

2019 REPORT OF THE TITLE EXAMINATION STANDARDS COMMITTEE OF THE REAL PROPERTY LAW SECTION

Proposed Amendments to Title Standards for 2020, to be presented for approval by the House of Delegates, Oklahoma Bar Association at the Annual Meeting, November 8, 2019. 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 7, 2019.

Proposals approved by the Section will be presented to the House of Delegates at the OBA Annual Meeting on Friday, November 8, 2019. 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 new to Standard 23.11, in order to reflect results in the holdings of *Taracorp V. Dailey*, 2018 OK 32, and *Automotive Finance Corporation v. Rogers*, 2019 OK CIV APP 16 as to foreign money judgments.*

23.11 FOREIGN MONEY JUDGMENTS AND LIENS.

A. Foreign Money Judgments. An authenticated copy of a money judgment rendered by a court of the United States, or by any other court entitled to full faith and credit in Oklahoma, may be filed in the district court clerk's office in any county in Oklahoma. Such money judgment shall have the same effect as a money judgment of a district court in Oklahoma, subject to the provisions regarding notice and possible stay outlined in the Uniform Enforcement of Foreign Judgments Act, Title 12 O.S. §719, et seq.

B. Lien Created Pursuant to a Foreign Money Judgment. A judgment lien, pursuant to a properly-filed foreign money judgment, can be created by compliance with the provisions of Title 12 O.S. §706.

Comment:

It should be noted that a foreign money judgment can be filed in Oklahoma, as outlined above, at any time during the period in which the original judgment or any renewal of the original judgment is enforceable pursuant to the laws of the state of origin for such judgment.

Authority:

Taracorp v. Dailey, 2018 OK 32

Automotive Finance Corporation v. Rogers, 2019 OK CIV APP 16

Note:

See Title Examination Standard 35.4 regarding the lack of authority of a foreign state court to establish or convey title to Oklahoma real property.

PROPOSAL NO. 2

The Committee recommends Comment 3 to Standard 17.4 be amended as follows to clarify the intent of the comment and the Title Examination Standards Sub-Committee and to add Comment 10 to clarify no additional instruments are required after a transfer on death deed has been revoked.

17.4 TRANSFER-ON-DEATH DEEDS

Comment 3: The examiner should be aware that the grantor's interest is subject to the homestead rights of a surviving spouse pursuant to Article 12 Section 2 of the Oklahoma Constitution. The examiner should be provided with satisfactory evidence which must be recorded, such as an affidavit as to marital status or death certificate of the grantor showing no surviving spouse. If the evidence provided to the examiner reveals that the grantor had a spouse at the time of death, and the surviving spouse did not execute the Transfer on Death Deed under examination, the examiner shall require a quit claim deed from the surviving spouse, showing marital status and joined by spouse, if any.

Comment 10: If the Grantor of a TOD deed revokes the TOD deed, no further instrument is required to terminate the potential interest of the Grantee of the revoked TOD deed. A TOD deed can be revoked by recording in the land records of the County where the TOD deed is recorded any one of the following executed by the Grantor of the TOD deed:

- (i) an instrument specifically revoking the TOD deed,
- (ii) a subsequently executed TOD deed covering the real property described in the original TOD deed, or
- (iii) a subsequent deed which immediately vests in the grantee of the deed the title to the real property described in the TOD deed.

Authority: 58 O.S. §§ 1252A, 1254 A and B and 1257.

PROPOSAL NO. 3

The Committee recommends Standard 14.10 be amended as follows to add a new sub-paragraph "A" and a new "Comment 1", and to renumber the previous sub-paragraphs and Comments, to clarify the ownership in a Series LLC during various time periods.

14.10 LIMITED LIABILITY COMPANY WITH SERIES

A. PRIOR TO NOVEMBER 1, 2004: A properly created or domesticated LLC could not establish Series.

AB. Prior to November 1, 2017, BEGINNING NOVEMBER 1, 2004 THOROUGH OCTOBER 31, 2017: Title title to real property which is to be held under a properly created LLC limited liability company with established Series series, domestic or foreign, must be acquired, held and conveyed in the name of the limited liability company LLC, with appropriate indication that such title is held for the benefit of the specific series.

BC. Beginning November 1, 2017, unless BEGINNING NOVEMBER 1, 2017: Unless otherwise provided in the operating agreement, a Series 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, if a conveyance has been made to a Series; the examiner should require a corrective conveyance from the original grantor.

Comment 1 2: Prior to November 1, 2017, Beginning November 1, 2004 through October 31, 2017, because a series is merely an attribute of the LLC, the series may could not hold title real property 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 a conveyance to or from an LLC for a 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.~~

Comment 3: Beginning November 1, 2004, if an LLC, prior to the establishment of a Series acquired property, the LLC shall convey to:

- A) The LLC for the benefit of the Series; or
- B) The Series (on or after November 1, 2017).

Comment 2 4: Beginning November 1, 2017, to ensure the Series has not been is not prohibited from holding title to real property in its own name, title the examiner may rely

upon ~~an~~ a properly recorded 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 real property~~.

Comment 5: 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.

PROPOSAL NO. 4

The Committee recommends Standard 7.2 be amended as follows to add a new sub-paragraph "D" and to revise the Comments to reflect the amendment of 16 O.S. §13.

C. The grantee is the spouse of the individual grantor and that fact is recited by the grantor in the body of the instrument; or

D. In the event a recorded conveyance of nonhomestead property has been executed by a married grantor without being joined by his or her spouse, said conveyance shall be marketable if one of the following instruments is placed of record:

1. An affidavit executed by the nonjoining spouse stating that the property conveyed was nonhomestead property; or

2. A conveyance executed by the nonjoining spouse, with or without others, relinquishing any claim to an interest in the property to the same grantee, or to a successor or successors in interest, with a recitation that the property was nonhomestead property.

Comment 1: There is no question that an instrument relating to the homestead is void unless 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 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 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 and can confer marketable title upon the satisfaction of Sub-Part (D) above.~~

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 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, prior to amendment of 16 O.S. § 13, effective November 1, 2019, was 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). However, the 2019 amendment authorized the use of affidavits and conveyances, executed by the nonjoining spouse and placed of record within ten (10) years of the filing of a conveyance described in 16 O.S. § 13(B), to evidence the property was not homestead and establish marketability.

PROPOSAL NO. 5

The Committee recommends Standard 34.2 be amended as follows to correct references and time limits.

A. Exempt Assets

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E. Judgment Liens in Bankruptcy

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5. For the title to real property passing through bankruptcy proceedings to be free and clear of a pre-petition judgment lien, the abstract being examined should contain, or the examiner should review certified copies of, the motion requesting that the lien be avoided pursuant to 11 U.S.C. § 522(f) and Fed. R. Bankr. P. 4003(d) and the order granting said motion. *Id.* and *Coats v. Ogg (In re: Ogg)*, ___F.3d___, 1999 WL 218774, BAP No. EO-98-028 (10th Cir. 1999).

Comment: BKR 4003(d) provides that a proceeding to avoid a lien under 11 U.S.C. § 522(f) is by motion pursuant to Rule 9014 Fed. R. Bankr. P., which provides at (b) that service shall be as in service of summons pursuant to Rule ~~704 Fed. R. Bankr. P. Rule~~ 7004(h); Fed. R. Bankr. P., which provides for service on an Insured Depository Institution.

B. Abandonment

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B. The Schedule of Real Property (Schedule "B-1" for cases filed prior to August 1, 1991, or Schedule "A" for cases filed on or after August 1, 1991) showing that the debtor(s)' interest in the property was disclosed. 11 U.S.C. § 521(a)(1) and Fed.R.Bankr.P. 1007(b) & 4002(a)(3).

C. If a trustee has been appointed in the case, evidence of the qualification of the case trustee to serve in that capacity. Such evidence shall consist of either:

1. Evidence that the trustee has filed with the bankruptcy court a bond in favor of the United States conditioned on the faithful performance of the trustee's official duties and transmitted notice of the acceptance of the office to the court and to the United States

trustee within ~~five (5)~~ seven (7) days of receipt of the notice of selection. 11 U.S.C. § 322(a) and Fed.R.Bankr.P. 2008; or

2. If the trustee has filed a blanket bond pursuant to Fed.R.Bankr.P. 2010, evidence that the trustee did not reject the appointment within ~~five~~ seven (7) days of receipt of notice of the appointment. 11 U.S.C. § 322(a) and Fed.R.Bankr.P. 2008; or

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E. If the property was affirmatively abandoned by either the case trustee or a debtor-in-possession:

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2. Evidence that there was no objection to the notice of abandonment filed within ~~eighteen (18)~~ fourteen 14 days of the date of mailing of the notice. Fed.R.Bankr.P. 6007(a) and 9006(f); or

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C. Sales

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B. The Schedule of Real Property (Schedule "B-1" for cases filed prior to August 1, 1991, or Schedule "A" for cases filed on or after August 1, 1991) showing that the debtor(s)' interest in the property was disclosed. 11 U.S.C. § 521(a)(1) and Fed.R.Bankr.P. 1007(b) & 4002(a)(3).

C. If a trustee has been appointed in the case, evidence of the qualification of the case trustee to serve in that capacity. Such evidence shall consist of either:

1. Evidence that the trustee has filed with the bankruptcy court a bond in favor of the United States conditioned on the faithful performance of the trustee's official duties and transmitted notice of the acceptance of the office to the court and to the United States trustee within ~~five (5)~~ seven (7) days of receipt of the notice of selection. 11 U.S.C. § 322(a) and Fed.R.Bankr.P. 2008; or

...

E. Evidence that the debtor, the trustee, all creditors and indenture trustees, any committees formed pursuant to Sections 705 or 1102 and the United States trustee received at least ~~twenty (20)~~ twenty-one (21) days notice of the proposed sale. Fed.R.Bankr.P. 2002(a)(2), (i) and (k).

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D. Sales Free and Clear of Liens

Section 363(f) of the Bankruptcy Code allows a movant to conduct a sale of estate property free and clear of certain specified interests that may encumber the interest being sold. In a Chapter 12 case, that authority is supplemented by Section ~~4208~~ 1206. If a sale free and clear of interests is encountered, in addition to the materials indicated in the immediately preceding section, the

abstract being examined should contain, or the examiner should review certified copies of, the following:

A. The notice of sale discussed in TES 34.2.H.C. Sales E. and F. should also contain the date of the hearing on the motion and the time within which objections may be filed and served on the debtor-in-possession or trustee. Fed.R.Bankr.P. 6004(c).

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E. Transfers Pursuant to a Confirmed Chapter 11 Plan

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A. The Plan and the court approved Disclosure Statement

1. The Plan and Disclosure Statement are filed concurrently. Fed.R.Bankr.P. 3016~~(e)~~(b).

B. Approval of the Disclosure Statement

1. When the Plan and Disclosure Statement are filed, in accordance with Fed.R.Bankr.P. 2002(b) a hearing for approval of the Disclosure Statement should be set on not less than ~~twenty five (25)~~ twenty-eight (28) days notice. Fed.R.Bankr.P. 3017(a).

2. Notice of the hearing must be served on:

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f. all other parties in interest, including:

...

vi. the Secretary of the Treasury. ~~Id.~~ [Fed.R.Bankr.P. ~~3017(a)~~2002(j)(5)].