

2011 REPORT OF THE TITLE EXAMINATION STANDARDS COMMITTEE OF THE REAL PROPERTY LAW SECTION

Proposed Amendments to Title Standards for 2011, to be presented for approval by the House of Delegates, Oklahoma Bar Association at the Annual Meeting, November 4, 2011. Additions are underlined, deletions are indicated by ~~strikeout~~.

The Title Examination Standards Sub-Committee of the Real Property Law Section proposes the following revisions and additions to the Title Standards for action by the Real Property Law Section at its annual meeting in Oklahoma City on Thursday, November 3, 2011.

Proposals approved by the Section will be presented to the House of Delegates at the OBA Annual Meeting on Friday, November 4, 2011. Proposals adopted by the House of Delegates become effective immediately.

An explanatory note precedes each proposed Title Standard, indicating the nature and reason for the change proposed.

Proposal No. 1

The Committee recommends a change in Standard No. 12.4 to reflect recent statutory provisions regarding the conversion of legal entities.

12.4 Recital of Identity ~~or~~, Successorship, or Conversion.

Unless there is some reason disclosed of record to doubt the truth of the recital (e.g., the recordation of a conflicting certificate prepared pursuant to 18 O.S. § 1144 or § 1090.2), then:

A. A recital of succession by corporate merger or corporate name change (e.g., the corporation was formerly known by another name) may be relied upon if contained in a recorded title document properly executed by the surviving or resulting corporation.

B. After September 1, 1990, a recital of succession by merger or consolidation of one or more corporations with one or more limited partnerships may be relied upon if contained in a recorded title document properly executed by the surviving or resulting entity.

C. On or after November 1, 1998, a recital of succession by merger or consolidation of one or more corporations with one or more business entities, as defined in 18 O.S. § 1090.2(A), may be relied upon if contained in a recorded title document properly executed by the surviving or resulting entity.

D. On or after January 1, 2010, a recital by a business entity, as defined in 18 O.S. § 2054.1(A), of a conversion to a domestic limited liability company may be relied upon if contained in a recorded title document properly executed by the domestic limited liability company.

Authority: 18 O.S. §§ 1144 (effective November 1, 1987), 1088 (effective November 1, 1986), 1090.2 (effective November 1, 1998) and 2054.1 (effective January 1, 2010).

~~Comment: While there seems to be no exact precedent for this standard, it is justified as a parallel to Standards 5.3 and as an extension of Standard 12.1.~~

Proposal 2.

The Committee recommends a change in Standard 15.4 to reflect that the date of death of a non-joining settlor is only relevant to whether an estate tax release is required from the Oklahoma Tax Commission and to update the authority for the Federal Estate Tax marital deduction.

15.4 ESTATE TAX CONCERNS OF REVOCABLE TRUSTS

Where title to real property is vested in the name of a revocable trust, or in the name of a trustee(s) of a revocable trust, and a subsequent conveyance of such real property is made by a trustee(s) of a revocable trust, who is other than the settlor(s) of such revocable trust, a copy of the order of the Oklahoma Tax Commission releasing or exempting the estate of the non-joining settlor(s) from the lien of the Oklahoma estate tax, and a closing letter from the Internal Revenue Service, if the estate is of sufficient size to warrant the filing of a Federal estate tax return, should be filed of record in the office of the county clerk where such real property is located unless evidence, such as an affidavit by a currently serving trustee of the revocable trust is provided to the title examiner to indicate that one of the following conditions exists:

- A. The non-joining settlor(s) was alive at the time of the conveyance; or
- B. The settlors were husband and wife and:
 - 1. One settlor is deceased, and
 - 2. The sole surviving settlor is the surviving spouse of the deceased settlor, and
 - 3. The assets of the trust, pursuant to the terms of the trust, pass to the benefit of the surviving settlor spouse, upon the death of the deceased settlor spouse; or
- C. The sole settlor is deceased and the assets of the trust, pass to the benefit of the surviving settlor spouse, upon the death of the deceased settlor spouse; or

D. More than ten (10) years have elapsed since the date of the death of the non-joining settlor(s) or since the date of the conveyance from the trustee(s), and no estate tax lien against the estate of the non-joining settlor(s) appears of record in the county where the property is located, or

E. As to the requirement for a copy of the order of the Oklahoma Tax Commission releasing or exempting the estate of the non-joining settlor(s) from the lien of the Oklahoma estate tax only, if the date of death of the non-joining settlor(s) is on or after January 1, 2010.

Authority: 68 O.S. §§ 807 (A)(3) and 811; 26 U.S.C. §§ 2038, 2056 and 6324 (a); and 16 O.S. § 82 *et seq.*

Proposal 3.

The Committee recommends additional comments to Standard 17.4 to reflect the issues which arise as a result of the 2011 amendment to 58 O.S. § 1251, et seq.

17.4 TRANSFER-ON-DEATH DEEDS

A deed appearing of record executed in accordance with the “Nontestamentary Transfer of Property Act” should be accepted as a conveyance of the grantor’s interest in the real property described in such deed effective upon the death of the grantor, provided that an affidavit evidencing the death of such grantor has been recorded, as specified in the Act, and no evidence appears of record by which:

- A. the conveyance represented by such deed has otherwise been revoked, disclaimed* or has lapsed pursuant to the provisions of the Act, or
- B. the designation of the grantee beneficiary or grantee beneficiaries in such deed has been changed via a subsequent transfer-on-death deed pursuant to the provisions of the Act.

Authority: 58 O.S. § 1251, *et seq.*

* ~~The examiner should be aware of the fact that~~ On and after November 1, 2008 through October 31, 2011, a disclaimer under the provisions of the Act may be executed only within a period of time ending nine (9) months after the death of the owner/grantor. On and after November 1, 2011, the property reverts to the estate of the deceased grantor if the affidavit described in § 1252C and D is not recorded within 9 months of the grantor's death.

Comment: Pursuant to the provisions of the Act, releases for Oklahoma estate taxes and, if applicable, federal estate taxes for the deceased grantor, together with a death certificate, shall be attached to the affidavit evidencing the death of the grantor, except no tax releases or death certificate are required in instances in which the grantor and grantee were husband and wife. No Oklahoma estate tax release is required for the estate of a grantor who died on or after January 1, 2010.

Comment: The examiner should be aware that the grantor's interest ~~may be~~ is subject to the homestead rights of a surviving spouse pursuant to Article 12, Section 2 of the Oklahoma Constitution. The examiner should be provided with satisfactory evidence which must be recorded, such as an affidavit as to marital status or death certificate of the grantor showing no surviving spouse. If the evidence provided to the examiner reveals that the grantor had a spouse at the time of death, the examiner ~~should~~ shall require a quit claim deed from the surviving spouse, showing marital status and joined by spouse, if any.

Comment: The examiner should be aware that an ambiguity will arise in 58 O.S. § 1254 (B) if the grantor records more than one Transfer-on-Death (TOD) deed conveying fractional interests, unless the owner/grantor has expressed an intent in the subsequent deed or deeds not to revoke the previous deed or deeds ("TOD deed"). For instance, if X owns Greenacre and conveys 50% to A by TOD deed, and later X conveys 50% to B by a TOD deed, the conveyance to B would create uncertainty as to whether A

and B each had 50%, for a total of 100%, or only B had 50% with the remaining 50% being vested in the grantor's estate.

Comment: On and after November 1, 2008 through October 31, 2011, in~~in~~ instances in which the TOD deed lists multiple grantee-beneficiaries as joint tenants, the death of one or more of such grantees prior to the death of the grantor in the deed ~~precludes~~ may preclude the creation of the estate of joint tenancy for the surviving grantees under the precepts of the requisite unities for a joint tenancy estate. A question remains as to whether the interest of the grantor vests, via the TOD deed, in the surviving grantees as joint tenants or as tenants-in-common or fails to vest in such grantees due to the fact the estate of joint tenancy ~~was not~~ may not have been created in such surviving grantees at the time of death of the grantor. On and after November 1, 2011, the death of a joint tenant beneficiary before the death of the grantor will not invalidate the joint tenancy estate of the surviving joint tenant beneficiaries.

Comment: On and after November 1, 2008 through October 31, 2011, if the grantor and grantee were husband and wife, it is not necessary to attach the death certificate described in Section 1252 D to the acceptance described in Section 1252 C.

Comment: On and after November 1, 2011, regardless of the marital status of the grantor and grantee, it is necessary to attach the death certificate described in Section 1252 D to the acceptance described in Section 1252 C.

Comment: Commencing November 1, 2010 pursuant to 58 O.S. § 1252 (C), the grantee-beneficiary, in order to accept the real estate pursuant to a TOD deed, shall record an affidavit with the County Clerk unless such grantee-beneficiary has recorded a timely executed disclaimer. ~~It is an unsettled point of law as to whether or not the requirement for an acceptance applies retroactively to TOD deeds recorded prior to November 1, 2010.~~

Comment: It is an unsettled point of law as to whether or not amendments to 58 O.S. § 1251 et seq. will apply retroactively to a TOD deed executed prior to the effective date of any amendment.

Proposal 4.

The Committee recommends a change to the comment of Title Standard 24.11 to clarify the situations that the Standard is addressing.

Standard 24.11 IMPROPERLY EXECUTED ASSIGNMENTS OF MORTGAGE

If a release of mortgage has been properly executed, recorded and acknowledged, the marketability of the title described in the released mortgage will not be affected by the fact that one or more assignments of the released mortgage appearing of record were not executed and/or acknowledged in accordance with law.

Authority: 16 O.S. § 53.

Comment: This standard is not intended to cure a situation in which an assignment was not executed by the record holder of the mortgage or where no assignment exists of record so that the ownership of the mortgage cannot be tracked of record or where the assignment does not contain enough information to establish of record which mortgage is being assigned.

Proposal 5.

The Committee recommends a new Standard 24.14 to give guidance to a title examiner as what is required when title is being passed to a property that is subject to a pending but incomplete mortgage foreclosure proceeding.

STANDARD 24.14 INCOMPLETE MORTGAGE FORECLOSURES

The title to real property shall be deemed marketable regarding a mortgage foreclosure action in which no sheriff's sale has occurred, if the following appear in the abstract:

- A. A properly executed and recorded release of all of the mortgages set out in the foreclosure action, and

- B. If a statement of judgment or affidavit of judgment has been filed in the land records of the county clerk in the county in which the real property is located evidencing a judgment lien for a money judgment granted in the foreclosure action, a release of the judgment lien filed in the land records of the county clerk in the county in which the real property is located, and

- C. A dismissal, with or without prejudice, of the entire mortgage foreclosure action, filed in the court case, by the plaintiff and any cross-petitioners in the action, or dismissal by court order, or a partial dismissal, with or without prejudice, of the mortgage foreclosure action, filed in the court case, by the plaintiff and any cross-petitioners in the action or partial dismissal by court order, dismissing the action insofar as it relates to or affects the subject real property.

Authority: 12 O.S. §§ 686 and 706; Anderson v. Barr, 1936 OK 471, 62 P.2d 1242; Bank of the Panhandle v. Irving Hill, 1998 OK CIV APP 140, 965 P.2d 413; Mehojah v. Moore, 1987 OK CIV APP 43, 744 P.2d 222; and White v. Wensauer 1985 OK 26, 702 P.2d 15.

Comment: In instances in which a proper dismissal of the foreclosure action has been filed in the court case, the absence of a release of a notice of lis pendens of such foreclosure action shall not be deemed to be a defect in the marketability of the title. A release of lis pendens is not a substitute for a dismissal of the foreclosure action.

Proposal 6.

The Committee recommends a change in Standard 25.2 to update the authority for the Federal Estate Tax marital deduction.

25.2 THE FEDERAL ESTATE TAX LIEN

A. SCOPE.

The total estate tax ultimately determined to be due in respect to the gross estate of a decedent is a lien in favor of the United States upon such gross estate, except that part of such gross estate as is used for the payment of charges against the estate and expenses of its administration allowed by any court having jurisdiction thereof. Said lien attaches immediately upon death and without notice.

Authority: 26 U.S.C.A. §§ 2031-2044, 2056 & 6324(a).

Proposal 7.

The Committee recommends an Amendment to Standard 30.13 to make clear that a so-called thirty year abstract which was compiled prior to the State Auditor and Inspectors Declaratory Order 96-1 may still be used as a base abstract when a separate supplemental abstract has been prepared.

30.13 ABSTRACTING

Abstracting under the Marketable Record Title Act shall be sufficient when the following is shown in the abstract:

A. The patent, grant or other conveyance from the government.

B. The following title transactions occurring prior to the first conveyance or other title transaction in "C." below: easements or interests in the nature of an easement; unreleased leases with indefinite terms such as oil and gas leases; unreleased leases with terms which have

not expired; instrument or proceedings pertaining to bankruptcies; use restrictions or area agreements which are part of a plan for subdivision development; any right, title or interest of the United States.

C. The conveyance or other title transaction constituting the root of title to the interest claimed, together with all conveyances and other title transactions of any character subsequent to said conveyance or other title transaction; or if there be a mineral severance prior to said conveyance or other title transaction, then the first conveyance or other title transaction prior to said mineral severance, together with all conveyances and other title transactions of any character subsequent to said conveyance or other title transaction.

D. Conveyances, title transactions and other instruments recorded prior to the conveyance or other title transaction in "C." which are specifically identified in said conveyance or other title transaction or any subsequent instrument shown in the abstract.

E. Any deed imposing restrictions upon alienation without prior consent of the Secretary of the Interior or a federal agency, for example, a Carny Lacher deed.

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

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

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

G. On September 18, 1996 the State Auditor and Inspector issued Declaratory Ruling 96-1, which prohibits abstractors from preparing abstracts under this standard after May 1, 1996. Abstracts, compiled and certified on or before May 1, 1996, may still be used as a base abstract when a separate supplemental abstract has been prepared.

Authority: 16 O.S. § § 71-80, 46 O.S. § 203, and Oklahoma Title Examination Standard 24.7.

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

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

3. Interests and defects prior to the first conveyance or other title transaction in “C.” are not to be shown unless specifically identified. The book and page of recording of a prior mortgage is required to be in any subsequent deed or mortgage to give notice of such prior mortgage, 46 O.S. § 203 and Title Standard 24.7. Specific identification of other instruments requires either the book and page of recording or the date and place of recording or such other information as will enable the abstractor to locate the instrument of record.

4. Abstracting under this standard should also be in conformity with Title Standard 29.6.