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OKLAHOMA

TITLE EXAMINATION STANDARDS HOT TOPICS FOR 1990-1991-1992

BY:

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AREAS OF PRACTICE: Commercial real estate lending and real property litigation.

MEMBERSHIPS: Oklahoma County, Oklahoma State and American Bar Associations.

POSITIONS: ABA Conveyancing Committee (current co-chairman); ABA State Customs and Practices Sub-Committee (current chairman); OBA Real Property Section (former director, former chairman, and current member); OBA Title Examination Standards Committee (current co-chairman, former vice-chairman); OBA Legislative Liaison Committee (former co-chairman and current member); and The Oklahoma City Title Attorneys Association (current director, current president).

SPECIAL HONORS AND EXPERIENCE: Who's Who in American Law, Marquis Who's Who, Sixth Edition (1990-1991); Adjunct professor for Oklahoma City University School of Law teaching Oklahoma Land Titles and Property II (Conveyancing) courses; previously served as title examiner and commercial loan closer with Lawyers Title Of Oklahoma City, Inc., and as general counsel of American First Land Title Insurance Co. (now American Guaranty Title Co.).

SELECTED PUBLICATIONS: "Oklahoma Title Examination Standards and Curative Acts Relating to Oil and Gas Interests", 24 Tulsa Law Journal 548 (Summer 1989); "Judgment Lien Creation Now Requires a Judgment Affidavit", 59 Oklahoma Bar Journal 3643 (December 1988); "UCC Fixtures Filings Require an Acknowledgement", 55 Oklahoma Bar Journal 695 (March 1984); "Abstract Certificate Officially Changes", 54 Oklahoma Bar Journal 1713 (June 1983); "Lender's Mineral Title Insurance: A Mini-Primer", 53 Oklahoma Bar Journal 3089 (December 1982); and "The Title Standards Committee: A Status Report", 53 Oklahoma Bar Journal 1827 (July 1982).

(Effective 8-2-90)
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I. BACKGROUND AND AUTHORITY OF STANDARDS

I. BACKGROUND AND AUTHORITY OF STANDARDS

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 any specific citation of authority expressly listed. There are currently over 90 Standards in Oklahoma, and about 13 of these have no specific citation of authority (i.e., Oklahoma statutes or caselaw).

In Oklahoma, new and revised Standards are proposed yearly by the Title Examination Standards Committee ("Committee") to its parent organization--the OBA Real Property Section ("Section")--at the Section's annual meeting, usually held in November of each year. Immediately thereafter, the Section forwards to the Oklahoma Bar Association ("OBA") House of Delegates ("House")--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 has held:

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

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

The Standards become binding between the parties (1) if the parties' contract incorporates the Standards as the measure of the quality of title (See: Standard 2.2), or (2) if proceeds from the sale of oil or gas production are being held up due to an allegedly unmarketable title (52 O.S. 1985 Supp. §540; also see: Hull, et al. v. Sun Refining, 60 OBJ 2358). In these instances, the parties can be subject to suits to specifically enforce or rescind 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.

The format used herein to present the newly revised Standards adopted in November 1989 as shown in Chapter II includes: (1) the language of the old Standard, (2) a discussion of the need for a revision of the Standard, and (3) the language of the new Standard. The format used to present the totally new Standards in Chapter II includes: (1) a discussion of the need for a Standard, and (2) the language of the proposed new Standard.

Chapter III lists the Standards being presented at the November 1990 Annual OBA meeting.

Chapter IV is a list briefly describing the possible topics for new and revised Standards which will be under consideration by the Committee in calendar year 1991. Prompt and constructive comments on these topics are hereby vigorously requested.

Please forward your comments to the Current Committee members shown in Chapter V.

II. APPROVED REVISED AND NEW STANDARDS FOR 1990
(EFFECTIVE NOVEMBER 17, 1989)

II. REVISED AND NEW STANDARDS

A. 4.5 REFERENCE TO PROPERTY IN PROBATE DECREES

1. Old Standard:

4.5 REFERENCE TO PROPERTY IN PROBATE DECREES

Except as to estates of deceased spouses of record owners dying after the effective date of the community property law, reference in a probate case to property, the record title to which does not appear in the decedent, does not constitute a cloud on the title.

Authority: Harrison v. Eaves, 191 Okla. 453, 130 P.2d 841 (1942).

History: Adopted as C., October 31, 1947, 18 O.B.A.J. 1750-51 (1947), became 24 on renumbering, 19 O.B.A.J. 223, 228 (1948), at which time it was reworded with no apparent change in meaning.

2. Discussion of Revisions:

In a jurisdiction, such as the State of Oklahoma, using a tract index system in addition to or instead of a grantor-grantee index system, a subsequent grantee or encumbrancer has constructive notice of any recorded instrument referring to a tract of land. This notice is given even if the conveyance is outside the chain of title (i.e., a conveyance from a grantor who does not have any prior recorded claim of interest) [See: Utah Farm Production Credit v. Wasatch Bank, 734 P.2d 904 (Utah 1987); and R&C Patton, Titles §69 (2nd ed. 1957)]. Therefore, reasonable inquiry as to the nature and validity of such a stranger's claim is necessary to protect ones bona fide purchaser status. It is also possible for an otherwise void instrument to become a

root-of-title after the requisite 30 years. [Mobbs v. City of Lehigh, 655 P.2d 547 (Okla. 1982)] Therefore, this Standard needs to be updated to require reasonable inquiry, just as Standard 3.1 was recently updated.

3. New Standard:

> A decree of distribution in a probate case describing property, the record title to which does not appear in the decedent, should be considered an instrument subject to Standard 3.1.
>
> Authority: 16 O.S.A. §78(f).

B. 10.3 IDENTITY OF GENERAL PARTNERS OF LIMITED PARTNERSHIP

1. Old 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. Discussion of Revisions:

The citations of authority under the old Standard (i.e., 54 O.S. §§81-85) referred to general partnerships, but not to limited partnerships. New authorities (i.e., 54 O.S. §§143 & 174) were substituted which do refer to limited partnerships.

3. New Standard:

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. §§143 & 174.

C. 20.2 BANKRUPTCIES ON OR AFTER OCTOBER 1, 1979

1. Old Standard:

20.2 BANKRUPTCIES ON OR AFTER OCTOBER 1, 1979

With respect to bankruptcy proceedings commenced on or after October 1, 1979, where title to real property is held by a debtor at the time of the commencement of bankruptcy proceedings (and if the proceedings have not been properly dismissed prior to a conveyance or other transfer of title to the property), the title examiner should be furnished with and review the following instruments (in addition to a copy or abstract of the bankruptcy petition):

A. Where the property is scheduled and claimed by the debtor as exempt, and no objection to such claim of exemption has been sustained by the bankruptcy court:

1. A copy or abstract of the Schedule of Real Property ("Schedule B-1") and the Schedule of Exempt Property ("Schedule B-4"), showing the claim of exemption for the property, or a copy or abstract of any other such claim of exemption by a dependent of the debtor on behalf of the debtor; and

2. A certificate by an abstracter or the appropriate bankruptcy court clerk, or other satisfactory evidence, that no objections to such claim of exemption have been filed; if such an objection has been so filed, the examiner should also be furnished with and review a copy or abstract of any order by the bankruptcy court overruling or otherwise resolving such objection.

Authority: 11 U.S.C.A. §§521-522; Bankruptcy Rules 1002 & 1007; 3 L. King, Collier on Bankruptcy 522.26 (15th ed. 1984).

Comment: Title examiners should be aware that even though property is exempt, a mortgagee or other lien creditor may not commence or continue a foreclosure action against the debtor or obtain a conveyance from the debtor, so long as the automatic stay continues in effect. Unless relief from the automatic stay has been obtained as to the debtor (by final order of the bankruptcy court to permit the action), the stay continues until the earliest of (a) the closing of the bankruptcy case, (b) the dismissal of the bankruptcy case or (c), in a Chapter 7 case concerning an individual or in a case under Chapter 9, 11, 12 or 13, the grant or denial of a discharge, 11 U.S.C.A. §362.

B. Where the property is affirmatively abandoned by the bankruptcy trustee or by a debtor in possession:

1. If abandoned by a bankruptcy trustee (except where the trustee is the United States Trustee), a certified copy or abstract of the order by the bankruptcy court approving the trustee's qualifying bond, or (if a blanket bond has been filed pursuant to Bankruptcy Rules 2010 or X-1004) a certified copy or abstract of the trustee's acceptance of his election or appointment (except where deemed accepted pursuant to Rules 2008 or X-1004, on or after August 1, 1987); or if abandoned by a debtor in possession, a certificate by an abstracter or by the appropriate bankruptcy court clerk, or other satisfactory evidence, that no trustee was appointed in the case; and

2. Either:

a. A copy or an abstract of the notice by the trustee or debtor in possession of his or her intention to abandon the property, and a certificate by an abstracter or the appropriate bankruptcy court clerk, or other satisfactory evidence, that no objections to such abandonment have been filed within the time allowed by such notice in accordance with the Rules of Bankruptcy Procedure and/or local court rules; or

b. If the abandonment is pursuant to a request of a party in interest, a copy or abstract of the order by the bankruptcy court authorizing or directing such abandonment, after such notice and hearing as required by the bankruptcy court, by the Bankruptcy Rules and/or by local court rules.

Authority: 11 U.S.C.A. §§102, 322 & 554; Bankruptcy Rules 2008, 2010 & X-1004; 4 L. King, Collier on Bankruptcy 554.02 (15th ed. 1984).

Comment: Upon abandonment, control of the property abandoned reverts to the debtor. In such event, unless the automatic stay has terminated as described in the Comment following section A above, a mortgagee or other lien creditor must obtain relief from the automatic stay as to the debtor by final order of the bankruptcy court before either (1) foreclosing the debtor's interest or (2) obtaining a conveyance from the debtor, 11 U.S.C.A. §362.

C. Where non-exempt property is not administered before the closing of the bankruptcy case and, unless otherwise ordered by the bankruptcy court, is therefore deemed abandoned:

1. A copy or abstract of the order discharging the trustee, if one has been appointed, and closing the estate; and

2. A copy or abstract of the bankruptcy proceedings showing that, or a certificate by an abstracter or the appropriate bankruptcy court clerk or other satisfactory evidence that, the property was scheduled by the debtor and was not administered at or before the closing of the case.

Authority: 11 U.S.C.A. §§350 & 554; 4 L. King, Collier on Bankruptcy ¶554.02 (15th ed. 1984).

D. Where the property is sold by the bankruptcy trustee or by a debtor in possession (other than in the ordinary course of business of the debtor):

1. If sold by a bankruptcy trustee (except where the trustee is the United States Trustee), a certified copy or abstract of the order by the bankruptcy court approving the trustee's qualifying bond, or (if a blanket bond has been filed pursuant to Bankruptcy Rules 2010 or X-1004) a certified copy or abstract of the trustee's acceptance of his election or appointment (except where deemed accepted pursuant to Rules 2008 or X-1004, on or after August 1, 1987); or if sold by the debtor in possession, a certificate by an abstracter or the appropriate bankruptcy court clerk, or other satisfactory evidence, that no trustee was appointed in the case as of the date of the conveyance;

2. A copy or abstract of the notice of such sale, in accordance with the Bankruptcy Code, the Bankruptcy Rules and/or local court rules, or a copy or abstract of the order of the bankruptcy court authorizing a different form of notice or dispensing with such notice;

3. A copy or abstract of the bankruptcy proceedings showing that, or a certificate by an abstracter or the appropriate bankruptcy court clerk or other satisfactory evidence that, (a) no objections to such sale were raised, or if such objections were raised, a copy or abstract of the order overruling such objections or otherwise authorizing the sale, and (b) that such sale has not been stayed pending an appeal from such order; and

4. A copy or abstract of the conveyance by the trustee or the debtor in possession.

Authority: 11 U.S.C.A. §§102(1), 322, 363(b), 363(m) & 1107; Bankruptcy Rules 2002, 2008, 2010, 6004(e)(2), X-1004 & X-1008; 2 L. King, Collier on Bankruptcy 554.02 (15th ed. 1984).

E. Where the property is sold in the ordinary course of business of the debtor, unless otherwise ordered by the court:

1. If the property is sold by the trustee:

a. Except where the trustee is the United States Trustee, a copy or abstract of the order by the bankruptcy court approving the trustee's qualifying bond, or (if a blanket bond has been filed pursuant to Bankruptcy Rules 2010 or X-1004) a certified copy or abstract of the trustee's acceptance of his election or appointment (except where deemed accepted pursuant to Rules 2008 or X-1004, on or after August 1, 1987);

b. If in a Chapter 11 case, a certificate by an abstracter or the appropriate bankruptcy court clerk, or other satisfactory evidence, that the bankruptcy court has not entered an order precluding the trustee from operating the debtor's business; and

c. A copy or abstract of the conveyance by the trustee.

2. If the property is sold by a debtor in possession, a certificate by an abstracter or the appropriate bankruptcy court clerk or other satisfactory evidence that no trustee was appointed in the case as of the date of the conveyance, and a copy or abstract of the conveyance by the debtor in possession.

Authority: 11 U.S.C.A. §§322, 363, 721, 1108 & 1304(b); Bankruptcy Rules 2008, 2010 & X-1004; 2 L. King, Collier on Bankruptcy ¶363.04 (15th ed. 1984); 4 L. King *id.* ¶721.04(1); 5 L. King *id.* ¶¶1108.03 & 1304.01(3).

F. Where the property is sold free and clear of any interest in such property of any entity other than the bankruptcy estate:

1. The instruments described in Paragraphs "D." and "E." above, as appropriate; and

2. A copy or abstract of the bankruptcy proceedings showing that such entity's interest in the property attached to the proceeds of such sale, that such entity consented to the sale, or that such entity received notice of such sale (or, for sales on or after August 1, 1987, that such entity was served, in accordance with Bankruptcy Rule 7004, with notice of the motion for authority to sell the property free and clear of such interest, which notice included the date of the hearing on the motion and the time within which objections may be filed and served upon the trustee or debtor in possession) and raised no objection, or if an objection was raised, a copy or abstract of the order overruling such objection or otherwise authorizing the sale free and clear of such interest.

Authority: 11 U.S.C.A. §363(f); Bankruptcy Rules 2002, 2010, 6004, X-1004 & X-1008; 2 L. King, Collier on Bankruptcy ¶363.07 (15th ed. 1984).

G. In a Chapter 11 case, where the property is the subject of a plan of reorganization of the debtor:

1. A copy or abstract of the notice (in accordance with the Bankruptcy Rules and/or local court rules) of the filing of the disclosure statement, and of the order approving the disclosure statement;

2. Satisfactory evidence of the mailing (in accordance with the Bankruptcy Rules and/or local court rules) to all creditors and equity security holders, of:

a. The plan, or a court approved summary of the plan;

b. The disclosure statement approved by the court;

c. Notice of the time within which acceptances and rejections of the plan may be filed;

d. Notice of any date fixed for the hearing on confirmation of the plan; and

e. Such other information as may have been directed by the court;

together with satisfactory evidence of the mailing of a form of ballot conforming to Official Form No. 30, to creditors and equity security holders entitled to vote on the plan;

3. A copy or abstract of the order confirming the plan; and

4. A copy or abstract of the plan.

Authority: 11 U.S.C.A. §§1123, 1125, 1128, 1129, 1141 & 1142; Bankruptcy Rules 3016, 3017 & 3020.

History: Adopted December 3, 1982. Standard proposed by Report of 1982 Title Examination Standards Committee, 53 O.B.J. 2731, 2736-38 (1982), approved by Real Property Section, December 2, 1982, and adopted by House of Delegates. Amendments proposed by 1985 Report of the Title Examination Standards Committee, 56 O.B.J. 2535, 2539-41. On November 14, 1985, the Real Property Section amended the proposal by striking the parenthetical clause in "F.2.", Report, *supra*, 2541. On November 15, 1985, the House of Delegates adopted the amended proposal, 57 O.B.J. 5, 7 (1986) and 57 O.B.J 147 (1986).

The 1986 Report of the Committee recommended substantial changes in this standard, 57 O.B.A. 2677, 2688 (1986). The report as published inadvertently indicated that section "F." was to be deleted. The proposal was amended by the Executive Committee of the Real Property Section to retain Section "F.". The amended proposal was approved by the Section November 20, 1986, and approved by the House of Delegates, November 21, 1986.

The 1987 Title Examination Standards Committee Report recommended several amendments to this standard, 58 O.B.J. 2839, 2847-48 (1987). In the first sentence of the "Comment" to Part "A." the words "or other lien creditor" were added and the words "so long as" were substituted for the word "unless". In the second sentence of the same part, all that which follows the parenthetical clause was added. In part "B.1." following the first parenthetical clause, the words "or abstract of " and the second parenthetical clause were added. In the "Authority" in part "B.", Bankruptcy Rule 2008 was added. In the "Comment" to part "B." the clause "unless the automatic stay ... above" and the words "or other lien creditor" were added to the second sentence. In part "D.1." the words "or abstract" were added. In the "Authority" following part "D.", Bankruptcy Rule 2008 was added. In part "E.1.a." the final parenthetical language was added. In the "Authority" following part "E.", Bankruptcy Rule 2008 was again added. In part "F.2.", the parenthetical clause was added. These proposals were approved by the Real Property Section, November 12, 1987, and adopted by the House of Delegates, November 13, 1987.

The Title Examination Standards Committee, in its 1988 Report, 59 O.B.J. 3098, 3106-09, proposed the addition of "G.". Numerous other changes to conform the standard with recent amendments to the Bankruptcy Act and to the Bankruptcy Rules were recommended. Several corrections to numbers in citations were made by the Executive Committee of the Section before this proposed amendment was submitted to the Real Property Section which approved the proposed amendments as corrected, December 8, 1988. The House of Delegates adopted the amended standard as corrected, December 9, 1988.

2. Discussion of Revisions:

Substantial discussion within the Committee resulted in a decision to revise this Standard so that it is more flexible concerning the type of evidence to be accepted to prove that certain actions had been taken by the parties or by the bankruptcy court.

Such increased flexibility is reflected in the replacement of the old phrase "review the following instruments" with the new phrase stating the need to "review duly certified or otherwise reliable evidence of the following matters".

3. New Standard:

With respect to bankruptcy proceedings commenced on or after October 1, 1979, where title to real property is held by a debtor at the time of the commencement of bankruptcy proceedings (and if the proceedings have not been properly dismissed prior to a conveyance or other transfer of title to the property), the title examiner should be furnished with an review duly certified or otherwise reliable evidence of the following matters (in addition to the bankruptcy petition):

A. Where the property is scheduled and claimed by the debtor as exempt, and no objection to such claim of exemption has been sustained by the bankruptcy court:

1. The Schedule of Real Property ("Schedule B-1") and the Schedule of Exempt Property ("Schedule B-4"), showing the claim of exemption for the property, or any other such claim of exemption by a dependent of the debtor on behalf of the debtor; and

2. Satisfactory evidence that no objections to such claim of exemption have been filed; if such an objection has been so filed, the examiner should also be furnished with and review any order by the bankruptcy court overruling or otherwise resolving such objection.

Authority: 11 U.S.C.A. §§521-522; Bankruptcy Rules 1002 & 1007; 3 L. King, Collier on Bankruptcy ¶522.26 (15th ed. 1984).

Comment: Title examiners should be aware that even though property is exempt, a mortgagee or other lien creditor may not commence or continue a foreclosure action against the debtor or obtain a conveyance from the debtor, so long as the automatic stay continues in effect. Unless relief from the automatic stay have been obtained as to the debtor (by final order of the bankruptcy court to permit the action), the stay continues until the earliest of (a) the closing of the bankruptcy case, (b) the dismissal of the bankruptcy case or (c), in a Chapter 7 case concerning an individual or in a case under Chapter 9, 11, 12 or 13, the grant or denial of a discharge, 11 U.S.C.A. §362.

B. Where the property is affirmatively abandoned by the bankruptcy trustee or by a debtor in possession:

1. If abandoned by a bankruptcy trustee (except where the trustee is the United States Trustee), the order by the bankruptcy court approving the trustee's qualifying bond (or other satisfactory evidence that the trustee filed with the court a bond in favor of the United States conditioned on the faithful performance of his official duties), or (if a blanket bond has been filed pursuant to Bankruptcy Rules 2010 or X-1004) the trustee's acceptance of his election or appointment (except where deemed accepted pursuant to Rules 2008 or X-1004, on or after August 1, 1987); or if abandoned by a debtor in possession, satisfactory evidence that no trustee was appointed in the case; and

2. Either:

a. The notice by the trustee or debtor in possession of his or her intention to abandon the property, and satisfactory evidence that no objections to such abandonment have been filed within the time allowed by such notice in accordance with the Rules of Bankruptcy Procedure and/or local court rules; or

b. If the abandonment is pursuant to a request of a party in interest, the order by the bankruptcy court authorizing or directing such abandonment, after such notice and hearing as required by the bankruptcy court, by the Bankruptcy Rules and/or by local court rules.

Authority: 11 U.S.C.A. §§102, 322 & 554; Bankruptcy Rules 2008, 2010 & X-1004; 4 L. King, Collier on Bankruptcy ¶554.02 (15th ed. 1984).

Comment: Upon abandonment, control of the property abandoned reverts to the debtor. In such event, unless the automatic stay has terminated as described in the Comment following section A above, a mortgagee or other lien creditor must find relief from the automatic stay as to the debtor by final order of the bankruptcy court before either (1) foreclosing the debtor's interest or (2) obtaining a conveyance from the debtor, 11 U.S.C.A. §362.

C. Where non-exempt property is not administered before the closing of the bankruptcy case and, unless otherwise ordered by the bankruptcy court, is therefore deemed abandoned:

1. The order discharging the trustee, if one has been appointed, and closing the estate; and

2. The bankruptcy proceedings showing that the property was scheduled by the debtor and was not administered at or before the closing of the case.

Authority: 11 U.S.C.A. §§350 & 554; 4 L. King, Collier on Bankruptcy ¶554.02 (15th ed. 1984).

D. Where the property is sold by the bankruptcy trustee or by a debtor in possession (other than in the ordinary course of business of the debtor):

1. If sold by a bankruptcy trustee (except where the trustee is the United States Trustee), the order by the bankruptcy court approving the trustee's qualifying bond (or other satisfactory evidence that the trustee filed with the court a bond in favor of the United States conditioned on the faithful performance of his official duties), or (if a blanket bond has been filed pursuant to Bankruptcy Rules 2010 or X-1004) the trustee's acceptance of his election or appointment (except where deemed accepted pursuant to Rules 2008 or X-1004, on or after August 1, 1987); or if sold by the debtor in possession, satisfactory evidence that no trustee was appointed in the case as of the date of the conveyance;

2. The notice of such sale, or in accordance with the Bankruptcy Code, the Bankruptcy Rules and/or local court rules, or the order of the bankruptcy court authorizing a different form of notice or dispensing with such notice;

3. The bankruptcy proceedings showing that (a) no objections to such sale were raised, or if such objections were raised, the order overruling such objections or otherwise

authorizing the sale, and (b) such sale has not been stayed pending an appeal from such order; and

4. The conveyance by the trustee or the debtor in possession.

Authority: 11 U.S.C.A. §§102(1), 322, 363(b), 363(m) & 1107; Bankruptcy Rules 2002, 2008, 2010, 6004(e)(2), X-1004 & X-1008; 2 L. King, Collier on Bankruptcy ¶554.02 (15th ed. 1984).

E. Where the property is sold in the ordinary course of business of the debtor, unless otherwise ordered by the court:

1. If the property is sold by the trustee:

a. Except where the trustee is the United States Trustee, the order by the bankruptcy court approving the trustee's qualifying bond (or other satisfactory evidence that the trustee filed with the court a bond in favor of the United States conditioned on the faithful performance of his official duties), or (if a blanket bond has been filed pursuant to Bankruptcy Rules 2010 or X-1004) the trustee's acceptance of his election or appointment (except where deemed accepted pursuant to Rules 2008 or X-1004, on or after August 1, 1987);

b. If in a Chapter 11 case, satisfactory evidence that the bankruptcy court has not entered an order precluding the trustee from operating the debtor's business; and

c. The conveyance by the trustee.

2. If the property is sold by a debtor in possession, satisfactory evidence that no trustee was appointed in the case as of the date of the conveyance, and the conveyance by the debtor in possession.

Authority: 11 U.S.C.A. §§322, 363, 721, 1108 & 1304(b); Bankruptcy Rules 2008, 2010 & X-1004; 2 L. King, Collier on Bankruptcy ¶363.04 (15th ed. 1984); 4 L. King, id. ¶721.04(1); 5 L. King, id. ¶¶1108.03 & 1304.01(3).

Where the property is sold free and clear of any interest in such property of any entity other than the bankruptcy estate:

1. The instruments described in Paragraphs "D." and "E". above, as appropriate; and

2. The bankruptcy proceedings showing that such entity's interest in the property attached to the proceeds of such sale, that such entity consented to the sale, or that such entity received notice of such sale (or, for sales on or after August 1, 1987, that such entity was served, in accordance with Bankruptcy Rule 7004, with notice of the motion for authority to sell the property free and clear of such interest, which notice included the date of the hearing on the motion and the time within which objections may be filed and served upon the trustee or debtor in possession) and raised no objection, or if an objection was raised, the order overruling such objection or otherwise authorizing the sale free and clear of such interest.

Authority: 11 U.S.C.A. §363(f); Bankruptcy Rules 2002, 2010, 6004, X-1004 & X-1008; 2 L. King, Collier on Bankruptcy ¶363.07 (15th ed. 1984).

G. In a Chapter 11 case, where the property is the subject of a plan of reorganization of the debtor:

1. The notice (in accordance with Bankruptcy Rules and/or local court rules) of the filing of the disclosure statement, and the order approving the disclosure statement;

2. Satisfactory evidence of the mailing (in accordance with the Bankruptcy Rules and/or local court rules) to all creditors and equity security holders, of:

a. The plan, or a court approved summary of the plan;

b. The disclosure statement approved by the court;

c. Notice of the time within acceptances and rejections of the plan may be filed;

d. Notice of any date fixed for the hearing on confirmation of the plan; and

e. Such other information as may have been directed by the court;

together with satisfactory evidence of the mailing of a form of ballot conforming to Official Form No. 30, to creditors and equity security holders entitled to vote on the plan;

3. The order confirming the plan; and

4. The plan (or such portion(s) thereof to which the disposition of the property is subject).

Authority: 11 U.S.C.A. §§1123, 1125, 1128, 1129, 1141 & 1142; Bankruptcy Rules 3016, 3017 & 3020.

Comment: In some instances it may be appropriate to furnish to the title examiner a duly certified copy of the bankruptcy case docket; while not necessarily conclusive of the issue, the case docket may indicate to the examiner's satisfaction whether certain events have or have not occurred--the "satisfactory evidence" referred to in this Standard. (See, Bankruptcy Rule 5003).

D. 22.2 TITLE TO PROPERTY HELD UNDER AN EXPRESS PRIVATE TRUST

1. Old 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. Discussion of Revisions:

Prior to November 1, 1988, express private trusts could not, according to many title examiners and to the pre-1988 version of this Standard, hold title in the name of the trust itself. Instead the trustees held title as persons, although it

was in their fiduciary roles. As of November 1, 1988, the Oklahoma legislature enacted 60 O.S.A. §171(B) which read:

> 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.

Then, in an effort to overcome certain serious objections to the procedures which had been established by §171(B), the Oklahoma legislature enacted, as of November 1, 1989, 60 O.S.A. §§175.6(a) and 175.6(b), and repealed 60 O.S.A. §171(B). [See Mike Richie's article entitled: "Conveyances to Express Private Trusts: A Caution to Title Examiners", at 59 OBJ 2852 (October 29, 1988).]

60 O.S.A. §§175.6(a) and 175.6(b) provide:

> 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 action to set aside such conveyance brought against a bona fide purchaser for value.

b. Any conveyance made and filed or 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.

The Committee was unable, in the time available, to reach a consensus on a Standard which would either support or object to this new legislative enactment. Such new law, at least in part, addresses the Committee's previous concerns about §171(B) (1) divesting persons of vested rights without an opportunity to object, and (2) identifying the trustees of the trust. Therefore, the Committee decided to adopt only a new Comment rather than a full Standard at this time.

3. New Standard:

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

Comment: The Legislature, in its 1988 Session, adopted 60 O.S.A. §171(B), which was intended to simplify the problem addressed by the former Standard. The Legislature, in its 1989 Session, adopted new law codified as 60 O.S.A. §§175.6(a) and 175.6(b) and amended 60 O.S.A. §171 by deleting paragraph B therefrom.

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

1. Old 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. Discussion of Revisions:

The Oklahoma legislature took steps, effective November 1, 1988, in an apparent effort to overcome the position taken by many title examiners that grantees who are labeled simply as "trustees", with no further identification of the trust, are--as individuals and not as trustees--in fact the grantees.

Such amendment allowed for the curing of such indefinite references to a trustee, by having some unspecified party file some undefined written evidence.

The new 60 O.S.A. §156 provides:

> 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.

It should be noted that this amendment does not include within its express language: (1) a grantee labeled as an "agent", and (2) any instrument other than a deed--such as a mortgage. (See: 60 O.S.A. §157, which covers non-deed instruments.)

The form of the "written evidence" is undefined and no identification is made of which persons are entitled to sign such written evidence.

3. <u>New Standard</u>:

> A. 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.

B. The presence of the words "trustee" or "as trustee" following a grantee's name in a deed will put the examiner on notice that the real property conveyed is subject to a beneficial interest in a person other than the grantee when written evidence, establishing that an express trust does exist with respect to the property conveyed, is recorded. The written evidence may be recorded before or after the grantor's death, so long as it is recorded prior to conveyance of the property by the party who took title "as trustee."

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

Caveat: The statute does not state where the written evidence is to be recorded.

F. 23.3 CAPACITY OF CONSERVATEES TO CONVEY

1. Old Standard:

23.3 CAPACITY OF CONSERVATEES TO CONVEY

While appointment of a conservator does not presuppose mental incapacity, a conservatee is thereafter unable to make a contract which creates an obligation against his estate (except for necessaries). Investment, management, sale or mortgage of property in the estate of a conservatee must be made in accordance with the laws governing guardianships.

Authority: 30 O.S.A. §§3-205, 3-205, 3-210 (formerly 58 O.S.A. §§890.5, 890.10 prior to December 1, 1988).

Comment: In *Lindsay v. Gibson*, 635 P.2d 331 (Okla. 1981), the Oklahoma Supreme Court held that a gift conveyance from the conservatee to the conservator and other siblings of the conservatee was invalid.

History: Standard proposed by Report of Title Examination Standards Committee, 55 O.B.J. 1817, 1819 (1984). Approved by Real Property Section, November 1, 1984, and adopted by the House of Delegates, November 2, 1984.

2. Discussion of Revisions:

The parenthetical phrase "(except for necessaries)" was replaced with "(except for necessities)", to conform to the literal language of the applicable statutes.

A discussion of the case of the Matter of Conservatorship of Spindle, 733 P.2d 388 (Okla. 1986) was added to the Comment, and a related Caveat was also added. In Spindle it was held that a physically disabled, but mentally competent, ward is legally able to convey real property, despite the appointment of a conservator. And the legislature went back and provided that to have an enforceable conservatorship, the conservatee must always consent to the appointment of a conservator; thereby leaving pre-November 1, 1989 involuntary appointments in jeopardy.

3. New Standard:

While appointment of a conservator does not presuppose mental incapacity, a conservatee is thereafter unable to make a contract which creates an obligation against his estate (except for necessities). Investment, management, sale or mortgage of property in the estate of a conservatee must be made in accordance with the laws governing guardianships.

Authority: 30 O.S.A. §§3-215 & 3-219 (formerly 58 O.S.A. §§890.5 & 890.10 prior to December 1, 1988; and 30 O.S.A. §§3-205 & 3-210 from December 1, 1988 to November 1, 1989).

Comment: In Lindsay v. Gibson, 635 P.2d 331 (Okla. 1981), the Oklahoma Supreme Court held that a gift conveyance from the conservatee to the conservator and other siblings of the conservatee was invalid. In Matter of Conservatorship of Spindle, 733 P.2d 388 (Okla. 1986), the Court held that a physically disabled but mentally competent ward is not legally disabled from making a gift to her conservator, overruling Lindsay to that extent.

Caveat: House Bill No. 1556, enacted as 1989 Okla. Sess. Laws, ch. 276, amended the conservatorship statutes to provide that a conservator may only be appointed with the consent of the ward, and further that all conservatorships created prior to November 1, 1989 with the consent of the ward would remain valid. The legislation is silent regarding the legal status of a conservatorship created prior to November 1, 1989, without the consent of the ward.

G. 24.2 SAVINGS AND LOAN ASSOCIATIONS AND SAVINGS BANKS

1. Discussion of Revisions:

In this new Standard, we attempt to provide a detailed outline of the steps to follow to document the trail of title through the FSLIC.

2. New Standard:

A. With regard to a savings and loan association or savings bank ("S&L") that is chartered by the State of Oklahoma for which the Federal Savings and Loan Insurance Corporation ("FSLIC") (or its successor) has been appointed Receiver, title to all assets and property of such S&L shall be deemed transferred to an vested in the FSLIC (or its successor) upon the execution of a certificate by the Oklahoma State Bank Commissioner evidencing the appointment of the FSLIC (or its successor) as such Receiver. Such certificate is filed in the office of the County Clerk of the County where the principal office of the S&L is located.

B. With regard to a federal S&L for which the FSLIC (or its successor) has been appointed Receiver, title to all assets and property of such S&L shall be deemed to have been transferred to and vested in the FSLIC (or its successor) upon the appointment of the FSLIC (or its successor) as Receiver by resolution of the Federal Home Loan Bank Board ("FHLBB") (or its successor), and the FSLIC (or its successor) shall thereupon be deemed to have all the rights, powers and privileges then possessed by or thereafter granted by law to a statutory receiver of a federal S&L. Such resolution is filed in the office of the County Clerk of the County where the principal office of the S&L is located.

C. Prior to August 9, 1989, deed and other instruments from the FSLIC, as Receiver for an S&L, were executed by Special Respresentatives appointed by the FHLBB. FSLIC Special Representatives were appointed in the FHLBB Resolutions Appointing the Receivers.

D. Prior to August 9, 1989, if the FSLIC, FDIC, or FHLBB transferred all interests in real property from an S&L to an existing or newly federally chartered S&L, such transfers may be evidenced by a Memorandum of Transfer and/or Assignment filed in each county in which the S&L owned interests in real property. A title examiner may rely upon a recitation in a deed or release of mortgage that the transferee association is the "successor in title" to the transferor S&L "as evidenced by the memorandum of transfer and/or assignment" and further reciting the book and page of recording and date and county of filing of such memorandum.

Authority: 18 O.S.A. §381.77(C) and (D); 12 U.S.C.A. §§1464(d)(6), and 1729(a)-(c); 12 C.F.R. §§547.1 et seq.; Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73 (Aug. 9, 1989), 103 Stat. 183.

Comment: On August 9, 1989, the FSLIC and FHLBB were abolished with the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") which divided and transferred the duties, responsibilities, assets, liabilities, etc. of those former entities among the FDIC, the Office of Thrift Supervision ("OTS"), the FSLIC Resolution Fund, the Resolution Trust Corporation ("RTC"), the Federal Housing Finance Board ("FHFB") and other federal agencies.

Basically, all assets and liabilities of the FSLIC were transferred to the FSLIC Resolution Fund, EXCEPT those assets and liabilities that were transferred to the RTC. All assets and liabilities held by receivers of S&Ls closed after January 1, 1989, were transferred to the RTC. The authority of the FHLBB was transfered to the Director of the OTS; EXCEPT all authority with regard to the Federal Home Loan Banks was transferred to the FHFB and EXCEPT certain FHLBB powers that were transferred to the FDIC or the Federal Home Loan Mortgage Corporation ("FHLMC").

The RTC has no employees. Rather it (and its predecessor, the FSLIC) employed the FDIC, under a Management Agreement, to perform all of the duties of the RTC. The FDIC can be removed from its managerial position only with Congressional approval.

With respect to transfers, mergers, consolidations, etc., by receivers or conservators, Section 212(a) of FIRREA specifically authorizes the FDIC to merge any insured depository institution (a new term to describe a savings and loan association, savings bank or bank) with another or to "transfer any asset or liability of the institution in default without any approval, assignment, or consent with respect to such transfer" except, if the transferee is another depository institution, the approval, if necessary, "of the appropriate Federal banking agency for such institution". (Emphasis added.)

Section 501 of FIRREA provides that the RTC, as successor to the FSLIC as receiver or conservator, shall have the same powers and rights to carry out its duties with respect to S&Ls as the FDIC has under the Federal Deposit Insurance Act (including the transfer provision above).

III. PROPOSED REVISED AND NEW STANDARDS FOR 1991 (EFFECTIVE NOVEMBER 16, 1990)

THE 1990 PROPOSALS

8.1 TERMINATION OF JOINT TENANCY ESTATES AND LIFE ESTATES

In the event of the death of a life tenant or a 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 made by the surviving joint tenant; on or after November 1, 1988, such affidavit must have been made by the surviving joint tenant or by the personal representative or the duly appointed attorney in fact 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 or a district court as to such deceased person and property unless made unnecessary by the ten (10) year statute of limitations; or if taxes were not due

under §804, then neither was required and the affidavit must so state.

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 or a district court as to such deceased person and property unless made unnecessary by the ten (10) year statute of limitations; or if taxes were not due under §804, then neither was required and the affidavit must so state.

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; AND

b. Either:

i. **Where death occurred prior to November 1, 1984.** In the case of an affidavit which is filed on or after November 1, 1984, with respect to a joint tenant who died prior to November 1, 1984, a waiver or release of the estate tax lien by the Oklahoma Tax Commission or a district court as to such deceased person and property, unless made unnecessary by the ten (10) year statute of limitations; or

ii. **Where death occurred on or after November 1, 1984,** no estate tax lien clearance documentation is required, and no recitation regarding estate tax liability need be contained in the affidavit; AND

c. If such affidavit was made on or after November 1, 1988, *on behalf of* the surviving joint tenant, there also shall have been recorded with the county clerk of the county in which the joint tenancy property is located:

i. A certified copy of the letters testamentary, letters of administration or letters of guardianship issued to the personal representative; or

ii. A copy of the power of attorney appointing the attorney in fact.

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 occurred 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, if the death occurred prior to November 1, 1984, unless a waiver or release thereof has been filed

or made unnecessary either (a) by the provisions of former paragraph numbered (3) of 58 O.S.A. §912 in effect from (and affecting only affidavits filed between) October 1, 1980 through October 31, 1984, or (b) by the ten (10) year statute of limitations.

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 a probate proceeding is commenced with respect to other property of the decedent, by the showing of a certified copy of the letters testamentary or of administration issued in such proceeding, 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 a district court has entered an order pursuant to 58 O.S.A. §282.1 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.

Authority: 58 O.S.A. §§282.1 & 912; 68 O.S.A. §§811 & 815.

Comment: 68 O.S.A. §811(d) was amended effective November 1, 1984. The amended statute 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 retroactively effective (i.e, effective in cases where death occurred prior to November 1, 1984) and it should not be considered to be retroactive at this time. For this reason and because of the repeal effective November 1, 1984, of former subsection 3 of 58 O.S.A. §912, it is necessary to record an estate tax lien clearance with an affidavit filed on or after November 1, 1984, with respect to a deceased joint tenant who died prior to November 1, 1984, even though 58 O.S.A. §912 has made no such requirement since its amendment in 1984.

12.1 JUDGMENT LIENS

A. Judgments of courts of record of this state and of the United States rendered on or after October 1, 1978, and filed on or after January 1, 1991, shall be liens on the real estate of the judgment debtor within a county from and after the time a certified copy of such judgment has been filed in the office of the county clerk in that county, and no such judgment shall be a lien until it has been filed in this manner. The term "filed", as used in this paragraph of this title examination standard, means "presented, with tender of filing fee, and accepted by the county clerk". Judgments for alimony are discussed in Title Examination Standard 12.2.

B. Judgments of courts of record of this state and of the United States rendered on or after October 1, 1978, and filed on or after November 1, 1988, but filed before January 1, 1991, shall be liens on the real estate of the judgment debtor within a county from and after the time an affidavit of judgment, with a certified copy of such judgment attached to such affidavit of judgment and incorporated by reference in such affidavit of judgment, has been filed in the office of the county clerk in that county, and no such judgment shall be a lien until it has been filed in this manner. The term "filed", as used in this paragraph of this title examination standard, means "presented, with tender of filing fee, and accepted by the county clerk". Judgments for alimony are discussed in Title Examination Standard 12.2.

C. Judgments of courts of record of this state and of the United States rendered on or after October 1, 1978, and filed before November 1, 1988, shall be liens on the real estate of the judgment debtor within a county from and after the time a certified copy of such judgment has been filed in the office of the county clerk in that county, and no such judgment shall be a lien

until it has been filed in this manner. The term "filed", as used in this paragraph of this title examination standard, means "filed and properly indexed" against the judgment debtor upon whose property a lien is sought to be impressed. Judgments for alimony are discussed in Title Examination Standard 12.2.

Authority: 12 O.S.A. §§706 & 1001(E), Gilbreath v. Smith, 50 Okla. 42, 150 P. 719 (1915); Long Bell Lumber Co. v. Etter, 123 Okla. 54, 251 P. 997 (1927); Flanagan v. Clark, 156 Okla. 230, 11 P.2d 176 (1932).

Comment: Judgments entered upon the judgment docket, in the office of the district court clerk in the county in which the land is located, prior to October 1, 1978, unless extinguished by release or operation of law, constitute liens upon non-exempt land and should not be disregarded, 1943 Okla. Sess. Laws, ch. 12, §1.

In determining the effectiveness of the lien of a judgment filed in the office of the county clerk pursuant to 12 O.S.A. §706, the examiner should take into consideration the law of the case in *Will Rogers Bank & Trust Company v. First National Bank of Tahlequah*, 710 P.2d 752 (Okla. 1985).

Note that 1990 Okla. Sess. Laws, ch. 251, §1, contains provisions prescribing the form of a judgment rendered on or after January 1, 1991, and that 1990 Okla. Sess. Laws, ch. 251, §7, provides that no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of ten (10) days after it is filed with the Court Clerk.

Caveat: The examining attorney should be aware of the possibility that a judgment which has been rendered, but not filed with the county clerk, might be filed with the county clerk and become a lien after the effective date of the opinion of the examiner but before the client acquires an interest in the property.

D. A judgment rendered in the small claims division of the district court after October 11, 1982, shall be a lien only from the date when a Statement of Judgment is filed of record in the office of the county clerk in the county in which the land is located and properly indexed against the judgment debtor upon whose real estate the lien is asserted, 12 O.S.A. §1770. Between October 1, 1978, and October 11, 1982, a judgment rendered in the small claims division of the district court was not a lien until it was (1) entered upon the judgment docket in the office of the district court clerk of the county in which the judgment was rendered and (2) filed of record in the office of the county clerk in the county in which the land is located and properly indexed against the judgment debtor upon whose real estate the lien is asserted, 1977 Okla. Sess. Laws, ch. 216, §1; 1979 Okla. Sess. Laws, ch. 83, §1. Prior to October 1, 1978, a judgment rendered in the small claims division of the district court was a lien only from the date when entered upon the judgment docket in the office of the clerk of the district court in the county in which the land is located, 1975 Okla. Sess. Law, ch. 15, §§1 & 2.

12.6 RETURN OF WRITS OF SPECIAL EXECUTION.

A. The 60 day time limit for a return of execution imposed by 12 O.S.A. §802 does not apply to special executions.

B. The failure of the Sheriff to return a writ of special execution on or before a return date set by the court is an irregularity which is cured by confirmation of the sale by the court.

Authority: 12 O.S.A. §732; Price v. Citizens' State Bank of Mediapolis, 23 Okla. 723, 102 P. 800 (1909).

12.7 PROPERTY ACQUIRED BY FARM CREDIT SYSTEM; RIGHT OF FIRST REFUSAL.

A. After January 6, 1988, agricultural real estate acquired by an institution of the Farm Credit System (a Federal Land Bank, a Farm Credit Bank or a Production Credit Association) as a result of a loan foreclosure or a voluntary conveyance from a borrower is subject to a right of first refusal vested in the "previous owner" to repurchase or lease the property. A "previous owner" is the person or entity from which or whom the Farm Credit System lender acquired title, by foreclosure or by voluntary conveyance in lieu of foreclosure, to land which had been mortgaged to such lender to secure the debt of such previous owner or of another.

B. If the previous owner waived his right of first refusal, the original or an authentic copy of the executed waiver should be furnished and may be recorded, with an appropriate affidavit where required.

C. Where the property was not sold to the previous owner, and no waiver was obtained, the examiner should be furnished with the following:

1. Evidence of notification by the lender to the previous owner by certified mail, at least 30 days (15 days for notifications between January 6, 1988 and August 17, 1988) prior to private sale to any other party, of the previous owner's right to purchase the property at the appraised value as determined by an accredited appraiser, and of the previous owner's right to offer to purchase the property at a price less than the appraised value.

2. If such sale was a private sale, an affidavit from an officer or agent of the lender that:

a. the previous owner failed to submit any offer to purchase within 30 days (15 days for offers between January 6, 1988 and August 17, 1988) after notice; or

b. the previous owner submitted an offer to purchase within the requisite time, but the offer was for less than the appraised value, and that the lender gave notice to the previous owner of the rejection of the previous owner's offer within 15 days after receipt of such offer, and that the institution thereafter sold the property to a third party for a stated price which is equal to or greater than the previous owner's offer; or

c. after the lender rejected an offer from the previous owner to purchase the property at a price less than the appraised value, and the lender thereafter sold the property to a third party for a price less than the previous owner's offer, or on different terms and conditions from those previously extended to the previous owner, the lender first gave notice to the previous owner of its intention to accept an offer from a third party for a price less than the previous owner's offer, or on terms and conditions different from those first extended to the previous owner, by certified mail, and that the previous owner did not, within 15 days from such certified mail notice, submit an offer in writing to purchase the property under such different terms and conditions.

3. If such sale occurred at public auction or pursuant to some other public bidding procedure:

a. proof that the previous owner was notified by certified mail in advance of the public auction, competitive bidding process or other similar public offering by a notice containing the minimum bid amount, if any, required to qualify as acceptable to the institution, and also containing the terms and conditions to which the sale would be subject; and

b. an affidavit from an agent or officer of the lender, if the property was sold to a third party other than the previous owner, that the previous owner did not bid an amount equal to or more than the amount for which the property was sold to the third party.

D. A certified mail notice is sufficient, whether or not received or accepted by the previous owner, if mailed one time to the last known address of the previous owner.

Authority: 12 U.S.C.A. §2219a (Farm Credit Act of 1971, §4.36, as amended by Agricultural Credit Act of 1987, Pub. L. No. 100-233 (January 6, 1988), tit. I, §108, 101 Stat. 1582 and Agricultural Credit Technical Corrections Act of 1988, Pub. L. No. 100-399 (August 17, 1988), tit. I, §104, 102 Stat. 990).

Comment: Note that the right of first refusal provisions apply only to "agricultural real estate". Some Farm Credit System loans are made on rural housing and not agricultural real estate. Such rural housing would not be affected by and is not subject to the right of first refusal legislation. Farm Credit Administration regulations provide that the

"previous owner" includes the prior record owner where the owner's land was used as collateral for the loan even though the prior record owner was not a borrower, 12 C.F.R. §614.4522(a)(2). Similar provisions apply to leases of agricultural property owned by Farm Credit System institutions. The "accredited appraiser" referred to in the statute is not elsewhere defined. The Ninth Farm Credit District, which includes Oklahoma, accredits certain appraisers, and utilizes such approved appraisers in determining the appraisal values.

Loans in a pool backing securities or obligations guaranteed by the Federal Agricultural Mortgage Corporation ("Farmer Mac") are exempted from the right of first refusal provisions, even if held by, originated by, or serviced by Farm Credit System institutions, provided that the borrower was given notice of such exemption at the time of loan origination, and opportunity to refuse to allow the loan to be pooled; see section 8.9 of the Farm Credit Act of 1971, 12 U.S.C.A. §2279aa-9. Loans in such a pool which were originated by non-Farm Credit System institutions are not subject to the statutory right of first refusal, even if later assigned to a Farm Credit system entity.

24.2 SAVINGS AND LOAN ASSOCIATIONS AND SAVINGS BANKS

A. With regard to a savings and loan association or savings bank ("S&L") that is chartered by the State of Oklahoma for which the Federal Savings and Loan Insurance Corporation ("FSLIC") or one of its successors has been appointed Receiver, title to all assets and property of such S&L shall be deemed transferred to and vested in the FSLIC or one of its successors upon the execution of a certificate by the Oklahoma State Bank Commissioner evidencing its appointment as such Receiver. Such certificate is filed in the office of the County Clerk of the County where the principal office of the S&L is located.

B. With regard to an S&L chartered under federal law for which the FSLIC or one of its successors has been appointed Receiver, title to all assets and property of such S&L shall be deemed to have been transferred to and vested in the FSLIC or one of its successors upon its appointment as Receiver by resolution of the Federal Home Loan Bank Board ("FHLBB") or one of its successors, and the FSLIC or one of its successors shall thereupon be deemed to have all the rights, powers and privileges then possessed by or thereafter granted by law to a statutory receiver of a federal S&L.

C. Prior to August 9, 1989, deeds and other instruments from the FSLIC, as Receiver for an S&L, were executed by Special Representatives appointed by the FHLBB. FSLIC Special Representatives were appointed in the FHLBB Resolutions appointing the Receivers.

D. If the FSLIC, FDIC or FHLBB, or any of their successors, transferred all interests in real property from an S&L to an existing or newly federally chartered S&L, such transfers may be evidenced by a Memorandum of Transfer and/or Assignment filed in each county in which the S&L owned interests in real property. A title examiner may rely upon a recitation in a deed or release of mortgage that the transferee association is the "successor in title" to the transferor S&L "as evidenced by the memorandum of transfer and/or assignment" and further reciting the book and page of recording and date and county of filing of such memorandum.

Authority: 18 O.S.A. §381.77(C) and (D); 12 U.S.C.A. §§1464(d)(6), and 1729(a)-(c); 12 C.F.R. §§547.1 *et seq.*; Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73 (Aug. 9, 1989), 103 Stat. 183.

Comment: On August 9, 1989, the FSLIC and FHLBB were abolished with the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") which divided and transferred the duties, responsibilities, assets, liabilities, *etc.* of those former entities among the FDIC, the Office of Thrift Supervision ("OTS"), the FSLIC Resolution Fund, the Resolution Trust Corporation ("RTC"), the Federal Housing Finance Board ("FHFB") and other federal agencies.

Basically, all assets and liabilities of the FSLIC were transferred to the FSLIC Resolution Fund, EXCEPT those assets and liabilities that were transferred to the RTC. All assets and liabilities held by receivers of S&Ls closed after January 1, 1989, were transferred to the RTC. The authority of the FHLBB was transferred to the Director of the OTS;

EXCEPT all authority with regard to the Federal Home Loan Banks was transferred to the FHFB and EXCEPT certain FHLBB powers that were transferred to the FDIC or the Federal Home Loan Mortgage Corporation ("FHLMC").

The RTC has no employees. Rather it (and its predecessor, the FSLIC) has employed the FDIC, under a Management Agreement, to perform many of the duties of the RTC. The FDIC can be removed from its managerial position only with Congressional approval.

With respect to transfers, mergers, consolidations, etc., by receivers or conservators, Section 212(a) of FIRREA specifically authorizes the FDIC to merge any insured depository institution (a new term to describe a savings and loan association, savings bank or bank) with another or to "*transfer* any asset or liability of the institution in default *without any approval, assignment, or consent* with respect to such transfer" except, if the transferee is another depository institution,the approval, if necessary, "of the appropriate Federal banking agency for such institution". (Emphasis added.)

Section 501 of FIRREA provides that the RTC, as successor to the FSLIC as receiver or conservator, shall have the same powers and rights to carry out its duties with respect to S&Ls as the FDIC has under the Federal Deposit Insurance Act (including the transfer provision above).

IV. POSSIBLE REVISED AND NEW STANDARDS FOR 1992
(Topics to be considered during 1991)

IV. POSSIBLE REVISED AND NEW STANDARDS FOR 1992.

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

Topics to be Considered During 1991

Committee	Standard	Description
Epperson	1.3	FEDERAL COURT CERTIFICATES - present necessity for requiring in abstract of title to real property in county where court sits.
Schuller & Morris	3.1	INSTRUMENTS BY STRANGERS - What extent of inquiry satisfies the minimum requirements of the standard?
Richie & Lyon	4.2	OIL AND GAS LEASES AND MINERAL AND ROYALTY INTERESTS - Can the examiner rely upon a certificate of non-development to establish for marketable record title purposes that a lease or other interest, dependent upon production for its continued existence, has expired?
J.T. Rowland, Smith, Reynolds & Schuller	4.4	(New) CORRECTED INSTRUMENTS - effect of amendments appearing on the face of a previously recorded instrument which has been re-recorded.
Astle	9.2	CORPORATE CONVEYANCES - can an examiner accept the signature of an Assistant Vice President as an effective signature on behalf of the corporation under current law?
Epperson & L. Thomas	10.4	CONVEYANCE OF REAL PROPERTY HELD IN PARTNERSHIP NAME - Revision to clarify comment to standard.

Epperson & Richie	12.2	LIENS UPON REAL PROPERTY BASED UPON JUDGMENTS FOR ALIMONY AND/OR SUPPORT - revisions to standard regarding: creation of lien by judge without necessity of other actions, judgments for continuing support alimony, effect of quit claim deed from judgment debtor former spouse to judgment creditor former spouse which does not contain an exception respecting such judgment.
Gossett & Epperson	12.4	NOTICE REQUIRED FOR EXECUTION SALES IN FEDERAL COURT - Applicability of 12 O.S. §§764 and 765 to execution sales of real estate conducted in federal district courts in Oklahoma.
Butler, Gossett & Rowland	12.4	NOTICE REQUIREMENTS FOR EXECUTION SALES - to what persons must notice of sale and confirmation be sent when such notice is given more than thirty (30) days after judgment is rendered?
Roffers, Gossett, Epperson & Kriegel	24.3	FAILED FINANCIAL INSTITUTIONS AFTER FIRREA - Documentary evidence required after FIRREA for an examiner to determine that a transfer by or on behalf of a "failed" financial institution or by a statutory liquidating or receiver agency in its own behalf is marketable.
Schuller & Newton		(New) INSTRUMENTS AFFECTING TITLE 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 by such filing or recording?
Morrissey, Richie & Hardwick		(New) CONVEYANCES OF PROPERTY IN A TESTAMENTARY TRUST WHERE THERE ARE CO-TRUSTEES AND NOT ALL TRUSTEES SIGN - particularly if there are less than 3 remaining trustees.

Moershel	(New) CONVEYANCES BY ELEEMOSYNARY INSTITUTIONS - special requirements for the title examiner to note in connection with this type of grantor.
Gossett, Marianos, Beaumont & Lyon	(New) LIENS UPON REAL PROPERTY ARISING FROM DELINQUENT AD VALOREM TAX LEVIED UPON PERSONAL PROPERTY - validity and priority of such liens in various circumstances.
Cleverdon & Hardwick	(New) JURISDICTION OF PROBATE COURTS
Cleverdon	(New) RESALE TAX DEED - what documentation should the examiner see in the abstract to evidence the sale?

V. 1990 TES COMMITTEE MEMBERSHIP (OCTOBER, 1990)

1990 TITLE EXAMINATION STANDARDS COMMITTEE OF THE REAL PROPERTY LAW SECTION OF THE OKLAHOMA BAR ASSOCIATION
OFFICERS: CO-CHAIRMEN: David P. Rowland and Kraettli Q. Epperson

29 October 90

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Moershel, Diane C.	405	236-5938			2270 Liberty Tower	100 North Broadway Avenue	Oklahoma City	7[illegible]2
Morrissey, Linda G.	918	584-2047	584-2939			1448 South Carson Avenue	Tulsa	7[illegible]9
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Roffers, Juley M.	918	585-8141	588-7873	Huffman, Arrington	1000 ONEOK Plaza	100 West Fifth Street	Tulsa	74103
Rosser IV, M. E. (Mac)	918	583-1777		Boesche, Mc Dermott	Suite 800, ONEOK Plaza	100 West Fifth Street	Tulsa	74103
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Rowland, Julie T.	918	742-2383	742-5519	Zarbano, Bridger-Riley	Second Floor	5051 South Lewis Avenue	Tulsa	74105
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Name	Phone	Fax					
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VI. JOINT ABA/OBA/OCU TES RESOURCE CENTER LIST OF TES MATERIALS FROM OTHER STATES

JOINT ABA/OBA/OCU TITLE EXAMINATION STANDARDS RESOURCE CENTER PROJECT

INDEX FOR TITLE EXAMINATION STANDARDS MATERIALS AVAILABLE AT OCU
(As of November 14, 1990)

BOOK NO.*	STATE, MATERIALS	EFFECTIVE DATE (Last Revision)
1. 6A1	COLORADO, TES	1/1/87
2. 7A1	CONNECTICUT, TES	Fall, 1987
3. 9A1	FLORIDA, TES	11/89
4. 10A1	GEORGIA, TES	1972
5. 15A1	IOWA, TES	8/89
6. 16A1	KANSAS, TES	1986
7. 19A1	MAINE, TES	1985
8. 21A1	MASSACHUSETTS, TES	1989
9. 22A1	MICHIGAN, TES	1988
10. 23A1	MINNESOTA, TES	1988
11. 25A1	MISSOURI, TES	1980
12. 27A1	NEBRASKA, TES	1989
13. 29A1	NEW HAMPSHIRE, TES	1/1/88
14. 32A1	NEW YORK, TES	1/30/76
15. 34A1	NORTH DAKOTA, TES	12/7/89
16. 35A1	OHIO, TES	1/89
17. 36A1	OKLAHOMA, TES	11/89
18. 39A1	RHODE ISLAND, TES	11/85
19. 41A1	SOUTH DAKOTA, TES	7/1/88
20. 50A1	WYOMING, TES	7/1/80

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*KEY:
a. The first symbol is a number which represents the state; e.g., "6" equals Colorado, which is the sixth state alphabetically.
b. The second symbol is a letter which represents the source of the material; i.e.: A - State, B - Local, and C - Other
c. The third symbol is a number which represents the order of receipt; e.g., "35A1" means the material is from Ohio, from the State level and it is the first item received from that source in that State.

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VII. A DISCUSSION OF NOTICE REQUIREMENTS IN A FORECLOSURE SALE IN FEDERAL COURT (OUTLINE OF PRESENTATION BY WILLIAM A. GOSSETT TO OKLAHOMA LAND TITLE ASSOCIATION OWNERS-MANAGERS MEETING ON DECEMBER 9, 1989)

OUTLINE OF PRESENTATION

TO

OKLAHOMA LAND TITLE ASSOCIATION
OWNERS-MANAGERS MEETING

BY

WILLIAM A. GOSSETT

ON

DECEMBER 9, 1989

I S S U E

Whether the requirements of 12 O.S. §§ 764, 765 (which are incorporated into Title Examination Standard 12.4) are applicable to mortgage foreclosures conducted in federal district court.

BACKGROUND

This issue has arisen due to foreclosures of federally insured (VA and FHA) mortgages conducted in the Eastern District of Oklahoma wherein the above Oklahoma Statutes have not been observed. The Oklahoma Bar Association Title Examination Standards Committee (the "TESC") has received reports that some titles have been turned down due to these alleged defects. The TESC has considered this issue at certain of its meetings in 1989 but has not yet reached a conclusion with respect to the issue.

DISCUSSION

I. OVERVIEW OF RELEVANT OKLAHOMA LAW RELATING TO MORTGAGE FORECLOSURES IN GENERAL.

A. 12 O.S. § 686 - judgment shall be rendered for amount due and for sale of mortgaged property and application of proceeds. Mortgaged property can not be sold except in pursuance of such judgment.

B. 12 O.S. § 732 - three kinds of executions; third kind is execution in special cases.

1. Order of sale issued after judgment in foreclosure suit is an execution within § 732. Bartlett Mortgage Co. v. Morrison, 81 P.2d 318 (Okla. 1938).

2. Special execution is proper process for enforcement of decrees of foreclosure of mortgages and other liens. Paschal Inv. Co. v. Atwater, 50 P.2d 357 (Okla. 1935); Martin v. Hostetter, 59 Okla. 246, 158 P. 1174 (1916).

C. 12 O.S. § 760 - if the words "appraisement waived" or other words of similar import are contained in the mortgage, the sale shall be without appraisement, but no execution can issue in such case until six months after the rendition of the judgment.

D. 12 O.S. § 762 - if sale is with appraisement, sale can not be made for less than two-thirds of the appraised value.

E. 12 O.S. § 764 - lands and tenements taken on execution (to include special executions pursuant to Johnson v. Taylor, 68 Okla. 229, 173 P. 1039 (1918)), shall not be sold unless:

1. Written notice . . .

2. Publication notice . . .

3. Affidavit of proof of mailing and publication or posting . . . and

4. Sale at least thirty days after the first publication.

F. 12 O.S. § 765 - upon return of execution, written (and sometimes publication) notice of the confirmation hearing must be given. Affidavit of proof of mailing, and of publication if required, is necessary.

G. 42 O.S. § 18 - every person with an interest in property subject to a lien has the right to redeem it from the lien at any time before the right of redemption is foreclosed.

1. Division 4 of the Oklahoma Court of Appeals has ruled the equity of redemption is extinguished upon confirmation. First National Bank of Davis v. Johnston (unpublished opinion, No. 67787, 12-6-88).

2. Division 2 of the Oklahoma Court of Appeals has ruled the equity of redemption is extinguished at sheriff's sale. Sooner Federal Savings & Loan Ass'n v. Bailey (58 OBJ 1365, No. 65823, 5-12-87).

a. The Oklahoma Supreme Court has accepted certiorari, withdrawn the opinion of the Court of Appeals and issued a new opinion, holding that the equity of redemption is extinguished upon confirmation of the sheriff's sale. Sooner Federal Savings &

Loan Ass'n v. Oklahoma Central Credit Union (60 OBJ 320, No. 65823, 2-7-89; opinion not yet final). The Supreme Court followed Lincoln Mortgage Investors v. Cook, 659 P.2d 925 (Okla. 1982).

H. Apparent purposes of 12 O.S. §§ 764, 765:

1. § 764 - advertisement of sale and procedural due process to claimants for protection of their interests in property.

2. § 765 - procedural due process to claimants for protection of their interests in property and to those entitled to redeem.

II. SEEMINGLY CONFLICTING FEDERAL AUTHORITIES.

A. 28 U.S.C. §§ 2001, 2002 - sale of real property under decree or order of federal court conducted at county courthouse of county where land is located and shall be upon such terms as the court directs. Publication notice once each week for at least four consecutive weeks prior to sale. (This is a judicial sale.)

B. FRCP 69 - makes state law applicable to procedure on execution, and proceedings supplementary to and in aid of federal court judgments. (This is an execution sale.)

C. 28 U.C.S. §§ 2001, 2002 have no application to execution sales. Yazoo & M. V. R. Co. v. Clarksdale,

257 U.S. 10 (1921); Weir v. United States, 339 F.2d 82 (Eighth Circuit 1965). Conversely, FRCP 69 applies to process to enforce a money judgment and apparently has no application to judicial sales. Hamilton v. MacDonald, 503 F.2d 1138 (Ninth Circuit 1974).

III. STATE LAW - FEDERAL LAW DICHOTOMY.

A. The Rules of Decision Act, 28 U.S.C. § 1652 - except where federal constitution, treaties or statutes otherwise require or provide, state law constitutes the rules of decision in civil actions in federal court.

1. For background (the Erie doctrine, the statutory common law test, the substance/procedure test, the outcome-determinative test, the source of right test, and the federal policy override test), see 32 Am Jur 2d, Federal Practice and Procedure, §§ 267 - 272.

2. Federal courts must follow applicable state property law unless case involves question of right under federal constitution, treaties or statutes. 36 C.J.S., Federal Courts, § 173.

3. Generally speaking, federal court mortgage foreclosure proceedings involving private litigants are governed by state law. Bacon v. Northwestern Mut. Life Ins. Co., 131 U.S. 258 (1889); Orvis v. Powell, 98 U.S. 76 (1878);

Duvall-Percival Trust Co. v. Jenkins, 16 F.2d 223 (Eighth Circuit 1926); Reconstruction Finance Corp. v. Breeding, 211 F.2d 385 (Tenth Circuit 1954); and First Federal Sav. & Loan Ass'n of Puerto Rico v. Zequeira, 288 F. Supp. 384 (D.C. Puerto Rico 1968).

4. Generally speaking, federal law governs foreclosure proceedings in federal court brought by the United States and/or involving a federally held or insured mortgage. U.S. v. Stadium Apartments, Inc., 425 F.2d 358 (Ninth Circuit 1970); U.S. v. Merrick Sponsor Corp., 421 F.2d 1076 (Second Circuit 1970); Thwaites Place Associates v. Secretary of U.S., 638 F. Supp. 301 (S.D.N.Y. 1986); U.S. v. Stewart, 361 F. Supp. 1161 (D.C. Neb. 1973); U.S. v. MacKenzie, 322 F. Supp. 1058 (D.C. Nev. 1971); U.S. v. Munroe Towers, Inc., 286 F. Supp. 92 (D.C.N.J. 1968); U.S. v. Skipper Smith's Marina, Inc., 283 F. Supp. 408 (D.C. Fla. 1968); U.S. v. Forest Glen, Sr. Residents, 278 F. Supp. 343 (D.C. Or. 1967); and U.S. v. Montgomery, 268 F. Supp. 787 (D.C. Kan. 1967).

   a. Many of these cases involve question of whether state law redemption right is

applicable. The courts uniformly hold that sound federal policy must promote security of federal investment; thus, state law redemption rights do not apply to foreclosure of federally held or insured mortgages.

(1) The same arguments would apply in determining that 42 O.S. § 18 (and thus 12 O.S. §§ 764, 765) do not apply to federal court foreclosures of federally held or insured mortgages.

5. However, in foreclosure proceedings in federal court brought by the United States and/or involving a federally held or insured mortgage, state law may be applicable by the terms of the mortgage or by federal statute or regulation. U.S. v. Stadium Apartments, Inc., supra; U.S. v. West Willow Apartments, Inc., 245 F. Supp. 755 (D.C. Mich. 1965); Thwaites Place Associates v. Secretary of U.S., supra. Likewise, state law may be adopted by the federal court in such proceeding if state law is an appropriate means to implement and fulfill federal policies. U.S. v. Montgomery, supra.

IV. FEDERAL DUE PROCESS CONSIDERATIONS.

A. Generally speaking, whenever divestiture of a real property interest is involved in a judicial proceeding, due process will be violated by the mere act of attempting to exercise jurisdiction upon process not reasonably calculated to afford the interested persons personal notice and an opportunity for hearing. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1949); Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983); and Verba v. Ohio Casualty Co., 851 F.2d 811 (Sixth Circuit 1988).

1. In Verba the Sixth Circuit Court of Appeals held that the due process clause of the Fifth Amendment applies to the federal government and requires that a mortgagee of record be given personal or mailed notice of an IRS levy and distraint sale.

B. State law requirements (12 O.S. §§ 764, 765) apparently do not apply to foreclosure of federally held or insured mortgages. 28 U.S.C. § 2001 authorizes such a judicial sale based upon only publication notice ("or otherwise if the court directs . . ."). Argument can be made that § 2001 is unconstitutional with respect to mortgage foreclosure sale in that it does not require reasonably diligent steps to afford interest holders personal notice.

1. Insofar as right of redemption is concerned, the argument should fail since state law redemption rights would not be applicable.

2. Insofar as the fact that the sale amounts to a divestiture of the interest holder's property interest is concerned, the argument may have merit. However, until a court rules on the issue, title examiners would not seem justified in substituting their judgment for that of the court. Any such ruling would hopefully be made effective as to the case at bar and prospectively, due to the adverse effect on land titles.

CONCLUSION

I. State law is applicable in foreclosure proceedings conducted in federal court between private parties. The provisions of 12 O.S. §§ 764, 765 and 42 O.S. § 18 are applicable in such cases.

II. State law may be made applicable by the terms of a mortgage held or insured by a federal agency or federal statute or regulation. Likewise, state law may be adopted by the federal court in proceedings for the foreclosure of federally held or insured mortgages if state law is an appropriate means to implement and fulfill federal policies. Otherwise, federal law controls in federal court proceedings

for the foreclosure of federally held or insured mortgages, and state law is inapplicable.

III. In a proceeding in federal court for the foreclosure of a federally held or insured mortgage, where there has been no notice other than publication notice pursuant to 28 U.S.C. § 2001, an argument can be made that such proceeding is violative of due process. This issue has apparently not been addressed by reported decision.