UPDATE ON OKLAHOMA REAL PROPERTY TITLE AUTHORITY: STATUTES, REGULATIONS, CASES, ATTORNEY GENERAL OPINIONS & TITLE EXAMINATION STANDARDS: REVISIONS FOR 2010-2011

(Covering July 1, 2010 to June 30, 2011)

BY:

KRAETTLI Q. EPPERSON, PLLC
MEE MEE HOGE & EPPERSON, PLLP
50 PENN PLACE
1900 N.W. EXPRESSWAY, SUITE 1400
OKLAHOMA CITY, OKLAHOMA 73118

PHONE: (405) 848-9100
FAX: (405) 848-9101

E-mail: kqe@meehoge.com
Webpages: www.meehoge.com
www.EppersonLaw.com

Presented For the:

2011 BOILING SPRINGS LEGAL INSTITUTE

At
Boiling Springs Park
September 20, 2011

(C:\mydocuments\bar&papers\papers\243TitleUpdate(10-11)(Boiling Springs).doc)

KRAETTLI Q. EPPERSON, PLLC
ATTORNEY AT LAW

POSITION: Partner: Mee Mee Hoge & Epperson, PLLP
1900 N.W. Expressway, Suite 1400, Oklahoma City, OK 73118
Voice: (405) 848-9100; Fax: (405) 848-9101
E-mail: kqe@MeeHoge.com; website: www.EppersonLaw.com

COURTS: Okla. Sup. Ct. (May 1979); U.S. Dist. Ct., West. Dist of Okla. (Dec. 1984)

EDUCATION: University of Oklahoma [B.A. (PoliSci-Urban Admin.) 1971];
State Univ. of N.Y. at Stony Brook [M.S. (Urban and Policy Sciences) 1974]; &
Oklahoma City University [J.D. (Law) 1978].

PRACTICE: Oil/Gas & Real Property Litigation (Arbitration, Shared Surface Use, Quiet Title, Condemnation, & Restrictions);
Condo/Home Owners Association Creation & Representation; and
Commercial Real Estate Acquisition & Development.

MEMBERSHIPS/POSITIONS:
OBA Title Examination Standards Committee (Chairperson: 1992-Present);
OBA Nat'l T.E.S. Resource Center (Director: 1989 - Present);
OBA Real Property Law Section (current member, former Chairperson);
OKC Real Property Lawyers Assn. (current member, former President);
OKC Mineral Law Society (current member); and
BSA: VC & Chair, Baden-Powell Dist., Last Frontier Council (2000-2007); former Cubmaster, Pack 5, & Asst SM, Troop 193, All Souls Episcopal Church

SPECIAL EXPERIENCE:
Court-appointed Receiver for 5 Abstract Companies in Oklahoma
Oklahoma City University School of Law adjunct professor: "Oklahoma Land Titles" course (1982 - Present);
Vernons 2d: Oklahoma Real Estate Forms and Practice, (2000 - Present) General Editor and Contributing Author;
Basye on Clearing Land Titles, Author : Pocket Part Update (1998 – 2000); Contributing Author: Pocket Part Update (2001-Present)
Oklahoma Bar Review faculty: "Real Property" (1998 - 2003);
Chairman: OBA/OLTA Uniform Abstract Certif. Committee (1982);
In-House Counsel: LTOC & AGT/Old Republic (1979-1981);
Urban Planner: OCAP, DECA & ODOT (1974-1979).

SELECTED PUBLICATIONS:
"Well Site Safety Zone Act: New Life for Act", 80 OBJ 1061 (May 9. 2009);
"The Elusive Mortgage Foreclosure Judgment Lien", V.41, No.5& 6 Oklahoma County Bar Association Briefcase 9 & 18, (May and June 2009); and
"Who Suffers if the County Clerk Mis-Indexes a Conveyance or a Money Judgment?" V.41, No.8 &9 Oklahoma County Bar Association Briefcase pages 7 &7, (August and September 2009).

SPECIAL HONORS: Okla. Bar Assn. 1997 Maurice Merrill *Golden Quill Award*;
Okla. Bar Assn. 1990 Earl Sneed *Continuing Legal Education Award*;
Okla. Bar Assn. 1990 Golden Gavel Award: *Title Exam. Standards Committee.;*
Who's Who In: The World, America, The South & Southwest, American Law, American Education, and Emerging Leaders in America

TABLE OF CONTENTS

AUTHOR'S RESUME

I. INTRODUCTION

II. STATUTORY CHANGES

III. REGULATORY CHANGES

IV. CASE LAW

V. ATTORNEY GENERAL OPINIONS

VI. TITLE EXAMINATION STANDARDS CHANGES

A. EXAMINING ATTORNEY'S RESPONSIBILITIES

B. NEED FOR STANDARDS

C. NEWEST CHANGES TO TITLE STANDARDS

1. 2010 Report of the Title Examination Standards Committee of the Real Property Section

2. 2011 Report of the Title Examination Standards Committee of the Real Property Section [NOTE: Only the latest agenda is attached.]

D. LATEST TES COMMITTEE AGENDA WITH SCHEDULE OF MEETINGS

APPENDICES

1. OKLAHOMA T.E.S. COMMITTEE MEMBERS (FOR PRIOR YEAR)

2. NATIONAL TITLE EXAMINATION STANDARDS RESOURCE CENTER REPORT

3. LIST OF LATEST 10 ARTICLES (AVAILABLE ON-LINE), BY KRAETTLI Q. EPPERSON

I. INTRODUCTION

The determination of the existence and the holder of "valid" title (i.e., enforceable between the parties), and "marketable" title (i.e., determinable "of record", and relied upon by third party grantees and lenders) to a parcel of real property, requires the application of the current law of the State where the land is located. (60 O.S.§21)

The following materials reflect a listing of selected changes in the law of Oklahoma related to real property title issues, arising over the 12 months following June 30, 2010, including any (1) statutes enacted during the most recent State legislative session, (2) new regulations, (3) cases from the Oklahoma Supreme Court and the Court of Civil Appeals, (4) opinions from the Oklahoma Attorney General, and (5) Oklahoma Title Examination Standards adopted (or proposed) during that period.

II. STATUTORY CHANGES

(see: www.lsb.state.ok.us)

(PREPARED BY JASON SOPER)

2010 - 2011 LEGISLATIVE SESSION

PENDING BILLS THAT MAY EFFECT REAL PROPERTY & TITLE EXAMINATION STANDARDS

Revised for July 16, 2011 Meeting

NEW LAWS ENACTED IN THE 2011 SESSION

HB 1226 Eminent Domain: Establishing right of first refusal to prior property owner if property is to be sold after taking.
Sponsor: Representative Ownbey & Senator Simpson
Approved by Governor on May 20, 2011.

The measure requires the State to give prior property owners the right of first refusal if property previously taken by eminent domain is to be sold. If prior owner does not exercise said right property must then be disposed of at public sale.

HB1564 Real Property: Creating the Airspace Severance Restriction Act
Sponsor: Representative Jordan & Senator Schultz
Approved by Governor on April 13, 2011.

New law amends Okla. Stat. 60 § 820.1, which restricts the permanent severing of the airspace over any real property for the purpose of developing and operating commercial wind or solar energy conversion systems.

HB1594 Real Property – Prohibiting Transfer Fee Covenants
Sponsor: Representative Steve Martin & Senator Crain
Approved by Governor on May 20, 2011.

The measure establishes Okla. Stat. 60 § 350, prohibiting the establishment and/or enforcement of developer created transfer fee covenants.

HB1821 Wind Energy: Exploration Rights Act of 2011
Sponsor: Representative Trebilcock & Senator Marlatt

Approved by Governor on May 10, 2011.

The measure specifies a mineral owner's rights with regards to the surface estate, and stipulates that certain parties may not unreasonably interfere with the mineral owner's right to make reasonable use of the surface estate. The measure also requires a wind energy developer to provide a notice of intent at least 30 days prior to beginning construction of wind energy facility; the required contents of the notice and publication dates are specified for wind energy facilities constructed on or after November 1, 2011.

HB1909 Oil & Gas-Advanced Horizontal Drilling and Spacing Law
Sponsor: Representative Jackson & Senator Branan
Approved by Governor on April 13, 2011.

With the advancement in horizontal drilling techniques, the new law updates state law as to unit spacing exists and seeks to give the Corporation Commission the authority to authorize units beyond the historical statutory spacing scheme found in Okla. Stat. 52 §§ 87.1, 287.1 through 287.15

SB102 Liens: Oklahoma Energy Independence Act; Amending Okla. Stat. 19 § 460.5
Sponsor: Senator Aldridge & Representative Schwartz
Approved by Governor on May 19, 2011.

The amendments allow for loans to be granted for energy conservation upgrades to existing structures and liens attached to the subject property in the same manner as mortgages.

SB104 Amending Okla. Stat. 68 § 2915
Sponsor: Senator Aldridge & Representative Banz
Approved by Governor on April 19, 2011.

Measure modifies Okla. Stat. 68 § 2915 to allow the county treasurer to send tax statements to the taxpayer by electronic mail in lieu of regular mail, provided the taxpayer has submitted a written request to receive such statements via electronic mail.

SB124 Eminent domain: Amending Okla. Stat. 27 § 7
Sponsor: Senator Justice & Representative Newell
Approved by Governor on May 10, 2011.

Measure amends the existing statute to prohibit the use of governmental eminent domain power for the development of wind farms or wind turbines on private property.

SB246 Amending Okla. Stat. 6 § 906, relating to transfer of deposits when owner is deceased.
Sponsor: Senator Burrage and Representatives Key & Ritze
Approved by Governor on April 25, 2011.

Measure amends Okla. Stat. 6 § 906 increasing the amount a bank or credit union can release to the known heirs via affidavit from $5,000.00 to up to $20,000.00.

SB277 Material man's Liens: Modifying procedures for pre-line notices.
Sponsor: Senator Anderson & Representative Sullivan
Approved by Governor on April 6, 2011.

The new law modifies Okla. Stat. 42 § 142.6 to state that a materialman's lien filed against an occupied dwelling will not be valid unless it is proceeded by a pre-lien notice is given to a contractor and a owner of said dwelling within 75 days of the last furnishing of materials, services or labor by the claimant.

SB521 Nontestamentary Transfer of Property (Transfer on Death Deed)
Senator Crain & Representative Sherrer
Approved by Governor on May 26, 2011.

The measure modifies Okla. Stat. 58 § 1252 to apply to the surface, minerals, structures and fixtures. Further, unless the named grantee beneficiary records an affidavit accepting the property under the deed within 9 months of the death of the owner, the estate shall revert to the deceased grantor's estate.

SB657 Electronic Signatures
Sponsor: Senator Jolley & Representative Kirby
Approved by Governor on April 13, 2011.

The measure amends Okla. Stat. 12A § 15-121(b) to delete the current requirement that electronic signatures for real estate transactions require the use of a registered certification authority, thereby allowing electronic signatures of real estate transactions under the general provisions of Okla. Stat. 12A § 15-101, et seq.

SB798 Foreclosure: Establishing method to protect and preserve abandoned or vacated property in a foreclosure case.

Sponsor: Senator Jolley & Representative Russ
Approved by Governor on May 26, 2011.

The measure creates Okla. Stat. 46 § 302 allowing a plaintiff in a foreclosure case to file a motion to protect and preserve an abandoned or vacated property by having the sheriff seize and secure the property for the duration of the foreclosure.

BILLS REQUIRING A VOTE OF THE PEOPLE TO BECOME LAW

HJR1002 Constitutional amendment modifying limitation on valuation increases
Sponsor: Representative Dank & Senator Reynolds
Status: Measure Passed House 81-16 on March 16, 2011. Measure Passed Senate 26-19 on April 13, 2011 with amendments. On April 14, 2011, the Measure has been engrossed back to the House for consideration due to amendments and on April 20, 2011 passed the House 77 to 16. It has been filed with the Secretary of State and will go to a vote of the people for consideration.

If passed, measure would (after a vote of the people), cap the yearly increase of the fair cash value of properties from 5% to 2%.

III. REGULATORY CHANGES

A. NEW PERMANENT OAB RULES

Effective as of July 1, 2011, the Oklahoma Abstractors Board adopted a new set of permanent rules. See the red-lined version of the new rules for following:

TITLE 5. OKLAHOMA ABSTRACTORS BOARD
CHAPTER 2. ADMINISTRATIVE OPERATIONS

SUBCHAPTER 1. GENERAL PROVISIONS

5:2-1-2. Definitions

In addition to the terms defined in the Oklahoma Abstractors Act, the definitions of the following words and terms shall be applied when implementing the Act and rules adopted by the Board:

"Abstractor" means the holder of an abstract license, certificate of authority, or temporary certificate of authority~~, or permit~~.

"Compile" means to arrange in an orderly and logical manner all recorded instruments relating to a particular chain of title of real property.

"Employee" means a person who is compensated, directly or indirectly, by a holder of a certificate of authority, permit, or temporary certificate of authority, who performs duties regulated by the Act.

"Final title report" means the document resulting from the final title search required to be conducted by ~~an abstractor~~ a certificate of authority holder in the county where the property is located prior to the issuance of a title insurance policy pursuant to the rules of the Oklahoma Insurance Department ~~as set out in Title 365:20-3-3(b) of the Oklahoma Administrative Code~~ and shall include all information as mandated by Section ~~11-3-9 (F)~~ 11-5-3 of these rules.

"Licensee" means a person who holds ~~a current~~ an abstract license.

"Supervision" means all work of an employee must be supervised within the authorized activities of a certificate of authority holder or a permit holder, respectively.

(A) Supervision of an abstract licensee by a certificate of authority holder means the oversight of the licensee to search or remove from county offices county records, summarize or compile copies of such records, maintain an independent set of abstract books or indexes, or compile an abstract of title for certification.

(B) Supervision of an abstract licensee by a permit holder means the oversight of the licensee to build, construct or develop an abstract plant and activities directly related thereto pursuant to 5:11-7-3 of these rules.

(C) Supervision of a non-licensed employee means the oversight of any person who is employed by a holder of a permit or certificate of authority who performs the activities set forth in 5:11-3-1(b) of these rules.

TITLE 5. OKLAHOMA ABSTRACTORS BOARD
CHAPTER 11. ADMINISTRATION OF ABSTRACTORS ACT

SUBCHAPTER 3. ABSTRACT LICENSES,
CERTIFICATES OF AUTHORITY, AND PERMITS

5:11-3-2. Examinations for abstract license

(a) The test for an abstract license shall be given at least quarterly and at such other times and locations as designated by the Board. The Board shall set the test dates for the calendar year at the first regular meeting of the Board of each calendar year.

(b) Tests shall be graded either pass or fail. Seventy per cent (70%) of the questions must be answered correctly to pass.

(c) If failed, the test can be taken ~~again in thirty (30) days.~~ two additional times during the next 12 months.

(d) After failure to pass the test, an applicant shall be required to submit a new application and applicable fees if:

(1) The applicant has failed to pass the test three (3) times; or

(2) A twelve month period within which the applicant has taken the test one or more times expires.

5:11-3-3. Bonds required for permits and certificates of authority

(a) **County records bond.**

(1) ~~Each application for a certificate of authority or permit shall be accompanied by a bond in such form clarifying the separate assumption of risks as to county records.~~ A bond in such form in favor of the Board protecting against loss or damage to county records shall be provided at the time of the application for certificate of authority or permit or within two (2) business days after approval by the Board.

(2) The bond shall be valid for one (1) year and extend coverage to the various county offices for damages by reason of mutilation, injury, or destruction of any record or records of the several county offices to which the applicant may have access.

(3) If a surety bond is provided it shall be issued by a surety company licensed to do business in the State of Oklahoma.

(4) The original bond shall be filed in the office of the Board. The Board or a person designated by the Board to perform such duties shall mail a certified copy of the bond to the County Clerk's office for filing.

(5) The amount of the county records bond shall be at least in the amount set forth in section 27(c) of the Act.

5:11-3-9. Forms

The forms prescribed by the Board shall include but not be limited for the following:

(1) **Certificate of authority.** The Board shall establish separate forms for the initial application for a certificate of authority, a temporary certificate of authority, annual renewal of a certificate of authority, and transfer of ownership of certificate of authority.

(2) **Permit.**

(A) The Board shall establish separate forms for the initial application for a permit and and for the annual renewal of a permit.

(B) The form shall include an affidavit prepared by the appropriate District Court Clerk and County Clerk certifying the status and availability of the county records.

(C) Each form regarding an initial application for a permit shall include a general statement of the law and instructions directing how the forms should be completed.

(D) The applicant for a permit shall provide the Board a list of all employees and third party providers involved in the construction of the abstract plant.

(3) **License.** The Board shall establish separate forms for the initial application for an abstract license and for the annual renewal of a license.

(4) **Uniform Abstract Certificate**. The Board shall establish a form which will provide to the consumer information including but not limited to:

~~(A)~~(1) the authority for providing an abstract of title;

~~(B)~~(2) the items being certified;

~~(C)~~(3) beginning page and ending page;

~~(D)~~(4) if the abstract certification excepts oil, gas, and other minerals, in which case substantial compliance with the following language shall be used: Except instruments of any kind and character relating to all oil, gas, and other minerals, including but not limited to deeds, grants, leases, assignments and releases thereof, all of which instruments are omitted and excepted entirely from this abstract.

~~(E)~~(5) the period covered; and

~~(F)~~(6) the signature and license number of the ~~abstractor~~ licensee.

~~(G)~~(7) certificate of authority number; and

~~(H)~~(8) date of issuance.

(5)~~(e)~~ **Final Title Report**. The Board shall establish a form for a Final Title Report which will provide to the consumer information including but not limited to:

(1) the authority for providing a Final Title Report;

(2) the items being certified;

(3) the period covered;

(4) the signature and license number of the licensee;

(5) certificate of authority number; and

(6) date of issuance.

(6)~~(f)~~ **Abstract Rates filing.** The Board shall establish a form to be used to file annually the statutorily mandated list of abstracting fees.

(7)~~(g)~~ **Public Complaint.** The Board shall create a sample form for use by an individual filing a written complaint with the Board. Substantial compliance with the requirements set out in the form shall be sufficient for the Board to accept the complaint. The information required shall include but not be limited to:

(A) the name, address, and phone number of the individual filing the complaint;

(B) the name, address, and phone number of the person against whom the complaint is being filed;

(C) the date of the preparation of the complaint; and

(D) an outline of the complaint.

(8)~~(h)~~ **Effective date of changes.** Any change in a form shall become effective thirty (30) days after adoption by the Board. If the change is declared an emergency, the Board shall specify the shorter effective date.

SUBCHAPTER 3. REGULATION OF LICENSEES, CERTIFICATE HOLDERS, AND PERMIT HOLDERS

5:11-5-3. Preparation of abstracts

(a) **Type of abstract**. A certificate of authority holder shall cause the preparation of an abstract of title on real property which shall cover:

(1) a fee simple estate, less and except oil, gas and other mineral interests; or

(2) upon the request of a customer, a fee simple estate including oil, gas, and other mineral interests; or

(3) oil, gas and other mineral interests.

(b) **Abstract certificate**. The abstract certificate and caption sheet shall reflect an appropriate disclaimer regarding that which is excluded.

(c) **Contents of abstract**. For the time period covered by the certification, an abstract of title shall include but not be limited to the following:

(1) all instruments that have been filed for record and have been recorded in the office of the county clerk for the county in which the property is located which:

(A) legally impart constructive notice of matters affecting title to the subject property, any interest therein or encumbrances thereon;

(B) disclose executions, court proceedings, pending suits, and liens of any kind affecting the title to said real estate; and

(C) judgments or transcripts of judgments filed against any of the parties appearing within the chain of title.

(2) the records of the court clerk for the county in which the subject property is located which:

(A) disclose executions, court proceedings, pending suits, and liens of any kind affecting the title to said subject property; and

(B) judgments or transcripts of judgments against any of the parties appearing within the chain of title.

(3) all ad valorem tax liens due and unpaid against said real estate, tax sales thereof unredeemed, tax deeds, unpaid special assessments certified to the office of the county treasurer for the county in which the subject property is located due and unpaid, tax sales thereof unredeemed, and tax deeds given thereon, and unpaid personal property taxes which are a lien on said real estate.

(d) **Federal court certificate.** Upon request of a consumer, a holder of a certificate of authority in Muskogee, Okmulgee, Oklahoma, and Tulsa counties ~~shall~~ may certify to the records of the Clerk of the United States District Court and the Clerk of the United States Bankruptcy Court for such federal judicial districts located in such counties for the time period covered by the certification, that disclose:

(1) executions, court proceedings, pending suits and bankruptcy proceedings in said courts affecting title to the subject property; and

(2) judgments or transcripts of judgments filed against any of the parties appearing within the chain of title.

(e) **Final certification for title insurance.** For purposes of a title insurance policy, a certificate of authority holder in the county where the insured property is located shall prepare either of the following:

(1) an extension of the abstract or supplemental abstract; or

(2) a final title report after a final title search has been conducted. The final title report shall include all information required for an abstract of title pursuant to the Act and these rules, and shall be certified up to and including the effective date of the title insurance policy.

(f) **Other services**. Any service performed or product produced by the holder of a certificate of authority that does not qualify as an abstract of title or final title report shall not be designated as an abstract of title and shall not include an abstract certificate.

(g) **Statement of abstracting charges.** All charges for abstracts, abstract extensions, supplemental abstracts, or final title reports shall be separately stated and shall not be combined with title insurance, closing fees, or examination charges on invoices, statements, settlement statements, and consumer estimates.

SUBCHAPTER 7. APPLICATION FOR PERMIT TO DEVELOP ABSTRACT PLANT

5:11-7-1. Application for permit to develop abstract plant

(a) **Form.** The application shall be on a form prescribed by the Board.

(b) **Notice and review.** The chairman or designee shall review the application for compliance with applicable laws and rules. Additional information from the applicant or other persons may be requested by the reviewer as deemed appropriate. Within ten (10) days of receipt of the application, the Board shall:

(1) notify the court clerk, the county clerk, and all holders of a certificate of authority in the county wherein such business is to be conducted; and

(2) post notice of the receipt of the application for a permit on the official website of the Board and provide an address where written information relative to the application can be sent.

(c) **Comment period.** Any person desiring to provide information pertaining to the application shall submit the information in writing to the Board within twenty (20) days of the notice provided for in subsection (b) of this section. Additional information may be received upon approval of the Board or the Chairman. Comments shall include specific facts and specific legal authority, if known, supporting the request for approval or disapproval of the application.

(d) **Board action on application.** The application for a permit to develop an abstract plant shall be considered by the Board at the next meeting after completion of the review provided for in subparagraph (b) of this section.

(1) In the event an adverse comment is filed, the applicant and any person providing adverse comments shall be notified of the receipt of the adverse comment not more than ten (10) days from the date of receipt of such comment. Notice of the date, time, and place of the meeting at which the application and information will be considered by the Board shall be provided to all interested parties not less than ten (10) days before the date of the meeting at which the application will be considered is to be held.

(2) Presentation before the Board.

(A) At the meeting where the application is being considered the applicant shall be limited to thirty (30) minutes to present information in support of the application. All persons wanting to provide adverse comments regarding the application collectively shall be limited to thirty (30) minutes to present adverse comment or information. Additional time may be granted by the chairman upon good cause shown.

(B) The order of presentation of information regarding the application and opposition shall be established by the chairman.

(3) Criteria.

(A) The Board shall consider the following factors in arriving at its decision:

(i) compliance with the Act and Rules;

(ii) payment of applicable fees; ~~and~~

(iii) adequacy of county records bond~~.~~;

(iv) the name of the company should not be deceptively similar to other certificate of authority or permit holders; and

(v) the applicant must show an actual physical presence in the county.

(B) The Board may consider other factors deemed relevant to the consideration of the application including additional information not obtained during the review.

(4) Decision of the Board. After consideration and action by the board on an application, the chairman shall issue an order reflecting the decision of the Board. A copy of the order shall be mailed to the applicant and any person submitting adverse comments.

5:11-7-2. Renewal of permit to develop abstract plant

(a) A permit holder must actively pursue construction of the abstract plant. Failure to do so may result in revocation of permit or non-renewal by the board.

(b) Board action on renewal application. The application for the renewal of a permit to develop an abstract plant shall be considered by the Board at the next meeting after receipt of the application and completion of the review.

(1) In the event a motion is made to not renew a permit, the matter may be set down as a show cause matter at the next Board meeting. The permit holder shall be notified of the matter at least ten (10) days prior to the meeting date. Notice of the date, time, and place of the meeting at which the application for renewal and information will be considered by the Board shall be provided to the permit holder. The notice shall include a statement of facts or conduct which warrant non-renewal of the permit.

(2) Presentation before the Board.

(A) At the meeting where the application for renewal is being considered the permit holder shall be limited to thirty (30) minutes to present information in support of the application. Other persons wanting to provide comments regarding the application collectively shall be limited to thirty (30) minutes to present information. Additional time may be granted by the chairman upon good cause shown.

(B) The order of presentation of information regarding the application and opposition shall be established by the chairman.

(3) Criteria.

(A) The Board shall consider the following factors in arriving at its decision:

(i) compliance with the Act and Rules;

(ii) payment of applicable fees; ~~and~~

(iii) adequacy of county records bond~~.~~;and

(iv) activity of the permit holder in pursuit of the construction of the plant.

(B) The Board may consider other factors deemed relevant to the consideration of the application for renewal including additional information not obtained during the review.

(4) Decision of the Board. After consideration and action by the board on an application, the chairman shall issue an order reflecting the decision of the Board. A copy of the order shall be mailed to the permit holder.

SUBCHAPTER 9. APPLICATION FOR CERTIFICATE OF AUTHORITY

5:11-9-1. Application for certificate of authority

(a) **Form.** The application shall be on a form prescribed by the Board.

(b) **Notice and review.** The chairman or designee shall review the application for compliance with applicable laws and rules. Additional information from the applicant or other persons may be requested by the reviewer as deemed appropriate. Within ten (10) days of receipt of the application, the Board shall:

(1) notify the court clerk, the county clerk, and all holders of a certificate of authority in the county wherein such business is to be conducted;

(2) post notice of the receipt of the application for the certificate of authority on the official website of the Board and provide an address where written information relative to the application can be sent.

(c) **Comment period.** Any Person desiring to provide information pertaining to the application shall submit the information in writing to the Board within twenty (20) days of the notice provided for in subsection (b) of this section. Additional information may be received upon approval of the Board or the Chairman. Comments shall include specific facts and specific legal authority, if known, supporting the request for approval or disapproval of the application.

(d) **Board action on application**. The application for a certificate of authority shall be considered by the Board at the next meeting after completion of the review provided for in subparagraph (b) of this section.

(1) In the event an adverse comment is filed, the applicant and any person providing adverse comments shall be notified of the receipt of the adverse comment not more than ten (10) days from the date of receipt of such comment. Notice of the date, time, and place of the meeting at which the application and information will be considered by the Board shall be provided to all interested parties not less than ten (10) days before the date of the meeting at which the application will be considered is to be held.

(2) Presentation before the board.

(A) At the meeting where the application is being considered the applicant shall be limited to thirty (30) minutes to present information in support of the application. All persons wanting to provide adverse comments regarding the application collectively shall be limited to thirty (30) minutes to present adverse comment or information. Additional time may be granted by the chairman upon good cause shown.

(B) The order of presentation of information regarding the application and opposition shall be established by the chairman.

(3) Criteria.

(A) The Board shall consider the following factors in arriving at its decision:

(i) compliance with the Act and Rules;

(ii) payment of applicable fees;

(iii) adequacy of errors and omissions insurance, corporate surety, or personal bond for possible errors in abstracts of title prepared by the applicant;

(iv) adequacy of county records bond; ~~and~~

(v) adequacy of abstract plant available for use~~.~~;

(vi) the name of the company should not be deceptively similar to other certificate of authority or permit holders; and

(vii) the applicant must show an actual physical presence in the county.

(B) The Board may consider any other factors deemed relevant to the consideration of the application including additional information not obtained during the review or inspections.

(4) **Decision of the Board.** After consideration and action by the Board on an application, the chairman shall issue an order reflecting the decision of the Board. A copy of the order shall be mailed to the applicant and any person submitting adverse comments.

SUBCHAPTER 11. TEMPORARY CERTIFICATE OF AUTHORITY

5:11-11-1. Procedures for the Board to issue a temporary certificate of authority

In the event the Board determines that a temporary certificate of authority needs to be issued pursuant to the provisions of Section 33 of the Act, the Board shall:

~~(1) suspend the certificate of authority of the subject holder pursuant to this chapter;~~
~~(2) declare the necessity for issuing a temporary certificate of authority;~~
~~(3) provide notice of the intent to issue a temporary certificate of authority to the office of the county clerk and each holder of a certificate of authority located in the county;~~
~~(4) accept applications for the issuance of the temporary certificate of authority; and~~
~~(5) issue a temporary certificate of authority pursuant to the terms and conditions determined by the Board.~~

(1) declare the necessity for issuing a temporary certificate of authority;
(2) notify the certificate of authority holder in writing of its determination;
(3) furnish the certificate of authority holder a written list of violations;
(4) suspend the certificate of authority of the subject holder pursuant to this chapter;
(5) provide written notice of the intent to issue a temporary certificate of authority to the office of the county clerk and each holder of a certificate of authority located in the county;
(6) accept applications for the issuance of the temporary certificate of authority; and
(7) issue a temporary certificate of authority pursuant to the terms and conditions determined by the Board.

5:11-11-2. Application for temporary certificate of authority

(a) **Forms**. The application shall be on a form prescribed by the Board. Such application shall include the applicants proposed list of abstract fees.

(b) **Fee.** There shall be no fee for the application for temporary certificate of authority.

(c) **Bonds required for temporary certificate of authority.** Each application for a temporary certificate of authority shall be accompanied by a county records bond and errors and omissions bond or insurance as provided for in 5:11-3-3 of these Rules covering the county clerk and abstract business in the county for which the application is sought. Such bonds shall be provided at the time of the application for temporary certificate of authority or within two (2) business days after approval by the Board.

(d) **Business Plan**. A written and detailed plan for the conduct of abstract business in the county shall accompany the application for temporary certificate of authority.

(e) **Notice and Board action.**

(1) **Notice and review.** The chairman or designee shall review the application for compliance with applicable laws and rules. Additional information from the applicant or other persons may be requested by the reviewer as deemed appropriate. Within ten (10) days of receipt of the application, the Board shall:

(A) notify the court clerk, the county clerk, and all holders of a certificate of authority in the county wherein such temporary certificate of authority has been requested; and

(B) post notice of the receipt of the application for a temporary certificate of authority on the official website of the Board and provide an address where written information relative to the application can be sent.

(2) **Comment period.** The chairman or designee may establish a comment period pertaining to the application and shall submit the information as deemed appropriate in the circumstances. If a comment period is authorized, then any person desiring to provide information pertaining to the application may do so, in writing, pursuant to the comment period procedure authorized. Comments shall include specific facts and specific legal authority, if known, supporting the request for approval or disapproval of the application.

(f) **Board action on application.** The application for a temporary certificate of authority shall be considered by the Board at the next meeting after completion of the review provided for in subparagraph (e) of this section.

(1) In the event an adverse comment is filed, the applicant and any person providing adverse comments shall be notified of the receipt of the adverse comment not more than ten (10) days from the date of receipt of such comment. Notice of the date, time, and place of the meeting at

which the application and information will be considered by the Board shall be provided to all interested parties not less than ten (10) days before the date of the meeting at which the application will be considered is to be held.

(2) Presentation before the Board.

(A) At the meeting where the application is being considered the applicant shall be limited to thirty (30) minutes to present information in support of the application. All persons wanting to provide adverse comments regarding the application collectively shall be limited to thirty (30) minutes to present adverse comment or information. Additional time may be granted by the chairman upon good cause shown.

(B) The order of presentation of information regarding the application and opposition shall be established by the chairman.

(3) Criteria.

(A) The Board shall consider the following factors in arriving at its decision:

(i) compliance with the Act and Rules;

(ii) payment of applicable fees; and

(iii) adequacy of county records bond and errors and omissions bonds or insurance.

(B) The Board may consider other factors deemed relevant to the consideration of the application including additional information not obtained during the review.

(4) Decision of the Board. After consideration and action by the board on an application, the chairman shall issue an order reflecting the decision of the Board. A copy of the order shall be mailed to the applicant and any person submitting adverse comments.

(g) **Declaration of Emergency**. The Chairman may convene a special or emergency meeting of the Board pursuant to the Administrative Procedures Act of the Oklahoma Statutes to summarily take action involving the holder of a certificate of authority where the protection of the public requires emergency action. A written statement of the allegations constituting the emergency shall be provided to the Board members as soon as practicable before the hearing. Notice of the hearing and the written statement of allegations constituting the emergency shall be provided to the subject holder of the certificate of authority as soon as practicable before any emergency hearing of the Board. The Board may determine that an emergency exists for the immediate issuance of a temporary certificate of authority, including but not limited to the suspension of the subject certificate of authority and approval of an application for temporary certificate of authority, pending proceedings for suspension or other appropriate action pursuant to these rules.

5:11-11-3. Duties, rights, and obligations under the temporary certificate of authority

A holder of a temporary certificate of authority shall have the same duties, rights and obligations of an abstractor pursuant to Title 1, Section 36 of the Oklahoma Statutes, including, but not limited to the maintenance of a Title Plant from the date of the issuance of the temporary certificate of authority.

5:11-11-4. Administration of temporary certificate of authority

(a) **Inspections**. A holder of a temporary certificate of authority shall make the premises and records utilized within the performance of activated regulated by the Act available for an inspection pursuant to 5:11-5-1 of these Rules.

(b) **Renewal of temporary certificate of authority.** A holder of a temporary certificate of authority may make application for the renewal of the temporary certificate of authority at least thirty (30) days prior to the expiration of the temporary certificate of authority as provided in Title 1, Section 33 of the Oklahoma States. The application shall be on a form prescribed by the Board.

5:11-11-5. Period of suspension

Such certificate of authority holder shall comply with the lawful requirements of the Board and shall have ninety (90) days from the date of the issuance of the temporary certificate of authority within which to comply with the requirements of the Board. If the certificate of authority holder does not comply with such requirements, such suspension may continue until such requirements are remedied or until the Board approves or completes pursuit of additional options as provided in the Abstractors Act.

5:11-11-6. Extension of suspension

If, after notice and hearing, at the conclusion of the 90-day period, the Board determines that the certificate of authority holder has failed to comply with the requirements, or upon consent of the certificate of authority holder, the Board may issue an order authorizing the temporary certificate holder to:

(1) Take charge of such certificate of authority holder and all of the property, books, records, and effects of the Abstract Plant;

(2) Conduct its business; and

(3) Take such other steps towards the removal of the causes and conditions which have necessitated such order, as the Board may direct.

(4) The temporary certificate of authority holder may be required to post an additional errors and omissions bond in an amount determined by the Board.

5:11-11-7. Voluntary agreements

In order to avoid the expense and time involved in formal administrative or legal proceedings, the certificate of authority holder may enter into voluntary agreements that provide for the management and rehabilitation of the abstract plant provided that such agreement fully safeguards the public interest, subject to the approval of the Board. The Board reserves the right in all cases to withhold the privilege of disposition by voluntary agreement.

B. OKLAHOMA REAL ESTATE COMMISSION ADOPTS NEW RESIDENTIAL PURCHASE CONTRACT

The Oklahoma Real Estate Commission adopted – as of January 2011--a new residential purchase contract which assumes the parties always want to retain their minerals (and water). The form of the contract is on the following page.

Anne M. Woody
Executive Director

Brad Henry
Governor

OKLAHOMA REAL ESTATE COMMISSION

December 17, 2010

IMPORTANT NOTICE TO REAL ESTATE LICENSEES
LEGAL DESCRIPTION CONTRACT PROVISION (MINERAL RIGHTS) AMENDED

Two years ago the Oklahoma Real Estate Commission's contracts were amended with the language "surface rights only" which indicated that the oil and gas interests would be retained by the Seller, unless such interests had already been severed or it was noted in the contract that such interests would be transferred with the property. This change was met with numerous comments and concerns from the industry.

The Oklahoma Real Estate Contract Forms Committee met with numerous entities to discuss this issue and has decided to **revert to similar language as it appeared in the 2008 version of the contracts wherein the mineral rights were included in the sale of the property unless reserved by the Seller in the contract and excluding mineral rights previously reserved or conveyed.**

Therefore, effective January 1, 2011, the following contracts will be AMENDED AS NOTED:

Commercial Improved
Commercial Land
New Home Construction
Residential Sales
Vacant Lot/Land

Paragraph 1 of the above mentioned contracts will read as follows:

1. LEGAL DESCRIPTION: ____
____
____
____
Property Address   City   Zip

Together with all fixtures and improvements, and all appurtenances, subject to existing zoning ordinances, plat or deed restrictions, utility easements serving the Property, **including all mineral and water rights owned by Seller unless expressly reserved by Seller in the Contract and excluding mineral rights previously reserved or conveyed of record** (collectively referred to as "the Property".)

The revised contract forms are on the Commission's website at www.orec.ok.gov. If you have any questions, please call our office or email the Commission at orec.help@orec.ok.gov.

Anne M. Woody
Executive Director
Oklahoma Real Estate Commission

Shepherd Mall ◆ 2401 N.W. 23rd, Suite 18 ◆ Oklahoma City, OK 73107 ◆ (405) 521-3387 ◆ FAX (405) 521-2189 ◆ www.orec.state.ok.us
"DEDICATED TO PROVIDING QUALITY CUSTOMER SERVICE"

OKLAHOMA REAL ESTATE COMMISSION
This is a legally binding Contract;
if not understood seek advice from an attorney
OKLAHOMA UNIFORM CONTRACT

This form was created by the Oklahoma Real Estate Contract Form Committee and approved by the Oklahoma Real Estate Commission.

RESIDENTIAL CONTRACT OF SALE OF REAL ESTATE

CONTRACT DOCUMENTS. The Contract is defined as this document with the following attachment(s):
(check as applicable)

____ Conventional Supplemental
____ FHA Supplemental
____ VA Supplemental
____ Assumption/Other
____ Seller Carry
___ Single Family Mandatory Homeowners' Association Supplemental
___ Condominium Association Supplemental
___ Townhouse Association Supplemental
___ Supplemental Addendum
___ ____________________

PARTIES. THE CONTRACT is entered into between:

____ "Seller"

and ____ "Buyer".

The Parties' signatures at the end of the Contract, which includes any attachments or documents incorporated by reference, with delivery to their respective Brokers, if applicable, will create a valid and binding Contract, which sets forth their complete understanding of the terms of the Contract. The Contract shall be executed by original signatures of the parties or by signatures as reflected on separate identical Contract counterparts (carbon, photo or fax copies). All prior verbal or written negotiations, representations and agreements are superceded by the Contract, which may only be modified or assigned by a further written agreement of Buyer and Seller.

Seller agrees to sell and convey by General Warranty Deed, and Buyer agrees to accept such deed and buy the Property described herein, on the following terms and conditions:

The Property shall consist of the following described real estate located in ____________________ County, Oklahoma.

1. LEGAL DESCRIPTION. ____

____

____

____

____

Property Address City Zip

Together with all fixtures and improvements, and all appurtenances, subject to existing zoning ordinances, plat or deed restrictions, utility easements serving the Property, including all mineral and water rights owned by Seller unless expressly reserved by Seller in the Contract and excluding mineral rights previously reserved or conveyed of record (collectively referred to as "the Property".)

2. PURCHASE PRICE, EARNEST MONEY AND SOURCE OF FUNDS. This is a CASH TRANSACTION unless a Financing Supplement Agreement is attached. The Purchase Price is $____________________ payable by Buyer as follows: Buyer has paid $____________________ as Earnest Money on execution of the Contract, and Buyer shall pay the balance of the purchase price and Buyer's Closing costs at Closing. Upon execution of the Contract, the Earnest Money shall be deposited in the trust account of ____________________________ or if left blank, the Listing Broker's trust account, as part payment of the purchase price and/or closing costs. If interest accrues on Earnest Money Deposit in Listing Broker's trust account, said interest shall be paid to "Oklahoma Housing Foundation".

3. CLOSING, FUNDING AND POSSESSION. The Closing process includes execution of documents, delivery of deed and receipt of funds by Seller and shall be completed on or before ______________________________, ("Closing Date") or not later than __________________________ days (five [5] days if left blank) thereafter caused by a delay of the Closing process, or such later date as may be necessary in the Title Evidence provision (reference Paragraph 10 D and E). Possession shall be transferred upon conclusion of Closing process unless otherwise provided below:

____.

In addition to costs and expenses otherwise required to be paid in accordance with terms of the Contract, Buyer shall pay Buyer's Closing fee, Buyer's recording fees, and all other expenses required from Buyer. Seller shall pay documentary stamps required, Seller's Closing fee, Seller's recording fees, if any, and all other expenses required from Seller. Funds required from Buyer and Seller at Closing shall be either cash, cashier's check or wire transfer.

PROPERTY ADDRESS ______________________________

4. **ACCESSORIES, EQUIPMENT AND SYSTEMS**. The following items, if existing on the Property, unless otherwise excluded, shall remain with the Property at no additional cost to Buyer:

- Attic and ceiling fan(s)
- Bathroom mirror(s)
- Other mirrors, if attached
- Central vacuum & attachments
- Floor coverings, if attached
- Key(s) to the property
- Built-in and under cabinet/counter appliance(s)
- Free standing slide-in/drop-in kitchen stove
- Built-in sound system(s)/speaker(s)
- Lighting & light fixtures
- Fire, smoke and security system(s), if owned
- Shelving, if attached
- Fireplace inserts, logs, grates, doors and screens
- Free standing heating unit(s)
- Humidifier(s), if attached
- Water conditioning systems, if owned
- Window treatments & coverings, interior & exterior
- Storm windows, screens & storm doors
- Garage door opener(s) & remote transmitting unit(s)
- Fences (includes sub-surface electric & components)
- Mailboxes/Flag poles
- Outside cooking unit(s), if attached
- Propane tank(s) if owned
- TV antennas/satellite dish system(s) and control(s), if owned
- Sprinkler systems & control(s)
- Swimming Pool/Spa equipment/ accessories
- Attached recreational equipment
- Exterior landscaping and lighting
- Entry gate control(s)
- Water meter, sewer/trash membership, if owned
- All remote controls, if applicable
- Transferable Service Agreements and Product Warranties

A. **Additional Inclusions**. The following items shall also remain with the Property at no additional cost to Buyer: ______________________________

B. **Exclusions**. The following items shall not remain with the Property: ______________________________.

5. **TIME PERIODS SPECIFIED IN CONTRACT.** Time periods for Investigations, Inspections and Reviews and Financing Supplement Agreement shall commence on ______________________________ **(Time Reference Date)**, regardless of the date the Contract is signed by Buyer and Seller. The day after the Time Reference Date shall be counted as day one (1). If left blank, the Time Reference Date shall be the third day after the last date of signatures of the parties.

6. **RESIDENTIAL PROPERTY CONDITION DISCLOSURE.** No representations by Seller regarding the condition of Property or environmental hazards are expressed or implied, other than as specified in the Oklahoma Residential Property Condition Disclosure Statement ("Disclosure Statement") or the Oklahoma Property Condition Disclaimer Statement ("Disclaimer Statement"), if applicable. A real estate licensee has no duty to Seller or Buyer to conduct an independent inspection of the Property and has no duty to independently verify accuracy or completeness of any statement made by Seller in the Disclosure Statement and any amendment or the Disclaimer Statement.

7. **INVESTIGATIONS, INSPECTIONS and REVIEWS**.

A. Buyer shall have ____________ days (10 days if left blank) after the Time Reference Date to complete any investigations, inspections, and reviews. Seller shall have water, gas and electricity turned on and serving the Property for Buyer's inspections, and through the date of possession or Closing, whichever occurs first. If required by ordinance, Seller, or Seller's Broker, if applicable, shall deliver to Buyer, in care of Buyer's Broker, if applicable, within five (5) days after the Time Reference Date any written notices affecting the Property.

B. Buyer, together with persons deemed qualified by Buyer and at Buyer's expense, shall have the right to enter upon the Property to conduct any and all investigations, inspections, and reviews of the Property. Buyer's right to enter upon the Property shall extend to Oklahoma licensed Home Inspectors and licensed architects for purposes of performing a home inspection. Buyer's right to enter upon the Property shall also extend to registered professional engineers, professional craftsman and/or other individuals retained by Buyer to perform a limited or specialized investigation, inspection or review of the Property pursuant to a license or registration from the appropriate State licensing board, commission or department. Finally, Buyer's right to enter upon the Property shall extend to any other person representing Buyer to conduct an investigation, inspection and/or review which is lawful but otherwise unregulated or unlicensed under Oklahoma Law. Buyer's investigations, inspections, and reviews may include, but not be limited to, the following:

1) **Disclosure Statement or Disclaimer Statement unless exempt**
2) **Flood, Storm Run off Water, Storm Sewer Backup or Water History**
3) **Psychologically Impacted Property and Megan's Law**
4) **Hazard Insurance** (Property insurability)
5) **Environmental Risks**, including, but not limited to soil, air, water, hydrocarbon, chemical, carbon, asbestos, mold, radon gas, lead-based paint
6) **Roof,** structural members, roof decking, coverings and related components
7) **Home Inspection**
8) **Structural Inspection**
9) **Fixtures, Equipment and Systems Inspection.** All fixtures, equipment and systems relating to plumbing (including sewer/septic system and water supply), heating, cooling, electrical, built-in appliances, swimming pool, spa, sprinkler systems, and security systems

10) **Termites and other Wood Destroying Insects Inspection**
11) **Use of Property.** Property use restrictions, building restrictions, easements, restrictive covenants, zoning ordinances and regulations, mandatory Homeowner Associations and dues
12) **Square Footage.** Buyer shall not rely on any quoted square footage and shall have the right to measure the Property.
13) ____

C. TREATMENTS, REPAIRS AND REPLACEMENTS (TRR).

1) **TERMITE TREATMENTS AND OTHER WOOD DESTROYING INSECTS.** Seller's obligation to pay treatment and repair cost in relation to termites and other wood destroying insects shall be limited to the residential structure, garage(s) and other structures as designated in Paragraph 13 and as provided in subparagraph C2b below.

2) **TREATMENTS, REPAIRS, REPLACEMENTS AND REVIEWS.** Buyer or Buyer's Broker, if applicable, within 24 hours after expiration of the time period referenced in 7A, shall deliver to Seller, in care of the Seller's Broker, if applicable, a copy of all written reports obtained by Buyer, if any, pertaining to the Property and Buyer shall select one of the following:

a. If, in the sole opinion of the Buyer, results of Investigations, Inspections or Reviews are unsatisfactory, the Buyer may cancel the Contract by delivering written notice of cancellation to Seller, in care of Seller's Broker, if applicable, and receive refund of Earnest Money.

OR

b. Buyer, upon completion of all Investigations, Inspections and Reviews, waives Buyer's right to cancel as provided in Paragraph 7, subparagraph C2a above, by delivering to Seller, in care of Seller's Broker, if applicable, a written list on a Notice of Treatments, Repairs, and Replacements form (TRR form) of those items to be treated, repaired or replaced (including repairs caused by termites and other wood destroying insects) that are not in normal working order (defined as the system or component functions without defect for the primary purpose and manner for which it was installed. Defect means a condition, malfunction or problem, which is not decorative, that will have a materially adverse effect on the value of a system or component).

i. Seller shall have __________ days (5 days if blank) after receipt of the completed TRR form from Seller's Broker, if applicable, to obtain costs estimates. Seller agrees to pay up to $________________ ("Repair Cap") of costs of TRR's. If Seller, or Seller's Broker, if applicable, obtains cost estimates which exceed Repair Cap, Seller, or Seller's Broker, if applicable, shall notify Buyer or Buyer's Broker, if applicable, in writing, within two days after receipt of cost estimates.

If the amount of the TRR's exceed the amount of the Repair Cap, Buyer and Seller shall have __________ days (3 days if blank) thereafter to negotiate the payment of costs in excess of Repair Cap. If a written agreement is reached, Seller shall complete all agreed TRR's prior to the Closing Date. If an agreement is not reached within the time specified in this provision, the Contract shall become null and void and Earnest Money returned to Buyer.

ii. If Seller fails to obtain cost estimates within the stated time, Buyer shall then have ___________ days (5 days if blank) to:

a) Enter upon the Property to obtain costs estimates and require Seller to be responsible for all TRR's as noted on Buyer's TRR form, up to the Repair Cap; and,

b) If the amount of the TRR's exceed the amount of the Repair Cap, Buyer and Seller shall have __________ days (3 days if blank) thereafter to negotiate the payment of costs in excess of Repair Cap. If a written agreement is reached, Seller shall complete all agreed TRR's prior to the Closing Date. If an agreement is not reached within the time specified in this provision, the Contract shall become null and void and Earnest Money returned to Buyer.

D. EXPIRATION OF BUYER'S RIGHT TO CANCEL CONTRACT.

1) Failure of Buyer to complete one of the following shall constitute acceptance of the Property regardless of its condition:
   a. Perform any Investigations, Inspections or Reviews;
   b. Deliver a written list on a TRR form of items to be treated, repaired and replaced; or
   c. Cancel the Contract within the time periods in Investigations, Inspections or Reviews Paragraph.

2) After expiration of the time periods in Investigations, Inspections and Reviews Paragraph, Buyer's inability to obtain a loan based on unavailability of hazard insurance coverage shall not relieve the Buyer of the obligation to close transaction.

3) After expiration of the time periods in Investigations, Inspections and Reviews Paragraph, any square footage calculation of the dwelling, including but not limited to appraisal or survey, indicating more or less than quoted, shall not relieve the Buyer of the obligation to close this transaction.

E. INSPECTION OF TREATMENTS, REPAIRS AND REPLACEMENTS AND FINAL WALK-THROUGH.

1) Buyer, or other persons Buyer deems qualified, may perform re-inspections of Property pertaining to Treatments, Repairs and Replacements.

2) Buyer may perform a final walk-through inspection, which Seller may attend. Seller shall deliver Property in the same condition as it was on the date upon which Contract was signed by Buyer (ordinary wear and tear excepted) subject to Treatments, Repairs and Replacements.

3) All inspections and re-inspections shall be paid by Buyer, unless prohibited by mortgage lender.

8. **RISK OF LOSS**. Until transfer of Title or transfer of possession, risk of loss to the Property, ordinary wear and tear excepted, shall be upon Seller; after transfer of Title or transfer of possession, risk of loss shall be upon Buyer. (Parties are advised to address insurance coverage regarding transfer of possession prior to Closing.)

9. **ACCEPTANCE OF PROPERTY**. Buyer, upon accepting Title or transfer of possession of the Property, shall be deemed to have accepted the Property in its then condition. No warranties, expressed or implied, by Sellers, Brokers and/or their associated licensees, with reference to the condition of the Property, shall be deemed to survive the Closing.

10. **TITLE EVIDENCE.**

A. BUYER'S EXPENSE. Buyer, at Buyer's expense, shall obtain:
(Check one)

☐ **Attorney's Title Opinion**, which is not rendered for Title Insurance purposes.

OR

☐ **Commitment for Issuance of a Title Insurance Policy** based on an Attorney's Title Opinion which is rendered for Title Insurance purposes for the Owner's and Lender's Title Insurance Policy.

B. SELLER'S EXPENSE. Seller, at Seller's expense, within thirty (30) days prior to Closing Date, agrees to make available to Buyer the following (*collectively referred to as "the Title Evidence"*):

1) A complete surface-rights-only Abstract of Title, last certified to a date subsequent to the Time Reference Date, by an Oklahoma licensed and bonded abstract company;

OR

A copy of Seller's existing owner's title insurance policy issued by a title insurer licensed in the State of Oklahoma together with a supplemental surface-rights-only abstract last certified to a date subsequent to the Time Reference Date, by an Oklahoma licensed and bonded abstract company;

2) A current Uniform Commercial Code Search Certificate; and

3) An inspection certificate (commonly referred to as a "Mortgage Inspection Certificate") prepared subsequent to the Time Reference Date by a licensed surveyor, which shall include a representation of the boundaries of the Property (without pin stakes) and the improvements thereon.

C. LAND OR BOUNDARY SURVEY. By initialing this space ____________, Buyer agrees to waive Seller's obligation to provide a Mortgage Inspection Certificate. Seller agrees that Buyer, at Buyer's expense, may have a licensed surveyor enter upon the Property to perform a Land or Boundary (Pin Stake) Survey, in lieu of a Mortgage Inspection Certificate, that shall then be considered as part of the Title Evidence.

D. BUYER TO EXAMINE TITLE EVIDENCE.

1) Buyer shall have ten (10) days after receipt to examine the Title Evidence and to deliver Buyer's objections to Title to Seller or Seller's Broker, if applicable. In the event the Title Evidence is not made available to Buyer within ten (10) days prior to Closing Date, said Closing Date shall be extended to allow Buyer the ten (10) days from receipt to examine the Title Evidence.

2) Buyer agrees to accept title subject to: (i) utility easements serving the property, (ii) building and use restrictions of record, (iii) set back and building lines, (iv) zoning regulations, and (v) reserved and severed mineral rights, which shall not be considered objections for requirements of Title.

E. SELLER TO CORRECT ISSUES WITH TITLE (IF APPLICABLE), POSSIBLE CLOSING DELAY. Upon receipt by Seller, or in care of Seller's Broker, if applicable, of any title requirements reflected in an Attorney's Title Opinion or Title Insurance Commitment, based upon the standard of marketable title set out in the Title Examination Standards of the Oklahoma Bar Association, the parties agree to the following:

1) Seller, at Seller's expense, shall make reasonable efforts to obtain and/or execute all documents necessary to cure title requirements identified by Buyer; and

2) Delay Closing Date for __________ days [thirty (30) days if blank], or a longer period as may be agreed upon in writing, to allow Seller to cure Buyer's title requirements. In the event Seller cures Buyer's objection prior to the delayed Closing Date, Buyer and Seller agree to close within five (5) days of notice of such cure. In the event that title requirements are not cured within the time specified in this subparagraph, the Buyer may cancel the Contract and receive a refund of Earnest Money.

F. Upon Closing, any existing Abstract(s) of Title, owned by Seller, shall become the property of Buyer.

11. TAXES, ASSESSMENTS AND PRORATIONS.

A. The following items shall be prorated to include the date of Closing: (i) General ad valorem taxes for the current calendar year, if certified. However, if the amount of such taxes has not been fixed, the proration shall be based upon the rate of levy for the previous calendar year and the most current assessed value available at the time of Closing; and (ii) Homeowner's Association assessments and dues, if any, based on most recent assessments.

B. The following items shall be paid by Seller at Closing: (i) All special assessments against the Property (matured or not matured), whether or not payable in installments; (ii) Documentary Stamps; (iii) all utility bills, actual or estimated; (iv) all taxes other than general ad valorem taxes which are or may become a lien against the Property; (v) any labor, materials, or other expenses related to the Property, incurred prior to Closing which is or may become a lien against the Property.

C. At Closing all leases, if any, shall be assigned to Buyer and security deposits, if any, shall be transferred to Buyer. Prepaid rent and lease payments shall be prorated through the date of Closing.

D. If applicable, membership and meters in utility districts to include, but not limited to, water, sewer, ambulance, fire, garbage, shall be transferred at no cost to Buyer at Closing.

12. RESIDENTIAL SERVICE AGREEMENT.
(CHECK ONE)

A. ☐ The Property shall not be covered by a Residential Service Agreement.

B. ☐ Seller currently has a Residential Service Agreement in effect on the Property. Seller, at Seller's expense, shall transfer the agreement with one (1) year coverage to the Buyer at Closing.

C. ☐ The Property shall be covered by a Residential Service Agreement selected by the Buyer at an approximate cost of $______________. Seller agrees to pay $______________ and Buyer agrees to pay the balance.

The Seller and Buyer acknowledge that the real estate broker(s) may receive a fee for services provided in connection with the Residential Service Agreement.

Buyer acknowledges that a Residential Service Agreement does not replace/substitute Property inspection rights.

13. ADDITIONAL PROVISIONS.

____

____

____

____

____

14. MEDIATION. Any dispute arising with respect to the Contract shall first be submitted to a dispute resolution mediation system servicing the area in which the Property is located. Any settlement agreement shall be binding. In the event an agreement is not reached, the parties may pursue legal remedies as provided by the Contract.

15. BREACH AND FAILURE TO CLOSE.

A. UPON BREACH BY SELLER. If the Buyer performs all of the obligations of Buyer, and if, within five (5) days after the date specified for Closing under Paragraph 3, Seller fails to convey the Title or fails to perform any other obligations of the Seller under this Contract, then Buyer shall be entitled to either cancel and terminate this Contract, return the abstract to Seller and receive a refund of the Earnest Money, or pursue any other remedy available at law or in equity, including specific performance.

B. UPON BREACH BY BUYER. If, after the Seller has performed Seller's obligation under this Contract, and if, within five (5) days after the date specified for Closing under Paragraph 3, the Buyer fails to provide funding, or to perform any other obligations of the Buyer under this Contract, then the Seller may, at Seller's option, cancel and terminate this Contract and retain all sums paid by the Buyer, but not to exceed 5% of the purchase price, as liquidated damages, or pursue any other remedy available at law or in equity, including specific performance.

PROPERTY ADDRESS_______________

16. INCURRED EXPENSES AND RELEASE OF EARNEST MONEY.

A. INCURRED EXPENSES. Buyer and Seller agree that any expenses, incurred on their behalf, shall be paid by the party incurring such expenses and shall not be paid from Earnest Money.

B. RELEASE OF EARNEST MONEY. In the event a dispute arises prior to the release of Earnest Money held in escrow, the escrow holder shall retain said Earnest Money until one of the following occur:

1) A written release is executed by Buyer and Seller agreeing to its disbursement;
2) Agreement of disbursement is reached through Mediation;
3) Interpleader or legal action is filed, at which time the Earnest Money shall be deposited with the Court Clerk; **or**
4) The passage of thirty (30) days from the date of final termination of the Contract has occurred and options 1), 2) or 3) above have not been exercised; Broker escrow holder, at Broker's discretion, may disburse Earnest Money. Such disbursement may be made only after fifteen (15) days written notice to Buyer and Seller at their last known address stating the escrow holder's proposed disbursement.

17. DELIVERY OF ACCEPTANCE OF OFFER OR COUNTEROFFER. The Buyer and Seller authorize their respective Brokers, if applicable, to receive delivery of an accepted offer or counteroffer.

18. NON-FOREIGN SELLER. Seller represents that at the time of acceptance of this contract and at the time of Closing, Seller is not a "foreign person" as such term is defined in the Foreign Investments in Real Property Tax Act of 1980 (26 USC Section 1445(f) et. Sec) ("FIRPTA"). If either the sales price of the property exceeds $300,000.00 or the buyer does not intend to use the property as a primary residence then, at the Closing, and as a condition thereto, Seller shall furnish to Buyer an affidavit, in a form and substance acceptable to Buyer, signed under penalty of perjury containing Seller's United States Social Security and/or taxpayer identification numbers and a declaration to the effect that Seller is not a foreign person within the meaning of Section "FIRPTA."

19. EXECUTION BY PARTIES.

AGREED TO BY BUYER:

On This Date_______________

____
Buyer's Printed Name

____
Buyer's Signature

____
Buyer's Printed Name

____
Buyer's Signature

AGREED TO BY SELLER:

On This Date_______________

____
Seller's Printed Name

____
Seller's Signature

____
Seller's Printed Name

____
Seller's Signature

TERMINATION OF OFFER. The above Offer shall automatically terminate on _______________ at 5:00 p.m., unless withdrawn prior to acceptance or termination.

EARNEST MONEY RECEIPT AND INSTRUCTIONS

Receipt of $_______________ ☐ Check ☐ Cash as Earnest Money Deposit, to be deposited in accordance with the terms and conditions of PURCHASE PRICE, EARNEST MONEY, AND SOURCE OF FUNDS Paragraph. Broker(s) acknowledges receipt of Earnest Money and Listing Broker, if applicable, shall deposit said funds in accordance with Paragraph 2 of this Contract. If deposited in an escrow account other than the Listing Broker, the Listing Broker, if applicable, shall provide a copy of receipt to the Selling Broker.

_____ _______________
Date Selling Broker/Associate Signature

____
(Print Name) Selling Broker/Associate

____
Company Name

____
Address Phone

_____ _______________
Date Listing Broker/Associate Signature

____
(Print Name) Listing Broker/Associate

____
Company Name

____
Address Phone

IV. CASE LAW

LIST OF CASES

NO.	TOPIC	CASE	OKLAHOMA CITATION	DECIDED	MANDATE
1	Enforcement of a Restrictive Covenant Not Barred by 5 Year Statute of Limitation	Vranesevich v. Pearl Craft	2010 OK CIV APP 92	10/09/09	10/08/10
2	Tax Sale Notice and Adverse Possession	Davis v. Mayberry	2010 OK CIV APP 94	05/14/10	10/08/10
3	Ownership of River Water	Wagoner County Rural Water District No. 2 v. Grand River Dam Authority	2010 OK CIV APP 95	05/07/10	10/08/10
4	Eminent Domain Regarding Uneconomic Remnants	State of OK ex rel. Dept. of Transportation v. Evans	2010 OK CIV APP 107	03/25/10	10/14/10
5	Error in Mortgage Payoff Figure	Baer, Timberlake, Coulson & Cates, P.C. v. Warren	2010 OK CIV APP 112	08/13/10	10/22/10
6	Arbitration in Landlord Tenant Dispute	City College v. Moore Sorrento	2010 OK CIV APP 127	06/18/10	11/30/10
7	Statute of Limitation for Mortgage Release Penalty	Melson v. Wachovia Bank	2010 OK CIV APP 135	10/22/10	11/30/10
8	Interference with an Easement	Tidwell v. Bezner	2010 OK CIV APP 143	08/26/10	12/10/10
9	Eminent Domain for Power Lines	OG&E v. Beecher and Bd. of County Commissioners, Kingfisher County	2011 OK CIV APP 1	10/19/10	01/20/11
10	Distribution of Assets of a Corporation by Will	In the Matter of the Estate of Hodges	2011 OK CIV APP 2	12/28/10	01/28/11
11	Notice in Certificate Tax Sale	Benton v. Ted Parks	2011 OK CIV APP 7	12/02/10	01/24/11

12	Application of Fair Market Value After General Execution Sale	Little Bear Resources, LLC v. Nemaha Services, Inc.	2011 OK CIV APP 18	02/14/11	02/22/11
13	Proof as to Holder of Note	BAC Home Loans Servicing v. White	2011 OK CIV APP 35	12/03/10	03/16/11
14	Ambiguous Deed	MacDonald O/G v. Sledd, Trustee of Nedbalek Family Trust	2011 OK CIV APP 36	12/28/10	03/16/11
15	Section Line Roadway	Mayes v. Williams	2011 OK CIV APP 40	02/16/11	04/22/11
16	Future Advances Clause	RCB Bank v. Villas Development	2011 OK CIV APP 44	03/18/11	04/22/11
17	Lis Pendens Against Executory Purchaser	Bank of Commerce v. Breakers	2011 OK CIV APP 45	03/18/11	04/22/11
18	Attorney Fees to Prevailing Party	Twin Creek Estates v. Tipps	2011 OK CIV APP 53	03/30/11	05/05/11
19	Adverse Possession Distinguished by Title by Acquiescence	McDonald v. Martin	2011 OK CIV APP 55	04/01/11	05/05/11
20	Purchase Money Mortgage Priorities	American Bank of OK v. Wagoner	2011 OK CIV APP 76	11/05/10	06/29/11
21	Prepayment Penalties Enforceability	Massey v. Bayview Loan Servicing	2011 OK CIV APP 78	04/04/11	06/29/11
22	Award of Attorney Fees for Removal From Small Claims Court	Eagle Bluff, LLC v. Taylor	2010 OK 47	06/22/10	
23	Can Guarantor Wave Statutory Right to Set-Off F.M.V. Against Debt in a Mortgage Foreclosure	JPMorgan Chase Bank v. Specialty Restaurants, Inc.	2010 OK 65	09/21/10	

24	Qui Tam Intervention by Tax Payer	City of Broken Arrow, Oklahoma v. Bass Pro Outdoor World	2011 OK 1	01/18/11	
25	Access to Residential Property to Determine Assessed Value	Atkinson v. Gurich	2011 OK 12	02/22/11	
26	Establishing Status as a Pipeline Company with Eminent Domain Powers	D-Mil Production v. DKMT	2011 OK 55	06/21/11	

1. **<u>ENFORCEMENT OF A RESTRICTIVE COVENANT NOT BARRED BY 5 YEAR STATUTE OF LIMITATION</u>**

(Suit to <u>enjoin</u> a violation of a restrictive covenant (prohibiting placing manufactured home on residential lot) is not barred by passage of 5-year contract statute of limitations)

<u>VRANESEVICH v. PEARL CRAFT,</u> 2010 OK CIP APP 92 (decided 10/09/09; mandate issued 10/08/10)

A restriction prohibited the placement of a manufactured home on a lot. A manufactured home was placed on a site and it stayed there without complaint for over 5 years. A neighbor sued for injunction to cause the removal of the manufactured home under (1) violation of restrictive covenant and (2) nuisance.

Owner of manufactured home filed a Motion for Summary Judgment based on the passage of the 5-year statute of limitations (12 §95(1)) applicable to a written contract.

Trial court granted the summary judgment in favor the owner of the manufactured home relying on an earlier Court of Civil Appeals decision holding that a restrictive covenant is a written contract and is barred after 5 years. (<u>Russell v. Williams</u>, 1998 OK CIV APP 135 ,964 P.2d 231) The summary judgment failed to dispose of the plaintiff's nuisance claim.

The Court of Civil Appeals reversed (expressly disagreeing with <u>Russell</u>) and held (¶13): "Although a restrictive covenant affecting the use of real property is created

by contract, the property interest created thereby 'runs with the land.' Consequently, Vranesevich's suit to enjoin an alleged breach of restrictive covenants is not barred by the five-year statute of limitations applicable to written contracts. Likewise, he may maintain an action to abate a private nuisance, subject to any defenses Craft may assert. The judgment of the district court is reversed, and this case is remanded for further proceedings."

2. **TAX SALE NOTICE AND ADVERSE POSSESSION**

(Tax certificate sale of restricted Indian land requires special notice to the Bureau of Indian Affairs (BIA), and is void in its absence; a void tax deed based on 5-years adverse possession can overcome such lack of jurisdiction, but requires more than simply recording a deed and paying taxes.)

DAVIS v. MAYBERRY, 2010 OK CIV APP 94 (decided 05/14/10; mandate issued 10/08/10)

A person bought an 11/60 undivided interest in a 160-acre tract, in taxable Restricted Indian land. The tax deed holder filed the tax deed to himself and then filed a deed conveying the interest to himself and his wife, as joint tenants. The tax deed holder did not occupy the premises, but did pay the taxes on the new property for 5 years, and did not have its deed challenged in that time.

A pending quiet title suit added the tax deed owners asserting the tax deed sale was void due to the absence of the 90-day advance notice of the tax sale to the BIA. Tax deed holder asserted (1) the notice requirement was unconstitutional and (2) they had proved 5-years of actual possession.

The trial court granted the BIA's Motion for Partial Summary Judgment, because the tax deed was void due to the absence of the required notice to the BIA. The trial court set the adverse possession issue for trial.

At trial, on the adverse possession claim, the trial court ruled against the tax deed holder's proof of adverse possession.

On appeal, the Court of Civil Appeal affirmed the trial court, ruling against the tax deed holder's defense that "county treasurers and lawyers are generally ignorant of this [BIA advance notice] statute." (¶11) The appellate court refused to consider the constitutionality of the federal notice statute.

The appellate court also considered the 5-year adverse possession claim—asserted in support of the tax deed holder—and affirmed the trial court, holding that in spite of the partial undivided interest the tax deed holder must prove actual exclusive possession, and he failed.

3. **OWNERSHIP OF RIVER WATER**

(Water in Grand River Dam Authority's Multi-County area is owned by GRDA and is properly sold to the four Water Districts in that area)

WAGONER COUNTY RURAL WATER DISTRICT NO. 2 v. GRAND RIVER DAM AUTHORITY, 2010 OK CIV APP 95 (decided 05/07/10; mandate issued 10/08/10)

After the GRDA had been charging, and the area's four Water Districts had been paying, the GRDA for water from the Fort Gibson Reservoir and its tributaries for a long time, the Water Districts filed a lawsuit claiming the GRDA did not own such water and therefore could not charge for it. (¶'s 2, 5 & 19)

The GRDA filed a Motion to Dismiss for failure to state a claim. The trial court treated the Motion as a Summary Judgment Motion, and granted GRDA's Motion.

The four Water Districts appealed, but the Court of Civil Appeals affirmed, holding: navigable waters are subject to the control of Congress; & ownership and Control of non-navigable waters (such as the Grand River) is in the states. Oklahoma created the GRDA and gave it ownership and control of non-navigable waters in its multi-county jurisdiction. The GRDA was held to own and control the waters in the Fort Gibson reservoir and its tributaries.

4. **EMNENT DOMAIN REGARDING UNECONOMIC REMANTS**

(Landowner cannot force condemning authority (ODOT) to declare remaining lands as an economic remnant)

STATE OF OKLAHOMA ex rel. DEPARTMENT OF TRANSPORTATION v. EVANS, 2010 OK CIV APP 107 (decided 03/25/10; mandate issued 10/14/10)

ODOT filed a proceeding to acquire a part of a landowner's tract, and the landowner challenged the Commissioners' Report insisting ODOT must take all of her land rather than leaving her with a worthless unusable "uneconomic remnant." The taking went right up to her doorstep.

Title 27 O.S.2001 § 13 **Policies** states:

> Any person, acquiring agency or other entity acquiring real property for any public project or program described in Section 9 of this title shall comply with the following policies:
> 9. If the acquisition of only part of the property would leave its owner with an uneconomic remnant, an offer to acquire that remnant shall be made. For the purposes of this section, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the property of the owner which has little or no value or utility to the owner.

The trial court rejected the land owner's request.

The Court of Civil Appeals affirmed. It explained (¶4): "Section 15 of Title 27 is apposite to Section 13, and describes the circumscription of landowners: 'The provisions of Section 5 [Title 27, § 13] create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation.' In *Western Farmers Electrical Co-Operative v. Willard*, 1986 OK CIV APP 5, 726 P.2d 361, this Court held that the trial court was correct in denying landowners' objections based on the condemning authority's failure to comply with § 13 because it is a statement of policy only."

5. **ERROR IN MORTGAGE PAYOFF FIGURE**

(If lender, or lender's attorney agent, provides payoff amount which is lower than the correct amount, the bank (or assignee of note) can pursue the shortfall (here about $10,000))

BAER, TIMBERLAKE, COULSON & CATES, P.C. v. WARREN, 2010 OK CIV APP 112 (decided 08/13/10; mandate issued 10/22/10)

Lender filed foreclosure action and Lender's foreclosure attorney provided three payoff amounts over a period of time, with the first two increasing in amount and the third one erroneously going down.

Owner secured a third party buyer and used the third payoff amount (the lower erroneous one) to cut and send a check to the lender's attorneys. Lender accepted and deposited such check and sent a letter to the debtor saying the mortgage was paid in full. Such payoff amount and debtor's check were about $10,000 short.

Lender's attorney paid the shortage to the lender and took an endorsement of the note. Such attorney sued the debtor for the difference.

Trial court awarded a judgment to the attorney.

It was affirmed on appeal.

6. **ARBITRATION IN LANDLORD TENANT DISPUTE**

(Parties (landlord and tenant) can (and did) confer authority on an arbitration panel to decide both possessory and damages issues, arising originally in a forcible entry and detainer (FED) Action)

CITY COLLEGE v. MOORE SORRENTO, 2010 OK CIV APP 127 (decided 06/18/10; mandate issued 11/30/10)

Landlord sued in an FED action to evict a non-paying commercial tenant. Tenant cross-claimed for damages. Parties entered Agreed Order terminating lease and possession, and appointing an arbitration panel to resolve remaining damages issues.

Panel granted tenant substantial damages, attorneys fees, and directed landlord to pay for the arbitration.

Tenant submitted arbitration panel's award to the District Court, and over the landlord's objection, the Court confirmed the award.

Landlord appealed, and the Court of Civil Appeals affirmed.

The appellate Court denied the landlord's assertion that arbitration was not mandatory and that the panel exceeded their authority, since the lease allowed arbitration and the parties agreed to it.

The appellate court also rejected the landlord's claims of bias and impartiality by one of the arbitrators, because there was no evidence of any visible bias, and the

relationship between the arbitrator and one of the parties' attorneys was known in advance and irrelevant.

7. **STATUTE OF LIMITATION FOR MORTGAGE RELEASE PENALTY**

(If a borrower waits more than 1- year after making a written demand for a release of mortgage, it is barred from seeking to recover either statutory penalty, or any other relief)

MELSON v. WACHOVIA BANK, 2010 OK CIV APP 135 (decided 10/22/10; mandate issued 11/30/10)

Borrower paid off their note and mortgage in 2001, and, when seeking to refinance their home in 2006, discovered the mortgage was not released. Borrower sent a written demand for release to the lender in 2006, which was not satisfied until February, 2009, when the lender filed a Release of Mortgage. The borrower filed an action for a statutory penalty under 46 O.S. Section15 in 2008.

The trial court held that due to the one-year statute of limitation to seek to recover a penalty (12 O.S. §95(4)) and, because this penalty statute is the exclusive remedy, the borrowers were without any relief for a penalty or other damages.

The Court of Civil Appeals affirmed.

8. **INTERFERENCE WITH AN EASEMENT**

(Owner of lands subject to roadway easement cannot install a drive-through "bump gate")

TIDWELL v. BEZNER, 2010 OK CIV APP 143 (decided 08/26/10; mandate issued 12/10/10)

Owner of lands subject to roadway easement built a fence to keep in his cattle and wanted to install a gate on the roadway. Easement holder did not want a gate and, at his own expense, installed a cattle guard. Cattle owner installed a "bump guard" gate with electrically charged wires on it to discourage cattle from pushing through it. Easement holder sued to remove the gate.

Trial court ordered the gate to be removed, because it was "unduly burdensome." (¶20)

Court of Civil Appeals affirmed holding (¶17):

"In this regard, Tidwell [easement holder] admitted that the bump gate did not bar access to his property. However, he presented evidence that the electrical lines attached to the gate posed a danger to himself, his visitors and his grandchildren, that bumping the gate could possibly damage vehicles which passed through, and that the bump gate had devalued his property. He also presented evidence of a simple, alternative solution for keeping the cattle out of his yard----properly maintaining the cattle guard or ramping it. Although Bezner [land owner] presented conflicting evidence, the trial court clearly resolved the factual conflicts in favor of Tidwell [easement holder] and balanced the equities before reaching its decision."

9. **EMINENT DOMAIN FOR POWER LINES**

(Exercise of eminent domain for construction of electric lines from wind farms is for a public purpose)

OG&E v. BEECHER AND BOARD OF COUNTY COMMISSIONERS, KINGFISHER COUNTY, 2011 OK CIV APP 1 (decided 10/19/10; mandate issued 01/20/11)

In an eminent domain action (six companion cases), OG&E sought to condemn lands for electric lines for wind farms. Land owners sought to prove (1) use of only 22% of electricity by Oklahoma customers meant it was for private and out of state purposes, and not public purposes, and (2) control of access to the lines by the Southwest Power Pool (SPP) meant it was not really an OG&E project for the use of the public in Oklahoma.

The trial court denied the land owner's objection to the Commissioner's Report, instead finding there was a public purpose.

The Court of Civil Appeals affirmed, finding (a) the landowners failed to prove the balance of the electricity (78%) would be used by out of state users and not by OG&E customers sometime in the future, and (b) the landowners failed to show SPP would deny OG&E customers access to any or all of the electricity.

10. **DISTRIBUTION OF ASSETS OF A CORPORATION BY WILL**

(The owner of all the stock of a corporation can pass the corporation's assets to a devisee/legatee)

IN THE MATTER OF THE ESTATE OF HODGES, 2011 OK CIV APP 2 (decided 12/28/10; mandate issued 01/28/11)

A holographic will gave into trust for a granddaughter, a ranch owned by a corporation whose stock was totally owned by the deceased, and the will expressly excluded a sister. It was necessary to sell the ranch to pay taxes and debts. A battle ensued between the granddaughter and sister as to the owner of the balance of the ranch sale proceeds ($950,000).

Trial court gave proceeds in trust to granddaughter to carry out intent of will.

Court of Civil Appeals affirmed allowing probate court, in equity, to treat corporate assets as property of deceased.

11. **NOTICE IN CERTIFICATE TAX SALE**

(Absence of proof of actual notice to the owner before a Certificate Sale voids both the Certificate Sale and the later Resale)

BENTON v. TED PARKS, 2011 OK CIV APP 7 (decided 12/02/10; mandate issued 01/24/11)

Sale at a Certificate Tax Sale requires actual notice to the owner. The notice of the Certificate Tax Sale was returned "unclaimed" after being sent to a lender (who was the prior owner) as the record owner. No attempt to send notice to the current owner, who received record title immediately before such sale, was attempted. The adequacy of the notice two years later in advance of the issuance of the Certificate Deed was challenged too.

The trial court sustained the prior owner's Motion for Summary Judgment in a quiet title suit.

The Court of Civil Appeals affirmed.

12. **APPLICATION OF FAIR MARKET VALUE AFTER GENERAL EXECUTION SALE**

(Where the general execution creditor buys the foreclosed real property at its own sale, the debtor receives credit for the fair market value rather than the lower sales price)

LITTLE BEAR RESOURCES, LLC v. NEMAHA SERVICES, INC., 2011 OK CIV APP 18 (decided 02/14/11; mandate issued 02/22/11)

Sheriff's Sale on a general execution produced a sales price of $107,000 (2/3 of the appraised value) bid by the judgment creditor on real property valued at $160,000 by the pre-sale appraisers on a debt of over $175,000 (leaving a deficiency).

The trial court confirmed the sale and only applied the sales price of $107,000 against the debt, leaving a larger deficiency than if the appraised value had been used.

The debtor challenged the trial court's order confirming the sale. "The parties do not dispute that the sheriff's sale was conducted fairly and resulted in a statutorily proper bid. The sole issue on appeal is whether the trial court erred in applying the $107,000 against Little Bear's judgment instead of the full appraised value of $160,000." [¶4]

On appeal, the Court of Civil Appeals reversed the trial court and remanded the case to have the "full appraised value of the property ($160,000)…credited against Little Bear's judgment." [¶13] The appellate court said: "The Oklahoma Supreme Court considered in *Riverside Nat'l Bank v. Manolakis*, 1980 OK 72, 613 P.2d 438, whether the principal debtor's protections from deficiency judgments in 12 O.S. 1971 §686 should also extend to guarantors. *Riverside* held that §686 does not extend to guarantors and notes that the rights and obligations under guaranty agreements are governed by the provisions of 15 O.S. §§321-344. *Riverside* noted Oklahoma's anti-deficiency statute had adopted the same statutory wording as the New York anti-deficiency statute, and suggested Oklahoma courts would adopt a construction of §686 similar to New York courts, except as to guarantors which in Oklahoma, unlike New York, are subject to their own statutory scheme. New York courts have applied the New York anti-deficiency statute, N.Y. Real Prop. Acts. Law §1371 (1962), in cases involving the foreclosure of judgment liens.

“In *Wandschneider v. Bekeny*, 75 Misc.2d 32, 346 N.Y.S.2d 925 (N.Y. Sup. Ct. 1973), the Supreme Court of New York, Westchester County discussed the origin of its anti-deficiency statute and concluded equity required the same rule (that the judgment debtor be allowed a credit against its debt for the sum representing the fair market value of the property sold) be applied to execution sales on judgment liens. Otherwise, the result is described as ‘unjust and oppressive,’ ‘unconscionable’ and an ‘undeserved windfall’ for the creditor. *Id.*, 75 Misc.2d at 34, 38, 346 N.Y.S.2d at 927, 931. While New York case law is certainly not controlling here, the reasoned construction of New York's similar statute is logical and equitable. Oklahoma courts should similarly apply the equitable principles of 12 O.S. 2001 §686 to execution on judgment liens to allow a debtor to receive full credit for the value actually received by the creditor - the fair market value of the property (or the sales price if it is higher). No good reason exists to treat judgment liens differently than if they were specifically included within the provisions of §686.

“Numerous other states have adopted anti-deficiency legislation requiring the application of fair market value to limit deficiency judgments. The Pennsylvania anti-deficiency statute has been applied to judgment debtors since its inception. Nevada has similarly applied the fair market value to actions involving any creditor/debtor relationship in which execution upon real property has occurred. Oklahoma courts sitting in equity should follow the reasoning of such other states to allow the same protection against a windfall for the judgment creditor as recognized in 12 O.S. 2001 §686. In situations where the judgment creditor purchases the judgment debtor's property at a

sheriff's sale, the judgment debtor must be entitled to "set off the fair and reasonable market value of the property less the amounts owing on prior liens and encumbrances."

[AUTHOR'S NOTE: I thought the general practice was to ignore the presale appraisal valuation at a deficiency hearing and to instead have both sides present a new appraisal.]

13. **PROOF AS TO HOLDER OF NOTE**

(A lender cannot foreclose a mortgage absent proof it holds the related note)

BAC HOME LOANS SERVICING V. WHITE, 2011 OK CIV APP 35 (decided 12/03/10; mandate issued 03/16/11)

In a foreclosure of a mortgage, where American Home Mortgage took a note with MERS holding the mortgage, there was an alleged—but not proven—assignment of the note to BAC, who sought a Summary Judgment.

The trial court granted summary judgment to the lender (BAC), ordering a sale.

On appeal to the Court of Civil Appeals, the matter was reversed and remanded for a determination as to who holds the note. The appeals court found there was no evidence offered to prove BAC held the note being foreclosed. The appellate court also noted that the mortgage follows the note, even without an assignment of the mortgage.

14. **AMBIGUOUS DEED**

(A conveyance of all of one's right, title and interest in surface and minerals, but reserving ½ of the oil, gas and minerals, when grantors owned less than ½ was ambiguous)

MACDONALD OIL AND GAS v. SLEDD, TRUSTEE OF NEDBALEK FAMILY TRUST, 2011 CIV APP 36 (decided 12/28/10; mandate issued 03/16/11)

Action to quiet title to minerals turned on whether each of two deeds conveying all of the grantors' right, title and interest, with an exception of ½ of the oil, gas and other minerals, reserved all of the minerals they owned (since they owned less than ½ of the minerals) or only reserved ½ of the portion they actually owned.

The trial court ruled the two deeds were unambiguous and reserved all the minerals.

On appeal, the Court of Civil Appeal held the deeds were ambiguous, and remanded for an evidentiary hearing on the parties' intentions.

15. **SECTION LINE ROADWAY**

(An abutting fee simple owner—by statute—is entitled to use a section line as a roadway (even if not opened by the County Commissioners), and such use cannot be blocked by another adjacent owner)

MAYES v. WILLIAMS, 2011 OK CIV APP 40 (decided 02/16/11; mandate issued 04/22/11)

A landowner needed to use a section line roadway to access the northern part of his land and did so for over 50 years. A new owner of the adjacent land installed a fence denying access to his neighbor. The user of the roadway sued to enjoin such obstacle.

The trial court granted the user's Motion for Summary Judgment enjoining the neighbor for maintaining a gate or otherwise obstructing such use.

On appeal, this decision was affirmed and the appellate court emphasized (1) such right of access was granted by statute (69 O.S. §1201), and (2) it is not necessary to prove such access is essential.

16. **FUTURE ADVANCES CLAUSE**

(Future advances (omnibus, dragnet) clauses in a mortgage survive payment of the initial note, and cover later notes and separate guarantees also)

RCB BANK V. VILLAS DEVELOPMENT, 2011 OK CIV APP 44 (decided 03/18/11; mandate issued 04/22/11)

A dispute arose (over priority) between two lenders holding competing mortgages upon default by the borrower. The holder of the later-recorded mortgage ("Lender 2") sought to defeat the earlier-recorded mortgage holder ("Lender 1") by claiming (1) Lender 1 held a note secured by the mortgage but it had to be released within 50 days of when it was fully paid off by statute (42 O.S. §15), the earlier ??? payoff, and (2) Lender 1's later guaranty and related note could not be secured by the mortgage because the later guaranty was not the type of obligation (i.e., not a note) expected to be secured by the mortgage.

The trial court granted Lender 1's motion for summary judgment giving the lender a valid first mortgage lien on all of its notes and the guaranty.

The losing lender appealed, but lost.

17. **LIS PENDENS AGAINST EXECUTORY PURCHASER**

(A buyer who signs a purchase contract before lis pendens is filed but takes title afterwards has no protectable interest and cannot intervene in the referenced action (a Mortgage foreclosure))

BANK OF COMMERCE v. BREAKERS, 2011 CIV APP 45 (decided 03/18/11; mandate issued 04/22/11)

A prospective buyer of real property, subject to two mortgages, who signed the purchase contract before a lis pendens foreclosure notice was filed. He then closed and took title after both of the lenders begin foreclosure and after one of the lenders filed a lis pendens. He sought to intervene, asserting he held a protectable interest.

Trial court denied the buyer's motion to intervene.

On appeal, the Court of Civil Appeal affirmed, declaring such purchaser had paid nothing, and therefore, had no interest to protect, and waited too long to seek to intervene (12 months).

18. **ATTORNEY FEES TO PREVAILING PARTY**

(Developer was awarded attorney fees (under a statute) for successfully enforcing restrictive covenants)

TWIN CREEK ESTATES v. TIPPS, 2011 CIV APP 53 (decided 03/30/11; mandate issued 05/05/11)

When homeowners applied for a building permit without having developer's approval of plans, which approval was required under the recorded restrictions, the developer sued to require submittal of architectural plans, and, in addition, to force the home owner to use an "approved" builder.

Trial court issued an order requiring the home owner to submit the plans for the house to the developer, but refused to force the use of an approved builder. Separately, the trial court awarded the developer attorney fees as the prevailing party, under 60 O.S. §856.

The attorney fees issue was appealed and the Court of Civil Appeals affirmed, mentioning "the substantial focus of the parties' dispute centered on the design of the Tipp's home…". (¶fn 1)

19. <u>ADVERSE POSSESSION DISTINGUISHED FROM TITLE BY ACQUIESCENCE</u>

(While a quit claim directed to "record owners" conveys away any title acquired by an in choate (unlitigated) adverse possession, it does not resolve the issue of title by acquiescence created by a long standing fence)

<u>MCDONALD v. MARTIN,</u> 2011 OK CIV APP 55 (decided 4/01/11; mandate issued 05/05/11)

An owner put up a replacement fence following the property line based on a deed to a parcel containing two parts, a large part based on record title and a smaller strip by in choate adverse possession. Thereafter, the grantees filed a deed of record directed to "record owners" covering the adverse possession strip for the purpose (stated on the deed) of "deed being filed to move cloud on title created by mortgage filed in book 5731, page 979." After this deed to "record owners" was recorded, the adjacent owner acquired title by deed to lands, apparently including the dispute strip. The new adjacent owner then tore down the fence and trees on the disputed strip. The owners by adverse possession sued to quiet title by adverse possession, slander of title, injunction, damages for trespass, damages to property, and diminution of value. The new adjacent owner sued to quiet title.

Trial court granted the owner's adverse possession claim and damages to trees, and denied slander of title.

Court of Civil Appeals reversed saying the adverse possession claim was given up by the quit claim deed, but that the trial court must consider the (unraised) issue of title by acquiescence, due to the long standing fence (over 40 years).

[NOTE This issue was <u>not</u> raised by any of the parties, or the trial court, and, therefore, seems waived.]

20. **<u>PURCHASE MONEY MORTGAGE PRIORITIES</u>**

(Where a vendor's purchase money mortgage is recorded after a third party's purchase money mortgage, but the third party knew of the vendor's mortgage, the vendor's mortgage has priority in a foreclosure)

<u>AMERICAN BANK OF OK v. WAGONER,</u> 2011 OK CIV APP 76 (decided 11/05/10; mandate issued 06/29/11)

A seller took a note and mortgage and recorded it after the third-party's simultaneous mortgage was recorded. On foreclosure, the two lenders fought over priority.

The trial court granted priority to the third party lender's mortgage because it was recorded first.

On appeal, the Court of Civil Appeals reversed, finding that because the third party lender knew of the simultaneous vendor's mortgage when taking its own mortgage, the third party lender could not rely on the order of recording to establish priority. Absent such recording rule's benefit, the buyer took title already encumbered by the vendor's mortgage, and consequently the third party lender's mortgage was second.

21. **<u>PREPAYMENT PENALTIES ENFORCEABILITY</u>**

(Note and mortgage provisions providing both a "Lockout Fee" and a "Prepayment Consideration" are penalties and, therefore, are unenforceable as impermissible liquidated damages, although there can be damages sought based on a determination of the "present value" of the lost interest)

MASSEY v. BAYVIEW LOAN SERVICING, 2011 OK CIV APP 78 (decided 04/04/11; mandate issued 06/29/11)

A couple took out a note and mortgage on a home, and then in less than 5 years, sold it. In preparation for the closing, they sought a payoff figure from the lender. The payoff figure that the borrower received included large amounts in addition to the unpaid principal, covering all anticipated unpaid interest ($117,613) ["Lockout Fee": if mortgage paid off sooner than 5 years], plus a substantial penalty for early payoff ($11,370, plus $3,428 for document fees, plus $7,390 in default interest, plus $11,114 in accrued interest) ["Prepayment Consideration"]. The borrower paid the full amount expressly "under protest," and, after the closing, sued to recover such excess amounts.

The trial court granted the lender's Motion for Summary Judgment saying the fees were agreed to.

The Court of Civil Appeals reversed holding both amounts were void as being punitive, and duplicative, but remanded to determine the present value of the lost anticipated interest, which would have been paid up until the end of the 5-year Lockout Period. This computed amount would reduce (offset) the amount to be repaid to the borrower.

22. **<u>AWARD OF ATTORNEY FEES FOR REMOVAL FROM SMALL CLAIMS COURT</u>**

(If small claims court matter is mandatorily transferred to the civil docket, no attorney fees are available if plaintiff defeats counterclaims)

<u>EAGLE BLUFF, LLC v. TAYLOR,</u> 2010 OK 47 (decided 06/22/10)

"Real estate developer brought a small claims action against property owners, seeking $900 for a pro rata share of subdivision maintenance expenses. Property owners counterclaimed for breach of contract, fraud in the inducement, fraud, and deceit. These counterclaims related to the parties' real estate purchase contract, and owners sought damages in excess of $10,000.

"Property owners moved to transfer the case to the civil docket citing 12 O.S.2001 § 1757, which gives the trial court discretion to transfer cases.

"The trial court transferred the case to the civil docket, but did so with the observation that the transfer was mandatory under 12 O.S. 2001 § 1759. After transfer, developer recovered on its claim for maintenance expenses and prevailed on the counterclaims. The court awarded an attorney's fee to developer for services related to *both* its claim and the counterclaims. In doing so, the court relied on the fee sanctions provision of 12 O.S.2001 § 1757(C), believing it was applicable to all transferred cases.

"On appeal, property owners contended the trial court erred by including services related to the defense of the counterclaims in the attorney's fee award. The Court of Civil Appeals agreed and reversed.

"This Court previously granted certiorari to provide precedential guidance for the award of an attorney's fee in cases transferred from the small claims docket. We hold (1)

the transfer of the case from the small claims docket was a mandatory transfer pursuant to § 1759(A) and not a discretionary transfer governed by § 1757; (2) the attorney's fee provision of § 1757(C) is not applicable in cases of mandatory transfers pursuant to § 1759; and (3) no independent basis existed for awarding an attorney's fee for services related to developer's defense of the counterclaims that triggered the mandatory transfer of the case." (¶0)

23. **CAN GUARANTOR WAVE STATUTORY RIGHT TO SET-OFF F.M.V. AGAINST DEBT IN A MORTGAGE FORECLOSURE**

(Guarantors can and did herein expressly waive any right to set off the fair market value of the real property being sold)

JPMORGAN CHASE BANK v. SPECIALTY RESTAURANTS, INC., 2010 OK 65 (decided 09/21/10)

Lender foreclosed on a real estate mortgage and sought to enforce two third-party guarantees for the deficiency. The debt was $1.7 million, the "fair and reasonable market value as determined in a hearing" was $1.5 million and the sale price was $750,000 (purchased by the creditor). [¶0]

The trial court confirmed the sale and credited the fair market value of $1.5 million against the debt during determination of a deficiency on the $1.7 million debt. Such credit was given to both the debtor and the two guarantors.

The lender appealed the credit given to the guarantors above the $750,000 sales price.

The Court of Civil Appeals affirmed.

The Supreme Court reversed holding that the express language of the two guarantees waived any right to a set off for anything other than the "actual payment."

24. **<u>QUI TAM INTERVENTION BY TAX PAYER</u>**

(City will adequately represent the tax payers in a Qui Tam action and, therefore, the taxpayers cannot intervene)

<u>CITY OF BROKEN ARROW, OKLAHOMA v. BASS PRO OUTDOOR WORLD,</u> 2011 OK 1 (decided 01/18/11)

Taxpayer filed a Qui Tam action to create a challenge to a city project involving spending city money to promote an economic development project in Broken Arrow for a Bass Pro Shop. City reacted to the Qui Tam demand by filing a declaratory judgment action. Taxpayer sought to intervene and city objected and also filed a Motion for Summary Judgment on the primary matter.

Trial court denied tax payer's Motion to Intervene and granted City's Motion for Summary Judgment.

Taxpayer appealed and Court of Civil Appeals affirmed. Taxpayer again appealed, seeking Certiori.

Oklahoma Supreme Court accepted the case and affirmed the trial Court (and vacated the Court of Civil Appeals) decision, finding the City adequately presented all relevant facts and law to the trial court concerning whether the deal with Bass Pro was proper and legally entered into.

25. **<u>ACCESS TO RESIDENTIAL PROPERTY TO DETERMINE ASSESSED VALUE</u>**

(Where residential property owner challenges county's valuation of real property for ad valorem tax purposes, but does not challenge personal property valuation, no access to the home is allowed, even in a related District Court action)

<u>ATKINSON v. GURICH,</u> 2011 OK 12 (decided 02/22/11)

Residential property owner challenged real property valuation first before the Board of Equalization and then to the District Court. When the County Assessor sought access to the interior of the home through a normal discovery request in the court action, the landowner sought a protective order denying such entry.

Trial court denied the protective order.

Landowner asked the Oklahoma Supreme Court to assume original jurisdiction, and it agreed.

The appellate court first held the assessment statutes only permit access to the home if (a) there is a dispute over the value of <u>personal</u> property and (b) the homeowner requests a re-valuation. It then concluded (1) Oklahoma County has no personal property tax, and (2) the discovery code does not overcome the U.S. and Oklahoma Constitution's protection against unreasonable searches.

26. **<u>ESTABLISHING STATUS AS A PIPELINE COMPANY WITH EMINENT DOMAIN POWERS</u>**

(A foreign (Texas) corporation, which is not authorized to act as a "pipeline company" in its state of origin, cannot, by simply becoming domesticated in

Oklahoma, become entitled to use the right of eminent domain to take easements for a pipeline in Oklahoma)

<u>D-MIL PRODUCTION v. DKMT ,</u> 2011 OK 55 (decided 06/21/11)

A Texas corporation, with unspecified business purposes in its Texas Charter, became domesticated in Oklahoma. Its Articles of Domestication in Oklahoma stated its purpose for doing business in Oklahoma was for "mineral leasing," and, yet in those same Articles, expressly disclaimed any interest in laying pipelines in Oklahoma or elsewhere. This corporation filed an eminent domain proceeding in Oklahoma District Court to take land for an easement for a pipeline. The landowner challenged the status of the company as a pipeline company which would entitle the company to condemn lands.

The trial court granted the company's Motion for Summary Judgment.

On appeal, the Oklahoma Supreme Court reversed and remanded with instructions to grand landowner Summary Judgment. This Court held the evidence showed the company was not a pipeline company in Texas and, therefore, could not be one in Oklahoma.

V. ATTORNEY GENERAL OPINIONS

(NONE)

VI. <u>TITLE EXAMINATION STANDARDS CHANGES</u>

A. **EXAMINING ATTORNEY'S RESPONSIBILITIES**

1. **GENERAL RESPONSIBILITY**

According to the Oklahoma Attorney General, only a licensed attorney can issue an "opinion on the marketability of title" regarding title to real estate. This issue arose during the process of interpreting the Oklahoma Statute requiring the examination of a duly-certified abstract of title before a title insurance policy can be issued. 36 O.S. § 5001 (C) provides:

> *Every policy of title insurance or certificate of title issued by any company authorized to do business in this state shall be countersigned by some person, partnership, corporation or agency actively engaged in the abstract of title business in Oklahoma as defined and provided in Title 1 or by an attorney licensed to practice in the State of Oklahoma duly appointed as agent of a title insurance company, provided <u>that no policy of title insurance shall be issued in the State of Oklahoma except after examination of a duly-certified abstract of title prepared by a bonded and licensed abstractor as defined herein</u>.* (underlining added).

The Attorney General opined (1983 OK AGG 281, ¶6-7) as follows:

> *Your second question raises the issue of whether the title examination for purposes of issuing a title policy must be done by a licensed attorney. A previous opinion of the Attorney General held:*
>
> > *"All such examinations of abstract .. . shall be conducted by a licensed attorney prior to issuance of the policy of title insurance." A.G. Opin. No. 78-151 (June 6, 1978).*
>
> *This opinion was based on the assertion that a title insurance policy "expresses an opinion as to the marketability of title." A.G. Opin. No. 78-151, supra. In reality, title insurance simply insures the policyholder against defects in the title. It does not express an opinion that the title is marketable. Land Title Company of Alabama v. State ex rel. Porter, 299 So.2d 289,295 (Ala.1974). While the rationale of the previous opinion is incorrect, <u>we adhere to the conclusion expressed in that opinion that the examination of the abstract pursuant to 36 O.S. 5001(C) (1981) must be done by a licensed attorney. We reach this conclusion because the examination required by</u>*

> *statute would only be useful if the examiner expressed an opinion on the marketability of the title. This constitutes the practice of law by the examiner. Land Title Company of Alabama v. State ex rel . Porter, supra at 295; Kentucky State Bar Association v. First Federal Savings & Loan, 342 S.W.2d 397 (Ky.App. 1961). The theory that the corporation is actually examining the title for itself through an agent or employee and thus not engaged in the practice of law is invalid since laypersons or nonprofessionals cannot perform legal services for their employers. Kentucky State Bar Association v. Tussey, 476 S.W.2d 177 (Ky.App. 1972). There is no prohibition, however, against licensed staff attorneys furnishing title opinions for the company as long as these opinions are not sold or given to third parties. The Florida Bar v. McPhee, 195 So.2d 552 (Fla. 1967); Steer v. Land Title Guarantee & Trust Co., 113 N.E.2d 763 (Ohio Com.Pl. 1953).* (underlining added)

As noted above, under the discussion of new Statutes, 36 O.S. § 5001 was amended, effective July 2007, to specifically require the examination described in that Section to be conducted by a licensed Oklahoma attorney, thereby prohibiting laymen and non-Oklahoma licensed attorneys from undertaking title exams for title insurance purposes.

2. LIABILITY OF TITLE EXAMINERS TO NON-CLIENTS

While there is no foolproof way to avoid liability to non-clients, it is usually a good practice to have both the inside address of the title opinion (i.e., the addressee) and limiting language, elsewhere in the opinion, expressly designate the sole person or company expected to rely on the opinion.

However, even where the opinion is addressed to a specific person or entity, it is possible that due to the particular circumstances surrounding the transaction, the attorney who is representing one party, such as the lender -- and rendering an opinion directed solely to that lender -- might be held to be liable to the opposing party, such as the borrower, as well.

As noted in an Oklahoma case considered by the 10th Circuit U.S. Court of Appeals, Vanguard Production, Inc. v. Martin, 894 F.2d 375 (10th Cir. 1990):

The Oklahoma Supreme Court replied that the pledgee's complaints stated a cause of action under Oklahoma law. Privity of contract does not apply to tort actions under Oklahoma law. See Keel v. Titan Constr. Corp., 639 P.2d 1228, 1232 (Okla. 1981). The Bradford court stated that to determine an attorney's negligence the jury must determine whether the attorney's conduct was "the conduct of an ordinarily prudent man based upon the dangers he should reasonably foresee TO THE PLAINTIFF OR ONE IN HIS POSITION in view of all the circumstances of the case such as to bring the plaintiff within the orbit of defendant's liability." Id. at 191 (emphasis in original).

***

In our view a contract for legal services is a contract for services giving rise to the duty of workmanlike performance. The record in this case reveals extensive communications between the attorneys [for the lender], Martin and Morgan, and the purchaser, Vanguard [the borrower], concerning the [lender's] title opinion. The record also shows that all parties, including Martin, Morgan, [the borrower] Vanguard, and [the lender] Glenfed, were concerned about the Texas Rose Petroleum suit. Thus, we find that an ordinarily prudent attorney in the position of the defendants would reasonably have apprehended that[the borrower] Vanguard was among the class of nonclients which, as a natural and probable consequence of the attorneys' actions in preparing the title opinion for Glenfed, could be injured. Thus, we hold that the defendants owed a duty of ordinary care, Bradford, 653 P.2d at 190, and workmanlike performance, Keel, 639 P.2d at 1231, to Vanguard in the performance of their contract for legal services with Glenfed. We stress that our holding only addresses the question of the duty of the defendants owed to Vanguard and not the question of whether Martin's, Morgan's and Ames, Ashabranner's acts were the proximate cause of Vanguard's injuries. See Bradford, 653 P.2d at 190-91; Keel, 639 P.2d at 1232. (underlining added)

An interesting Oklahoma Court of Appeals case was decided in 1991, American Title Ins. v. M-H Enterprises, 815 P.2d 1219 (Okl. App. 1991). Therein it was held that a buyer of real property can sue (i.e., via counter claim) the title insurer for negligence in the preparation of a title policy, even if the title insurance policy was issued only in favor of the buyer's lender. This rule was applied where: (1) no abstract was prepared, (2) an attorney's title examination was not undertaken, and (3) the insurer/abstractor missed a recorded first mortgage. The facts of the case showed that, after the buyer/borrower lost

the house through a foreclosure of the missed first mortgage, the insurer paid the insured second mortgage holder to settle under the terms of the title insurance policy and had such lender assign the worthless second note and mortgage to the insurer. The insurer then sued the buyer/borrower under the warranty of title in the second mortgage. The appellate court held that while the buyer/borrower was not a named insured, the insurer's own negligence (i.e., no abstract and no examination) caused the loss, and that the insurer did not buy the note and mortgage as a holder in due course, because (1) no value was paid for the acquisition of the note and mortgage (i.e., the payment was to settle its obligations under the policy) and (2) the note and mortgage were already in default when the insurer took an assignment of them.

The message in these two cases appears to be that a party that conducts either the examination or insures the title, can be held liable for an error in such effort to a third party. This is true even where the title examiner and title insurer had not expressly entered into any contractual relationship with such third party. Based upon these two cases, it appears that this liability might arise even where the attorney or insurer specifically directed his opinion or policy to only one of the multiple participants in the transaction.

3. STATUTE OF LIMITATIONS ON TITLE OPINIONS

In terms of the nature of (i.e., tort vs. contract), and the statute of limitations on, attorneys' errors in examination of title, it should be noted that in 1985 the Oklahoma Supreme Court held:

> *In Oklahoma, an action for malpractice, whether medical or legal, though based on a contract of employment, is an action in tort and is governed by the two-year statute of limitations at 12 O.S.A. 1981, § 95 Third. (Seanor*

v. Browne, 154 Okl. 222, 7 P.2d 627 (1932)). This limitation period begins to run from the date the negligent act occurred or from the date the plaintiff should have known of the act complained of. (McCarroll v. Doctors General Hospital, 664 P.2d 382 (Okl. 1983)). The period may be tolled, however, by concealment by the attorney of the negligent acts which injured the client. This Court has previously held, in Kansas City Life Insurance Co. v. Nipper, 174 Okl. 634, 51 P.2d 741 (1935) that:

> *One relying on fraudulent concealment to toll the statute of limitation must not only show that he did not know facts constituting a cause of action, but that he exercised reasonable diligence to ascertain such facts.*

(underlining added)

(Funnell v. Jones, 737 P.2d 105 (Okla. 1985))

However, in 1993 the Oklahoma Supreme Court "clarified" their holding in Funnell by declaring:

> *Appellees argue the instant case should be controlled by Funnell v. Jones, 737 P.2d 105 (Okla. 1985), cert. denied, 484 U.S. 853, 108 S.Ct. 158, 98 L.Ed.2d 113 (1987), a case where we applied the two year tort limitation period to a legal malpractice case. Appellees' reliance on Funnell is misplaced. The opinion in Funnell gives no indication a separate contract theory was alleged there or that the plaintiffs there attempted to rely on the three year limitation period for oral contracts. Thus, our statement in Funnell to the effect an action for malpractice, whether legal or medical, though based on a contract of employment, is an action in tort, must be taken in the context it was made, to wit: determining whether the two year limitation for torts was tolled based on allegations of fraudulent concealment on the part of defendant attorneys and that no acts alleged against defendants occurred within the two years immediately preceding filing of the lawsuit. Id. at 107-108. We did not decide in Funnell a proceeding against a lawyer or law firm is limited only to a proceeding based in tort no matter what the allegations of a petition brought against the lawyer or law firm. We have never so held and, in fact, to so rule would be tantamount to treating lawyers differently than we have treated other professions, something we refuse to do.*
>
> *We have held a party may bring a claim based in both tort and contract against a professional and that such action may arise from the same set of facts. Flint Ridge Development Company, Inc. v. Benham-Blair and Affiliates, Inc., 775 P.2d 797, 799-801 (Okla. 1989) (architectural,*

> *engineering and construction supervision services). In essence, the holding of Flint Ridge is if the alleged contract of employment merely incorporates by reference or by implication a general standard of skill or care which a defendant would be bound independent of the contract a tort case is presented governed by the tort limitation period. Id. at 799-801. However, where the parties have spelled out the performance promised by defendant and defendant commits to the performance without reference to and irrespective of any general standard, a contract theory would be viable, regardless of any negligence on the part of a professional defendant. Id. As pertinent here, the specific promise alleged or reasonably inferred from the petition and documents attached thereto was to search the records of the County Clerk for an approximate nine (9) year period and report those records on file affecting the title for loan purposes. Simply, if this was the promised obligation a contractual theory of liability is appropriate which is governed by the three year limitation period applicable to oral contracts.* (underlining added)

(Great Plains Federal Savings & Loan v. Dabney, 846 P.2d 1088, 1092 (Okla. 1993))

[See: Article #227 at www.Eppersonlaw.com: "The Elusive Legal Malpractice Statute of Limitations for Attorney Title Opinions."]

B. NEED FOR STANDARDS

1. BACKGROUND AND AUTHORITY OF STANDARDS

The first set of Statewide Standards was adopted in 1938 by the Connecticut Bar Association. On November 16, 1946 the General Assembly and House of Delegates of the Oklahoma Bar Association ("OBA") approved 21 Title Examination Standards ("Standards") for the first time in state history. 17 O.B.J. 1751. Of these 21, there were 10 without any specific citation of authority expressly listed. There are currently over 100 Standards in Oklahoma, and about 13 of these have no specific citation of authority (i.e., no citation of supporting Oklahoma statutes or case law).

In Oklahoma, new and revised Standards are developed and considered each year at 9 monthly Title Examination Standards Committee ("Standards Committee") meetings held from January to September. These proposals are then presented annually by the Standards Committee to the OBA Real Property Law Section ("Section") at the Section's annual meeting, usually held in November of each year. Immediately thereafter, the Section forwards to the OBA House of Delegates ("House"), for the House's consideration and approval, on the day following the Section meeting, any new or revised Standards which were approved at the Section's meeting.

All Oklahoma Supreme Court opinions are binding and must be followed by all trial court judges, meaning that such decisions are “precedential”. However, an opinion of one of the multiple intermediate 3-judge panels of Courts of Civil Appeals is only “persuasive” on future trial judge’s decisions, and not binding.

Oklahoma’s set of Standards have received acceptance from the Oklahoma Supreme Court which has held:

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

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

The Standards become binding between the parties:

(1) IF the parties' contract incorporates the Standards as the measure of the required quality of title, for example:

(a) Standard 2.2 REFERENCE TO TITLE STANDARDS provides: *"It is often practicable and highly desirable that, in substance, the following language be included in contracts for a sale of real estate: 'It is mutually understood and agreed that no matter shall be construed as an encumbrance or defect in title so long as the same is not so construed under the real estate title examination standards of the Oklahoma Bar Association where applicable;'"* (emphasis added) and

(b) the Oklahoma City Metropolitan Board of Realtors standard contract provides: *"7. TITLE EVIDENCE: Seller shall furnish Buyer title evidence covering the Property, which shows marketable title vested in Seller according to the title standards adopted by the Oklahoma Bar Association. . .",* (emphasis added) or

(2) IF proceeds from the sale of oil or gas production are being held up due to an allegedly unmarketable title [52 O.S. 570.10.D.2a; also see: Hull, et al. v. Sun Refining, 789 P.2d 1272 (Okla. 1990) ("Marketable title is determined under §540

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

In these above instances, the parties might be subject to suits to specifically enforce or to rescind their contracts, to seek damages, or to pay increased interest on the withheld proceeds (i.e., 6% vs. 12%), with the Court's decision being based on the "marketability" of title as measured, where applicable, by the Standards.

However, it should be noted that *"It is, therefore, the opinion of the Attorney General that where there is a conflict between a title examination standard promulgated by the Oklahoma Bar Association and the Oklahoma Statutes, the statutory provisions set out by the Legislature shall prevail."* Okl. A.G. Opin. No. 79-230.

2. IMPETUS FOR STANDARDS: PROBLEMS WITH SEEKING PERFECT TITLE

The title examiner is required, as the first step in the examination process, to determine what quality of title is being required by his client/buyer or client/lender before undertaking the examination.

According to Am Jur 2d:

> *An agreement to sell and convey land is in legal effect an agreement to sell a title to the land, and in the absence of any provision in the contract indicating the character of the title provided for, the law implies an undertaking of the part of the vendor to make and convey a good or marketable title to the purchaser. A contract to sell and convey real estate ordinarily requires a conveyance of the fee simple free and clear of all liens and encumbrances. There is authority that the right to the vendee under an executory contract to a good title is a right given by law rather than one growing out of the agreement of the parties, and that he may insist on having a good title, not because it is stipulated for by the agreement, but on his general right to require it. In this respect, the terms "good title," "marketable title," and "perfect title" are regarded as synonymous and indicative of the same character of title. To constitute such a title, its validity must be clear. There can be no reasonable doubt*

as to any fact or point of law upon which its validity depends. As is sometimes said, a marketable title must be one which can be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence. (underlining added)
(77 Am Jur 2d §115 Title of Vendor: Generally; Obligation to furnish good or marketable title)

While, in the absence of any provisions in a contract for the sale of land indicating the character of the title to be conveyed, the law implies an obligation or undertaking on the part of the vendor to convey or tender a good and marketable title, if the contract expressly stipulates as to the character of the title to be furnished by the vendor, the courts give effect thereto and require that the title offered conform to that stipulation, it is immaterial that it may in fact be a good or marketable title. A contract to convey a specific title is not fulfilled by conveying another and different title. On the other hand, when the title which the vendor offers or tenders conforms to the character of title stipulated in the contract of sale, the vendee is bound to accept it although the title may not be good or marketable within the meaning of the obligation or undertaking to furnish such a title which the law would have implied in the absence of any stipulation. Refusal to accept title tendered in accordance with the terms of sale constitutes a breach by the purchaser of land of his contract to purchase. If a contract for the purchase of real estate calls for nothing more than marketable title, the courts cannot substitute a different contract therefor. (underlining added)
(77 Am Jur 2d §123 Special Provisions as to character of title: Generally.)

The terminology which is used to define the quality of title to real property has apparently changed over time. Patton notes:

In the early law courts, titles as between vendor and purchaser were either good or bad; there was no middle ground. No matter how subject to doubt a purchaser might prove the title to be, he was under obligation to take it, unless he could prove that it was absolutely bad. But the courts of equity coined the expression "marketable title," to designate a title not necessarily perfect, or even good, in the law sense, but so free from all fair and reasonable doubts that they would compel a purchaser to accept it in a suit for specific performance. Conversely, an unmarketable title might be either one that was bad, or one with such a material defect as would cause a reasonable doubt in the mind of a reasonable, prudent, and intelligent person, and cause him to refuse to take the property at its full or fair value. Therefore the term "unmarketable title" includes both "bad titles" and "doubtful titles." Though originally there might have been a difference between a "good title" and a "marketable title," now the terms

are used interchangeably. Other equivalent terms appear in the notes. A perfect record title may not be marketable, because of apparent defects, which cause reasonable doubts concerning its validity, and a good or marketable title may be far from perfect, because of hidden defects. In fact, under either the English system of unrecorded conveyances, or under the system afforded by our recording acts, "it is impossible in the nature of things that there should be a mathematical certainty of a good title." While examiners should be cautious in advising clients as to the acceptance of a title, neither should they frighten them by advertising these relatively infrequent dangers; and they must remember that a purchaser cannot legally demand a title which is absolutely free from all suspicion or possible defect. He may require only such a title as prudent men, well advised as to the facts and their legal bearings, would be willing to accept. Many courts further hold that a doubt sufficient to impair the character of marketableness must be such as will affect the selling value of the property or interfere with the making of a sale.

If unmarketable, the doubt which makes it so may be based upon an uncertainty either as to a fact or as to the law. If objection is made because of doubt upon a question of law, this does not make the title unmarketable unless the question is fairly debatable -- one upon which the judicial mind would hesitate before deciding it. Likewise as to a question of fact, there must be a real uncertainty or a difficulty of ascertainment if the matter is to affect marketability. A fact which is readily ascertainable and which may be readily and easily shown at any time does not make title unmarketable. For instance, where a railway company reserved a right of way for its road as **now** located and constructed or hereafter to be constructed, the easement depended on the fact of the **then** location of the line; and as the evidence showed that no line had then been located, and as the matter could be easily and readily proved at any time, the clause did not make plaintiff's title unmarketable. But where there are known facts which cast doubt upon a title so that the person holding it may be exposed to good-faith litigation, it is not marketable.

Recorded muniments form so generally the proofs of title in this country, that the courts of several jurisdictions hold not only that a good or marketable title must have the attributes of that term as used by the equity courts, but also that it must be fairly deducible of record. This phase of the matter will be considered further in the ensuing section.

Determination of questions as to the marketability of titles is peculiarly within the province of counsel for buyer or mortgagee. Counsel for the owner will not only endeavor to remedy the condition of the title as to any requirements which he concedes to be proper, but usually finds it easier to do so than to contest the matter, even as to matters not so conceded. In

the main it is only when compliance is impossible or when time for compliance is lacking or has passed that the question reaches the courts. Even then a decision is not always possible. This is because courts usually will not undertake to determine doubtful questions involving the rights of others who are not parties to the action. (underlining)
(§46. Classification of Vendor Titles)

Title insurance, like most types of insurance, insures against loss due to certain conditions. One of these conditions which triggers liability is "unmarketability of title". Such term is defined in such policy as: "an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which could entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title." (ALTA Owner's Policy (10-21-87)) Such definition is sufficiently circular to require the interpretation of the applicable State's law in each instance to determine whether specific performance would be enforced in such jurisdiction.

In summary, it appears that "marketable title" means (1) the public record affirmatively shows a solid chain of title (i.e., continuous and uninterrupted) and (2) the public record does not show any claims in the form of outstanding unreleased liens or encumbrances. This "good record title" can be conveyed and backed up by the delivery of a deed to the vendee containing sufficient warranties to ensure that the vendor must make the title "good in fact", if non-record defects or non-record liens and encumbrances surface later.

However, to the extent that a contract provision -- providing that the vendor must convey "marketable title" -- is interpreted to require title to be free from "all reasonable doubt", it opens the door to differences of opinion between persons of "reasonable

prudence". As noted in Bayse:

> *Time cures certain errors in conveyancing by means of statutes of limitations. The healing effect of curative legislation removes other defects of conveyancing. But operation of these kinds of legislation neither defines nor declares what constitutes a marketable title. The usual definition of a marketable title is one which is free from all reasonable doubt. This negative approach is not now satisfactory, for it is a rare title concerning which an examiner cannot entertain some doubt with respect to some transaction in its history.* (underlining added)
> (Paul E. Bayse, Clearing Land Titles (herein "Bayse"): §8. Legislation)

It is this focus on looking for a defect -- any defect -- whether substantive or merely a technical one, that can cause the system to bog down. If there is more than a single title examiner within a community, there is also the possibility of there being a wide range of examination attitudes resulting in differing conclusions as to the adequacy of the title.

In "Increasing Land Marketability Through Uniform Title Standards", 39 Va.L.Rev. 1 (1953), John C. Payne, (herein "Increasing Marketability") the problems caused by each examiner exercising unbridled discretion are noted:

> *When the examiner, upon the basis of these decisions, has found that the present vendor can convey a title which is good in fact, he must then ask whether the title has the additional characteristic of marketability. What constitutes a marketable title? Here again legal definitions are subordinate to functional meaning. What the purchaser of land wants is a title which not only can be defended but which can be presented to another examiner with the certainty that it will be unobjectionable. It is small comfort to the owner that he has not been disseized if he is unable to sell or mortgage. If one and the same examiner passed all titles in a given locality, the title which the examiner considered good as a practical matter would, of course, also be merchantable. But such is not the case, and the present examiner must anticipate that his client will in the future attempt to either sell or mortgage and that the same title will come under the scrutiny of some other examiner. In each of the decisions which an examiner has made in determining the validity of a title he has had to exercise sound legal and practical judgment. Will a second examiner, vested with the same wide discretion, reach the same conclusion? If his*

conclusion is different and he rejects the title, the professional reputation of the first examiner will be impaired and his client may suffer substantial financial loss. Faced with this uncertainty, many examiners have adopted a solution which emphasizes individual security rather than the general facility of land transfers. This is the practice known as "construing against title," or more picturesquely, as "flyspecking." These terms indicate that the examiner indulges in a minimum of presumptions of law and fact, demands full search of title in every instance, and places no reliance upon the statute of limitations. As a consequence he considers all errors of record as substantial. The result of even a ***single examiner*** *in a community adopting this practice is to set up titles which are practically good in fact. Examiner* ***A*** *rejects a title on technical grounds. Thereafter, Examiner* ***B****, to whom the same problem is presented, feels compelled to reject any title presented to him which exhibits a similar defect. Examiner* ***A*** *is thereupon confirmed in the wisdom of his initial decision, and resolves to be even more strict in the future. It is sometimes said that the practice of construing against title reduces an entire bar to the standards of its most timorous member. This is an understatement, for the net effect is an extremity obtained only by mutual goading.*

The consequences of construing against title are iniquitous, and the practice itself is ridiculous in that it is predicated upon a theoretical perfection unobtainable under our present system of record land titles. Many titles which are practically unassailable become unmarketable or the owners are put to expense and delay in rectifying formal defects. Examiners are subjected to much extra labor without commensurate compensation, and the transfer of land is retarded. As long as we tolerate periodic re-examination of the same series of non-conclusive records by different examiners, each vested with very wide discretion, there is no remedy for these difficulties. However, some of the most oppressive results may be avoided by the simple device of agreements made by examiners in advance as to the general standards which they will apply to all titles which they examine. Such agreements may extend to: (1) the duration of search; (2) the effect of lapse of time upon defects of record; (3) the presumptions of fact which will ordinarily be indulged in by the examiner; (4) the law applicable to particular situations; and (5) relations between examiners and between examiners and the public. Where agreements are made by title examiners within a particular local area having a single set of land records, such agreements may extend even further and may embrace the total effect of particular specific records. For example, it may be agreed that certain base titles are good and will not thereafter be examined or that specific legal proceedings, normally notorious foreclosures and receivership actions, will be conclusively deemed effective. Although such agreements may not be legally binding upon the courts, they may go far toward dispelling the fear that if one

> *examiner waives an apparent defect of title it may be deemed a cloud upon the title by a subsequent examiner. The result is an increase in the marketability of land and a reduction of the labor imposed upon the proponent of the title. The obvious utility of such an arrangement has led to the adoption of uniform standards for the examination of titles by an increasing number of bar associations.* (underlying added)

The problems resulting from this quest for perfect title can impact the examiner and his clients in several ways:

1. The legal fees charged to the public are higher because each examination for a parcel must always go back all the way to sovereignty (or, in some states, back to the root of title);
2. The costs to cure minor defects are often relatively large compared to the risk being extinguished;
3. The unexpected costs to remedy problems already existing when the vendor came into title, which were waived by the vendor's attorney, are certainly not welcomed by the public; and
4. The prior examiner looks inept and/or the subsequent examiner looks unreasonable, when a preexisting defect is waived by one attorney and "caught" by the next.

(John C. Payne, "The Why, What and How of Uniform Title Standards", 7 Ala.L.Rev. 25 (1954) (herein "The Why of Standards")).

In addition, friction and lowering of professional cooperation increase between the title examining members of the bar as they take shots at each other's work. This process of adopting an increasingly conservative and cautious approach to examination of titles creates a downward spiral. As noted in Bayse:

> *Examiners themselves are human and will react in different ways to the same factual situation. Some are more conservative than others. Even though one examiner feels that a given irregularity will not affect the marketability of a title as a practical matter, he is hesitant to express his opinion of marketability when he knows that another examiner in the same community may have occasion to pass upon the title at a later time and would undoubtedly be more conservative and hold it to be unmarketable. Under these circumstances he is inclined to be more conservative himself and declare the title to be unmarketable. People do not like to be required to incur expense and effort to correct defects which do not in a practical*

sense jeopardize a title when they have already been advised that their title is marketable. The public becomes impatient with a system that permits such conservative attitudes.

If the same examiner passed judgment upon all title transactions, this situation would remain dormant. Unfortunately such is not the case. Or if all examiners would hold the same opinion as to specific irregularities in titles, this complication would not arise. But this also is not the case. The result in many communities has been greatly depressive, sometimes tragic.
(underlining added)
(Bayse: §7. Real Estate Standards)

The State of Oklahoma used to have one of the most strict standards for "marketable title" which was caused by the interpretation of the language of several early Oklahoma Supreme Court cases. The current title standard in Oklahoma has been changed, as of November 10, 1995, to be less strict. It now provides:

1.1 MARKETABLE TITLE DEFINED

"A marketable title is one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title fairly deducible of record."

In response to this obvious need to avoid procedures that alienated the public and caused distance to grow between examiners, a movement began and mushroomed in a couple of decades throughout the country to adopt uniform title examination standards. Such standards were adopted first in local communities by the practicing bar and then on a statewide basis. Although there is some competition among local bars for the place of honor, it appears that the local bar of Livingston County, Illinois adopted a set of 14 standards on April 7, 1923. Thereafter, in 1933 or 1934, the Gage County Nebraska Bar Association formulated 32 title standards. The Connecticut Bar, in 1938, became the first state to have statewide standards by adopting a set of 50. ("Increasing Marketability")

Over the years, since 1938, a total of 31 States have adopted statewide sets of

Standards. Of these, there are currently 19 States which have sets of Standards which have been updated in the last 5 years. In the recent past, 4 States have adopted their first sets of Standards including: Vermont (1995), Arkansas (1995), Texas (1997) and Louisiana (2001). See the attached National Title Examination Standards Resource Center Report, and see my web site at www.eppersonlaw.com for more details on the status of Standards in other States.

C. NEWEST CHANGES TO TITLE STANDARDS

The revised Standards and new Standards, discussed below, were considered and approved by the Standards Committee during the January-September 2010 period. The proposed changes and additions were then published in the Oklahoma Bar Journal in October, and were then considered and approved by the Section at its annual meeting in November. They were thereafter considered and approved by the OBA House of Delegates in November. These changes and additions became effective immediately upon adoption by the House of Delegates. A notice of the House's approval of the proposed new and revised Standards was thereafter published in the Oklahoma Bar Journal. The new "TES Handbook", containing the updated versions of these Standards, is printed and mailed to all Section members by sometime in January.

The following sections display and discuss the Proposals which were submitted to the Section and the House of Delegates for their approval. The text for the discussion is taken from the Annual Report published in the Oklahoma Bar Journal in October. This text was prepared by the Title Examination Standards Handbook Editor for the OBA Real Property Law Section, Jack Wimbish, a Committee member from Tulsa. Note that where an existing standard is being revised, a “legislative” format is used below, meaning

additions are underlined, and deletions are shown by [brackets].

A brief explanatory note precedes each Proposed Standard, indicating the nature and reason for the change proposed.

ATTACHED IS A SET OF REVISED TITLE EXAMINATION STANDARDS:

1. **THE 2010 REPORT WAS SUBMITTED TO THE NOVEMBER 18, 2010 ANNUAL SECTION MEETING AND THE NOVEMBER 19, 2010 HOUSE OF DELEGATES MEETING, FOR THEIR CONSIDERATION. THEY WERE APPROVED, AND WERE EFFECTIVE IMMEDIATELY.**

2. **THE FOLLOWING 2011 T.E.S. REPORT WILL BE SUBMITTED TO THE NOVEMBER 3, 2011 ANNUAL REAL PROPERTY LAW SECTION MEETING AND THE NOVEMBER 4, 2011 HOUSE OF DELEGATES MEETING, FOR THEIR CONSIDERATION.**

   (NOTE: Only the latest TES Agenda listing the status of each Standard under consideration is attached.)

1. 2010 REPORT OF THE TITLE EXAMINATION STANDARDS COMMITTEE OF THE REAL PROPERTY LAW SECTION

The following Amendments to Title Standards for 2010, were presented and approved by the House of Delegates at the Oklahoma Bar Association Annual Meeting, Nov. 19, 2010. Additions are underlined, deletions are indicated by ~~strikeout~~.

The Title Examination Standards Sub-Committee of the Real Property Law Section proposed the following revisions and additions to the Title Standards for action by the Real Property Law Section at its annual meeting in Tulsa on Thursday, Nov. 18, 2010.

The proposals were approved by the Section and were presented to and approved by the House of Delegates at the OBA Annual Meeting on Friday, Nov. 19, 2010. Proposals adopted by the House of Delegates became effective immediately.

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

Proposal 1.

The committee recommends a change to the first comment of Title Standard 7.2 to more accurately reflect that the legal authority on which the standard is based.

Standard 7.2 MARITAL INTERESTS AND MARKETABLE TITLE

Except as otherwise provided in Standard 7.1, no deed, mortgage or other conveyance by an individual grantor shall be approved as sufficient to vest marketable title in the grantee unless:

A. The body of the instrument contains the grantor’s recitation to the effect that the individual grantor is unmarried; or

B. The individual grantor’s spouse, identified as such in the body of the instrument, subscribes the instrument as a grantor; or

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

Comments:

1. There is no question that an instrument relating to the homestead is void unless husband and wife subscribe it. *Grenard v. McMahan*, 1968 OK 75, 441 P.2d 950 (Okla. 1968), *Atkinson v. Barr*, 1967 OK 103, 428 P.2d 316, but also see *Hill v. Discover Bank*, 2008 OK CIV APP 111, 213 P.3d 835. It is also settled that

husband and wife must execute the same instrument, as separately executed instruments will be void. *Thomas v. James*, 1921 OK 414, 84 Okla. 91, 202 P. 499 (1921). It is essential to make the distinction between a *valid conveyance* and a conveyance vesting *marketable title* when consulting this standard.

2. While 16 O.S. §13 states that "The husband or wife may convey, mortgage or make any contract relating to any real estate, other than the homestead, belonging to him or her, as the case may be, without being joined by the other in such conveyance, mortgage or contract," joinder by husband and wife must be required in all cases due to the impossibility of ascertaining from the record whether the property was or was not homestead or whether the transaction is one of those specifically permitted by statute. *See* 16 O.S. §§4 and 6 and Okla. Const. Art. X II, §2. A well-settled point is that one may not rely upon recitations, either in the instrument or in a separate affidavit, to the effect that property was not the homestead. Such a recitation by the grantor may be strong evidence when the issue is litigated, but it cannot be relied upon for the purpose of establishing marketability. *Hensley v. Fletcher*, 172 Okla. 19, 44 P.2d 63 (1935).

3. If an individual grantor is unmarried and the grantor's marital status is inadvertently omitted from an instrument, or if two grantors are married to each other and the grantor's marital status is inadvertently omitted from an instrument, a title examiner may rely on an affidavit executed and recorded pursuant to 16 O.S. §82 which recites that the individual grantor was unmarried or that the two grantors were married to each other at the date of such conveyance.

4. A non-owner spouse may join in a conveyance as part of a special phrase placed after the habendum clause, yet be omitted from the grantor line of a deed, and still be considered a grantor to satisfy paragraph B. of this title standard. *Melton v. Sneed*, 188 Okla. 388, 109 P.2d 509 (1940).

Proposal 2.

The committee recommends amendment to Standard 8.1 and 15.4 to reflect the effect of the repeal in the Oklahoma Estate Tax.

STANDARD 8.1 TERMINATION OF JOINT TENANCY ESTATES AND LIFE ESTATES

A. The termination of the interest of a deceased joint tenant or life tenant may be established on a conclusive basis by one of the following methods:

1. By proceeding in the district court as provided in 58 O.S. §911,

2. By a valid judicial finding of the death of the joint tenant in any action brought in a court of record, or

3. By filing documents that satisfy 58 O.S. §912C.

B. The termination of the interest of a deceased joint tenant or life tenant may be established on a prima facie basis by one of the following methods:

1. By recording certified copies of letters testamentary or letters of administration for the estate of the deceased joint tenant or life tenant or

2. by recording an affidavit from a person other than those listed in 58 O.S. §912C which:

> a. has a certified copy of the decedent's death certificate attached;
>
> b. reflects that the affiant has personal knowledge of the matters set forth therein;
>
> c. includes a legal description of the property;
>
> d. states that the person named in the death certificate is one and the same person as the deceased joint tenant or life tenant named in a previously recorded instrument which created or purported to create the joint tenancy or life tenancy in such property, and identifying such instrument by book and page where recorded.

C. A waiver or release of the Oklahoma estate tax lien for the joint tenant or life tenant must be obtained unless:

1. A district court has ruled pursuant to 58 O.S. §282.1 that there is no estate tax liability,

2. The joint tenant or life tenant has been dead more than 10 years, or

3. The sole surviving joint tenant or remainder interest holder is the surviving spouse of the deceased joint tenant or sole life tenant~~.~~, or

4. The date of death of the joint tenant or life tenant is on or after Jan. 1, 2010.

Authority: 16 O.S. §§53 A (10); 82-84; 58 O.S. §§23, 133, 282.1, 911 and 912; 60 O.S. §§36.1 and 74, and 68 O.S. §§811 and 815.

> Comment: Title 58 O.S. §912 is a procedural statute, and may be applied retroactively because it does not affect substantive rights; See Opin. Atty. G en. 74-271 (Feb. 10, 1975), *Texas County Irr. & Water v. Okla. Water*, 803 P.2d 1119 (Okla. 1990), and *Shelby-Downard Asphalt Co., v. Enyart*, 67 Okla. 237, 170 P.

708 (1918). The death of a joint tenant or a life tenant may be conclusively established under §912 regardless of the date of death and regardless of the date of filing of the affidavit.

A retained life estate [e.g., Mom conveys Blackacre to Son, reserving a life estate to herself] is included in the life tenant's taxable estate at death, 68 O.S. §807 (A) (3). However, a non-retained pure life estate, unaccompanied by a general power of appointment, is not subject to Oklahoma estate tax, and an estate tax lien release is not required in such instance. For example, if Mom conveys Blackacre for life to Son, remainder over to Granddaughter, Son has a pure life estate which is not included in his gross estate at his death and is not taxable nor subject to the estate tax lien. An estate tax lien release is not required in such a case. But if Mom were to have given Son not only the life estate but also a general power of appointment [as specially defined at 68 O.S. §807 (A) (9)] over the remainder, such a life estate with a power *would be included* in Son's taxable estate, and a lien release would be required.

The marketability of title may also be impaired by the lien of Federal estate tax. See Title Standard No. 25.2.

STANDARD 15.4 ESTATE TA X 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, pursuant to the terms of the trust, pass to the benefit of the surviving spouse of the deceased settlor, upon the death of the settlor; 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. the date of death of the non-joining settlor(s) is on or after Jan. 1, 2010.

Proposal 3.

The committee recommends a change in Title Standards 12.3 and 12.5 to reflect that the standards apply to all legal entities.

12.3 CONCLUSIVE PRESUMPTIONS CONCERNING ~~CORPORATE~~ INSTRUMENTS RECORDED FOR MORE THAN FIVE YEARS

The following defects my be disregarded after an instrument from a ~~corporation~~ legal entity has been recorded for five years:

A. the instrument has not been signed by ~~a proper officer of the corporation~~ the proper representative of the legal entity,

B. The representative is not authorized to execute the instrument on behalf of the legal entity,

~~B.~~C. the instrument is not acknowledged, and

~~C.~~D. any defect in the execution, acknowledgment, recording or certificate of recording the same.

Authority: 16 O.S. §§1 & 27a.

12.5 ~~CORPORATE~~ POWERS OF ATTORNEY BY LEGAL ENTITIES

A. If a recorded instrument has been executed by an attorney in fact on behalf of a ~~corporation,~~ legal entity, the examiner should accept the instrument if:

1. the power of attorney authorizing the attorney in fact to act on behalf of the ~~corporation~~ legal entity is executed in the same manner as a ~~corporate~~ conveyance by a legal entity,

2. the power of attorney is recorded in the office of the county clerk,

3. the power of attorney shows that the attorney in fact had the authority to execute the recorded instrument, and

4. the power of attorney was executed before the recorded instrument was executed.

B. Notwithstanding paragraph A above, if a recorded instrument has been executed by an attorney in fact on behalf of a ~~corporation~~, legal entity, the examiner should accept the instrument if the instrument has been of record for at least five (5) years even though a power of attorney has not been recorded in the office of the county clerk of the county in which the property is located.

Authority: 16 O.S. §§1, 3, 20, 27a, 53, 93.

Proposal 4.

The committee recommends amendments to the comments to Title Standard 17.4 to reflect unanswered issues created by the statute and the repeal of the Oklahoma Estate Tax.

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 a disclaimer under the provisions of the act may be executed within a period of time ending nine (9) months after the death of the owner/grantor.

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 Jan. 1, 2010.

Comment: The examiner should be aware that the grantor's interest may be 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 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 deed ("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. 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: 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 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 tenants-in-common or fails to vest in such grantees due to the fact the estate of joint tenancy was not created in such surviving grantees at the time of death of the grantor.

Comment: Commencing Nov. 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 Nov. 1, 2010.

Proposal 5.

The committee recommends the comments of Title Standards 30.3, 30.4, 30.5, 30.6, 30.7, 30.8, 30.9 and 30.10 be amended to make the current effect of the Marketable Record Title Act more apparent to examiners.

30.3 UNBROKEN CHAIN OF TITLE OF RECORD

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

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

Similar Standard: Mich., 1.3.

Comment: Assume A is the grantee in a deed recorded in ~~1915~~1975 and that nothing affecting the described land has been recorded since then. In ~~1945~~2005 A has an "unbroken chain of title of record." Instead of a conveyance, the title transaction may be a decree of a district court or court of general jurisdiction, which was entered in the court records in ~~1915~~1975. Likewise, in ~~1945~~2005, A has an "unbroken chain of title of record."

Instead of having only a single link, A's chain of title may contain two or more links. Thus, suppose X is the grantee in a deed recorded in ~~1915~~1975; and X conveyed to Y by deed recorded in ~~1925~~1985; Y conveyed to A by deed recorded in ~~1940~~2000. In ~~1945~~2005 A has an "unbroken chain of title of record." Any or all of these links may consist of decrees of a district court or court of general jurisdiction instead of deeds of conveyance.

The significant time from which the 30-year record title begins is not the delivery of the instrument, but the date of its recording. Suppose the deed to A is delivered in ~~1915~~1975 but recorded in ~~1925~~1985. A will not have an "unbroken chain of title of record" until ~~1955~~2015.

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

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

30.4 MATTERS PURPORTING TO DIVEST

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

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

Similar Standard: Mich., 1.4.

Comment: The obvious case of a recorded instrument purporting to divest is a conveyance to another person. A is the grantee in a deed recorded in ~~1915~~1965. The record shows a conveyance of the same tract by A to B in ~~1925~~1975. Then B deeds to X in ~~1957~~2007. Although B had a 30-year record chain of title in ~~1945~~1995, the deed to X purports to divest it, and B, thereafter, does not have a title.

A recorded instrument may also purport to divest even though there is not a complete chain of record title connecting the grantee in the divesting instrument with the 30-year chain. Suppose A is the last grantee in a recorded chain of title, the last deed of which was recorded in ~~1915~~1975. A deed of the same land was recorded in ~~1925~~1985, from X to Y , which recites that A died intestate in ~~1921~~1981 and that X is A's only heir. There is nothing else on record indicating that X is A's heir. The deed recorded in ~~1925~~1985 is one "purporting to divest" within the terms of the act. This is the conclusion to be reached whether the recital of heirship is true or not.

Or suppose, again, that A is the last grantee in a chain of title, the last deed of which was recorded in ~~1915~~1965. A deed to the same land from X to Y was recorded in ~~1925~~1975, which contains the following recital: "being the same land heretofore conveyed to me by A." There is no instrument on record from A to X . This instrument is nevertheless one "purporting to divest" within the terms of the act.

Suppose that in ~~1915~~1975, A was the last grantee in a recorded chain of title, the deed to A being recorded in that year. A deed of the same land was recorded in ~~1925~~1985, signed:

"A by B, attorney-in-fact." Even though there is no power of attorney on record, and even though the recital is untrue, the instrument is one "purporting to divest" within the terms of the act.

Suppose that A is the last grantee in a recorded chain of title, the last deed of which was recorded in ~~1915~~1935. In ~~1955~~1975 there was recorded a deed to Y from X , a stranger to the title, which recited that X and X 's predecessors have been "in continuous, open, notorious and adverse possession of said land as against all the world for the preceding thirty years." This is an instrument "purporting to divest" A of A's interest, within the terms of the act.

On the other hand, an inconsistent deed on record, is not one "purporting to divest" within the terms of the act, if nothing on the record purports to connect it with the 30-year chain of title. The following fact situations illustrate this.

A is the last grantee in a recorded chain of title, the last deed of which was recorded in ~~1915~~1965. A warranty deed of the same land from X to Y was recorded in ~~1925~~1975. The latter deed is not one "purporting to divest" within the terms of the act.

A is the last grantee in a recorded chain of title, the last deed of which was recorded in ~~1915~~1965. A mortgage from X to Y of the same land, containing covenants of warranty, is recorded in ~~1925~~1975. The mortgage is not an instrument "purporting to divest" within the terms of the act.

Although the recorded instruments in the last two illustrations are not instruments "purporting to divest" the 30-year title, they are not necessarily nullities. The marketable record title can be subject to interests, if any, arising from such instruments, 16 O.S. §72(d).

30.5 INTERESTS OR DEFECTS IN THE THIRTY-YEAR CHAIN

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

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

Similar Standard: Mich., 1.8.

Comment: This standard is explainable by the following illustrations:

1. In ~~1915~~1975, a deed was recorded conveying land from A, the owner in fee simple absolute, to "B and B's heirs so long as the land is used for residence purposes," thus creating a determinable fee in B and reserving a possibility of reverter in A. In ~~1925~~1985, a deed was recorded from B to C and C's heirs "so long as the land is used for residence purposes, this conveyance being subject to a possibility of reverter in A." In ~~1945~~2005, C has a marketable record title to a determinable fee which is subject to A's possibility of reverter.

2. Suppose, however, that, in ~~1915~~1975, a deed was recorded conveying a certain tract of land from A, the owner in fee simple absolute, to "B and B's heirs so long as the land is used for residence purposes"; and suppose, also, that in ~~1918~~1978 a deed was recorded by B to C and C's heirs, conveying the same tract in fee

simple absolute, in which no mention was made of any special limitation or of A's possibility of reverter. There being no other instruments of record in 19482008, C has a marketable record title in fee simple absolute. C's root of title is the deed from B to C and not the deed from A to B; and there are no interests in third parties or defects created by the "muniments of which such chain of record title is formed."

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

30.6 FILING OF NOTICE

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

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

Comment: Suppose A was the grantee in a chain of record title of a tract of land, a deed to which was recorded in ~~1900~~1960. In ~~1902~~1962, a mortgage of the same land from A to X was recorded. In ~~1906~~1966, a mortgage of the same land from A to Y was recorded. In ~~1918~~1978, a deed of the same land from A to B in fee simple absolute was recorded, which made no mention of the mortgages. In ~~1947~~2007, Y recorded a notice of Y 's mortgage, as provided in Sections 74 and 75 of the act. X did not record any notice. In ~~1948~~2008, B had a marketable record title, which is subject to Y 's mortgage, but not to X 's mortgage. B's root of title is the ~~1918~~1978 deed. Therefore, X and Y had until ~~1948~~2008 to record a notice for the purpose of preserving their interests. If X had filed a notice after ~~1948~~2008, it would have been a nullity, since X's interest was already extinguished.

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

30.7 THIRTY-YEAR POSSESSION IN LIEU OF FILING NOTICE

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

of such possessory owner, even though such possessory owner has failed to record any notice of such possessory owner's claim.

> Authority: 16 O.S. §§72(d) & 74(b); L. Simes & C. Taylor, Model Title Standards, Standard 4.8, at 30-31 (1960).
>
> Comment: The kind of situation which gives rise to this standard is suggested by the following illustration. A was the last grantee in a chain of record title to a tract of land, by a deed recorded in ~~1915~~1975. There were no subsequent instruments of record in this chain of title. A has been in possession of the land since ~~1915~~1975 and continues in possession, but has never filed any notice as provided in Section 74 of the Marketable Record Title Act. A deed of the same land, unconnected with A's chain of title, from X to Y , was recorded in ~~1916~~1976; no other instruments with respect to this land appearing of title. On the other hand, A had a marketable record title in ~~1945~~2005, but in ~~1946~~2006, according to Section 72(d), it is subject to Y 's marketable record title. Thus, the relative rights of A and of Y are determined independently of the act, since the interest of each is subject to the other's deed. A's interest being prior in time, and Y 's deed being merely a "wild deed," under common law principles A's title should prevail.
>
> Under 16 O.S. §74(b), possession cannot be "tacked" to eliminate the necessity of recording a notice of claim.

30.8 EFFECT OF ADVERSE POSSESSION

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

> Authority: 16 O.S. §§72(c) & 73; L. Simes & C. Taylor, Model Title Standards, Standard 4.9, at 31 (1960).
>
> Comment: (Assume the period for title by adverse possession is 15 years.)
>
> 1. A is the grantee of a tract of land in a deed which was recorded in ~~1900~~1950. In the same year, X entered into possession claiming adversely to all the world and continued such adverse possession until ~~1916~~1966. In ~~1917~~1967, a deed conveying the same land from A to B was recorded. No other instruments concerning the land appearing of record, B has a marketable record title in ~~1947~~1997, which extinguished X 's title by adverse possession acquired in ~~1915~~1965.
>
> 2. Suppose A is the grantee of a tract of land in a deed which was recorded in ~~1915~~1965. In ~~1941~~1991, X entered into possession claiming adversely to all the world and continued such adverse possession until the present time. No other

instruments concerning the land appearing of record. In ~~1945~~1995, A had a marketable record title, but it was subject to X 's adverse possession and when X's period for title by adverse possession was completed in ~~1956~~2006, A's title was subject to X 's title by adverse possession.

30.9 EFFECT OF RECORDING TITLE TRANSACTION DURING THE THIRTY YEAR PERIOD

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

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

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

1. Suppose A is the grantee of a tract of land in a deed which was recorded in ~~1900~~1960. A mortgage of this land executed by A to X was recorded in ~~1905~~1965. In ~~1910~~1970, a deed conveying the land from A to B was recorded, this deed making no reference to the mortgage to X. In ~~1939~~1999, an instrument assigning X 's mortgage to Y was recorded. In 19402000, B had a marketable record title. But it was subject to the mortgage held by Y because the assignment of the mortgage was recorded less than 30 years after the effective date of B's root of title. If, however, Y had recorded the assignment in ~~1941~~2001 the mortgage would already have been extinguished in ~~1940~~2000 by B's marketable title; and recording the assignment in ~~1941~~2001 would not revive it.

2. Suppose a tract of land was conveyed to A, B and C as tenants in common, the deed being recorded in ~~1900~~1960. Then in ~~1905~~1965, A and B conveyed the entire tract in fee simple to D and the deed was at once recorded. In ~~1925~~1985, D conveyed to E in fee simple, and the deed was at once recorded. No mention of C's interest was made in either the ~~1905~~1965 or ~~1925~~1985 deeds. Nothing further appearing of record, E had a marketable record title to the entire tract in ~~1935~~1995. This extinguished C's undivided one-third interest.

3. Suppose the same facts, but assume also that, in ~~1936~~1996, C conveyed C's one-third interest to X in fee simple, the deed being at once recorded. This does not help C any. C's interest, having been extinguished in ~~1935~~1995, is not revived by this conveyance.

4. Suppose A, being the grantee in a regular chain of record title, conveyed to B in fee simple in ~~1900~~1960, the deed being at once recorded. Then, in ~~1905~~1965, X ,

a stranger to the title, conveyed to Y in fee simple, and the deed was at once recorded. In ~~1925~~1985, Y conveyed to Z in fee simple, and the deed was at once recorded. Then suppose in ~~1927~~1987 B conveyed to C in fee simple, the deed being at once recorded. In ~~1935~~1995, Z and C each has a marketable record title, but each is subject to the other. Hence, neither extinguishes the other, and the relative rights of the parties are determined independently of the act. C's title, therefore, should prevail.

5. Suppose, however, that the facts were the same except that B conveyed to C in ~~1937~~1997 instead of ~~1927~~1987. In that case, Z's marketable record title extinguished B's title in ~~1935~~1995, 30 years after the effective date of Z's root of title, and B's title is not revived by the conveyance in ~~1937~~1997.

30.10 QUITCLAIM DEED OR TESTAMENTARY RESIDUARY CLAUSE IN THIRTY-YEAR CHAIN

A recorded quitclaim deed or residuary clause in a probated will can be a root of title or a link in a chain of title, for purposes of a 30-year record title under the Marketable Record Title Act.

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

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

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

A quitclaim deed can be a root of title to the interest it purports to create. Suppose there is a break in the chain of title, and the first instrument after the break is a quitclaim deed. Assume that the first recorded instrument in the chain of title is a patent from the United States to A, recorded in 1890, and that the next is a warranty deed from A to B in fee simple, recorded in ~~1910~~1940. Then, in ~~1915~~1975, there is a quitclaim deed from C to D purporting to convey "the above described land" to D in fee simple. Further assume that there are no other recorded title transactions or notices after this deed and that D is in possession, claiming to be the owner in fee simple. Under the Marketable Record Title Act, the ~~1915~~1975 deed is the root of title and purports to create a fee simple in D. Therefore, in ~~1945~~2005, D has a good title in fee simple.

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

D. LATEST TES COMMITTEE AGENDA

TITLE EXAMINATION STANDARDS COMMITTEE
of the
Real Property Law Section of the O.B.A.

"FOR THE PURPOSE OF EDUCATING AND GUIDING TITLE ATTORNEYS"

2011 AGENDA

(As of August 15, 2011)

[NOTE: SEE MEETING DATES AND LOCATIONS AT THE END]

[NOTE: REVIEW AND PRINT MATERIALS BEFORE MEETING FOUND AT WWW.EPPERSONLAW.COM USING THE NOTED "MATERIALS NUMBER"*]

_______________________________*AUG 20/STROUD*___________________

Speakers (Comm.)	Std.	Status	Description

BUSINESS/GENERAL DISCUSSION OF CURRENT EVENTS

9:30 a.m. – 10:00 a.m.

Hot Topics: General Questions Sent from Title Industry Representatives (Epperson)

Approval of Previous Month's TES Committee Minutes (Smith)

PRESENTATIONS

==========================PENDING============================

10:00 a.m. – 10:45 a.m.

Speakers (Comm.)	Std.	Status	Description
Astle **Wimbish** **Carson** **Kempf** **Doyle** **Reid** **Schomp**	**NEW (2011.11)**	**Aug Draft**	**INCOMPLETE FORECLOSURE RESOLUTION** ***The issue has arisen as to how title examiners should handle incomplete mortgage foreclosures.***

10:45-11:00 a.m. BREAK

PRESENTATIONS (CONT'D)

11:00 a.m. – 12:00

<u>Wimbish</u> Gilbertson Astle Chansolme Ritter	**NEW (2011.13)**	**Aug Draft**	**FEDERAL ESTATE TAX MARITAL DEDUCTION** ***It has been suggested that all of the existing title standards that refer to federal estate tax marital deduction matters (and those that should but don't) should be reviewed to ensure the authority being listed is correct, and to ensure the use of standard language in all of the standards***

<u>Noble</u> Epperson Orlowski	**17.4 (2011.04)**	**Aug Draft**	**"TRANSFER ON DEATH" DEED** ***Further clarifications are needed for the existing Standard due to 2011 statutory amendments.***

<u>Munson</u> Wimbish McEachin	**30.10 (2011.08)**	**Aug Report**	**QUIT CLAIM DEED…** ***Can a warranty or quit claim deed, with this language: "All grantor's right, title and interest" or "All my right, title and interest", constitute a "root of title" under the MRTA? See Reed v. Whitney, 1945 OK CIV APP 354 (warranty limited to interest actually owned), but also see Joiner v. Ardmore Loan and Trust Co., 1912 OK 464 (a grantor under a warranty deed is liable even if "both parties knew of the lack of title") . Should this Standard have a comment added, explaining this issue?***

********************** END OF PRESENTATIONS ***********************

______________________________***SEPTEMBER 17/TULSA***___________________

<u>Kempf</u> Evans Wimbish Schomp	**3.2 (2011.15)***	**Sep Draft**	**AFFIDAVITS AND RECITALS** ***The Standard provides that affidavits and recitals "cannot substitute for a conveyance or probate of a will."(except in circumstances covered in 16 O.S. Section 83 and other statutes). 16 O.S. Section 67 provides that an affidavit filed of record for 10 years, without challenge, establishes marketable title as to***

			severed minerals, in lieu of a probate. These inconsistencies need to be addressed.

<u>McEachin</u> Munson Ob Costello Evans Schamp	**30.9 (2011.07)**	**Sep Report**	**MRTA** ***One of the comments to this standard refers to the possibility of there being two roots of title creating two marketable record titles, with each being subject to the other. This is improper circular reasoning and needs to be revised.***

<u>Durbin</u> Doyle Chansolme	**14.1 (2011.03)**	**Sep Report**	**LLC'S MAY OWN PROPERTY** **Can a *separate "series" LLC own title to real property, in light of the language of 18 O.S. Section 2054.4.***

<u>Epperson</u> Schamp Munson McEachin Carson	**30.1 et seq (2011.06)**	**Sep Report**	**MRTA** ***Due to the holding in the Rocket case, can it be concluded that the MRTA does affect severed mineral chains of title? (see Epperson's published article on the issue)***

<u>Epperson</u> Orlowski Wimbish	**NEW (2011.14)**	**Sep Report**	**JUDGMENTS/DECREES & CONSTRUCTIVE NOTICE** ***Under the MRTA, the SLTA, and under the terms of the Uniform Abstractors Certificate, do documents that are <u>not</u> filed with the County Clerk (e.g., divorce and probate proceedings) constitute constructive notice and become part of the official chain of title. Also, if a judgment or decree – affecting title to real property -- is required by statute to be placed in the county clerk's land records in order to constitute constructive notice, but has not been filed there, does the inclusion of such document in an abstract give to the examiner and the client actual notice of the same liens and ownership changes? If so, as of what date? Can you rely upon a decree as part of a chain of title, if it was never recorded in the land records?***

==========================APPROVED==========================

<u>Noble</u> Epperson	**30.13 (2011.09)**	**May App'd**	**ABSTRACTING-30 YEAR ABSTRACT** ***Due to the prior Regulations and a specific ruling by***

			the State Auditor (who regulated the Abstractors until January 1, 2008), it appears that TES 30.13 which directs abstractors to prepare "short" "30-year" abstracts for the use of examining attorneys, is correct for only a specific period of time, and should be revised to show the two periods of time.

<u>Munson</u> Ritter Sullivan Kempf Sullivan	**12.4 & 14.9 (2011.02)***	**May App'd**	**CONVERSION OF ENTITIES** ***Statutes allow the conversion of entities. We need a standard to recognize the continued ownership of the real property in the surviving entity, like a merger or name change.***

==========================TABLED============================

<u>Soper</u>	**NA**	**July Tabled to next year**	**LEGISLATIVE UPDATE** ***Brief presentation concerning proposed or pending legislation affecting real property titles.***

<u>Evans</u> Sullivan Hardwick Wimbish Astle	**7.2 (2011.01)**	**Jul Tabled**	**MARITAL HOMESTEAD** ***Is it acceptable for a title examiner to rely upon either a recital in a deed or on an affidavit filed either with or after a deed, which deed is signed by one spouse but not the other, where such recital or affidavit asserts that such land is not the marital homestead? The instance involved is where the spouse who holds the entire title is the grantor or affiant.[IT WAS DECIDED TO LEAVE THIS STANDARD "AS IS", IN THE ABSENCE OF NEW LAW.]***

<u>McEachin</u> Durbin Chansolme Costello Rheinberger Reid	**24.12 & 24.13 (2011.12)**	**May Tabled**	**MERS** ***This issue has become a national topic and recent significant activity affecting our existing standard will be monitored and reported on. [IT WAS DECIDED THAT THE CURRENT STANDARD IS STILL CORRECT]***

<u>Sullivan</u> Noble Costello Gilberts	**NEW (2011.10)**	**Apr Tabled**	**LP AND OTHER ENTITIES BY "PRESIDENT"** ***On a practical level has it become acceptable practice to accept a signature on a conveyance from a corporate officer for a non-corporate entity such as for***

			a limited partnership?[IT WAS DECIDED THERE IS NO AUTHORITY FOR THIS PRACTICE]

Astle **Durbin** **Kempf** **McEachin** **Noble**	**NEW (2011.10)**	**Feb Tabled**	***LLC'S SIGNING BY "PRESIDENT" OR "VICE PRESIDENT"*** ***Did recent statutory changes, which approve the use of corporate-type bylaws also thereby recognize the authority of corporate-type "officers" to sign for an LLC, especially a non-Oklahoma LLC? Apparently, it is common practice for title insurance/closing companies in Oklahoma to accept such signatures.[DECIDED TO SEEK LEGISLATIVE RELIEF]***

COMMITTEE OFFICERS:

Chair: Kraettli Q. Epperson, OKC (405) 848-9100 fax: (405) 848-9101
kqelaw@aol.com

Comm. Sec'y: Chris Smith, Edmond (405) 843-8448
Chris.smith.ok@gmail.com

(C:\MYDOCUMENTS\BAR&PAPERS\OBA\TES\2011\Agenda2011 08(Aug)

2011 Title Examination Standards Committee

(Third Saturday: January through September)

Time: 9:30 a.m. to 12 noon

Month	Day	City/Town	Location
January	15	Tulsa	Tulsa County Bar Center
February	19	Stroud	Stroud Conference Center
March	19	OKC	Oklahoma Bar Center
April	16	Stroud	Stroud Conference Center
May	21	Tulsa	Tulsa County Bar Center
June	18	Stroud	Stroud Conference Center
July	16	OKC	Oklahoma Bar Center
August	20	Stroud	Stroud Conference Center
September	17	Tulsa	Tulsa County Bar Center

Tulsa County Bar Center
1446 South Boston
Tulsa, Oklahoma 74119-3612

Stroud Conference Center
218 W. Main St.
Stroud, Oklahoma 74079

Oklahoma Bar Center
1901 N. Lincoln Blvd.
Oklahoma City, OK 73152-3036

APPENDICES

1. OKLAHOMA T.E.S. COMMITTEE MEMBERS (FOR PRIOR YEAR)

2. NATIONAL TITLE EXAMINATION STANDARDS RESOURCE CENTER REPORT

3. LIST OF THE LATEST 10 ARTICLES, BY KRAETTLI Q. EPPERSON (AVAILABLE ON-LINE)

APPENDIX 1

OKLAHOMA T.E.S. COMMITTEE MEMBERS (FOR PRIOR YEAR)

2010 Title Examination Standards Committee

Name	City	Office
Kraettli Epperson	Oklahoma City	Chair
Chris Smith	Oklahoma City	Secretary
Dale L. Astle	Tulsa	
Jason Baker	Tulsa	
Barbara L. Carson	Tulsa	
Alice Costello	Oklahoma City	
William Doyle	Tulsa	
Larry Evans	Tulsa	
Martha M. Hardwick	Tulsa	
Scott McEachin	Tulsa	
Luke Munson	Oklahoma City	
Bill Newton	Tulsa	
Jeff Noble	Oklahoma City	
A. Daniel Ogunbase	Oklahoma City	
D. Faith Orlowski	Tulsa	
Henry P. Rheinburger	Oklahoma City	
Darin Savage	Oklahoma City	
Bonnie Schomp	Oklahoma City	
Jason Soper	Oklahoma City	
Scott Sullivan	Oklahoma City	
John B. Wimbish	Tulsa	

APPENDIX 2

THE NATIONAL TITLE EXAMINATION STANDARDS RESOURCE CENTER

(Effective May 1, 2011)

STATUS REPORT

State		Last Revised		Standards		
		Pre-2006	2006+	#Ch.	#Stands.	#Pgs.
1.	Arkansas	-	12-07-09	22	110	65
2.	Colorado	-	05-00-10	15	134	71
3.	Connecticut	-	01-12-09	30	151	471
4.	Florida	-	11-00-10	21	142	187
5.	Georgia	08-18-05	-	39	194	144
6.	Idaho	c. 1946	-	-	-	-
7.	Illinois	01-00-77	-	14	26	35
8.	Iowa	-	06-00-10	16	105	90
9.	Kansas	00-00-05	-	23	71	122
10.	Louisiana	00-00-01	-	25	233	99
11.	Maine	-	05-18-10	09	72	90
12.	Massachusetts	-	05-05-08	N/A	74	103
13.	Michigan	-	05-00-07	29	430	484
14.	Minnesota	-	11-14-09	N/A	97	85
15.	Mississippi	10-00-40	-	-	-	-
16.	Missouri	05-15-80	-	N/A	26	17
17.	Montana	c. 1955	-	N/A	76	78
18.	Nebraska	-	01-30-09	16	96	99
19.	New Hampshire	-	12-31-10	13	180	36
20.	New Mexico	00-00-50	-	06	23	05
21.	New York	01-30-76	-	N/A	68	16
22.	North Dakota	-	00-00-10	18	191	231
23.	Ohio	-	05-13-09	N/A	53	45
24.	Oklahoma	-	11-19-10	33	120	110
25.	Rhode Island	-	04-28-09	14	78	78
26.	South Dakota	06-21-03	-	N/A	66	58
27.	Texas	-	06-30-10	16	89	80
28.	Utah	06-18-64	-	N/A	59	13
29.	Vermont	-	10-00-10	28	43	61
30.	Washington	09-25-42	-	N/A	29	09
31.	Wisconsin	02-00-46	-	N/A	15	08
32.	Wyoming	07-01-80	-	22	81	99
Total		**15**	**17**			

Prepared by Kraettli Q. Epperson, Attorney-at-Law, OKC, OK
(405) 848-9100; kqe@meehoge.com

APPENDIX 3

LIST OF THE LATEST 10 ARTICLES,
AUTHORED BY KRAETTLI Q. EPPERSON
(AVAILABLE ON-LINE)

2011

240. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2009-2010", The 2011 Cleverdon Roundtable Seminar, Oklahoma City, Oklahoma (March 6, 2011), and Oklahoma City, Oklahoma (March 13, 2011)

239. "**Oklahoma's Marketable Record Title Act: An Argument for its Application to Chains of Title to Severed Minerals after *Rocket Oil and Gas Co. v. Donabar***", The Oklahoma Bar Journal (March 12, 2011)

238. "Legal Descriptions and Surveys: An Overview in Oklahoma", Oklahoma City University School of Law "Real Estate Development", Oklahoma City, Oklahoma (March 8, 2011)

237. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2009-2010", Oklahoma City Real Property Lawyers Association, Oklahoma City, Oklahoma (January 14, 2011)

2010

236. (Not Published)

235. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2009-2010", Recent Developments 2010 in Oklahoma, Oklahoma Bar Association, Tulsa, Oklahoma (December 10, 2010), and Oklahoma City, Oklahoma (December 17, 2010)

234. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2009-2010", Title Law in Oklahoma, National Business Institute, Oklahoma City, Oklahoma (December 8, 2010)

233. "Update on Oklahoma Land Title Related Cases: For 2009-2010", Oklahoma Bar Association Real Property Law Section Annual Meeting, Tulsa, Oklahoma (November 18, 2010)

232. "Oil and Gas Title Examination Basic Terms", Energy Law Basics, The National Business Institute, Oklahoma City, Oklahoma (November 18, 2010)

231. "Update on Oklahoma Real Property Title Authority: Statutes, Regulations, Cases, Attorney General Opinions & Title Examination Standards: Revisions for 2009-2010", Tulsa Title and Probate Association, Tulsa, Oklahoma (October 14, 2010)