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TITLE EXAMINATION STANDARDS

RELEVANT TO OIL AND GAS LEASES

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I. INTRODUCTION

If a title examiner was seeking to establish the highest possible quality of title, he would be seeking for the benefit of his client what we might call "perfect title". However, such perfect title is an impossibility to establish because there will always be questions that cannot be fully answered, no matter how much time or effort one expends in reviewing documents and interviewing knowledgeable parties. Therefore, the best the title examiner can offer to his client is a quality of title that is something less than certain, even though the degree of certainty might be improved by the undertaking of additional efforts.

It is also true that with the seeking of a greater degree of certainty in a title, as with any other endeavor, each incremental increase in improvement in quality, requires a substantial and ultimately unreasonable or disproportionate increase in time and effort. In an effort to establish a reasonable level of effort expected throughout the state's title industry, it might be appropriate to say that the industry, through such means as the Title Examination Standards, establishes a reasonably high level of requirements in order to satisfy various title questions. However, it is also true that in certain circumstances, depending upon whether you are dealing with a single-family residence, a commercial transaction, or an oil and gas transaction, the particular facts and the needs of

your client may indicate that it is reasonable, through an interaction between the attorney and the client, to decide to accept some standard of title less than the industry-wide standard (e.g., "defensible title"). This situation arises because it is impossible to come up with an industry-wide standard which will anticipate all possible circumstances, both as to facts as well the amount of money at risk.

The purpose of the Title Examination Standards is not, therefore, to establish steps to take in order to achieve perfect title, because that is a impossibility, but, instead, it is to establish a reasonably high level of certainty in the quality of title being dealt with by the professionals in this field. This degree of quality of title is often referred to as "marketable title."

In another context marketable title has been defined as title which a buyer could be forced by the courts to accept. This concept is used to define "marketable title" in the 1987 American Land Title Association title insurance policy for owners and lenders.[1] Even though it is obviously circular, this 1987 policy is the first time the ALTA has tried to expressly define "marketable title" in its policy. This policy is the standard form used in the nation's title insurance industry.

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[1] The new 1987 ATLA Owners Title Insurance Policy provides under paragraph 1. DEFINITION OF TERMS:

(g) "unmarketability of the title": an

The Title Examination Standards[2] provide the following directive and definition concerning "marketable title:"

> 4.1 MARKETABLE TITLE DEFINED.
>
> All title examinations should be made on the basis of marketability as defined by the Supreme Court, to wit:
>
> "A marketable or merchantable title is synonymous with a perfect title or clear title of record; and is one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title fairly deducible of record."
>
> (Note: This language has remained the same since this Standard was adopted in 1946.)

While the above noted language of Standard 4.1 might at first glance appear to state a rigid definition of marketable title as being "perfect title," the very sentence goes on to equivocate, i.e., "grave" doubts and "litigious" uncertainty. One wonders how to deal with "ordinary" doubts and how to decide which uncertainties are which not "litigious."

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> alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

[2] Hereinafter the "Title Examination Standards" are referred to as the "Standards," as "Standard," or as "TES."

Marketable title as actually encompassed by the Standards might most accurately be defined as record title that is generally agreed to be "good enough". Adherence to the Standards does not assure unassailable title but they do offer guidance and reasonable benchmarks for the title examiner.

If the Standards are approached from the perspective of being an attempt to state the standards in the title examination community rather than pronouncements of absolute certainty, they present a valuable tool for the examiner. To the extent that the Standards present concepts or conclusions as being those generally accepted as reliable, they serve an important purpose, but that is not to say that they leave no room for spirited disagreement as to what a standard should be under the circumstances. Such disagreement may also arise because a client may agree to accept a more cost effective alternative to curing title, or because it can be reasonably anticipated that a court may force a buyer to accept title with minor "apparent defects,"[3] or because the fact situation was unanticipated by the drafters of the Standard (e.g., how many counties do you search under Standard 10.2 to find a certificate of fictitious name partnership, if there is no certificate filed locally and the partnership's principal place of business in unknown).

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[3] See Belrose v. Baker, 426 A.2d 454 (N.H. 1981).

While it is true that title examiners tend to be an altogether more reasonable and agreeable lot than the general bar, even such examiners would not agree to completely forego disagreement. (Note: However, such disagreement may be curtailed by the parties agreeing to use the Standards[4] or by the facts making such Standards applicable by statute; these instances are discussed further below).

Perhaps in recognition of the fact that examinations of title are made for differing purposes; under varying instructions and knowledge of facts and admitting the possibility of reasonable disagreement, together with perhaps some measure of communal self-preservation, the Standards have since their inception included the following provision:

> When an examiner finds a situation which he believes creates a question as to marketable title and has knowledge that another attorney handled the questionable proceeding or has passed the title as marketable, the examiner, before writing an opinion, should communicate, if feasible, with the other attorney and afford an opportunity for discussion. (emphasis added) Standard 2.1.

Recognizing, then, the value and inherent limitation provided by an objective set of Standards, a number of efforts have been made to establish such Standards. In an effort to

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[4] But see JRC Drilling Program 77-1 v. Petro-Lewis Corp., No. 84-1567 (10th Cir. June 16, 1987).

establish such standards within the bar of a state for the examination of titles, Connecticut in 1938 and Nebraska in 1939 became the first States to adopt statewide title examination standards. Paul E. Bayse, Clearing Land Titles, §7 (2d ed. 1970). Even before these statewide efforts were undertaken, county bar associations were adopting such standards. Id. Twenty-six of the 50 states currently have such statewide standards, although several of these sets of standards have not been updated for many years. Id. Unpublished article entitled: Joint ABA/OBA/OCU TES Resource Center Project (Interim Survey Results: September 8, 1989) by Kraettli Q. Epperson.

When such standards are developed they will usually arise in one of two situations:

1. There is some law available on the issue--either legislative or court-made--but it needs to be expressed from the title examiner's viewpoint to avoid differences of interpretation; or

2. There is not any law on the subject, but a thorough consideration of common sense, the law of other jurisdictions and treatises on the subject, strongly suggest that a "short cut" or "abbreviated procedure" should be taken to expeditiously resolve or even ignore the potential problem.

It is often suggested by practicing attorneys in Oklahoma that the only reason to ever adopt a Standard is to eliminate the need for a requirement in a particular fact

situation or at least to reduce the degree of the burden created by the resulting title requirement. However, the impetus to adopt standards in an industry involving a commercial transaction is to allow the flow of commerce to move more smoothly and efficiently without serious delays arising from disputes between the parties. Therefore, it can also be argued that the flow of commerce is also improved by any standard since the adoption of even a reasonably conservative standard that is likely to be accepted by most parties in the industry. Parties can then choose to affirmatively agree as to a lesser standard to be used.

On November 16, 1946 the General Assembly and House of Delegates of the Oklahoma Bar Association approved 21 Standards for the first time in state history. 17 O.B.J. 1751. Of these 21, there were 10 without specific citations of authority expressly included with each particular Standard. There are currently 94 Standards in Oklahoma, and only 13 of these have no specific citation of authority (i.e., Oklahoma statutory or case-law) at all.

In Oklahoma, new and revised Standards are proposed yearly by the Title Examination Standards Committee to its parent organization--the OBA Real Property Section--at the Section's annual meeting, usually held in November or December of each year. Immediately thereafter, the Section forwards to the OBA House of Delegates--meeting at the same time as the Section--

for the House's consideration and approval, any new or revised Standards which were approved at the Section's meeting.

These Standards in Oklahoma have received support from the Oklahoma Supreme Court which recently 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. (emphasis added)

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

The Standards become binding between the parties (1) if the contract incorporates the Standards as the measure of the quality of title;[5] or, (2) if proceeds from the sale of oil or

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[5] STANDARD 2.2 REFERENCE TO STANDARDS provides:

> It is often practicable and highly desirable that, in substance, the following language be included in contracts for 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."

(Note: This language has remained the same since this Standard was adopted in 1946.)

The 1987 Oklahoma City Metropolitan Board of Realtors standard form Real Estate Purchase Contract has the following provision: "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."

gas production are being held up due to an allegedly unmarketable title.[6] In these instances, the parties can be subject to suits to specifically enforce or defeat their contracts, or to seek damages, as appropriate, with the Court's decision being based on the "marketability" of title as measured, in part, by the Standards.

As noted above, there are 94 separate Standards in Oklahoma. On the following pages, we will try to discuss with you 42 of these 94 Standards. The Standards we have chosen to cover include (1) those on express private trusts and partnerships, which appear to be currently of interest to a good many examiners, (2) several which exclusively deal with oil and gas issues (e.g., Standard 4.2 OIL AND GAS LEASES AND MINERAL AND

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[6] 52 O.S. 1985 Supp. §540 A. provides, in pertinent part:

> The proceeds derived from the sale of oil or gas production from any oil or gas well shall be paid to persons legally entitled thereto, commencing no later than six (6) months after the date of first sale, and thereafter no later than sixty (60) days after the end of the calendar month within which subsequent production is sold ... . Provided, however, that in those instances where such proceeds cannot be paid because the title thereto is not marketable, the purchasers of such production shall cause all proceeds due such interest to earn interest at the rate of six percent (6%) per annum, until such time as the title to such interest has been perfected. Marketability of title shall be determined in accordance with the then current title examination standards of the Oklahoma Bar Association. (emphasis added)

ROYALTY INTERESTS), and (3) others which are among the most used (e.g., Standard 9.4 RECITAL OF IDENTITY OR SUCCESSORSHIP).

The format used herein to present 11 of these Standards in Chapter II includes the following three parts: (1) the exact language of the Standard, (2) some background on the origin and purpose of the Standard, and (3) the risks and inappropriateness of applying the Standards in certain fact situations.

Chapter III contains a detailed discussion of 33 Standards (31 not otherwise discussed herein and 2 discussed herein), by the authors herein in an article appearing in the summer 1989 issue of the Tulsa Law Journal.

Chapter IV is a list showing the status of numerous new and revised standards under consideration by the Oklahoma Title Examination Standards Committee ("Committee") in calendar year 1989. Prompt and constructive comments on these topics are hereby vigorously solicited. To aid you in forwarding your comments, Chapter V contains the names and phone numbers of the current Committee members.

II. DISCUSSION OF SELECTED STANDARDS:

A. TES 10.1 CONVEYANCES TO AND BY PARTNERSHIPS (Adopted 1946; last amended 1965.)

1. Standard:

10.1 CONVEYANCES TO AND BY PARTNERSHIPS

Under the Uniform Partnership Act, enacted by the 1955 Legislature, which became effective on June 3, 1955, a partnership constitutes a separate entity authorized to take, hold and convey real estate, 54 O.S.A. §§208-210. H.B. 698, enacted by the 1965 Legislature, amending Sections 208 (3) and 210 (1), validates conveyances to and from partnerships executed prior to June 3, 1955, unless such conveyances are invalid for reasons other than lack of legal capacity or because the partnership was not at the time a legal entity.

Such conveyances to a partnership using the partnership firm or trade name as grantee of real property or any interest therein, and conveyances by a partnership in the partnership firm or trade name as grantor of real property or any interest therein held in the partnership firm or trade name, should not be rejected or questioned on the basis that a partnership was not a legal entity having capacity to take or convey title to real property or an interest therein.

Authority: 54 O.S.A. §§208-210.

History: Adopted as 17, November 16, 1946, 17 O.B.A.J. 1729 (1946), printed, *id.* at 1753; became 19 on renumbering in 1948, 19 O.B.A.J. 223, 226 (1948); amended December 8, 1955, 27 O.B.A.J. 176 (1956). Substantially amended December 2, 1965. Resolution No. 8, 1965 Real Property Committee, 36 O.B.A.J. 2094 & 2182 (1965), and Exhibit E, *id.* at 2098 & 2186. Approved by Real Property Section and adopted by House of Delegates, 37 O.B.A.J. 437, 438 (1966).

2. Background:

This Standard recognizes that by the enactment of the Uniform Partnership Act, the Oklahoma Legislature exercised its legislative authority to cause this fictitious person (i.e., a partnership) to be defined as a separate legal entity entitled to the same rights as a natural person in dealing with real property, and interests therein, in the partnership name (i.e., to take, hold and covey such property interests).

3. Practicalities:

This Standard is useful to the examiner in that it validates any conveyance to and from a partnership both before and after the effective date of the statute.

B. TES 10.2 IDENTITY OF PARTNERS OF FICTITIOUS NAME PARTNERSHIPS (Adopted 1946; last amended 1985.)

1. Standard:

10.2 IDENTITY OF PARTNERS OF FICTITIOUS NAME PARTNERSHIP

Identity of partners of a fictitious name partnership may be established by reference to the latest certificate of fictitious name partnership filed in the office of the county clerk in the county in which the land is located as of the date of conveyance in the partnership name. If the certificate of fictitious name has not been filed in the county where the land is located, a certified copy of the certificate of fictitious name partnership filed in the office of the county clerk of the county of the principal place of business of the partnership, or a copy of the current articles of partnership, should be examined.

Authority: 54 O.S.A. §§81-86.

History: Adopted as 17, November 16, 1946, 17 O.B.A.J. 1729 (1946), printed, *id.* at 1753; became 19 on renumbering in 1948, 19 O.B.A.J. 223, 226 (1948); amended December 8, 1955, 27 O.B.A.J. 176 (1956). Substantially amended December 2, 1965. Resolution No. 8, 1965 Real Property Committee, 36 O.B.A.J. 2094 & 2182 (1965), and Exhibit E, *id*, at 2098 & 2186. Approved by Real Property Section and adopted by House of Delegates, 37 O.B.A.J. 437, 438 (1966). Further amendments proposed by the 1985 Report of the Title Examination Standards Committee, 56 O.B.J. 2537 (1985), proposal amended by Real Property Section, November 14, 1985, and adopted by House of Delegates, as amended by the Section, November 15, 1985, 57 O.B.J. 5 (1986).

2. Background:

Under 54 O.S. 1982 Supp. §81 a "fictitious name" partnership is "a designation not showing the names of the persons interested as partners in such business." A partnership name or title containing surnames (i.e., last or family names) of all general partners is not fictitious. Thomas v. Blaylock, 187 Okl. 258, 102 P.2d 585 (1940); Thomas v. Belcher, 184 Okl. 410, 87 P.2d 1084 (1939); Asplund v. Pearce, Porter & Martin, 181 Okl. 320, 73 P.2d 866 (1937); Bolen v. Ligett, 49 Okl. 788, 154 P. 547 (1916); Patterson v. Byers, 17 Okl. 633, 89 P. 1114 (1907).

Title 54 O.S. (Supp. 1982) §81 states that a "fictitious name" partnership must file a certificate ("Fictitious Certificate") with the county clerk of the county in which its

principal place of business is situated which indicates the full names and place of residence of each partnership member. This mandatory statutory language carries with it the significant consequence of prohibiting the partnership from being able to sue or defend in court unless and until such a Fictitious Certificate is filed.

An organization such as a corporation or a partnership, must operate through a natural person, and the examiner must have an objective means to confirm the position of the person executing the documents in a real estate transaction on behalf of the organization. When a corporate president or vice president signs a document, the corporate secretary "attests" (i.e., witnesses) that the person signing holds the designated office and also affixes the corporate seal in evidence of that fact. (See: Standard 9.2).

However, there is not a "corporate-secretary" type person in a partnership situation available to authenticate the current position of a partner. An acknowledgment does <u>not</u> authenticate a person's position but only their identity as the named person. Therefore, the title examiner must look to some outside source to verify that the individual is a partner. To avoid the inconvenience of locating and reviewing the partnership agreement each and every time a parcel changes hands--even long after the partnership is out of title--and to avoid the invasion of the partners' privacy by requiring the partnership agreement

be filed of record, the examiner can look at the mandatory Fictitious Certificate.

The law only requires that the Fictitious Certificate be filed in the county where the partnership has its principal place of business. However, an examiner will typically only initially ask for an abstract covering the records of the county where the land is located. Therefore, if the Fictitious Certificate is only filed in the county of the partnership's principal place of business, and the land is in a different county, the examiner will not receive and examine such a Fictitious Certificate in his intitial abstract. Additional delay and expense will arise while the parties (1) determine, if possible, which county is the partnership's principal place of business, and (2) obtain a certified copy of the Fictitious Certificate, if it was ever filed. Upon failure in finding such a Fictitious Certificate, a request will be made to examine the then-current partnership agreement. If all else fails, a quiet title suit may be the final alternative.

Therefore, if a fictitious name partnership holds land outside the county of its principal place of business, prudence dictates that a Fictitious Certificate should be filed and updated periodically in every county where the partnership holds real estate. While this additional filing is not mandated by law, it is helpful to future title examiners and saves the partnership from subsequent multiple requests for a certified copy of the Fictitious Certificate or the partnership agreement.

3. Practicalities:

This Standard identifies methods by which the identity of partners of a fictitious name partnership may be established and to that extent the Standard may prove useful in suggesting a starting point for identifying such partners. That part of the Standard which states that the Fictitious Certificate may be reviewed in the office of the County Clerk where the land is located should be easy enough to follow presuming that the Ficitious Certificate is in fact filed in that county. A more difficult circumstance may present itself, however, when the Fictitious Certificate is filed in the county which is the principal place of business of the partnership. The initial problem in this situation is, of course, determining where the principal place of business might be. Nevertheless, in some instances recitals in the conveyance or perhaps return addresses on the face of the conveyance might offer the best beginning point for such a search. The Standard seems to offer no guidance or limitation as to how far such a search should be carried, but practicality would seem to dictate that a search of all County Clerks within the state not be conducted. The question of partnerships whose principal place of business might be located outside of the state seems to be completely open.

The Standard provides that an alternative means of identifying the partners would entail obtaining a copy of the current articles of partnership. This course of action would normally

involve contacting one or more of the partners in order to obtain the partnership agreement. Presuming that an Agreement can be obtained, a question might remain as to whether such Agreement was in fact the "current" partnership agreement in effect at the time the transaction was made. A verification of identity by this means would seem to offer little alternative but to obtain statements from a partner or perhaps even all the partners to the Agreement stating that the particular instrument was the Agreement in effect at the time of the subject transaction.

Unless Standard 10.4 is read to provide some relief in regard to presumptions of identity of partners, there seem to be no further alternatives offered by the present Standard regarding verification of identity.

C. TES 10.3 IDENTITY OF GENERAL PARTNERS OF LIMITED PARTNERSHIPS (Adopted 1971; not yet amended.)

1. Standard:

10.3 IDENTITY OF GENERAL PARTNERS OF LIMITED PARTNERSHIP

The identity of the general partners of a limited partnership may be established by the certificate of limited partnership on file in the office of the Secretary of State. A certified copy of such certificate may be filed in the office of the county clerk of the county in which land described in partnership conveyance is located.

Authority: 54 O.S.A. §§81-85.

History: Proposed by report of 1971 Real Property Committee as part of Resolution (3) published, 42 O.B.A.J. 2899, 3017, 3081, & 3165 (1971) and Exhibit C, *id.* at 2902, 3020, 3084 & 3168 where the text of this standard is published as proposed standard 10.4. Approved as 10.3 by the Real Property Section on December 2, 1971, and adopted as such by the House of Delegates on December 3, 1971, 43 O.B.A.J. 642 (1972).

2. Background:

54 O.S. 1984 Supp. §143 provides that a limited partnership must file for record in the Office of the Secretary of State a signed and sworn certificate ("Limited Certificate") listing, among other things, "The name and place of residence of each member; general and limited partners being respectively designated." [§143(a)(1)(D)]

54 O.S. 1981 §147 specifies that any party to such a Limited Certificate who knows that some part of it is false is liable to third parties relying to their detriment on the false certificate.

54 O.S. 1981 §165 establishes the circumstances wherein this Limited Certificate must be cancelled or amended. An amendment is mandatory when a general partner is added or dropped [§165(b)(4) and (5)]. And 54 O.S. 1981 §166 lists the steps to

follow to cancel or amend such Limited Certificate. 54 O.S. 1982 Supp. §81 states:

> The publication provisions of this section [requiring publication of notice of a partnership acting under a fictitious name] shall not apply to limited partnerships which are transacting business under a name filed with the Secretary of State in compliance with the Oklahoma Uniform Limited Partnership Act.

3. Practicalities:

This Standard recognizes that the Limited Certificate provides objective information available for review on an on-going basis in the offices of a public official. However, as noted in the above discussion on TES 10.2, it will speed up the examination process if a certified copy of such Limited Certificate is also filed in the county records in any county where the limited partnership owns land or an interest therein.

As with TES 10.2 this Standard makes reference to the identification of a partner, in this case in a limited partnership, and provides only that the Limited Certificate on file with the office of the Secretary of State be examined or that the Limited Certificate may be filed of record with the office of the County Clerk where the land is located. While no other methods of identification of a general partner in a limited partnership is offered by the Standard, there would seem to be no reason that examination of the relevant Articles of Partnership would not also suffice to identify a general partner (as noted in TES 10.2).

D. TES 10.4 CONVEYANCE OF REAL PROPERTY HELD IN PARTNERSHIP NAME (Adopted 1973; not yet amended.)

1. Standard:

10.4 CONVEYANCE OF REAL PROPERTY HELD IN PARTNERSHIP NAME

Real property acquired by a partnership and held in the partnership name may be conveyed only in the partnership name. Any conveyance from the partnership so made, and signed by one or more members of the partnership, which conveyance appears to be executed in the usual course of partnership business, shall be presumed to be authorized by the partnership, in the absence of knowledge of facts indicating a lack of authority, and the recitals in the instrument of conveyance shall be accepted as sufficient evidence of such authority.

Authority: 54 O.S.A. §§209-10.

Comment: Elmer Jones and Robert Smith are partners, doing a real estate business in the name of Enterprise Associates. Real estate is purchased for the partnership and title is taken in the name of Enterprise Associates, a partnership. The partnership wishes to sell the land to Henry Green. The deed should be executed in the name of Enterprise Associates, a partnership. It may be signed by one or both of the partners. Thus, the signature can read: "Enterprise Associates, a partnership, consisting of Elmer Jones and Robert Smith, by Elmer Jones and Robert Smith", or "Enterprise Associates, a partnership, by Elmer Jones." If the latter form of execution is used, the deed should show, by its recitals, or evidence should be secured to show, that Elmer Jones is one of the partners. The purchaser should have no knowledge negating the presumption that Elmer Jones was acting with authority of the partnership. If the deed should read "Enterprise Associates, a partnership, by Elmer Jones, one of the partners", it should be passed by the title examiner in the absence of any knowledge of lack of authority on the part of Jones.

Suppose title to partnership real estate has been taken in the name of Enterprise Associates, a partnership, and the partnership consists of Elmer Jones and Robert Smith. Suppose Elmer Jones and Robert Smith and their wives execute a conveyance of the property to Henry Green, the deed making no reference to a partnership. Green would have only an equitable title to the land. See Uniform Partnership Act, §10(2).

History: Standard was proposed in the 1973 Report of the Real Property Committee, 44 O.B.A.J. 3319, 3320, 3432, 3536 & 3614 (1973). The proposal was adopted by the House of Delegates on November 30, 1973, 45 O.B.A.J. 652 (1974).

2. Background:

54 O.S. 1981 §§209 and 210 set out the limits on who can convey partnership property. A partner's act, such as the conveyancing of partnership real property, will bind the partnership, on an agency theory, so long as the partner's act conforms with the partnership's usual business. However, the partnership is not bound by such conveyance, if the following two facts exist (a) the partner had no authority to act for the partnership and (b) the person dealing with the partner had knowledge

of this lack of authority. Therefore, if a grantee does not know of limitations on the partner's authority or, if the grantee -- who knew of such limitation -- re-conveys the real property to a third person who is without knowledge of such limitation, the real property cannot be recovered by the partnership from such innocent grantee.

TES 10.4 attempts to state the principles found in 54 O.S. 1981 §§209 and 210 in the form of a Standard which will eliminate the need for title requirements requiring proof of the extent of the powers of a particular partner to act for the partnership. (See discussion below of TES 10.5.)

3. Practicalities:

Whereas TES 10.2 and 10.3 addressed the methods of verifying the identify of a party executing an instrument as a partner, TES 10.4 can be viewed in a narrow sense to address only the authority of such a partner to convey partnership property. This Standard recognizes the statutory provision (i.e., 54 O.S. 1981 §209) which provides that every partner is an agent for the partnership for the purpose of conducting business; that the partners' acts bind the partnership, if (a) such acts appear to be for the purpose of conducting partnership business in the usual way and (b) the person with whom the partner is dealing has no knowledge of the fact that the partner did not have the authority to so act.

That part of the Standard, which states that if a conveyance "... appears to be executed in the usual course of partnership business, ..." it is presumed to actually be authorized by the partnership, could cause the examiner serious concern because of the requisite determination that the conveyance was in the usual course of the partnership business. However, TES 10.5 seems to avoid requiring the examiner to make an affirmative conclusion that a transaction was partnership business and instead creates a presumption that every transaction is partnership business in the absence of evidence to the contrary.

If conveyances involving partnerships are approached from the standpoint of meeting dual criteria of establishing first the identity of the party executing the instrument as a partner and then the authority of such a partner to act on behalf of the partnership, then TES 10.2 and 10.3 address the former and 10.4 and 10.5 address the latter. That is, 10.2 and 10.3 provide guidance as to the manner by which the identity of a partner may be established, and 10.4 and 10.5 cover the next level of concern as to whether that partner could in fact convey property of the partnership.

TES 10.4 and 10.5 then offer relief to the third party purchaser who is without knowledge that the transaction was not made in the usual course of the partnership business.

The Comment to TES 10.4, however, has caused some confusion because of its apparent simultaneous approach to the

questions of identity and authority, and the directive that the examiner should, in fact, pass title if the conveyance matches any of the examples given. This Comment reads as follows:

> Comment: Elmer Jones and Robert Smith are partners, doing a real estate business in the name of Enterprise Associates. Real estate is purchased for the partnership and title is taken in the name of Enterprise Associates, a partnership. The partnership wishes to sell the land to Henry Green. The deed should be executed in the name of Enterprise Associates, a partnership. It may be signed by one or both of the partners. Thus, the signature can read: 'Enterprise Associates, a partnership consisting of Elmer Jones and Robert Smith, by Elmer Jones and Robert Smith', or 'Enterprise Associates, a partnership, by Elmer Jones.' If the latter form of execution is used, the deed should show, by its recitals, or evidence should be secured to show, that Elmer Jones is one of the partners. The purchaser should have no knowledge negating the presumption that Elmer Jones was acting with authority of the partnership. If the deed should read 'Enterprise Associates, a partnership, by Elmer Jones, one of the partners', it should be passed by the title examiner in the absence of any knowledge of lack of authority on the part of Jones.
>
> Suppose title to partnership real estate has been taken in the name of Enterprise Associates, a partnership, and the partnership consists of Elmer Jones and Robert Smith. Suppose Elmer Jones and Robert Smith and their wives execute a conveyance of the property to Henry Green, the deed making no reference to a partnership. Green would have only an equitable title to the land. See Uniform Partnership Act, §10(2). (emphasis added)

While TES 10.2, 10.3 and 10.4 seem to address identification and authority as two separate issues which must be verified, the above noted Comment to TES 10.4 appears to approach the question from the standpoint of combining the issues of identity and authority. The Comment, in effect, states that (a) if an instrument properly makes the self-serving recital that a party is a partner and (b) if the grantee is without knowledge negating the presumption of full authority, then the instrument should be passed by the title examiner.

In other words, the identity of a partner, according to the Comment, can be shown by recitals in the instrument and only in the absence of such recital should evidence be secured to show that the party doing the execution was a partner (presumably by reference to TES 10.2 and 10.3). The Comment specifically states that a deed should show by its recitals "or" evidence should be secured to show that a party is a partner. The choice of the word "or" rather than "and" would seem to negate the necessity of otherwise identifying a partner through the means noted in TES 10.2 and 10.3, if the instrument makes the proper recitation of identity. If this conclusion was intended by the Standards, it is suggested that TES 10.2 and 10.3 should be prefaced with a phrase such as, "In the absence of recitals of identity of a partner ... ." In other words, this particular interpretation would dictate that TES 10.2 and 10.3 would only be applicable if

an instrument failed to properly recite that the party executing the instrument was a partner.

We understand that some title examiners may approach the partnership identification and authority question as being completely covered by TES 10.4 and, therefore, they will be relying solely upon recitations in the instrument. While this approach would be one possible interpretation of these particular Standards, until the Standards are clarified we suggest that a conservative approach be followed whereby the identity of a partner be established by reference to TES 10.2 or 10.3 and that TES 10.4 only be relied upon with regard to the authority of a partner to so act once that partner has been identified.

E. TES 10.5 AUTHORITY OF ONE PARTNER TO ACT FOR ALL (Adopted 1973; last amended 1974.)

1. Standard:

10.5 AUTHORITY OF ONE PARTNER TO ACT FOR ALL

When real property is held by a partnership, and a conveyance is made on behalf of the partnership by one or more, but less than all, of the partners, and the conveyance appears to be executed in the usual course of partnership business, it is presumed, in the absence of evidence to the contrary, that the conveyance was made by the partner or partners executing it for the purpose of carrying on in the usual way the business of the partnership; and no further evidence of authority of such partner or partners to execute the instrument should be required by the title examiner.

Authority: Crane, Handbook on the Law of Partnership §49 (2d ed. 1952); 54 O.S.A. §209.

History: Standard was proposed in the 1973 Report of the Real Property Committee, 44 O.B.A.J. 3319, 3321, 3433, 3537, & 3615 (1973). The proposal was adopted by the House of Delegates on November 30, 1973, 45 O.B.A.J. 652 (1974). It should be noted that, as published, the text of the standard contained a second paragraph. This paragraph was included in the Report of the Committee by error. The minutes of the House of Delegates show that this paragraph was not intended by the Real Property Committee to be a part of the proposed standard and the paragraph was not submitted to the House of Delegates for adoption, 45 O.B.A.J. 652 (1974).

2. Background:

Section 49 of Crane, Handbook on the Law of Partnership, (2d ed. 1952), and 54 O.S. 1981 §209 (both cited in the "Authority" for TES 10.5) clearly confirm the basic premise contained in TES 10.5, as well as TES 10.4, that one partner can bind the partnership. However, Crane also points out that the language "'for apparently carrying on in the usual way of business of the partnership of which he is a member' [of The Uniform Partnership Act (§209)] is ambiguous" because it may be interpreted two ways: (1) usual for the particular partnership; and (2) usual for similar types of partnerships. Crane does go on to note that: "The draftsman of the Act, Dean Lewis, has correctly maintained that the former [i.e., "particular partnership"] should be included." And, Crane states further

that: "The latter [i.e., "similar types of partnerships"] may also be included under the usual rule of construction in accordance with the common law." (Crane, §49 at 242-43) However, this question remains: How does an examiner determine what is "the usual way of business of the partnership"?

3. Practicalities:

While TES 10.4, as noted above, addresses the conveyance which, "appears to be executed in the usual course of partnership business ...," TES 10.5 offers some relief in that it allows the presumption, in the absence of evidence to the contrary, that the conveyance was in fact made for the purpose of carrying on in the usual way of the business.

This presumption as stated in the Standard seems to be critical in that it removes the burden from the examiner of making a positive determination that the transaction "appears" to be made in the usual course of business to a situation where "absent evidence to the contrary" the conveyance will be presumed to have been made in the usual course of business.

F. TES 10.6 NO MARITAL RIGHTS IN PARTNERSHIP REAL PROPERTY (Adopted 1973; last amended 1983.)

1. Standard:

10.6 NO MARITAL RIGHTS IN PARTNERSHIP REAL PROPERTY

No homestead or other marital rights attach to the interest of a married partner in specific partnership real property. If, by recitals in instruments in the chain of title or otherwise, it appears that partnership real property was conveyed, the title examiner should not require any evidence of release or non-existence of such marital rights.

Authority: 54 O.S.A. §225(e).

Comment: Suppose real property has been conveyed to "Enterprise Associates, a partnership, consisting of Elmer Jones and Robert Smith," and a conveyance of the same property is then made to Henry Green, signed in the name of "Enterprise Associates, a partnership, by Elmer Jones and Robert Smith, co-partners." Both Jones and Smith are married,but their wives do not join in the conveyance. Green gets a marketable title, and nothing further is required to explain why the wives did not join.

Suppose real property has been conveyed to Elmer Jones and Robert Smith, a co-partnership. A conveyance is then made of the same property to Henry Green, executed by "Elmer Jones and Robert Smith, a co-partnership". The wives of Jones and Smith do not join in the conveyance. Green gets a marketable title, and nothing further is required.

Suppose a conveyance to the co-partnership, as in the preceding hypothetical case. In this case, the partnership does not sell the real property, and Elmer Jones dies leaving a widow. The widow cannot claim homestead rights in the land.

History: Standard was proposed in the 1973 Report of the Real Property Committee, 44 O.B.A.J. 3319, 3321, 3433, 3537 & 3615 (1973). The proposal was adopted by the House of Delegates on November 30, 1973, 45 O.B.A.J. 652 (1974). The Report of the 1983 Title Examination Standards Committee. 54 O.B.J. 2379, 2382 (1983), recommended correction of typographical and punctuation errors. These changes were approved by the Real Property Section on November 3, 1983, and adopted by the House of Delegates on November 4, 1983.

2. Background:

54 O.S. 1981 §225 states in pertinent part:

(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

> (a) A partner, subject to the provisions of this Act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

> (b) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.
>
> (c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim agains the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.
>
> (d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal reprentative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.
>
> (e) A partner's right in specific partnership property is not subject to dower, courtesy, or allowances to widows, heirs, or next of kin. (emphasis added)

Thus, it is clear that only partners, as partners, have any interest in partnership property, and no rights of homestead, of exemption, or of dower, courtesy or allowances to widows, heirs or next of kin, arise in favor of either the partners individually or others. And consequently, the partners' spouses do not have any marital rights and the partners, as grantors, do not need to recite their marital status in any conveyances and their spouses, if any, do not need to join on such a conveyance.

3. Practicalities:

When partnership real property is conveyed by its partners, no reasons exist to determine the marital status of a partner. Joinder of a spouse in the execution neither enhances nor detracts from the title conveyed. Widows have no claim to partnership property, but will be entitled to liquidated proceeds as to the deceased partner's interest.

G. TES 10.7 ASSETS OF PARTNERSHIP NOT SUBJECT TO EXECUTION FOR DEBTS OF INDIVIDUAL PARTNERS (Adopted 1980; not yet amended.)

1. Standard:

10.7 ASSETS OF PARTNERSHIP NOT SUBJECT TO EXECUTION FOR DEBTS OF INDIVIDUAL PARTNERS

Specific partnership property is not subject to execution on a claim, judgment or lien against a partner of the partnership. A partner is co-owner with his partners of specific partnership property, holding as a tenant in partnership. His right to possess property is equal with his partners and he has no right to possess such property for any other purpose, except with the consent of his partners. A partner's right in specific partnership property is not assignable except in connection with the assignment of all rights of all partners in the same property.

Authority: 54 O.S.A. §225.

History: The standard was recommended by the 1980 Title Examination Standards Committee, 51 O.B.J. 2726, 2727 (1980). It was approved by the Real Property Section, December 3, 1980, and adopted by the House of Delegates, December 5, 1980.

2. Background:

As noted above in the discussion about TES 10.6, the partnership statute 54 O.S. 1981 §225 clearly provides that "a partner's right in specific partnership property is not assignable", and "is not subject to attachment or execution". Thus, while partnership property can be directly reached to satisfy a partnership debt, it cannot be directly reached by a creditor to satisfy the debts of a partner as an individual.

However, it should be noted that, pursuant to 54 O.S. 1981 §228, the existence of an unpaid debt of an individual partner can result in a judgment whereby the debtor partner's share of the partnership's profits can be taken and applied to the debt.

3. Practicalities:

The debts of an individual partner cannot be satisfied with partnership property unless specifically authorized by all the other partners. If such were debts that could affect partnership property, then the partnership could be forced -- by the actions of one partner as an individual -- to liquidate such property and divide the proceeds among all partners in their respective proportions.

H. TES 10.8 CONVEYANCES TO AND BY JOINT VENTURES (Adopted 1982; last amended 1984.)

1. Standard:

10.8 CONVEYANCES TO AND BY JOINT VENTURES

A. A joint venture is not a legal entity capable of holding title to real property in Oklahoma in the name of such joint venture.

Comment: A joint venture is not a partnership. If the joint venturers organize as a partnership and the property is held in the name of the partnership, the usual rules regarding conveyances by the partnership apply.

B. If a conveyance to a joint venture in its name alone appears in the chain of title, a correction conveyance should be obtained from the original grantor to the members of the joint venture who are natural persons or legal entities capable of holding title to real property in Oklahoma. In addition, in order to eliminate any claim of interest existing of record by virtue of the fact that such joint venture purported to hold title in its name alone, such correction conveyance should also recite the name of such joint venture immediately after the name(s) of the joint venturer grantee(s) (e.g., "Robert Jones and William Smith d/b/a Investment Enterprises, a joint venture" or "Robert Jones and William Smith, joint venturers of Investment Enterprises, a joint venture").

Comment: In some instances, the correction conveyance described above may not be obtainable or appropriate. In those circumstances, alternative curative requirements appropriate for the particular circumstance should be made.

C. Any conveyance, mortgage or other real estate instrument executed by the joint venturers should be executed by those joint venturers who then appear of record as grantees (without notice of other joint venturers). The names of the joint venturers should be followed by a recital of the name of the joint venture.

Comment: Real property or an interest therein acquired in furtherance of a joint venture is owned by all joint venturers with each owning an undivided interest equal to his undivided interest in the joint venture. If title is acquired in the name of one or more, but less than all, of the members of the joint venture, the remaining members have an equitable interest in the property.

A title examiner who is without notice of the existence of additional joint venturers is not required to examine the joint venture agreement. However, if instruments in the chain of title suggest other members exist, the examiner should review the joint venture agreement to determine the authority of the record title holders to transfer the equitable rights of non-record title holders and the joint venture agreement will have to be recorded. If that authority is not clearly granted in the agreement, all joint venturers must join in the instrument transferring the interest.

An instrument to "A and B, members of XYZ joint venture," does not give notice of the existence of other members because a joint venture can be two people. An instrument to "A, a member of XYZ joint venture," is notice because one person alone cannot be a joint venture. Similarly an instrument to "A and B, some members of XYZ joint venture," is notice of the existence of at least one other joint venturer.

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

Authority: See R. Cleverdon, *Ownership and Conveyancing of Land by Joint Adventurers Within the State of Oklahoma*, 52 O.B.J. 2137 (1981),and authority collected therein.

History: Adopted December 3, 1982. Proposed by Report of 1982 Title Examinations Standards Committee, 53 O.B.J. 2731, 2733 (1982), where it was inadvertently numbered "10.7", approved by Real Property Section, December 2, 1982, and adopted by House of Delegates. Authority added, November 22, 1983, by Editor of Title Examination Standards on instruction of Title Examination Standards Committee. Substantial revisions of Paragraphs B and C recommended by Title Examination Standards Committee Report, 55 O.B.J. 1817-18 (1984). The proposal as printed was amended in the Real Property Section by changing "minority" in the second sentence in the standard to "majority". As amended, the standard was approved by the Section, November 1, 1984, and adopted by the House of Delegates, November 2, 1984.

The 1988 Report of the Title Examination Standards Committee recommended the addition of "Comment" in "B", 59 O.B.J. 3098, 3103. The recommendation was approved by the Real Property Section, December 8, 1988 and adopted by the House of Delegates, December 9, 1988.

2. Background:

It is well established law that only legal entities are capable of holding and conveying title to real property. City of Ardmore v. Knight, 270 P.2d 325 (Okla. 1954). Therefore, any association or organization other than a natural person can become a legal entity only by legislation or court-made law. Partnerships gained such status in 1955 (See: TES 10.1).

However, several other associations and organizations are still awaiting such clear recognition, such as express private trusts (discussed below in TES 22.2) and unincorporated associations.[7]

According to the Oklahoma Supreme Court, in order to determine that there is a business relationship between two or more persons constituting a joint venture, there must be (1) a joint interest in the particular property or project involved, (2) an agreement, either express or implied, to share in the profits and losses, and (3) acts or conduct reflecting cooperation

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[7] Jones v. Alpine Investments, Inc., 58 OBJ 3151 (1987), on petition for rehearing.

in the project. Oklahoma Company v. O'Neal, 440 P.2d 978 (Okla. 1968).

And in W.B. Johnston Grain Co. v. Self, 344 P.2d 653 (Okla. 1959) the Oklahoma Supreme Court held:

> But unlike a partnership, the establishment of a joint venture does not create a distinct legal entity separate and apart from the parties composing it;

and:

> We hold that a joint venture is not a distinct legal entity separate and apart from the parties composing it.

Thus, joint ventures continue to hold the non-person status that the partnership held prior to the enactment of The Uniform Partnership Act (54 O.S. 1981 §201 et seq.).

The language of the text of this Standard describes in detail through examples how to cure an attempted conveyance into a joint venture.

3. Practicalities:

It is quite common for an oil and gas title examiner to encounter a conveyance to a grantee which appears to be a joint venture. Some very cautious examiners even assume that a grantee that is not specified as a partnership or a corporation may be a joint venture or an unincorporated association and make a requirement that asks for evidence of the type of entity involved.

If the grantee is a joint venture, a correction instrument should be obtained from the original grantor to a natural

person or legal entity capable of holding real property in Oklahoma. It is also suggested that the correction instrument recite that the named grantees are doing business as a particular joint venture. This type of recitation is not mandated by law, but will clarify to subsequent examiners why the correction instrument has been made. A very liberal approach to this Standard would treat this requirement as only dealing with an identification problem and would only call for the operator of the lease or disburser of proceeds to identify the members of a joint venture prior to the distribution of proceeds.

Subsection (c) deals with an instrument conveying title out of joint venturers. If the conveyance to the joint venturers was done properly by naming the individual joint venturers, the conveyance from the joint venturers should be done in exactly the same manner, by using the names of the individual joint venturers followed by a recitation of the name of the joint venture. Subsection (d) is a reminder that homestead or other marital rights may attach to interests in real property held in the name of the individual joint venturer. Ths conclusion is based upon the fact that title is actually held by the individuals involved rather than by a separate entity, as in the case of partnerships. See TES 7.2 for proper conveyancing techniques involving marital interests and marketable title.

I. TES 22.1 POWERS OF TRUSTEE (Adopted 1983; last amended 1987.)

1. Standard:

22.1 POWERS OF TRUSTEE

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

Authority: 60 O.S.A. §§171 *et seq.*, 175.7 & 175.45; and see 60 O.S.A. §175.24 for a listing of the extensive powers which a trustee has unless they have been denied to the trustee by the trust agreement or a subsequent order of a court; Linkletter v. Walker, 318 U.S. 618 (1965); Cox v. Broadway, Inc., 708 P.2d 1087 (Okla. 1985); In re Baumgardner, 711 P.2d 92 (Okla. 1985); Morris v. Meacham, 718 P.2d 1355 (Okla. 1986).

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

History: The standard was proposed as "Standard 22.2" in the 1983 Report of the Title Examination Standards Committee, see Report, 54 O.B.J. 2379 at 2384 (1983). It was renumbered "22.1" by the Real Property Section prior to the Section's approval of the standard after the Section referred the proposed "Standard 22.1" back to the Committee, November 3, 1983. It was adopted as renumbered by the House of Delegates, November 4, 1983.

The report of 1987 Title Examination Standards Committee recommended amendment of the first sentence to refine the statement of the trustee's powers. In the second sentence, the deletion of the words "done after October 1, 1979" (the effective date of an amendment to 60 O.S.A. 175.45) was recommended, and language relating to notice was to be refined. It was further recommended that additional statutory and case citations be added to "Authority". These changes were approved by the Real Property Section, November 12, 1987, and adopted by the House of Delegates on November 13, 1987.

2. Background:

According to 60 O.S. 1981 §175.45(c):

> It is the intent of the Legislature that trusts are private instruments and it shall not be necessary to record the instrument establishing a trust unless the trustor desires to put the public on notice of restrictions or limitations upon the powers of the trustee, in which case the same must be recorded.

This Standard tries to make it crystal clear that, from a title examiner's viewpoint, the conveyance of real property by the

trustee, or a majority, if there be more than one, is--by statute (60 O.S. 1988 Supp. §171A.)--binding on the beneficiaries, in the absence of notice by the grantee of limitations on the trustee's authority.

However, it should be noted that you will be able to know how many trustees must sign such a conveyance, and who are the trustees, only if their names are clearly set forth on the face of the earlier conveyancing instrument wherein they were the grantees. However, if someone follows the literal language of the newly enacted 60 O.S. 1988 Supp. §171.B and 60 O.S. 1989 Supp. §175.6(b), there might be a conveyance in a chain of title wherein the grantee is set forth as the name of the express private trust, and the trustees are not identified as to name or number. In that event, it will be necessary to see the trust instrument and also to record it to ensure its availability to future title examiners.

3. Practicalities:

This Standard was originally enacted in 1983, apparently as a result of 60 O.S. (Supp. 1979) §175.45, which had an effective date of October 1, 1979. The original Standard initially used the October 1, 1979 date as the cut-off date as to when it became no longer necessary to call for the examination of a trust instrument when there was a conveyance to a named trustee of an express private trust. Title examiners felt comfortable in relying on 60 O.S. (Supp. 1979) §175.45 to establish marketable

title where there was a conveyance after October 1, 1979 to the trustee of an express trust. Such reliance was justified only if the examiner was without actual or constructive knowledge imposed by a trust instrument containing recitations or limitations which had been recorded in the county where the real estate was located. Relying on the authority of 60 O.S. (1981) §175.7 which affords protection to a purchaser without notice, it was subsequently recommended by the Committee that it was not necessary to call for the trust instrument even for conveyances recorded prior to October 1, 1979. One of the overall purposes of Standard 22.1 is to allow for trusts to be private instruments which do not need to be recorded unless the trustor desires to put the public on notice of restrictions on the trustee's powers.

J. TES 22.2 TITLE TO PROPERTY HELD UNDER AN EXPRESS PRIVATE TRUST (Adopted 1984; repealed 1988.)

1. Standard:

22.2 TITLE TO PROPERTY HELD UNDER AN EXPRESS PRIVATE TRUST

Standard repealed. (Reserved for future revised standard concerning this topic.)

Caveat: The Legislature, in its 1988 Session, adopted 60 O.S.A. §171B which was intended to simplify the problem addressed by this standard. The new statute provides that a private express trust may hold title to real estate in the name of the trust.

Insofar as the legislation provides for the retrospective application to conveyances made prior to the effective date of the act, November 1, 1988, its constitutionality is problematical. The Oklahoma Supreme Court has held that a grantee of a deed must be a legal entity, *City of Ardmore v. Knight*, 270 P.2d 325 (Okla. 1954); *James v. Unknown Trustees*, 203 Okla. 312, 220 P.2d 831 (1950); *Lynch v. Calkins*, 75 Okla. 137, 182 P. 225 (1919). See also *Jones v. Alpine Investments, Inc.*, 58 O.B.J. 351 (1987), on petition for rehearing. It is generally agreed that trusts are not legal entities. Therefore, conveyances made to trusts before the effective date of §171B would have left title in the grantor. It is possible that the retroactive application of the statute to take title out of the grantors would be held to lack due process, *Franklin v. Margay Oil Co.*, 194 Okla. 519, 153 P.2d 286 (1944); see *Walker & Withrow, Inc. v. Haley*, 653 P.2d 191, 193 (1982). For this reason, title examiners ought not pass a title which depends upon a conveyance to a trust prior to the effective date of the subject legislation.

The prospective application of §171B is not without its problems. There is no mechanism provided by which a grantor of a deed, purporting to convey the title out of the trust, can be established as having the power to bind the trust or the beneficial owners of the trust *res*.

History: Standard proposed by Report of Title Examination Standards Committee, 55 O.B.J. 1817, 1818 (1984). Amended by the Real Property Section, November 1, 1984, and adopted as amended by the House of Delegates, November 2, 1984.

The 1988 Report of the Title Examination Standards Committee recommended the repeal of this standard and the adoption of the present "Caveat", 59 O.B.J. 3098, 3109. The caveat recites the reason for the action. For further authority which prompted this proposal, see M. Richie, *Conveyances to Express Private Trusts: a Caution to Title Examiners*, 59 O.B.J. 2852 (1988). The proposal was approved by the Real Property Section, December 8, 1988, and adopted by the House of Delegates, December 9, 1988.

2. Background:

This Standard, which had stated that the then-current law was that conveyances to an express private trust using the name of the trust as the grantee were void, has been repealed, but not replaced, since the legislative enactment of 60 O.S. (Supp. 1988) §171B which became effective November 1, 1988.

This Section 171B provides:

> A. Express trusts may be created in real or personal property or both, with power in the trustee, or a majority of the trustees, if

there be more than one, to receive title to, hold, buy, sell, exchange, transfer and convey real and personal property for the use of such trust; to take, receive, invest or disburse the receipts, earnings, rents, profits or returns from the trust estate; to carry on and conduct any lawful business designated in the instrument of trust, and generally to do any lawful act in relation to such trust property which any individual owning the same absolutely might do.

B. Title to real property or an interest therein which is held under an express private trust may be held in the name of the trust itself. If a conveyance has been made prior to the effective date of this act placing such real property or an interest therein in trust naming the trust itself as the grantee, no correction conveyance need be obtained from the original grantor to the trustee or trustees of the trust showing the name of the trust. Any such conveyance shall, for all purposes, be deemed valid.

A new version, HB 1623, which repealed 60 O.S. (Supp. 1988) §171B and added §175.6(a) and (b), becomes effective November 1, 1989, and it provides:

§175.6(a) Any estate in real property may be acquired and held in the name of an express private trust which is a legal entity. Where real property is so acquired, any conveyance, assignment or other transfer shall be made in the name of such trust by the trustee or trustees of said trust. When real property is transferred or acquired in the name of the trust after the effective date of this act, the trustee shall file a memorandum of trust with the county clerk in which the real property is located. The memorandum of trust shall include the date of creation and the name of the trustee or trustees of the trust.

Any person or persons making such conveyances and executing instruments while purporting to be the trustee or trustees of such trusts

> shall be presumed to be acting in the capacity indicated and within the scope of their authority in any actions to set aside such conveyance brought against a bona fide purchaser for value.
>
> §175.6(b) Any conveyance made and filed of record prior to the effective date of this act placing real property or any interest therein in a trust naming the trust itself as the grantee shall be valid for all purposes unless any person claiming adversely to such trust or to its successors shall file an affidavit setting forth the basis of such in the office of the county clerk of the county or counties wherein said property is located within one (1) year from the effective date of this act.

Michael S. Richie, an Oklahoma City real estate attorney who is active in the OBA Title Examination Standards Committee and in the Oklahoma City Title Attorneys Association, discussed in detail in a recent article ["Conveyances to Express Private Trusts: A Caution to Title Examiners," 59 OBJ 2852 (October 29, 1988)] an assortment of possible problems associated with the enactment in 1988 of §171B including: (1) attempted retroactive validation of void conveyances made prior to the November 1, 1988 effective date; (2) difficulty in the identification of the number and names of the trustees since there is not any penalty for failing to meet the requirement for placement of documents, providing identification of the trustees in the county records, (i.e., through a memorandum of trust similar to a fictitious name partnership certificate), and (3) possible due process infirmities arising from difficulties in securing proper notice to the trustees in quiet title and other legal actions.

At the present time, the OBA Title Examination Standards Committee is continuing to actively consider the effect that §171B, and its replacement §175.6(a) and (b), will have on the issues covered by this Standard.

The new 175.6(a) and (b) tried to overcome--after the statute has been in place for the prescribed one-year period--the questions about the validation of a void conveyance. However, its effectiveness in eliminating such questions is uncertain.

Also, as stated recently by two prominent Oklahoma real estate attorneys, in proposed language updating an existing real estate practice manual:

> By Enrolled House Bill No. 1623 (the "Act"), signed by the governor on May 9, 1989, to be effective November 1, 1989, the legislature repealed Subsection B of §171 and restored §171 to its prior form, and then adopted new §175.6(a) and §175.6(b) of Title 60. The first sentence of new §175.6(a) is as follows: "Any estate in real property may be acquired and held in the name of an express private trust which is a legal entity." New §175.6(b) is in effect a curative statute that validates prior conveyances to trusts of record that are not contested by affidavits filed within one year of the effective date of the Act. Unless one accepts the first sentence of new §175.6(a) as doing so, there is still no Oklahoma statutory or case authority establishing that a private trust or an express business trust created under Oklahoma law is a legal entity capable of owning, receiving and holding title to real or personal property in this state. Viewing the Act, including its title, as a whole, and considering the patent ambiguity of the first sentence of §175.6(a), the authors are of the opinion that title to real and personal property should only be conveyed to, held by and

> alienated by trustees of express business trusts and private trusts created under Oklahoma law. This is especially true because of the clear, unequivocal, and time-tested language still contained in 60 O.S. §171 and §175.6. We express no opinion as to the constitutionality of either §175.6(a) or §175.6(b) except to say, in the words of the Caveat inserted in place of former Title Standard 22.2 regarding the recently repealed §175.B, that their constitutionality is "problematical" (emphasis added).

Alan Durbin and Temple Bixler, Oklahoma Real Estate Forms, Form 2.9 (Proposed revision for 1989 Supp.).

3. Practicalities:

The oil and gas examiner sees many conveyances (particularly overriding royalty interests and small working interests) to entities such as the John Doe Trust. Prior to the enactment of §171.B, the Standard requirement was to call for a correction instrument from the original grantor or assignor to a named trustee of the John Doe Trust. From a practical standpoint, this requirement was often ignored and the more common solution was for the oil and gas operator or disburser of proceeds to informally identify who the trustee was and send money or notices to that person. Thus, this issue was often treated as more of an identification problem rather than a title problem. More complicated problems arose when there was an attempt to effectuate a subsequent conveyance from the trust; this was more commonly thought of as a title problem.

The purpose of the two statutes [§171.B and §175.6(a) and (b)] seemed to be curative in nature. While some examiners had taken the position that they were comfortable that a court would reform such a conveyance to a trust even if it affected third parties, other examiners more cautiously required curative action.

As noted above under the background to §175.6(b), certain title examiners have not been satisfied with the legislative attempts to resolve these problems.

A lesson to be learned from the confusion generated by the new "curative" statutes might be that a good deal of caution should be exercised in title curative legislation and that in-depth involvement of committees of title lawyers might prove useful in anticipating and avoiding the kind of uncertainty presently faced by the title community.

K. TES 22.3 PRESENCE OF WORDS "TRUSTEE," "AS TRUSTEE" OR "AGENT" (Adopted 1985; not yet amended.)

1. Standard:

22.3 PRESENCE OF WORDS "TRUSTEE," "AS TRUSTEE" OR "AGENT"

The words "trustee," "as trustee" or "agent" following the name of a grantee or mortgagee, without additional language actually identifying a trust, do not give notice that, or put one on inquiry whether, a trust does exist or any person except the grantee or mortgagee does have a beneficial interest.

A subsequent conveyance by such grantee, whether or not his, her or its name is followed by such words in the subsequent conveyance, vests title in the conveyee of the subsequent conveyance free of all claims of others. If such grantee making the said subsequent conveyance is an individual and the property conveyed could be subject to the right of homestead (see Title Standard 7.1), the said subsequent conveyance must be executed by his or her spouse also, or must show that such grantee has no spouse, or the trust must be identified so as to make 60 O.S.A. §175.45 applicable.

An assignment or release by such mortgagee, whether his, her or its name is followed by such words or not in the assignment or release, vests ownership in the mortgage in the assignee or completely releases the property from the mortgage as to all persons claiming thereunder.

Authority: 60 O.S.A. §§156-157 & 175.45.

History: The 1985 Report of the Title Examination Standards Committee proposed this standard, 56 O.B.J. 2535, 2541 (1985). It was approved by the Real Property Section, November 14, 1985, and adopted by the House of Delegates, November 15, 1985, 57 O.B.J. 5 (1986).

2. Background:

This Standard simply paraphrases the statutes which provide:

> A. The appearance of the words "trustee" or "as trustee" or "agent" following the names of the grantee in any deed of conveyance of land or other property, or an interest therein, heretofore or hereafter executed, without other language showing a trust, shall not be deemed to give notice to or put on inquiry any person dealing with said property that a trust exists, or that there are other beneficiaries of said conveyance except the grantee named therein, and such conveyance shall vest the title to such property in such grantee and a conveyance by such grantee, whether followed by the words "trustee" or "as trustee" or "agent" or not, shall vest title in his grantee free from any claims of all persons or corporations.

> B. Subsection A of this section shall not apply if other written evidence is recorded, whether before or after the grantor's death, which establishes that an express trust does exist with respect to property which the grantor has conveyed by deed to his grantee followed by the words "trustee" or "as trustee" provided such other written evidence is recorded prior to conveyance of such property by such grantee.

60 O.S. 1988 Supp. §156 (§157 covers "mortgages" and has language similar to part A of §156, but does not include language like part B).

Part B of §156 was new and was effective November 1, 1988, and is an attempt to allow unspecified persons to file of record "written evidence" either "before or after the grantor's death" to give notice of the existence of an express private trust. This recent enactment is apparently an attempt to allow the unilateral reform of a deed originally conveying to a grantee whose title is simply shown as a "trustee". The purpose of this enactment, which is apparently to protect the beneficiaries of the "secret" trust from the claims of the trustee's heirs and/or devisees, is perhaps a worthy one. However, it seeks to use a method which (1) uses vague undefined terms (i.e., who can file such "written evidence" and what form shall it take), (2) attempts to divest parties of vested rights (i.e., the trustee's prior grantees, heirs and devisees), and (3) causes confusion by omitting any reference to "agent", and omitting any

reference to "mortgages" (since §156B only affects the "deeds" in §156A and not the "mortgages" in §157).

Was there a way for the grantor (i.e., settlor) to protect itself? Yes, the grantor could correctly designate the grantee in their initial conveyance (e.g., Sue Smith, trustee of the Tom Smith 1989 Irrevocable Trust).

3. Practicalities:

A title examiner will often encounter a conveyance to "John Doe, Trustee". The statute provides that if a trust or similar relationship has been created, such a notice may be placed of record. Absent such record notice, the Standard allows the examiner to treat the conveyance to John Doe, Trustee in the same manner as if the property was owned by John Doe, individually. This has caused confusion for many lawyers and their clients. As noted above, part B of §156 was apparently designed to allow a method of curing deeds which had already been placed of record, whereby the statute allows a beneficiary or some other person to state for the record that there is an express trust which should be considered. Obviously, from a prospective standpoint, the proper conveyance would be to John Doe, Trustee of the 1987 John Doe Trust, accompanied by a memorandum of trust imposing certain restrictions on the trustee if those are desired. This appeared to be a better solution to the legisla-

ture than to "punish" the beneficiaries of prior trusts where the deed to the trustee was silent as to the particular trust involved.

III. ADDITIONAL DISCUSSION OF SELECTED STANDARDS:

"Oklahoma Title Examination Standards and Curative Acts Relating to Oil & Gas Interests," 24 Tulsa Law Journal 547 (Summer 1989), David D. Morgan and Kraettli Q. Epperson

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OKLAHOMA TITLE EXAMINATION STANDARDS AND CURATIVE ACTS RELATING TO OIL AND GAS INTERESTS

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I. INTRODUCTION

The purpose of this article is to bring together the intellectual reasoning behind Title Examination Standards[1] and the practical aspects of oil and gas title examination.

A. *Reasons for Examination of Title*

In the practice of oil and gas law, many situations may arise which necessitate that an attorney conduct a title examination. The circumstances requiring title examination vary. Although this is not purported to be an exhaustive list, oil and gas titles may be examined for the following purposes: (1) the client has acquired oil and gas leases and has a certain number of days to approve payment of lease bonuses (Lease Acquisition or Original Title Opinion); (2) the client is proposing to drill a well and is preparing to pool other leasehold owners and unleased mineral owners and allocate costs for the well (Drilling Opinion); (3) the client, as operator, has completed a well and is preparing to disburse proceeds (Division Order Title Opinion); (4) the client, as first purchaser, is preparing to disburse proceeds (Division Order Title Opinion); (5) the client is purchasing producing or non-producing property (Purchase Opinion); or (6) the bank client is lending money secured by producing or non-producing property (Mortgagee Title Opinion).

1. Hereafter, the Title Examination Standards will be referred to as "Standards" and a specific Title Examination Standard will be referred to as "Standard" followed by the section number.

B. *Distinctions Between Various Opinions*

The Standards do not distinguish between the various types of opinions, and it is unnecessary for the title examiner to make such a distinction. A defect is a defect regardless of the purpose of the opinion. Therefore, the proper distinction is determining the curative steps necessary to solve a particular problem. However, it may be practical to know the purpose of the opinion in order for the title examiner's comments and requirements to be worded accordingly. For example, it is not unusual to preface a requirement with the words, "For the purpose of this Lease Acquisition Opinion, you may be willing to rely on an affidavit of death and heirship." This serves both the practical need of the client and warns the client that more curative steps may be required at a later time. The title examiner should feel uncomfortable not mentioning a problem during the lease acquisition stage of the drilling program knowing that later, curative steps must be taken before allowing the payment of proceeds. The purpose of the lease acquisition is the eventual economic realization of the leases taken. Thus the client may not understand why a requirement not mentioned earlier is made only at the division order title opinion stage.

1. Lease Acquisition or Original Title Opinion

In the normal sequence of events, the client acquires oil and gas leases based on an ownership done by a landman or lease broker. Subsequently, abstracts are gathered and the client must first be advised whether to honor the money drafts which have been sent for the payment of lease bonuses. Normally, the client will ask if there are any "big title problems" connected with a person's interest. In answering this question, it is appropriate to take into consideration the amount of acreage involved on a particular lease as well as the degree of the problem involved. It is unusual for the landman or lease broker to completely miss the ownership of a potential lessor, but the possibility should always be considered. Additionally, the client should be made aware of any encumbrances, liens, or mortgages which affect his lessor's title. This is the best time to obtain subordinations of mortgages, affidavits of possession, and tenant disclaimers. It is also a good time to inquire as to the status of previous oil and gas leases which may have expired in the absence of production. Although there is usually not time to do judicial determinations of death and heirship, probate proceedings, or quiet title suits, this

is a good time to determine whether the facts are such that these proceedings could be concluded successfully.

2. Drilling Opinion

The lease bonuses have been paid, and the client is now proposing to drill a well. The client is also preparing to pool other leasehold owners and unleased mineral owners and to allocate the costs of the well. Normally, a pooling application list will be taken from the original title opinion. One concern is to advise the client whether all potential owners of the right to drill are included on his list of pooling applicants. For purposes of precautionary pooling, it is also advisable to include a list of parties whose interests may be in doubt and unsettled. In addition, the client should be interested in the mortgagees of various working interest owners as a consideration for pooling.

It is also important to take into consideration problems involving the ownership of the surface at the proposed well location including easements and rights-of-way. The client will also begin providing specific curative materials for the requirements connected with his own interest or that of his lessor.

3. Division Order Title Opinion (For Operator or First Purchaser)

The true nightmare of a title examiner has taken place. The well has been successfully completed and is producing in paying quantities. Any mistake made by the title examiner will not be cured by a "dry hole." The payment of proceeds from the sale of oil and gas production is now governed by Section 540 of Title 52 of the Oklahoma Statutes. Section 540 imposes time limitations for payment of proceeds and provides for interest on proceeds that cannot be paid because the title thereto is not marketable. Furthermore, Section 540 states that the marketability of title shall be determined in accordance with the then-current title examination standards of the Oklahoma Bar Association.[2]

Suddenly, an entirely different standard of title is used. No longer

2. OKLA. STAT. tit. 52, § 540.A (Supp. 1988). Section 540.A provides:
The proceeds derived from the sale of oil or gas production from any oil or gas well shall be paid to persons legally entitled thereto, commencing no later than six (6) months after the date of first sale, and thereafter no later than sixty (60) days after the end of the calendar month within which subsequent production is sold . . . Provided, however, that in those instances where such proceeds cannot be paid because the title thereto is not marketable, the purchasers of such production shall cause all proceeds due such interest to earn interest at the rate of six percent (6%) per annum, until such time as the title to such interest has

are affidavits and suppositions to be substituted for properly executed and recorded disclaimers and quit claim deeds. Affidavits of heirship no longer are substituted for judicial determinations of death and heirship, or proper probate or administration proceedings. The then-current Title Examination Standards of the Oklahoma Bar Association will be used as the guide for the proper determination of title. This statute is the only place in the Oklahoma Statutes where the Standards are mentioned. Section 540 seems to incorporate not only the existing Standards as a benchmark of title, but also allows for the criteria of marketability to be changed by the adoption of future Standards.

This discussion must then closely parallel that of Standard 4.1 (Marketable Title Defined) in the discourse as to what constitutes marketable title. However, from a practical standpoint, especially where the operator is the entity disbursing proceeds of production, many of the same presumptions made at other stages of title examination are applicable here. Affidavits of death and heirship are often accepted by the operator in the place of judicial proceedings. Long possession histories are substituted by the operator for quiet title decrees. In many cases, indemnifying language in division orders is substituted for potential title defects. Additionally, liberal use is made of the Marketable Record Title Act and Simplification of Land Titles Act to determine the marketability of title. These decisions are matters involving the business judgment of the client.

Other matters are considered for the first time. Mortgages from lessors which were subordinated to leases must be reconsidered with regard to payment of proceeds. Mortgages from leasehold owners must be considered. Operating agreements, well completion reports, and pooling elections must be considered in order to make determinations about the final disbursement of proceeds. Although not required by the statutes or the Standards, most clients also require executed division orders before disbursing proceeds.

4. Purchase Opinion

When the client is purchasing producing property, special consideration should be given to the type of purchase which is taking place. Often there is a large number of leases and/or producing properties which have different degrees of value to the client. It is advisable to

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been perfected. Marketability of title shall be determined in accordance with the then current title examination standards of the Oklahoma Bar Association.

Id.

break down the allocation of the purchase price into three or four categories of properties. While a full examination of title may be important in one category, it may well be that a less strict examination will be desired for a different category of property. Proper inquiry may reveal that the purchase price is justified by the inclusion of only certain properties and many of the other properties carry little or no allocated weight to the entire purchase price. The cost of examination of a low priority property may be more than that property is actually worth. One advantage in the purchase of producing properties is that there are usually fairly recent title opinions available which can be examined and updated through abstract examination or tract index examination.

There is another consideration for the purchase opinion. Commonly, upon the acceptance of a purchase offer, the purchaser will have a certain number of days to examine title and notify the seller in writing of any objections or title defects. Normally the standards to be used are the then-existing Standards. However, another criteria which can be employed is what a reasonable and prudent person engaged in the business of ownership, development, operation, or production of oil and gas properties, or the purchase of production therefrom would use in order to disburse revenues in accordance with the title which has been offered. This may be a more appropriate standard for the purchase of producing properties. The most important issue for the purchasing client is whether the seller is receiving revenue. If so, it must be that the title is acceptable to the current purchaser of production and is probably going to be acceptable to the purchaser-client. There is even some argument that a lesser standard can be forced upon a purchaser even when a strict "marketable title" standard is used in the purchase agreement.

5. Mortgagee Title Opinion

Situations where the bank client has been offered oil and gas property (usually leasehold interests) to secure a promissory note ordinarily fall into two categories, and the scope of examination depends upon the category.

In the first category, the borrower is purchasing oil and gas leases (producing) and has asked the bank to finance all or part of the transaction. The title examination will be similar to that of a Purchase Opinion with consideration being given to the weight of various categories of property. Examination may involve updating previous title opinions and determining who is actually receiving revenue. The bank should have its

own standards of acceptable title, and should not rely on the standards which may be acceptable to the purchaser. It is not uncommon for a conflict to develop between the bank and the borrower, especially where the borrower has agreed to pay for the expenses of the examination of title on behalf of the bank. Since the purchase will often involve a distressed seller, special consideration should be given to mortgages, liens, and lawsuits which may affect the seller's interest.

In the second category, the borrower is offering additional collateral to further secure an existing loan which has fallen into arrears. Normally, the bank prefers not to pay additional expenses of title examination and will often rely upon the representations of the borrower as to the amount of monthly revenue from various properties. A bank client should categorize the property offered, and at least do a limited examination of the high priority properties. The property is usually offered to the bank in return for the bank's forebearance of an immediate foreclosure, and the bank takes the property knowing that an eventual foreclosure is probably going to be necessary. It is not uncommon to find that the interest of this borrower is heavily encumbered and may be subject to the priorities of third parties.

II. AUTHORITATIVENESS OF THE STANDARDS

The discussion below briefly highlights the reasons for the substantial weight given by Oklahoma's real property title attorneys to the Standards. The development of these Standards is carried out in order to: (1) facilitate title transfers by resolving issues upon which there may be a difference of opinion within the Bar[3] by adopting the customary position followed by the vast majority of practicing title attorneys,[4] and (2) collect title curative authority in one place.

After extensive research and discussion, the Title Examination Standards Committee ("Committee") of the Real Property Section ("Section") of the Oklahoma Bar Association ("OBA") revises or develops new standards which are submitted to the Section at its annual meeting held at the same time and location as the annual meeting of the OBA. After the Section and the OBA House of Delegates approve the revised or new Standards, they are officially published in the Appendix to Chapter 1 of Title 16 (Conveyances) of the Oklahoma Statutes.

3. Promulgation of Standards is necessary when differences of opinion cannot be resolved by a review of the current law.

4. Customary positions are adopted if they are not contrary to existing law.

In order to encourage pre-adoption comment by the members of the OBA, the proposed revised and new Standards are published in the end-of-the-month issue of the *Oklahoma Bar Journal* one to two months prior to the annual meeting of the OBA. After the annual OBA meeting, those revised and new Standards that received final approval from both the Section and the OBA House of Delegates are incorporated into the existing Standards and published in the Section's *Title Examination Standards Handbook*. The *Handbook* contains all of the Standards including recent revisions or additions. It is published annually by the Section as soon as possible after the annual OBA meeting. The handbook is provided free of charge to all Section members and is sold for a nominal price to others. The Oklahoma Statutes Annotated will include the most recent Standards in the next revised pocket part. The development, notice, and approval process promotes vigorous analysis, discussion, and debate on the Standards before adoption so that once they are adopted the Standards can reasonably be called the official "custom" or "standard" in Oklahoma.

The Standards are developed and founded on an exhaustive analysis of existing statutes, case law, major treatises, other states' statutes and cases, and uniform national "standards." Such authorities are studied, discussed, and then set out in the "Authority" part of each Standard. Consequently, a title attorney can begin research on a title question by reviewing the language of a particular Standard itself, and then reviewing the cited authority. The Standards can thus act as a mini-brief or mini-treatise. To the extent that a particular Standard is based directly on the express wording of existing Oklahoma Statutes or Oklahoma cases, it is obviously controlling on all parties.

As previously mentioned, the state legislature has clearly expressed its confidence in the Standards by enacting Section 540, which states that marketability of title shall be determined in accordance with the then-current title examination standards of the OBA.[5] It should be noted, however, that the state legislature has expressly provided for such Standards to apply only to the payment of proceeds. Therefore, it cannot be presumed that the courts will find that there was legislative intent to automatically apply the Standards to every surface or other mineral conveyance or transaction.

The Oklahoma Supreme Court has also expressed its confidence in the Standards. In *Knowles v. Freeman*, the court found that although

5. *See supra* note 2.

they were not binding, the standards and the annotations cited in support were persuasive.[6] The persuasiveness of the Standards, according to Justice Lavender, is based on the careful research and study prior to their adoption as well as their general acceptance among the members of the bar.[7]

The Attorney General's Office stated that "[t]itle examination standards are not state statutes and, are not promulgated by the Legislature."[8] However, the same opinion also stated that "[t]he title examination standards are uniform interpretations for the application of the law that attorneys should use when examining titles."[9]

The Standards may also apply to a real estate or oil and gas transaction in which the parties agree that the Standards will be used in determining the acceptability of the title being offered.

Although the Standards are useful and authoritative, there are dangers that can be avoided only by the conscientious efforts of the examining attorney. The title examiner must be careful to completely review the body and especially the notes of the Standard. The examiner must also keep abreast of changes in statutes and cases since the last revisions to a Standard were made.

III. STANDARDS AND CURATIVE ACTS

Several current Standards and several Oklahoma curative acts are addressed below. The Standards are treated in numerical order. The actual language of the particular Standard is given, followed by a discussion of the Standard's background and authority as well as the practical aspects of applying the particular Standard.

A. *Standard 3.3. Affidavits (adopted 1986, no amendments)*

> While an affidavit recorded after October 31, 1985, which satisfies the conditions of 16 O.S.A. § 82 is not a substitute for a judicial proceeding or any other statutory procedure, it does give notice and may be relied upon for interpretation or clarification purposes in determining the marketability of title, unless the examiner has reason to suspect the personal knowledge, competency or veracity of the affiant.[10]

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6. Knowles v. Freeman, 649 P.2d 532, 535 (Okla. 1982).
7. *Id.*
8. 11 Op. Att'y Gen. 370 (1979).
9. *Id.*
10. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 3.3 state:
Comment: In the course of examination of titles, there are frequently matters which create some doubt in the mind of the title examiner but are not of a nature which would

1. Background

For many years, affidavits setting forth facts about title matters were filed in the land records without authority allowing their filing or making filing constructive notice of their contents.[11] In fact, any taking of an affidavit without specific statutory authority was a crime.[12] However, on November 1, 1985, Title 16, Sections 82-85 of the Oklahoma Statutes became effective, providing the authority for filing of record an affidavit in the local land records.[13] The statute also provides that when an affidavit is acknowledged and recorded it serves as notice (i.e., constructive notice) of the matters covered therein.[14] However, the affidavit does not take the place of a judicial proceeding, judgment, decree, or title standard.[15]

The affidavit may provide information on age, sex, birth, death, relationship, family history, heirship, names, identities of parties (individual, corporate, partnership, or trust), identity of officers of corporations, membership of partnerships, joint ventures or other incorporated associations, identities of trustees and terms of service, history of organization of corporations, partnerships, joint ventures and trusts, marital status, possession, residence, service in Armed Forces, and conflicts in recorded instruments.[16] The statute further states that the affidavit must include a legal description of the real property affected,[17] and that any person giving a false affidavit would be guilty of perjury and liable for actual and punitive damages.[18]

Since the statute expressly states that an affidavit cannot replace a

require a judicial proceeding to cure the defect. In such cases, affidavits may be relied upon. For example, where no indication is given in a conveyance of real property as to the marital status of the grantor, an affidavit that the grantor was not married at the time of the conveyance should be relied on for purposes of marketability. On the other hand, an affidavit of heirship cannot take the place of a judicial determination of heirship. Of course, such an affidavit of heirship would give notice of persons purported to be heirs.

History: The standard as stated above was recommended by the Report of the 1986 Title Examination Standards Committee, 57 O.B.A.J. 2677 (1986). It was approved by the Real Property Section, November 19, 1986, and adopted by the House of Delegates, November 20, 1986. For the statement of the standard previously, see 56 O.B.A.J. 2535 (1985).

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

11. Carter v. Wallace, 193 Okla. 32, 34, 140 P.2d 1018, 1020 (1943); Wilson v. Shasta Oil Co., 171 Okla. 467, 470, 43 P.2d 769, 772 (1935).

12. OKLA. STAT. tit. 21, § 541 (1981).

13. OKLA. STAT. tit. 16, §§ 82-85 (Supp. 1986) (Marketable Record Title Act).

14. *Id.* § 82.

15. *Id.*

16. *Id.* § 83.

17. *Id.* § 84.

18. *Id.* § 85.

formal proceeding, the impact of the statute is principally: (1) to cloud title by giving notice of outstanding claims, and (2) to preserve factual information that some, but not necessarily all, examiners might choose to rely upon but that is usually lost in the file of an earlier title examiner. Discussions have arisen on an irregular basis within the Section about how to give such filed affidavits some weight, perhaps as a presumption, after being filed of record for a long time, such as ten years. It should be noted that there is no authority in this statute for the filing of an affidavit concerning the homestead or non-homestead nature of a tract of real property.

2. Practicalities

The full impact of Standard 3.3 is not yet known. Even without statutory authority, abstracts and county records have contained affidavits covering the same areas as those mentioned in the statute. These affidavits are immensely helpful in the work of a title examiner. An affidavit of death and heirship can tie together breaks in the chain of title and explain the proper ownership percentage that might otherwise require a probate or administration proceeding. Depending on how a title opinion is being used, one client may be willing to rely upon such an affidavit for all purposes. Another client may be willing to rely upon an affidavit of heirship to support the payment of lease bonuses, but may require judicial proceedings before incurring the expense of drilling a well or the risk of disbursing proceeds of production.

Only time will tell whether these statutorily approved affidavits will have more dignity than the ones used previously. However, from a practical standpoint, an affidavit tells a title examiner part of the overall title story regardless of how defectively drafted or recorded the document may be. One practical question the title examiner will have to face in the future is how to handle affidavits that were not properly executed, acknowledged, and recorded, but still are contained in the county records. Another question is how much reliance can be placed on the affidavits since an affidavit is usually self-serving, such as a member of a family explaining the family history and heirship in lieu of a decree of distribution, a property owner stating that she is in possession of property, or a grantor of a deed stating that he was unmarried at the time of execution of the deed. In particular, an oil and gas title examiner reviews many unrecorded affidavits of possession. These are usually self-serving statements of possession by the record owner and often contain the apparent

inconsistency of an out-of-county or out-of-state acknowledgment coupled with a statement that the affiant is in possession of the property.

In summary, Standard 3.3 will not change the way in which a careful title examiner uses affidavits. He or she will explain to the client that an affidavit is only as good as the person behind the affidavit and would be hard to defend if the information is in fact not true.

B. *Standard 4.1. Marketable Title Defined (adopted 1946; last amended 1966)*

> All title examinations should be made on the basis of marketability as defined by the Supreme Court, to wit:
>
> "A marketable or merchantable title is synonymous with a perfect title or clear title of record: and is one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title fairly deducible of record."[19]

1. Background

Standard 4.1 creates a common basis for examination of title to both surface and mineral interests. The Standard presents the Oklahoma Supreme Court's definition of marketable or merchantable title and urges that, in the absence of any other express agreement between the parties, all examining attorneys should examine their titles based on this particular level of quality of title. Further, the Standard emphasizes and affirms

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19. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 4.1 state:

Cross References: See Standard 19.1.

Authority: Pearce v. Freeman, 122 Okla. 285, 254 P. 719 (1927); Hausam v. Gray, 129 Okla. 13, 263 P. 109 (1928); Campbell v. Harsh, 31 Okla. 436, 122 P. 127 (1912); Jennings v. New York Petroleum Royalty Corp., 169 Okla. 528, 43 P.2d 762 (1934); Tull v. Milligan, 173 Okla. 131, 48 P.2d 835 (1935); Seyfer v. Robinson, 93 Okla. 156, 219 P. 902 (1923); Tucker v. Thaves, 50 Okla. 691, 151 P. 598 (1915); Ammerman v. Karnowski, 109 Okla. 156, 234 P. 774 (1924); Wilson v. Shasta Oil Co., 171 Okla. 467, 43 P.2d 769 (1935); Empire Gas & Fuel Co. v. Stern, 15 F.2d 323 (8th Cir. 1926); Leedy v. Ellis County Fair Ass'n, 188 Okla. 348, 110 P.2d 1099 (1941); Hanlon v. McLain, 206 Okla. 227, 242 P.2d 732 (1952); Gordon v. Holman, 207 Okla. 496, 250 P.2d 875 (1952); Hawkins v. Johnson, 203 Okla. 398, 222 P.2d 511 (1950); Koutsky v. Park Nat'l Bank, 167 Okla. 373, 29 P.2d 962 (1934); Davidson v. Roberson, 92 Okla. 161, 218 P. 878 (1923).

History: Adopted as 11, November 16, 1946, 17 O.B.A.J. 1729 (1946), printed, *id.* at 1751-1752; became 1 on renumbering in 1948, 19 O.B.A.J. 223 (1948) at which time the *Leedy* case was added to the cited authority. On November 30, 1960, the last five cases cited were added, 1960 Proceedings of the Annual Meeting of the Oklahoma Bar Association at 20. Cross reference added. December 2, 1965. Resolution No. 2, 1965 Real Property Committee, 36 O.B.A.J. 2094 (1965), *id.* at 2182. Approved by Real Property Section and adopted by House of Delegates, 37 O.B.A.J. 437 (1966).

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

the use of this general definition for the terms "marketable" or "merchantable" title whenever either of these terms is expressly used by the parties.

2. Practicalities

Standard 4.1 defines "marketable title" without discussion as to the purpose for which the title examiner is examining title. Practically, "marketable title" may mean different things in oil and gas practice than in the area of residential real estate or commercial lending. However, few oil and gas title examiners would feel comfortable explaining to a client that the title opinion did not include certain comments and requirements that would usually have been made but were omitted because the oil and gas practice requires a "less perfect title." Most examiners have come to the conclusion that an examiner should not make a decision for the client as to the degree of marketability required in an opinion.

While Standard 4.1 is good as a case citation for many authorities defining marketable title, it does not affect the day-to-day examination of title. Once the title has been examined, and all defects and potential defects have been brought to the attention of the client, the Standards may be helpful in determining what curative steps are required given the purpose of the title opinion. A lessee acquiring leases may require less certainty of title than the first purchaser who is disbursing proceeds. This has nothing to do with the marketability of title, but rather with the economics and time involved in acquiring leases in competition with other lessees and with the time constraints in making title considerations.

C. *Standard 4.2. Oil and Gas Leases (adopted 1947; last amended 1987)*

> The recording of a certificate supplied by the Corporation Commission under 17 O.S.A. §§ 167 & 168, reflecting no production and no exceptions, renders a title marketable as against an unreleased oil and gas lease or a mineral or royalty conveyance or reservation for a term of years and as long thereafter as there is production, the primary term of which has expired prior to the date of the certificate, if the certificate covers all of the land described in the lease, mineral or royalty conveyance or reservation, as well as any additional land which may have been spaced or unitized by either the Corporation Commission or by recorded declaration pursuant to the lease or other recorded

instrument as of the date of the expiration of the primary term.[20]

1. Background

The purpose of Standard 4.2 is to identify and encourage the use of a reliable means for a title examiner to determine whether an oil and gas lease, a mineral or royalty conveyance, or a reservation of a term of years that would continue beyond its primary term for as long thereafter as

20. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 4.2 state:

Comment: Said Act originally applied only to oil and gas leases, as did the standard as originally adopted October 1947. The Act was amended in 1951 so as to cover term mineral conveyances, as well as oil and gas leases, and the standard was then amended in November, 1954. By said Act, such certificates constitute *prima facie* evidence that no such oil and gas lease or term mineral conveyance is in force, which, if not refuted, will support a decree for specific performance of a contract to deliver a marketable title. The facts in *Wilson v. Shasta Oil Co.*, 171 Okla. 467, 43 P.2d 769 (1935), disclose that the Court only held that proof to establish marketability cannot be shown by affidavit of nondevelopment. *Beatty v. Baxter*, 208 Okla. 686, 258 P.2d 626 (1953), is deemed not to affect *prima facie* marketability as provided for in the statute.

Note: This standard does not apply to Osage County, where oil and gas operations are not under the control and supervision of the Corporation Commission.

Caveat: The Corporation Commission has been known to issue clear certificates of non-development when, in fact, a well has been drilled and not plugged; therefore, the cautious attorney will also advise his clients to satisfy themselves there is no well nor production upon any of said property and that the lease in not being kept alive by in lieu royalty payments or production not reported to the Corporation Commission. The examiner should also be aware that the documents evidencing spacing or unitization may either be unrecorded or only appear in the records of the Corporation Commission.

History: Adopted as G, October 31, 1947, 18 O.B.A.J. 1750, 1751 (1947); became 10 on renumbering, 19 O.B.A.J. 223, 225 (1948), at which time the Note was added. The standard was amended, November 18, 1954, 1954 Proceedings of the Annual Meeting of the Oklahoma Bar Association at 91-92 (see also 177) by adding the words, "or a mineral or royalty conveyance." The form of the motion did not include amendment to the comment. Therefore, only the two sentences beginning, "By said act," and concluding, "an affidavit of nondevelopment," of the Comment as printed above had been officially adopted prior to 1962.

The 1962 Real Property Committee recommended that the first two sentences and the last sentence of the comment as it appears above also be officially adopted, see Recommendation (7), 33 O.B.A.J. 2157, 2183 (1962). This recommendation was adopted by the Real Property Section and the House of Delegates, see *id.* at 2470.

The 1980 Title Examination Standards Committee of the Real Property Section recommended that the Caveat be added, 51 O.B.A.J. 2726 (1980). The recommendation was approved by the Real Property Section, December 3, 1980, and adopted by the House of Delegates, December 5, 1980.

This standard was further amended December 3, 1982. The amendment was proposed by Report of 1982 Title Examination Standards Committee, 53 O.B.A.J. 2731-32 (1980), approved by Real Property Section, December 2, 1982, and then adopted by the House of Delegates.

The report of the 1987 Title Standards Committee recommended amending the body of the standard and the "Caveat", 58 O.B.A.J. 2839-40 (1987). The Real Property Section approved the recommendation November 12, 1987, and the House of Delegates adopted it on November 13, 1987. The amendment added the words "reflecting no production and no exceptions" to the first sentence of the body of the standard and the words "clear" and "therefore" to the first sentence of the "Caveat". The amendment added the last sentence of the "Caveat" also.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

there is production, has in fact expired. The mechanism is the use of a certification of the fact of non-development of a lease tract by a knowledgeable third party, namely the Corporation Commission. Title 17, Sections 167 and 168 of the Oklahoma Statutes establish that such certificate constitutes prima facie evidence of the actual state of production.[21]

2. Practicalities

Standard 4.2 is more helpful in curing title than in the initial examination by the title examiner. Usually, not enough information is provided in the abstract to cover the situations most often encountered. An examiner is likely to see many old oil and gas leases whose primary terms have expired in the absence of production. Standard 4.2 can be helpful in determining whether these leases may create a cloud on title. However, caution must be used because many times these leases cover large tracts of lands, requiring the abstracter to include a certificate of non-development for all the lands in the leases and any other lands spaced or unitized with those lands. The abstracter seldom gives enough information for the use of Standard 4.2 with old leases.

In regard to more current oil and gas leases whose primary terms have expired in the absence of production, the cautious approach would be to allow time between the expiration date of the lease and the effective date of the certificate of non-development. Close attention should be paid both to lease terms that would permit the lessee to complete the drilling of a well that was commenced during the primary term and to other lease terms that may excuse delayed drilling. Subsequent top leases may be one excuse for delay of drilling on the original lease.

The practical approach is to provide the client a list comprised of all unreleased oil and gas leases, with complete legal description. It can be a waste of time to chain old oil and gas leases to determine a list of current owners when the client intends to use Standard 4.2 and obtain a certificate of non-development instead of acquiring releases from those current owners. As a practical matter, once it becomes apparent that there are a number of old leases that have not been released, or an inordinate amount of time is being spent on the chaining of their ownership, it may be wise to make one general requirement covering all of these leases, specifying the actual descriptions necessary to be covered by certificates of non-development, cautioning the client that additional lands spaced or unitized must be included.

21. OKLA. STAT. tit. 17, §§ 167-68 (Supp. 1988).

There is an important caveat to Standard 4.2. The title examiner should advise the client that the Oklahoma Corporation Commission records can be incorrect. Therefore, the client should make inquiry to acquire assurance that there is no production on the lands, no royalty payments being made in lieu of production, and that the possession affidavits of the lands include existing oil and gas wells.

D. *Standard 6.1. Defects in or Omission of Acknowledgments (adopted 1981; last amended 1988)*

> With respect to instruments relating to interests in real estate:
>
> A. The validity of such instruments as between the parties thereto is not dependent upon acknowledgments, 16 O.S.A. § 15.
>
> B. As against subsequent purchasers for value, in the absence of other notice to such purchasers, such instruments are not valid unless acknowledged and recorded, except as provided in C and D herein, 16 O.S.A. § 15.
>
> C. Such an instrument containing an acknowledgment which is defective in form shall be considered valid notwithstanding such defect, and shall not be deemed to impair marketability, provided such instrument has been recorded for a period of not less than five (5) years, 16 O.S.A. § 39a.
>
> D. Such an instrument which has not been acknowledged or which contains an acknowledgment which is defective in some manner other than in form shall be considered valid notwithstanding such omission or defect, and shall not be deemed to impair marketability, provided such instrument has been recorded for a period of not less than ten (10) years, 16 O.S.A. § 27a.[22]

1. Background

Standard 6.1 summarizes existing statutes concerning acknowledgments. Such statutes declare that acknowledgments are not necessary to the validity of instruments between the parties, and they make instruments with defective or omitted acknowledgments valid for constructive notice purposes after they have been of record for several years. Formerly, the curative periods were five years if the form was defective and ten years if the facts were defective or if the acknowledgment itself was

22. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 6.1 state:

> History: Adopted December 4, 1981. Proposed by Report of the 1981 Title Examination Standards Committee, 52 O.B.A.J. 2723, 2724 (1981). Approved by Real Property Section and adopted by House of Delegates, 53 O.B.A.J. 257-58 (1982). The Title Examination Standard which, prior to December 4, 1981, bore the number 6.1 has been renumbered 2.3.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

omitted in part or in full. As of November 1, 1988, both kinds of defects are cured after the document is of record for five years.[23]

It should be noted that at least a few practicing real property attorneys have taken the position that absent estoppel or other arguments an acknowledgment is necessary to the validity of a corporate conveyance as between the parties. The support for this position is derived from a combination of the language in Sections 15, 92, and 95 of Title 16 of the Oklahoma Statutes and the Oklahoma Supreme Court case of *Bentley v. Zelma Oil Co.*[24] The introductory language of Section 15 states that "[e]xcept as hereinafter provided, no acknowledgment or recording shall be necessary to the validity of any deed."[25] Section 92 provides that every instrument affecting real estate and acknowledged by a corporation shall be valid.[26] Section 95 requires that every deed executed by a corporation must be acknowledged by the officer or person signing for the corporation.[27] In *Bentley v. Zelma Oil Co.*, the court held that a contract from a corporation which affected real estate was invalid because it was not acknowledged in substantial compliance with what is now Section 95.[28]

2. Practicalities

Standard 6.1 can save the title examiner time and allows title to

23. OKLA. STAT. tit. 16, § 15 (1981); OKLA. STAT. tit. 16, § 27a (1981) *amended by* OKLA. STAT. tit 16, § 27a (Supp. 1988); OKLA. STAT. tit. 16, § 39a (1981).

24. 76 Okla. 116, 184 P. 131 (1919).

25. OKLA. STAT. tit. 16, § 15 (1981). Section 15 states:

> *Except as hereinabove provided, no acknowledgment or recording shall be necessary to the validity of any deed,* mortgage, or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lease or other instrument relating to real estate other than a lease for a period not exceeding one (1) year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided.

Id. (emphasis added).

26. OKLA. STAT. tit. 16, § 92 (1981). Section 92 provides:

> *Every instrument* affecting real estate or authorizing the execution of any deed, mortgage or other instrument relating thereto, executed and *acknowledged by a corporation* or its attorney-in-fact in substantial compliance with this chapter, *shall be valid* and binding upon the grantor, notwithstanding any ommission or irregularity in the proceedings of such corporation or any of its officers or members, and without reference to any provision in its constitution or bylaws.

Id. (emphasis added).

27. OKLA. STAT. tit. 16, § 95 (1981). Section 95 states:

> *Every deed,* or other instrument affecting real estate, *executed by a corporation, must be acknowledged by the officer or person subscribing the name of the corporation thereto.*

Id. (emphasis added).

28. Bentley v. Zelma Oil Co., 76 Okla. 116, 126, 184 P. 131, 141 (1919). *See generally* A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORMS - PRACTICE (1987).

improve with the passage of time. From a practical standpoint, defects that occur that are not covered by the Standards are noted and correction instruments are requested. The problem of intervening purchasers must be dealt with on a case-by-case basis, but normally, the practical approach is to assume that the subsequent purchaser accepts as valid the otherwise defectively acknowledged instrument.

E. *Standard 6.2. Omissions and Inconsistencies in Instruments and Acknowledgments (adopted 1947; last amended 1961)*

> Omission of the date of execution from a conveyance or other instrument affecting the title does not, in itself, impair marketability. Even if the date of execution is of peculiar significance, an undated instrument will be presumed to have been timely executed if the dates of acknowledgment and recordation, and other circumstances of record, support that presumption.
>
> An acknowledgment taken by a notary public in another state which does not show the expiration of the notary's commission is not invalid for that reason.
>
> Inconsistencies in recitals or indications of dates, as between dates of execution, attestation, acknowledgment or recordation, do not, in themselves, impair marketability. Absent a peculiar significance of one of the dates, a proper sequence of formalities will be presumed notwithstanding such inconsistencies.[29]

29. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 6.2 state:

Authority: R. & C. Patton, Titles §§ 350, 353, 359 & 364 (2d ed. 1957); P. Basye, Clearing Land Titles §§ 233-236 & 247-249 (1953); 26 C.J.S., *Deeds* §§ 22a. & f., & 53a; May v. Archer, 302 P.2d 768 (Okla. 1956); Maynard v. Hustead, 185 Okla. 20, 90 P.2d 30 (1939); Scott v. Scott, 111 Okla. 96, 238 P. 468 (1925).

Vol. 1 C.J.S. *Acknowledgments* § 876; Annot., 29 A.L.R. 980 (1928); Kansas City & S.E. Ry. Co. v. Kansas City & S.W. Ry. Co., 129 Mo. 62, 31 S.W. 451 (1895); Sheridan County v. McKinney, 79 Neb. 220, 112 N.W. 329 (1907); (See also acknowledgment curative statutes).

Comment: An indication of the date of execution is not essential for any purpose. It is a recital, like other recitals: important, if the date is in issue; helpful, in any case; presumptively correct, but subject to rebuttal or explanation. The same is true of the date of attestation and, generally, of acknowledgment. The only crucial date, that of delivery, is not normally found in the instrument. Hence, omission of the date from one of an ordinary series of conveyances may be disregarded. Even though a special importance attaches to the date of execution, as in the case of a power of attorney, a presumption of timely execution (e.g., in proper sequence in relation to other instruments) should be indulged if supported by other dates and circumstances of record.

As recitals of dates may be omitted or explained, are notoriously inaccurate and are more generally in error than are the actual sequences of formalities, inconsistencies in the indicated dates of formalities (e.g., acknowledgment dated prior to execution: execution dated subsequent to indicated date of recordation) should be disregarded. Further, the inconsistency or impossibility of a recited date should not be regarded as vitiating the particular formality involved. An act curative of the formality will eliminate any question as to its date. If, however, under the circumstances indicated by the record, a peculiar significance attaches to any of the dates (e.g., priorities; important presumption), inconsistency or impossibility should not be disregarded.

1. Background

In the absence of an expressed delay set out on the face of the document, the date of delivery of a conveyance to the grantee is the effective date of the instrument. As stated in *May v. Archer*, "a deed, in the absence of a contrary statutory position, takes effect from the date of its delivery, not from the time of its record or date, or signing and acknowledgement."[30] Therefore, errors in other dates recited on the face of an instrument, such as the execution or acknowledgment, usually have no effect on the marketability of the title.

2. Practicalities

Standard 6.2 provides comfort to the examiner so that he does not get too excited over the sequence of events where it appears an instrument was dated after it was acknowledged. It is not uncommon for a date to have been omitted either on the instrument or the acknowledgment. Standard 6.2 states that even if the date of execution is of peculiar significance, an undated instrument will be presumed to have been timely executed if the date of acknowledgment and recordation support that presumption.

The third paragraph of the Standard involves inconsistencies in the recitals on instruments. Absent a peculiar significance of one of the dates, a proper sequence of formalities will be presumed notwithstanding such inconsistencies.

The comments following the Standard are helpful in putting the "date" issue in proper perspective. The date of execution is seen as a recital and presumptively correct, subject to rebuttal or correction. The same is true of the attestation and the acknowledgment. The only crucial date is the date of delivery, which is never shown on the instrument.

F. *Standard 7.1. Marital Interests: Definition, Applicability of Standards; Bar or Presumption of Their Non-Existence (adopted 1947; last amended 1984)*

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

History: Second paragraph of standard and second paragraph of citations adopted as B, October 31, 1947, 18 O.B.A.J. 1750 (1947); became 6 on renumbering, 19 O.B.A.J. 223, 224 (1948); enlarged and adopted as 6.2, December 2, 1961, 32 O.B.A.J. 2280 (1961); printed, *id.* at 1866-67, 1921-22, 1970-71 & 2030-31; *see also id.* at 1425-26.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

30. May v. Archer, 302 P.2d 768, 771 (Okla. 1956) (quoting 26 C.J.S. Deeds § 53(a)).

ability to convey or encumber the homestead and the protections afforded to the landowner's spouse therein.

Severed minerals cannot be impressed with homestead character and therefore, the standards contained in this chapter are inapplicable to instruments relating solely to previously severed mineral interests.

Marketability of title is not impaired by the possibility of an outstanding marital interest in the spouse of any former owner whose title has passed by instrument or instruments which have been of record in the office of the county clerk of the county in which the property is located for not less than ten (10) years after the date of recording, where no legal action shall have been instituted during said ten (10) year period in any court of record having jurisdiction, seeking to cancel, avoid or invalidate such instrument or instruments on the ground or grounds that the property constituted the homestead of the party or parties involved.[31]

The Oklahoma Constitution[32] and Section 4 of Title 16 of the Oklahoma Statutes[33] protect family homestead by restricting the record

31. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 7.1 state:

Authority: 16 O.S.A. § 4.

Comment: See Title Examination Standard 21.1 as to use of powers of attorney.

History: Adopted as A., October 31, 1947, 18 O.B.A.J. 1750 (1947); became 7 on renumbering in 1948, 19 O.B.A.J. 224 (1948). An amended standard, proposed by the 1970 Real Property Committee's Supplemental Report as Exhibit A, 41 O.B.A.J. 2676 (1970) was approved by the Real Property Section on December 3, 1970, and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706 (1971). It substantially modifies the previous standard of the same number. The Comment was added on the recommendation of the 1983 Title Examination Standards Committee, see Committee Report, 54 O.B.J. 2379 (1983), approved by the Real Property Section, November 3, 1983, and adopted by the House of Delegates, November 4, 1983.

The first two paragraphs were proposed as additions by the Report of the Title Examination Standards Committee, 55 O.B.A.J. 1871 (1984) and were approved by the Real Property Section, November 1, 1984, and adopted by the House of Delegates, November 2, 1984.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

32. OKLA. CONST. art. XII, § 2. Section 2 provides:

The homestead of the family shall be, and is hereby protected from forced sale for the payments of debts, except for the purchase money therefor or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon; *nor shall the owner, if married, sell the homestead without the consent of his or her spouse, given in such manner as may be prescribed by law; Provided, Nothing in this article shall prohibit any person from mortgaging his homestead, the spouse, if any, joining therein;* nor prevent the sale thereof on foreclosure to satisfy any such mortgage.

Id. (emphasis added).

33. Okla. Stat. tit. 16, § 4 (Supp. 1986). Section 4 states:

No deed, mortgage, or conveyance of real estate or any interest in real estate, other than a lease for a period not to exceed one (1) year, shall be valid unless in writing and subscribed by the grantors. *No deed, mortgage, or contract affecting the homestead exempt by law,* except a lease for a period not exceeding one (1) year, *shall be valid unless in writing and subscribed by both husband and wife, if both are living and not divorced, or legally separated, except as otherwise provided for by law.* Nonjoinder of the spouse shall not invalidate the purchase of a home with mortgage loan insurance furnished by the Veteran's Administration or written contracts and real estate mortgages executed by the spouse of a person

owner's right to convey said homestead. During the first ten years that an instrument is recorded, close attention is given to potential homestead restrictions; after ten years, the problem completely disappears if no legal action has been instituted seeking to cancel, avoid, or invalidate the conveyance. Any instrument which has been recorded less than ten years should be examined closely for the consideration of the marital interest.

If a grantor, mortgagor, or lessor owns a surface interest in the tract of land being conveyed, mortgaged, or leased, the marital status should be noted and the instrument should be executed by the spouse if married. This is true even if the instrument being executed is an oil and gas lease, a mineral deed, or another kind of instrument not directly affecting the surface.

G. *Standard 7.2. Marital Interests and Marketable Title (adopted 1983; last amended 1986)*

> Except as otherwise provided in Standard 7.1, no deed, mortgage or other conveyance by an individual grantor shall be approved as sufficient to vest marketable title in the grantee unless:
>
> A. The body of the instrument contains the grantor's recitation to the effect that the individual grantor is unmarried;
>
> or
>
> B. An affidavit made and recorded pursuant to 16 O.S.A. § 82 recites that the individual grantor was unmarried at the date of such conveyance;
>
> or
>
> C. The individual grantor's spouse, identified as such in the body of the instrument, subscribes the instrument as a grantor;
>
> or
>
> D. The grantee is the spouse of the individual grantor and the fact is recited by the grantor in the body of the instrument.[34]

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who is certified by the United States Department of Defense to be a prisoner of war or missing in action. *A deed affecting the homestead shall be valid without the signature of the spouse of the grantor, and the spouse shall be deemed to have consented thereto, when said deed has been recorded in the office of the county clerk of the county in which the real estate is located for a period of ten (10) years prior to a date six (6) months after May 25, 1953, and thereafter when the same shall have been so recorded for a period of ten (10) years, and no action shall have been instituted within said time in any court of record having jurisdiction seeking to cancel, avoid, or invalidate such deed by reason of the alleged homestead character of the real estate at the time of such conveyance.*

Id. (emphasis added).

34. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 7.2 state:

> Comment: There is no question that an instrument relating to the homestead is void unless subscribed by both husband and wife. The word "void" should be emphasized. *Grenard v. McMahan*, 441 P.2d 950 (Okla. 1968). It is also settled that husband and wife must execute the same instrument, separately executed separate instruments being both void, *Thomas v. James*, 84 Okla. 91, 202 P. 499 (1921). Joinder by husband and wife must

1. Background

The Oklahoma Constitution and Statutes[35] clearly prohibit the marital homestead from being conveyed without the joinder of both spouses on the same instrument. In fact, a conveyance without such joinder is void according to case law in Oklahoma.[36]

Since the homestead nature of a tract of land cannot be determined by any recordable means other than a lawsuit, it is necessary to have a recital of marital status and joinder of spouse accompanying every conveyance, except for a conveyance of previously severed minerals. Therefore, from a title examination standpoint, the authority granted under Title 16, Section 13 of the Oklahoma Statutes, which allows a spouse to

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be required in all cases due to the impossiblity 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.A. §§ 4, 6, 7 and Okla. Const. art. XII § 2. It is essential that the distinction between a *valid* conveyance and a conveyance vesting *marketable title* be made when consulting this standard. See Title Examination Standard 4.1.

Another rather settled point is that one may not rely upon recitations, either in the instrument or in a separate affidavit, to the effect that the property was not in fact homestead. Such a recitation by the grantor may be strong evidence when the issue is litigated, but cannot be relied upon for the purpose of establishing marketability, *Hensley v. Fletcher*, 172 Okla. 19, 44 P.2d 63 (1935).

Although the distinction may seem tenuous, the examiner may rely upon the grantor's recitation to the effect that he is unmarried. This may have its foundation in *Payne v. Allen*, 178 Okla. 328, 62 P.2d 1227 (1936), wherein the Court in its syllabus said, "the recitation . . . *is conclusive . . . in the absence of proof to the contrary.*" (Emphasis supplied.) Perhaps the recitation of one's marital status is a recital of that person's identity, see Title Examination Standard 5.3. Or perhaps this recitation must be relied upon due to the lack of any alternative.

Caveat: The recitation may not be relied upon if, upon "proper inquiry," the purchaser could have determined otherwise, *Keel v. Jones*, 413 P.2d 549 (Okla. 1966).

It is not clear whether or not the spouse of the individual owner/grantor must be named in the granting clause as a grantor. Until the matter is clarified, the title examiner must so require. The case of *Melson v. Sneed*, 188 Okla. 388, 109 P.2d 509 (1940), so "assumed" but specifically did not so "decide".

Definitions of the word "subscribe" may be found in various sources, but the cases seem to uphold or invalidate instruments because husband and wife did or did not "sign" or "join", without distinguishing between the two words or reconciling them with the word "subscribe". See *Atkinson v. Barr*, 428 P.2d 316 (Okla. 1967); *Grenard v. McMahan*, 441 P.2d 950 (Okla. 1968).

One may convey to his spouse without the grantee/spouse's joinder as a grantor, but prudence would dictate that the grantor/spouse identify himself in the body of the deed as the spouse of the grantee/spouse. This would appear to be a reliable recital and comparable with a recital by a grantor that he is unmarried. See *Brooks v. Butler*, 184 Okla. 414, 87 P.2d 1092 (1939) and Title Examination Standard 5.3.

History: Adopted, November 4, 1983, by House of Delegates on recommendation of the 1983 Committee on Title Examination Standards, 54 O.B.A.J. 2379-80 (1983), and approval of the Real Property Section, November 3, 1983. Section B added to the standard by recommendation in the Report of the 1986 Title Examination Standards Committee, 57 O.B.A.J. 2677-78 (1986), approval of the Real Property Section, November 20, 1986, and adoption by the House of Delegates, November 21, 1986. See "Comment" to Standard 3.3. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

35. *See supra* notes 32-33 and accompanying text.

36. Grenard v. McMahan, 441 P.2d 950 (Okla. 1968).

convey real estate, other than homestead, belonging to him or her without joinder of the other spouse in the conveyance is rendered useless.[37]

The provisions of Title 16, Sections 6 and 7 of the Oklahoma Statutes, which allow conveyance of the homestead by one of the spouses if abandoned for a year or if the non-joining spouse is incapacitated, are similarly useless in the absence of a properly recorded court order.[38]

However, there are three instances where the title examiner may encounter a conveyance without a joinder by both spouses: (1) the grantor is not married (i.e., single, divorced, or widowed); (2) the grantor failed to have the spouse join and the land was not homestead property when conveyed; and (3) the grantee is the "non-joining" spouse. If the grantor is not married, then obviously no spouse can join in the conveyance. While a recital in the conveyance by the grantor that the land is not "homestead" cannot be relied on for marketability purposes,[39] it is generally accepted that there is no alternative to relying on a recital of the grantor that he or she is unmarried. However, any person other than a subsequent innocent purchaser who fails to make reasonable inquiry is charged with notice of a non-joining spouse's claim.[40] If the grantor simply failed to have the other spouse join in the conveyance, a corrective instrument must be executed by both spouses and filed of record. If the grantee is the non-joining spouse, it is self-evident that it would be redundant for the non-joining spouse to join in a conveyance to himself or herself.

Many spouses may not desire to be responsible for a general or limited warranty or other representations made in a conveyance if the title to a parcel of land is owned solely by their spouse. Therefore, it might be appropriate for the language of the conveyance to limit the non-title holder's participation in a conveyance so that it is without representation or warranty but simply conveys their "homestead interest, if any."

2. Practicalities

If there is a defect in this execution, it should be emphasized to the client that a correction deed or ratification of the prior instrument itself

37. OKLA. STAT. tit. 16, § 13 (1981). Section 13 states:

> 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.

Id.

38. OKLA. STAT. tit. 16, §§ 6 (1981), 7 (Supp. 1988).

39. Hensley v. Fletcher, 172 Okla. 19, 21, 44 P.2d 63, 65 (1935).

40. Keel v. Jones, 413 P.2d 549, 552 (Okla. 1966).

will be void unless the husband and wife execute the same instrument to correct the defective instrument.

Types of conveyances which are acceptable include the following: (a) a conveyance executed by husband and wife with a recitation that they are husband and wife; (b) a conveyance executed by John Doe with a recitation that John Doe is single or unmarried; (c) a conveyance executed by John Doe without recitation, followed by an affidavit properly executed and recorded reciting that the individual grantor was unmarried at the date of such conveyance; and (d) a conveyance where the grantee is the spouse of the individual grantor and that fact is recited by the grantor in the body of the instrument.

Particular situations which are not acceptable include the following: (a) a conveyance from "Mary Smith, dealing in her sole and separate property"; (b) a conveyance from "John Doe, a married man"; (c) a conveyance from "John Doe, a married man, dealing in his sole and separate property"; (d) a conveyance from "John Doe," with further recitation that the property is not the homestead of the grantor; and (e) a conveyance from "John Doe and Mary Doe," but it is not recited that they are husband and wife.

The situation that causes the most trouble for title examiners is when the grantor was aware of the possible homestead restriction and has included words on the instrument that the property "is not the homestead property" or "is the grantor's sole and separate property." The requirement that the joinder of the spouse is necessary is usually not believed. However, the comment to Standard 7.2 makes it clear that while such a recitation may be strong evidence when the issue is litigated, it cannot be relied upon for the purpose of establishing marketability.

As a practical matter, attention should be given to the caveat regarding the grantor's recitation that he is unmarried. The caveat states: the recitation may not be relied upon if, upon "proper inquiry," the purchaser could have determined otherwise.[41] If this caveat is cautioning the title examiner to do a "due diligence" inquiry to determine if the grantor is in fact unmarried, subparagraphs A and B of Standard 7.2 will lose their effectiveness. More likely, it means that if the abstract itself includes evidence that the grantor was in fact married on the date of conveyance, or the logical inference from other instruments was that the grantor was married, the examiner may not blindly rely upon an incorrect recitation.

41. *Id.*

H. *Standard 8.1. Termination of Joint Tenancies and Life Estates (adopted 1981; last amended 1988)*

In the event of the death of a life tenant or joint tenant, the death is a fact which must have been established by one of the following methods and such showing in the abstract shall satisfy the rule on marketability.

A. NON-JUDICIAL TERMINATION OF JOINT TENANCY ESTATES.

Where a joint tenancy estate in real property was held only by a husband and wife, the death of one of the joint tenants and the termination of the joint tenancy thereby may have been evidenced, to the extent permitted by statute from time to time from and after August 16, 1974, by the filing, in the office of the county clerk in the county in which the joint tenancy property is located, of an affidavit meeting the requirements of 58 O.S.A. § 912 in effect at the date of such filing.

Prior to November 1, 1988, such affidavit must have been executed by the surviving joint tenant; on or after November 1, 1988, such affidavit must have been executed by either the surviving joint tenant or the personal representative of such surviving joint tenant.

1. Affidavit filed prior to November 1, 1983. In the case of an affidavit filed prior to November 1, 1983, only a single tract of real property, any portion of which was held as homestead by husband and wife as joint tenants, could be the subject of the affidavit and the following must have been filed with the affidavit:

a. A certified copy of the certificate of death of the joint tenant issued by the State Department of Public Health of Oklahoma or the comparable agency of the place of the death of said joint tenant; and

b. Either:

i. Prior to October 1, 1975. Certification by the County Treasurer of the county wherein the property is located that all or a portion of the tract described was claimed as homestead by the affiant and the decedent in the year of decedent's death, and describing such real property and a complete list of all real property owned by decedent; or

ii. On or after October 1, 1975. Certification by the county assessor of the county wherein the property is located, that all or part of the tract described was allowed as homestead to the affiant and the decedent in the year of decedent's death; and

c. Either:

i. Prior to October 1, 1980. In the case of an affidavit filed before October 1, 1980, a waiver or release of the state estate tax lien, unless made unnecessary by the ten (10) year statute of limitations; or

ii. On or after October 1, 1980. In the case of an affidavit filed on or after October 1, 1980, if such property was included in an estate where taxes were due under the provisions of 68 O.S.A. § 804, a waiver

or release of the estate tax lien by the Oklahoma Tax Commission as to such deceased person and property unless made unnecessary by the ten (10) year statute of limitations; provided that, if no such taxes were due, then neither was required and the affidavit must so state, pursuant to 1980 Okla. Sess. Laws, ch. 286, § 2 and 68 O.S.A. § 815(d) effective October 1, 1980.

2. Affidavit filed on or after November 1, 1983, and prior to November 1, 1984. In the case of an affidavit filed on or after November 1, 1983, and prior to November 1, 1984, any real property which was held by husband and wife as joint tenants could be the subject of the affidavit and the following must have been filed with the affidavit:

a. A certified copy of the certificate of death of the joint tenant issued by the State Department of Health of Oklahoma or the comparable agency of the place of the death of said joint tenant; and,

b. If such property was included in an estate where taxes were due under the provisions of 68 O.S.A. § 804, a waiver or release of the estate tax lien by the Oklahoma Tax Commission as to such deceased person and property unless made unnecessary by the ten (10) year statute of limitations; provided that, if such taxes were not due, the affidavit shall so state, pursuant to 1983 Okla. Sess. Laws, ch. 20 § 1, effective November 1, 1983 and 68 O.S.A. § 815(d).

3. Affidavit filed on or after November 1, 1984. In the case of an affidavit filed on or after November 1, 1984, any real property which was held by husband and wife as joint tenants could be the subject of the affidavit and the following must have been filed with the affidavit:

a. Either:

i. For an Affidavit filed prior to November 1, 1986. A certified copy of the certificate of death of the deceased joint tenant issued by the State Department of Health or the comparable agency of the place of death of said joint tenant; or

ii. For an Affidavit filed on or after November 1, 1986. A certified copy of the certificate of death of the joint tenant issued by the State Department of Public Health of Oklahoma or a court clerk as prescribed in 63 O.S.A. § 1-307 or the comparable agency of the place of the death of said joint tenant. 58 O.S.A. § 912(1) as amended, effective November 1, 1986: and

b. Either:

i. Where death occured prior to November 1, 1984. A waiver or release by the Oklahoma Tax Commission of the estate tax lien must be filed with an affidavit which is *filed* on or after November 1, 1984, with respect to a joint tenant who died *prior* to November 1, 1984, unless such waiver or release is made unnecessary by the ten (10) year statute of limitations, 58 O.S.A. § 912 & 68 O.S.A. § 811(d), both as amended, effective November 1, 1984; or

ii. Where death occured on or after November 1, 1984. No tax

clearance documentation is required, and no recitation regarding estate tax liability need be contained in the affidavit.

Title 58 O.S.A. § 912 is a procedural statute, and an affidavit filed pursuant thereto may be relied upon as evidence of the death of a joint tenant irrespective of the date of death if such statute is otherwise applicable, even though the death may have occured prior to the effective date of 58 O.S.A. § 912; *provided* that the merchantability of the title of the surviving spouse may be impaired by the estate tax lien under the circumstances noted in paragraph 3. b. i. above, unless a waiver or release has been filed, if necessary.

B. JUDICIAL TERMINATION OF JOINT TENANCY ESTATES AND LIFE ESTATES.

In all other instances, the death is a fact which must be judicially determined by any of the following proceedings:

1. By proceeding in the district court as provided in 58 O.S.A. § 911; or

2. In connection with an action brought in any court of record, where the court makes a valid judicial finding of death of the person having the interest as a life tenant or a joint tenant; or

3. With respect only to joint tenancy estates, if the estate of the decedent was probated on other property, by showing the letters testamentary or of administration, 60 O.S.A. § 74.

A waiver or release of the estate tax lien as to such joint tenant or life tenant must be obtained with any of said proceedings, unless the district court in which the estate of the decedent was probated enters an order pursuant to 58 O.S.A. § 282.1, effective October 1, 1980, adjudicating that there is no estate tax liability, or unless made unnecessary by the ten (10) year statute of limitations or by 68 O.S.A. § 811(d), effective November 1, 1984.[42]

1. Background

At the death of a joint tenant or life tenant, there is not a transfer of title to the survivors or remaindermen. Instead, there is an instantaneous extinguishment of any claim of interest by the deceased or their estate

42. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 8.1:

Comment: 68 O.S.A. § 811(d) was amended effective November 1, 1984. The pertinent amendment provides that no estate tax lien shall attach to any property passing to a surviving spouse, either through the estate of the deceased or by joint tenancy. The text of the statute does not clearly make it retroactive to deaths occuring prior to November 1, 1984, and should not be considered to be retroactive at this time. For this reason, it is necessary to obtain estate tax clearances where the deceased joint tenant died prior to November 1, 1984, even though 58 O.S.A. § 912 as amended effective November 1, 1984, makes no such requirement. Such statute may be utilized on or after November 1, 1984, together with the appropriate tax clearances, to terminate a joint tenancy where the deceased joint tenant died prior to November 1, 1984.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

against the subject interest. If title to the land is held in joint tenancy, or as a life estate, the fact that a joint tenant or life tenant has died can be determined by a court.[43]

In an effort to speed up the determination of death of a joint tenant and to reduce the related expenses, an affidavit process has been established by the state legislature. Under this system, an affidavit from the surviving joint tenant which includes a legal description of the interest is filed of record in the local land records. The affidavit process is not applicable to life tenants.

Since the inception of the system, the allowable uses of affidavits has expanded. Originally affidavits were used only when joint tenants were husband and wife and the one tract of property involved was the homestead. Currently affidavits can cover multiple tracts of homestead and non-homestead property as long as title was held by husband and wife.

The format of Standard 8.1 helps distinguish which requirements must be met over the years. By statute, the affidavit is required to have certain informational documents attached before it constitutes satisfactory evidence of a joint tenant's death. The required attachments have always included a certified copy of the death certificate. For a certain period of time, a certification of the homestead nature of the property by the local county treasurer was required. Additionally, in the past a waiver of estate tax, release of estate tax, or a self-serving recital of no estate tax being due was necessary. However, for deaths occurring on or after November 1, 1984, no estate tax can arise on joint tenancy property and, therefore, no documentation or self-serving recital concerning estate tax liability is needed.

The use of self-serving affidavits to render title marketable is a concept which made several members of the Title Examination Standards Committee of the OBA ("Standards Committee") uncomfortable. However, Standard 8.1 was approved in reliance on the express language of Title 58, Section 912 of the Oklahoma Statutes, which provides: "The filing of such documents shall constitute conclusive evidence of the death of such joint tenant and the termination of said joint tenancy. The title of such real estate shall be deemed merchantable unless otherwise defective."[44]

The question has arisen whether anyone other than the surviving joint tenant can sign the subject affidavit. While there is not any case law

43. OKLA. STAT. tit. 58, § 911 (1981).
44. OKLA. STAT. tit. 58, § 912 (Supp. 1988).

in Oklahoma on point, until November 1, 1988, the Standards Committee unofficially suggested that the statute should be interpreted literally with the result that an attorney-in-fact and a personal representative of the "surviving" joint tenant could not exercise this right. However, as of November 1, 1988, authority for allowing the "surviving" joint tenant's personal representative to sign the subject affidavit is expressly granted by Title 58, Section 912 of the Oklahoma Statutes.

2. Practicalities

Careful attention should be given to the diffferent procedures which apply to non-judicial termination of a joint tenancy. Although it is becoming more common, most abstracts do not include the items covered by Standard 8.1. Generally, there are two questions which occur in connection with the termination of a joint tenancy or life estate, namely: (1) Is the person dead? and (2) Is a tax release necessary? Standard 8.1 covers both of these questions. The oil and gas client will usually be willing to accept much less than is required in the title opinion. This is particularly true at the early stages of the leasing and drilling program where almost any evidence of the death of a joint tenant or life tenant will be relied upon for the payment of lease bonuses and/or the allocation of expenses for the drilling of a well.

I. *Standard 9.2. Execution Defects (adopted 1957; last amended 1988)*

> Any corporation deed, mortgage or other instrument affecting real property which has been on record in the county clerk's office for five (5) years or more and which is defective because of: (1) the failure of the proper corporate officer to sign; (2) the absence of the corporate seal; (3) the lack of an acknowledgment; or (4) any defect in the execution, acknowledgment, recording or certificate of recording, should be accepted without requirement. 16 O.S.A. § 27a.
>
> Such instruments recorded less than five (5) years must have the name of the corporation subscribed thereto either by an Attorney in Fact, or by the President or any Vice-President, and, unless executed by an Attorney in Fact, must be atteted by the Secretary, an Assistant Secretary or a Clerk of such corporation, or by the Secretary, an Assistant Secretary, Clerk, Cashier or Assistant Cashier in case of a bank, with the corporate seal attached. 16 O.S.A. §§ 91-94, 6 O.S.A. § 414(F), 6 O.S.A. § 104 and 12 U.S.C.A. § 24 (5) & (6).
>
> The Power of Attorney authorizing an Attorney in Fact to act on behalf of a corporation must be executed and attested in the same manner as a deed or other conveyance, and must be filed in the office of the

County Clerk before the executed instrument becomes effective; provided, however, that any Power of Attorney promulgated by an agency of the Government of the United States shall be deemed sufficiently recorded for purposes of this standard if the promulgation thereof shall be published in the Federal Registry of the Government of the United States and any instrument executed pursuant to said Power of Attorney recites the specific reference to said publication. 16 O.S.A. § 20. A showing of the authority of the board of Directors to execute such instrument is not necessary. 18 O.S.A. §§ 1015, 1016(4) & 1018.

Every Oklahoma corporation has authority to acquire, encumber and sell property subject only to the limitations in Okla. Const. art. XXII, § 2 and 18 O.S.A. § 1020. See 18 O.S.A. § 1016(4).

Any corporation, foreign or domestic, which has conveyed real property by instrument signed, acknowledged, attested and sealed as required in 16 O.S.A. §§ 93-95, and which has received the consideration therefor, cannot assert as a defense its lack of authority to sell said property. 18 O.S.A. § 1018, 16 O.S.A. § 92 and 16 O.S.A. § 11.

An instrument executed by a corporation with its seal attached prior to November 1, 1986, is *prima facie* evidence that such instrument was the act of the corporation, that it was executed and signed by persons who were its officers or agents acting by authority of the board of directors and that the seal is the corporate seal and was affixed by authorized persons. 1947 Okla. Sess. Laws, p. 185, § 242. A corporate instrument executed, attested, sealed and acknowledged in proper form on or after November 1, 1986, should be presumed, in the absence of actual or constructive knowledge to the contrary, to have been duly authorized, signed by authorized officers and affixed with the genuine seal by proper authority, 18 O.S.A. § 1018, R. & C. Patton, Titles §§ 403-404 (2d ed. 1957) and Flick, Abstract and Title Practice § 1292 (2nd ed. 1958).

Such evidence becomes conclusive after five (5) years, 16 O.S.A. § 27a.

A dissolved domestic corporation continues to exist for three (3) years (or a longer period if directed by a district court) for the purpose of winding up its affairs, 18 O.S.A. § 1099.[45]

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45. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 9.2 state:

Comment: It is immaterial from an examiner's standpoint that the corporation acquired real estate by an *ultra vires* act: R. & C. Patton, Titles § 401 (2d ed. 1957).

Comment: The Legislature's repeal in 1986 of 1947 Okla. Sess. Laws, p. 186, § 242 as a part of the complete revision of Title 18 does not appear to have been intended to require thereafter proof of record of corporate and officer authority, etc.

Comment: See Title Examination Standard 6.5 as to documents executed outside the State of Oklahoma.

History: Adopted as 33, December 1959, 30 O.B.A.J. 2091, 2092 (1957). Statutory citation in first group of "Authorities" changed to "6 O.S.A. § 414" from "6 O.S.A. § 108(f)" to reflect statutory amendment, December 3, 1966, Resolution No. 4, 1966 Real Property Committee, 37 O.B.A.J. 2382, 2383 (1966) and adopted by House of Delegates, *id.* at 2538, 2539. Substantial changes in second paragraph of standard recommended by

1. Background

If an instrument relating to real property is executed on behalf of a corporation, there are certain formalities which must be observed in order for the conveyance to be valid and recordable. By statute, the instrument must be signed by an attorney-in-fact or by a president or vice-president.[46] Although the practice varies around the state, it is generally agreed that a person holding the title of "Senior Vice-President" or "Executive Vice-President" is the equivalent of a president or vice-president. It is not universally agreed that an "Assistant Vice-President" is the equivalent of a president or vice-president. However, it should be noted that the language of Section 93 of Title 16 of the Oklahoma Statutes was changed from "a vice president" to "any vice president," effective June 24, 1987.[47]

Unless the instrument is executed by an attorney-in-fact, the statute requires an attestation by a secretary, assistant secretary or clerk of the corporation, or in the case of a bank, by a secretary, assistant secretary, clerk, cashier, or assistant cashier. The corporate seal must also be attached.[48]

Some practicing attorneys think that a conveyance by a corporation must be acknowledged for it to be valid between the parties and to be recordable. Since, according to statute, documents cannot be accepted by the county clerk for filing without an acknowledgment, this omission is not likely to occur.[49]

2. Practicalities

This is another Standard which allows the title to improve with the passage of time. Certain execution defects for instruments which have

1983 Title Examination Standards Committee, 54 O.B.A.J. 2379, 2381-82 (1983), approved by Real Property Section, November 3, 1983, and adopted by House of Delegates, November 4, 1983. The final Comment was added by the Real Property Section before its approval.

In 1986, the Oklahoma Legislature revised Title 18. As a result, the 1987 Title Standards Committee recommended changing many of the statutory citations included in this standard. It was also recommended that the fifth (now sixth) paragraph of the body of the standard be amended to reflect the change in significance of the subject matter of that paragraph prior to and after the 1986 amendments, 58 O.B.A.J. 3839, 2842 (1987). These recommendations were approved by the Real Property Section, November 12, 1987, and adopted by the House of Delegates, November 13, 1987.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

46. OKLA. STAT. tit. 16 § 93 (Supp. 1988).

47. *Id. See generally* A. DURBIN & C. BIXLER, OKLAHOMA REAL ESTATE FORMS PRACTICE (1987).

48. OKLA. STAT. tit. 16, § 94 (1981).

49. *See supra* notes 25-27 and accompanying text.

been on record for more than five years can be accepted without requirement. These defects include the failure of the proper corporate officer to sign, the absence of the corporate seal, the lack of acknowledgment or any defect in the execution, acknowledgment, recording, or certificate of recording. If the instrument has been on record for less than five years, it must adhere strictly to the requirements for execution, attestation, and acknowledgment. Instruments which are defective should be corrected and properly recorded.

A special problem occurs with the execution by an attorney-in-fact. First of all, a power of attorney must be executed and attested in the same manner as any other deed or conveyance and filed in the office of the county clerk before the executed instrument becomes effective. There is not a five-year presumption of validity for an instrument executed by an attorney-in-fact where the power of attorney is not recorded in the county records. There is a minority view that not only must the power of attorney be recorded before the executed instrument becomes effective, but it also must be recorded before the executed instrument is recorded. The minority view stands for the proposition that there is no relation back, and the only proper cure is to have the instrument itself recorded again after the power of attorney is recorded. Finally, as previously mentioned, some attorneys believe that a corporate conveyance must be acknowledged for it to be valid even between the parties. The impact of this will affect operating agreements which typically are not executed and acknowledged in the same manner as a corporate deed.

J. *Standard 9.4. Recital of Identity or Successorship (adopted 1980; last amended 1987)*

> Absent the recording of the certificate required by 18 O.S.A. § 1144, a recital of identity, contained in a title document of record properly executed, attested and sealed by a corporation whose identity is recited or which recites that it is the successor by merger, corporate change of name, or was formerly known by another name, may be relied upon unless there is some reason disclosed of record to doubt the truth of the recital.[50]

50. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 9.4 state:
Authority: 18 O.S.A. § 1144 (effective November 1, 1987) & § 1088.
Comment: While there seems to be no exact precedent for this standard, it is justified as a parallel to Standard 5.3 and as an extension of Standard 9.1.
History: The standard was recommended by the 1980 Title Examination Standards Committee, 51 O.B.A.J. 2726, 2727 (1980). It was approved by the Real Property Section, December 3, 1980, and adopted by the House of Delegates, December 5, 1980. The Authority was added by the Editor of the Title Examination Standards at the suggestion of

1. Background

The Oklahoma General Corporation Act, Section 1088 of Title 18, makes it clear that in the event of merger or consolidation of corporations, all rights and obligations of each corporation shall be vested in the corporation resulting from the merger or consolidation.[51] The language of Section 1088 is substantially the same as its predecessor, Section 1.167, which was repealed upon enactment of the General Corporation Act.[52]

There is no express statutory authority allowing a title examiner to rely on a self-serving recital of successorship in a conveyance. It should be noted that certificates of merger from secretaries of state have often been encountered in abstracts and relied upon by examiners in prior years. However, there is apparently no legal authority allowing an examiner to rely on this certificate giving constructive notice to third parties. However, some authority was granted for the filing of and reliance on certain merger documents, in particular: (1) the affidavit statute was passed in 1985 allowing the filing of affidavits covering the "history of the organization of corporations," and (2) a recent amendment was made, effective November 1, 1987, to the General Corporation Act whereby a certificate of merger or consolidation must be filed in the local land records where the surviving or resulting corporation has title to real property.[53]

2. Practicalities

Standard 9.4 is helpful to the examiner in allowing reliance upon the recital of identity of a corporate successor by merger or corporate change of name in dealing with corporate conveyances. The only warning is that it may be relied upon unless there is some reason disclosed of record to

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Richard Cleverdon, Tulsa, the chairman of the 1980 Title Examination Standards Committee.

As a result of the extensive revision of Title 18 effective November 1, 1986, the report of the 1987 Title Standards Committee recommended the amendment of this standard, 58 O.B.A.J. 2839, 2842-43 (1987). The recommendation was approved by the Real Property Section, November 12, 1987, and adopted by the House of Delegates, November 13, 1987. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

51. OKLA. STAT. tit. 18, § 1088 (Supp. 1988). Section 1088 states that, in the event of a merger or consolidation of corporations:

> [A]ll and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts . . . belonging to each of such corporations shall be vested in the corporation surviving or resulting from such merger or consolidation; . . . all rights of creditors and all liens upon any property of any said constituent corporations shall be preserved unimpaired. . . .

Id.

52. OKLA. STAT. tit. 18, §§ 1001-1144 (Supp. 1988).

53. OKLA. STAT. tit. 18, § 1144 (Supp. 1988).

doubt the truth of the recital. Conveyances which make a recital of identity or successorship can make the opinion less cluttered by a long list of presumptions of corporate identities.

K. *Standard 10.1. Conveyances To and By Partners (adopted 1946; last amended 1966)*

> Under the Uniform Partnership Act, enacted by the 1955 Legislature, which became effective on June 3, 1955, a partnership constitutes a separate entity authorized to take, hold and convey real estate, 54 O.S.A. §§ 208-210. H.B. 698, enacted by the 1965 Legislature, amending Sections 208(3) and 210(1), validates conveyances to and from partnerships executed prior to June 3, 1955, unless such conveyances are invalid for reasons other than lack of legal capacity or because the partnership was not at the time a legal entity.
>
> Such conveyances to a partnership using the partnership firm or trade name as grantee of real property or any interest therein, and conveyances by a partnership in the partnership firm or trade name as grantor of real property or any interest therein held in the partnership firm or trade name, should not be rejected or questioned on the basis that a partnership was not a legal entity having capacity to take or convey title to real property or an interest therein.[54]

1. Background

The legislature has the authority to define whether a fictional "person," such as a corporation, can be treated as a real person. Until June 3, 1955, a partnership was not a separate entity but a group of individuals holding title to real property as individual tenants in common.[55] After June 3, 1955, a partnership can and must hold title in the name of the partnership itself. Absent express restrictions filed of record, any partner can be relied on to validly convey or encumber the title as the agent of all the other partners.[56]

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54. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 10.1 state:
Authority: 54 O.S.A. §§ 208-210.
History: Adopted as 17, November 16, 1946, 17 O.B.A.J. 1729 (1946), printed, *id.* at 1753; became 19 on renumbering in 1948, 19 O.B.A.J. 223, 226 (1948); amended December 8, 1955, 27 O.B.A.J. 176 (1956). Substantially amended December 2, 1965, Resolution No. 8, 1965 Real Property Committee, 36 O.B.A.J. 2094 & 2182 (1965), and Exhibit E, *id.* at 2098 & 2186. Approved by Real Property Section and adopted by House of Delegates, 37 O.B.A.J. 437, 438 (1966).
OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

55. Sanguin v. Wallace, 234 P.2d 394, 397 (Okla. 1951) (citing OKLA. STAT. tit 54, §§ 81, 83 (1941)).

56. OKLA. STAT. tit. 54, §§ 208-10 (1981).

2. Practicalities

Standard 10.1 validates any conveyance to a partnership both before and after the effective date of the statute.

L. *Standard 10.2. Identity of Partners of Fictitious Name Partnership (adopted 1946; last amended 1986)*

> Identity of partners of a fictitious name partnership may be established by reference to the latest certificate of fictitious name partnership filed in the office of the county clerk in the county in which the land is located as of the date of conveyance in the partnership name. If the certificate of fictitious name has not been filed in the county where the land is located, a certified copy of the certificate of fictitious name partnership filed in the office of the county clerk of the county of the principal place of business of the partnership, or a copy of the current articles of partnership, should be examined.[57]

1. Background

Since the names of the members of a fictitious name partnership are not disclosed by the name itself, the title examiner is unable to determine whether the person signing and acknowledging a conveyance of partnership real property is a member of the partnership. The acknowledgment for an individual as an individual must be based on "personal knowledge" or "satisfactory evidence" that "the person appearing before the officer and making the acknowledgment is the person whose true signature is on the instrument."[58] However, it is inadequate to know that "Sally Smith" is really "Sally Smith," if the real question is whether "Sally Smith" is a current general partner of "XYZ, a partnership."

Section 81 of Title 54 of the Oklahoma Statutes requires that every

57. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 10.2 state:

Authority: 54 O.S.A. §§ 81-86.

History: Adopted as 17, November 16, 1946, 17 O.B.A.J. 1729 (1946), printed, *id.* at 1753; became 19 on renumbering in 1948, 19 O.B.A.J. 223, 226 (1948); amended December 8, 1955, 27 O.B.A.J. 176 (1956). Substantially amended December 2, 1965. Resolution No. 8, 1965 Real Property Committee, 36 O.B.A.J. 2094 & 2182 (1965), and Exhibit E, id. at 2098 & 2186. Approved by Real Property Section and adopted by House of Delegates, 37 O.B.A.J. 437, 438 (1966). Further amendments proposed by the 1985 Report of the Title Examination Standards Committee, 56 O.B.J. 2537 (1985), proposal amended by Real Property Section, November 14, 1985, and adopted by House of Delegates, as amended by the Section, November 15, 1985, 57 O.B.J. 5 (1986).

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

58. OKLA. STAT. tit. 49, § 113(A) (Supp. 1988).

fictitious name partnership file a certificate giving the full names and addresses of all members of the partnership together with proof of publication in the county clerk's office of its principal place of business.[59] Any fictitious name partnership failing to make such filing and publication cannot maintain any lawsuit concerning an account or contract entered into in the name of the partnership until such filing and publication is completed. If a fictitious name partnership holds title to real property outside the county where its principal place of business is located, and no certificate has been filed in the county where the property is located, the title examiner will need to get a copy of such certificate from the county clerk where the business is located. Alternatively, the title examiner could obtain a copy of the then-current articles of partnership from the partnership itself, identifying the names of the general partners.

2. Practicalities

Standard 10.2 is useful in advising the client where to find the identity of the partners of a fictitious name partnership when such identity is important to the marketability of title.

M. *Standard 12.5. Money Judgments Filed Against an Oil and Gas Leasehold Interest (adopted 1986; no amendments)*

> The interest vested in the owner of an oil and gas leasehold estate is not real estate within the meaning of 12 O.S.A. § 706; therefore, a money judgment filed in the office of the county clerk of the county in which the oil and gas leasehold is located does not create a lien on said oil and gas leasehold.[60]

1. Background

In *First National Bank v. Dunlap*,[61] the Oklahoma Supreme Court

59. OKLA. STAT. tit. 54, § 81 (Supp. 1988). Section 81 provides:

> [E]very partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file for recording with the county clerk of the county or subdivision in which its principal place of business is stated, a certificate, stating the names in full of all the members of such partnership, and their places of residence, together with proof of publication . . . .

Id.

60. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 12.5 state:

> Authority: First National Bank of Healdton v. Dunlap, 122 Okla. 288 (1927); Hinds v. Phillips Petroleum Company, 591 P.2d 697 (Okla. 1979).
>
> History: This standard was recommended by the 1986 Report of the Title Examination Standards Committee, 57 O.B.J. 2677, 2682 (1986). It was approved by the Real Property Section, November 20, 1986, and adopted by the House of Delegates, November 21, 1986.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

61. 122 Okla. 288, 254 P. 729 (1927).

interpreted the term "real estate," used in what is now Title 12, Section 706 of the Oklahoma Statutes,[62] to exclude oil and gas leases. The court held that although an oil and gas lease is an interest or estate in real estate, it is not real estate itself and therefore not included in the judgment creditor's lien under the statute.[63] In 1979, the Oklahoma Supreme Court reaffirmed this position in *Hinds v. Phillips Petroleum Co.*[64] The court summarized *First National Bank v. Dunlap* by stating, "A judgment lien will not attach to an oil and gas lease."[65]

2. Practicalities

Standard 12.5, adopted in 1986, brought the cases cited above to the attention of title examiners. It is now well settled that a money judgment filed with the county clerk does not create a lien on an oil and gas leasehold. Therefore, it is not necessary to use the same approach against a leasehold estate as would be used against a surface or mineral interest owner in the property. Until an actual execution is made on the leasehold estate, the estate could be sold to an owner with knowledge of the money judgment prior to the institution of an execution for sale. This is particularly useful in the Purchase Opinion, where a money judgment is filed against the seller's name.

N. *Standard 13.8. Unenforceable Mortgages and Marketable Title (adopted 1980; last amended 1986)*

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

B. A mortgage, contract for deed or deed of trust showing on its

62. OKLA. STAT. tit. 12, § 706 (Supp. 1987).

63. First National Bank v. Dunlap, 122 Okla. 288, 290, 254 P. 729, 732 (1927). The court stated:

> But the statute [§ 690 C.O.S. 1921] provides that the judgment creditor shall have a lien upon "real estate" owned by the judgment debtor in the county. The plaintiff in error would have this court go to the extent of holding that all and every kind of estate recognized in the law, which one, individual or corporate, may have in real property is itself real estate within the meaning of said section. While unquestionably such an oil and gas lease creates an interest or an estate in the realty, that interest or estate is not "real estate" in the sense in which the said section 690, supra, uses this terminology. It would unquestionably be within the power of the legislative body to make a judgment a lien upon every conceivable estate recognized by the law as capable of being owned by natural as well as coporate persons. But the statute relied upon as fixing the lien upon the interest of the defendant Dunlap in the realty created by the oil and gas lease does not go to that extent.

Id.

64. 591 P.2d 697 (Okla. 1979).

65. *Id.* at 699 n.5.

face that it secures a debt payable on demand shall be deemed to be due on the date of its execution. Thus, the date of execution shall be deemed to be "the date of the last maturing obligation" for the purpose of 46 O.S.A. § 301, unless an extension has been filed of record pursuant to such statute.[66]

1. Background

In order to avoid costly legal actions to extinguish ancient unreleased mortgages, the legislature enacted Title 46, Section 301 of the Oklahoma Statutes.[67] Absent contrary notice as provided in the statute, Section 301 allows title examiners to ignore recorded mortgages with expressed maturity dates on their faces if they are over ten years past such maturity date. Recorded mortgages with no expressed maturity date can be ignored if they have been recorded for over thirty years at the time of examination.

A question by a title examiner about the extinguishment date for mortgages relating to "demand notes" under Title 46, Section 301 of the Oklahoma Statutes[68] led to a discussion of what date is "the date of the last maturing obligation" under that statute. Title 12A, Section 3-122(1)(b) of the Oklahoma Statutes provides that in the case of a demand instrument, a cause of action against a maker or acceptor accrues upon its date, or if no date is stated, on the date issued.[69] Therefore, Standard 13.8 was revised to show that a mortgage relating to a demand note is extinguished ten years after its execution date.

2. Practicalities

Standard 13.8 is probably more practically useful than any other Standard. A base abstract will normally include a patent, a few deeds, some oil and gas leases, easements, and mortgages and releases with many potential defects in relation thereto. According to Title 46, Section

66. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 13.8 state:
Authority: 12A O.S.A. § 3-122(2).
History: The standard was recommended by the 1980 Title Examination Standards Committee, 51 O.B.J. 2726, 2727 (1980). It was approved by the Real Property Section, December 3, 1980, and adopted by the House of Delegates, December 5, 1980. The second paragraph of the standard was recommended by the Report of the 1986 Title Examination Standards Committee, 57 O.B.J. 2677, 2682 (1986). It was approved by the Real Property Section, November 20, 1986, and adopted by the House of Delegates, November 21, 1986.
OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

67. OKLA. STAT. tit. 46, § 301 (Supp. 1988).

68. *Id.*

69. OKLA. STAT. tit. 12A, § 3-122(1)(b) (1981).

301 of the Oklahoma Statutes,[70] many of these mortgages will be unenforceable.

However, one cautionary statement is necessary. Old mortgages are usually shown only in abstracted versions without the due date, although it is not stated that the due date is not shown on the actual instrument. For example, if you examine an abstracted version of a 1955 mortgage and no due date is shown by the abstracter, the examiner cannot be sure that the instrument itself actually contained no due date unless the abstracter specifically states such in the abstracted version. If the 1955 mortgage does not contain a due date, the mortgage may be ignored in 1985. If the due date of 1985 appears on the instrument but is not shown by the abstracter, the mortgage cannot be ignored until 1995 unless a copy of the mortgage is acquired and the due date or absence thereof has been determined.

O. *Standards 18.1 - 18.6. Simplification of Land Titles Act (adopted 1962; last amended 1983)*

18.1. REMEDIAL EFFECT

The Simplication of Land Titles Act is remedial in character and should be relied upon with respect to such claims or imperfections of title as fall within its scope.[71]

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70. OKLA. STAT. tit. 46, § 301 (Supp. 1988).

71. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 18.1 state:

Authority: Lane v. Travelers Ins. Co., 230 Iowa 973, 299 N.W. 553 (1941); Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800, 71 A.L.R.2d 816 (1957); L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 271 (1960); P. Basye, Clearing Land Titles § 374 (1953), & § 182 (1962 Pock. Part); R. & C. Patton, Titles § 563 (2d ed. 1957); Ashabranner, *An Introduction to Oklahoma's First Comprehensive Land Title Simplification Law*, 14 Okla. L. Rev. 516 (1961).

Comment: 1. The Simplification of Land Titles Act is similar to a recording statute. It is similar to the marketable title acts adopted in Michigan, Minnesota, Iowa and other states, which have been held constitutional on the grounds that the legislature, which has the power to pass recording stautes originally, can amend or alter those statutes and require recording or the filing of a notice of claim to give notice of existing interests, and can extinguish claims of those who fail to re-record, *Lane v. Travelers Ins. Co.*, 230 Iowa 973, 299 N.W. 553 (1941); *Wichelman v. Messner*, 250 Minn. 88, 83 N.W.2d 800, 71 A.L.R.2d 816 (1957); L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation, 271 (1960); P. Basye, Clearing Land Titles, § 374 (1953), & § 186 (2d ed. 1970); R. & C. Patton, Titles § 563 (2d ed. 1957). In many situations the Simplification Act operates against defects made in the past by parties trying to complete the transaction correctly but who failed to do so in every detail. It will give effect to the intentions of the parties which were bona fide. Usually a full consideration was paid. To this extent the results will be those of a curative statute. A similar curative statute in Oklahoma, 16 O.S.A. § 4, has been held constitutional, *Saak v. Hicks*, 321 P.2d 425 (Okla. 1958). In a few situations the Act will operate against defects considered jurisdictional. In the past, a statute of limitations, with its requirements of adverse possession, followed by a suit to quiet title was considered necessary to eliminate jurisdictional defects. The Simplification Act provides a new and additional method by invalidating the claim and creating marketable title unless claimant

18.2. PROTECTION AFFORDED BY THE ACT

The Simplification of Land Titles Act 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, executor's, or administrator'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.A. § 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 named as a defendant in the judgment preceding the sheriff's or marshal's deed, or

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files notice of claim within the time provided in the act (or is in actual possession of the land). Since the Act protects the rights of claimants in actual possession as against a purchaser, the reasoning in *Williams v. Bailey* 268 P.2d 868 (Okla. 1954), reading a requirement for adverse possession into the tax recording statute, is not applicable.

2. Where a seller does not have a marketable title due to defects for which the Act affords protection to a "purchaser for value," and no notice has been filed as required by the Act, the attorney for the purchaser may advise the purchaser that a purchase for value will afford protection of the Act and that such a purchaser will acquire a valid and marketable title, provided no one is in possession claiming adversely to the seller.

History: The 1962 Real Property Committee Report recommended the adoption of this standard, see Recommendation (2), 33 O.B.A.J. 2157 (1962) and Exhibit B, *id.* at 2162. Approved by Real Property Section and House of Delegates, *id.* at 2469, November 29, 1962.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

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.A. §§ 61-66 or from October 1, 1973, the effective date of 16 O.S.A. § 62 as amended in 1973." The State of Oklahoma and its political subdivisions or a public service corporation or transmission company with facilities installed in, over, across or under the land are deemed to be in possession.[72]

18.3. PURCHASER FOR VALUE

"Purchaser for value" within the meaning of the Simplication of Land Titles Act, refers to one who has paid value in money or money's worth. It does not refer to a gift or transfer involving a nominal consideration.[73]

18.4. CONVEYANCE OF RECORD

"Conveyance of record" within the meaning of the Simplification of Land Titles Act includes a recorded warranty deed, deed, quitclaim deed, mineral deed, mortgage, lease, oil and gas lease, contract of sale, easement, or right-of-way deed or agreement.[74]

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72. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 18.2 state:
Authority: 16 O.S.A. §§ 62 & 66.
History: The 1962 Real Property Committee Report recommended the adoption of this standard, see Recommendation (2), 33 O.B.A.J. 2157 (1962) and Exhibit B, *id.* at 2163. Approved by Real Property Section and House of Delegates, *id.* at 2469, November 29, 1962.
The 1980 Title Examination Standards Committee recommended changes in the standard to reflect the broadening effect made in legislative changes of 1973 and 16 O.S.A. § 62, 51 O.B.J. 2726, 2728. The Real Property Section, on December 3, 1980, made some changes in style but also deleted the word "county" before "court records" in "A.(1)" and added the last sentence in "C." As amended, the standard was approved by the Real Property Section, December 3, 1980, and adopted by the House of Delegates, December 5, 1980.
OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

73. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 18.3 state:
Authority: Noe v. Smith, 67 Okla. 211, 169 P. 1108, L.R.A. 1918C, 435 (1917); Exchange Bank of Perry v. Nichols, 196 Okla. 283, 164 P.2d 867 (1945).
Comment: The title acquired by a "purchaser for value" within the meaning of the Simplification of Land Titles Act will descend or may be devised or transferred without involving "value" and without loss of the benefits of the act.
History: The 1962 Real Property Committee Report recommended the adoption of this standard, see Recommendation (2), 33 O.B.A.J. 2157 (1962) and Exhibit B, *id.* at 2164. Approved by Real Property Section and House of Delegates, *id.* at 2469, November 29, 1962.
OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

74. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 18.4 state:
Authority: 16 O.S.A. § 62(a).
Comment: The definition of a conveyance of record should not be less than the definition of an interest in real estate in 16 O.S.A. § 62(a).
History: The 1962 Real Property Committee Report recommended the adoption of this

18.5. EFFECTIVE DATE OF THE ACT

The Simplification of Land Titles Act became effective October 27, 1961. Notices under the Act required to be filed within one (1) year from the effective date of the act must be filed for record in the county clerk's office in the county or counties where the land is situated on or before October 26, 1962.[75]

18.6. ABSTRACTING

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

A. In sales by guardians, executors or administrators, the deed and order confirming the sale.

B. In probate and partition proceedings in district court, the final decree and estate tax clearance unless not required by 58 O.S.A. § 912(3) or 68 O.S.A. § 815(d) or unless the estate tax lien is barred.

C. In general jurisdiction court sales under execution, the petition and other instruments, if any, showing defendants sued, the service upon defendants or their entry of appearance, the judgment, the deed and the court order directing the delivery thereof.

D. In general jurisdiction court partitions, or adjudications of ownership, the petition and other instruments, if any, showing defendants sued, the service upon defendants or their entry of appearance, the final judgment, any deed on partition, and any court order directing the delivery thereof.

The abstractor can make in substance the following notation: "other proceedings herein omitted by reason of 16 O.S.A. § 61, *et seq.*, and Title Examination Standards Chapter 18."[76]

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standard, see Recommendation (2), 33 O.B.A.J. 2157 (1962) and Exhibit B, *id.* at 2162. Approved by Real Property Section and House of Delegates, *id.* at 2469, November 29, 1962.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

75. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 18.5 state:

Authority: 16 O.S.A. §§ 62 & 63.

Comment: An adverse claimant may avoid the effects of the act by being in possession of the land, either personally or by tenant, or by filing the notice of claim required in Section 63, within ten years of the recording of the conveyance, or entry (or recording) of the decree under which the claim of valid and marketable title is to be made, or within one year of the effective date of the Act, whichever date occurs last. The filing of the notice of claim takes the interest or claim out from under the operation of the Act.

History: The 1962 Real Property Committee Report recommended the adoption of this standard, see Recommendation (2), 33 O.B.A.J. 2157 (1962) and Exhibit B, *id.* at 2164. Approved by Real Property Section and House of Delegates, *id.* at 2469, November 29, 1962.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

76. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 18.6 state:

1. Background

The Simplification of Land Titles Act allows the title examiner to ignore certain record title defects if they have been of record at least ten years. The Act protects any purchaser for value (not a person who acquired the land as a gift or for a nominal consideration) even with actual or constructive notice of any defect listed in Standard 18.2 above.

The applicability of the Act to severed mineral interests was discussed but not decided by the Oklahoma Court of Appeals in *Clark v. Powell.*[77] *Clark* involved the application of the Act to validating a 1937 probate decree and a 1938 quiet title suit which covered both the surface and all minerals. A previous deed leading to the probate decree reserved a one-third mineral interest in one of three children. In its modification of the decision, the court of appeals held that although the judgments relied upon would ordinarily qualify for protection under the Act, the Act did not apply to the facts of the case.[78]

The facts which disqualified the judgments from protection were that the one-third mineral interest was a severed mineral interest and thereby free of the operation of the Act, the probate court had no jurisdiction over interests not held by the deceased at the time of death, and the quiet title suit court had no jurisdiction over the owner of the one-

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Authority: 16 O.S.A. § 62(a), (c) & (d).

Comments: The foregoing will disclose all showing needed under the applicable statutory provisions and the standards in this chapter.

Caveat: If the final decree is incomplete, uncertain, vague or ambiguous, the same is subject to judicial interpretation, notwithstanding the rule that a decree of distribution made by the court having jurisdiction of the settlement of a testator's estate, entered after due notice and hearing, is conclusive, in the absence of fraud, mistake or collusion, as to the rights of parties interested in the estate to all portions of the estate therby ordered, and capable of being then distributed under, the Will, unless reversed or modified on appeal and that such decree is not subject to collateral attack. In case the final decree is incomplete, uncertain, vague or ambiguous, the title examiner is justified in requiring a full transcript of such proceedings.

History: Adopted, December, 1964. Printed as Proposal No. 5 of the 1964 Real Property Committee, 35 O.B.A.J. 2045 (1964) and see Exhibit E, *id.* at 2050-51. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). As a result of a proposal by the 1970 Real Property Committee's Supplemental Report, printed as Exhibit C, 41 O.B.A.J. 2676-77 (1970), approved by the Real Property Section on December 3, 1970, and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706 (1971), a short paragraph was dropped from "Comments". Its sense was carried over and expanded into the "Caveat" which was added by the same action. The 1983 Report of the Title Examination Standards Committee recommended substantial change in "B." of the standard, 54 O.B.J. 2379, 2383 (1983). The recommendation was approved by the Real Property Section, November 3, 1983, and adopted by the House of Delegates November 4, 1983.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

77. Clark v. Powell, 52 OKLA. B.J. 2584 (Okla. Ct. App. 1981), *modified* 53 OKLA. B.J. 738 (Okla. Ct. App. 1982), *withdrawn* 53 OKLA. B.J. 879 (Okla. Ct. App. 1982).

78. *Clark*, 53 OKLA. B.J. at 739.

third severed mineral interest because it was a default judgment and no allegations of adverse possession of the minerals were made.

The court of appeals also said, in regard to the parties attempting to rely on the Act, "None are 'purchasers for value' within the meaning of the Act."[79] The opinion was allowed to stand but was subsequently withdrawn from publication. This suggests that the Oklahoma Supreme Court agreed with the result but not necessarily the reasoning. Therefore, one can conclude that before this Act can apply to surface or minerals, severed or not, there must be an intervening "purchaser for value."

2. Practicalities

The most practical use of this Standard involves final decrees or decrees of distribution that have been recorded for more than ten years. If a final decree is recorded for less than ten years, full probate or administration proceedings should be examined before relying on the final decree. At the anniversary of the tenth year of recordation, Standard 18 allows the examiner to rely on the validity of the final decree assuming other aspects of the statutes are met.

One ironic implication is that the oil and gas lessee may be protected although the lessor is not protected if that lessor is not a purchaser for value. In this case, a lessee who asserts the marketability of the lease may then suspend the payment of proceeds to the lessor of that lease.

Standard 18 is also useful in examining other court decrees that have been recorded more than ten years. The title examiner must be careful that the adverse claimant is a named defendant to the court action and that there is an intervening purchaser for value.

P. *Standards 19.1 - 19.13. Marketable Record Title Act (adopted 1964; last amended 1988)*

19.1. REMEDIAL EFFECT

The Marketable Record Title Act is remedial in character and should be relied upon as a cure or remedy for such imperfections of title as fall within its scope.[80]

79. *Id.* at 740.

80. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.1 state:

Authority: Marketable Record Title Act, 16 O.S.A. §§ 71-80; L. Simes & C. Taylor, Model Title Standards, Standard 4.1 at 24 (1960); P. Basye, Clearing Land Titles §§ 186 & 374 (2d ed. 1970); R. & C. Patton, Titles § 563 (2d ed. 1957); L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation 253 (1960); L. Simes, *The Improvement of Conveyancing: Recent Developments*, 34 O.B.A.J. 2357 (1963), I.c.p. 2363; "Comment."

19.2. REQUISITES OF MARKETABLE RECORD TITLE

A Marketable Record Title under the Marketable Record Title Act exists only where (1) A person has an unbroken chain of title of record extending back at least thirty (30) years; and (2) Nothing appears of record purporting to divest such person of title.[81]

Oklahoma Title Standard. 18.1. The following cases sustain the constitutionality of marketable title acts: Lane v. Travelers Ins. Co., 230 Iowa 973, 299 N.W. 553 (1941); Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957); Annot., "Marketable Title Statutes", 71 A.L.R.2d 846 (1960); Opinion No. 67-444 of the Attorney General of Oklahoma, dated March 21, 1968, 39 O.B.A.J. 593-595 (1968).

Similar standards: Ill., 22; Iowa, 10.1: Mich., 1.1; Minn. 61; Nebr., 42; N.D. 1.13; S.D. 34; Wis., 4.

Caveat: Whether or not the provisons of the Marketable Record Title Act may be relied upon to cure or remedy such imperfections of title as fall within its scope, which imperfections occurred or arose during the time title to the land was in a tribe of Indians or held in trust by the United States for a tribe of Indians or a member or members thereof, or was restricted against alienation by treaty or by act of Congress, is a matter for determination by Congress or by a federal court in a case to which the United States is properly made a party. Until such determination, the Marketable Record Title Act should not be relied upon to cure or remedy such imperfections. See: Section 1, Oklahoma Enabling Act, § 134 Stat. 267 (1906); Okla. Const., art. 1, § 3; W. Semple, Oklahoma Indian Land Titles § 53 (1952). However, it is possible that the federal courts will consider the Marketable Title Act to be a statute of limitations within the meaning of the Act of April 12, 1926, with respect to the Five Civilized Tribes.

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2052. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). Last sentence of "Caveat" added December 2, 1965. Resolution No. 3, 1965 Real Property Committee, 36 O.B.A.J. 2094 & 2182 (1965). Approved by Real Property Section and adopted by House of Delegates, 37 O.B.A.J. 437 (1966). A.L.R. citation added to Authorities, December 3, 1966. Resolution No. 3, 1966 Real Property Committee, 37 O.B.A.J. 2382, 2383 (1966) and adopted by House of Delegates, 37 O.B.A.J. 2538, 2539 (1966). Opinion of Attorney General added December 1968 on recommendation of Real Property Committee, Resolution (2) printed at 39 O.B.A.J. 2308 (1968); adopted House of Delegates, 40 O.B.A.J. 585 (1969). Citation of Act amended by Editor, 1978, to agree with repeal of § 81, 1970 Okla. Sess. Laws, ch. 92, § 5, see Minutes of House of Delegates for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

81. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.2 state:

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

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

Similar Standard: Mich., 1.2.

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 or 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2052. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). As a result of a proposal by the 1970 Real Property Committee's Supplemental Report, printed as Exhibit D, 41 O.B.A.J. 2676, 2677 (1970), approved by the Real Property Section on December 3, 1970, and adopted by the House of Delegates on December 4, 1970 the last sentence of the standard calling attention to the amendment shortening the period to thirty years was added. Pertinent statutory authority, relating to the amendment has been added by the editor pursuant to the directive in the Committee's Supplemental Report, 41 O.B.A.J. 2676, 2679 (1970). The 1975 Report of the Real Property Section recommended change from "forty" to "thirty" and the deletion of the former last sentence of the standard which referred to the amendment of the Marketable Title Act changing the period from forty to thirty years, 46 O.B.A.J. 2131, 2183, 2241 & 2317

19.3. UNBROKEN CHAIN OF TITLE OF RECORD

"An unbroken chain of title of record", within the meaning of the Marketable Record Title Act, may consist of (1) A single conveyance or other title transaction which purports to create an interest and which has been a matter of public record for at least thirty (30) years; or (2) A connected series of conveyances or other title transactions of public record in which the root of title has been a matter of public record for at least thirty (30) years.[82]

19.4. MATTERS PURPORTING TO DIVEST

Matters "purporting to divest" within the meaning of the Marketable Record Title Act are those matters appearing of record which, if taken at face value, warrant the inference that the interest has been divested.[83]

(1975). Recommendation adopted by House of Delegates. Minutes of House, December 5, 1975, at 50.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

82. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.3 state:

Authority: 16 O.S.A. § 71(a) & (b); L. Simes & C. Taylor, Model Title Standards, Standard 4.3, at 25 (1960).

Similar Standard: Mich., 1.3.

Comment: Assume A is the grantee in a deed recorded in 1915 and that nothing affecting the described land has been recorded since then. In 1945 A has an "unbroken chain of title of record." Instead of a conveyance, the title transaction may be a decree of a district court or court of general jurisdiction, which was entered in the court records in 1915. Likewise, in 1945, A has an "unbroken chain of title of record."

Instead of having only a single link, A's chain of title may contain two or more links. Thus, suppose X is the grantee in a deed recorded in 1915; and X conveyed to Y by deed recorded in 1925; Y conveyed to A by deed recorded in 1940. In 1945 A has an "unbroken chain of title of record." Any or all of these links may consist of decrees of a district court or court of general jurisdiction instead of deeds of conveyance.

The significant time from which the thirty-year record title begins is not the delivery of the instrument, but the date of its recording. Suppose the deed to A is delivered in 1915 but recorded in 1925. A will not have an "unbroken chain of title of record" until 1955.

Decrees of a court in a county other than where the land lies do not constitute a root of title until recorded in the county in which the land lies.

For a definition of "root of title" see Marketable Record Title Act, 16 O.S.A. § 78(e).

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2053. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). As a result of a proposal of the 1970 Real Property Committee's Supplemental Report printed as Exhibit E, 41 O.B.A.J. 2676, 2678 (1970). Approved by the Real Property Section on December 3, 1970 and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706 (1971), the last sentence of the standard shortening the period to thirty years was added. Pertinent statutory authority, relating to the amendment, has been added by the editor pursuant to the directive in the Committee's Supplemental Report, 41 O.B.A.J. 2676, 2679 (1970). All references to prior 40-year period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30-year period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

83. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.4 state:

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

19.5. INTERESTS OR DEFECTS IN THE THIRTY-YEAR CHAIN

If the recorded title transaction which constitutes the root of title, or any subsequent instrument in the chain of record title required for a marketable record title under the terms of the act, creates interests in third parties or creates defects in the record chain of title, then the

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Similar Standard: Mich., 1.4.

Comment: The obvious case of a recorded instrument purporting to divest is a conveyance to another person. A is the grantee in a deed recorded in 1915. The record shows a conveyance of the same tract by A to B in 1925. Then B deeds to X in 1957. Although B had a thirty-year record chain of title in 1945, the deed to X purports to divest it, and B thereafter does not have a title.

A recorded instrument may also purport to divest even though there is not a complete chain of record title connecting the grantee in the divesting instrument with the thirty-year chain. Suppose A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1915. A deed of the same land was recorded in 1925, from X to Y, which recites that A died intestate in 1921 and that X is his only heir. The deed recorded in 1925 is one "purporting to divest" within the terms of the Act. This is the conclusion to be reached whether the recital of heirship is true or not.

Or suppose, again, that A is the last grantee in a chain of title, the last deed of which was recorded in 1915. A deed to the same land from X to Y was recorded in 1925, which contains the following recital: "being the same land heretofore conveyed to me by A." There is no instrument on record from A to X. This instrument is nevertheless one "purporting to divest" within the terms of the Act.

Suppose that in 1915, A was the last grantee in a recorded chain of title, the deed to him being recorded in that year. A deed of the same land was recorded in 1925, signed: "A by B, attorney-in-fact." Even though there is no power of attorney on record, and even though the recital is untrue, the instrument is one "purporting to divest" within the terms of the Act.

Suppose that A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1915. In 1955 there was recorded a deed to Y from X, a stranger to the title, which recited that X and his predecessors have been "in continuous, open, notorious and adverse possession of said land as against all the world for the preceding thirty years." This is an instrument "purporting to divest" A of his interest, within the terms of the Act.

On the other hand, an inconsistent deed on record, is not one "purporting to divest" within the terms of the Act, if nothing on the record purports to connect it with the thirty-year chain of title. The following fact situations illustrate this.

A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1915. A warranty deed of the same land from X to Y was recorded in 1925. The latter deed is not one "purporting to divest" within the terms of the Act.

A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1915. A mortgage from X to Y of the same land, containing covenants of warranty, is recorded in 1925. The mortgage is not an instrument "purporting to divest" within the terms of the Act.

Although the recorded instruments in the last two illustrations are not instruments "purporting to divest" the thirty-year title, they are not necessarily nullities. The marketable record title can be subject to interests, if any, arising from such instruments, 16 O.S.A. § 72(d).

History: Adopted, December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2053-54. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). All references to prior 40-year period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30-year period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

marketable record title is subject to such interests and defects.[84]

19.6. FILING OF NOTICE

A marketable record title is subject to any interest preserved by filing a notice of claim in accordance with the terms of Section 74 and 75 of the Marketable Record Title Act.[85]

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84. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.5 state:

Authority: 16 O.S.A. § 72(a) & (d); L. Simes & C. Taylor, Model Title Standards, Standard 4.6, at 28-29 (1960).

Similar Standard: Mich., 1.8.

Comment: This standard is explainable by the following illustrations:

1. In 1915, a deed was recorded conveying land from A, the owner in fee simple absolute, to "B and his heirs so long as the land is used for residence purposes," thus creating a determinable fee in B and reserving a possibility of reverter in A. In 1925, a deed was recorded from B to C and his heirs "so long as the land is used for residence purposes, this conveyance being subject to a possibility of reverter in A." In 1945, C has a marketable record title, to a determinable fee, which is subject to A's possibility of reverter.

2. Suppose, however, that, in 1915, a deed was recorded conveying a certain tract of land from A, the owner in fee simple absolute, to "B and his heirs so long as the land is used for residence purposes"; and suppose, also, that in 1918 a deed was recorded by B to C and his heirs, conveying the same tract in fee simple absolute, in which no mention was made of any special limitation or of A's possibility of reverter. There being no other instruments of record in 1948, C has a marketable record title in fee simple absolute. His root of title is the deed from B to C and not the deed from A to B; and there are no interests in third parties or defects created by the "muniments of which such chain of record title is formed."

A general reference to interests prior to the root of title is not sufficient unless specific identification is made to a recorded title transaction. 16 O.S.A. § 72(a).

History: Adopted December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2054-55. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). All references to prior 40-year period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30-year period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

85. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.6 state:

Authority: 16 O.S.A. §§ 74 & 75; L. Simes & C. Taylor, Model Title Standards, Standard 4.7, at 29-30 (1960).

Comment: Suppose A was the grantee in a chain of record title of a tract of land, a deed to which was recorded in 1900. In 1902, a mortgage of the same land from A to X was recorded. In 1906, a mortgage of the same land from A to Y was recorded. In 1918, a deed of the same land from A to B in fee simple absolute was recorded, which made no mention of the mortgages. In 1947, Y recorded a notice of his mortgage, as provided in Sections 74 and 75 of the Act. X did not record any notice. In 1948, B had a marketable record title, which is subject to Y's mortgage, but not to X's mortgage. B's root of title is the 1918 deed. Therefore X and Y had until 1948 to record a notice for the purpose of preserving their interests. If X had filed a notice after 1948, it would have been a nullity, since his interest was already extinguished.

The filing of a notice may be a nullity not only because it comes too late, but also because it concerns a subject matter not within the scope of the statute. Thus, recorded notices of real estate commissions claimed or other charges which do not constitute liens on the property have no effect under the Act. 16 O.S.A. § 72(b).

History: Adopted December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2055-56. Approved, upon recommendation of Real Property Section, by House of Delegates, 36

19.7. THIRTY-YEAR POSSESSION IN LIEU OF FILING NOTICE

If an owner of a possessory interest in land under a recorded title transaction (1) has been in possession of such land for a period of thirty (30) years or more after the recording of such instrument, and (2) such owner is still in possession of the land, any Marketable Record Title, based upon an independent chain of title, is subject to the title of such possessory owner, even though such possessory owner has failed to record any notice of his claim.[86]

19.8. EFFECT OF ADVERSE POSSESSION

A marketable record title is subject to any title by adverse possession which accrues at any time subsequent to the effective date of the root of title, but not to any title by adverse possession which accrued prior to the effective date of the root of title.[87]

O.B.A.J. 179, 182 (1965). All references to prior 40-year period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30-year period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

86. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.7 state:

Authority: 16 O.S.A. §§ 72(d) & 74(b); L. Simes & C. Taylor, Model Title Standards, Standard 4.8, at 30-31 (1960).

Comment: The kind of situation which gives rise to this standard is suggested by the following illustration. A was the last grantee in a chain of record title to a tract of land, by a deed recorded in 1915. There were no subsequent instruments of record in this chain of title. A has been in possession of the land since 1915 and continues in possession, but has never filed any notice as provided in Section 74 of the Marketable Record Title Act. A deed of the same land, unconnected with A's chain of title, from X to Y, was recorded in 1916; no other instruments with respect to this land appearing of title. On the other hand, A had a marketable record title in 1945, but in 1946, according to Section 72(d), it is subject to Y's marketable record title. Thus, the relative rights of A and of Y are determined independently of the Act, since the interest of each is subject to the other's deed. A's interest being prior in time, and Y's deed being merely a "wild deed," under common law principles A's title should prevail.

Under 16 O.S.A. § 74(b), possession cannot be "tacked" to eliminate the necessity of recording a notice of claim.

History: Adopted December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2056. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). As a result of a proposal by the 1970 Real Property Committee's Supplemental Report, printed as Exhibit F, 41 O.B.A.J. 2676, 2678 (1970), approved by the Real Property Section on Dec. 3, 1970 and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706 (1971), the last sentence of the standard in its previous form calling attention to the amendment shortening the period to thirty years was added. Pertinent statutory authority, relating to the amendment, has been added by the editor pursuant to the directive in the Committee's Supplemental Report, Exhibit I, 41 O.B.A.J. 2676, 2679 (1970). Subsequently all references to prior 40-year period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30-year period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

87. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.8 state:

Authority: 16 O.S.A. §§ 72(c) & 73; L. Simes & C. Taylor, Model Title Standards, Standard 4.9, at 31 (1960).

Comment: (Assume the period for title by adverse possession is 15 years.)

19.9. EFFECT OF RECORDING TITLE TRANSACTION DURING THIRTY-YEAR PERIOD

The recording of a title transaction subsequent to the effective date of the root of title has the same effect in preserving any interest conveyed as the filing of the notice provided for in Section 74 of the Act.[88]

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1. A is the grantee of a tract of land in a deed which was recorded in 1900. In the same year, X entered into possession, claiming adversely to all the world, and continued such adverse possession until 1916. In 1917, a deed conveying the same land from A to B was recorded. No other instruments concerning the land appearing of record, B has a marketable record title in 1947, which extinguished X's title by adverse possession acquired in 1915.

2. Suppose A is the grantee of a tract of land in a deed which was recorded in 1915. In 1941, X entered into possession, claiming adversely to all the world, and continued such adverse possession until the present time. No other instruments concerning the land appearing of record in 1945, A had a marketable record title, but it was subject to X's adverse possession and when his period for title by adverse possession was completed in 1956, A's title was subject to X's title by adverse possession.

History: Adopted December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2056-57. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). All references to prior 40-year period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30-year period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

88. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.9 state:

Authority: 16 O.S.A. §§ 72(d); L. Simes & C. Taylor, Model Title Standards, Standard 4.10, at 32-33 (1960).

Comment: This standard is operative both where there are claims under a single chain of title and where there are two or more independent chains of title. The following illustrations show how it operates.

1. Suppose A is the grantee of a tract of land in a deed which was recorded in 1900. A mortgage of this land executed by A to X was recorded in 1905. In 1910, a deed conveying the land from A to B was recorded, this deed making no reference to the mortgage to X. In 1939, an instrument assigning X's mortgage to Y was recorded. In 1940, B had a marketable record title. But it was subject to the mortgage held by Y because the assignment of the mortgage was recorded less than thirty years after the effective date of B's root of title. If, however, Y had recorded the assignment in 1941 the mortgage would already have been extinguished in 1940 by B's marketable title; and recording the assignment in 1941 would not revive it.

2. Suppose a tract of land was conveyed to A, B and C as tenants in common, the deed being recorded in 1900. Then in 1905, A and B conveyed the entire tract in fee simple to D and the deed was at once recorded. In 1925, D conveyed to E in fee simple, and the deed was at once recorded. No mention of C's interest was made in either the 1905 or 1925 deeds. Nothing further appearing of record, E had a marketable record title to the entire tract in 1935. This extinguished C's undivided one-third interest.

3. Suppose the same facts, but assume also that in 1936, C conveyed his one-third interest to X in fee simple, the deed being at once recorded. This does not help him any. His interest, being extinguished in 1935, is not revived by this conveyance.

4. Suppose A, being the grantee in a regular chain of record title, conveyed to B in fee simple in 1900, the deed being at once recorded. Then, in 1905, X, a stranger to the title, conveyed to Y in fee simple, and the deed was at once recorded. In 1925, Y conveyed to Z in fee simple and the deed was at once recorded. Then suppose in 1927, B conveyed to C in fee simple, the deed being at once recorded. In 1935, Z and C each have marketable record

19.10. QUITCLAIM DEED OR TESTAMENTARY RESIDUARY CLAUSE IN THIRTY-YEAR CHAIN

A recorded quitclaim deed or residuary clause in probated will can be a root of title or a link in a chain of title, for purposes of a thirty-year record title under the Marketable Record Title Act.[89]

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titles, but each is subject to the other. Hence neither extinguishes the other, and the relative rights of the parties are determined independently of the Act. C's title, therefore, should prevail.

5. Suppose, however, that the facts were the same except that B conveyed to C in 1937 instead of 1927. In that case, Z's marketable record title extinguished B's title in 1935, thirty years after the effective date of his root of title, and it is not revived by the conveyance in 1937.

History: Adopted December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2057-58. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). All references to prior 40-year period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30-year period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

89. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.10 state:

Authority: 16 O.S.A. §§ 71 & 78(e) & (f); L. Simes & C. Taylor, Model Title Standards, Standard 4.11, at 33-34 (1960).

Related Standards: Mich., 1.3; Neb., 52.

Comment: The Marketable Record Title Act defines "root of title" as a title transaction "purporting to create the interest claimed." See section 78(e). "Title transaction" is defined to include a variety of transactions, among which are title by quitclaim deed, by will and by descent. See Section 78(f).

A quitclaim deed can be a root of title to the interest it purports to create. Suppose there is a break in the chain of title, and the first instrument after the break is a quitclaim deed. Assume that the first recorded instrument in the chain of title is a patent from the United States to A, recorded in 1890, and that the next is a warranty deed from A to B in fee simple, recorded in 1910. Then, in 1915, there is a quitclaim deed from C to D purporting to convey "the above described land" to D in fee simple. Further assume that there are no other recorded title transactions or notices after this deed, and that D is in possession, claiming to be the owner in fee simple. Under the Marketable Record Title Act, the 1915 deed is the root of title and purports to create a fee simple in D. Therefore, in 1945, D has a good title in fee simple.

Clearly the quitclaim deed can be a link in a chain of record title under the provisions of the Act. See sections 71 and 78(f). If it can be an effective link, it must necessarily follow that it can be an effective "root" to the interest it purports to create.

History: Adopted December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 and see Exhibit H, *id.* at 2058. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182. As a result of a proposal by the 1970 Real Property Committee's Supplemental Report, printed as Exhibit G, 41 O.B.A.J. 2676, 2678 (1970), approved by the Real Property Section on Dec. 3, 1970 and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706 (1971), the last sentence of the standard in its previous form calling attention to the amendment shortening the period to thirty years was added. Pertinent statutory authority, relating to the amendment, has been added by the editor pursuant to the directive in the Committee's Supplemental Report, Exhibit I, 41 O.B.A.J. 2676, 2679 (1970). All references to prior 40-year period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30-year period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

19.11. THIRTY-YEAR ABSTRACT

The Marketable Record Title Act has not eliminated the necessity of furnishing an abstract of title for a period in excess of thirty (30) years.[90]

19.12. EFFECTIVE DATE OF THE ACT

The Marketable Record Title Act became effective September 13, 1963. The two year period for filing notices of claim under Section 74 expired September 13, 1965. The Act was amended March 27, 1970, by reducing the forty (40) year period to thirty (30) years, effective July 1, 1972. If the thirty (30) year period expired prior to March 27, 1970, such period was extended to July 1, 1972 and notices of claim could be filed to and including that date.[91]

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90. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.11 state:

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

Similar Standard: Nebr., 44.

Comment: Section 76 of the act names several interests which are not barred by the Act, to-wit: the interest of a lessor as a reversioner; mineral or royalty interests; easements created by a written instrument; subdivision agreements; interests of the U.S., etc. These record interests may not be determined by an examination of the abstract for a period of no more than thirty (30) years.

Furthermore, in all cases, the abstract must go back to the conveyance or other title transaction which is the "root of title"; and it will rarely occur that this instrument was recorded precisely thirty years prior to the present time. In nearly every case the period, from the recording of the "root of title" to the present, will be somewhat more than thirty years.

History: Adopted December, 1964. Printed as a part of Proposal No. 12 of 1964 Real Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2058-59. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). As a result of a proposal by the 1970 Real Property Committee's Supplemental Report, printed as Exhibit H, 41 O.B.A.J. 2676, 2678 (1970), approved by the Real Property Section on Dec. 3, 1970 and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706, the last sentence of the standard making it clear that the amendment to the Marketable Record Title Act will not eliminate the necessity of furnishing an abstract of title in excess of thirty years after July 1, 1972 was added. Pertinent statutory authority, relating to the amendment, has been added by the editor pursuant to the directive in the Committee's Supplemental Report, Exhibit I, 41 O.B.A.J. 2676, 2679 (1970). All references to prior 40-year period deleted, 30 years substituted, and dates in "Comments" corrected to agree with 30-year period as per direction of House of Delegates, see Minutes of House for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

91. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.12 state:

Authority: As to the original "forty years" statute, 1963 Okla. Sess. Laws, ch. 31, §§ 4, 5 & 11. As to the present "thirty years" statute, 16 O.S.A. §§ 74 & 75 and 1970 Okla. Sess. Laws, ch. 92, § 7.

Comment: Remainders, long term mortgages and other non-possessory interests prior to the root of title should be reviewed to see if a notice of claim is required. Also, if the owner is out of possession and he has recorded no instruments or other title transactions during the preceding thirty (30) years, consideration should be given to filing a notice of claim.

Prior non-possessory interests may be preserved by reference in an instrument or other title transaction recorded subsequent to the root of title. But the reference must specifically identify a recorded transaction. A general reference is not sufficient. 16 O.S.A. § 72(a).

History: Adopted December, 1964. Printed as a part of Proposal No. 12 of 1964 Real

19.13. 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 occuring 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 whch 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 tranactions 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

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Property Committee, 35 O.B.A.J. 2045, 2046 (1964) and see Exhibit H, *id.* at 2059. Approved, upon recommendation of Real Property Section, by House of Delegates, 36 O.B.A.J. 179, 182 (1965). As a result of a proposal by the 1970 Real Property Committee's Supplemental Report, printed as Exhibit I, 41 O.B.A.J. 2676, 2679 (1970). Approved by the Real Property Section on Dec. 3, 1970 and adopted by the House of Delegates on December 4, 1970, 42 O.B.A.J. 706 (1971), this standard was modified to reflect the amendment shortening the period to thirty years. Pertinent statutory authority, relating to the amendment, has been added by the editor pursuant to the directive in the Committee's Supplemental Report, Exhibit I, 41 O.B.A.J. 2676, 2679 (1970). Tense of verbs in last clause of third sentence changed by Editor, 1978; "Authority" amended to indicate where prior and current statutes may be found by Editor, 1978, see Minutes of House of Delegates for 1977, at 93-96.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

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. 19.13 under 16 O.S.A. §§ 71-80."[92]

1. Background

The Act underlying these Standards is an extinguishment statute that destroys most claims or defects of title before the root of title.[93] The root of title is an instrument "purporting to divest" that is in a chain of title and that has been of record for at least thirty years.

A title examiner must look for and review the following instruments prior to a root of title: (a) patent, grant, or other conveyance from the government; (b) easements or interests in the nature of an easement;

92. OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988). The Comments to Standard 19.13 state:

Authority: 16 O.S.A. §§ 71-80, 46 O.S.A. § 203, and Oklahoma Title Examination Standard 13.7.

Comments: 1. The purpose of this standard is to simplify title examination and reduce the size of abstracts.

2. Deeds, mortgages, affidavits, caveats, notices, estoppel agreements, powers of attorney, tax liens, mechanic liens, judgments and foreign executions recorded prior to the first conveyance or other title transaction in "C." and not referred to therein or subsequent thereto and also probate, divorce, foreclosure, partition and quiet title actions concluded prior to the first conveyance or other title transaction in "C." are to be omitted from the abstract.

3. Interests and defects prior to the first conveyance or other title transaction in "C." are not to be shown unless specifically identified. The book and page of the recording of a prior mortgage is required to be in any subsequent deed or mortgage to give notice of such prior mortgage, 46 O.S.A. § 203 and Title Standard 13.7. Specific identification of other instruments requires either the book and page of recording or the date and place of recording or such other information as will enable the abstractor to locate the instrument of record.

4. Abstracting under this standard should also be in conformity with Title Standard 18.6.

History: Adopted December 5, 1969. Resolution No. 1, 1969 Real Property Committee 40 O.B.A.J. 2405 (1969) and Exhibit A, *id.* at 2406-2407. Approved by Real Property Section and adopted by House of Delegates, 41 O.B.A.J. 287 (1970). Citation of act amended by Editor, 1978, to agree with repeal of § 81, 1970 Okla. Sess. Laws, Ch. 92, § 5, reference to prior 40-year period deleted and 30 years substituted, see Minutes of House of Delegates for 1977, pages 93-96.

Amended December 3, 1982. Amendment proposed by Report of 1982 Title Examination Standards Committee, 53 O.B.A.J. 2731, 2734-35 (1982). Proposal amended by Real Property Section, December 2, 1982, and approved as amended. Adopted as amended by House of Delegates.

OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

93. Mobbs v. City of Lehigh, 655 P.2d 547 (Okla. 1982).

(c) unreleased leases with indefinite terms, such as oil and gas leases; (d) unreleased leases with terms that have not expired; (e) instruments or proceedings pertaining to bankruptcies; (f) use restrictions or area agreements which are part of a plan for subdivision development; (g) any right, title, or interest of the United States; (h) severed mineral and royalty interests; (i) instruments expressly identified in other instruments falling within a chain of title back to and including the root of title; and (j) instruments relating to Indian titles.

In *Anderson v. Pickering*, the Oklahoma Court of Appeals stated that there is no authority for requiring a vendee to purchase real property when title is defective. The court further explained that although the Merchantable Title Act, really the Marketable Record Title Act, provides a statutory method for quieting title, it is not self-executing nor a perfect remedy applicable in every case.[94] However, as one article has noted, it appears that the *Anderson* decision is premised on the fact that the sellers were trying to force the buyers to accept title based on adverse possession and not on marketable title created under the Act.[95]

A later decision of the Oklahoma Supreme Court, *Mobbs v. City of Lehigh*, expressly assumed the Act was constitutional, but the court also stated that "[w]e intimate no view on the constitutionality of the Act because its validity was not framed as an issue in the trial court."[96] *Mobbs* held that under the operation of the Act, a void tax deed could be a valid root of title because its defective nature was not "inherent" but rather was a "transmission" problem.[97]

As mentioned above, the constitutionality of this Act has not been directly challenged. There is general Oklahoma case law to the effect that every statute is presumed to be valid, constitutional, and binding on all parties as of the effective date of each statute, and that such a presumption continues until there is a determination to the contrary.[98]

It was hoped that the applicability of this Act to Indian land would be upheld if it were determined to be a statute of limitations and not an extinguishment statute. However, the *Mobbs* decision[99] ended this possibility.

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94. Anderson v. Pickering, 541 P.2d 1361, 1364 (Okla. Ct. App. 1975).

95. Blair & Rheinberger, *Anderson v. Pickering and the Marketable Record Title Act*, 51 OKLA. B.J. 2517, 2518 (1980).

96. *Mobbs*, 655 P.2d at 547.

97. *Id.* at 549.

98. *See* Standard 2.3, OKLA. STAT. tit. 16, ch. 1, app. (Supp. 1988).

99. *Mobbs*, 655 P.2d at 550-51.

As an oil and gas title examiner, one must be especially cautious to look behind the root of title first to determine title ownership to any mineral or royalty interest which has been severed, and second to identify unreleased leases with indefinite or unexpired terms. Therefore, the Act is only helpful to the extent that a surface and mineral estate remain together and unsevered.

Standard 19.13 allows and encourages abstracters to prepare thirty-year root of title abstracts conforming to the Act. A proposal to repeal Standard 19.13 was presented by the Standards Committee to the Real Property Section in 1986 at the Section's annual meeting, but the repeal proposal was defeated. Repeal of this Standard would not have affected the statute, but would have discouraged abstracters and examiners from making and relying on such "short" abstracts.

2. Practicalities

The following discussion does not address all the examples accompanying Standard 19, but includes some general comments concerning the applicability of the Act as well as some situations where the Act and the Standards are useful.

The examiner should not examine the title backwards from the most recent instrument to attempt to find a root of title recorded for more than thirty years. Every abstract or county record should be examined from inception forward. Only after full consideration of all the instruments should the examiner apply the Act to a certain sequence. Most examiners have never seen an abstract prepared pursuant to Standard 19.13 and might feel uncomfortable if such an abstract were presented to them for examination. The examiner should not question the constitutionality of the Act even though the issue of constitutionality has not been determined by the Oklahoma Supreme Court. An examiner should not rely on the Act without advising the client that such reliance has been made and further advising that there is some case authority that the statute is not self-executing, but must be accompanied by a quiet title action. The Act cannot be used in dealing with severed minerals. The Act should not be relied upon without mentioning it is subject to the rights of persons in possession of the property.

The following are five situations in which the Act and Standards are very useful. The first situation is when a record owner has an interest which is the subject of a mortgage foreclosure followed by a sheriff's deed which has been recorded more than thirty years. This situation is

also reinforced by reliance on the Simplification of Land Titles Act previously discussed. Second, the Act comes into play when a patent from the Commissioners of the Land Office is issued after the extinguishment of a prior certificate of purchase. It is not unusual to see a certificate of purchase issued to one party, followed by another certificate of purchase issued to another party together with a Commissioners of the Land Office patent that has been recorded more than thirty years. The Act can then be relied upon, and no further inquiry into the proper extinguishment of the certificate of purchase is necessary.

Third, in regard to tax deeds, the case of *Mobbs v. City of Lehigh*,[100] is authority for the proposition that a tax deed can be relied upon as a valid root of title without inquiring into the validity of the proceedings leading to the tax deed. Fourth, an examiner can rely upon deeds recorded more than thirty years in which the grantors purport to be the sole heirs of the record owner. And fifth, relying on dicta in the *Mobbs* case, an examiner should be fairly comfortable with a "stray" or "wild" deed which has been of record more than thirty years.[101]

IV. CONCLUSION

This article is by its nature only an analysis of the current status of title examination practice in the state of Oklahoma. The continuing enactment of new statutes, deciding of new cases, and drafting of new title standards dictates that this area of the law changes almost on a daily basis. All practitioners in this area must, therefore, actively seek to keep their knowledge up-to-date.

100. *Id.*
101. *Id.*

IV. SUMMARY OF PENDING NEW AND REVISED STANDARDS
(1989 AGENDA AS OF AUGUST 21, 1989)

Title Examination Standards Committee
of the
Real Property Section of the O.B.A.

1989 AGENDA AS OF 21 August 1989

Month	Chairman	Std.	Description
SEP	Butler	23.3	Amendment to update case citation which has been overruled and to reflect Goodman decision (with Richie). AMENDED STANDARD PROPOSAL ADOPTED 4/1. Effect of any 1989 legislation to be reviewed at September meeting
SEP	Gossett	12.4	Applicability of 12 O.S. sec. 764, 765 to execution sales of real estate conducted in federal district courts in Oklahoma
SEP	Gossett	9.4	Rephrase for clarity in relation to FSLIC / FDIC reorganization of insolvent institutions.
SEP	Roffers	24.2	(New) Titles through the F.S.L.I.C. - Documentary evidence required for marketability of "transfers" from failed institutions to FSLIC and from FSLIC, either as receiver or for its own account, to third parties. (with Gossett)
SEP	Richie	22.2	Conveyance to Private Trust - amendment to Standard to reflect 1989 amendment (HB 1623) to statutory authority for a conveyance to reflect the name of a private trust as the grantee (rather than the trustee thereof).
SEP	Richie	23.2	Effect, if any, of recodification of Guardianship statutes on Standard (with Moershel)
SEP	Smith	New	Re-recorded Instruments - effect of amendments appearing on the face of a previously recorded instrument which has been re-recorded. (with J. Rowland)
SEP	Cleverdon	New	Resale Tax Deed - what documentation should the examiner see in the abstract to evidence the sale?
SEP	Gossett	New	Lien on real property arising from ad valorem tax on personal property.
SEP	Epperson	10.4	Revision to clarify comment to standard (with L. Thomas)
DEC	Epperson	1.3	Federal Court certificates - present necessity for requiring in abstract of title to real property in county where court sits.

Month	Chairman	Std.	Description
DEC	Schuller	3.4	(New) Instruments affecting title to real property which are required to be filed or recorded OTHER than in the office of a County Clerk - what constructive notice, if any, is imparted to the public? (with B. Newton)
DEC	Epperson	12.2	Alimony or Support Judgments - revisions regarding creation of lien by judge without necessity of other actions.
DEC	Epperson	12.1	Affidavit of Judgment - changes needed, if any, to make Standard reflect 1989 amendments to applicable statutes
DEC	Cleverdon		Jurisdiction of Probate Courts (possible OBJ article)
DEC	Palomar	New	Standard dealing with instruments needed by examiner to evidence chain of title to real property which has been the subject of a federal or state forfeiture sale proceeding

COMPLETED PROJECTS

Chairman	Std.	Description
Lyon		Oil and Gas Lien per 1988 S.B. 84: Do any provisions of this new lien statute require a standard, e.g., to whom the lien applies. (with Mc Eachin) COMPLETED 6/89 - NO ACTION NEEDED.
Moershel	10.3	LIMITED PARTNERSHIPS - Statutory requirements (if any) for a foreign limited partnership to register or otherwise domesticate itself in Oklahoma. COMPLETED 4/89 - CHANGE IN AUTHORITY CITATION ONLY.
Schuller	20.2	BANKRUPTCY - review current standards for statutory and/or rules changes. COMPLETED 8/19 - AMENDED STANDARD PROPOSAL.
Richie	22.1	Effect, if any, of Thomas v. BOK on Standard. COMPLETED 5/20 - NO CHANGES MADE.
Butler	4.5	Amendment to make parallel with 3.1 as recently amended. COMPLETED 2/25 - AMENDED STANDARD PROPOSAL.
Beaumont	New	Bankruptcy - Party liable for ad valorem taxes after sale. COMPLETED 8/89 - NO ACTION NEEDED.

V. 1989 TITLE EXAMINATION STANDARDS COMMITTEE MEMBERSHIP

1989 TITLE EXAMINATION STANDARDS COMMITTEE OF THE REAL PROPERTY SECTION OF THE OKLAHOMA BAR ASSOCIATION

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