IV. EXAMINATION OF THE MUNIMENTS OF TITLE (continued)

B. COURT DECREES

1. DIVORCE

a) LIS PENDENS

If, at the time that a divorce is initiated, the title to one or more of the tracts of real property held by the parties to the divorce is held in the name of only one of the two parties, the court could find itself without control of such land when it becomes time to distribute the assets. This unhappy circumstance can arise only if the attorney fails in his duty to file a Lis Pendens Notice in the land records at the same time the Petition is filed.

As provided in 12 O.S. § 2004.2:

NOTICE OF PENDENCY OF ACTION

A. Upon the filing of a petition, the action is pending so as to charge third persons with notice of its pendency. While an action is pending, no third person shall acquire an interest in the subject matter of the suit as against the prevailing party's title; except that:

1. As to actions in either state or federal court involving real property, such notice shall be effective from and after the time that a notice of pendency of action, identifying the case and the court in which it is pending and giving the legal description of the land affected by the action, is filed of record in the office of the county clerk of the county wherein the land is situated; and

2. Notice of the pendency of an action shall have no effect unless service of process is made upon the defendant or service by publication is commenced within one hundred twenty (120) days after the filing of the petition.

B. Except as to mechanics and materialman lien claimants, any interest in real property which is the subject matter of an action pending in any state or federal court, acquired or purported to be acquired subsequent to the filing of a notice of pendency of action as provided in subsection A of this section, or acquired or purported to be acquired prior to but filed or perfected after the filing of such notice of pendency of action, shall be void as against the prevailing party or parties to such action.

> *C. No person purporting to acquire or perfect an interest in real property in contravention of this section need be given notice of a sale upon execution or of hearing upon confirmation thereof.*

It is only when a Notice of Lis Pendens is filed along with the divorce petition that the public land records can be relied upon to warn would-be lenders or borrowers to avoid taking an interest in such land.

It has been suggested to this author that the common practice of filing such Lis Pendens Notice, which is prevalent among real property practicioners, is seldom followed by divorce attorneys. The usual explanation given is that such filing is unnecessary because the parties are too scared of the consequences if they convey an interest in their land and thereby make the judge angry. However, people do not always act rationally, especially while in the midst of a divorce. The suggestion that there is the possibility of penalties being impressed on the offending party for such an improper conveyance begs the question as to what the practitioner can and should do to avoid the problem in the first place.

The court is unable to challenge a conveyance of an interest in real property, if it has been transferred to an innocent third party purchaser, and, consequently, the parties' asset base is substantially diminished by what is an avoidable event. [16 O.S. §§15 & 16] As stated by the Oklahoma Supreme Court: "*The rule is well established in this jurisdiction that in the transfer of real estate in the absence of actual or constructive notice of a previous conveyance or of matters which would put a purchaser on inquiry, a bona fide purchaser for value will take good title to the property. This has been held by us both as to deeds and oil and gas leases."* Williams v. McCann, 1963 OK 204, ¶___, 385 P.2d 788

"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." [16 O.S. §13] Hence, the divorce attorney could find himself in an indefensible situation, if he fails to prevent the dissipation of the assets of the parties.

b) *TERMINATION OF JOINT TENANCY*

The divorce decree is intended to achieve several purposes. In addition, to formally ending the marital relationship, it is an opportunity to formally allocate the resources and assets among the parties. When dealing with the title to real property, the goal is usually to shift title from either a co-tenancy of some type (either tenants in common – no survivorship rights -- or joint tenancy – meaning survivorship rights) to just one of the parties or to transfer title from one of the parties to the other, exclusively. Failure to have the court clearly terminate a joint tenancy, either because the parties expect the land to be sold soon or because of a simple oversight, leaves the right of survivorship in place.

It would be a very unpleasant situation if the party (and their dependants or siblings), which is expecting to receive the proceeds from the sale of the land, dies before receiving such proceeds because the joint tenancy was left in place. By the nature of a joint tenancy interest, the deceased party's claim of interest dies with them, and, consequently, their heirs or devisees will receive nothing. There is apparently a misconception that a divorce decree, which terminates the martial relationship between the parties, somehow automatically and simultaneously transforms a joint tenancy into a tenancy in common. It does not.

According to the Oklahoma Court of Appeals: "*We believe the better rule is that of the majority of jurisdictions deciding the issue, that is, in the absence of a decree provision contemplating severance of joint tenancy, its character remains unchanged.*", Frantz v. Frantz, 2000 OK CIV APP 144, ¶14, 16 P.3d 482

To terminate a joint tenancy, the attorney must make the appropriate changes in title through the language of the divorce decree.

c) *DIRECTED AND DEFAULTED CONVEYANCE*

The decree often includes language that directs one of the parties to execute and deliver to the other spouse a deed covering certain lands. It would not hurt anything to include language in the decree, in addition to the language directing the execution of such deed, declaring that, in the event that such deed is not executed and delivered, the decree itself would act as a conveyance. However, such additional language, which provides that the decree can act as a conveyance, is not necessary. The decree – if recorded in the land records – acts as such conveyance without such additional operative wording. Title Examination Standard 16.3 reads:

> *'Judgments of the District Court awarding real property to either litigant to a divorce action shall be effective to pass title to such real property irrespective of whether the decree of divorce directs the execution and delivery of a deed or other conveyance describing the land affected.'*

And the comment with this Standard states:

> *'In divorce cases the practice of requiring with awards of real property upon failure to do so, that the decree shall operate as a conveyance, should be continued.*
>
> *'In the absence of a deed between the parties, the divorce decree may be recorded in the office of the County Clerk of the County where the land is situated.'*

d) *FILING DECREES AND USING LEGAL DESCRIPTIONS*

If a divorce decree is intended to convey an interest in certain real property or to place a lien on specific land, the decree must be filed in the local county land records in order to give third parties constructive notice of its contents. [12 O.S. §181] In the absence of such a filing, the apparent owner of the tract – according to the land records—could convey or mortgage non-homestead lands to an innocent purchaser. [16 O.S. §13; 16 O.S. §§15 & 16]

The use of alternative descriptions for real property, such as street addresses, is perhaps useful in the courtroom for general discussion of the lands involved, but such descriptions are not in the form required by statute. Before the county clerk can accept a decree affecting real property for filing and for proper indexing in the land records, there must be a "legal" description included on the document. [19 O.S. §§287, 291, & 298]

C. **EXAMINATION OF LIENS AND ENCUMBRANCES**

1. INTRODUCTION

By statute in Oklahoma, liens are charges upon real property that can result in the sale of the land upon the failure of the promissory/mortgagor to perform the agreed-upon action (usually payment of an amount of money). [42 O.S. §1] Encumbrances are generally a broader group of interests in real property that includes liens but which also include other restrictions upon the unfettered use, possession and reconveyance of the land. In the encumbrance category, in addition to liens, there such interests as easements, restrictive covenants, and limitations on the reconveyancing powers/authority of the title holder. In this first section we will address liens, leaving encumbrances for later discussion.

2. LIENS

Liens can be loosing divided between voluntary liens and involuntary liens. Voluntary liens are those liens that the landowner willingly places on his property, such as a mortgage lien where the lien is given as collateral to secure a promissory note, or similar obligation. Involuntary liens are not placed on the land at the request and with the permission of the landowner. They include statutory money judgment liens, mechanics and materialmens' liens, county advalorem tax liens, state tax warrants, state estate tax liens, federal tax warrants, federal estate tax liens, divorce-related judge-made liens, and other less frequently seen liens such as physicians liens.

a. Voluntary Liens: Mortgage Liens

The title examiner who discovers a real estate mortgage in the abstract must decide whether it is still a valid lien on the property. The examiner must decide whether it has been affirmatively released by a written release properly describing the mortgage instrument or it has expired by the passage of sufficient time. The written release must sufficiently identify the mortgage, usually including both a legal description matching the land involved and the book and page of the recorded mortgage. In addition, the party releasing the mortgage lien must be the same party that held either the original mortgage or a proper assignment of the mortgage. Where the party releasing the mortgage is not the original mortgagee, an investigation might reveal that there is an unrecorded assignment, which, once it is found and recorded, will support the release.

If, as sometimes happens, the promissory note which is secured by the mortgage has been paid off but the mortgage has not been released. If sufficient time has passed, the underlying obligation is no longer enforceable by statute, and, by statute, the related

mortgage lien is also unenforceable. [42 O.S. §23: *"A lien is extinguished by the mere lapse of the time within which, under the provisions of civil procedure, an action can be brought upon the principal obligation."*]

However, like other matters that are not reflected in the record, the date of the underlying promissory note is not filed in the land records and its maturity date may not be disclosed on the face of the mortgage. By statute, 46 O.S. §301, if the maturity date of the underlying note is disclosed, then 10 years after such date has passed, the mortgage lien is extinguished by statute and can be ignored. If the maturity date of the underlying note is not disclosed, then 30 years after the mortgage was filed of record, the mortgage lien is extinguished by statute and can be ignored. This conclusion assumes that there is no information in the public record that discloses that the maturity date has been extended by agreement or otherwise.

b. <u>Involuntary Liens</u>

(1) Judgment Liens

The examiner will note the existence of a judgment lien when he observes a Statement of Judgment in the local land records. Such Statement of Judgment is a state-created form that is completed by the holder of a money judgment who wants to create a lien on the debtor's land. [42 O.S.§35; 12 O.S. §706] By establishing such a lien, the creditor puts his claim ahead of any other creditors who might try subsequently to enforce their claim against this property interest, by filing a similar judgment lien and then trying to enforce it by attachment or by pursuing an attachment and execution directly against the land using the judgment alone. [12 O.S. §§751 et seq] The statement of judgment does not include a legal description and instead lists the name of the debtor so that the

lien will cover all lands owned by the debtor in the county. If the creditor files the judgment itself, such filing does not create a lien because such a lien is a creation of the statutes and strict compliance is required. The statute prescribing the precise process to follow to create the lien makes it clear that the filing of the judgment does not create a lien. Only if the language of the judgment expressly creates a lien itself for equitable reasons (e.g., the creation of a constructive or resulting trust, then the filing of the judgment itself (rather than a Statement of Judgment) will create a lien. ["*Constructive trusts are 'imposed against an individual when the individual obtains legal right to property through fraudulent, abusive means, or by means 'against equity and good conscience'. Matter of Estate of Ingram, 874 P.2d 1282, 1287 (Okla.1994). Unlike a resulting trust, which relies on the doctrine of valuable consideration and not legal title, a 'constructive trust primarily involves the presence of fraud, which requires that the equitable title be recognized in one other than the legal title holder.' Cacy v. Cacy, 619 P.2d 200, 202 (Okla.1980). Both resulting and constructive trusts are equitable remedies."* Ely v. Bowman, 1996 OK CIV APP 87, 925 P.2d 567]

The lien of such a money judgment expires either through a written release or upon the passage of 5 years. [12 O.S. §735] The lien of the judgment can be extended beyond 5 years only by (1) taking the necessary steps to keep the underlying judgment alive in the court where it was initially issued and (2) separately taking the necessary steps to keep the lien alive in each of the local county land records. The steps taken to keep the judgment itself alive, produces the same documents which are then used to keep the lien alive.

As stated in 12 O.S. §735:

A. A judgment shall become unenforceable and of no effect if, within five (5) years after the date of filing of any judgment that now is or may hereafter be filed in any court of record in this state:

1. Execution is not issued by the court clerk and filed with the county clerk as provided in Section 759 of this title;

2. A notice of renewal of judgment substantially in the form prescribed by the Administrative Director of the Courts is not filed with the court clerk;

3. A garnishment summons is not issued by the court clerk; or

4. A certified copy of a notice of income assignment is not sent to a payor of the judgment debtor.

B. A judgment shall become unenforceable and of no effect if more than five (5) years have passed from the date of:

1. The last execution on the judgment was filed with the county clerk;

2. The last notice of renewal of judgment was filed with the court clerk;

3. The last garnishment summons was issued; or

4. The sending of a certified copy of a notice of income assignment to a payor of the judgment debtor.

C. This section shall not apply to judgments against municipalities or to child support judgments by operation of law.

And, as stated in 12 O.S. §759:

A. When a general execution is issued and placed in the custody of a sheriff for levy, a certified copy of the execution shall be filed in the office of the county clerk of the county whose sheriff holds the execution and shall be indexed in the same manner as judgments.

B. If a general or special execution is levied upon lands and tenements, the sheriff shall endorse on the face of the writ the legal description and shall have three disinterested persons who have taken an oath to impartially appraise the property levied on, upon actual view; and the disinterested persons shall return to the officer their signed estimate of the real value of the property.

C. To extend a judgment lien beyond the initial or any subsequent statutory period, prior to the expiration of such period, a certified copy of one of the following must be filed and indexed in the same manner as judgments in the office of the county clerk in the county in which the statement of judgment was filed and the lien thereof is sought to be retained:

1. A general execution upon the judgment;

2. A notice of renewal of judgment;

3. A garnishment summons issued against the judgment debtor; or

4. A notice of income assignment sent to a payor of the judgment debtor.

A recent Oklahoma Supreme Court ruling makes it clear that the efforts to keep the lien alive must be timed to parallel the efforts being made to keep the judgment itself alive. [U.S. Mortgage v.Laubach, 2003 OK ___, WL 21517756] In other words, the initial filing of the Statement of Judgment, which creates (i.e., causes simultaneously both the attachment – between the parties – and the perfection – as to third parties – of the lien) the judgment lien, does not start a separate clock, but instead the lien renewal must be done just as often as steps are undertaken to continue the judgment.

(2) Mechanics and Materialmens' Liens

If the general contractor has a contract with the landowner, and, in the instance of an owner-occupied residence, has given the landowner advance written notice of the possible imposition of a lien, then, if the landowner fails to pay the general contractor, or if the general contractor fails to pass the funds along to the laborer or material provider, the unpaid general contractor or the unpaid laborers, mechanics, and materialmen can sign and file a lien in the local land records and subsequently foreclose such lien. [42 O.S.§141 et seq]

However, the title examiner will only see whatever documents end up in the public land records. These papers usually include the sworn Lien Statement signed by the contractor and, in the absence of a Release, the Lis Pendens notice that is filed in the local land records (to be indexed against the subject legal description) upon the initiation of any lawsuit to foreclose such lien. If no lawsuit is initiated by the claimant, within 1 year after the Lien Statement is filed, the lien created by the filing of the Lien Statement is extinguished. [42 O.S. §149]

For the Lien Statement to be valid at all, it must show on its face that the contracted-for work was completed less than 4 months since the general contractor or 90 days since the sub-contractor or mechanic or materialman last provided labor or material to the project. [42 O.S. §§142 & 143] It should be noted that the filing of a lawsuit to enforce the unpaid bill and the related lien within the same time frame for the filing of the Lien Statement, is a satisfactory substitute for filing the Lien Statement. [Peaceable Creek Coal Co. v. Jackson, 1910 OK ___, Okla., 26 Okla. 1, 108 P. 409] In addition, the Lien Statement must be signed and notarized by the claimant, or, in the case of a corporation, by a representative from the corporation, although it does not have to be a person off the statutory list (e.g., corporate president or vice president, or chairman or vice chairman) who must sign land related documents. [Davidson Oil Country Supply Company, Inc.v. Pioneer Oil & Gas Eqpt. Co., et seq, 1984 OK 65, 689 P.2d 1279]

However, the title examiner will usually not take it upon himself to declare a Lien Statement to be invalid due to an apparent defect on the face of the document. Such information set forth on the face of the claim form might -- upon further investigation or discovery -- be determined to be incorrect, or may be amended so that the lien is in fact

enforceable. Consequently, the only instance where an examiner will be bold enough to declare the lien created by the Lien Statement to be unenforceable is where more than a year has elapsed since it was filed of record. Because some parties fail to file their *Lis Pendens* notice in the land records upon the filing of a lawsuit, such as the filing of a lien foreclosure action, the examiner must ensure that whatever compilation of records that he is relying upon, such as an abstract of title, purports to disclose all pending cases in the county affecting the subject land.

The argument might be advanced that the creation of a Mechanics and Materialmens Lien by the filing of a self-serving Lien Statement signed only by the claimant is an unreasonable and impermissible assertion of an interest in another person's land. Such interest has been neither granted by the landowner (e.g., a voluntary mortgage lien) nor imposed under the supervision of a court (e.g., a court granted money judgment). So how can a third party simply declare that they have a lien? The Oklahoma Supreme Court visited this issue and declared that such ability to cloud a person's title through the filing of a Mechanics and Materialmens' Lien Statement to impose what amounts to pre-judgment attachment and perfection was an acceptable intrusion into a person's property rights saying: "*that the filing of the lien statement is a de minimis taking to which due process protection does not attach*." [Mobile Components, Inc. v. Layon , 1980 OK 173, 623 P.2d 591]

A special aspect of a Mechanics and Materialmens' lien is that it can lie invisible for up to 3-4 months (depending on the claimant) until the claimant finally files it in the land records. Any intervening innocent third party grantee or mortgagee takes their

interest subject to the Mechanics and Materialmens' lien, even though they were ignorant of its existence.

There is another especially strange provision of the *Lis Pendens* statute that relieves a Mechanics and Materialmens' lien claimant from the impact of the *Lis Pendens* statute, so that the winner as to any title matter in any lawsuit or the purchaser of an interest through a lawsuit takes their interest subject to the outstanding Mechanics and Materialmens' lien claimant, who filed their lien claim after the *Lis Pendens* notice of the lawsuit was initiated. ["*B. Except as to mechanics and materialman lien claimants, any interest in real property which is the subject matter of an action pending in any state or federal court, acquired or purported to be acquired subsequent to the filing of a notice of pendency of action as provided in subsection A of this section, or acquired or purported to be acquired prior to but filed or perfected after the filing of such notice of pendency of action, shall be void as against the prevailing party or parties to such action*." 12 O.S.§ 2004.2] The legislative lobby for such lien claimants must have been very strong indeed.

(3) County Ad valorem Taxes

If the examiner discovers the existence of outstanding county ad valorem taxes, he will first determine whether they are at least 7 years old, in which case they have been extinguished by the passage of time. [68 O.S. §2941] If they are still valid, he will call for their payment.

It is the usual practice for any unpaid ad valorem taxes to be paid as part of the distribution of proceeds at a general or special execution sale. However, case law provides that the only means to collect such taxes is not through any form of an execution sale but solely through a normal tax sale.

(4) State and Federal Taxes

Whenever Oklahoma Tax Commission tax warrants appear in the record their satisfaction and release must be called for, unless 10 years have passed since the warrant was filed of record. A single 10-year extension beyond the initial 10-year period can be filed. [66 O.S. §§231 & 234; see TES 25.6]

General federal tax warrants lapse after they have been of record for 10 years, and 30 days. [26 U.S.C.§§6322, 6502 & 6503]

Both Oklahoma and federal estate taxes lapse after the decedent has been dead for 10 years; otherwise a release is required. Where the value of the estate fails to exceed the minimum exemption amount – meaning there is no tax liability -- it will be difficult to secure a release, but it is still necessary. [68 O.S. §§811(e) & 815(c); 26 U.S.C. §6324(a)(1)]

3. ENCUMBRANCES

As noted above, an encumbrance encompasses both liens and other types of limitations on a person's interest in his land. Such other types of non-lien limitations or diminutions in rights must be disclosed by the examiner unless such interests have been affirmatively released or have clearly lapsed by the passage of time, or other triggering condition.

An example of a limitation is a subdivision restriction that might dictate the minimum size of a structure such as the square footage of a house, or the types of materials that must be used for the roof of the house.

Such CC&R's (i.e., conditions, covenants and restrictions) are usually imposed upon the entire development, and they continue indefinitely to provide a uniform

framework to ensure the creation of a homogenous neighborhood, which in turn assures each resident that the value of their improvements will be maintained.

Rather than covering an entire series of lots, the restrictions may be imposed through the inclusion of language in a separate deed. In this manner the grantor can protect other neighboring lands.

Changes in circumstances -- such as the wholesale change of a neighborhood from single family homes to businesses on what has become a busy commercial street rather than a lazy residential avenue -- can sometimes give justification to change the limitations on use of the lands. However, such changes will not normally be visible on the public record. Therefore, in the absence of a court decision changing an existing express limitation on the use of a tract of land, the examiner must simply report the known limitations.

Where easements are granted or imposed by the owner of land, such easements, whether limited to a narrow strip (e.g., being 25 feet on either side of a designated pipeline location) or being a blanket easement covering an entire tract (e.g., the SE/4), the examiner must set forth the easement “as is” even if he suspects the blanket easement can be reasonably restricted to the current location of the installed pipeline or other utility line.

VII. CORRECTIVE TOOLS

A. COMMON ISSUES & T.E.S./CURATIVE TOOLS

1. Title Examination Standards

[COPIES OF THE STANDARDS CAN BE FOUND AT "www.eppersonlaw.com]

a) **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 that were approved at the Section's meeting.

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

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

Knowles v. Freeman, 1982 OK 89, ¶16, 649 P.2d 532

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'"* (underlining 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. . ."*, (underlining 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, 1989 OK 168, ¶9, 789 P.2d 1272 *("Marketable title is determined*

under §540 [now §570.10] pursuant to the Oklahoma Bar Association's title examination standards.")].

In these above two instances, the parties might be subject to suits to specifically enforce or to rescind their contracts, to seek damages, or to pay increased interest (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.

(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.

(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 muniments form so generally the proofs of title in this country, that the courts of several jurisdictions hold not only 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. 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.*
>
> (§46. Classification of Vendor Titles)

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/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 reasonable persons. 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.*
>
> (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 more strict 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.

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.*
>
> (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 initial standard was based upon a reading of certain California cases which were initially read to mean that “the title must be perfect in order to be deemed marketable”, but a later re-reading and discussion of those cases led the Oklahoma Title Examination Committee to conclude that the rule was really that “the title will be deemed perfect if it is marketable”. The current title standard in Oklahoma has been changed, as of November 10, 1995, to be less onerous. 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."*

Other states also utilize this "apparently perfect" test as their measuring stick.

In response to a 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 that have sets of Standards which have been updated in the last 5 years (i.e., since 1998). In the last seven years, 4 States have adopted their first sets of Standards including: Vermont (1995), Arkansas (1995), Texas

(1997) and Louisiana (2001). [See the National Title Examination Standards Resource Center Report, at my web site at www.eppersonlaw.com.]

2. Other Major Curative Acts

In order to facilitate real estate transactions, the States' legislatures have adopted numerous uniform curative acts that reduce the number of stale claims which the prospective buyer or lender must be concerned about. These legislative enactments have withstood constitutional challenges in the states where they have been adopted, and, when used for their proper purposes, they have reduced the need for numerous unnecessary lawsuits and other curative steps. Such potential claims that are being extinguished usually have almost no chance of being asserted and less chance of succeeding due to equitable principals and due the universal attitude in America that in regard to land rights: (a) "possession is 9/10th of the law", and (b) "use it or lose it".

In tandem with the title standards, the numerous legislative curative acts in Oklahoma provide a formidable arsenal to use to blaze past seemingly numerous but, in reality, miniscule challenges to title.

While there are dozens of title curative acts and over a hundred title standards in Oklahoma, there are a handful that cover the bulk of the usual title problems. In the following sections these selected curative acts and title standards will be briefly presented. A further review by the examiner of these aides will be appropriate to ensure a comprehensive understanding of the application of each statute or standard.

(a) Marketable Record Title Act:

In 1963 the Marketable Record Title Act, 16 O.S.§§71-80, was adopted in Oklahoma (the "MRTA"). See TES Chapter 30 "Marketable Record Title Act" (TES 30.1 –30.14). Its primary result was to reduce and almost eliminate the need to review

any documents in the chain of title which were over 30 years old. The examiner must first identify the deed or other decree of conveyance that has been in the local land records at least 30 years as of the time of examination. Such initiating document is called the "root of title" from which the subsequent chain springs. Each state tailored the national uniform version of the Marketable Title Record Act to fit what are perceived to be local unique factors, which were supposedly not adequately addressed in the uniform version of the Act.

In Oklahoma, in addition to the document representing the root of title and all subsequent documents, the examiner must review and take notice of certain additional documents that predated the root. As stated in TES 30.13:

> ***30.13 ABSTRACTING***
>
> *Abstracting under the Marketable Record Title Act shall be sufficient when the following is shown in the abstract:*
>
> *A. The patent, grant or other conveyance from the government.*
>
> *B. The following title transactions occurring prior to the first conveyance or other title transaction in "C." below: easements or interests in the nature of an easement; unreleased leases with indefinite terms such as oil and gas leases; unreleased leases with terms which have not expired; instruments or proceedings pertaining to bankruptcies; use restrictions or area agreements which are part of a plan for subdivision development; any right, title or interest of the United States.*
>
> *C. The conveyance or other title transaction constituting the root of title to the interest claimed, together with all conveyances and other title transactions of any character subsequent to said conveyance or other title transaction; or if there be a mineral severance prior to said conveyance or other title transaction, then the first conveyance or other title transaction prior to said mineral severance, together with all conveyances and other title transactions of any character subsequent to said conveyance or other title transaction.*
>
> *D. Conveyances, title transactions and other instruments recorded prior to the conveyance or other title transaction in "C." which are specifically identified in said conveyance or other title transaction or any subsequent instrument shown in the abstract.*
>
> *E. Any deed imposing restrictions upon alienation without prior consent of the Secretary of the Interior or a federal agency, for example, a Carny Lacher deed.*

F. Where title stems from a tribe of Indians or from a patent where the United States holds title in trust for an Indian, the abstract shall contain all recorded instruments from inception of title other than treaties except (1) where there is an unallotted land deed or where a patent is to a freedman or inter-married white member of the Five Civilized Tribes, in which event only the patent and the material under "B.", "C.", "D." and "E." need be shown, and (2) where a patent is from the Osage Nation to an individual and there is of record a conveyance from the allottee and a Certificate of Competency, only the patent, the conveyance from the allottee, the Certificate of Competency, certificate as to degree of blood of the allottee and the material under "B.", "C.", "D." and "E." need be shown.

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

"This abstract is compiled in accordance with Oklahoma Title Standard No. 30.13 under 16 O.S. §§ 71-80."

The three primary sets of documents pre-dating the "root" that must be considered are: (a) the patent out of the sovereign, due to the inability of subsequent owners and parties in possession to rely upon the concept of "adverse possession" to extinguish the state's original claim of interest, and (b) interests which by their nature are expected by everyone to continue indefinitely in order to impose order and uniformity on subdivision developments, and (c) severed mineral interests, severed before the "root".

Through the proper application of this MRTA, the examiner can ignore gaps in the chain of title or errors in documents that would otherwise need to be corrected, if such gaps and erroneous documents pre-date the root.

The allowance of a 30-year window of opportunity for the filing of any challenges to the apparent chain of title that followed from the root of title was deemed sufficient by the state legislature.

(b) Simplification of Land Titles Act:

In 1961 the Simplification of Land Titles Act, 16 O.S.§§61-63, 66, was adopted in Oklahoma (the "SLTA"). See TES Chapter 29. "Simplification of Land Titles Act" (TES 29.1 –29.6). According to TES 29.2:

29.2 PROTECTION AFFORDED BY THE ACT

The Simplification of Land Titles Act, 16 O.S. §§ 61-63, 66 (§§ 64-65 repealed effective April 10, 1980), protects any purchaser for value, with or without actual or constructive notice, from one claiming under a conveyance or decree recorded or entered for ten (10) years or more in the county, as against adverse claims arising out of:

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

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

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

D. (1) Sheriff's or marshal's deeds executed pursuant to an order of court having jurisdiction over the land, (2) final judgments of courts determining and adjudicating ownership of land or partitioning same, (3) receiver's conveyances executed pursuant to an order of any court having jurisdiction, (4) trustee's conveyances referring to a trust agreement or named beneficiaries or indicating a trust where the agreement is not of record, (5) certificate tax deeds or resale tax deeds executed by the county treasurer, as against any person, or the heirs, devisees, personal representatives, successors or assigns of such person, who was named as a defendant in the judgment preceding the sheriff's or marshal's deed, or determining and adjudicating ownership of or partitioning land, or settlor, trustee or beneficiary of a trust, and owners or claimants of land subject to tax deeds, unless claimant is in possession of the land, either personally or by a tenant, or files a notice of claim prior to such purchase, or within "one year from October 27, 1961, the effective date of 16 O.S. §§ 61-66 or from October 1, 1973, the effective date of 16 O.S. § 62 as amended in 1973." The State of Oklahoma and its political subdivisions or a public service corporation or transmission company with facilities installed on, over, across or under the land are deemed to be in possession.

Through the proper application of the SLTA, the examiner can rely upon deeds and decrees as being valid which are part of the record being relied upon to establish the continuous chain of title, although there might have been “off the record” defects (e.g., recorded powers of attorney that are invalid according to unknown facts which are outside the official record). Such deeds and decrees must have been recorded for at least

10 years, and the person relying upon such passage of time must be a subsequent purchaser for value rather than being the grantee under the subject deed or decree. Such 10-year window of opportunity for the filing of any challenges to such recorded deed or decree was deemed sufficient by the state legislature.

(c) Marital Interests:

In 1910, 16 O.S.§4 was adopted, and amended several times since then, and it is currently entitled: *§ 4. Necessity of writing and signing--Veterans' loans--Homestead--Joinder of husband and wife--Effect of record for 10 years.* See TES Chapter 7. "Marital Interests" (TES 7.1 –7.2). Also see: OK. CON. Art.12, §2

Oklahoma's history as a "populist" state is reflected in its continuing efforts to protect the family homestead from impecunious acts of one spouse against the interests of the other non-title-holding spouse and any minor children. While several attempts have been made over the years – even as recently as the first Gulf War in the early 1990's – to enact legislation requiring a spouse to take the affirmative step of filing a Declaration of Marital Homestead in order for such homestead to receive legislative protection against the improper conveyance or encumbrance of the family homestead, nothing has been passed.

Instead, the buyers, lenders and title examiners are left with the continuing need to protect themselves. Otherwise they can face a challenge from the non-joining spouse, or even the joining spouse, attacking the conveyance or mortgage – on the homestead -- as being unenforceable, due the lack of joinder of both spouses. No manner of recitals by the joining spouse claiming that the land is non-homestead binds the non-joining spouse, who may disagree with the joining spouse's claim that the land is non-homestead.

Some people argue that unless the land was listed as homestead with the county assessor at the beginning of the year, it was obviously non-homestead. However, the public policy favoring the protection of the homestead combined with the factual-based nature of the process of determining what land is the homestead, suggests that it is dangerous to "assume" any land is non-homestead. While the statutes allow the conveyance of a married person's non-homestead without the joinder of the other spouse, such statutes do not take away the other spouse's right to dispute such claim. [16 O.S.§13]

The opinions of the Oklahoma Supreme Court frighten would-be buyers and lenders, and examiners, by declaring such conveyances of the homestead, without the other spouse's signature, to be "void", not just "voidable". However, instead of really being "void", after the questionable document has been recorded for at least 10 years, without being challenged, the conveyance is deemed valid.

In order to avoid the threat of a void conveyance, the practice among the conveyancing and title examining bar is to require the marital status of the grantor be disclosed on the conveyance, and to require the spouse, if any, to join thereon. It should be noted that this marital interest is separate from, and addition to, any actual legal (i.e., record) interest that the other non-joining spouse might own and hold.

This curative statute provides that in the absence of a claim being filed during the 10 years after the deed is recorded with only one spouse's signature on it – where the joining spouse appears in the public record as the sole owner – eliminates any potential claim by the non-joining spouse.

(d) Unenforceable Mortgages and Marketable Title

In 1980, 46 O.S.§301 was adopted in Oklahoma, and it is entitled: *§ 301. Foreclosure--Limitations--Cessation of lien--Extension agreements--Notice--Record marketable title--Application of act.* See TES 24.8 "Unenforceable Mortgages and Marketable Title".

Under the terms of this act, the lien of a recorded but unreleased mortgage is extinguished by the passage of time – in the absence of a recorded Notice of Extension – of either (a) 7 years (formerly 10 years) from the ascertainable date of maturity, or (b) 30 years from the date of recording, if the date of maturity cannot be ascertained from the face of the mortgage. It has often been impossible to locate the mortgagees on old mortgages to secure a release of mortgage, even though the debt was paid off some time ago. This statute provides a vehicle for disposing of such ancient mortgages.

(e) Other Helpful Curative Acts and Standards

There are many other helpful curative acts and title standards available to ease the title examiner's burden. The above discussion was not meant to be exhaustive but only illustrative with an emphasis on the ones that cure the more numerous defects.

VIII. EXAMINATION OF CURATIVE ACTIONS

When potential title problems, which were identified as the result of a title examination, cannot be resolved by seeking to apply the rules found in the Oklahoma Title Examination Standards and the other Title Curative Acts, discussed above, it becomes necessary to undertake curative actions to overcome an outstanding claim of interest that is contrary to the anticipated ownership result.

A. CURATIVE DEEDS

Whenever an outstanding claim of interest is discovered in the course of the examination of a title, the usual requirement is to seek either a quit claim deed from the claimant into the assumed seller/owner or the prospective buyer, or to initiate and complete a quiet title action.

In order to clear the title problem without filing a lawsuit, the assumed owner can first take the step of sending a written demand for a curative instrument, such as a quit claim deed, to the alleged claimant. If the deed is signed and returned, the delay, expense and uncertainty of the litigation outcome are avoided. Also, if the alleged claimant fails to provide the requested deed, the plaintiff has met the statutory conditions to support a request for attorney fees from the court, assuming the plaintiff wins. In the absence of such a written demand, it is less likely there will be any authority to recover attorney fees. [12 O.S.§§1141, & 1141.1-1141.5]

B. QUIET TITLE ACTION (ADVERSE POSSESSION)

Surprisingly, many attorneys think that a quiet title action is a free-standing self-supporting action wherein all the plaintiff has to do is to assert the “right to quiet the

title". In fact, the plaintiff must assert and prove a superior claim to the title based upon some legal or equitable rights. These usually entail establishing title through adverse possession. [12 O.S. §§11141 & 1142]

Plaintiff in a quiet title action need not show a perfect or complete title, but need merely show that his title is superior to that of adversary selected as defendant. Bonner v. Smith, E.D.Okla.1953, 114 F.Supp. 895.

In order to establish a title through adverse possession, also described as a title by prescription, there are several elements to be established, including: 15 years of continuous exclusive actual possession, which was open, notorious, and hostile.

And 60 O.S. §333 provides:

> *"Occupancy for the period prescribed by civil procedure, or any law of this state as sufficient to bar an action for the recovery of the property, confers a title thereto, denominated a title by prescription, which is sufficient against all."*

12 O.S. §93(4) prescribes 15 years as the statute of limitation.

If the land is not being actually possessed by anyone in fact (i.e., it is vacant), it is assumed by law that such possession is in the true record owner, rather than in some interloper. *"The constructive possession, in the absence of actual possession, follows the valid title."* Collins v. Smith, 1962 OK 128, ¶___, 372 P.2d 878

Hence, the adverse possessor will lose, if he cannot affirmatively show continuous actual possession for the required time.

Such continuous possession must be either by one adverse possessor for the full time or by a series of possessors who have occupied the premises without a significant gap between their series of occupations. *"Herein, continuous and uninterrupted possession*

was achieved by tacking possession of predecessors to the succeeding adverse occupants." Cloer Land Co. v. Wright, 1993 OK CIV APP 56, ¶___, 858 P.2d 110

This process of accumulating the minimum number of years needed to reach the required 15 by adding together multiple owners is called "tacking", because they run together (attach together or tack together) the multiple periods of occupancy to achieve the goal of 15 years. The gauge as to whether any gap in occupancy – in one person's occupancy or between two different person's occupancy -- was significant enough to interrupt the adverse possession claim depends upon the facts of the case.

One unanswered question concerns whether simply transferring possession of the disputed tract to the new occupant is sufficient without the delivery of a deed which actually includes the disputed tract in the legal description on the deed. Where the grantor already owns the majority of the tract, but does not have good title to a smaller strip adjacent to the main tract, it will seldom happen that the legal description has been revised and expanded to incorporate the disputed strip.

The element of open or notorious possession refers to the need for the occupancy by the adverse possessor to be visible to the true owner who would be expected to challenge the interloper. In the absence of such challenge for a sufficiently long time, the record owner will lose his title. This is a fact intensive issue, in part because the test allows the type of such actual possession to be based on the normal use of the land in question. Is it cattle land with part of it being alternatively occupied in the appropriate season, low land part in winter and high land part in summer?

For a time, the intent of the adverse possessor to knowingly occupy someone else's land was a necessary element. Such evil intent was replaced by the objective standard based on the parties' actions:

> *The intent with which an adverse possessor occupies the property is immaterial if he meets the criteria set forth above.*

Cloer Land Co. v. Wright, 1993 OK CIV APP ___,¶___, 858 P.2d 110

Hostility is required to prevent a person who has requested and has been granted permission -- verbally or in writing -- to enter onto the premises for a limited time and a limited purpose. For adverse possession to arise, there must be an occupancy which challenges rather than acknowledges the record title holder's rights. For instance, if a person goes into possession under a written or verbal agreement, such as a lease or license, such initially permissive occupancy cannot constitute adverse possession.

> *We are unaware of any Oklahoma case requiring an affirmatively communicated denial or repudiation of the right of the true owner when the possession did not begin as rightful or permissive.*

Krosmico v. Pettit, 1998 OK 90, ¶16, 968 P.2d 345

It is also difficult to establish adverse possession against a co-tenant (i.e., a tenant in common or a joint tenant) for the same reason. Each of the co-tenants has the simultaneous right to occupy the premises, and, consequently, it is difficult to establish that the co-tenant -- who is out of possession – ever realized that his co-tenant's occupancy was adverse.

> *These conclusions were reached in the face of 'emphatic and unqualified propositions' stated by courts of most of the jurisdiction of this country, including this one, to the general effect that in order for one cotenant to render his possession adverse to another, there Must be 'an actual ouster', or some act or acts of disseizin or exclusive ownership making manifest the fact of hostile holding and carrying knowledge or notice thereof to the other cotenants.*

Caywood v. January, 1969 OK 87, 455 P.2d 49; see 12 O.S.§1144

As with any title examination, the title examiner will be looking for certain minimum elements in the quiet title proceedings. As provided by 12 O.S. § 181, the final judgment which expressly establishes who owns the land must be filed of record in the local county land records in the county where the land is located.

A review of a separate abstract including all of the proceedings in the quiet title action will need to be studied, if the final decree has been of record less the 30 years required under the Marketable Record Title Act. The required elements which must be present would include: (1) evidence of initial acquisition of jurisdiction of the person, meaning proof of service of the Petition with Summons on the party whose interest is being attacked, either (a), for an individual, in the form return of service by a private process server, or sheriff's deputy, or my U.S. mail showing Certified, Return Receipt, restricted delivery, showing service on the named party or on a person over 15 years old who resides at the named person's residence [12 O.S. §2004(C)(1) & (C)(2)]; or (b) proof of publication notice containing the needed content (primarily the defendant's name, the legal description, the relief being sought and both the deadline and address for presentation for any objection to the requested relief) in the proper newspaper for the appropriate number of times [12 O.S. 2004(C)(3)], and (2) proper venue, meaning it is filed in the county where the land is located (although venue unlike jurisdiction can be waived, if it is not raised by the time of the answer being filed) [12 O.S. §131], and (3) proof of proper notice of any proceeding leading up to the Judgment, such as a certificate of mailing on the Motion for Summary Judgment, followed by not only the Judgment but by proof on the face of the Judgment, or on a separate free standing Certificate of

Mailing, showing that the Judgment was mailed to the losing party and that 30 days have passed since such Judgment was sent, without an intervening appeal being filed. All of these pleadings must not only be served on the other side but must be filed in the court clerk's records as well. If the Judgment has been of record (in the local county clerks' land records) for at least 30 years, then it can constitute a "Root of Title" under the Marketable Record Title ("MRTA") [16 O.S. §78(e)], and, under the provisions of the MRTA, it is unnecessary to check behind the judgment [16 O.S. §73].

C. PARTITION

On occasion there are multiple parties (i.e., co-tenants) who each own a separate undivided interest in a tract of land. This can arise either by an initial conveyance to multiple parties, or upon a death and the resulting probate whereby a tract of land is distributed to multiple owners as co-tenants.

So long as the co-tenants can peaceably share the benefits and obligations associated with the ownership of such land (such as deciding: who occupies the land, who manages any renters and rent from the land, who pays the taxes and insurance, etc.) there is no problem to solve. However, when for any reason the co-tenants reach a point where they cannot peaceably manage and occupy the premises jointly, they often attempt to "buy out" the other person's interest in he land.

When such a voluntary approach fails to result in the sale of the tract, there is a statutory judicial process that leads to the determination of the fair market value of the land by an objective appraisal process followed by the opportunity for one of the other owners to buy it at the appraised price before a public auction is held. The judicial process is know as a Partition Action (12 O.S. §§1501.1 et seq), and the record which the

examiner must find includes the same general process outlined above for a quiet title suit. In addition, there is a sale process that must be documented including the notice of sale to the parties and to the public, and the notice of the confirmation of sale.

D. MORTGAGE FORECLOSURE

The Sheriff's deed that results from a completed real estate mortgage sale can constitute sufficient evidence of title by itself. This means that the deed can be reviewed for adequacy as to legal descriptions, signatures and acknowledgment, without the need for a review of the underlying proceedings. This situation arises when the sheriff's deed has been in the local county land records for at least 10 years at the time of examination, with no protests (i.e., motions or petitions to vacate) being filed in that interim period. As discussed above, in the section on the Simplification of Land Titles Act ("SLTA"), there is a group of listed conveyances and judicial actions involving conveyances which are above an challenge – even challenges based on jurisdictional grounds -- to its validity. Included in this list is a sheriff's deed. [16 O.S. §§61 et seq]

Where this 10-year period has not yet passed, the examiner must review an abstracter's compilation of the proceedings from the foreclosure to ensure that initial jurisdiction has been established, and that the necessary steps were followed and documented through the confirmation of sale, with enough time having passed (i.e., 30 days) to be beyond any possible appeal.

It has been suggested that title examiners feel comfortable overlooking minor defects when examining title for purposes of rendering an opinion in favor of a lender, where the opinion is not being relied upon by a prospective purchaser. The first concern with such an approach has been discussed above where it appears that law is creating an

expanding penumbra recognizing an attorney's liability to a "class of non-clients" who rely – to their detriment -- on an attorney's opinion directed solely to a lender. [Vanguard Production, Inc. v. Martin, 894 F.2d 375 (10th Cir. 1990)]

The second concern is based upon the examiner's reliance upon a false assumption to justify deciding to overlook some real but "minor" defects, such as omitted heirs, or holders of old but unreleased easements. The examiner deems such outstanding interests in third parties as being no threat to the lender's interest, on a practical level, because the examiner believes that the third party who holds such interest can be quieted out as a defendant in any subsequent foreclosure action, like the owner/borrower and any junior lien holders.

However, a quiet title action must, by statute [12 O.S. §1141], assert and prove that the plaintiff – the lender – is either already in possession of the land or is asking the court to place the plaintiff – again, the lender -- in possession under an existing right to such possession. A lender, based upon the "lien theory" concept of a mortgage in Oklahoma – unlike the "title theory" existent in some other States -- has no right of possession whatsoever to assert during the foreclosure process. [Teachers Ins. and Annuity Ass'n of America v. Oklahoma Tower Associates Ltd. Partnership, 1990 OK 97, 798 P.2d 618]

Therefore, any party – such as the omitted heir -- who faces such a quiet title claim in a foreclosure action can, if they think of it, simply have the action dismissed – probably with prejudice – as to them, because there is no theory by which the lender can assert a right to possession.

Do you want to be the examiner who has to explain to a lender why they will now have to conduct a foreclosure sale on an undivided interest in the collateral of less than 100%, at what will probably be a substantially discounted price?

E. SERVICE ON ARTIFICIAL PERSONS AND VIA PUBLICATION NOTICE

There are instances where the party being served, usually as a defendant in a real estate related proceeding, is not a natural person but is a person created by a legal fiction established by the legislature, such as a corporation or partnership. In such instances, it is impossible to serve a single "person" and, instead, a representative of such an artificial entity must be (a) designated by the legislature as the proper contact person for the entity – by title, such as the president, vice president, chairman or vice chairman, of a corporation, or a general partner of a general or limited partnership – or (b) designated as the official "service agent" for the artificial entity in a form filed with the Oklahoma Secretary of State. ["*Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the petition to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant".* 12 O.S. § 2004]

A signed Return Receipt from a Certified mail summons and petition, or other notice, or a Return of Service from a private process server or sheriff/marshal, must be filed in the court file to demonstrate that the court had jurisdiction throughout the proceedings.

The use of publication notice in lieu of personal (i.e., mailed or direct personal delivery) is appropriate for securing jurisdiction of the parties in a real property lawsuit,

such as a quiet title case, real estate mortgage foreclosure, partition action, etc. In those types of lawsuits that involve requests for relief including both *in personam* (e.g., money damages or injunction) and *in rem* (e.g., quieting title or selling title to property), if the plaintiff, or other party requesting relief, secures personal service on the defendant, then both types of relief can be granted.

In those instances where only publication notice has been achieved, there is a disagreement among various attorneys as to whether only *in rem* relief can be granted or whether both *in rem* and *in personam* relief is available. [Dana P. v. State, 1982 OK ___, 656 P.2d 253]

Where jurisdiction has been achieved by publication notice only, the statutes provide that the case can be reopened within 3 years after the judgment is rendered. [12 O.S. §§2004(C)(3)(f), 1031.1, 1033] However, proper grounds must be asserted to justify such reopening of the case including having a good faith defense to the underlying matter in the case itself. If the real property has been conveyed to a third party who is without actual notice of any defect in the proceedings, the title which is held by such third party is not subject to challenge or recovery even if the party who lost the title due to the lawsuit subsequently reopens and wins the case. [12 O.S. §2004(C)(3)(f) provides in part: *"The title to any property which is the subject of and which passes to a purchaser in good faith by or in consequence of the judgment or order to be opened shall not be affected by any proceedings under this subparagraph. Nor shall proceedings under this subparagraph affect the title of any property sold before judgment under an attachment."*]

IX. ETHICAL ISSUES IN REAL ESTATE

A. LIABILITY IN TITLE EXAMINATIONS

While there is no foolproof way to avoid liability to non-clients (notwithstanding Patton's assertion that*: "But, unless there are circumstances to take the case out of the general rule, his liability, like that of an abstracter, extends only to those by whom he has been employed.")*, it is usually a good practice to have both the inside address of the title opinion (i.e., the addressee) and the limiting language, elsewhere in the opinion, expressly designate the sole person(s) allowed 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).

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> 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 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. (emphasis 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), wherein 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 who 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 it 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 the title search and examination can be held liable for an error in such effort to a third party although the title examiner and title insurer had not expressly entered into any contractual relationship with such third party. 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.

B. CONFLICTS OF INTEREST

The duty of loyalty is inherent in the attorney-client relationship. [Ok. Rules of Professional Conduct: Rule 1.7] When an examining attorney undertakes to represent more than one party, he can do so only so long as such dual representation does not give rise to a conflict of interest whereby the attorney is unable to give totally unbiased advice to either party.

1. TITLE INSURANCE AGENT

Can an attorney who is representing a prospective purchaser of a tract of land also simultaneously represent the title insurance company that is issuing the owner's title insurance policy?

The initial position of the ethics committee of the Oklahoma Bar Association was that such multiple representation was inappropriate [Opinion No. 281(1974)]. The

reasons were clear: "*An attorney may not act as an agent for a title insurance company in the placement of title insurance covering the title to property purchased by the attorney's client. Such an intertwined transaction presents serious questions of a conflict of interest between the various interests being represented by the attorney.*"

Then the American Bar Association issued a ruling allowing such dual representation, and Oklahoma fell in line, in 1976, reversing itself, for reasons which were supposedly equally "clear": "*An attorney may recommend to his client the purchase of title insurance, and thereafter act as both title examiner and agent for the title insurance company in a real estate transaction or a loan transaction, so long as the attorney makes full disclosure to this client of the details of the transaction, including the financial remuneration to be received by the attorney from the title insurance company and the restrictions on his ability to represent either of the parties should a claim arise, and does not violate any of the disciplinary rules of the Canons of Professional Responsibility.*". What would you do? What would you advise other attorneys to do?

2. INSIDE-OUTSIDE COUNSEL

In what circumstances could an in-house counsel provide direct legal representation to a customer of a non-law firm entity?

As first blush, such provision of legal services by a non-law firm would appear to be the unauthorized practice of law by a non–law firm entity – an open and shut case right? In 1931 the OBA ethics committee issued its first opinion and prohibited a (non-law firm) real estate company from providing legal services to its patrons, because: "*If a lay agency is not entitled to practice law directly, it is not entitled to do so indirectly by*

employing licensed attorneys to carry out that portion of its activities for it." [Advisory Opinion No. 1]

Is that still the law? Not so, according to our own current OBA ethics committee. They issued an opinion [Legal Ethics Advisory Opinion No. 1997-1] saying that outside captive law firms were extremely loyal to the insurance or other company that hires their law firm to provide representation to third parties on a regular basis. Consequently, such outside law firms were no longer expected to be loyal to their individual client. And, therefore, by some unfathomable leap of logic, it was consequently acceptable for the insurance or other non-law firm company to provide the legal representation to the company's customer directly – using in-house counsel, thereby cutting out the unnecessary "middle man" – the independent law firm which would normally have been used due to its unquestioned loyalty to the client/customer.

What do you think?

3. DUAL EXAMINATION

Can an examiner prepare a title opinion that is directed to both a lender and a buyer/borrower? A title with a minor title defect, for instance a omitted heir who might hold a very small portion of the title (e.g., 1/50) that will be cured by the Simplification of Land Titles Act after 10 years where it is already over 9 years old, is of little concern to a lender because the defect is almost time-barred. [16 O.S. §4] However, if the prospective owner was advised of this defect before completing the transaction, what would happen to the deal if he balked at completing the closing? Could an attorney advise the buyer to refuse to close while telling the lender to move forward? I do not have the answer to this question.