UPDATE ON OKLAHOMA REAL PROPERTY TITLE AUTHORITY: STATUTES, REGULATIONS, CASES, ATTORNEY GENERAL OPINIONS & TITLE EXAMINATION STANDARDS REVISIONS FOR 2016-2017

(Covering July 1, 2016 to June 30, 2017)

Presented For the:
"Legal Updates 2017", Oklahoma Bar Association

At:
Oklahoma City, OK: December 1, 2017
Tulsa, OK: December 15, 2017

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(C:\mydocuments\bar&papers\papers\305 Title Update(16-17)(OBA--Dec 2017)

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COURTS: Okla. Sup. Ct. (May 1979); U.S. Dist. Ct., West. Dist of Okla. (Dec. 1984)

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State Univ. of N.Y. at Stony Brook [M.S. (Urban and Policy Sciences) 1974]; &
Oklahoma City University [J.D. (Law) 1978].

PRACTICE: Oil/Gas & Real Property Title Litigation (Curative; Appeals; Expert Consultant/Witness)
Oil/Gas & Surface Title Opinions
Mediations and Arbitrations

MEMBERSHIPS/POSITIONS:
OBA Title Examination Standards Committee (Co- & Chairperson: 1988-Present);
OBA Nat'l T.E.S. Resource Center (Director: 1989 - Present);
OBA Real Property Law Section (current member, former Chairperson);
OBA Mineral Law Section (current member)
OKC Real Property Lawyers Assn. (current member, former President);
OKC Mineral Law Society (current member);
Kiwanis (Downtown OKC Club--member and former President); and
BSA: *Vice Chair & Chair, Baden-Powell Dist., Last Frontier Council (2000-2007); former Cub master, Pack 5, & Asst. Scout Master, Troop 193, All Souls Episcopal Church*

SPECIAL EXPERIENCE: Court-appointed Receiver for 5 Abstract Companies in Oklahoma;
Oklahoma City University School of Law adjunct professor: "Oklahoma Land Titles" (1982 - Present), & "Oil & Gas Title Examination" (2015)
Vernons 2d: Oklahoma Real Estate Forms and Practice, (2000 - Present) General Editor and Contributing Author;
Basye on Clearing Land Titles, Author: Pocket Part Update (1998 – 2000); Contributing Author: (2001 - 2015)
Pocket Part Update
Oklahoma Bar Review faculty: "Real Property" (1998 - 2003);
Chairman: OBA/OLTA Uniform Abstract Certif. Committee (1982);
In-House Counsel: LTOC & AFLTICO/AGT/Old Republic (1979-1981);
Urban Planner: OCAP, DECA & ODOT (1974-1979).

SELECTED PUBLICATIONS:
"The Oklahoma Marketable Record Title Act ("AKA The Re-Recording Act"): An Argument That This 30-Year Curative Act Can Extinguish Co-Tenancies", 87 OBJ 27, (October 15, 2015)
"Marketable Record Title: A Deed Which Conveys Only the Grantor's 'Right, Title and Interest' Can Be A 'Root of Title'", 85 OBJ 1104 (May 17, 2014)
"The Real Estate Mortgage Follows the Promissory Note Automatically Without an Assignment: The Lesson of BAC Home Loans", 82 OBJ 2938 (Dec. 10, 2011)

SPECIAL HONORS: Super Lawyers - Oklahoma 2017: Real Estate
Okla. Bar Assn. 1997 Maurice Merrill *Golden Quill Award*;
Okla. Bar Assn. 1990 Earl Sneed *Continuing Legal Education Award*;
Okla. Bar Assn. 1990 Golden Gavel Award: *Title Exam. Standards Committee*

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I. INTRODUCTION

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

The following materials reflect a listing of selected changes in the law of Oklahoma related to real property title issues, arising over the 12 months following June 30, 2016, including any (1) statutes enacted during the most recent State legislative session, (2) new regulations (if any), (3) cases from the Oklahoma Supreme Court and the Court of Civil Appeals, (4) opinions from the Oklahoma Attorney General (if any), and (5) Oklahoma Title Examination Standards adopted (or proposed) during that period.

II. STATUTORY CHANGES

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

(PREPARED BY RHONDA McLEAN)

2017 Legislative Report
Oklahoma Title Examination Standards Committee
1st Session of the 56th Legislature
June 17, 2017

Please do not hesitate to contact me if you know of a bill that should be included, think a bill should be included under a different section, would like to suggest a different interpretation of a bill, or have a proposed edit to the referenced title standard(s).

Legislative Deadlines*

Deadline for bill draft requests	December 9, 2016
Substantive language deadline	December 30, 2016
Bill introduction deadline	January 19, 2017
Legislative session begins	February 6, 2017
Senate bills out of Senate committees	March 2, 2017
House bills out of House committees	March 3, 2017
Third reading of measures in chamber of origin	March 23, 2017
House bills out of Senate committees	April 13, 2017
Senate bills out of House committees	April 14, 2017
Third reading of measures in opposite chamber	April 27, 2017
Sine Die	May 26, 2017

*some exceptions apply Source: http://okpolicy.org/resources/2017-oklahoma-legislative-primer/

Introductory Notes

Bills that may potentially affect current title standards are shown first. Those are followed by other bills broadly related to real property, attorneys, and the judiciary and are sorted by subject. The summaries do not necessarily reflect all changes, deletions or additions presented by the bills.

Updates will be provided at regular TES Committee monthly meetings. Outside of these meetings, you can check for updates at www.oklegislature.gov either by entering the bill number and checking the history or by using the "Track Bills" feature which will email you updates.

All summaries and interpretations are those of this author. If you are specifically interested in any bill, please read the bill in its entirety to confirm its scope and effect.

MEA CULPA

SB 819 Oklahoma Health Care Authority Liens statutes – changes nursing "home" to nursing facility or an intermediate care facility for individuals with intellectual disabilities (ICF/IID); lien can include amount of assistance paid beginning the day the patient began receiving care (1) year period eliminated); removes the requirement to include in the lien the amount which is expected to accumulate on a monthly basis; Authority can assign its lien; the lien shall sever a joint tenancy but shall be enforceable only to the extent of the ownership of the person receiving assistance as it existed at the time the recipient began receiving assistance. Effective November 1, 2017.

Status: **APPROVED BY GOVENOR 5/12/17**.

New Proposed Legislation

SB 833 Correction to fix statutes where multiple versions amendments were enacted in 2016, including: 60 O.S. §176 regarding trusts for the benefit of a state, county or municipality; and 82 O.S. §862 regarding powers of Grand River Dam Authority; among others.

Status: Passed. Engrossed to House, measure passed, returned to Senate, referred for enrollment. **APPROVED BY GOVERNOR 4/13/17.**

Proposed Legislation Potentially Affecting Current Title Standards

Corporations – Standard 12.4

~~HB 1809 Oklahoma Benefit Corporation Act creates a new class of corporations called Benefit Corporations formed or converted for the purpose of creating a general public benefit.~~

~~Status: Second reading referred to Business, Commerce and Tourism~~. Presumed to have died in committee.

~~SB 343 Oklahoma Benefit Corporation Act creates a new class of corporations called Benefit Corporations formed or converted for the purpose of creating a general public benefit.~~

~~Status: Second reading referred to Business, Commerce and Tourism~~. Presumed to have died in committee.

Estate Tax – Standards 15.4, 25.5

HB 1327 Amends 68 O.S. §804.1 to include extinguishment of estate tax liens for deaths occurring before 1/1/10 subsequent to the lapse of 10 years after the date of death and no order exempting estate shall be required for marketable title.

Status: Second reading referred to Appropriations and Budget, referred to Appropriations and Budget Finance Subcommittee, recommended do pass. Engrossed to Senate, second reading referred to Appropriations, Sub-Finance. **APPROVED BY GOVERNOR 5/2/17**

Marriage – Standard 3.2, Comment 2

~~HB 1418 Allows for an Affidavit of Common Law Marriage to be filed with the court clerk. Sets forth requirements for the affidavit. Provides that any entity requiring proof of marriage be required to also accept the affidavit of common law marriage.~~

~~Status: Second reading referred to Judiciary – Civil and Environmental~~. No action since 2/7/17. Presumed dead.

~~HB 1257 Sets forth proof of common law marriage; Prohibits common law marriage (between man and woman??) beginning 1/1/18; certain common law marriages remain valid after 1/1/18; allows for affidavit of common law marriage.~~

~~Status: Second reading referred to Judiciary – Civil and Environmental~~ No action since 2/7/17. Presumed dead.

~~Status: Second reading referred to General Government~~. No action since 2/7/17. Presumed dead.

Other Proposed Legislation of Interest

Abstracting

~~SB 161 Extends sunset date for Oklahoma Abstractors Board from 7/1/19 to 7/1/21.~~

~~Status: Second reading referred to General Government~~. No action since 2/7/17. Presumed dead.

Acknowledgments

~~HB 1366 Changes requirement for a deed, mortgage or other instrument affecting real estate to be "acknowledged" to be "acknowledged or verified under oath or affirmation." Changes language regarding acknowledgements relating to military business of the state. Increases required notary bond from $1000 to $10,000. Other changes including fees, contracts to provide notarial services, and software issues. Adds administer oaths "of affirmations; to take a verification upon oath or affirmation to witness or attest a signature; to certify or attest a copy" to notary public authority. Numerous changes to definitions in the Uniform Law on Notarial Acts, including definitions related to video and electronic signatures. Multiple deletions of "stamp" from "official stamp or seal." Official certificate and seal of notary public is "presumptive evidence of the facts stated in cases where, by law, the notary public is authorized to certify the facts." Grandfathers in electronic notarial acts performed before 1/1/18 under the Uniform Electronic Transactions Act. Creates a new section of law~~

~~called the Uniform Law on Notarial Acts, which supersedes the Electronic Signatures in Global and Nation Commerce Act with exceptions, and sets forth the procedure, scope, and requirements of video notarial acts.~~

~~Status: Second reading referred to Rules, recommended do pass. Engrossed to Senate, second reading referred to Judiciary~~. No action since 3/27/17. Presumed dead.

Appraisals

~~HB 1358 Appointments of disinterested person to appraise when general or special execution is levied upon lands shall be made on a rotating basis from a list of persons maintained by the sheriff and can't be related with the third degree to the sheriff, any person having an interest in the lands, or to another disinterested person valuing the same lands. In counties with a population of 65,000 or more, the disinterested person must be a certified real estate appraiser, a licensed real estate broker, or real estate agent licensed for more than two years.~~

~~Status: Second reading referred to Judiciary – Civil and Environmental~~. No action since 2/7/17. Presumed dead.

~~HB 1707 Appraisers in foreclosure must be "unassociated and disinterested outside party or parties which shall make a determination of the current market value" using at least three independent, disparate and credible sources, each of which has estimated the current market value of the subject property independently from one another." Allows for electronic and phone bidding at sales. [Senate amendments: allows legal entity to perform appraisal in lieu of 3 disinterested persons; requires written affidavit of impartially and signed estimate of current market of property; allows sheriffs to implement policies and procedures for remote bidding.]~~

Status: Second reading referred to Banking, Financial Services, and Pensions, recommended do pass, floor amendment. Engrossed to Senate, second reading referred to Judiciary, w/drawn from Judiciary and referred to Business, Commerce and Tourism reported do pass, passed. Engrossed to House with amendments, amendments rejected, conference granted.

~~SB 533 Requires invoice disclosing compensation to appraiser when services are performed independently or not within an employer/employee relationship. Appraisal Management Company cannot prohibit an employee from including an invoice which describes the fee.~~

~~Status: Second reading referred to Business, Commerce and Tourism~~. No action since 2/7/17. Presumed dead.

~~SB 571 Real Estate Appraiser Board to define type of educational and equivalent experience to meet the Appraiser Qualification Board and Appraisal~~

~~Foundation approval for a new category, Special Appraisers, supervised by the Board of other designated persons. Special Appraisers will have no examination requirement but must complete 75 classroom hours of specified courses.~~

~~Status: Second reading referred to Business, Commerce and Tourism~~. No action since 2/7/17. Presumed dead.

Attorneys

~~HB 2109 Changes "the State of Oklahoma" to "this state" in 5 O.S. §12 (Supreme Ct. power to pass on qualifications and fitness of applicants to the bar).~~

~~Status: Second reading referred to Rules~~. No action since 2/7/17. Presumed dead.

~~HB 1791 Changes "the State of Oklahoma" to "this state" in 70 O.S. §18-114.3 (JD degree).~~

~~Status: Second reading referred to Rules~~. No action since 2/7/17. Presumed dead.

~~HB 1574 Modifies rules regarding state contracts for legal representation by private attorneys and requires the list of attorneys desiring to furnish services and the schedule of fees for each attorney to be maintained and available to the public.~~

Status: Second reading referred to Judiciary – Civil and Environmental, amended by the committee, passed. Engrossed to Senate, second reading referred to Judiciary, reported do pass, passed. Engrossed to House with enacting clause stricken, conference granted. Died in conference 5/26/2017.

~~SB 821 Creates the Private Attorney Retention Sunshine Act related to state agencies or agents wishing to retain a lawyer or law firm to perform legal services on behalf of the State where fees and expenses will exceed or reasonably expected to exceed $5,000.00.~~

~~Status: Second reading referred to Judiciary Committee then to Appropriations Committee~~. No action since 2/7/17. Presumed dead.

Civil Procedure

HB 1235 Amends 12 O.S. §2004 to allow for an alternative method other than personal delivery, mail, or publication upon certain defendants and upon filing an affidavit that with due diligence service cannot otherwise be made.

Status: Second reading referred to Judiciary – Civil and Environmental, passed in House. Engrossed to Senate, second reading referred to Judiciary,

recommended do pass, passed, senate amendments adopted, sent to Governor. **APPROVED BY GOVENOR 5/19/2017**.

HB 2275 Amends 12 O.S. §990A to provide filing procedures for appeals to the Supreme Court regarding counter-designation of records.

Status: Second reading referred to Judiciary – Civil and Environmental, recommendation to pass, passed in House. Engrossed to Senate, second reading referred to Judiciary, recommended do pass, passed. **APPROVED BY GOVERNOR 5/1/2017.**

~~SB 365 Amends 12 O.S. §2001 from "Code shall be construed" to Code shall be "construed, administered and employed by the court and the parties." Amends 12 O.S. §2008 to expand the particularities required in pleadings that set forth claims for relief. Changes requirement for pleading to be concise and direct. Amends 12 O.S. §2009 to incorporate changes to 2008 and to stay discovery and other proceedings when a 12B6 motion to dismiss, motion for judgment on pleadings, or motion for more definite statement has been filed.~~

~~Status: Second reading referred to Judiciary~~. No action since 2/7/17. Presumed dead.

Condemnation / Eminent Domain

~~HB 1271 Repeals 11 O.S. §21-222 Moratorium on Municipal Condemnation Proceedings.~~

~~Status: Second reading referred to Utilities~~. No action since 2/7/17. Presumed dead.

~~HB 2194 Amends 27 O.S. §11 to allow for attorney fees where the jury award is for any amount over the commissioner's award (previously 10%). Amends 27 O.S. §13 (amendments not specified in the introduced bill). Amends 27 O.S. §16 to allow for comparable sales and actual amount paid or awarded for other tracts of the same intended use to be included in the fair market value calculation. Amends 27 O.S. §18 to include in the Landowner's Bill of Rights Title 69 proceedings and the right to demand a jury trial. Amends commissioner's duties listed in 66 O.S. §53. Amends 66 O.S. §55 related to jury trial, costs, "legitimate business purpose planned", and annual reports to Attorney General. Amends 69 O.S. §1203 regarding notice to landowner, jury trials, burden of proof, costs, payment of award, fair market value, annual reports to Attorney General, and good faith negotiations.~~

~~Status: Second reading referred to Wildlife, committee amendment, recommended do pass~~. Not engrossed to Senate. Presumed dead.

SB 290 Amends 66 O.S. §55 changing taxing of costs on jury trial and allowing for last offer to settle. Amends 27 O.S. §11 changing language regarding award of 10% more than commissioner's award to exceeds by any amount the last offer to settle.

Status: Second reading referred to Judiciary, passed in Senate. Engrossed to House, second reading referred to Judiciary, recommended do pass, failed, motion to reconsider adopted, laid over 4/25/17.

~~SB 318 Authorization for ODOT to complete the acquisition and rehabilitation of the 90 mile "Sunbelt Line" between Shawnee and McAlester.~~

~~Status: Second reading referred to Transportation Committee, recommended do pass, title stricken, referred then to Appropriations Committee. Not engrossed to Senate.~~ Presumed dead.

HB 1534 Enacts a new law creating the Oklahoma Public and Private Facilities and Infrastructure Act relating to public facilities or transportation currently available or to be made available to a governmental entity for public use. States it will not alter the eminent domain laws or grant power under eminent domain to any person not already authorized.

Status: Second reading referred to Business, Commerce and Tourism, amended by committee, recommended do pass. Engrossed to Senate, second reading referred to General Government, reported do pass, amended by Committee substitute, passed. Engrossed to House, Senate amendments rejected, conference granted, title restored. **APPROVED BY GOVERNOR 5/25/2017**

~~SB 422 Enacts a new law creating the Oklahoma Public and Private Facilities and Infrastructure Act (see HB 1534 above).~~

~~Status: Second reading referred to General Government~~. No action since 2/7/17. Presumed dead.

SB 430 Enacts a new law creating the Oklahoma Public and Private Facilities and Infrastructure Act (see HB 1534 above).

Status: Second reading referred to General Government, reported do pass, amended by committee. ~~No action since 2/20/17. Presumed dead~~. Engrossed to House, second reading referred to Business, Commerce and Tourism, recommended do pass, passed with amendments. Engrossed to Senate, House amendments adopted. **APPROVED BY GOVERNOR 5/12/17.**

~~SB 548 Enacts a new law creating Prosperity Districts which will be municipal corporations in the form of a special district that can form enforceable contracts,~~

~~sue and be sued and exercise exclusively the jurisdiction, power and authority specified in the act. Limitations on Prosperity Districts include no ability to levy tax, exercise eminent domain, etc.~~

~~Status: Second reading referred to General Government Committee then to Appropriations Committee, reported do pass, committee substitute, title stricken, referred to Appropriations. Not engrossed to House~~. Presumed dead.

Constitution

~~SJR 13 Puts to a vote of the people an amendment to Section 1, Article 1, of the Oklahoma Constitution changing "State of Oklahoma is an inseparable part of the Federal Union" to "State of Oklahoma is a part of the Federal Union."~~

Status: Second reading referred to Rules. No action since 2/7/17. Presumed dead.

Corporations

SB 769 Expands 18 O.S. §1014.1 to include interpretation and enforcement of instruments in addition to the certificate of incorporation and bylaws.

Status: Second reading referred to Business, Commerce and Tourism, reported do pass, committee substitute, passed. Engrossed to House, second reading referred to Rules, withdrawn from Rules and referred to Judiciary – Civil and Environmental, amended and passed. Engrossed to Senate, House amendments adopted, sent to Governor. **APPROVED BY GOVERNOR 5/22/17**.

Counties

~~HB 1436 Allows County Clerk to employ general counsel. Adds 4 paragraphs regarding recording fees for counties with a population of more than 400,000: $15.00 for deeds 4 pages or less and $2 per page for additional pages; and $40.00 for mortgages of twenty pages or less and $2 per page for additional pages. (Note that is does not modify the listing of the current fees to counties of 400,000 population or less.)~~

~~Status: Second reading referred to Appropriations and Budget, Referred to Appropriations and Budget General Government Subcommittee, recommendation do pass, committee amendment, passed. Engrossed to Senate, second reading referred to General Government~~. Failed in General Government. Presumed dead.

HB 1516 Prohibits county commissioners from declaring any property to be surplus during the period the elections of any two county commissioners occur at the same time.

Status: Second reading referred to County and Municipal Government, recommended do pass, committee amendment, passed in House. Engrossed to Senate, second reading referred to General Government, reported do pass, passed. Signed and returned to House. **APPROVED BY GOVERNOR 5/2/17.**

~~SB 417 Enacts a new law to allow board of county commissioners to transfer ownership of real property designated as a common area or greenbelt for neighborhood development to the municipality that created the common area or greenbelt.~~

~~Status: Second reading referred to General Government; amended; recommended do pass; title stricken~~. Not engrossed to House. Presumed dead.

~~SB 538 Repeals 19 O.S. §570 Abolition of Office of County Surveyor.~~

~~Status: Second reading referred to General Government, recommended do pass. Not engrossed to Senate~~. Presumed dead.

Execution

SB 116 Amends 12 O.S. §760 (judgments when "appraisement waived" appears in instrument) order of sale or execution issuance from 6 months from the rendition of "said judgment" to 6 months from the rendition of the "initial judgment."

Status: Second reading referred to Judiciary, recommended do pass, passed. Engrossed to House, second reading referred to Judiciary – Civil and Environmental, passes in committee, passed. Signed and returned to Senate. **APPROVED BY GOVERNOR 5/3/17.**

Judiciary

~~HB 1699 Modifies the Supreme Court to be made up of 5 Justices, one from each Congressional District as exists on 1/1/19. Switches districts of then sitting district Justices and staggers the terms of the Justices.~~

~~Status: Second reading referred to Judiciary – Civil and Environmental~~. Presumed to have died in committee.

HB 1823 Decreases district judges in District 24 (Okfuskee, Okmulgee, and Creek Counties) to 4. Increases district judges in District 25 (Canadian) to 2.

Status: Second reading referred to Judiciary – Civil and Environmental; recommended do pass, amended, passed. Engrossed to Senate, second reading referred to Judiciary, reported do pass as amended, passed. Engrossed to House, Senate amendments adopted, passed. **APPROVED BY GOVERNOR 5/10/17.**

~~HB 1932 Mandatory retirement at age 75 for any Justice or Judge of the Supreme Court, Court of Criminal Appeals, or Court of Civil Appeals.~~

~~Status: Second reading referred to Judiciary – Civil and Environmental~~. Presumed to have died in committee.

~~SB 699 Mandatory retirement for all appellate Justices and Judges when the sum of their years of judicial service and age equals 80.~~

~~Status: Second reading referred to Judiciary, recommended do pass. Not engrossed to House~~. Presumed dead.

~~SB 213 Supreme Court Judicial Districts will be 5 which conform with the congressional districts and 4 statewide at-large districts.~~

Status: Second reading referred to Judiciary, recommendation to pass, passed. Engrossed to House, second reading referred to Judiciary – Civil and Environmental, recommended do pass, amendment, title stricken, passed. Engrossed to Senate, House amendments rejected, conference granted. Died in conference. Died in conference 5/31/17.

~~SB 702 Changes the counties in the 9 Supreme Court Judicial Districts. (Counties that would change district are Pawnee, Coal, Sequoyah, Washita, and Pottawatomie.)~~

~~Status: Second reading referred to Judiciary, recommendation to pass. Not engrossed to House~~. Presumed dead.

~~SB 779 Changes the included counties and number of district judges for certain judicial districts. (Counties affected are Comanche, Stephens, Cotton, Jefferson, Grady, and Caddo.)~~

~~Status: Second reading referred to Judiciary, recommendation to pass, amended, passed. Engrossed to House, second reading referred to Judiciary~~. No action since 3/27/17. Presumed dead.

~~SB 700 Changes makeup of the Judicial Nominating Commission. Terminates all current attorney members of the JNC and provides that 3 attorney members will be appointed by the President Pro Tempore of the Senate and 3 attorney members will be appointed by the Speaker of the House of Representatives.~~

~~Status: Second reading referred to Judiciary, recommendation to pass. Not engrossed to House~~. No action since 3/15/17. Presumed dead.

~~SB 708 Requires District Judge to have been lead counsel in at least 3 jury trials brought to verdict prior to filing for such office or appointment.~~

Status: Second reading referred to Judiciary, recommendation to pass, passed. Engrossed to House, second reading referred to Judiciary – Civil and Environmental. No action since 3/27/17. Presumed dead.

Liens

HB 1281 Creates Oklahoma Construction Registry Act. Does not apply to residential (single family or multifamily of four or fewer units). Project registration is voluntary. Registration will afford different lien rights than current lien rights.

Status: Second reading referred to Judiciary – Civil and Environmental, recommended do pass, committee substitute, passed. Engrossed to Senate, second reading referred to Business, Commerce and Tourism, then Appropriations, reported to pass, title stricken, referred to Appropriations. No action since 4/6/17. Presumed dead.

HB 1673 Extends filing time for subcontractor liens from 90 days to 6 months.

Status: Second reading referred to Judiciary – Civil and Environmental. Presumed to have died in committee.

SB 581 Decreases time a county clerk can discharge M&M liens from 10 years to 3 years.

Status: Second reading referred to Judiciary. Presumed to have died in committee.

HB 1701 Removes the 1 year waiting period related to homestead liens filed by OHCA and allows the liens to be assignable. Removes language that lien "shall not sever a joint tenancy nor affect the right of survivorship." Allows for a reduced amount to pay off the lien if necessitated by the value of the property at the time of a sale or transfer.

Status: Second reading referred to Health Services and Long-Term Care; recommended do pass. Not engrossed to Senate. Presumed dead.

Minors

SB 122 Oklahoma Uniform Transfers to Minors Act. Parents as successor custodian: either parent if they are still married; if divorced, primary custody parent or if joint custody, parent determined by written agreement between the parents.

Status: Second reading referred to Judiciary. Presumed to have died in committee.

Municipalities

HB 1262 Repeals 11 O.S. 22-110.1 Municipalities Prohibited from Requiring Registration of Real Property.

~~Status: Second reading referred to County and Municipal Government~~. Presumed to have died in committee.

HB 1381 Permits municipalities to require the registration of dilapidated and abandoned buildings after the municipality provides notice and hearing during the abatement process.

Status: Second reading referred to Business, Commerce and Tourism, recommended do pass, committee substitute, passed. Engrossed to Senate, second reading referred to General Government, reported do pass, passed. Engrossed to House. **APPROVED BY GOVERNOR 4/24/17.**

~~SB 420 Amends 11 O.S. §22-111 regarding municipality cleaning trash and weeds and cutting grass to include "entity responsible for easements or rights of way on a property" to the definition of Owner.~~

~~Status: Second reading referred to General Government~~. Presumed to have died in committee.

Oil and Gas

~~SB 285 Amends the Oklahoma Brine Development Act to the Oklahoma Brine and Produced Water Development Act to reduce disposal of brine water and encourage reuse, recycling and reclaiming of the water and its constituents.~~

Status: Second reading referred to Energy, amended, recommended do pass, title stricken, emergency clause stricken, passed. Engrossed to House, second reading referred to Energy and Natural Resources, recommended do pass as amended. Engrossed to Senate, House amendments read. Presumed dead.

~~SB 284 Amends the 2011 Shale Revenue Development Act to the Horizontal Well Development Act to expand to include any common source of supply that is designated by the OCC as potentially suited for development through a multiunit horizontal well or extended lateral horizontal unit or part of an order approving the multiunit horizontal well or extended lateral horizontal unit.~~

Status: Second reading referred to Energy, amended, recommended do pass, title stricken, emergency clause stricken, amended, passed. Engrossed to House, second reading referred to Energy and Natural Resources, recommended do pass as amended, passed. Engrossed to Senate, House amendments rejected, conference requested. No action since 5/24/17, presumed dead.

~~SB 680 Amends the 2011 Shale Reservoir Development Act to the Extended Lateral Horizontal Well Development Act to expand to include any common source of~~

supply designated by the OCC as suited for development through a multiunit horizontal well or part of an order approving a multiunit horizontal well.

Status: Second reading referred to Energy, amended, recommended do pass, title stricken. Not engrossed to House. Presumed dead.

HB 1356 Amends 52 O.S. §87.1 to require notice of application be sent by regular mail to every owner of an occupied structure within 1,500' of proposed drilling site. Amends 52 O.S. §320.1 to require wellbore of active well to be at least 500 feet from any occupied structure unless waived by surface owner.

Status: Second reading referred to Energy and Natural Resources. Presumed to have died in committee.

HB 1639 Enacts new law allowing municipality, county or other political subdivision to prevent oil and gas drilling therein and provide its own rules and regulations regarding well spacing units, drilling and production.

Status: Second reading referred to Energy and Natural Resources. Presumed to have died in committee.

SB 193 Enacts new law allowing cities and towns to prevent oil or gas drilling and provide its own rules and regulations regarding well spacing units, drilling, and production.

Status: Second reading referred to Energy. Presumed to have died in committee.

HB 1902 Enacts a new law defining as a taking any ordinance, rule, etc., by a municipality, county, or other political subdivision (other than the OCC) that substantially interferes with the use and enjoyment of the mineral estate; imposes or enforces a limitation that adversely impacts the use and development of minerals; or prohibits access to develop the mineral estate resulting in substantially increased costs of oil and gas operations or substantial reduction in fair market value of the mineral estate.

Status: Second reading referred to Rules, recommended do pass. Not engrossed to Senate. Presumed dead.

SB 731 Amends Production Revenue Standards Act. Includes royalty proceeds erroneously withheld to provisions regarding royalty proceeds incorrectly paid regarding liability of party whose error or omission caused the error. Removes "compounded annually" from interest rate. Allows the holder of proceeds to interplead such proceeds where marketability has remained uncured for 120 days. Allows operator to remit to the Unclaimed Property Fund proceeds where title has remained unmarketable for 2 years after written notice by operator. Adds provision that interest shall not apply when mineral owner or assignee

~~elects to take in kind or where mineral owner or assignee cannot be located after reasonable inquiry.~~

Status: Second reading referred to Energy, amended, recommended do pass, title stricken, passed. Engrossed to House, second reading referred to Energy and Natural Resources, recommended do pass, enacting clause stricken, passed as amended. Engrossed to Senate, House amendments read. No action since 4/18/17, presumed dead.

~~SB 768 Amends 2011 Shale Reservoir Development Act to require the plan of development of any shale reservoir include the condition under which the proposed unit will terminate.~~

~~Status: Second reading referred to Energy~~. Presumed to have died in committee.

~~SB 794 Amends jurisdiction of OCC; substances allowed to be injected into Class II well must be "from Oklahoma."~~

~~Status: Second reading referred to Energy~~. Presumed to have died in committee.

Real Property

~~HB 1927 Creates the Uniform Commercial Real Estate Receivership Act regarding the appointment and power of receivers for some commercial real estate.~~

~~Status: Second reading referred to Rules~~. Presumed to have died in committee.

~~SB 362 Commercial RE Creates Uniform Commercial Real Estate Receivership Act regarding the appointment and power of receivers for some commercial real estate.~~

~~Status: Second reading referred to Judiciary~~. Presumed to have died in committee.

~~HB 1412 Creates the Real Estate Owner's Rights Act allowing "an owner of residential real property or farm property who resides in this state and whose real property is located in this state" to personally perform certain improvements, construction, repairs, etc.~~

~~Status: Second reading referred to Business, Commerce and Tourism~~. Presumed to have died in committee.

~~SB 104 Creates Real Estate Owner's Rights Act allowing "an owner of residential real property or farm property who resides in this state and whose real property is~~

~~located in this state" to personally perform certain improvements, construction, repairs, etc.~~

~~Status: Second reading referred to Business, Commerce and Tourism, amended, recommended do pass~~. Not engrossed to House. Presumed dead.

~~SB 139 Exempts from the requirement to have a real estate license persons or business entities that "do not actually buy, sell or act with intent to acquire or transfer, or to assist another in acquiring or transferring, title ownership to real estate."~~

~~Status: Second reading referred to Business, Commerce and Tourism~~. Presumed to have died in committee.

SB 266 Extends sunset date of OK Real Estate Commission to 7/1/21 and requires the registration of " all associate groups affiliated under the same brokerage for the purpose of allowing the Commission to better align and track the affiliated groups within each brokerage" [Amended to change "real estate broker" to "broker" and limit the definition of that term; amend application requirements for broker license by those who hold sales associate license and are not currently licensed; and change "all teams affiliated under a brokerage for the purpose of allowing the Commission to better align and tract the teams within each brokerage."]

Status: Second reading referred to General Government, recommended do pass, passed. Engrossed to House, second reading referred to Administrative Rules, amended, passed. Engrossed to Senate, House amendments adopted, passed. **APPROVED BY GOVERNOR 5/12/17.**

HB 1337 Creates Freedom to Display the American Flag Act.

Status: Second reading referred to Business, Commerce and Tourism, recommended do pass, passed in House. Engrossed to Senate, second reading referred to Business, Commerce and Tourism, reported do pass. **APPROVED BY GOVERNOR 5/2/17**.

~~SB 269 New law requiring seller of real property to disclose if there is no public road or other public means of access.~~

~~Status: Second reading referred to Business, Commerce and Tourism~~. Presumed to have died in committee.

~~HB 1334 Allows Board of Education of any school district to transfer title to unimproved real property to a municipal or other local housing authority in order for such housing authority to construct single family dwellings or multifamily dwellings on such property.~~

Status: Second reading referred to Appropriations and Budget; referred to Appropriations and Budget Education Subcommittee, recommended do pass, committee substitute, passed. Engrossed to Senate, second reading referred to Education. Presumed dead.

~~HB 1722 Changes consent required for purchase of real property by the United States from consent of the Legislature to both houses of the Legislature and the Governor.~~

~~Status: Second reading referred to Rules~~. Presumed to have died in committee.

~~HB 1852 Empowers Governor, Speaker of the House of Representatives, and the President Pro Tempore of the Senate to approve transactions to sell, lease, transfer, etc., any or all of the property of the Grand River Dam Authority. Removes provision limiting lands transferred to any entity other than a public authority.~~

~~Status: Second reading referred to Appropriations and Budget~~. Presumed to have died in committee.

~~SB 509 Includes wind and battery storage plants in types of plants Grand River Dam Authority can acquire an interest in. Allows Authority to enter into notes, loans, commercial paper and credit or liquidity support. Amends how and when directors are elected. Amends deposit funds requirements.~~

~~Status: Second reading referred to Energy Committee then to Appropriations Committee, amended, recommended do pass, title stricken. Not engrossed to House~~. Presumed dead.

~~SB 75 Amends the scenic river designation for the Illinois River from above "its confluence with the Barron Fork Creek" to above "the Horseshoe Bend Public Use Area Boat Ramp of Tenkiller Ferry Lake." 14~~

~~Status: Second reading referred to Energy, recommended do pass. Engrossed to House, second reading referred to Appropriations and Budget, referred to Select Agencies subcommittee~~. No action since 3/27/17. Presumed dead.

Tax

SB 91 Requires notice to be sent to the last known address of the owner of the property on which a manufactured home is located if personal property taxes on the manufactured home not owned by the property owner are delinquent.

Status: Second reading referred to Appropriations; title stricken; recommended do pass as amended, title stricken, amended, passed. Engrossed to

House, second reading referred to Appropriations and Budget, recommended do pass, passed, returned to Senate, referred for enrollment. **APPROVED BY GOVERNOR 4/13/17.**

Title Companies

~~HB 1826 Requires title company to provide certified copies of all recorded covenants and restrictions to the buyer as part of the closing (previously was upon request of the buyer).~~

Status: Second reading referred to Judiciary – Civil and Environmental, amended, recommended do pass, passed. Engrossed to Senate, second reading referred to Business, Commerce and Tourism, reported do pass as amended, passed. Engrossed to House, Senate amendments rejected, conference granted. No activity since 5/25/17. Presumed dead.

Title Insurance

HB 2303 ~~Removes requirement that attorneys examine abstracts prior to issuing title insurance~~. Penalties on abstractors for not timely providing abstracts. Title producer or underwriting title insurance company shall provide a copy of any previously issued owner's policy upon request by current owner or owner's authorized agent.

Status: Second reading referred to Banking, Financial Services, and Pensions, recommended do pass, committee substitute, passed. Engrossed to Senate, second reading referred to Business, Commerce and Tourism, reported do pass, passed. Signed and sent to Senate. **APPROVED BY GOVERNOR 5/1/17.**

Trusts

SB 358 Removes requirement that fieldwork and reporting standards in GAS be used as it relates to annual audits of trusts created for public functions with the state, county, or municipality as beneficiary.

Status: Second reading referred to General Government, recommended do pass, passed in Senate. Engrossed to House, second reading referred to Government Modernization, recommended do pass, passed. Signed and returned to Senate. **APPROVED BY GOVERNOR 4/24/17.**

Wills

~~HB 1227 Creates Wills and Estate Planning Registry Act – shell bill.~~

~~Status: Second reading referred to Rules~~. Presumed to have died in committee.

Wind Energy

SB 593 Modifies notice of intent to build wind energy facility to certain operators or lessees of oil and gas leases.

Status: Second reading referred to Energy, amended, recommended do pass, title stricken, title restored, emergency added, passed in Senate. Engrossed to House, second reading referred to Rules, recommended do pass, third reading passed, returned to Senate and referred for enrollment. **APPROVED BY GOVENOR 4/17/17**.

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With special thanks to Ryan Schaller for his forms and guidance.

III. REGULATORY CHANGES

(NONE)

A. OKLAHOMA SUPREME COURT CASES

(JULY 1, 2016-JUNE 30, 2017)

LIST OF CASES

NO.	TOPIC		CASE	OLAHOMA CITATION	DECIDED / MANDATE
	GENERAL	SPECIFIC			
A. OKLAHOMA SUPREME COURT					
1	Mechanics & Materialmen's Liens	Does a subcontractor have to give pre-lien notice, and what happens if no notice is given and the claim exceeds $10,000?	Pizano v. Lacey & Associates, LLC	2016 OK 73	6/21/2016 10/20/2016
2	Enforceability of deed	Was a person restored to competency when the statute presuming incompetence is repealed, and does a grand daughter's assistance to a grandmother constitute undue influence?	Blair v. Richardson	2016 OK 96	9/20/2016 10/20/2016
3	Abstractor's Negligence and Deed Reformation	When does the statute of limitations for an error in a deed (failing to exclude minerals) begin to run?	Calvert v. Swinford	2016 OK 100	10/4/2016 11/2/2016
4	Attorney's Negligence and Deed Reformation	When does the statute of limitations for an error in a deed (failing to exclude minerals) begin to run?	Calvert v. Swinford	2016 OK 104	10/11/2016 11/2/2016
5	Deed Reformation	When does the statute of limitations for an error in a deed (failing to exclude minerals) begin to run?	Calvert v. Swinford	2016 OK 105	10/11/2016 11/2/2016
6	Deed Reformation	When does the statute of limitations for an error in a deed (failing to exclude minerals) begin to run?	Scott v. Peters	2016 OK 108	10/25/2016 2/7/2017
7	Conditional Use Permit for a Wind Farm	Can a county Board of Adjustment deny a conditional use permit for a wind farm without grounds other than its "vision" for the county?	Mustang Run Wind Project, LLC v. Osage County BD. of Adjustment	2016 OK 113	11/1/2016 12/1/2016

8	Private Nuisance	Is a neighbor allowed to rely on personal aesthetic objections to the image of a cell tower and the required blinking lights to justify finding it is a private nuisance?	Laubenstein and Wallace v. Bode Tower, L.L.C.	2016 OK 118	12/6/2016 4/17/2017
9	Condemnation	Under what circumstances are attorney's fees and other costs recoverable in a condemnation proceeding?	State ex rel. Dept. of Transportation v. Cedars Group, L.L.C.	2017 OK 12	2/22/2017 5/11/2017
10	Void Probate Decree	Is it constitutionally required that the Final Account be mailed to all heirs, or is Notice of the Hearing on such Final Account being mailed sufficient?	Bebout v. Ewell	2017 OK 22	3/21/2017 4/17/2017
11	Contract for Deed	Does a buyer's/grantee's interest under a Contract for Deed -- in itself -- make him an insured party to a homeowner's policy?	Hensley v. State Farm Fire and Casualty Co.	2017 OK 57	6/20/2017 7/19/2017

A. OKLAHOMA SUPREME COURT

1. PIZANO v. LACEY & ASSOCIATES, LLC (2016 OK 73)

GENERAL TOPIC:

Mechanics and Materialmen's Liens

SPECIFIC TOPIC:

Does a sub-contractor have to give pre-lien notice, and what happens if no notice is given and the claim exceeds $10,000?

HOLDING:

ALL SUB-CONTRACTORS WHO DO NOT CONTRACT DIRECTLY WITH THE OWNER MUST GIVE PRE-LIEN NOTICE, AND FAILURE TO GIVE PRE-LIEN NOTICE REDUCES ANY RECOVERY TO LESS THAN $10,000 (I.E., $9,999.00).

FACTS:

Plaintiff, sub-sub-contractor (Pizano) contracted with a sub-contractor (Williams) to remove a roof, and did so. Sub-sub-contractor did not give owner (Lacey) a pre-lien notice before filing a lawsuit (42 O.S. §142.6). Sub-contractor failed to pay sub-sub-contractor, and sub-sub-contractor sued sub-contractor and after receiving a default judgement for more than $10,000, sought to foreclose the lien on the homeowner.

TRIAL COURT RULING:

Trial court held that the sub-sub-contractor met the definition of a "claimant" (42 O.S. §141) who did work under a contract which was not directly with the owner, and, therefore, the sub-sub-contractor must give pre-lien notice to the owner and original contractor, which it failed to do. However, the statute only required such pre-lien notice to be given if the debt was $10,000 or more. So the trial court sustained the lien as to $9,999.00, and allowed the foreclosure.

COURT OF CIVIL APPEALS RULING:

Both parties appealed. The COCA held that the sub-sub-contractor preserved her lien, but that there were disputed facts and the matter needed to be remanded to determine the amount and the enforceability of the lien.

SUPREME COURT RULING: Vacated COCA and affirmed trial court ruling.

2. BLAIR v. RICHARDSON (2016 OK 96)

GENERAL TOPIC:

Enforceability of deed.

SPECIFIC TOPIC:

Was a person restored to competency when the statute presuming incompetence is repealed, and does a grand daughter's assistance to a grandmother constitute undue influence?

HOLDING:

IT IS THE STATUTE IN FORCE AT THE TIME OF THE CONVEYANCE, PRESUMING COMPETANCE, THAT PREVAILS AND NOT A REPEALED STATUTE WHICH TREATED SOMEONE WHO WAS ADMITTED FOR TREATMENT AS BEING INCOMPETENT. NO UNDUE INFLUENCE WAS SHOWN BY GRANDDAUGHTER GIVING GRANDMOTHER NORMAL ASSISTANCE.

FACTS:

Mother who was a grandmother's only child died, leaving two adult children. One grandchild moved away to another state, while one grandchild remained near the grandmother and helped the grandmother in minor ways. The grandmother expressed an intent to convey her home to the local granddaughter, and the granddaughter took the grandmother to an abstract company where the grandmother put the title in joint tenancy between herself and the local granddaughter. After the grandmother died, the local granddaughter had the court determine that she, the local granddaughter, was the surviving owner. The local granddaughter rented out the land and split the proceeds with her distant sister and her father. A dispute arose, and the distant daughter sued to set aside the joint tenancy deed.

TRIAL COURT RULING:

The distant granddaughter argued that (1) the admission of the grandmother for treatment made her statutorily incompetent until she was restored, which did not occur, and (2) the local granddaughter was a fiduciary who used undue influence to secure the joint tenancy deed. The trail court denied both theories. The earlier statute (43A O.S. §55) presumed that if someone was admitted for treatment, they were incompetent. The grandmother was admitted for treatment for about 3 months in 1966 and then released. Such statute was repealed in 1986 and replaced with a statute expressly providing that such placement, without a separate finding of incompetence, did not create a presumption of incompetence. Therefore, when the grandmother executed the joint tenancy deed in 1987 she was -- under the current statute -- presumed competent. Also, the local granddaughter's minor unofficial assistance to her grandmother, driving her to do local errands, did not create a fiduciary relationship, and the actions by the local granddaughter to help the grandmother

find a form joint tenancy deed and drive her to the local abstract company to complete the form did not constitute undue influence.

COURT OF CIVIL APPEALS RULING:

The distant granddaughter appealed. The COCA reversed the trial court, and held that the grandmother was never restored to competency and, therefore, she lacked the capacity to execute the deed. The undue influence issue was not addressed.

SUPREME COURT RULING:

The Supreme Court vacated the COCA decision and affirmed the trial court.

3. CALVERT v. SWINFORD (2016 OK 100)
[see 2016 OK 104 and 2016 OK 105, below]

GENERAL TOPIC:

Abstractor's negligence and deed reformation.

SPECIFIC TOPIC:

When does the statute of limitations for an error in a deed (failing to exclude minerals) begin to run?

HOLDING:

THE STATUTE OF LIMITATIONS FOR NEGLIGENCE BY AN ABSTRACTOR CONDUCTING A CLOSING AND USING AN INCORRECT DEED (FAILING TO EXCLUDE MINERALS PER CONTRACT) BEGINS TO RUN WHEN THE DEED IS FILED IN THE LAND RECORDS, AND IS EITHER 2 YEARS FOR NEGLIGENCE OR 5 YEARS FOR REFORMATION, AND IS NOT FROM DISCOVERY.

FACTS:

Two sisters had a sales contract for real property providing that the minerals were to be reserved to the grantors. Their attorney prepared a deed which he claims included such reservation. The title company which checked the title sent a packet to the sisters to review and sign, and return. The sisters signed all of the documents including the deed, without the reservation of minerals, and returned them to the abstracting company, which then conducted the closing (without the sisters being present), and filed the deed in the land records. The sisters did not receive a copy of the filed deed. 12 years later, the sisters noticed the error and sued the grantees, their attorney and the abstract company.

TRIAL COURT RULING:

The trial court held that the statute of limitations had run on negligence (2 years -- 12 O.S. §95(A)(3)) and on reformation of conveyances (5 years -- 12 O.S. §95(A)(12). The argument that the statute of limitations should be tolled until the injured party learned of the error was rejected, because the grantors read and signed the deed which omitted the mineral reservation, and more importantly the deed was constructive notice upon its filing in the land records.

COURT OF CIVIL APPEALS RULING:

[NONE—the Supreme Court retained the case]

SUPREME COURT RULING: The trial court was affirmed.

4. CALVERT v. SWINFORD (2016 OK 104)
[see 2016 OK 100 above, and 2016 OK 105 below]

GENERAL TOPIC:

Attorney's negligence and deed reformation.

SPECIFIC TOPIC:

When does the statute of limitations for an error in a deed (failing to exclude minerals) begin to run?

HOLDING:

THE STATUTE OF LIMITATIONS FOR NEGLIGENCE BY AN ATTORNEY IN PREPARATION OF A DEED (FAILING TO EXCLUDE MINERALS PER CONTRACT) BEGINS TO RUN WHEN THE DEED IS FILED IN THE LAND RECORDS, AND IS EITHER 2 YEARS FOR NEGLIGENCE OR 5 YEARS FOR REFORMATION, AND IS NOT FROM DISCOVERY.

FACTS:

Two sisters had a sales contract for real property providing that the minerals were to be reserved to the grantors. Their attorney prepared a deed which he claims included such reservation. The title company which checked the title sent a packet to the sisters to review and sign, and return. The sisters signed all of the documents including the deed, without the reservation of minerals, and returned them to the abstracting company, which then conducted the closing (without the sisters being present), and filed the deed in the land records. The sisters did not receive a copy of the filed deed. 12 years later, the sisters noticed the error and sued the grantees, their attorney and the abstract company.

TRIAL COURT RULING:

The trial court held that the statute of limitations had run on negligence (2 years -- 12 O.S. §95(A)(3)) and on reformation of conveyances (5 years -- 12 O.S. §95(A)(12). The argument that the statute of limitations should be tolled until the injured party learned of the error was rejected, because the grantors read and signed the deed which omitted the mineral reservation, and more importantly the deed was constructive notice upon its filing in the land records.

COURT OF CIVIL APPEALS RULING:

[NONE—the Supreme Court retained the case]

SUPREME COURT RULING: The trial court was affirmed.

5. CALVERT v. SWINFORD (2016 OK 105)
[see 2016 OK 100 and 2016 OK 104 above]

GENERAL TOPIC:

Deed reformation against grantee.

SPECIFIC TOPIC:

When does the statute of limitations for an error in a deed (failing to exclude minerals) begin to run?

HOLDING:

THE STATUTE OF LIMITATIONS FOR REFORMATION OF A DEED AGAINST THE GRANTEE (FAILING TO EXCLUDE MINERALS PER CONTRACT) BEGINS TO RUN WHEN THE DEED IS FILED IN THE LAND RECORDS, AND IS EITHER 2 YEARS FOR NEGLIGENCE OR 5 YEARS FOR REFORMATION, AND IS NOT FROM DISCOVERY.

FACTS:

Two sisters had a sales contract for real property providing that the minerals were to be reserved to the grantors. Their attorney prepared a deed which he claims included such reservation. The title company which checked the title sent a packet to the sisters to review and sign, and return. The sisters signed all of the documents including the deed, without the reservation of minerals, and returned them to the abstracting company, which then conducted the closing (without the sisters being present), and filed the deed in the land records. The sisters did not receive a copy of the filed deed. 12 years later, the sisters noticed the error and sued the grantees, their attorney and the abstract company.

TRIAL COURT RULING:

The trial court held that the statute of limitations had run on reformation of conveyances (5 years—12 O.S. §95(A)(12). The argument that the statute of limitations should be tolled until the injured party learned of the error was rejected, because the grantors read and signed the deed which omitted the mineral reservation, and more importantly the deed was constructive notice upon its filing in the land records.

COURT OF CIVIL APPEALS RULING:

[NONE—the Supreme Court retained the case]

SUPREME COURT RULING: The trial court was affirmed.

6. SCOTT v. PETERS (2016 OK 108)

GENERAL TOPIC:

Deed reformation against grantee.

SPECIFIC TOPIC:

When does the statute of limitations for an error in a deed (failing to exclude minerals) begin to run?

HOLDING:

THE STATUTE OF LIMITATIONS FOR REFORMATION OF A DEED AGAINST THE GRANTEE (FAILING TO EXCLUDE MINERALS PER CONTRACT) BEGINS TO RUN WHEN THE DEED IS FILED IN THE LAND RECORDS, AND IS EITHER 2 YEARS FOR NEGLIGENCE OR 5 YEARS FOR REFORMATION, AND IS NOT FROM DISCOVERY.

FACTS:

Grantor/plaintiff had a sales contract for real property providing that the minerals were to be reserved to the grantors. The deed did not reserve the minerals. Later, the grantor/plaintiff again deeded the same land to a third party, without reserving the minerals. The third party conveyed such lands again to a "fourth" party, who then conveyed to the original grantee, when such original grantee demanded such deed. Such grantee signed a mineral lease. All of these deeds were promptly filed in the land records. The original grantor, more than 5 years after he (the original grantor) conveyed the same land to the third party, sued his original grantee, to quiet the title to the minerals.

TRIAL COURT RULING:

The trial court held that the statute of limitations had run on reformation of conveyances (5 years -- 12 O.S. §95(A)(12)) because the grantor had notice upon the filing of the deed. The argument that the statute of limitations should be tolled until the injured party realized the error was rejected. The grantor included an argument claiming that the 15 year adverse possession statute should apply, but that argument was rejected. Summary judgment was granted to the original grantee.

COURT OF CIVIL APPEALS RULING:

[NONE -- the Supreme Court retained the case]

SUPREME COURT RULING:

The trial court was affirmed (unanimously), relying on the three Calvert cases.

It is heartening that the Supreme Court stated in the concluding paragraph 19:

> *"If this were not the case, real property transactions across the state could be set aside at almost any time which could leave all real property transactions unsettled indefinitely. Accordingly, we had that, notice imposed on the grantor by the filing of the deed with the county clerk precludes this action as untimely."*

7. MUSTANG RUN WIND PROJECT, LLC v. OSAGE COUNTY BD. OF ADJUSTMENT (2016 OK 113)

GENERAL TOPIC:

Conditional use permit for a wind farm.

SPECIFIC TOPIC:

Can a county Board of Adjustment deny a conditional use permit for a wind farm without grounds other than its "vision" for the county?

HOLDING:

A COUNTY BOARD OF ADJUSTMENT CANNOT DENY A CONDITIONAL USE PERMIT FOR A WIND FARM, WITHOUT SPECIFIC GROUNDS SUPPORTED BY EVIDENCE. NEIGHBORS' COMPLAINTS ARE INSUFFICIENT GROUNDS.

FACTS:

A company applied to the Osage County Board of Adjustment for a conditional use permit to install a 68-unit wind farm on a 15 acre tract. The applicant met all requirements for the granting of the permit. The Board of Adjustment denied the application with the primary stated reason being that "we're really here to look at our vision, is this appropriate for adjacent landowners and is it appropriate for the county." The applicant appealed to the District Court.

TRIAL COURT RULING:

The Osage Nation (as amicus) protested the proposal, raising various arguments ranging from the county not having statutory authority to issue any conditional use permits, to concerns about a negative impact on the environment (such as prairie chickens and eagles) and visual pollution and decrease in land values on adjacent property. The trial court reviewed the entire record from the Board of Adjustment hearings and heard all the various arguments. It rejected them all, based on the evidence or the lack of evidence. It ordered the Board of Adjustment to issue the permit. The trial court stated: "It appears that some members of the Board were more concerned with adjoining landowners that with the rights of the surface owners to use their property in a lawful manner and receive compensation therefore."

COURT OF CIVIL APPEALS RULING:

[NONE -- the Supreme Court retained the case]

SUPREME COURT RULING:

The Supreme Court affirmed the trial court, stating: "Property rights and the use of property are fundamental rights on which this country was established, and it is a board

of adjustment's duty to determine the reasonableness of a property owner's request based on the evidence before the board."

8. LAUBSTEIN v. BODE TOWER, L.L.C. (2016 OK 118)

GENERAL TOPIC:

Private Nuisance.

SPECIFIC TOPIC:

Is a neighbor allowed to rely on personal aesthetic objections to the image of a cell tower and the required blinking lights to justify finding it is a private nuisance?

HOLDING:

"OUR CASE LAW PROHIBITS NUISANCE CLAIMS BASED ENTIRELY ON AESTHETIC CONCERNS. IT WOULD BE WHOLLY UNREASONABLE TO ALLOW ONE INDIVIDUAL'S VISUAL SENSIBILITIES TO IMPEDE DEVELOPMENT OF CELLULAR PHONE SERVICE FOR THE RESIDENTS OF MUSKOGEE." NEIGHBORS' COMPLAINTS ARE INSUFFICIENT GROUNDS.

FACTS:

BoDe Tower, LLC owned land and secured state and federal authorization to construct a cell tower in an effort to fill a gap in cellular coverage. No zoning or restrictive covenants prohibit construction of the tower. Neighbors filed a lawsuit to enjoin the existence of the tower, although they did not enjoin its construction during the pendency of the lawsuit.

TRIAL COURT RULING:

The tower was deemed a private nuisance and it was ordered that it must be torn down. Such destruction was stayed during the appeal.

COURT OF CIVIL APPEALS RULING:

The COCA affirmed the trial court.

SUPREME COURT RULING:

The Supreme Court accepted Cert, and vacated the COCA opinion and reversed the trial court, with instructions to enter judgment for the defendant, the tower builder. The Oklahoma Supreme Court held: "We have said that a nuisance 'arises from an unreasonable, unwarranted, or unlawful use' of property." Also, "An alleged nuisance must 'substantially interfere with the ordinary comforts of human existence.'" "The evidence in this case unequivocally established that the tower was lawfully constructed, and the nuisance claim was predicated entirely on Laubenstein's distinctive aesthetic preferences."

9. STATE ex rel. DEPT. OF TRANSPORTATION v. CEDARS GROUP, L.L.C. (2017 OK 12)

GENERAL TOPIC:

Condemnation.

SPECIFIC TOPIC:

Under what circumstances are attorney's fees and other costs recoverable in a condemnation proceeding?

HOLDING:

WHERE THE CONDEMNEE AND ATTORNEY HAVE AN AGREEMENT WHEREBY NO ATTORNEY FEES ARE DUE UNLESS THE RECOVERY EXCEEDS THE COMMISSIONERS' AWARD BY 10%, SUCH AGREEMENT SUPPORTS AN AWARD OF ATTORNEY FEES, AND COSTS.

FACTS:

When the condemnee rejected the Commissioners' award, and a jury trial was held, the jury award exceeded the Commissioners' award by 10%, thus triggering the award of attorney fees to the condemnee. There was conflicting evidence offered first of a specific written contingency fee contract for attorney fees and then a substituted oral contract which removed the formula for the amount of attorney fees and allowed the court to set the amount.

[Author's Comment: It should be noted that ODOT made a good faith offer before the condemnation action was filed of $562,500, the Commissioners awarded $462,500, and the jury award was $525,000; meaning the condemnee received $37,500 LESS after the trial than he would have received if he had accepted ODOT's original offer.]

TRIAL COURT RULING:

The trial court granted an assessor's bill, but denied all attorney fees, including a Burke incentive, (because the fees were contingent and not "actually incurred"), and all engineering, expert witness and costs.

COURT OF CIVIL APPEALS RULING:

Trial court was affirmed.

SUPREME COURT RULING:

Supreme Court granted Cert. Supreme Court (1) allowed reasonable attorney fees because "actually incurred" language included contingent fees, (2) allowed engineering costs to determine location of underground storage tanks, which had to be relocated, as part of the

taking of the land, (3) allowed expert witness fees per statute, (4) allowed some litigation (non-overhead) costs and denied others (overhead), with the trial court to decide which costs in which category. No Burke incentive was allowed (1) because such incentives only apply in a civil action and not in a special proceeding such as condemnation, (2) Burke incentive could have been "actually incurred", and (3) in order to balance granting just compensation while protecting the public treasury.

10. BEBOUT v. EWELL (2017 OK 22)

GENERAL TOPIC:

Void probate decree.

SPECIFIC TOPIC:

Is it constitutionally required that the Final Account be mailed to all heirs, or is Notice of the Hearing on such Final Account being mailed sufficient?

HOLDING:

WHERE PRETERMITTED MINOR HEIRS RECEIVE NOTICE OF THE FILING OF A FINAL ACCOUNT AND A HEARING THEREON IN A PROBATE, AND THEY FAIL TO LOCATE AND REVIEW SUCH FINAL ACCOUNT, AND DO NOT ATTEND THE HEARING, AND THEY WAIT MORE THAN ONE YEAR AFTER REACHING MAJORITY TO FILE A CHALLENGE, SUCH CHALLENGE IS TOO LATE, EVEN IF THE DECREE CONTAINED AN ERROR OF LAW (FAILING TO APPPOINT AN ATTORNEY FOR MINORS AND FAILING TO PROVIDE FOR OMITTED PRETERMITTED HEIRS). BOOTH IS DISTINGUISHED.

FACTS:

The probate court distributed the estate's assets according to the terms of the will, to the daughter and granddaughter, with no mention in the will or in the decree about two omitted grandsons (pretermitted heirs). The two grandsons received a copy of the Notice for Hearing of Final Account, but did not receive a copy of such Final Account. Such Final Account was available in the court file. The two grandsons were minors, although one reached majority just before the final decree was filed. The two grandsons filed an action 32 years later (probably a quiet title action) to have the probate decree deemed void for lack of due process notice and to have their interests confirmed. They also argued that the probate court errored by not appointing attorneys for them as minors.

TRIAL COURT RULING:

The trial court agreed that the probate decree was void on its face for lack of evidence that the final account was sent to the two grandsons.

COURT OF CIVIL APPEALS RULING:

The court of civil appeals affirmed the trial court.

SUPREME COURT RULING:

The Supreme Court vacated the COCA and reversed the trial court, and remanded it to the trial court to issue a decision against the two grandsons. The Supreme Court said the

Notice of the Hearing on the Final Account should have prompted them (inquiry notice) to review the Final Account which was on file, and which gave them constructive notice. The two grandsons countered with the holding in the Booth case, which ruled that an old probate decree was void on its face when the pretermitted heirs did not receive a copy of the Final Account. However, in this pending case, Booth was distinguished on its facts by saying that if the heirs in Booth (two brothers) had made the effort to review the Final Account such knowledge would still not have advised them that they were being omitted from the distribution because the Final Account showed them -- pursuant to the will -- each receiving their 1/3 share, along with the sister/personal representative getting 1/3. However, at the hearing to confirm the Final Account the Booth court directed that such distribution to the three heirs would occur but only after the fees of the attorneys and personal representative and the costs of administration had been paid. Such costs would have exhausted the estate, so the court conveyed the land (the only asset) to the sister as her personal representative fees. In addition, the Supreme Court rejected the two minor grandsons' argument that the probate judge's failure to appoint attorney for them rendered the decree void.

Also, the Supreme Court concluded the Bebout opinion by saying:

> "*Because the final distribution of an estate could deprive interested persons of certain protected property interests, it is of the utmost importance that constitutionally sufficient notice be provided to such persons. Of no less importance, however, is the stability of the law in connection with real property and titles to lands in this state.*"

11. HENSLEY v. STATE FIRE AND CASUALTY CO. (2017 OK 57)

GENERAL TOPIC:

Contract for Deed

SPECIFIC TOPIC:

Does a buyer's/grantee's interest under a Contract for Deed -- in itself -- make him an insured party to a homeowner's policy?

HOLDING:

WHERE A BUYER/GRANTEE UNDER A CONTRACT FOR DEED IS NOT A NAMED PARTY UNDER A HOMEOWNERS INSURANCE POLICY BUT THE SELLER/GRANTOR IS A NAMED PARTY, THE BUYER/GRANTEE IS NOT AN INSURED -- SOLELY DUE TO CONTRACT FOR DEED. FACTS ABOUT WHETHER THE INSURER TREATED THE BUYER/GRANTEE AS AN INSURED PARTY CAN BE OFFERED TO ESTABLISH A GOOD FAITH DUTY ON THE INSURER.

FACTS:

Buyer/grantee was buying a house and the insurance premium on the homeowner's insurance was included in the monthly payment to the seller/grantor. When a hail storm damaged the mobile home on the land both the seller and buyer submitted separate claims. The insurance company paid the seller but refused to pay the buyer, when the buyer said the amount paid to the seller was too low and should have been paid to him. The buyer filed a lawsuit to establish that he was an insured and that the insurer acted in bad faith in handling the claim.

TRIAL COURT RULING:

The trial court granted summary judgment to the insurer holding that the buyer was a stranger to the insurance policy.

COURT OF CIVIL APPEALS RULING:

The COCA affirmed, and the buyer sought Cert, which was granted.

SUPREME COURT RULING:

The Supreme Court agreed that the status of holding equitable title under a contract for deed does not -- in itself -- make the buyer an insured or a third party beneficiary under a hazard insurance policy. However, because there were facts in dispute about the insurer's treatment of the buyer as an insured, the matter had to be remanded for determination of the facts concerning the bad faith claim.

B. OKLAHOMA COURT OF CIVIL APPEALS CASES

(JULY 1, 2015-JUNE 30, 2016)

LIST OF CASES

NO.	TOPIC		CASE	OKLAHOMA CITATION	DECIDED / MANDATE
	GENERAL	SPECIFIC			
B. OKLAHOMA COURT OF CIVIL APPEALS					
1	Mortgage Foreclosure	Can the liability for failure to give a required notice arising under a high risk mortgage and the failure to charge the correct interest rate -- if the loan is a consumer loan -- be extinguished by an amendment of the note interest?	First National Bank in Marlow v. Bicking	2016 OK CIV APP 22	12/30/2015 4/14/2016
2	Attorney's Fees	Can the prevailing defendant seek to recover attorney fees and costs from the members of a class or the insurers of a class regarding fire damage to real property?	Avens v. Cotton Electric Cooperative, Inc.	2016 CIV APP 39	12/18/2015 6/27/2016
3	Probate	Must the plaintiff file a proof of claim of pending lawsuit against deceased?	Guerra v. Starnes	2016 OK CIV APP 42	5/24/2016 6/27/2016
4	Deficiency Judgment	Can notice of a deficiency judgment be corrected by nunc pro tunc, and is the 30-day period to appeal measured from the original or the correction judgment?	Charles Sanders Homes, Inc. v. Cook and Assoc. Engineering, Inc.	2016 OK CIV APP 45	12/23/2015 7/18/2016
5	Guaranty Exoneration	Does the dismissal of a motion for deficiency judgment against the debtor exonerate the guarantor?	The People's National Bank v. Allison	2016 OK CIV APP 51	11/24/2015 7/26/2016
6	Local Rules	Does failure to file the resulting judgment (or a motion to settle JE) within the 30 days required by local court rules make the judgment void?	Deutsche Bank National Trust Co. v. Myers	2016 OK CIV APP 54	8/3/2016 8/30/2016
7	Homeowner's Association	Does an HOA have responsibility to protect lots adjacent to streams (in common areas) from damage from erosion and floods?	Grindstaff v. The Oaks Owners' Association, Inc.	2016 OK CIV APP 73	4/25/2016 12/1/2016

8	Residential Condition Disclosure Act	If a seller and his realtor knew or might have known of prior residential defects, is a summary judgment for the seller and a dismissal of the realtor appropriate.	Stauff v. Bartnick	2016 OK CIV APP 76	9/2/2016 12/14/2016
9	Smoking Prohibition	Are there any grounds in law or in Condo regulations prohibiting a person from smoking in a private residence?	Nuncio v. Rock Knoll Townhome Village, Inc.	2016 OK CIV APP 83	5/13/2016 12/30/2016
10	Spousal Forced Share	Can a second surviving wife defeat a conveyance of the homestead by the husband as an individual (from his own revocable trust – set up and "funded" between marriages) made during his second marriage to a daughter of the first wife, where the children of the first marriage are the contingent beneficiaries, and claim a probate homestead, and claim a spousal forced share, and claim a surviving spousal allowance from such asset?	In the Matter of the Estate of Eagleton	2017 OK CIV APP 2	12/9/2016 1/12/2017
11	Prenuptial Agreement, and Power of Appointment	Can a spouse grant by conveyance or will greater rights than specified in a prenuptial agreement, and does the failure to meet the formal requirements for exercising a power of appointment, which exceed the statutory requirements, make such appointment, which invalid?	In the Matter of the Estate of Pierce	2017 OK CIV APP 25	12/13/2016 5/11/2017
12	Attorney Fees	If an offer of judgment is made with a specific reference to 12 O.S. §1101 (and not to §1101.1), and, if it is accepted, is the recipient of such judgment entitled to attorney fees, when the offer is silent?	Winn-Tech, Inc. v. Nubuko Lawson	2017 OK CIV APP 28	4/23/2017 5/18/2017
13	Water Rights, and Injunctive vs. Declaratory Relief	If a request for a temporary injunction is denied, does that mean a request for a declaratory ruling is futile, and does a delay of 5 months between denial of the request for a temporary injunction and the request for leave to amend to ask for a declaratory ruling constitute undue and prejudicial delay, and	City of Blackwell v. Bruce Wooderson, et al	2017 OK CIV APP 33	5/12/2017 6/6/2017

		does the absence of a current shortage of water preclude consideration of a declaratory request?			

B. OKLAHOMA COURT OF CIVIL APPEALS:

1. FIRST NATIONAL BANK IN MARLOW v. BICKING (2016 OK CIV APP 22)

GENERAL TOPIC:

Mortgage Foreclosure

SPECIFIC TOPIC:

Can the liability for failure to give a required notice arising under a high risk mortgage and the failure to charge the correct interest rate -- if the loan is a consumer loan -- be extinguished by an amendment of the note interest?

HOLDING:

AN AMIBIGUITY AS TO THE PURPOSE OF A LOAN (BUSINESS VS. CONSUMER) CANNOT BE RESOLVED IN A SUMMARY JUDGMENT, AND VIOLATIONS OF VARIOUS RATE LIMITS AND NOTICES REQUIRED UNDER A CONSUMER LOAN CANNOT BE CURED BY AMENDING THE NOTE.

FACTS:

Lender made a note where the proceeds were used to buy or refinance several consumer and business purchases, and the rate of interest was too high for a consumer loan, and several consumer loan related notices were not given. The note went into default and the lender sought foreclosure of the mortgage.

TRIAL COURT RULING:

Summary judgment was given to lender concluding that the loan was for business purposes, so the interest rate limitation and notices were not required, and any violations of the requirements were cured by the refinancing of the note at a lower interest rate.

COURT OF CIVIL APPEALS RULING:

Trial court was reversed and remanded. The facts concerning whether the loan was for a business or consumer purpose needed to be decided by the trier of fact and not in a summary judgment. Also, any initial violations were not cured by the refinancing of the note.

2. AVENS v. COTTON ELECTRIC COOPERATIVE, INC. (2016 OK CIV APP 39)

GENERAL TOPIC:

Attorney Fees

SPECIFIC TOPIC:

Can the prevailing defendant seek to recover attorney fees and costs from the members of a class or the insurers of a class regarding fire damage to real property?

HOLDING:

WHERE A MEMBER OF A CLASS (NOT THE PLAINTIFF REPRESENTATIVE) AND AN INSURER OF A MEMBER OF A CLASS WERE NOT ACTIVE IN THE CASE, WHERE THE DEFENDANT WINS, AND WHERE THE DEFENDANT AGREES NOT TO PURSUE AN AWARD OF ATTORNEY FEES AGAINST THE REPRESENTATIVE OF THE CLASS, NO ATTORNEY FEES CAN BE AWARDED AGAINST THE MEMBER OR INSURER.

FACTS:

There was wild fire that caused damages to a large number of structures. There was a class action lawsuit filed against Cotton Electric Cooperative, Inc. claiming that the Coop's negligence caused the fire. There were many non-participating members and in addition several insurance companies interested in the outcome because they paid for such damages. These non-participating members and the insurers did not participate in the lawsuit.

TRIAL COURT RULING:

There was a jury trial which found against the class and for the Coop. The Coop and the participating members reached a settlement agreement wherein the Coop would not seek attorney fees against the participating members if they refrained from seeking an appeal. Then the Coop sought recovery of attorney fees and expenses against the non-participating members and the insurers under the statute (12 O.S. §940) allowing attorney fees and expenses in a lawsuit involving injury to real property. The trial court denied such fees and expenses. The Co-Op appealed.

COURT OF CIVIL APPEALS RULING

The COCA affirmed the trial court because the non-participating members and the insurers were not directly involved in the litigation.

3. GUERRA v. STARNES (2016 OK CIV APP 42)

GENERAL TOPIC:

Probate

SPECIFIC TOPIC:

Must the plaintiff file a proof of claim of pending lawsuit against deceased?

HOLDING:

IF A TIMELY SUBSTITUTION OF THE DEFENDANT'S PERSONAL REPRESENTATIVE IS MADE IN A CASE PENDING AT THE DEATH OF THE DEFENDANT -- MEANING WITHIN 90 DAYS OF A SUGGESTION OF DEATH FILED IN THE PENDING CASE -- THEN UNDER CURRENT STATUTORY LAW (12 O.S. §2015), THERE IS NO REQUIREMENT FOR THE PLAINTIFF TO FILE A NOTICE OF CLAIM (58 O.S. §331) IN THE PROBATE.

FACTS:

A defendant was sued for a range of claims, including elements of contract, negligence, breach of statutory duty, and fraud, relating to breach of duty and breach of disclosure requirements in a real estate transaction involving the defendant as a real estate agent. The defendant died and a probate was filed, and the personal representative was substituted for the deceased defendant in the damages case within 90 days of the filing of a corrected suggestion of death in the case. However, the plaintiff in the damages case failed to file a proof of claim in the probate within the two-month deadline.

TRIAL COURT RULING:

Trial court held: the plaintiff "failed to make a claim with the [defendant's] Estate regarding the [plaintiff's] pending lawsuit, and hence the lawsuit was barred by operation of the 'non-claim' provisions of 58 O.S. 2011 §§331-334 of Oklahoma's probate procedure statutes." The plaintiff appealed.

COURT OF CIVIL APPEALS RULING:

The COCA appeals went through a lengthy discussion of the history of the interactive civil procedure and probate statutes. 58 O.S. §331 required the personal representative to send notice to the known creditors with 2 months of appointment. The use of publication notice to give creditors notice was found to constitutionally deficient and the statute was amended to require written notice. Then the next question was whether the plaintiff filed a timely proof of claim. However, due to significant repeals and amendments of these statutes in 1972, especially the repeal of the statute requiring the plaintiff to present a claim (58 O.S. §343), the COCA held (¶17) "Given the conflict/ambiguity between §331 and §1080…The legislature chose to alter the probate code by repealing the §343 requirement that the plaintiff in a lawsuit existing before the defendant's death must present a claim to the

executor or administrator."… And (¶10): "However, after examining the relevant statutes, we find that a plaintiff with a lawsuit pending at the time of the defendant's death is no longer required to file a creditor's claim with the estate, but establishes the claim by substituting an estate representative as defendant within 90 days of a suggestion of death on the record."

4. **CHARLES SANDERS HOMES, INC. v. COOK AND ASSOC. ENGINEERING, INC. (2016 OK CIV APP 45)**

GENERAL TOPIC:

Deficiency Judgment.

SPECIFIC TOPIC:

Can notice of a deficiency judgment be corrected by nunc pro tunc, and is the 30-day period to appeal measured from the original or the correction judgment?

HOLDING:

A NUNC PRO TUNC ORDER IS RETROACTIVE, AND CONSEQUENTLY ANY APPEAL MUST BE INITIATED WITHIN 30 DAYS OF THE ORIGINAL ORDER AND NOT OF THE CORRECTION ORDER; AN APPEAL CANNOT BE MADE FROM A "MINUTE ORDER".

FACTS:

A note and mortgage was given by two persons, including the buyer of the land ("Cook and Associates"), and a related person ("Justin Cook" an additional party on the note). The note went into default and a foreclosure was filed.

TRIAL COURT RULING:

Judgment was given and a sheriff's sale held. No appeal from the foreclosure judgment was filed. The appraisal for the property, in advance of the sale, was for $278,769.78, but the amount of the judgment is not disclosed in the appellate opinion. The property sold for $186,000 which was less than the appraised value and less than the amount of the judgment (whatever that amount was), and a deficiency judgment for $93,769.78 was granted by default separately against each promisor. [See comment below*] No appeal from the determination of deficiency was filed. However, after the appeal time had lapsed, each of the defendants filed a motion to vacate the deficiency judgments for lack of sufficient information in the notice of hearing to determine the deficiency. The alleged defect ("irregularity") asserted by the buyer ("Cook and Associates") was because the only evidence of the value of the land being sold was the pre-sale appraised valuation of $278,769.78, and that figure was [apparently] not used to compute the deficiency. The motion to vacate filed by Cook and Associates was denied on the merits. Another motion to vacate filed by both defendants was asserted because -- allegedly -- the notice of the deficiency hearing incorrectly stated that the pre-sale appraised valuation would be used to compute the deficiency. This motion was denied on its merits. Both issues were appealed.

COURT OF CIVIL APPEALS RULING:

The first motion to vacate was determined to be challenging a "Minute Order" which is not an appealable order; and was therefore premature and was dismissed.

The second motion to vacate was considered, and the actual language of the notice of the hearing on the deficiency was determined to be correct because it correctly advised the defendants that there would be a "judicial determination of the difference between the amount of the judgment entered in the lawsuit and the fair market value of the mortgaged premises on or near the date of the sale." Denial of motion to vacate was affirmed.

Another complaint was whether the Amended Journal Entry of Deficiency Judgment was adequate because it lacked the specific language required to support a notice by publication. However, because such amendment was a nunc pro tunc, it was retroactively effective back to the date of the original Journal Entry of Deficiency Judgment. Because this appeal was filed more than 30 days after the Original Journal Entry was filed it was not timely, and was dismissed.

[Author's Comment: By statute (12 O.S. §686), the deficiency is determined by subtracting the market value of the land being sold from the amount of the judgment. It is impossible to determine with certainty from this appellate opinion: (1) the amount of the judgment, or (2) the market value of the land used at the deficiency hearing. Using the sale price of $180,000 and the deficiency amount of $93,769.78, one must conclude that the value of the land was $180,000 and that the amount of the judgment was the total of these two numbers meaning $273,769.78. However, based on this incomplete appellate opinion, it appears that the only market value available was the original pre-sale appraisal value of $278,769.78. Consequently, the minimum bid had to be 2/3 of that, or $185,846.52 ($5,846.52 more than the sale price). It appears that two errors were made by the trial court, and not corrected by the COCA: (1) the minimum 2/3 bid was not made, and (2) there was no deficiency at all.]

5. THE PEOPLE'S NATIONAL BANK v. ALLISON (2016 OK CIV APP 51)

GENERAL TOPIC:

Guaranty Exoneration

SPECIFIC TOPIC:

Does the dismissal of a motion for deficiency judgment against the debtor exonerate the guarantor?

HOLDING:

UNLESSS THE GUARANTY AGREEMENT EXPRESSLY WAIVES THE PROTECIONS OF 15 O.S. §§338 AND 344, A GUARANTOR IS EXONERATED BY THE VOLUNTARY DISMISSAL OF THE DEBTOR BY THE CREDITOR, WHERE THE CREDITOR FILED THE MOTION FOR DEFICIENCY TOO LATE (MORE THAN 90 DAYS AFTER SALE).

FACTS:

A couple signed a note and mortgage and another person signed a guaranty. The note went into default and the creditor sued the promisors and guaranty, to foreclose the note and mortgage and to seek a deficiency judgment on all defendants.

TRIAL COURT RULING:

Trial court granted a default summary judgment against all defendants on the note and mortgage, and conducted and confirmed a sale of the mortgaged property. The creditor filed a motion for determination of a deficiency judgment against all defendants, because the land sold for less than the debt. The promisors objected to the motion for deficiency claiming it was filed more than 90 days (12 O.S. §686) after the sheriff's sale. The creditor dismissed the motion for deficiency against the debtors, but continued to assert it against the guarantor. The trial court granted the deficiency determination against the guarantor. The guarantor paid the judgment, but still appealed.

COURT OF CIVIL APPEALS RULING

The creditor asserted the appeal by the guarantor was moot, because the guarantor paid the judgment. But the appellate court held that unless the payment was made as a settlement, the liability could be appealed and the funds repaid if the payor won; and held that there was no settlement (Ok. Sup. Ct Rule 1.6(C)(1)). In regard to whether the guaranty language waived the protections of 15 O.S. §338, the appellate court held: "Bank's failure to seek a deficiency judgment against the [debtors] impaired Guarantor's future right to recover from the [debtors]. Pursuant to §§338 and 344, Guarantor's liability is therefore exonerated." The case was reversed and remended.

6. DEUTSCHE BANK NATIONAL TRUST CO. v. MYERS (2016 OK CIV APP 54)

GENERAL TOPIC:

Local Rules

SPECIFIC TOPIC:

Does failure to file the resulting judgment (or a motion to settle JE) within the 30 days required by local court rules make the judgment void?

HOLDING:

WHERE THE STATUTES ALLOW A LOCAL COURT TO SPECIFY ANY DEADLINE FOR THE SUBMITTAL AND APPROVAL OF A JUDGMENT, A LOCAL RULE REQUIRING A QUICK SUBMITTAL -- WHICH IS MISSED -- EVEN IF MANDATORY, CANNOT OVERCOME SUCH STATUTE.

FACTS:

A note and mortgage went into default. There was a local court rule requiring the final judgment or a motion to settle Judgment be filed within 30 days. Due to the parties' inability to agree on the judgment, the motion to settle Judgment was file after that 30 day deadline. At the hearing, the Bank's judgment was accepted and signed by the court. The debtor filed a motion to vacate asserting that the missed deadline made the judgment void.

TRIAL COURT RULING:

The motion to vacate filed by the debtor was denied, and the debtor appealed.

COURT OF CIVIL APPEALS RULING:

The appellate court held that according to 20 O.S. §91.8, court rules "shall not conflict with statutes of this state." Also, 12 O.S. §696.2(A) provides: "…the court may prescribe procedures for the preparation and timely filing of the judgment…including but not limited to, the time within which it is to be submitted to the court." Hence, the judge can allow more time than the local rule requiring action in 30 days. The trial court was affirmed.

[Author's Comment: While the local judge might have been allowed to SET a different deadline for submittal of the JE, there is no evidence that the court set a longer deadline. Instead, it appears that the trial court's action in considering and granting the Bank's judgment -- out of time -- was an IMPLIED retroactive granting of such extended deadline.]

7. GRINDSTAFF v. THE OAKS OWNERS' ASSOCIATION, INC. (2016 OK CIV APP 73)

GENERAL TOPIC:

Homeowners Associations.

SPECIFIC TOPIC:

Does an HOA have responsibility to protect lots adjacent to streams (in common areas) from damage from erosion and floods?

HOLDING:

WHERE THE HOA BYLAWS AND COVENANTS MAKE IT CLEAR THAT THE ONLY DUTY OF THE HOA IS "TO MAINTAIN AND REPAIR", AND THAT THE LOT OWNER IS RESPONSIBLE FOR "ALL MAINTENANCE AND REPAIR WORK" ON HIS LOT, IT IS THE LOT OWNER AND NOT THE HOA WHO MUST TAKE AFFIRMATIVE ACTION TO PROTECT AGAINST THE STREAM IN THE COMMON AREA DAMAGING A LOT, BY UNDERCUTTING A LOT AND THE HOUSE.

FACTS:

A lot owner bought a lot in 1991 which abutted a stream, which was located in a "common area" of the addition. In 2007 a large tree washed into the stream and the homeowner advised the HOA of this threat. The HOA removed the tree but disclaimed any duty to prevent erosion in the common area or in the lot. Another large rain occurred in 2010 taking out another large tree and a "large portion" of the lot. The HOA again denied any responsibility. The homeowner filed this lawsuit in 2011 against the HOA and the City of Oklahoma City.

TRIAL COURT RULING:

The homeowner asserted negligence and breach of contract (the Covenants), but dismissed the City due to the Governmental Tort Claims Act. The trial court agreed with the HOA and it held (1) the HOA met its duty by removing debris from the stream, and it had no duty to restore the eroded dirt, (2) the storm of 2010 (a 500 year flood) was an Act of God, and excluded by the Covenants, and (3) the homeowner failed to mitigate.

COURT OF CIVIL APPEALS RULING:

The appellate affirmed the trial court. It specifically held that the Covenants were not a contract of adhesion in part because the homeowners could have tried (but did not) to amend the Covenants to change the HOA duties; in addition, the language of the Covenants on the allocation of duties was not ambiguous. The HOA met its duty by removing debris from the stream. The HOA cannot be required to incur expenses, such as ensuring the stream does not damage a single lot, which benefit one lot owner and the expense of all lot

owners. Also, these damages were caused by an Act of God, and are expressly excluded from being the responsibility of the HOA, under the Covenants.

The appellate court rejected the homeowner's claim that the HOA had a common law duty to avoid damaging conduct, since the Covenants made the homeowner responsible and, in this instance, the HOA did not take any action which caused damages. The assertion that the HOA owed a statutory duty to provide lateral support (60 O.S. §66) was rejected because this statute only prohibits an adjacent land owner from undertaking excavation which removes such support. No excavation by the HOA is asserted.

The trial court was affirmed.

8. STAUFF v. BARTNICK (2016 OK CIV APP 76)

GENERAL TOPIC:

Residential Condition Disclosure Act.

SPECIFIC TOPIC:

If a seller and his realtor knew or might have known of prior residential defects, is a summary judgment for the seller and a dismissal of the realtor appropriate.

HOLDING:

WHERE THERE IS CONTROVERTED EVIDENCE ABOUT WHETHER THE SELLER AND REALTOR KNEW OF EXISTING MATERIAL DEFECTS IN A HOUSE WHICH WERE NOT DISCLOSED, SUMMARY JUDGMENT IS NOT APPROPRIATE IN A "FAILURE TO DISCLOSE" LAWSUIT.

FACTS:

Seller's realtor and seller were sued by a buyer after a closing on a home, where the Residential Condition Disclosure Statement failed to disclose material defects in the house.

TRIAL COURT RULING:

The trial court granted summary judgment to the seller based, allegedly on the buyer failing to offer proof of actual knowledge of the defects. The trial court granted a dismissal in favor of the realtor. Such dismissal was based on the assertion that while the company to which the realtor belonged had information about existing defects due to the earlier purchase of the house by the current seller, the internal confidentiality policy of the company prevented the realtor from having access to such information.

COURT OF CIVIL APPEALS RULING:

The COCA reversed the summary judgment for the seller and required further proceedings in the trial court, to determine what the seller really knew. And, after rejecting the real estate company's assertion of an internal confidentiality policy -- as being contrary to the law requiring disclosure -- reversed the dismissal of the realtor and required further proceedings in the trial court, to determine what information was held by the employer of the realtor. This dismissal were especially unacceptable because it failed to provide the buyer the opportunity to amend its pleadings to assert a claim.

9. NUNCIO v. ROCK KNOLL TOWNHOME VILLAGE, INC. (2016 OK CIV APP 83)

GENERAL TOPIC:

Smoking Prohibition.

SPECIFIC TOPIC:

Are there any grounds in law or in Condo regulations prohibiting a person from smoking in a private residence?

HOLDING:

THERE IS NO DUTY UNDER NUISANCE, NEGLIGENCE, GROSS NEGLIGENCE, AND NEGLIGENCE PER SE TO PROHIBIT SMOKING IN A PRIVATE RESIDENCE, ADJACENT TO ANOTHER CONDO RESIDENCE, NOR IN THIS INSTANCE WAS THERE ANY PROHIBITION AGAINST SMOKING UNDER THE CONDO REGULATIONS.

FACTS:

The son of an owner of a condo unit occupied a unit, and complained about a neighbor who smoked in their home, patio and garage, and who allowed the smoke to enter the plaintiff's unit.

TRIAL COURT RULING:

Plaintiff sued for breach of contract (Condo declaration), nuisance, negligence, gross negligence, and negligence per se. The defendants filed a motion to dismiss for failure to state a claim. The trial court held (1) there was no contractual duty under the Condo declaration to prevent smoking, and (2) no negligence existed because there was no statutory or common law duty prohibiting smoking in a private residence (although smoking in public places is regulated). The case was dismissed.

COURT OF CIVIL APPEALS RULING:

The COCA reviewed the Condo declaration and the Smoking in Public Places act, and also reviewed cases from other states, and found that there was no prohibition on smoking in a private residence, and affirmed the dismissal.

10. IN THE MATTER OF THE ESTATE OF EAGLETON (2017 OK CIV APP 2)

GENERAL TOPIC:

Spousal Forced Share.

SPECIFIC TOPIC:

Can a second surviving wife defeat a conveyance of the homestead by the husband as an individual (from his own revocable trust -- set up and "funded" between marriages) made during his second marriage to a daughter of the first wife, where the children of the first marriage are the contingent beneficiaries, and claims a probate homestead, and claims a spousal forced share, and claims a surviving spousal allowance from such asset?

HOLDING:

THE HUSBAND'S DEED AS AN INDIVIDUAL (FROM HIS OWN PREMARITAL TRUST) WITHOUT HIS SECOND WIFE'S SIGNATURE IS SUBJECT TO HER PROBATE HOMESTEAD UNLESS WAIVED, AND THE SECOND WIFE CANNOT CLAIM A SPOUSAL SHARE BECAUSE 84 O.S. §44 WAS AMENDED IN 1985 TO LIMIT SUCH SHARE TO ONE HALF OF THE "JOINT COVERTURE PROPERTY" (WHICH THIS WAS NOT), AND THE SECOND WIFE CANNOT SEEK A SURVIVING SPOUSAL ALLOWANCE SINCE THE SOLE ASSET IS NOT GOING TO BE DISTRIBUTED TO HER.

FACTS:

Husband was divorced from his first wife, with whom he had several children. Shortly before getting married a second time, he conveyed his home into his own revocable trust, with him as sole trustee. The trust provided that the home would, on his death, go to one or more of his adult children. Once married, he and his second wife lived elsewhere and then occupied the home until his death. During this occupancy, he (individually) deeded the house to one of his daughters by the first marriage, without his second wife's signature. The daughter paid the taxes and insurance on the house thereafter. When the husband died intestate, the second wife filed a lawsuit to declare the deed to the daughter as being void due to the absence of the second wife's signature, to confirm her probate homestead, to receive a spousal forced share in the home, and to receive a surviving spousal allowance from the estate assets (being the home).

TRIAL COURT RULING:

On a motion for summary judgment by the second wife the trial court held (1) denied that the deed of the homestead home by the husband alone from the trust without the wife's signature was invalid, (2) denied the forced share, (3) denied the surviving spousal allowance, and (4) granted the spousal rights to personal property (without identifying such property). The trial court certified the judgment for immediate appeal, although it disposed of fewer than all of the claims or parties. Wife appealed.

COURT OF CIVIL APPEALS RULING:

As to the validity of the deed to the daughter, the COCA disagreed with the trial court and held that such deed of the homestead without the spouse's signature was not permitted due to 84 O.S. §44(B)(1), and that the spouse was entitled to a probate homestead right of occupancy, unless the spouse waived or abandoned such homestead rights. The spouse was not entitled to a forced share under 84 O.S. §44, because it was amended in 1985 to be limited to an undivided one-half (½) interest in the property acquired by the joint industry of the husband and wife during coverture…", and this house was owned by the husband before the marriage. The request for a surviving spousal allowance from the estate was denied because this house was the only possible asset, and such allowance is an advance on an anticipated distribution, which in this case will not occur. In addition, the trial court was directed to determine whether the homestead rights were waived or abandoned, and identify the personal property to be received by the spouse.

[Author's Comments: This case:

1. Ignores the failure of the owner of the interest (the trust) to convey the interest; the conveyance is void;

2. Appears to require any conveyance from a grantor revocable tract to (a) include the grantor's signature as an individual (either instead of, or in addition to, signing as trustee), plus (b) the spouse's signature, due to possible homestead; and

3. Such ruling appears to create a nearly impossible situation for a title examiner who may not be able to determine, from the record, whether (a) it is a revocable trust, (b) it is a grantor revocable trust, (c) whether the grantor is married, and (d) whether the land is marital or probate homestead.]

11. IN THE MATTER OF THE ESTATE OF PIERCE (2017 OK CIV APP 25)

GENERAL TOPIC:

Prenuptial Agreement, and Power of Appointment.

SPECIFIC TOPIC:

Can a spouse grant by conveyance or will greater rights than specified in a prenuptial agreement, and does the failure to meet the formal requirements for exercising a power of appointment, which exceed the statutory requirements, make such appointment invalid?

HOLDING:

A SPOUSE CAN BY DEED OR WILL GRANT GREATER INTERESTS THAN ALLOWED IN A PRENUPTIAL AGREEMENT, AND A REQUIREMENT IN A TRUST FOR THE EXERCISE OF THE POWER OF APPOINTMENT SPECIFYING THAT SUCH EXERCISE MUST BE REFERENCED IN THE DOCUMENT EXERCISING SUCH APPOINTMENT IS NOT NECESSARY OR ENFORCEABLE. A CONVEYANCE TO TWO PEOPLE CAN BE ENFORCED AS TO THE PERSON ON THE TRUST'S APPROVED LIST.

FACTS:

A man's mother executed an irrevocable trust with her son as the primary beneficiary with title to a home (Nichols Hills) being distributed to her son under the trust. In the trust the son was given the power to appoint by will to a restricted group, being his issue. The man had several adult children by a first marriage. He remarried and prior to such second marriage he entered into a prenuptial agreement which did not contemplate receipt of title to such house. He had a child in the second marriage. He executed a will giving his second wife a life estate with the remainder to his child by the second marriage. When he died his second wife filed a petition to probate his will. The adult children of his first marriage challenged the second wife's right to the house.

TRIAL COURT RULING:

The trial court held that a spouse can voluntarily give more property to a spouse than is anticipated under a prenuptial agreement. It also held that although the trust required the husband to specifically reference the exercise of the power of appointment in devising by will the house to someone, that such formality, which the husband failed to satisfy, was not required because it exceeded the requirements of the statutes. Also, it held that the second spouse was not in the list of acceptable objects of such appointment, the granting of a life estate in his will was void. However, the grant of the remainder interest in the house to his son by his second marriage was acceptable because such son was included in the list of acceptable objects of appointment.

COURT OF CIVIL APPEALS RULING:

The COCA affirmed all three of the trial court's rulings, so that the son (a minor) by his second marriage received the fee simple title to the house, even though his mother (the second wife) would indirectly benefit because she lived with and cared for her minor son in the house.

12. WINN-TECH, INC. v. NUBUTOKO LAWSON (2017 OK CIV APP 28)

GENERAL TOPIC:

Attorney Fees.

SPECIFIC TOPIC:

If an offer of judgment is made with a specific reference to 12 O.S. §1101 (and not to §1101.1), and, if it is accepted, is the recipient of such judgment entitled to attorney fees, when the offer is silent?

HOLDING:

THERE ARE TWO OFFER OF JUDGMENT STATUTES WHICH CO-EXIST (12 O.S. §§1101 & 1101.1), AND IF THE OFFER IS EXPRESSLY MADE UNDER §1101.1(EVEN IF IT FAILS TO EXPRESSLY SAY IT INCLUDES ATTORNEY FEES), IT AUTOMATICALLY INCLUDES ATTORNEY FEES, BUT DOES NOT AUTOMATICALLY INCLUDE ATTORNEY FEES IF IT IS EXPRESSLY MADE UNDER §1101 (IF IT FAILS TO EXPRESSLY SAY IT INCLUDES ATTORNEY FEES)

FACTS:

A contractor filed a mechanics and materialmen's lien and filed a lawsuit to enforce it. The homeowner made an offer of judgment expressly under 12 O.S. §1101, with 5 days to accept it. No mention of attorney fees was included in the offer. The contractor accepted the offer and then requested attorney fees as the prevailing party under 12 O.S. §936 and 42 O.S. §176.

TRIAL COURT RULING:

The trial court heard testimony on the law and on the reasonableness of the fees. After reducing the fees by a small amount (reduced from 42 hours to 34.6 hours), it awarded such fees. It held that such offer was made under 12 O.S. §1101 which does not automatically include attorney fees (while §1101.1 would have). Such offer did not refer to attorney fees, such they were not covered. The homeowner appealed.

COURT OF CIVIL APPEALS RULING:

The COCA affirmed the ruling, after noting that "We can only conclude the Legislature intended both statutes to co-exist in harmony."

[Author's Comment: Because (1) §1101 covers "recovery of money only" and §1101.1 covers not only "money" but "recovery of money or property" and is therefore more inclusive, (2) §1101.1 was adopted later, (3) §1101.1 expressly includes "and costs and attorney fees", but §1101 does not, and (4) §1101.1 provides "[t]his section shall apply to all civil actions filed after the effective date of this act" (1995), it appears that §1101.1 was

intended to replace the earlier less extensive §1101. The failure to repeal §1101 appears to have been an oversight.]

13. CITY OF BLACKWELL v. BRUCE WOODERSON, et al (2017 OK CIV APP 33)

GENERAL TOPIC:

Water Rights, and Injunctive vs. Declaratory Relief.

SPECIFIC TOPIC:

If a request for a temporary injunction is denied, does that mean a request for a declaratory ruling is futile, and does a delay of 5 months between denial of the request for a temporary injunction and the request for leave to amend to ask for a declaratory ruling constitute undue and prejudicial delay, and does the absence of a current shortage of water preclude consideration of a declaratory request?

HOLDING:

THE DENIAL OF A TEMPORARY INJUNCTION DOES NOT MEAN A REQUEST FOR A DECLARATORY RULING OF RIGHTS TO WATER WOULD BE FUTILE, BECAUSE THE GOALS AND STANDARDS ARE DIFFERENT, THEREFORE, THE PETITION IS AMENDABLE, AND A 5 MONTH DELAY DUE TO THE NEED TO SEEK CITY COUNCIL APPROVAL IS NEITHER UNDUE NOR PREJUDICIAL, ESPECIALLY SINCE THE SAME TYPES OF ISSUES ARE BEING LITIGATED, AND THE OTHER PARTY INSISTED ON SUCH APPROVAL.

FACTS:

Both the City of Blackwell and certain farmers held permits from the Oklahoma Water Resources Board to draw water from a common river with the City having the senior right. The farmers drew their water at a point before the City accessed the water. On occasion the farmers took so much water that there was insufficient water for the City's use. The City sought an injunction to prohibit the farmers from drawing water when two measuring gauges indicated the level of the river was too low for both parties to draw water.

TRIAL COURT RULING:

The trial court denied a request from the City for a temporary injunction prohibiting the farmers from drawing water when the level of the river reached a certain point. The City asked the farmers to agree to allow the City file an amended petition asking for a declaratory decision on when the farmers' use of the water reached a point that would allow the City to object. The farmers refused to agree to such amendment until the City Council approved such amendment. It took 5 months to secure such approval. When the City filed its motion for leave to file an amended petition, the farmers filed a motion for summary judgment on the pending claim for an injunction. The trial court rejected the request to amend saying that such new claim would be futile since the court had already rejected the request for a temporary injunction and because it took too long to make such request (5 months). The trial court also granted the farmers' motion for summary judgment denying the pending claim for a permanent injunction. The City appealed.

COURT OF CIVIL APPEALS RULING:

Reversed and remanded. The COCA held that the 5 month delay was not unreasonable considering the need to seek City Council approval, and that the subjects were not new (use of water) and no prejudice was shown. The issue of futility was rejected because the denial of a temporary injunction required a higher standard than a declaratory ruling, and the denial of the temporary injunction came at a time when no discovery had been conducted. Amendment of a petition is liberally allowed to promote justice. The issue of whether to consider the summary judgment in favor of the farmers was deemed unnecessary in light of the COCA decision to allow the amendment of the petition.

V. ATTORNEY GENERAL OPINIONS

(NONE)

VI. TITLE EXAMINATION STANDARDS CHANGES

A. EXAMINING ATTORNEY'S RESPONSIBILITIES

1. GENERAL RESPONSIBILITY

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

> *Every policy of title insurance issued by any insurance company authorized to do business in this state shall be countersigned by some person, partnership, corporation or agency actively engaged in the real estate title business and maintaining an office in the state, who is duly appointed agent of a title insurance company holding a valid license and authorized to do business in the state; provided, that no policy of title insurance shall be issued in the State of Oklahoma except:*
>
> *1) After examination by an attorney licensed to practice in this state of a duly certified abstract extension or supplemental abstract prepared by an abstractor licensed in the county where the property is located, from a certified abstract plant in the county where the property is located or per a temporary certificate or authority as provided in Section 33 of Title 1 of the Oklahoma Statutes, from the effective date of a prior owner's policy of title insurance issued by a title insurer licensed in this state provided by the insured pursuant to the policy at the time a valid order is placed pursuant to the provisions of the Oklahoma Abstractors Law brought forward to the effective date of abstract plant. Subject to the conditions and stipulations, the exclusions from coverage, exceptions from coverage and endorsements to the policy, any policy issued based on a prior owner's policy and a supplemental abstract shall insure the insured against loss or damage sustained or incurred by reason of unmarketability of title from sovereignty to the effective date of policy, not to exceed the amount of insurance stated in the policy; or*
>
> *2) If the previously insured owner does not provide a copy of the owner's policy of title insurance, then a title insurance policy may be issued after examination by an attorney licensed to practice in this state of a duly certified abstract of title prepared by a bonded and licensed abstractor as defined in the Oklahoma Abstractors Law.*

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

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

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

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

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

2. LIABILITY OF TITLE EXAMINERS TO NON-CLIENTS

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

However, even where the opinion is addressed to a specific person or entity, it is possible that due to the particular circumstances surrounding the transaction, the attorney who is

representing one party, such as the lender -- and rendering an opinion directed solely to that lender -- might be held to be liable to the opposing party, such as the borrower, as well.

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

> *The Oklahoma Supreme Court replied that the pledgee's complaints stated a cause of action under Oklahoma law. Privity of contract does not apply to tort actions under Oklahoma law. See Keel v. Titan Constr. Corp., 639 P.2d 1228, 1232 (Okla. 1981). The Bradford court stated that to determine an attorney's negligence the jury must determine whether the attorney's conduct was "the conduct of an ordinarily prudent man based upon the dangers he should reasonably foresee TO THE PLAINTIFF OR ONE IN HIS POSITION in view of all the circumstances of the case such as to bring the plaintiff within the orbit of defendant's liability." Id. at 191 (emphasis in original).*
>
> ***
>
> *In our view a contract for legal services is a contract for services giving rise to the duty of workmanlike performance. The record in this case reveals extensive communications between the attorneys [for the lender], Martin and Morgan, and the purchaser, Vanguard [the borrower], concerning the [lender's] title opinion. The record also shows that all parties, including Martin, Morgan, [the borrower] Vanguard, and [the lender] Glenfed, were concerned about the Texas Rose Petroleum suit. Thus, we find that an ordinarily prudent attorney in the position of the defendants would reasonably have apprehended that [the borrower] Vanguard was among the class of nonclients which, as a natural and probable consequence of the attorneys' actions in preparing the title opinion for Glenfed, could be injured. Thus, we hold that the defendants owed a duty of ordinary care, Bradford, 653 P.2d at 190, and workmanlike performance, Keel, 639 P.2d at 1231, to Vanguard in the performance of their contract for legal services with Glenfed. We stress that our holding only addresses the question of the duty of the defendants owed to Vanguard and not the question of whether Martin's, Morgan's and Ames, Ashabranner's acts were the proximate cause of Vanguard's injuries. See Bradford, 653 P.2d at 190-91; Keel, 639 P.2d at 1232. (underlining added)*

An interesting Oklahoma Court of Appeals case was decided in 1991, American Title Ins. v. M-H Enterprises, 815 P.2d 1219 (Okl. App. 1991). Therein it was held that a buyer of real property can sue (i.e., via counter claim) the title insurer for negligence in the preparation of a title policy, even if the title insurance policy was issued only in favor of the buyer's lender. This rule was applied where: (1) no abstract was prepared, (2) an attorney's title examination was not undertaken, and (3) the insurer/abstractor missed a recorded first mortgage. The facts of the case

showed that, after the buyer/borrower lost the house through a foreclosure of the missed first mortgage, the insurer paid the insured second mortgage holder to settle under the terms of the title insurance policy and had such lender assign the worthless second note and mortgage to the insurer. The insurer then sued the buyer/borrower under the warranty of title in the second mortgage. The appellate court held that while the buyer/borrower was not a named insured, the insurer's own negligence (i.e., no abstract and no examination) caused the loss, and that the insurer did not buy the note and mortgage as a holder in due course, because (1) no value was paid for the acquisition of the note and mortgage (i.e., the payment was to settle its obligations under the policy) and (2) the note and mortgage were already in default when the insurer took an assignment of them.

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

A fairly new Oklahoma Supreme Court case has included some language that might be considered dicta, but which, when taken at face value, turns some existing understandings of actual notice and agency relationships on their head. While the Oklahoma Supreme Court was only ruling on the issue of who was the prevailing party in a combined foreclosure and quiet title suit -- for attorney fees purposes -- the failure of the Supreme Court to take the opportunity to correct the prior unpublished COCA opinion creates some serious unintended consequences. In Benefiel v. Boulton, 2015 OK 32, the Supreme Court ruled:

> *¶4 Boulton [Defendant] initiated an appeal of the trial court judgment, and on March 31, 2011, COCA reversed the ruling and remanded the matter for further proceedings (Boulton I). The opinion in Boulton I made several findings which are relevant to the present appellate proceeding. First, COCA determined that*

> *Plaintiff's [Benefiel's] judgment lien was properly perfected.*[1] *[citing to Boulton I] Specifically, COCA found that notwithstanding Plaintiff's failure to file the divorce decree with the Seminole County Clerk, inclusion of the judgment in the abstract of title provided Boulton with actual notice of the lien. Therefore, Boulton purchased the residence subject to a valid preexisting encumbrance. Second, COCA noted the judgment lien was "analogous to a real estate mortgage lien which secures a specific parcel of real property for the payment of a sum of money."*[2] *Finally, the COCA opinion reversed summary judgment, finding the reversionary provision in the divorce decree was void because it deprived Boulton of the right to redeem the property.*[3] *On October 17, 2011, we granted certiorari for the limited purpose of vacating an appeal-related attorney fee award to Boulton issued by COCA. We issued an order which postponed a final ruling on attorney fees and directed the parties to submit their applications in the trial court once a prevailing party could be determined.*[4]

The Supreme Court's failure to explain or correct these two finding by the COCA in Boulton I leaves standing two new principals of law: (1) failure of the filing of the divorce decree did not prevent it from being "perfected" (i.e., notice to third parties), and (2) inclusion of the unrecorded divorce decree in the abstract that was supposedly seen -- but either overlooked or treated as a non-perfected or non-created lien -- by the title company's title examiner constituted "actual" notice to the buyer/insured who had no contractual relationship with the title company's title examiner, and no knowledge of the decree and its lien.

While it may be the practice of some or all abstract companies to include such unperfected divorce decrees in their abstracts, such practice puts the title examiner in the awkward position of being aware of an unrecorded and, therefore, an unperfected lien. In First Community Bank v. Hodges, 1995 OK 124, the court held that because a divorce decree was recorded in the land records, pursuant to 16 O.S. §31, the judge-made lien created therein was "perfected" as to third parties, and specifically as to a bank seeking to have its properly filed judgment lien (under 12 O.S. §706) declared senior to such judge-made and recorded divorce decree lien for property division. Recording a judge-made lien seems necessary to its perfection.

In Benefiel the abstract company's inclusion of the decree was, apparently, not because the decree was a necessary link in the wife's chain of title, since the husband had given the wife a

separate deed to the land. The title examiner in such circumstances can either require the release of the unrecorded and unperfected lien (unperfected as to the buyer, who would have been a BFP), and be accused of making creating curative requirements caused solely due to the abstract company's action, or, as happened here, the title examiner can omit mentioning the judge-made property division lien created in the decree, and force the buyer into the position of being given "actual notice", despite the buyer's lack of any personal knowledge of the decree and its lien. The Supreme Court could have avoided such unintended consequences by correcting or at least explaining such significant holdings. Does such relationship between the title company's title examiner and the third party insured/buyer create a "two way" street, where the buyer gets notice based on the title examiner's knowledge and as a consequence the buyer gets to sue the title examiner for his alleged negligence in omitting such significant information? Such liability by the title examiner to the third party buyer is already suggested in the earlier case of Vanguard, discussed immediately above, where the lender's title attorney was potentially liable to the buyer for an allegedly defective title opinion. This matter bears watching and possible clarification by the Supreme Court.

3. STATUTE OF LIMITATIONS ON TITLE OPINIONS

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

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

exercised reasonable diligence to ascertain such facts.

(underlining added)

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

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

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

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

The 2016 Oklahoma Supreme Court case (Calvert v. Swinford, 2016 OK 104) involved a lawsuit by grantors against their attorney and his law firm for negligence in failing to exclude minerals from a deed drafted by such attorney. The Supreme Court (¶0) held that:

> *We retained this cause, concerning the lawyer and law firm, to address the same dispositive issue of whether the statute of limitations for an action brought by a grantor begins to accrue when a deed is filed with the county clerk. We hold it does pursuant to our decision in 114,957, Calvert v. Swinford, 2016 OK 100, _____ P.3d _____.*

Such statute of limitations was held to be 2 years for negligence -- 12 O.S. §95 (3) -- and 5 years for deed reformation -- 12 O.S. §95 (1). Consequently, filing an action 12 years, after the allegedly erroneous deed was filed in the county land records was barred by both statutes of limitations. See the two companion cases, Calvert v. Swinford, 2016 OK 105 (suit to reform the same deed against grantees), and Calvert v. Swinford, 2016 OK 100 (suit against the abstract office that conducted the closing with the same deed). Also see a similar case, decided at the same time, Scott v. Peters, 2016 OK 108 (suit to reform the deed to exclude minerals was barred because it was filed 14 years after the deed was filed in the county land records).

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

B. NEED FOR STANDARDS

1. BACKGROUND AND AUTHORITY OF STANDARDS

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

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

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

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

> *While [the Oklahoma] Title Examination Standards are not binding upon this Court, by reason of the research and careful study prior to their adoption and by reason of their general acceptance among members of the bar of this state since their adoption, we deem such Title Examination Standards and the annotations*

cited in support thereof to be persuasive. (underlining added)

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

In a 2016 Oklahoma Supreme Court case (Blair v. Richardson, 2016 OK 96, 381 P.3d 717) the court relied on a Standard relating to mental capacity to convey title, and held:

> *The lack of capacity can be established in three ways. The Title Examination Standards[24] provide in part that:*
>
> > *On or after June 3,1977, lack of capacity must be established (i) in a mental health case filed prior to that date, (ii) in a civil action or (iii) in a guardianship proceeding.*
> >
> > *The specification of items in a list implies the exclusion of all others. The word "must" is an affirmative command. So, lack of capacity to convey property can only be established by a mental health case filed before 1977, a civil action, or a guardianship proceeding. Therefore, lack of capacity cannot be established by operation of statutory law, and consequently the operation of 43A O.S. 1961 §64 cannot establish the grandmother's lack of capacity.*

And, at footnote 24 of the Blair case, the Court stated:

> *In Knowles v. Freeman, 1982 OK 89, ¶ 16, 649 P.2d 532, this Court unanimously held that because the Title Examination Standards were adopted by the Oklahoma Bar Association and accepted by practitioners in the State, they are a persuasive authority.*

The Standards become binding between the parties:

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

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

applicable;'" (emphasis added) and

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

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

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

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

2. IMPETUS FOR STANDARDS: PROBLEMS WITH SEEKING PERFECT TITLE

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

According to Am Jur 2d:

> *An agreement to sell and convey land is in legal effect an agreement to sell a title to the land, and in the absence of any provision in the contract indicating the character of the title provided for, the law implies an undertaking of the part of the vendor to make and convey a good or marketable title to the purchaser. A contract to sell and convey real estate ordinarily requires a conveyance of the fee simple free and clear of all liens and encumbrances. There is authority that the right to the vendee under an executory contract to a good title is a right given by law rather than one growing out of the agreement of the parties, and that he may insist on having a good title, not because it is stipulated for by the agreement, but on his general right to require it. In this respect, the terms "good title," "marketable title," and "perfect title" are regarded as synonymous and indicative of the same character of title. To constitute such a title, its validity must be clear. There can be no reasonable doubt as to any fact or point of law upon which its validity depends. As is sometimes said, a marketable title must be one which can be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence.* (underlining added)
>
> (77 Am Jur 2d §115 Title of Vendor: Generally.) Obligation to furnish good or marketable title)
>
> *While, in the absence of any provisions in a contract for the sale of land indicating the character of the title to be conveyed, the law implies an obligation or undertaking on the part of the vendor to convey or tender a good and marketable title, if the contract expressly stipulates as to the character of the title to be furnished by the vendor, the courts give effect thereto and require that the title offered conform to that stipulation, it is immaterial that it may in fact be a good or marketable title. A contract to convey a specific title is not fulfilled by conveying another and different title. On the other hand, when the title which the vendor offers or tenders conforms to the character of title stipulated in the contract of sale, the vendee is bound to accept it although the title may not be good or marketable within the meaning of the obligation or undertaking to furnish such a title which the law would have implied in the absence of any stipulation. Refusal to accept title tendered in accordance with the terms of sale constitutes a breach by the purchaser of land of his contract to purchase. If a contract for the purchase of real estate calls for nothing more than marketable title, the courts cannot substitute a different contract therefor.* (underlining added)

(77 Am Jur 2d §123 Special Provisions as to character of title: Generally.)

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

> *In the early law courts, titles as between vendor and purchaser were either good or bad; there was no middle ground. No matter how subject to doubt a purchaser might prove the title to be, he was under obligation to take it, unless he could prove that it was absolutely bad. But the courts of equity coined the expression "marketable title," to designate a title not necessarily perfect, or even good, in the law sense, but so free from all fair and reasonable doubts that they would compel a purchaser to accept it in a suit for specific performance. Conversely, an unmarketable title might be either one that was bad, or one with such a material defect as would cause a reasonable doubt in the mind of a reasonable, prudent, and intelligent person, and cause him to refuse to take the property at its full or fair value. Therefore the term "unmarketable title" includes both "bad titles" and "doubtful titles." Though originally there might have been a difference between a "good title" and a "marketable title," now the terms are used interchangeably. Other equivalent terms appear in the notes. A perfect record title may not be marketable, because of apparent defects, which cause reasonable doubts concerning its validity, and a good or marketable title may be far from perfect, because of hidden defects. In fact, under either the English system of unrecorded conveyances, or under the system afforded by our recording acts, "it is impossible in the nature of things that there should be a mathematical certainty of a good title. "While examiners should be cautious in advising clients as to the acceptance of a title, neither should they frighten them by advertising these relatively infrequent dangers; and they must remember that a purchaser cannot legally demand a title which is absolutely free from all suspicion or possible defect. He may require only such a title as prudent men, well advised as to the facts and their legal bearings, would be willing to accept. Many courts further hold that a doubt sufficient to impair the character of marketableness must be such as will affect the selling value of the property or interfere with the making of a sale.*
>
> *If unmarketable, the doubt which makes it so may be based upon an uncertainty either as to a fact or as to the law. If objection is made because of doubt upon a question of law, this does not make the title unmarketable unless the question is fairly debatable -- one upon which the judicial mind would hesitate before deciding it. Likewise as to a question of fact, there must be a real uncertainty or a difficulty of ascertainment if the matter is to affect marketability. A fact which is readily ascertainable and which may be readily and easily shown at any time does not make title unmarketable. For instance, where a railway company reserved a right of way for its road as **now** located and constructed or hereafter to be constructed, the easement depended on the fact of the **then** location of the line; and as the evidence showed that no line had then been located, and as the matter could be easily and readily proved at any time, the clause did not make plaintiff's title unmarketable. But where there are known facts which cast doubt upon a title so that the person holding it may be exposed to good-faith litigation,*

it is not marketable.

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

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

Title insurance, like most types of insurance, insures against loss due to certain conditions. One of these conditions which triggers liability is “unmarketability of title”. Such term is defined in such policy as: “an alleged or apparent matter affecting the title to the land, not excluded or accepted from coverage, which could entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.” (ALTA Owner’s Policy (10-21-87)) Such definition is sufficiently circular to require the interpretation of the applicable State’s law in each instance to determine whether specific performance would be enforced in such jurisdiction.

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

However, to the extent that a contract provision -- providing that the vendor must convey

“marketable title” -- is interpreted to require title to be free from "all reasonable doubt", it opens the door to differences of opinion between persons of “reasonable prudence”. As noted in Bayse:

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

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

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

> *When the examiner, upon the basis of these decisions, has found that the present vendor can convey a title which is good in fact, he must then ask whether the title has the additional characteristic of marketability. What constitutes a marketable title? Here again legal definitions are subordinate to functional meaning. What the purchaser of land wants is a title which not only can be defended but which can be presented to another examiner with the certainty that it will be unobjectionable. It is small comfort to the owner that he has not been disseized if he is unable to sell or mortgage. If one and the same examiner passed all titles in a given locality, the title which the examiner considered good as a practical matter would, of course, also be merchantable. But such is not the case, and the present examiner must anticipate that his client will in the future attempt to either sell or mortgage and that the same title will come under the scrutiny of some other examiner. In each of the decisions which an examiner has made in determining the validity of a title he has had to exercise sound legal and practical judgment. Will a second examiner, vested with the same wide discretion, reach the same conclusion? If his conclusion is different and he rejects the title, the professional reputation of the first examiner will be impaired and his client may suffer substantial financial loss. Faced with this uncertainty, many examiners have adopted a solution which emphasizes individual security rather than the general facility of land transfers. This is the practice known as "construing against title,"*

or more picturesquely, as "flyspecking." These terms indicate that the examiner indulges in a minimum of presumptions of law and fact, demands full search of title in every instance, and places no reliance upon the statute of limitations. As a consequence he considers all errors of record as substantial. The result of even a ***single examiner*** *in a community adopting this practice is to set up titles which are practically good in fact. Examiner* ***A*** *rejects a title on technical grounds. Thereafter, Examiner* ***B****, to whom the same problem is presented, feels compelled to reject any title presented to him which exhibits a similar defect. Examiner* ***A*** *is thereupon confirmed in the wisdom of his initial decision, and resolves to be even stricter in the future. It is sometimes said that the practice of construing against title reduces an entire bar to the standards of its most timorous member. This is an understatement, for the net effect is an extremity obtained only by mutual goading.*

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

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

1. The legal fees charged to the public are higher because each examination for a parcel

must always go back all the way to sovereignty (or, in some states, back to the root of title);

2. The costs to cure minor defects are often relatively large compared to the risk being extinguished;
3. The unexpected costs to remedy problems already existing when the vendor came into title, which were waived by the vendor's attorney, are certainly not welcomed by the public; and
4. The prior examiner looks inept and/or the subsequent examiner looks unreasonable, when a preexisting defect is waived by one attorney and "caught" by the next.

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

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

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

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

less strict. It now provides:

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

In response to this obvious need to avoid procedures that alienated the public and caused distance to grow between examiners, a movement began and mushroomed in a couple of decades throughout the country to adopt uniform title examination standards. Such standards were adopted first in local communities by the practicing bar and then on a statewide basis. Although there is some competition among local bars for the place of honor, it appears that the local bar of Livingston County, Illinois adopted a set of 14 standards on April 7, 1923. Thereafter, in 1933 or 1934, the Gage County Nebraska Bar Association formulated 32 title standards. The Connecticut Bar, in 1938, became the first state to have statewide standards by adopting a set of 50. ("Increasing Marketability").

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

C. NEWEST CHANGES TO TITLE STANDARDS

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

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

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

THE FOLLOWING 2017 T.E.S. REPORT WAS SUBMITTED TO THE NOVEMBER 2, 2017 ANNUAL REAL PROPERTY LAW SECTION MEETING AND TO THE NOVEMBER 3, 2017 OBA HOUSE OF DELEGATES MEETING AND HAS BEEN APPROVED. THESE STANDARDS ARE EFFECTIVE IMMEDIATELY UPON THEIR APPROVAL BY THE HOUSE OF DELEGATES

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 (10th 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 PRESUMTION 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 (10th 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 decendent." Oklahoma Tax Commission Regulation OAC 710: 35-3-9 provides that the Oklahoma estate tax lein is extinguished upon the expiration of ten (10) years from the date of the death of the decendent 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 decendent 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 endorsee/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 ~~Testament 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).

Authority: 5 O.S. Section 6

D. LATEST TES COMMITTEE AGENDA

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

"FOR THE PURPOSES OF EDUCATING
AND GUIDING TITLE EXAMINATION ATTORNEYS"

2017 SEPTEMBER AGENDA

(As of September 11 2017)

[NOTE: SEE MEETING DATES & LOCATIONS AT THE END OF THIS AGENDA]

[NOTE: IF YOU NEED A FREE PDF COPY OF THE CURRENT 2017 TES HANDBOOK, GO TO WWW.EPPERSONLAW.COM]

SEPTEMBER 16/TULSA

Speakers (Sub-Comm.)	Standard#	Status	Description

BUSINESS/GENERAL DISCUSSION OF CURRENT EVENTS

9:30 a.m. – 10:00 a.m.

Hot Topics: General Questions from Attorneys and Other Title Industry Members (Epperson)
[INCLUDING DISCUSSION OF CLEVELAND COUNTY'S NEW MEMO ON SIZE OF DEED MARGINS, AND NEW STATUTORY OKLAHOMA HEALTH CARE AUTHORITY LIEN THAT SEVERS JOINT TENANCY]

Approval of Previous Month's TES Committee Minutes (Carson)

PRESENTATIONS

==========PENDING==========

10:00 a.m. – 10:45 a.m.

Kempf & Seda Keen Wimbish	**7.1 & 7.2**	**Sep Report**	***MARITAL INTERESTS AND MARKETABLE TITLE*** ***Interest has been expressed in revisiting the question as to how to cure the absence of a recital of marital status and risk of a "void" deed for failure of one spouse to***

			join in execution of a deed to possible homestead property. Should TES 7.1 & 7.2 include mention of possible post-deed curative measures under limited circumstances to show that a deed was Not Void by the recital of non-homestead status by a later affidavit from persons who potentially had a homestead claim, if any, at the time of the deed by one spouse, in order to avoid need for a correction deed, quiet title, probate, or waiting 10 years. JULY: IT WAS DECIDED TO SEEK A LEGISLATIVE SOLUTION.

<u>Brown</u> **Tack** **McEachin** **Shields** **Orlowski** **Seda**	**30.10**	**Sept. Draft**	***QUIT CLAIM DEED OR TESTAMENTARY RESIDUARY CLAUSE IN THIRTY-YEAR CHAIN*** ***Under the MRTA "A recorded quit claim deed or residuary clause in a probated will can be a root of title or a link in a chain of title…". Can a residuary clause in an intestate decree also serve the same purpose?***

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

<u>PRESENTATIONS (CONT'D)</u>

11:00 a.m. – 12:00

<u>Reed</u> **McLean** **Dryer** **Kempf** **Wimbish**	**14.10**	**Sept Draft**	***LLC WITH SERIES*** ***There has been new legislation enacted in 2017 which changes the status of titles held by Series with LLC. Our new standard needs to be revised to reflect this new legislation.***

<u>Astle</u> **Reed** **Wittrock** **Dryer** **Wimbish** **Seda**	**?**	**Sept Draft**	***MISSING ASSIGNMENT OF MORTGAGE*** ***The question has been raised as to whether a mortgage could be released by the current holder of the promissory note secured by such mortgage if evidence of the promissory note with all necessary endorsements thereon, together with adequate identification of such mortgage appear of record. The application of this criteria would be limited to circumstances in which an assignment of such mortgage is missing and unobtainable.***

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

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

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

<u>Schaller</u> McLean Fisher	**7.1 & 7.2**	**June App'd**	***MARITAL INTERESTS AND MARKETABLE TITLE*** ***Due to recent judicial recognition of same sex marriages we need to add cites to the new cases, and we need to "clean up" our references in our standards to husband or wife, if a more neutral term is appropriate. Where we are quoting a case, it must remain unchanged.***

<u>Brown</u> Seda	**8.1** **25.5** **15.4D**	**Aug App'd**	***OKLAHOMA TAX LIEN*** ***There has been new legislation enacted in 2017 which restores the authority to cause an Oklahoma Estate Tax Lien to lapse after 10 years. The prior statute which created such extinguishment had been repealed. The multiple Standards which are impacted by this new legislation need to be corrected/restored.***

_____*UNSCHEDULED*_____

(<u>Moore & Holmes</u>?)	**?**	**Unsch**	***ANCIENT PROBATES*** ***The question has arisen about the impact on title examination due to a recent COCA case overturning an ancient probate due to failure to mail Final Account to parties (despite no statutory requirement to do so, relying on constitutional due process grounds). This COCA was reversed on Cert (9-0). Bebout v. Ewell, case no. 114,364.***

Epperson	**?**	**Unsch**	***NOTICE OF SPACING AND POOLING ORDERS*** ***The case of In re Cornerstone E&P Company v. Union Bank of California, 436 B.R. 830, US Bkcty Ct. N.D. Texas, 2010 (affecting Oklahoma titles) holds that in the absence of the OCC pooling order being filed in the local county land records, there is no notice of such change in interest, to third party vendors. This holding may impact the Title Standards dealing with the filing of court orders covered by the SLTA and MRTA.***

(Epperson?)	**30.9 & 30.10**	**Unsch**	***MRTA & CO-TENANCY TERMINATION*** ***One of the comments to this standard refers to the possibility of there being two roots of title creating two marketable record titles, with each being subject to the other. The sample fact pattern is (1) decree of Blackacre to wife and two sons with decree filed 35 years ago, and (2) wife deeds Blackacre (without specifying a quantum of interest) to one of two sons, with deed filed 31 years ago. Since wife's deed is more than 30 years old, does the MRTA establish title in the grantee son, and extinguish the omitted son's claim?*** **[KRAETTLI EPPERSON HAS AN ARTICLE ON THIS TOPIC WHICH WAS PUBLISHED IN THE OBJ IN OCT. 2016--THE COMMITTEE IS AWAITING FEEDBACK FROM THE MEMBERS OF THE BAR ON THIS ARTICLE BEFORE RECOMMENCING DISCUSSION OF THIS TOPIC.]**

(Epperson?)	**30.14**	**Unsch**	***FEDERAL BANKRUPTCY COURT PROCEEDINGS*** ***In 2012 the Committee repealed 30.14 covering both Federal District Court and Bankruptcy Proceedings, and replaced it with a revised Standard covering only Federal District Court matters, but not Bankruptcy matters. We need to adopt a new Standard covering bankruptcy matters. Also need to consider whether to add a Caveat that all titles are subject to any bankruptcy filings anywhere in the country without local notice being filed.***

(Epperson?)	**30.9 & 30.10**	**Unsch**	***MRTA/Deed as Root: All Right, Title and Interest*** ***What quantity of title is included in either a warranty or quit claim deed, using this language: "All grantor's right, title and interest" or "All my right, title and interest"? What impact, if any, does such language have***

			on that instrument acting as a "root of title" under the MRTA? See Reed v. Whitney, 1945 OK 354 (warranty limited to interest actually owned). If such a deed cannot be a root for the interest conveyed, how far back does the examiner need to go to ascertain what interest the grantor owns and thereby conveys? Should this Standard on the MRTA have a comment added, explaining this issue?

<u>Epperson</u> **Shields** **Seda**	**30.1** **et seq**	**Unsch**	***MRTA/Severed Minerals*** ***Due to the holding in the Rocket case, can it be concluded that the MRTA does affect severed mineral chains of title? (see Epperson's published article on the issue at www.eppersonlaw.com)***

(<u>McEachin?</u>)	**24.12** **&** **24.13**	**Unsch**	***MERS*** ***This issue has become a national topic and ongoing out of state cases will be monitored and reported on as necessary.***

(<u>Wittrock?</u>)	**???**	**Unsch**	***ACCESS TO DEATH CERTIFICATES*** ***The question has been raised as to how to overcome the current interpretation of 63§1-323 which is preventing attorneys and other third parties from getting copies of Death Certificates to file with Affidavits to Terminate Joint Tenancy, and Severed Mineral Affidavits of Heirship, and similar filings. Legislation may be necessary. Social Security Account Numbers for deceased persons are already freely available on-line, so that is not a valid reason to withhold death certificates from public access and use.***

==========REJECTED==========

<u>Epperson</u> **Weintraub**	**3.2**	**May** **Tabled**	***AFFIDAVITS AND RECITALS*** ***Leisa Weintraub (general counsel to Tulsa County Assessor) needs assistance in determining what her duty is in regard to changing the county land tax records to reflect changes in land ownership when a new affidavit of heirship or ownership is filed in the land records. There are existing statutes (16 O.S. Sections 82 and 83 which refer to "ownership" and "heirship". The question has arisen: Why cannot those two statutes be used to reflect ownership of a deceased's land?***

Fisher **Keen** **Kempf** **Dryer**	**?**	**Feb** **Reject**	***DEFAULT JUDGMENT INVALID WITHOUT NOTICE*** ***The new case of Schweigert v. Schweigert, 2015 OK 20, holds that a default judgment cannot be taken without notice to the defaulting party, even if the statutes allow a default judgment to be taken where the service was adequate and no entry or answer was filed. This holding may impact the Title Standards dealing with the SLTA and MRTA.***

==========*TABLED TO 2017*==========

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COMMITTEE OFFICERS:

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

Comm. Secretary: Barbara Carson, Tulsa (918) 605-8862
barbaracarson@yahoo.com

(C:\MYDOCUMENTS\BAR&PAPERS\OBA\TES\2017\Agenda 2017 09 (Sep)

2017 Title Examination Standards Committee

(Third Saturday: January through September)

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

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

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

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

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

APPENDICES

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

2. NATIONAL TITLE EXAMINATION STANDARDS RESOURCE CENTER REPORT

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

APPENDIX 1

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

Last Name	First Name
ANTHONY	ANITA
ASTLE	DALE
BROWN	BYRON (RUSTY)
BUBLIS	JAMES
CARSON	BARBARA
COULSON	MARILYN O.
DEFILIPPO	DIANE
DODD	MORGAN
DOYLE	BILL
DRYER	DAVID
EPPERSON	KRAETTLI Q.
EVANS	LARRY
FISCHER	JENNIFER
GOSSETT	BILL
HAND	JEFF
KEEN	RALPH
KEMPF	FRED
MCLEAN	RHONDA
McEACHIN	SCOTT W.
MCMILLIN	MICHAEL
NOBLE	JEFF
NUNLEY	DAN
PALOMAR	JOYCE
ORLOWSKI	FAITH
REED	DEBORAH
SCHALLER	RYAN
SEDA	ROBERTO
SHIELDS	CHRIS
TACK	JAMES
TUCKER	RICK
WARD	CHARIS L.
WILLIAMS	JENA
WILSON	KATIE
WIMBISH	JACK
WITTROCK	MONICA

*** These members attended at least 3 out of 9 meetings in 2017**

APPENDIX 2

THE NATIONAL TITLE EXAMINATION STANDARDS RESOURCE CENTER

(Effective July 15, 2016)

STATUS REPORT

State		Last Revised		Standards			Availability				
		Pre-2011	2011+	#Ch.	#Stands.	#Pgs.	1	2	3	4	5
1.	Arkansas	-	01-01-13	22	110	65				4	
2.	Colorado	-	07-01-14	15	135	72			3		
3.	Connecticut	01-12-09	-	30	151	471			3		
4.	Florida	-	06-00-12	21	143	187					5
5.	Georgia	-	05-00-14	-	39	194					5
6.	Idaho	c. 1946	-	-	-	-	1				
7.	Illinois	01-00-77	-	14	26	35		2			
8.	Iowa	-	06-00-16	16	118	114				4	
9.	Kansas	00-00-05	-	23	71	122			3		
10.	Louisiana	00-00-01	-	25	233	99			3		
11.	Maine	-	05-17-12	43	80	90				4	
12.	Massachusetts	-	05-07-12	N/A	74	103				4	
13.	Michigan	-	12-00-14	29	430	484			3		
14.	Minnesota	-	09-27-14	N/A	98	86			3		
15.	Mississippi	10-00-40	-	-	-	-		2			
16.	Missouri	05-15-80	-	N/A	26	17		2			
17.	Montana	c. 1955	-	N/A	76	78		2			
18.	Nebraska	-	10-03-13	16	96	99			3		
19.	New Hampshire	-	12-31-13	13	182	38					5
20.	New Mexico	00-00-50	-	06	23	05		2			
21.	New York	01-30-76	-	N/A	68	16		2			
22.	North Dakota	-	00-00-12	18	191	231			3		
23.	Ohio	05-13-09	-	N/A	53	45			3		
24.	Oklahoma	-	11-06-15	35	132	159					5
25.	Rhode Island	-	01-00-16	14	79	79			3		
26.	South Dakota	06-21-03	-	N/A	66	58					5
27.	Texas	-	10-00-14	16	90	80					5
28.	Utah	06-18-64	-	N/A	59	13			2		
29.	Vermont	-	09-00-14	28	43	61					5
30.	Washington	09-25-42	-	N/A	29	09			2		
31.	Wisconsin	02-00-46	-	N/A	15	08			2		
32.	Wyoming	07-01-80	-	22	81	99			2		
Total		**16**	**16**				**1**	**10**	**10**	**4**	**7**

Key:
1=No copy available
2=Paper copy only (not regularly updated)
3=Paper copy only (regularly updated)
4=Electronic copy available
5=Link to standards available

Prepared by Kraettli Q. Epperson, Attorney-at-Law, OKC, OK
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APPENDIX 3

LIST OF THE LATEST 10 ARTICLES, AUTHORED BY KRAETTLI Q. EPPERSON (OMITTING DUPLICATES)

(Last Revised November 6, 2017)

303. "Constructive Notice: Oklahoma's Hybrid System Affecting Surface and Mineral Interests", Oklahoma City Mineral Law Society, Oklahoma City, Oklahoma (October 19, 2017)

302. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2015-2016", Boiling Springs, Woodward County Bar Association: Boiling Springs State Park, Woodward, Oklahoma (September 19, 2017)

301. "Examination of an Abstract of Title in Oklahoma: A Procedural Outline," OBA Solo and Small Firm Conference, Durant, Oklahoma (June 24, 2017)

294. "The Oklahoma Marketable Record Title Act ('aka' The 'Recording Act'): An Argument That This 30-Year Curative Act Can Extinguish Co-Tenancies," 87 OBJ 27 (October 15, 2016)

292. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions, & Title Examination Standards Revisions for 2014-2015", Oklahoma Bar Association: Cleverdon Round Table Seminar, Oklahoma City, Oklahoma (May 19, 2016) and Tulsa, Oklahoma (May 20, 2016)

286. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2013-2014," Boiling Springs Annual CLE, Boiling Springs Park, Oklahoma (September 15, 2015)

276. "Marketable Record Title: A Deed Which Conveys Only the Grantor's 'Right, Title and Interest' Can be A 'Root of Title'", 85 OBJ 1104 (May 17, 2014)

275. "Title Examination Standards in America and in Oklahoma", Oklahoma City University, School of Business "Energy Law Master's Program" (Property Law), Oklahoma City, Oklahoma (May 14, 2014)

274. "'Defensible Title' When Examining Oil and Gas Interests: An Overview of the Law in Oklahoma, and Oklahoma Severed Minerals Affidavit of Heirship", Garfield County Bar Association, Enid, Oklahoma (May 13, 2014)

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