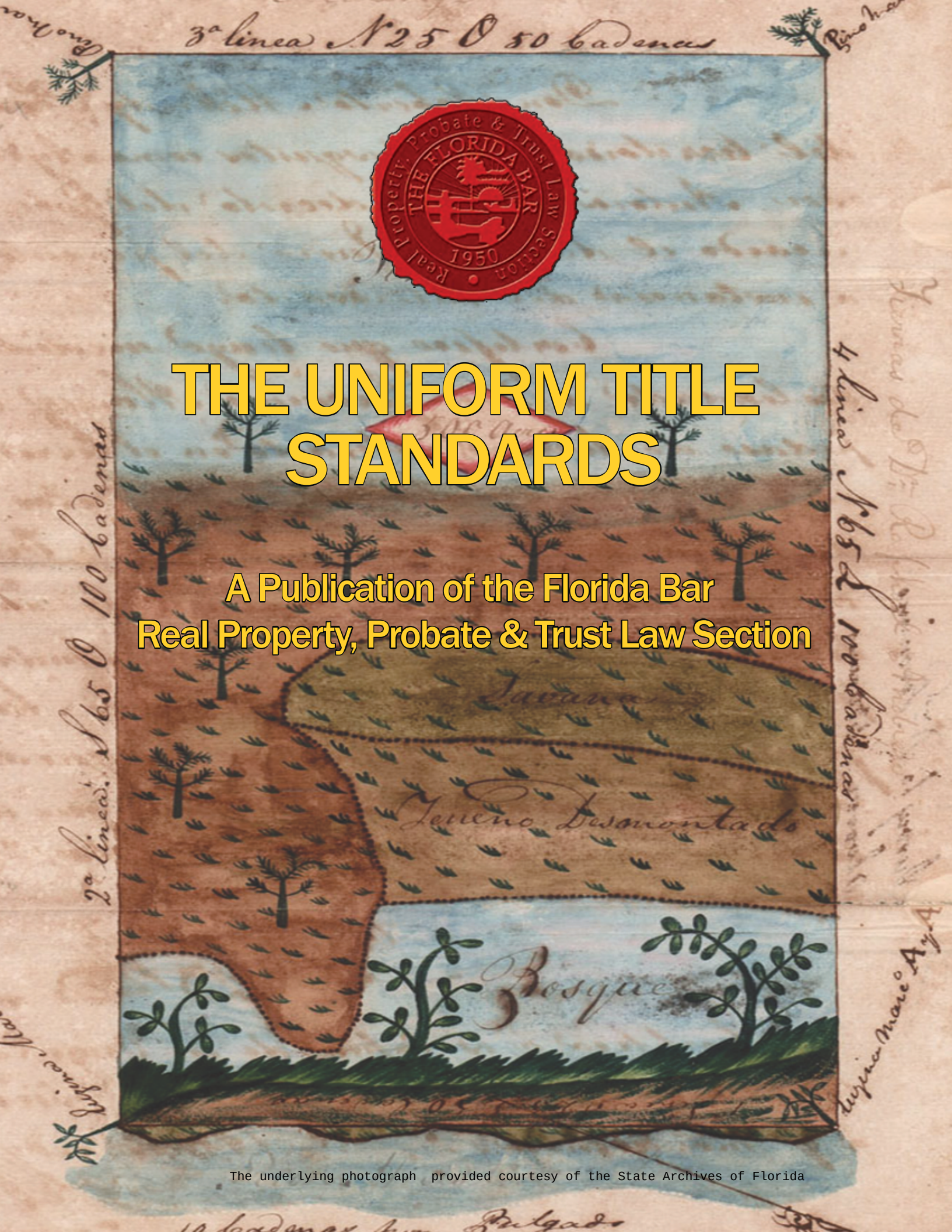

THE UNIFORM TITLE STANDARDS

A Publication of the Florida Bar
Real Property, Probate & Trust Law Section

The underlying photograph provided courtesy of the State Archives of Florida

The Cover

The underlying photograph included on the cover page is provided courtesy of the State Archives of Florida.

The description below was initially published in the Florida Bar Journal, March 1959 Supplement, Pages 208, 213

This 140-year-old water color sketch which accompanied a land survey made in Florida during the second Spanish occupation, 1783-1821, remains fresh and unspoiled. The original illustrated survey, prepared by a Spanish surveyor named Roberto McHardy, is on file in the office of Field Note Division, Department of Agriculture, in the Capitol at Tallahassee. A glance at the history of the period reveals that the origin of disagreement of title standards is not recent. The dossier containing McHardy's survey of Geronimo Alvarez' land was assembled in connection with Alvarez confirming this Spanish land grant before the Board of Commissioners — East Florida. This Board was created by act of Congress on May 8, 1822. The act was passed Pursuant to Article VIII of the Treaty of February 22, 1819, wherein all Spanish grants of land made prior to January 24, 1818, were to be "ratified and confirmed to the persons in possession of the lands, to the same extent that the said grants would be valid if the territories had remained under the domain of his Catholic Majesty."

The first meeting of the Board was held on August 4, 1823 with the three duly appointed Commissioners, Davis Floyd, William F. Blair and Alexander Hamilton. The Board at this initial meeting passed certain regulations in an effort to standardize the procedures of confirming Spanish land grants and the titles to lands in East Florida. One of the regulations read as follows:

"All persons claiming title to lands under any patent grant, concession or order of survey, will make a brief statement by Memorial setting forth the situation, boundaries and if possible, the deraignment of title, to the Lands claimed, and by whom granted, and by what authority, and whether the same be the whole or part of the original grant."

It appears in the minutes of this first meeting of the Board that Alexander Hamilton dissented to the resolution that claimants be not required to produce plan title papers translated into the English language, but in all cases be -permitted to file the original Spanish documents.

Among the members of this first Board of Commissioners there arose in 1824 such a "divergence of opinion between Hamilton and the other Commissioners as to procedure that Hamilton refused to participate in the sessions and bombarded President Monroe, Secretary of Treasury Crawford, Secretary of State Adams, and the Chairman of the House Committee on Public Lands with serious charges against his colleagues and those in charge of Public Archives."[1] Hamilton resigned on March 31, 1824.

The land surveyed by McHardy consisted of a 500-acre tract "on the west side of Hillsborough River" and "located south of 210 acres situated on Gabardy's Canal, granted to Rafael Andrew and confirmed to Jose Sanchez." This property was granted to one Geronimo Alvarez by the Spanish territorial governor, Jose Coppinger, who was the last of the territorial governors of East Florida during the second Spanish occupation and prior to Spain's ceding of the Floridas to the United States by treaty ratified and proclaimed February 22, 1821. It is likely that the grant to Alvarez, an "ensign of the Irish

[1] (G & S, V 750) (*Spanish Land Grants in Florida,* Vol. 2, page 43).

company of Militia of this city" (St. Augustine) was based on the Spanish royal order of 1815 for patriotic service. “The royal order of 1815 permitting grants for patriotic services was supposed to have been made in response to Governor Kindelan's recommendation two years earlier. The `Patriot War' had just ended and the Governor suggested to one Juan Ruiz de Apadoca, Captain-General of Cuba, rewards for the three white militia companies and for the 3rd battalion of Cuba: (1) to each of the militia officers, a royal commission for each grade possible to him as a provincial; and (2) to all soldiers of the militia and to the married officers and soldiers of the 3rd battalion of Cuba, lands in proportion to the size of their families. He admitted that his plan would not, in reality, give them anything which was not already open to them, but he thought that 'public approbation would content the men and stimulate their patriotism’.”[2]

Few residents of New Smyrna Beach today realize that the title to a Portion of the lands now occupied by them was initially confirmed through the petitions of Geronimo Alvarez and an artistically inclined Spanish surveyor by the name of Roberto McHardy.

[2] Ibid., page 25.

PREFACE

The Florida Uniform Title Standards are designed to serve as a reference for some of the more common problems encountered in the examination of titles to real estate in Florida. The purpose of uniform title standards, generally, is to facilitate conveyancing by eliminating needless objections to marketability of title. A title standard is a voluntary agreement made in advance by members of the Bar on the manner of treating a particular title problem when and if it arises. These standards are interpretations of existing law and practice, and, although they are approved by the Real Property, Probate, and Trust Law Section of The Florida Bar, they do not have the formal approval of any court or legislative body. Nevertheless, if they are generally adhered to, their purpose should be accomplished satisfactorily.

These title standards are intended to be used not only by experienced title attorneys, but also by those with little experience or those whose work may bring them into contact with title examinations less frequently. Accordingly, some of the standards set forth well settled principles of law, while others are statements of generally prevailing practices in areas where the applicable law provides no definitive answers.

Each title standard begins with a statement of the Standard, followed by one or more illustrative Problems, citations to Authorities & References, and in some cases, Comments designed to call attention to related issues and cautionary matters. The Standard itself rather than the Problems or comments, was intended to be the focal point, and primary consideration should be given to it.

The main purpose of the Problems is to give examples of the application of the Standard to representative factual situations, most of which are readily apparent. In some instances, the Problems were used as a vehicle to address less obvious issues related to the Standard. The Problems are illustrative and not intended to be all-inclusive.

The Authorities and References were included to indicate the source material in support of the Standard. It was not always possible to find primary authorities directly on point, and therefore in some instances the citations are to references that are merely of persuasive value. Also, citations to secondary authorities were frequently included as a convenience for locating a discussion of the subject matter.

The Comments were designed to call attention to related issues, to raise cautionary notes to be considered in applying the Standard, and in some instances to point out limitations or exceptions with respect to the application of the Standard. Occasionally, the Comments were used to set forth arguments contrary to the position adopted in the Standard. This was done for informational purposes only, and not intended to detract from the Standard as stated.

Finally, whenever possible, cross-references to other Standards were included so that related issues might more readily be considered.

UNIFORM TITLE STANDARDS

Foreword to the July 2022 Update

The July 2022 update of the electronic uniform title standards (eUTS) includes a revised Chapter 17 reflecting court decisions interpreting the Marketable Record Title Act and legislative updates to the Act. In addition, a citation was corrected in UTS 1.1. Minor amendments to the forward and table of contents reflect the newest approval date, but in all other ways the eUTS remain unchanged.

The March 2021 Update of the electronic Uniform Title Standards (eUTS) included a new chapter on Easements, approved by action of the Executive Council in December 2020. Edits were made to the Preface, Foreword, and Table of Contents. References to archives were removed, all other portions of the eUTS remain unchanged.

The eUTS was previously republished in July 2020 to include the standards updated under the leadership of the Immediate Past Chair, Christopher Smart, and approved incrementally by the Section. Similar incremental republications have intervened, but the last major re-write of the Title Standards was approved at the June 1, 2012, Executive Council meeting, when the Real Property Probate & Trust Law Section ("the Section") approved the "final" revised standard to the Uniform Title Standards, completing the first major update of the Title Standards since 1981. The 2012 version of the standards was published under the leadership of then Chair, Patricia P. Jones, and represented the first time the standards existed solely in electronic form (eUTS).

The Uniform Title Standards are standards for examining title to real property in Florida with the goal of resolving disagreements among real property attorneys on various types of title defects and their impact on the marketability of the title. Even though fewer attorneys today perform title examinations, the standards still serve as a resource for attorneys representing buyers and sellers in real estate transactions, where contracts typically call for the seller to convey marketable title. The popular FR/BAR Contract for Sale and Purchase has long incorporated the Uniform Title Standards as the "standard" for determining a buyer's marketable title to the real property. Since its inception in the early 1970's, the FAR/BAR Contract has provided that "(m)arketable title shall be determined according to applicable standards adopted by authority of The Florida Bar and in accordance with law."

Of equal significance to all Floridians is the fact that the Florida courts have consulted and cited to the Uniform Title Standards when confronted with title issues covered by the standards. *See, e.g., Marshall v. Hollywood, Inc.*, 236 So.2d 114 (Fla. 1970); *City of Miami v. St. Joe Paper Co.*, 364 So.2d 439 (Fla. 1970); and *Cunningham v. Haley*, 501 So. 2d 649 (Fla. 5th DCA 1986). Understandably, the issues in these cases dealt with the proper application of Florida's Marketable Record Title Act. Most recently, the Fifth District Court of Appeals cited to the Uniform Title Standards in a decision dealing with corporate authority to convey real property. *DGG Development Corp. v. Estate of Capponi,* 983 So. 2d (Fla. 5th DCA 2008).

The Uniform Title Standards occupied a central role in the function of the Section when it was created in 1954, becoming the *first* committee established by the Section. In fact, Florida's first title standards committee existed as a committee of the Board of Governors of The Florida Bar ("BOG") before there was a RPPTL Section. After the Section was created, the BOG effectively ceded responsibility for developing uniform standards to the Section. In 2008-09 the BOG unanimously re-endorsed the Uniform Title Standards as

the first known set of published Florida title standards is the set that appeared as a supplement to the March 1959 issue of The Florida Bar Journal. The Committee Chair at that time was David Catsman, who wrote in the Forward to the standards that Florida joined 25 other states in utilizing this method of solving some of the problems involved in real property title transactions.

The next known publication of title standards was in 1975, under the leadership of Sherwood Spencer, who noted that the 1975 update was the work of a task force led by Mandell Glicksberg, Professor of Law at University of Florida School of Law, with the help of a grant from the George B. Carter Foundation. (George B. Carter was a founder of Lawyers' Title Guaranty Fund, which became Attorneys' Title Insurance, Fund, Inc.) The Uniform Title Standards Committee was then set up as a continuing committee of the Section responsible for updating and revising the Standards. In the following years, revisions to the title standards would be developed under Professor Glicksberg's leadership and would utilize the resources of the University of Florida Law Review. Their work culminated in the third revision of the Uniform Title Standards in 1981. That version was published in a small blue three-ring binder and distributed by the Section to new members; it can still can be found on the shelves of good law libraries.

Since the late 1990's, the members of the Uniform Title Standards Committee, which was renamed the Title Issues and Standards Committee, have undertaken to research and draft revised standards on their own, with conferencing support provided by the Section. The members of the committee are a broad representation of the title insurance industry as well as attorneys in the private practice of law.

The most-current compilation is always published on the home page of the Committee's website and is freely available to all visitors. Archives of prior versions are available to Section members only.

Rebecca L.A. Wood
Chair, Title Issues and Standards Committee
July 2022

Space does not permit me to personally recognize everyone who has contributed to this effort over the years, but I would like to specially recognize the following members of the Section for their dedication and hard work on the new content:

Christopher Smart, Immediate Past Chair Amanda Hersem Co-Chair Robert Graham, Vice Chair Melissa Scaletta, Vice Chair Karla Staker, Vice Chair	Jeremy Cranford Jeff Dollinger Michael Gelfand Laura Licastro Cynthia Manfredi Lee Offir Sanjiv Patel Cynthia Raleigh

FLORIDA

The Florida Uniform Title Standards, prepared by the Real Property, Probate and Trust Law Section of the Florida Bar (with updated content approved July 23, 2022), are available to the public on the committee webpage.

FLORIDA UNIFORM TITLE STANDARDS

Table of Contents

STANDARD 00

CONSTRUCTION OF TITLE PROBLEMS

STANDARD: THE ATTORNEY, UPON EXAMINING AN ABSTRACT OF TITLE TO LAND, SHOULD CONSTRUE QUESTIONS IN FAVOR OF MARKETABILITY WHENEVER POSSIBLE.

Problem: What questions and objections should be raised by the examining attorney?

Answer: Objections and requirements should be made only when the irregularities or defects appearing in the abstract of title actually impair the title or may be expected to expose the purchaser or lender to the hazards of adverse claims or litigation. When such a situation arises the attorney should consult, when possible, with the prior examiner and endeavor to resolve the question in favor of marketability. The Attorney should communicate, when possible, with the prior examining attorney before delivering an opinion of title to the client.

CHAPTER 1
AGENCY AND POWERS OF ATTORNEY

STANDARD 1.1
EXECUTION AND RECORDATION OF POWER OF ATTORNEY FOR DEED

STANDARD: WHEN A DEED IS EXECUTED BY VIRTUE OF A POWER OF ATTORNEY, THE POWER OF ATTORNEY MUST BE EXECUTED AND RECORDED IN THE SAME MANNER AS THE DEED, EXCEPT THAT A POWER OF ATTORNEY EXECUTED IN ANOTHER STATE BY AN INDIVIDUAL WHICH IS USED TO CONVEY NON-HOMESTEAD PROPERTY MAY BE EXECUTED IN COMPLIANCE WITH THE LAW OF THE STATE OF EXECUTION.

Problem 1: John Doe executes a power of attorney in Florida authorizing Richard Roe to convey real property, but the power of attorney does not contain two subscribing witnesses. Roe, as attorney in fact for Doe, executes a deed of Blackacre from Doe to Simon Grant. The deed and power of attorney are both recorded. Is the conveyance valid against subsequent bona fide purchasers and creditors?

Answer: No.

Problem 2: John Doe executes a power of attorney in New York authorizing Richard Roe to convey non-homestead real property in Florida. Although the power of attorney is acknowledged it does not contain two subscribing witnesses. New York law did not require subscribing witnesses at the time. Roe, as attorney in fact for Doe, executes a deed of Blackacre from Doe to Simon Grant. The deed and power of attorney are both recorded. Is the conveyance valid against subsequent bona fide purchasers and creditors?

Answer: Yes.

Problem 3: John Doe gives Richard Roe a power of attorney, properly executed and acknowledged, authorizing Roe to convey real property, but the power of attorney is not recorded. Roe, as attorney in fact for Doe, executes and records a deed of Blackacre from Doe to Simon Grant. Is the conveyance valid against subsequent bona fide purchasers and creditors?

Answer: No. The power of attorney must be recorded in addition to the deed.

Authorities & References: F.S. 95.231(1), Fla. Stat. (2015); § 689.111, Fla. Stat. (2015); § 695.01 (2015); § 709.015(2), Fla. Stat. (2015); § 709.2106(3), Fla. Stat. (2015); 2A C.J.S. Agency § 40 (2014); FUND TN 4.02.01.

Comment: The general law is that a power of attorney must be executed with the same formality as the law requires for the instrument to be executed under it. 2A C.J.S. Agency § 40 (2014). Section 709.2105(2), Florida Statutes, which became effective October 1, 2011, requires powers of attorney to be signed by the principal and by two subscribing witnesses. However, a power of attorney executed in another state which does not require two subscribing witnesses is valid in Florida if its execution complied with the law of the state of execution. § 709.2106(3), Fla. Stat. Note that 709.2106(3) only applies to powers of attorney executed by individuals. Note further that "another state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. Last, it should be noted that the requirement of subscribing witnesses does not apply to military powers of attorney.

Special considerations apply to homestead property. Section 689.111, Florida Statutes (2015) authorizes a deed of homestead property to be executed by virtue of a power of attorney if the power of attorney is executed in the same manner as a deed. Therefore, a power of attorney, regardless of where it is executed, must contain two subscribing witnesses if it is to be used to convey homestead property.

A power of attorney must be recorded in the official records of the county in which the real property is situated to be valid against subsequent bona fide purchasers and creditors. F.S. 695.01 (2015). To be entitled to recordation it must contain an acknowledgement. F.S. 695.03 (2015).

Note: Section 95.231(1), Florida Statutes (2015), validates a power of attorney that has been of record for five years or more and that accompanies a deed as if there had been no lack of witnesses or defects in the acknowledgment.

STANDARD 1.2

AFFIXING NAME OF PRINCIPAL IN EXECUTION
OF INSTRUMENTS BY ATTORNEY IN FACT

STANDARD: IN THE EXECUTION OF AN INSTRUMENT BY AN ATTORNEY IN FACT, THE NAME OF THE PRINCIPAL SHOULD BE SPECIFICALLY SET FORTH AND MAY BE EITHER WRITTEN, PRINTED OR TYPED.

Problem:	Blackacre was purportedly conveyed by a deed in which the wording of the execution is "John Doe by Richard Roe, as his attorney in fact." The name of John Doe was typed but Richard Roe's name was signed, and Roe acknowledged that he executed the deed as attorney in fact for John Doe. Roe has a power of attorney in proper form. Did the grantee acquire title?
Answer:	Yes.
Authorities & References:	*State v. Hickman*, 189 So.2d 254 (Fla. 2d DCA 1966), *cert. den*. 194 So.2d 618 (Fla. 1966); 2 FLA. JUR. 2d, *Agency and Employment*, §53 (1998); FLORIDA REAL PROPERTY SALES TRANSACTIONS (CLE 1997), Sec. 6.65; ATIF TN 4.02.02.

STANDARD 1.3

AUTHORITY TO CONVEY REAL PROPERTY

STANDARD: TO EMPOWER AN AGENT TO CONVEY REAL PROPERTY THE POWER OF ATTORNEY MUST GIVE CLEAR AUTHORITY TO DO SO, ALTHOUGH THE REAL PROPERTY NEED NOT BE SPECIFICALLY DESCRIBED IF THE TERMS OF THE INSTRUMENT SHOW SUCH LAND TO BE WITHIN THE PRINCIPAL'S INTENTION IN THE GRANTING OF THE POWER.

Problem 1: John Doe gives to Richard Roe a power of attorney authorizing Roe "to generally act for me and in my name, place and stead, in any state and in relation to all matters, to do any and all things to execute any and all instruments which I might or could do if personally present." Does Roe have the authority to convey land owned by Doe?

Answer: No.

Problem 2: John Doe gives to Richard Roe a power of attorney authorizing Roe to "sell and convey any and all land owned by me," without specifically describing such land. Does Roe have the authority to convey any part or all of such land?

Answer: Yes.

Authorities & References: F.S. 709.2201(1) (2015); 2A C.J.S., *Agency* §§223, 230 (2007); AmJur 2d., *Agency* §29 (2010); FUND TN 4.02.03; 27 FUND CONCEPT 123 (October 2005); *Bloom v. Weiser*, 348 So. 2d 651 (Fla. 3d DCA 1977)

Comment: With respect to homestead property, see Title Standard 18.4 (Alienation Of Homestead -- Power Of Attorney).

STANDARD 1.4

WITNESSES ON POWER OF ATTORNEY
FOR MORTGAGE OF HOMESTEAD PROPERTY

STANDARD: WHEN A MORTGAGE OF HOMESTEAD PROPERTY IS EXECUTED BY VIRTUE OF ANY POWER OF ATTORNEY, THE POWER OF ATTORNEY MUST CONTAIN TWO SUBSCRIBING WITNESSES UNLESS IT IS A MILITARY POWER OF ATTORNEY.

Problem 1: John Doe executed a power of attorney in Florida authorizing Richard Roe to mortgage any of John Doe's real property. The power of attorney does not contain two subscribing witnesses. Would a mortgage executed by Roe, as Doe's attorney in fact, constitute a valid mortgage lien on Doe's homestead property in Florida?

Answer: No.

Problem 2: John Doe executed a power of attorney in New York authorizing Richard Roe to mortgage any of Doe's real property. The power of attorney does not contain two subscribing witnesses. New York law did not require subscribing witnesses at the time. Would a mortgage executed by Roe, as Doe's attorney in fact, constitute a valid mortgage lien on Doe's homestead property in Florida?

Answer: No.

Authorities & References: F.S. 689.111 (2015); F.S. 689.01 (2015).

Comment: Section 689.111, Florida Statutes, provides that a mortgage of homestead may be executed by virtue of a power of attorney, provided the power of attorney is executed in the same manner as a deed. Section 689.01, Florida Statutes, provides that two subscribing witnesses are required for execution of a deed. Therefore, two subscribing witnesses are required for execution of a power of attorney used to mortgage homestead property.

Section 709.2106(3), Florida Statutes, provides that a power of attorney executed in another state which does not require two subscribing witnesses is valid in Florida if its execution complied with the law of the state of execution. That statute, however, should not be relied upon as to mortgages of homestead property in light of 689.111, which is specific as to homestead property and requires two subscribing witnesses.

Note, however, that witnesses are not required for military powers of attorney. 10 U.S.C. § 1044b. Further, it should be noted that a power of attorney must be recorded in the official records of the county in which the real property is situated to provide constructive notice of the mortgage to subsequent bona fide purchasers and creditors. F.S. 695.01 (2015). To be entitled to recordation it must contain an acknowledgment. See F.S. 695.03 (2015).

For information on the necessity of subscribing witnesses on powers of attorney used to mortgage nonhomestead property, please see Title Standard 1.5.

STANDARD 1.5

WITNESSES ON POWER OF ATTORNEY
FOR MORTGAGE OF NONHOMESTEAD PROPERTY

STANDARD: WHEN A MORTGAGE OF NONHOMESTEAD PROPERTY IS EXECUTED BY VIRTUE OF A POWER OF ATTORNEY, THE POWER OF ATTORNEY MUST CONTAIN TWO SUBSCRIBING WITNESSES UNLESS IT: (1) WAS EXECUTED PRIOR TO OCTOBER 1, 1995; (2) IS A NONDURABLE POWER OF ATTORNEY EXECUTED PRIOR TO OCTOBER 1, 2011; (3) WAS EXECUTED IN ANOTHER STATE BY AN INDIVIDUAL IN COMPLIANCE WITH THE LAW OF THE STATE OF EXECUTION; OR (4) IS A MILITARY POWER OF ATTORNEY.

Problem 1: On September 1, 2011, John Doe executed a durable power of attorney authorizing Richard Roe to mortgage real property but the power of attorney does not contain two subscribing witnesses. In 2015, may Roe, as attorney in fact for Doe, execute a mortgage of nonhomestead Florida property?

Answer: No. Any durable power of attorney executed on or after October 1, 1995, but before October 1, 2011, requires two subscribing witnesses if it is used to mortgage or convey Florida real property, regardless of where the power of attorney was executed.

Problem 2: On October 1, 2011, John Doe executed a power of attorney in New York authorizing Richard Roe to mortgage real property but the power of attorney does not contain two subscribing witnesses. New York law did not require subscribing witnesses at the time. In 2015, may Roe, as attorney in fact for Doe, execute a mortgage of nonhomestead Florida property?

Answer: Yes.

Authorities & References: F.S. 689.111, 689.01, 709.08(1), 709.2105(2), 709.2106(3) (2015).

Comment: All durable and non-durable powers of attorney executed in Florida on or after October 1, 2011, require two subscribing witnesses. F.S. 709.2105(2) and 709.2106(1). This title standard sets forth the general rule that a power of attorney used to execute a mortgage of nonhomestead property must contain two subscribing witnesses, subject to the following four exceptions.

(1) The power of attorney was executed prior to October 1, 1995. Prior to that date, Florida law did not require a power of attorney used to execute a mortgage on nonhomestead property to contain subscribing witnesses.

(2) The power of attorney is a nondurable power of attorney executed prior to October 1, 2011. Prior to October 1, 2011, a nondurable power of attorney used to execute a mortgage on nonhomestead property only needed to be executed with the same formalities as the mortgage. Since mortgages do not require witnesses, a nondurable power of attorney used to execute the mortgage did not require witnesses.

(3) The power of attorney was executed in another state by an individual in compliance with the laws of the state of execution. Section 709.2106(3), Florida Statutes, provides that a power of attorney executed in another state which does not require two subscribing witnesses is valid in Florida if its execution complied with the law of the state of execution. Note that 709.2106(3) only applies to powers of attorney executed by individuals. Note further that "another state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(4) The power of attorney is a military power of attorney. Federal law exempts military powers of attorney from the typical state law requirements for form, substance or formality, including subscribing witnesses. 10 U.S.C. § 1044b.

A power of attorney must be recorded in the official records of the county in which the real property is situated to provide constructive notice of the mortgage to subsequent bona fide purchasers and creditors. F.S. 695.01 (2015). To be entitled to recordation it must contain an acknowledgement. F.S. 695.03 (2015).

For information on the necessity of subscribing witnesses on powers of attorney used to mortgage homestead property, please see Title Standard 1.4.

CHAPTER 2

BANKRUPTCY

STANDARD 2.1

EFFECT OF BANKRUPTCY PROCEEDINGS ON TITLE
OF DEBTOR'S REAL ESTATE

STANDARD: ON OR AFTER OCTOBER 1, 1979, THE FILING OF A PETITION IN BANKRUPTCY CREATES AN ESTATE WHICH INCLUDES ALL LEGAL OR EQUITABLE INTERESTS OF THE DEBTOR IN REAL PROPERTY AS OF THE TIME OF FILING OF THE PETITION, INCLUDING THAT WHICH MAY BE LATER EXEMPTED FROM THE BANKRUPTCY PROCEEDINGS.

Problem 1:	John Doe held three parcels of property by various tenancies: Blackacre by a tenancy by the entireties, Whiteacre by a joint tenancy, and Greenacre by a tenancy in common. Doe filed a petition in bankruptcy on or after October 1, 1979, and subsequently he and his various co-tenants attempted to convey Blackacre, Whiteacre, and Greenacre to Richard Roe. Doe was later granted a discharge and the proceeding was closed. Is Roe's title valid?
Answer:	No. Whether the bankruptcy proceedings are voluntary or involuntary, the filing of the bankruptcy petition creates an estate over which the trustee has dominion. Property held by the entireties by a debtor whose spouse does not also file a petition in bankruptcy will still become property of the estate until an exemption is established. Likewise, interests in tenancies in common or joint tenancies will become property of the estate until such property is exempted.
Problem 2:	Same facts as above, except that Doe also holds Blueacre as trustee for the benefit of Marvin Moe. What will happen to Blueacre upon the filing of the petition in bankruptcy?
Answer:	The estate will consist only of such right and title to the property as was possessed by the debtor. Generally, the estate will hold such property subject to the outstanding interest of the beneficiary.
Authorities & References:	Bankruptcy Code, 11 U.S.C. §§ 522, 541, 549 (2001); § 222.20, Fla. Stat. (2001); 4 COLLIER ON BANKRUPTCY 1522 (15th ed. 2001); 5 COLLIER ON BANKRUPTCY 1541, 1549 (15th ed. 2001); FUND TN 5.06.01.

Comment: Section 541(a) provides that the commencement of a bankruptcy case creates an estate and specifies what property shall comprise the estate. Essentially, the estate is composed of all legal or equitable interests of the debtor in property, wherever located, as of the time the case is filed. This estate includes all types of property, both tangible and intangible. In short, an important provision of § 541 is that all interests of the debtor in property as of the commencement of the case become the property of the estate. *See* § 541(a) (1).

Once the property comes into the estate, the debtor is permitted to exempt it in accordance with § 522 of the Code. Pursuant to § 522(b) (1), the State of Florida has opted to veto the federal statutory scheme of exemptions; therefore, Florida's state law exemptions control in Florida bankruptcy cases. 4 COLLIER ON BANKRUPTCY 1522.01 (15th ed. 2001); § 222.20, Fla. Stat. (2001). Nonetheless, under Bankruptcy Code, 11 U.S.C. § 522(b) the debtor must affirmatively claim any available exemption to release the property from the "estate." *See* 5 COLLIER ON BANKRUPTCY 1541.02 (15th ed. 2001). Moreover, any challenge to a claimed exemption must be timely filed or it is lost.

After commencement of the bankruptcy case, protection is afforded to a transferee of real property who obtains the property in good faith, without knowledge, and for a fair equivalent value. Bankruptcy Code, 11 U.S.C. § 549(c). A purchaser at a judicial sale also is protected against avoidance of the transfer by the trustee in bankruptcy. *See* 5 COLLIER ON BANKRUPTCY 1541 (15th ed. 2001). However, this protection does not exist if the trustee has recorded a copy or notice of the petition in the land records of the jurisdiction where the property is located. If a fair equivalent value is not paid, but some value is given, then a lien arises in favor of the transferee to the extent that some value was present. Bankruptcy Code, 11 U.S.C. § 549(c) (2001).

Some protection is afforded transferees of property from a debtor who is involved in involuntary bankruptcy proceedings. Bankruptcy Code, 11 U.S.C. § 549(b). This provision only applies to transferees who take during the period between commencement of the case and entry of the order of relief. Bankruptcy Code, 11 U.S.C. § 303. Such a transfer is validated only to the extent that value was given after commencement of the case under this section; however, knowledge of the bankruptcy proceedings is irrelevant. 5 COLLIER ON BANKRUPTCY 1549 (15th ed. 2001).

Note: An interest which the debtor acquires by bequest, devise, inheritance, or as a result of a property settlement or a divorce decree also becomes property of the estate if the interest is acquired within 180 days after the filing of the petition. Bankruptcy Code, 11 U.S.C. § 541(a) (5).

STANDARD 2.2

SALE, LEASE, OR USE OF DEBTOR'S REAL PROPERTY
BY DEBTOR OR TRUSTEE IN BANKRUPTCY

STANDARD: ON OR AFTER OCTOBER 1, 1979, EITHER THE DEBTOR IN POSSESSION OR THE TRUSTEE IN BANKRUPTCY CAN PROPERLY SELL, LEASE, OR USE THE REAL PROPERTY OF THE DEBTOR'S ESTATE PROVIDED THAT NOTICE AND OPPORTUNITY FOR A HEARING OF ANY SUCH SALE, LEASE, OR USE OF THE PROPERTY IN THE ESTATE (OTHER THAN IN THE ORDINARY COURSE OF BUSINESS) IS PROVIDED AS REQUIRED BY THE BANKRUPTCY CODE.

Problem l:	A trustee in bankruptcy in the bankruptcy proceedings of John Doe entered into a contract for the sale of Doe's nonexempt real property to Richard Roe. The sale was not in the ordinary course of business. Notice of the proposed sale was given to Doe's creditors, but no hearing was ever requested by a party in interest and no hearing was ever held on the matter. The sale was subsequently completed. Did valid title pass to Roe?
Answer:	Yes. Bankruptcy Code, 11 U.S.C. §§ 102(1) and 363(b) simply require notice and an opportunity for a hearing of any sale, lease, or use of property of the estate other than in the ordinary course of business. A court order is not required.
Problem 2:	Same facts as above, except that Doe, who is a debtor in possession, himself sells the property to Roe. Did valid title pass?
Answer:	Yes.
Authorities & References:	Bankruptcy Code, 11 U.S.C. §§ 102, 361, 363 (2001); 3 COLLIER ON BANKRUPTCY 1363 (15th ed. 2001); FUND TN 5.05.02.
Comment:	Bankruptcy Code, 11 U.S.C. § 363 defines the rights and powers of parties with interests in property of the estate. 3 COLLIER ON BANKRUPTCY 1363.01 (15th ed. 2001). Section 363(b) states that the trustee may, "after notice and a hearing," use, sell, or lease the property, "other than in the ordinary course of business." A court order is not required. Bankruptcy Code, 11 U.S.C. § 363(b) (1) (2001); 3 COLLIER ON BANKRUPTCY 1363.02[1] (15th ed. 2001). Bankruptcy Code, 11 U.S.C. § 102(1) defines "after notice and a hearing" as "after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances but authorizes an act without an actual hearing if notice is properly given and if such a hearing is not requested in a timely manner by a party in interest." Thus, the burden is shifted to interested parties to provide the request for a hearing and, should no such request be made, action may be taken without a hearing. 3 COLLIER ON BANKRUPTCY 1363.02 (15th ed. 2001). **NOTE: ADDITIONAL REQUIREMENTS EXIST UNDER Bankruptcy Code, 11 U.S.C. § 363(f) FOR SALES "FREE AND CLEAR" OF LIENS AND ENCUMBRANCES.**

The requirements of notice and a hearing should be considered to have been met if the public records of the appropriate county reflect the recordation of one of the following:

a. A certified copy of the bankruptcy court docket showing that no request for a hearing was made pursuant to the notice; or,

b. A certified copy of the notice filed in the bankruptcy court together with a certified copy of any court order entered after a request for a hearing.

Bankruptcy Code, 11 U.S.C. § 363(e) provides that at any time, on request of an entity with an interest in property which has been or is proposed to be used, sold, or leased, the court shall prohibit or condition such use, sale, or lease as necessary to provide adequate protection. Section 361 states that adequate protection may be provided by periodic cash payments to provide for the decrease in value, or by additional replacement security to compensate for the decrease in value, or by other relief which will result in "the indubitable equivalent of such entity's interest in such property." The requirement of adequate protection is mandatory. If the proposed use, sale, or lease cannot be so conditioned then it must be prohibited. *See* 3 COLLIER ON BANKRUPTCY 1363.05[2] (15th ed. 2001).

Section 363(h) permits the sale of any interest of a co-owner in property in which the debtor had, at the time of filing of the case, "an undivided interest as a tenant in common, joint tenant, or tenant by the entirety," provided that certain conditions specified in this section are met.

Purchasers are protected under § 363(m) from the effect of a "reversal or modification on appeal" from the authorization to sell as long as the purchaser acted in good faith. *See* 3 COLLIER ON BANKRUPTCY 1363.06 (15th ed. 2001). Notwithstanding the provisions of § 363(m), Bankruptcy Rule 6004(g) operates to stay an order authorizing the use, sale, or lease of property until the expiration of ten days after entry of the order, unless the court orders otherwise.

If the trustee or debtor in possession is operating a business, it may sell property in the ordinary course of business without notice and a hearing unless the court orders otherwise. Bankruptcy Code, 11 U.S.C. § 363(c) (l).

STANDARD 2.3

EFFECT OF BANKRUPTCY ON RIGHT TO FORECLOSE

STANDARD: ON OR AFTER OCTOBER 1, 1979, PRIOR RELIEF FROM THE BANKRUPTCY AUTOMATIC STAY IS NECESSARY FOR A VALID FORECLOSURE OF A MORTGAGE ENCUMBERING SUCH PROPERTY.

Problem:	John Doe, a mortgagor under a conventional mortgage, files a bankruptcy proceeding on or after October 1, 1979, at which time the subject mortgage is in default. The mortgagee desires to foreclose the mortgage without the approval of the bankruptcy court. May the mortgage foreclosure be commenced?
Answer:	No. The bankruptcy automatic stay extends to all of the property of the estate and all property of the debtor, regardless of whether it is located within the district in which the court sits.
Authorities & References:	Bankruptcy Code, 11 U.S.C. § 362 (2001); 3 COLLIER ON BANKRUPTCY 1362 (15th ed. 2001).
Comment:	The automatic stay, which arises upon the filing of a bankruptcy petition, stops all foreclosure actions. Code § 362(a). This automatic stay is broader than the stay in the previous Bankruptcy Act and includes a stay against a pending mortgage foreclosure in a liquidation bankruptcy which was not stayed under the old Bankruptcy Act. Section 362(b) provides a number of exceptions to this stay. A complete discussion may be found in 3 COLLIER ON BANKRUPTCY 1362.04 (15th ed. 2001). Section 362(e) provides that thirty days after a request for relief from the stay, the stay will be automatically vacated unless the court, after notice and a hearing, orders such stay continued in effect pending a final hearing. In addition, § 362(d) provides that, under certain circumstances, the stay may be terminated, annulled, modified, or conditioned upon request of a party in interest after notice and a hearing. If the court does not grant relief from the stay, it will remain in effect. Code § 362(c) (2) (2001). However, if the stay is vacated pursuant to § 362(e), no further court order is necessary to permit foreclosure unless the court order granting stay relief so specifies.

STANDARD 2.4

EFFECT OF TRUSTEE IN BANKRUPTCY
ABANDONING PROPERTY OF DEBTOR

STANDARD: AFTER NOTICE AND A HEARING, THE TRUSTEE MAY ABANDON PROPERTY OF THE ESTATE WHICH IS BURDENSOME OR OF INCONSEQUENTIAL VALUE.

Problem:	After authorization by the bankruptcy court, a trustee in bankruptcy abandoned Blackacre, which was property of the estate. The property was abandoned to John Doe, the debtor, because of his possessory interest in the property. May Doe convey valid title to Blackacre to Richard Roe?
Answer:	Yes.
Authorities & References:	Bankruptcy Code, 11 U.S.C. §§ 350, 521, 554 (2001); ATIF TN 5.01.01.
Comment:	Section 554 of the Bankruptcy Code provides that after notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate; similarly, upon request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any such property of the estate. Code § 554(c) provides that in the absence of a court order to the contrary, any property scheduled under § 521(1) and not otherwise administered at the time of closing of a case is deemed abandoned to the debtor and deemed administered for the purpose of § 350. Section 554(d) provides that unless the court orders otherwise, property of the estate that is not abandoned and that is not administered in the case remains property of the estate. This subsection recognizes that abandonment requires notice and that there can be no abandonment by mere operation of law of property which is not listed in the debtor's schedules or otherwise disclosed to the creditors, and that such property will remain property of the estate. The unscheduled and unadministered asset remains property of the estate and the estate must be reopened and the property abandoned, sold, or exempted in order to remove it from the estate**.** **But Note**: If a lender desires to proceed against property that has been abandoned to the debtor before the debtor receives a discharge, the lender should obtain relief from the automatic stay, because the stay relates to property of the debtor as well as to property of the estate. The notice and hearing discussed above have the same construction as discussed in Title Standard 2.2 (Sale, lease, or use of debtor's real property by debtor or trustee in bankruptcy). If these requirements are met, the abandonment takes place and vests title to the abandoned property in the transferee, regardless of whether the transferee receives a deed.

STANDARD 2.5

EFFECT OF JUDGMENT DISCHARGED IN BANKRUPTCY
ON TITLE TO AFTER-ACQUIRED PROPERTY

STANDARD: A JUDGMENT LIEN ACQUIRED BEFORE BANKRUPTCY THAT IS SUBSEQUENTLY DISCHARGED IN BANKRUPTCY AND IS NOT SUBJECT TO EXCEPTIONS TO DISCHARGE IN BANKRUPTCY WILL NOT BECOME A LIEN ON PROPERTY ACQUIRED AFTER DISCHARGE.

Problem:	A judgment upon claims not subject to exceptions to discharge in bankruptcy was entered against John Doe on August 1, 1998, and a certified copy was recorded so as to constitute a lien on real property. Doe filed a petition in bankruptcy on January 4, 1999, properly scheduling the judgment, and subsequently received a discharge in the bankruptcy proceeding. Before one year following discharge had elapsed, Doe acquired a parcel of real property. Does the lien of the judgment attach to this after-acquired property?
Answer:	No. The judgment, properly discharged in the bankruptcy proceeding, does not become a lien against property thereafter acquired by the debtor. The judgment is not a lien against the after-acquired property, and no petition pursuant to F.S. §55.145 (200I) is necessary.
Authorities & References:	*Albritton v. General Portland Cement Co.*, 344 So. 2d 574 (Fla. 1977); Bankruptcy Code, 11 U.S.C. §§ 350, 523, 524, 541 (2001); F.S. § 55.145 (2001); 5 COLLIER ON BANKRUPTCY 1524, 1522 (15th ed. 2001); ATIF TN 5.03.02.
Comment:	Section 524(a) of the Bankruptcy Code provides that a discharge as to claims not subject to exceptions to discharge in bankruptcy is completely effective and will operate as an injunction against the commencement of any action or any act to collect a debt as a personal liability of the debtor. Section 524(a) (3) specifically operates as an injunction against the commencement of an action to collect against any property of the debtor that is acquired after filing the bankruptcy petition. A creditor, including a judicial lien creditor, could not levy upon property acquired by the debtor after the filing of the bankruptcy petition. After the discharge in bankruptcy, no enforceable judgment exists against the person of the debtor. Code § 554(a) (2001). As there is no actual cloud on title to the after-acquired property following discharge in bankruptcy, no action pursuant to F.S § *55*.145 (2001) is necessary. It is recommended that marketable title be reflected in the official records of the county in which the property is located. Therefore, certified copies of the petition in bankruptcy, the schedule of liabilities showing the judgment, and the order of discharge preferably should be recorded in that county. **Note**: **Judgment liens against property owned by the debtor prior to bankruptcy proceedings are not covered by this Title Standard. Generally, the judgment lien continues to attach to property that was owned by the debtor before bankruptcy, even though the debtor has been personally discharged from the debt.**

CHAPTER 3

CONVEYANCES

STANDARD 3.1

CONVEYANCES TO AN UNINCORPORATED VOLUNTARY ASSOCIATION

STANDARD: A CONVEYANCE TO AN UNINCORPORATED VOLUNTARY ASSOCIATION DOES NOT OPERATE TO VEST LEGAL TITLE IN SUCH ASSOCIATION, UNLESS SPECIFICALLY AUTHORIZED BY STATUTE.

Problem:	Blackacre was conveyed to Wild Life Hunting and Fishing Association, an unincorporated voluntary association. Later, Blackacre was conveyed by this association by its president and secretary to John Doe. Did Doe acquire marketable title to Blackacre?
Answer:	No.
Authorities & References:	*Reid v. Barry*, 93 Fla. 849, 112 So. 846 (1927) (unincorporated religious society); *Daniels v. Berry*, 513 So. 2d 250 (Fla. 5th DCA 1987) (unincorporated civic association); *Escambia Properties, Inc., v. Largue*, 260 So. 2d 213 (Fla. 1st DCA 1972) (corporation formed after acquisition of title); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 10.02 (2002); FUND TN 6.01.02 B. (unincorporated church); FUND TN 10.04.05 (legal existence of parties to conveyance); FUND TN 10.04.09 (unincorporated labor unions); FUND TN 11.01.05 (conveyance to corporation prior to incorporation).
Comment:	Though most unincorporated associations are not legal entities capable of acquiring or conveying real estate, there are some exceptions. If a business trust is a legal entity for purposes of holding title under the laws of the country or state where it was formed, then it would be considered a legal entity with the same powers and abilities in Florida. *See* FUND TN 31.01.01. Partnerships and joint ventures under Ch. 620, Fla. Stat., are other types of unincorporated associations capable of acquiring or conveying title. *See* Title Standards, Chapter 19 (Partnerships). With respect to conveyances to partnerships, see Title Standards, Chapter 19 (Partnerships).

STANDARD 3.1-1

CONVEYANCES TO AND BY
TRUSTEES OF UNINCORPORATED CHURCHES

STANDARD: EVERY DEED OR OTHER INSTRUMENT TRANSFERRING REAL PROPERTY TO NAMED OR UNNAMED TRUSTEES OF A NAMED UNINCORPORATED CHURCH VESTS TITLE TO THE PROPERTY IN THE TRUSTEES OF THE UNINCORPORATED CHURCH AND THEIR SUCCESSORS WITH FULL POWER AND AUTHORITY TO CONVEY AND MORTGAGE THE PROPERTY TRANSFERRED.

Problem:	The deed to Blackacre transfers the property to "the trustees of United Kingdom Church." United Kingdom Church is an unincorporated church. May the trustees of United Kingdom Church convey the property to John Doe?
Answer:	Yes. If the deed transfers the property to named or unnamed trustees of a named unincorporated church, the trustees have full authority to convey or mortgage the property.
Authorities & References:	§ 692.101, Fla. Stat. (2001); 45 Fla. Jur. 2d *Religious Societies* § 9 (2002); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 10.10 (2002); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 3.70 (Fla. Bar CLE 4th ed. 1996); FUND TN 6.03.01.
Comment:	The pastor, secretary, or other authorized administrative personnel of an unincorporated church may execute an affidavit stating the names of the trustees of the unincorporated church as of the date stated in the affidavit. Such an affidavit is conclusive as to the facts stated therein as to purchasers and mortgagees without notice. All deeds and mortgages executed by the trustees of an unincorporated church and recorded in the public records of the county where the real property is located prior to the effective date of the statute, May 21, 1986, are good and valid if they were not contested by suit commenced within two years after the effective date of the act.

STANDARD 3.2

DEED PURPORTING TO CORRECT PREVIOUS EFFECTIVE DEED

STANDARD: A GRANTOR WHO HAS CONVEYED LAND BY AN EFFECTIVE AND UNAMBIGUOUS DEED CANNOT AVOID THE EFFECT OF SUCH CONVEYANCE BY EXECUTING A NEW DEED MAKING A CHANGE IN THE CONVEYANCE, EVEN THOUGH THE LATTER DEED PURPORTS TO CORRECT OR MODIFY THE FORMER.

Problem:	John Doe, the record owner of Blackacre, conveyed the west half of Blackacre to Richard Roe. Doe later conveyed the east half of Blackacre to Roe by a deed containing a recital that it was executed to correct an erroneous description in the previous deed. Doe then executed a deed of the west half of Blackacre to Simon Grant. Did Grant acquire *marketable* title to the west half of Blackacre?
Answer:	No. The later conveyance from Doe to Roe of the east half of Blackacre did not nullify the former conveyance of the west half of Blackacre. It is necessary for Simon Grant to obtain a conveyance from Roe.
Authorities & References:	*Kirkpatrick v. Ault*, 177 Kan. 552, 280 P.2d 637 (1955); *Hilterbrand v. Carter*, 27 P.3d 1086 (Or. Ct. App. 2001); 26A C.J.S. *Deeds* §§ 31, 174 (2001); FUND TN 10.03.03.
Comment:	The Standard is designed to point out that marketability of title cannot be achieved by the apparent unilateral action of the grantor. Where the rights of third parties are not involved, the grantee's acceptance of the corrective deed may nullify the effect of the prior deed, as between the parties.

STANDARD 3.3

AFFIDAVIT

STANDARD: WHENEVER POSSIBLE AND IN CONFORMITY WITH STANDARDS PROMULGATED HERE, THE EXAMINER SHOULD ACCEPT AND RELY ON AN AFFIDAVIT WHICH STATES SUFFICIENT FACTS TO NEGATE A POSSIBLE DEFECT IN AN OTHERWISE MARKETABLE TITLE.

Problem 1: Blackacre was conveyed to John Doe. Later a conveyance appears from J. Doe. May an affidavit that grantee and grantor are one and the same person be accepted as true?

Answer: Yes.

Problem 2: Blackacre was conveyed to John Doe. A judgment appears against J. Doe. May an affidavit to the effect that J. Doe and John Doe are not the same person be accepted?

Answer: Yes.

Problem 3: Blackacre was owned by John Doe and Jane Doe, his wife, as an estate by the entireties. There is a conveyance by Jane Doe, a widow, and a death certificate of J. Doe appears of record. May an affidavit be accepted that J. Doe and John Doe are one and the same person?

Answer: Yes.

Problem 4: Blackacre was conveyed to Simon Grant. Simon Grant then conveyed to John Doe. There was no recitation of the marital status of Simon Grant on the deed of conveyance. Should an affidavit from a person with knowledge of the facts, stating that Simon Grant was a single man at the time of the conveyance, be accepted?

Answer: Yes.

Authorities & References: *Felt v. Morse*, 80 Fla. 154, 85 So. 656 (1920); ; Annot., 7 A.L.R. 1166, 1171 (1920); BASYE, CLEARING LAND TITLES §§31-45 (2d ed. 1970); I FLORIDA REAL PROPERTY PRACTICE §9.31 (CLE 2d ed. 1971); ATIF TN 10.04.07, 18.02.01, 20.02.05.

Comment: With respect to continuous marriage affidavits, see Title Standard 6.6.

STANDARD 3.4

ACKNOWLEDGMENT − NECESSITY FOR SEAL
(FLORIDA AND FOREIGN COUNTRIES)

STANDARD: A CERTIFICATE OF ACKNOWLEDGMENT, MADE IN FLORIDA OR IN A FOREIGN COUNTRY, TO BE VALID AND ENTITLE THE INSTRUMENT TO WHICH IT IS APPENDED TO BE RECORDED MUST HAVE THE OFFICER'S SEAL AFFIXED.

Problem 1: A certificate of acknowledgment attached to a deed was duly signed by a Florida notary (or other authorized official), but his seal was not affixed. The clerk accepted the deed for recordation. Was the recordation effective?

Answer: No.

Problem 2: Same facts as in Problem 1 except that the Florida notary had obtained and attached a certificate of notarial authority from the Secretary of State, as provided in F.S. 117.03. The clerk overlooked the omission of the notary's seal and recorded the deed. Was the recordation valid and effective?

Answer: No.

Problem 3: A certificate of acknowledgment attached to a deed was duly signed by a notary of a foreign country having a seal, or by an authorized officer of the United States, but no seal was affixed. The clerk accepted the deed for recordation. Was the recordation valid and effective?

Answer: No.

Authorities & References: *F.S.* 695.03(1), (3) (2002); *Norris v. Billingsley*, 48 Fla. 102, 37 So. 564 (1904); *Florida Nat'l Bank & Trust Co. v. Hickey*, 263 So.2d 269 (3d D.C.A. Fla. 1972); ATIF TN 1.02.07, 1.04.02.

Comment: A certificate evidencing the authority of an officer to act is not a substitute for the positive statutory requirement of a seal in executing an acknowledgment certificate.

But see *James v. Gollnick*, 100 Fla. 829, 130 So. 450 (1930) (the lack of a notary's seal may be cured seven years after recordation by *F.S.* 694.08). See also, *F.S.* 95.231 (2002); ATIF TN 1.02.07.

Exceptions to this Standard are those acknowledgments of members of the Armed Forces and their spouses taken in accordance with *F.S.* 695.031 (2002). Spouses were not included prior to May 2, 1957. Also, under the Uniform Electronic Signature Act, neither a rubber stamp nor an impression seal is required for an electronic notarization. *F.S.* 668.50(11)(a) (2002); ATIF TN 1.02.07.

Effective January 1, 1992, a Florida notary's seal must be a rubber stamp. *F.S.* 117.05(3)(a) (2002); ATIF TN 1.02.07. From 1973 to 1992, the seal may be of the rubber stamp or impression type. See ATIF TN 1.02.07.

STANDARD 3.5

ACKNOWLEDGMENT -- NECESSITY FOR SEAL (OUT OF STATE)

STANDARD: A CERTIFICATE OF ACKNOWLEDGMENT MADE OUT OF FLORIDA BUT IN THE UNITED STATES, TO BE VALID AND ENTITLE THE INSTRUMENT TO WHICH IT IS APPENDED TO BE RECORDED, MUST BE UNDER THE SEAL OF THE OFFICER OR COURT OF THE OFFICIAL AUTHORIZED BY FLORIDA LAW, UNLESS THE ACKNOWLEDGMENT IS MADE BEFORE A NOTARY PUBLIC WHO DOES NOT AFFIX A SEAL, IN WHICH CASE IT IS SUFFICIENT IF THE NOTARY PUBLIC TYPES, PRINTS, OR WRITES BY HAND ON THE INSTRUMENT, "I AM A NOTARY PUBLIC OF THE STATE OF (STATE), AND MY COMMISSION EXPIRES ON (DATE)".

Problem: A certificate of acknowledgment attached to a deed dated in 1991 was duly signed by a South Dakota notary who did not affix a seal. However, the instrument included the statement, "I am a notary public of the state of South Dakota, and my commission expires on July 1, 1992." The clerk accepted the deed for recordation. Was the recordation valid and effective?

Answer: Yes.

Authorities & References: *F.S.* 695.03(2) (2002); ATIF TN 1.04.01.

Comment: See Comment, Title Standards 3.4 (Acknowledgment -- Necessity For Seal (Florida and Foreign Countries).

The following are the officers before whom an acknowledgment or proof may be made in another state: a civil law notary of this state; a judge or clerk of any court of the United States or of any state, territory, or district; a United States commissioner or magistrate; a notary public, justice of the peace, master in chancery, or registrar or recorder of deeds of any state, territory, or district having a seal. For all officers except notaries public, the acknowledgment or proof must be under the seal of the officer or court, as the case may be. Effective October 1, 1980, *F.S.* 695.03 (2) was amended to provide that if the acknowledgment or proof is made before a notary public who does not affix a seal, it is sufficient for the notary public to type, print, or write by hand on the instrument, "I am a Notary Public of the State of (state), and my commission expires on (date)." *F.S.* 695.03 (2).

STANDARD 3.6

ERRONEOUS, INCONSISTENT OR OMITTED DATE

STANDARD: THE FACT THAT AN INSTRUMENT SUCH AS A DEED OR MORTGAGE IS UNDATED, BEARS A DATE DIFFERENT FROM THE DATE OF THE ACKNOWLEDGMENT, OR BEARS AN IMPOSSIBLE DATE, DOES NOT AFFECT THE VALIDITY OF THE INSTRUMENT AS A MUNIMENT OF TITLE.

Problem 1: Doe's deed to Blackacre conveying it to Roe is dated June 1, 1998. The acknowledgment is dated May 31, 1998. Is Roe's title marketable?

Answer: Yes.

Problem 2: A deed to Blackacre from Doe to Roe bears no date but is otherwise regular. Is Roe's title marketable?

Answer: Yes.

Problem 3: A deed to Blackacre from Doe to Roe is dated April 31, 1998, an impossible date. The acknowledgment is dated April 20, 1998. Is Roe's title marketable?

Answer: Yes.

Authorities & References: *Douglas v. Tax Equities, Inc.*, 144 Fla. 791, 797, 198 So. 5, 8, *rehearing denied*, 144 Fla. 801, 198 So. 578 (1940); *Moody v. Hamilton*, 22 Fla. 298 (1886); *Henry v. First Indiana Bank,* 200 B.R. 59 (Bkrtcy. M.D. 1996); 26A C.J.S. *Deeds* §38 (2002); 19 Fla. Jur.2d *Deeds* Sec. 19 (2003);Game, *Examination of Abstracts*, 6 U.FLA.L.REV. 77, 80 (1953); ATIF TN 1.02.02.

STANDARD 3.7

AFTER ACQUIRED TITLE

STANDARD: A WARRANTY DEED AUTOMATICALLY CONVEYS AFTER ACQUIRED TITLE TO THE GRANTEE.

Problem 1: In 2010, before receiving title to Blackacre, John Doe gave a warranty deed to Joe Roe conveying Blackacre. In 2012, Simon Grant conveyed Blackacre to John Doe. Does Joe Roe have marketable title to Blackacre?

Answer: Yes. John Doe's after acquired title automatically passed through to Joe Roe by operation of law. The best practice would be to re-record a copy of the deed from John Doe to Joe Roe after the deed from Simon Grant is of record to ensure that it appears in the chain of title.

Authorities & References: *Nottingham v. Denison*, 63 So. 2d 269 (Fla. 1953) (warranty deed conveys after acquired title).

Comment: A deed even without warranties of title may convey after acquired title. *See, Tucker v. Cole*, 3 So. 2d 875 (Fla.1941); *Daniell v. Sherrill*, 48 So. 2d 736 (Fla. 1950) (When a person conveys land in which he has no interest at the time, but afterwards acquires title, he is estopped to deny the conveyance).

On the other hand, a quit claim deed does not convey after acquired title as the quit claim deed conveys only whatever title the grantor holds at the time of the conveyance. *Goldtrap v. Bryan*, 77 So. 2d 446 (Fla. 1955); *June Sand Co. v. Devon Corporation*, 23 So. 2d 621 (Fla. 1945).

The practitioner should re-record the prior deed so that it is within the chain of title.

The title of a mortgagor acquired after the execution of a mortgage may inure to the benefit of the mortgagee if the mortgage contains warranties of title. See, *Hillman v. McCutchen*, 166 So. 2d 611 (Fla. 3d DCA), cert. denied, 171 So.2d 391 (Fla. 1964) ("where a mortgage contains a full covenant of warranty of title, then any title acquired by the mortgagor after execution of the mortgage inures to the benefit of the mortgagee**")** However, a mortgage executed and recorded before a mortgagor acquires title to the property will not be in its chain of title. Therefore, it may not impart constructive notice to bona fide purchasers and encumbrancers and may not be superior to their subsequently recorded interests.

STANDARD 3.8

CONVEYANCE WITHOUT CONSIDERATION

STANDARD: CONSIDERATION IS NOT NECESSARY FOR A VALID CONVEYANCE OF REAL PROPERTY.

Problem 1: John Doe conveyed Blackacre as a gift to Richard Roe. Is Richard Roe's title marketable?

Answer: Yes, in the absence of evidence of inequitable conduct by Roe.

Problem 2: John Doe conveyed Blackacre as a gift to his local college. Is the college's title marketable?

Answer: Yes.

Authorities & References: F.S. 689.01; 689.03; 689.09; *Chase Federal Sav. and Loan Ass'n v. Schreiber*, 479 So.2d 90 (Fla. 1985) (consideration unnecessary for a conveyance of land.); FUND TN 10.03.08.

Comment: Chapter 689's requirements for a valid conveyance of real property do not include the receipt of consideration, and thereby significantly limited the prior common law requirements for the receipt of consideration. *Chase v. Schreiber* held that an owner of real property may convey it without consideration to any person the grantor chooses, regardless of family or marital relationship. According to the Court in *Chase v. Schreiber*, the "role of consideration in land conveyancing has been reduced to a mere matter of form except when courts choose to rely on the lack of consideration as a reason to intervene when something fraudulent or inequitable has taken place." *Id.* at 99. With respect to such exception, a court may rescind a deed for failure of consideration where consideration is demonstrably intended by the parties as part of the transaction such as where the grantee obtained the conveyance through fraud, misrepresentation or undue influence. *Id.* at 102

Note, however, that prior to January 7, 1969, homestead property could be alienated only in a bona fide transaction based upon a valuable consideration. *See*, Archived Title Standard 18.2. It should be noted, however, that a recipient of an executed and delivered deed for no consideration is not entitled to protection under section 695.01, Florida Statutes, which protects subsequent purchasers for valuable consideration against unrecorded interests. *Chase v. Schreiber*, at 101, 102.

A conveyance as a gift to a charitable institution is valid. *Montgomery v. Carlton*, 126 So. 135, at 140 (Fla. 1930) (property donated to charity in which the title is vested absolutely and with no conditions vests absolute title into the charity).

STANDARD 3.9

CERTAIN DEFECTS IN DEEDS CURED

STANDARD: A DEFECTIVE ACKNOWLEDGEMENT OR A LACK OF A SEAL OR WITNESSES IN A CONVEYANCE OF REAL PROPERTY MAY BE CURED AFTER THE STATUTORY PERIOD HAS RUN.

Problem 1: A deed recorded in 2007 from John Doe to Richard Roe lacked two witnesses. May the deed be treated as an effective conveyance in 2013?

Answer: Yes. The defect was cured after being recorded five years pursuant to F.S. 95.231.

Problem 2: A deed recorded in 2005 from John Doe, as Trustee for the John and Jane Doe Trust, to Richard Roe lacked two witnesses. May the deed be treated as an effective conveyance in 2013?

Answer: Yes. The defect was cured after being recorded seven years pursuant to F.S. 694.08.

Problem 3: A 2007 deed from John Doe to Richard Roe contained an acknowledgment which misspelled the name of the grantor, did not specify whether the grantor was personally known to the notary or produced a driver license or other personal identification, did not have the notary's printed name under the notary's signature, and lacked a notary seal. May the deed be treated as an effective conveyance in 2013?

Answer: Yes. The defect was cured after being recorded five years pursuant to F.S. 95.231.

Problem 4: A 2007 deed from John Doe and Richard Roe to Simon Grant contained an acknowledgement which acknowledged John Doe's signature but not Richard Roe's. May the deed be treated as an effective conveyance by Richard Roe in 2013?

Answer: No. The applicable curative statutes may cure a defective acknowledgement but not a missing acknowledgement.

Problem 5: A 2007 deed from John Doe to Richard Roe lacked two witnesses. In 2011, John Doe conveyed the same property to Thomas Frank in a deed with no defects. Does Richard Roe have marketable title in 2013?

Answer: No. Although in the absence of fraud, adverse possession, or pending litigation, F.S. 95.231 may have cured the earlier deed's technical defect, the statute is not retroactive, taking effect only after the five year

period.The later deed created a competing interest, resulting in a cloud on title as to both interests.

Authorities & References: F.S. 95.231; F.S. 694.08; ATIF TN 1.03.01

Comment: Where the grantor has conveyed in his individual capacity, F.S. 95.231 cures the lack of a seal or witnesses, or a defective acknowledgement, after five years from date of recording, in the absence of fraud, adverse possession or pending litigation. Where the grantor conveyed in an official or representative capacity, such as an attorney in fact, trustee or corporate officer, F.S. 95.231 may not apply. However, F.S. 694.08 cures the same defects after seven years from date of recording where the defective deed was executed in an official or representative capacity and where the grantee, in a subsequently recorded deed, conveyed with evident intent to do so.

Although F.S. 95.231 and F.S. 694.08 may cure a defective acknowledgement, neither will cure a total lack of acknowledgement of the signature of a grantor. *Sanders v. Pepoon*, 4 Fla. 465, at 471 (1852); FUND TN 1.05.01; FUND TN 1.03.01. However, the title examiner may resort to a review of the whole instrument to determine the sufficiency of the acknowledgement. *Edenfield v. Wingard*, 89 So.2d 776 (Fla. 1956); FUND TN 1.02.06

See Standards 3.4 and 3.5 concerning the necessity that acknowledgements include the seal of the notary or other authorized official.

An instrument signed by one or more persons not named in the granting clause is insufficient. *Heath v. First National Bank in Milton*, 213 So.2d 883 (Fla. 1st DCA 1968); Likewise, a deed which omits the name of a grantee is inoperative as a conveyance. *Myers v. Francis*, 548 So.2d 833 (Fla. 3d DCA 1989); FUND TN 10.04.03.

CHAPTER 4

CORPORATIONS AND LIMITED LIABILITY COMPANIES

STANDARD 4.1

ACKNOWLEDGMENT OF CORPORATE INSTRUMENTS

STANDARD: AN INSTRUMENT OF A CORPORATION IS ENTITLED TO BE RECORDED WHEN EXECUTED BY THE PROPER OFFICER(S) WHOSE CAPACITY IS RECITED IN THE INSTRUMENT, BUT NOT IN THE ACKNOWLEDGMENT.

Problem: A corporate deed is executed by John Doe as President. His office is set out under his signature, but the acknowledgment merely recites:

"The foregoing instrument was acknowledged before me this ___ day of _____, (year), by John Doe."
(Signature of Notary Public—State of Florida)
(Print, Type or Stamp Commissioned Name of Notary Public)
Personally Known ___OR Produced Identification ___.
Type of Identification Produced _____.

Is the acknowledgment sufficient for the instrument to be recorded?

Answer: Yes.

Authorities & References: F.S. 695.03 (2017); *House of Lyons, Inc. v. Marcus*, 72 So. 2d 34 (Fla. 1954); *see also Edenfield v. Wingard*, 89 So. 2d 776 (Fla. 1956); *Florida Nat'l Bank & Trust Co. v. Hickey*, 263 So. 2d 269 (Fla. 3d DCA 1972); *Mills v. Barker*, 664 So. 2d 1054 (Fla. 2d DCA 1995); F.S. 117.05 (2017); FUND TN 1.02.06.

Comment: Florida favors a liberal policy of upholding certificates of acknowledgment. As long as substantial compliance with the recording requirements is available from the instrument as a whole, obvious clerical errors and technical omissions will be disregarded and not allowed to defeat the acknowledgment.

STANDARD 4.2

PRIOR CONVEYANCE OF ALL OR SUBSTANTIALLY ALL
PROPERTY AND ASSETS OF A CORPORATION

STANDARD: UNLESS THE OFFICIAL RECORDS SHOW THAT A CORPORATE DEED IN THE CHAIN OF TITLE CONSTITUTED A CONVEYANCE OF ALL OR SUBSTANTIALLY ALL OF THE PROPERTY AND ASSETS OF THE CORPORATION, A PRACTITIONER MAY ASSUME THAT THE TRANSACTION DID NOT REQUIRE AUTHORIZATION BY A MAJORITY OF THE SHAREHOLDERS FOR A SALE OF ALL OR SUBSTANTIALLY ALL OF THE CORPORATE PROPERTY AND ASSETS.

Problem 1: Appearing in the chain of title is a properly executed deed of a corporation conveying one or more parcels of land. Nothing in the official records shows that the property conveyed constituted all or substantially all of the property and assets of the corporation. Must a practitioner make independent inquiry as to whether the conveyance was a conveyance of all or substantially all of the property and assets of the corporation and whether the corporation had the authorization of a majority of the shareholders to make the sale?

Answer: No.

Problem 2: The deed of the corporation recites, or the official records show, that the deed was a conveyance of all or substantially all of the property and assets of the corporation. Must the practitioner make an independent inquiry as to whether the corporation had the authorization of a majority of the shareholders?

Answer: Yes. However, if the conveyance was made on or after July 1, 1990, the effective date of F.S. 607.1201, shareholder approval is not necessary for conveyances of all or substantially all of the property and assets of the corporation, when such conveyances are made in the usual and regular course of business, unless the corporation's articles of incorporation require otherwise.

Authorities & References: F.S. 607.1201 (2017); F.S. 607.1202 (2017); FUND TN 11.01.01.

Comment: In 1990, the Florida Legislature repealed F.S. 607.241 (1989), which required shareholder authorization for a conveyance of all, or substantially all, of the property and assets of a corporation. The Florida Business Corporation Act now provides that a corporation may dispose of all, or substantially all, of its property in the usual and regular course of business without shareholder authorization unless the articles of incorporation provide otherwise. F.S. 607.1201 (2017). However, if the disposition of property is not in the usual and regular course of business, the corporation's board of directors must obtain shareholder authorization for the disposition. F.S. 607.1202 (2017).

A disposition of corporate assets may be considered a sale of "substantially all" of those assets if the sale substantially limits the corporation's business or serves to destroy the fundamental purpose for which the corporation was organized. *Schwadel v. Uchitel*, 455 So. 2d 401 (Fla. 3d DCA 1984); *see also South End Improvement Group, Inc. v. Mulliken*, 602 So. 2d 1327 (Fla. 4th DCA 1992) (the test is whether the disposition's quantitative or qualitative impact, or both, would fundamentally change the nature of the corporation); *BSF Co. v. Philadelphia Nat'l Bank*, 204 A.2d 746 (Del.

1964); *National Bank of Commerce v. United States*, 158 F. Supp. 887 (E.D. Va. 1958); *Union-May-Stern Co. v. Industrial Commission of Missouri*, 273 S.W.2d 766 (Mo. Ct. App. 1954); FLORIDA CORPORATE PRACTICE §10.46 (Fla. Bar CLE 8th ed. 2015).

Effective July 1, 1991, as to corporations not for profit, the applicable statutes are F.S. 617.1201 and .1202; *see also Lensa Corp.v. Poinciana Gardens Ass'n*, 765 So. 2d 296 (Fla. 4th DCA 2000).

When taking a deed or other instrument transferring title to real property, consideration must be given to Title Standard 4.2-1.

STANDARD 4.2-1

CURRENT CONVEYANCE OF ALL OR SUBSTANTIALLY ALL
PROPERTY AND ASSETS OF A CORPORATION

STANDARD: A CURRENT CONVEYANCE OF ALL OR SUBSTANTIALLY ALL OF THE PROPERTY AND ASSETS OF A CORPORATION, WITHOUT SHAREHOLDER APPROVAL, CONVEYS MARKETABLE TITLE IF (I) IT IS IN THE USUAL AND REGULAR COURSE OF BUSINESS AND (II) THE CORPORATION'S ARTICLES OF INCORPORATION DO NOT REQUIRE SUCH APPROVAL.

Problem 1: ABC Real Estate Corporation, in the business of selling real estate, is conveying Blackacre to John Doe. Blackacre constitutes all or substantially all of the property and assets of the corporation. Should the practitioner review the articles of incorporation to determine if shareholder approval is required?

Answer: Yes.

Problem 2: Same facts as above, but ABC Corporation is in the business of manufacturing. Should the practitioner require evidence of shareholder approval?

Answer: Yes.

Problem 3: Same facts as Problem 2, except that Blackacre does not constitute all or substantially all of the property and assets of the corporation. Should the practitioner require evidence of shareholder approval?

Answer: No.

Authorities & References: F.S. 607.1201 (2017); F.S. 607.1202 (2017); F.S. 692.01 (2017); FLORIDA CORPORATE PRACTICE §10.46 (Fla. Bar CLE 8th ed. 2017); FUND TN 11.01.01.

Comment: This standard applies only to what a practitioner should do in connection with a corporate conveyance being made in a current transaction. Reference should be made to Title Standard 4.2 to determine what a practitioner may justifiably infer when the corporate conveyance has already become a part of the chain of title.

F.S. 607.1201 (2017) does not require majority shareholder authorization of a disposition of all, or substantially all, of the property and assets of a corporation which is in the usual and regular course of business unless authorization is required by the corporation's articles of incorporation. The requirement of majority shareholder authorization does not apply in the case of a mortgage on any or all of the corporate property and assets, whether or not in the usual and regular course of business, unless the articles of incorporation provide otherwise. F.S. 607.1201 (2017).

A conveyance that is in the usual and regular course of business does not require majority shareholder authorization. However, majority shareholder authorization is required for any disposition of all, or substantially all, of the property and assets of a corporation not in the usual and regular course of business. F.S. 607.1202 (2017). The articles of incorporation or the board of directors may require a greater vote than a majority of shareholders, or authorization by a particular voting group. Evidence of shareholder authorization may, among other possibilities, take the form of minutes of the shareholders' meeting at which authorization was given.

As a precautionary note, “usual and regular course of business” could be interpreted differently by various courts, and a conveyance of all of substantially all of the corporation’s assets may or may not be considered in the ordinary course of business. In situations where there is doubt, always seek a corporate resolution from the corporation indicating that a majority of the shareholders have authorized the conveyance.

The practitioner should bear in mind that additional limitations on corporate conveyances may exist in the articles of incorporation or bylaws. A careful practitioner should consider asking the corporation for a copy of the articles of incorporation and bylaws if the practitioner is unsure whether the conveyance will require the authorization of more than a majority of the shareholders.

Effective July 1, 1991, as to corporations not for profit, the applicable statutes are F.S. 617.1201 and .1202; *see also Lensa Corp.v. Poinciana Gardens Ass’n*, 765 So. 2d 296 (Fla. 4th DCA 2000).

In situations where the facts are not readily discernible from an examination of the land records, the prudent practitioner may want to document on the face of the deed, in affidavits, resolutions or other documents filed in the land records, whether the transaction is a sale of all or substantially all of the assets of the corporation, and if so whether it was authorized by the majority of the shareholders or a sale within the ordinary course of business.

STANDARD 4.3

CONVEYANCE BY CORPORATIONS

STANDARD: A CORPORATION MAY CONVEY ITS LAND EITHER BY AN INSTRUMENT IN WRITING SIGNED IN ITS NAME BY AN AUTHORIZED AGENT IN THE PRESENCE OF TWO SUBSCRIBING WITNESSES, OR BY AN INSTRUMENT SEALED WITH THE COMMON OR CORPORATE SEAL AND SIGNED IN ITS NAME BY ITS PRESIDENT OR ANY VICE-PRESIDENT OR CHIEF EXECUTIVE OFFICER.

Problem 1: ABC Corporation conveyed Blackacre by deed executed by its President in the presence of two subscribing witnesses. The deed contained no corporate seal. Is the conveyance valid?

Answer: Yes.

Problem 2: ABC Corporation conveyed Blackacre by deed executed by its Secretary in the presence of two subscribing witnesses. There was no authorizing resolution from the board of directors. Is the conveyance valid?

Answer: No.

Problem 3: ABC Corporation conveyed Blackacre by deed sealed with the corporate seal and executed by its president. There were no subscribing witnesses. Is the conveyance valid?

Answer: Yes.

Authorities & References: F.S. 689.01 (2017); F.S. 692.01 (2017); F.S. 692.02 (2017); *Ocean Bank v. Inv-Uni Inv. Corp.*, 599 So. 2d 694 (Fla. 3d DCA 1992); *Adams v. Whittle*, 135 So. 152 (Fla. 1931); *Douglass v. State Bank of Orlando*, 82 So. 593 (Fla. 1919); *Campbell v. McLaurin Inv. Co.*, 77 So. 277 (Fla. 1917); *Norman v. Beekman*, 50 So. 876 (Fla. 1909); *Snead v. U.S. Trucking Corp.*, 380 So. 2d 1075 (Fla. 1st DCA 1980) *rev. denied* 389 So. 2d 1116 (Fla. 1980); *Prezioso v. Cameron*, 559 So. 2d 423 (Fla. 4th DCA 1990); *Skyline Outdoor Commc'ns, Inc. v. James*, 903 So. 2d 997 (Fla. 1st DCA 2009); *See Pan-American Const. Co. v. Searcy*, 84 So. 2d 540 (Fla. 1956); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §10.07 (Bender 2015); FLORIDA REAL PROPERTY SALES TRANSACTIONS §7.43 (Fla. Bar CLE 7th ed. 2013); FLORIDA REAL PROPERTY SALES TRANSACTIONS §7.44 (Fla. Bar CLE 7th ed. 2013); FUND TN 11.05.02, 11.05.03.

Comment: If the corporate conveyance is made by an instrument in writing signed by an authorized agent in the presence of two subscribing witnesses, the conveyance is valid. F.S. 689.01 (2017).

If the corporate conveyance is made by an instrument sealed with the corporate seal and signed by the president, vice-president, or chief executive officer, no corporate resolution need be recorded to evidence the authority of the party executing the conveyance, and the instrument will be valid. F.S. 692.01 (2017).

If a corporate conveyance is made by an instrument in writing signed by any person other than the president or chief executive officer of the corporation in the presence of two subscribing witnesses (in accordance with F.S. 689.01), and without a corporate seal, an authorizing resolution should be recorded which evidences the authority of the

person signing the deed.

A vice president may execute a deed on behalf of a corporation without an authorizing resolution from the corporation's board of directors if the deed contains the corporate seal. F.S. 692.01. However, contrary to dicta in *DGG Dev. Corp. v. Estate of Capponi*, 983 So. 2d 1232 (Fla. 5th DCA 2008), when a vice president signs a deed on behalf of a corporation in the presence of two subscribing witnesses, and such deed does not contain a corporate seal, an authorizing resolution should be obtained.

In *DGG Dev. Corp. v. Estate of Capponi*, the court, citing F.S. 692.01, correctly included vice presidents as officers who could convey the corporation's property by a deed containing the corporate seal, without the need for an authorizing resolution. However, the court apparently incorrectly cited the previous version of this title standard, as well as Fund TN 11.05.03, and FLORIDA REAL PROPERTY SALES TRANSACTIONS §7.43 (Fla. Bar CLE 7th ed. 2013) (formerly §6.43), as support for including a vice president as an officer, together with presidents and chief executive officers, who may convey corporate property by a deed executed in accordance with F.S. 689.01 (i.e., without a common or corporate seal) without an authorizing resolution from the corporation's board of directors. A careful practitioner should always obtain an authorizing resolution from the corporation when a vice president will be signing on behalf of the corporation, and the deed does not contain a corporate seal.

There is uncertainty as to whether a corporation can make a valid conveyance in trust without having two subscribing witnesses to the deed. F.S. 689.06 requires two witnesses and does not make an exception for corporations. Therefore, caution dictates having two subscribing witnesses on corporate conveyances under seal. *See* FLORIDA REAL PROPERTY SALES TRANSACTIONS §7.45 (Fla. Bar CLE 7th ed. 2013).
The attesting signature of a secretary or assistant secretary is not necessary to the validity of a corporate conveyance, but it serves to identify the seal used and the officers making the conveyance. *See* FLORIDA REAL PROPERTY SALES TRANSACTIONS §7.48 (Fla. Bar CLE 7th ed. 2013).

STANDARD 4.3-1

CONVEYANCE BY CORPORATIONS:
AUTHORITY TO CONVEY; FRAUD

STANDARD: ON OR AFTER JANUARY 1, 1972, AN INSTRUMENT CONVEYING LAND OF A CORPORATION, SEALED WITH THE COMMON OR CORPORATE SEAL AND SIGNED IN THE CORPORATE NAME BY ITS PRESIDENT, VICE-PRESIDENT, OR CHIEF EXECUTIVE OFFICER IS, ABSENT FRAUD IN THE TRANSACTION BY THE PERSON RECEIVING THE INSTRUMENT, VALID WHETHER OR NOT THE OFFICER SIGNING FOR THE CORPORATION WAS AUTHORIZED BY THE BOARD OF DIRECTORS TO DO SO.

Problem: On January 1, 2002, John Doe gives valuable consideration in exchange for an instrument conveying Blackacre, owned by ABC Corporation. The instrument is sealed with the common or corporate seal and signed in the corporate name by Richard Roe, the chief executive officer of ABC Corporation. Roe does not have authority from the board of directors to execute such an instrument. Is the deed valid?

Answer: Yes, absent fraud in the transaction by Doe.

Authorities & References: F.S. 692.01 (2017); F.S. 607.0304 (2017); *Jackson v. Citizens' Bank & Trust Co.*, 44 So. 516 (Fla. 1907); *Snead v. U.S. Trucking Corp.*, 380 So. 2d 1075 (Fla. 1st DCA 1980) *rev. denied* 389 So. 2d 1116 (Fla. 1980); *Prezioso v. Cameron*, 559 So. 2d 423 (Fla. 4th DCA 1990); *Ocean Bank of Miami v. Inv-Uni Inv. Corp.*, 599 So. 2d 694 (Fla. 3d DCA 1992); *Radison Props., Inc .v. Flamingo Groves, Inc.*, 767 So. 2d 587 (Fla. 4th DCA 2000); FUND TN 11.05.03.

Comment: When there is doubt as to the authority of the corporate officer to sign for the corporation, such questions should be resolved by requiring evidence of the authority of the corporate officer to convey. *Rothfleisch v. Cantor*, 534 So. 2d 823 (Fla. 4th DCA 1988). In the case of fraud, subsequent good faith purchasers for value and without notice of the fraud take free of any defect arising from the fraud. F.S. 692.01 (2017).

STANDARD 4.4

FOREIGN CORPORATIONS

STANDARD: THE FAILURE OF A FOREIGN CORPORATION TO OBTAIN A CERTIFICATE OF AUTHORITY PRIOR TO TRANSACTING BUSINESS IN FLORIDA DOES NOT PRECLUDE IT FROM ACQUIRING, HOLDING, ENCUMBERING, OR DISPOSING OF TITLE TO REAL PROPERTY IN THIS STATE.

Problem 1: ABC Company, a New York corporation, is the record owner of a tract of land in Florida. It has never obtained a certificate of authority to transact business in Florida. The corporation conveyed the property. Is the conveyance valid?

Answer: Yes.

Problem 2: Same facts as above, except that ABC Company did obtain a certificate of authority from the Florida Department of State to transact business in Florida which has since been withdrawn or revoked. Is the conveyance valid?

Answer: Yes.

Authorities & References: F.S. 607.1501(1) (2017); F.S. 607.1501(2)(g) (2017); F.S. 607.1501(2)(m) (2017); F.S. 607.1502(5) (2017); *see Hogue v. D.N. Morrison Const. Co.*, 156 So. 377 (Fla. 1934); *Herbert H. Pape, Inc. v. Finch*, 136 So. 496 (Fla. 1931); *Rubin v. Kapell*, 105 So. 2d 28 (Fla. 3d DCA 1958); *Batavia, Ltd. v. United States*, 393 So. 2d 1207 (Fla. 1st DCA 1980)

Comment: Upon the issuance of a certificate of revocation, or upon the filing of an application for withdrawal, the authority of a foreign corporation which had previously obtained a certificate of authority to transact business in Florida will cease. F.S. 607.1531(3) (2017); F.S. 607.1520(1) (2017). Under the facts of Problem 2, because the foreign corporation conveyed the property without having a valid certificate of authority to transact business in Florida, the corporation is in the same position as under the facts of Problem 1. *See* F.S. 607.1502(5) (2017). The practitioner should note that a foreign corporation may also own or create a security interest in real property without obtaining a certificate of authority to transact business. F.S. 607.1501(2)(g) (2017); F.S. 607.1501 (2)(m) (2017); FLORIDA REAL PROPERTY SALES TRANSACTIONS §7.54 (Fla. Bar CLE 7th ed. 2013).

If a foreign corporation conveys property in connection with activities which require a certificate of authority from the Florida Department of State to transact business and it does not have the certificate, the corporation will be subject to statutory penalties. F.S. 607.1502 (2017). However, the conveyance of title will be valid. F.S. 607.1502(5) (2017).

As to foreign corporations not for profit, the applicable statutes are F.S. 617.1501(2) and 617.1502(5) (2017).

STANDARD 4.4-1

DISSOLVED FOREIGN CORPORATION

STANDARD: TITLE TO FLORIDA REAL PROPERTY HELD BY A DISSOLVED FOREIGN CORPORATION MUST BE CONVEYED BY A PERSON OR PERSONS AUTHORIZED UNDER THE LAWS OF THE FOREIGN STATE OR COUNTRY TO CONVEY PROPERTY OF THE DISSOLVED FOREIGN CORPORATION.

Problem 1: XYZ Corporation, incorporated under the laws of Foreign State, secured a certificate of authority to transact business in Florida and was subsequently dissolved. After dissolution, XYZ Corporation's board of directors conveyed to John Doe land located in Florida which was owned by the Corporation. The directors had the power to convey property of the dissolved corporation under Foreign State's laws. Does Doe have marketable title?

Answer: Yes.

Problem 2: Same as Problem 1, except that under Foreign State's laws the directors did not have the power to convey the property of the corporation after dissolution. Does Doe have marketable title?

Answer: No.

Problem 3: Same as in Problem 1, except that XYZ Corporation's certificate of authority to transact business in Florida was withdrawn or revoked, or was never obtained, prior to the conveyance. Does Doe have marketable title?

Answer: Yes.

Authorities & References: F.S. 607.01401(5) (2017); F.S. 607.1405 (2017); F.S. 607.1501 (2017); F.S. 607.1502(5) (2017); F.S. 607.1505(3) (2017); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §299 (1971); 36 Am. Jur. 2d *Foreign Corporations* §396 (2015); *see Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947); *Oklahoma Natural Gas Co. v. Oklahoma*, 273 U.S. 257, 260 (1927).

Comment: Foreign corporations are excluded from the requirements of Florida law pertaining to transfer of property after dissolution because foreign corporations are excluded from the definition of a corporation under the statute. F.S. 607.01401 (2017); F.S. 607.1405 (2017); F.S. 607.1505(3) (2017). Dissolved foreign corporations are thus governed by the laws of the state or country of incorporation. Failure to obtain a valid certificate of authority to transact business before making the conveyance is of no consequence to the marketability of title. F.S. 607.1502(5) (2017); *see* F.S. 607.1501 (2017); Title Standard 4.4 (Foreign Corporations).

F.S. 692.03 purports to validate a conveyance executed by the surviving directors or trustees of a dissolved foreign corporation if the conveyance has been of record for at least seven years.

STANDARD 4.5

ADMINISTRATIVELY DISSOLVED CORPORATIONS

STANDARD: A CORPORATION WHICH HAS BEEN ADMINISTRATIVELY DISSOLVED MAY CONVEY REAL PROPERTY ONLY AS NECESSARY TO WIND UP AND LIQUIDATE ITS BUSINESS AND AFFAIRS.

Problem 1: ABC Corporation conveyed a portion of its land after June 30, 1990. At the time of the conveyance, it was administratively dissolved for failure to file its annual report and pay certain corporate fees and taxes that were required at the time. Was the conveyance valid?

Answer: Yes but only if the conveyance was appropriate to wind up and liquidate the corporation's business and affairs. F.S. 607.1405 (2017).

Problem 2: ABC Corporation conveyed a portion of its land after June 30, 1990. At the time of the conveyance, the officers of the corporation did not know that the corporation had been administratively dissolved, and did not convey the property with the intent of winding up and liquidating the corporation's business and affairs. The officers of the corporation reinstated the corporation shortly thereafter. Following the reinstatement, was the conveyance valid?

Answer: Yes. F.S. 607.1422 (3) (2017)

Problem 3: ABC Corporation conveyed a portion of its land. It was not yet administratively dissolved, but at that time it had not filed its annual report or paid certain corporate fees and taxes that were required at the time. Was the conveyance valid?

Answer: Yes.

Authorities & References: F.S. 607.1422 (3) (2017); F.S. 607.1622 (2017); *see Webb v. Scott*, 176 So. 442 (Fla. 1937); *330 Michigan Ave., Inc. v. Cambridge Hotel, Inc.*, 183 So. 2d 725 (Fla. 3d DCA 1966); FLORIDA REAL PROPERTY SALES TRANSACTIONS §7.51 (Fla. Bar CLE 7th ed. 2013); FUND TN 11.01.06.; FUND TN 11.04.07; FUND TN 11.04.02; FUND TN 11.04.12.

Comment: The prescribed penalties for failure to file the required annual report include dissolution or cancellation of the corporation's certificate of authority to do business. F.S. 607.1622(8) (2017). If the corporation has not yet been administratively dissolved, the validity of a conveyance by a corporation is not affected by the fact that the corporation at the time of the conveyance was delinquent in the filing of its annual report and the payment of fees and taxes due under Chapter 607, F.S. If the corporation was administratively dissolved, its reinstatement will relate back to the effective date of the dissolution and validate a conveyance that occurred while dissolved that was not for the purpose of winding up the affairs of the corporation. F.S. 607.1422 (3) (2017).

STANDARD 4.5–1

VOLUNTARILY DISSOLVED CORPORATIONS

STANDARD: A CORPORATION WHICH HAS BEEN VOLUNTARILY DISSOLVED MAY CONVEY PROPERTY ONLY IF IT IS IN THE COURSE OF WINDING UP AND LIQUIDATING THE CORPORATION'S BUSINESS AND AFFAIRS.

Problem: ABC Corporation conveyed a portion of its land in 2010. In 2009, the corporation had been voluntarily dissolved by its directors and shareholders. Was the conveyance valid?

Answer: Yes. F.S. 607.1405 (2017)

Authorities & References: F.S. 607.1405 (2017); FUND TN 11.04.02

Comment: A corporation dissolved after June 30, 1990 continues in existence for the purpose of winding up its affairs. The corporation may only carry on business that is appropriate to wind up and liquidate its business and affairs. Because the dissolved corporation continues in existence for the purpose of winding up affairs, it may convey real property in its own name, and the agents who were authorized for the active corporation are the agents of the dissolved corporation. In a current transaction, an affidavit should be recorded establishing that the conveyance is consistent with winding up the affairs of the corporation. F.S. 607.1405 (2017); FUND TN 11.04.02(D)

Reference should be made to Title Standard 4.3 (Conveyances by Corporations), which sets forth who can sign as an authorized agent on behalf of a corporation, and what procedures must be followed based on the agent's relationship to the corporation.

A corporation that dissolved between June 20, 1976 and June 30, 1990, is not an entity in being for the purpose of conveying real property, but the directors serving at the time of dissolution may convey the corporation's property as trustees. A majority of trustees surviving at the time of the conveyance are required to convey. In a current transaction, an affidavit should be recorded identifying the trustees, and establishing that a majority of the surviving trustees signed the deed. F.S. 607.301 (1987); FUND TN 11.04.02(C)

A corporation that dissolved between January 1, 1976, and June 19, 1976, is not an entity in being for the purpose of conveying real property, but the directors serving at the time of dissolution may convey the corporation's property as trustees. All of the trustees surviving at the time of the conveyance are required to convey. In a current transaction, an affidavit should be recorded identifying the trustees, and establishing that all of the surviving trustees signed the deed. F.S. 607.301 (1987); FUND TN 11.04.02(B)

A corporation that dissolved prior to January 1, 1976, is not an entity in being for the purpose of conveying real property, but the directors serving at the time of dissolution may convey the corporation's property as trustees. A majority of trustees surviving at the time of the conveyance are required to convey. In a current transaction, an affidavit should be recorded identifying the trustees, and establishing that a majority of the surviving trustees signed the deed. F.S. 608.301 (1987); FUND

TN 11.04.02(A)

Note: A court may dissolve a corporation if it is established that there are grounds for judicial dissolution as set forth in F.S. 607.1430 (2017). If the court enters a judgment of dissolution, the court will direct the corporation to wind up and liquidate its business and affairs.

STANDARD 4.6

CORPORATION NAME OMITTED FROM SIGNATURE

STANDARD: THE VALIDITY OF A CONVEYANCE BY A CORPORATION IS NOT AFFECTED BY THE OMISSION OF THE CORPORATE NAME OVER THE SIGNATURE OF THE OFFICER EXECUTING THE CONVEYANCE WHERE THE CORPORATION NAME APPEARS IN THE BODY OF THE INSTRUMENT AS THE GRANTOR AND THE INSTRUMENT IS OTHERWISE PROPERLY EXECUTED AND ACKNOWLEDGED.

Problem: ABC Corporation is named in the body of a deed as the grantor. The deed is signed by "John Doe, President," or "John Doe, President of A.B.C. Corporation," but the name of the corporation does not appear immediately above the signature of the president. Is the deed valid?

Answer: Yes.

Authorities & References: *See Ballas v. Lake Weir Light & Water Co.*, 130 So. 421 (Fla. 1930); *Steele v. Hallandale, Inc.*, 125 So. 2d 587 (Fla. 2d DCA 1960); FLORIDA REAL PROPERTY SALES TRANSACTIONS §7.50 (Fla. Bar CLE 7th ed. 2013); 18B Am. Jur. 2d *Corporations* §1708 (2015); FUND TN 11.07.02.

Comment: In *Ballas*, an executory contract and not a conveyance was involved, but the principles stated appear to apply with equal weight to a conveyance.

STANDARD 4.7

USE OF SCROLL SEAL BY CORPORATION

STANDARD: A CORPORATION MAY USE A HAND DRAWN SCRAWL OR SCROLL SEAL IN LIEU OF AN IMPRESSION SEAL OR STAMP SEAL WHEREVER A CORPORATE SEAL IS REQUIRED.

Problem: A deed of ABC Corporation was executed by its president, vice president, or chief executive officer. The officer hand drew a seal instead of using an impression seal or stamp seal. There were no witnesses. Is the deed valid?

Answer: Yes.

Authorities & References: F.S. 692.01 (2017); F.S. 695.07 (2017); F.S. 695.08 (2017); F.S. 607.0302(2) (2017); *Jacksonville, M., P. R. & N. Co. v. Hooper*, 160 U.S. 514 (1896); *Sarasota Kennel Club, Inc. v. Shea*, 56 So. 2d 505 (Fla. 1952); *Campbell v. McLaurin Inv. Co.*, 77 So. 277 (Fla. 1917); *Cross v. Robinson Point Lumber Co.*, 46 So. 6 (Fla. 1908); *Langley v. Owens*, 42 So. 457 (Fla. 1906); *Comerford v. Cobb*, 2 Fla. 418 (Fla. 1859); *Epstein v. Deerfield Beach Bank & Trust Co.*, 280 So. 2d 690 (Fla. 4th DCA 1973); *See also* FUND TN 11.03.02.

Comment: As to Florida corporations not for profit, the seal must contain the words "corporation not for profit." F.S. 617.0302(3) (2017). "Scrawl" and "scroll" simply mean "hand drawn."

-

STANDARD 4.8

CONVEYANCE BY A LIMITED LIABILITY COMPANY

STANDARD: A LIMITED LIABILITY COMPANY MAY CONVEY ITS LAND BY AN INSTRUMENT IN WRITING SIGNED IN ITS NAME BY AN AUTHORIZED SIGNATORY IN THE PRESENCE OF TWO SUBSCRIBING WITNESSES.

Problem 1: Jane Doe is the sole manager of 123 LLC, a manager-managed limited liability company. 123 LLC conveyed Blackacre by deed executed by Jane Doe, Manager, in the presence of two subscribing witnesses. The deed was properly acknowledged. Is the conveyance valid?

Answer: Yes.

Problem 2: Jane Doe is the sole manager of 123 LLC, a manager-managed limited liability company. 123 LLC conveyed Blackacre by deed executed by Jane Doe, Manager. The deed was not witnessed but a seal bearing the limited liability company name and document number is affixed. The deed was properly acknowledged. Is the conveyance valid?

Answer: No.

Authorities & References: F.S. 689.01 (2017); F.S. 605.04074 (2017); F.S. 605.0302 (2017); FUND TN 11.10.01.

Comment: Deeds executed by a limited liability company must satisfy the requirements of F.S. 689.01; *see Skylake Ins. Agency, Inc. v. NMB Plaza, LLC*, 23 So. 3d 175 (Fla. 3d DCA 2009); *see also* FUND TN 11.10.01. A limited liability company is not a corporation. F.S. 692.01 (2017) does not apply and there is no similar statute applicable to a limited liability company. Two subscribing witnesses are required to comply with F.S. 689.01 (2017).

This Standard, and the scenarios described in the problems above, are applicable to member-managed limited liability companies as well.

Though the sole manager of a dissolved manager-managed limited liability company may transfer title to the limited liability company's real property, confirmation that the transfer is for winding up the entity's affairs is required. By contrast, a mortgage from a dissolved limited liability company creates doubt regarding the act being consistent with winding up affairs. See FUND TN 11.10.01. If the company was dissolved by judicial decree, compliance with the terms thereof is required.

STANDARD 4.9

STATUTORY APPARENT AUTHORITY OF A MANAGER OF A MANAGER-MANAGED LIMITED LIABILITY COMPANY

STANDARD: ANY MANAGER OF A MANAGER-MANAGED LIMITED LIABILITY COMPANY HAS STATUTORY APPARENT AUTHORITY TO SIGN AND DELIVER AN INSTRUMENT TRANSFERRING OR AFFECTING THE LIMITED LIABILITY COMPANY'S INTEREST IN REAL PROPERTY. THE INSTRUMENT IS CONCLUSIVE IN FAVOR OF A PERSON WHO GIVES VALUE WITHOUT KNOWLEDGE OF THE LACK OF THE AUTHORITY OF THE PERSON SIGNING AND DELIVERING THE INSTRUMENT.

Problem 1: Blackacre is owned by 123 LLC, a Florida limited liability company. Richard Roe gives valuable consideration in exchange for an instrument conveying Blackacre. The Florida Department of State filings evidence that 123 LLC is a manager-managed limited liability company, and that John Doe, Sue Smith, and James Mann are managers. The instrument conveying Blackacre is executed by John Doe as manager of 123 LLC in the presence of two subscribing witnesses. No operating agreement has been produced and no statement of authority has been filed or recorded. Is the conveyance valid?

Answer: Yes.

Problem 2: Same facts as Problem 1, except that three weeks after closing an operating agreement was produced and demonstrated that John Doe did not have the actual authority to execute the instrument. Is the conveyance valid?

Answer: Yes.

Authorities & References: F.S. 689.01 (2017); F.S. 605.04074 (2017); F.S. 605.0302 (2017); F.S. 605.0103(4)(b)(5) (2017); FUND TN 11.10.01

Comment: In a manager-managed limited liability company, each manager is an agent of the company for the purpose of its activities and affairs, and the act of a manager, including signing an instrument of transfer in the name of the company, for apparently carrying on in the ordinary course of the company's activities and affairs, binds the company unless the manager had no authority to act on behalf of the company in a particular matter and the person with whom the manager was dealing knew or had notice that the manager lacked authority. F.S. 605.04074(2)(b) (2017). However, as it pertains to real property conveyances, the standard is that the conveyance is valid unless the third party purchaser had actual knowledge that the manager lacked authority to convey title on behalf of the company. F.S. 605.04074(3) (2017).

A member is not an agent of a manager-managed limited liability company for purpose of conducting the limited liability company's business, solely by reason of being a member. *See* F.S. 605.04074 (2)(a) (2017).

Absent actual knowledge or a limitation of authority recorded in the Official Records of the County in which the real property is located, a third party

purchaser, who is not a member or a manager of the limited liability company, does not have knowledge of a limitation on the authority of a manager of the limited liability company to convey title on behalf of the limited liability company. F.S. 605.0103(4)(b)(5) (2017).

If the practitioner has any question about the authority of a manager to convey the real property of the LLC, the practitioner may want to consider reviewing the operating agreement and, if it requires consent of all or a majority of the members, requiring reasonable evidence that such consent has been obtained. F.S. 605.04073 (2017).

The principles set forth in this standard also apply to members of member-managed limited liability companies. See F.S. 605.04074(1)(a)(2017); F.S. 605.04074(1)(b) (2017).

STANDARD 4.10

LIMITED LIABILITY COMPANY STATEMENT OF AUTHORITY

STANDARD: A STATEMENT GRANTING AUTHORITY TO TRANSFER OR AFFECT A LIMITED LIABILITY COMPANY'S INTEREST IN REAL PROPERTY FILED IN THE FLORIDA SECRETARY OF STATE'S OFFICE AND RECORDED IN THE OFFICIAL RECORDS OF THE COUNTY WHERE THE PROPERTY IS LOCATED, IS CONCLUSIVE IN FAVOR OF A PERSON WHO GIVES VALUE IN RELIANCE ON THE GRANT OF AUTHORITY WITHOUT ACTUAL KNOWLEDGE TO THE CONTRARY.

Problem 1: 123 LLC conveyed Blackacre by deed executed by John Doe as a member of 123 LLC, a manager-managed limited liability company, in the presence of two subscribing witnesses. A statement of authority, which evidences the authority of John Doe to convey 123 LLC's real property, is filed with the Florida Department of State and a certified copy is recorded in the office for recording transfers of Blackacre. Is the conveyance valid?

Answer: Yes.

Problem 2: 123 LLC conveyed Blackacre by deed executed by Richard Roe as the authorized agent of 123 LLC, a manager-managed limited liability company, in the presence of two subscribing witnesses. Richard Roe is the personal assistant of the sole manager of 123 LLC. A statement of authority, which evidences the authority of Richard Roe to convey 123 LLC's real property, is filed with the Florida Department of State and a certified copy is recorded in the office for recording transfers of Blackacre. Is the conveyance valid?

Answer: Yes.

Authorities & References: F.S. 689.01 (2017); F.S. 605.04074 (2017); F.S. 605.0302 (2017); FUND TN 11.10.01;

Comment: A member is not an agent of a manager-managed limited liability company for purpose of conducting the limited liability company's business, solely by reason of being a member. See F.S. 605.04074(2)(a) (2017).

A statement of authority may state the authority of a specific person to execute an instrument transferring or affecting the limited liability company's interest in real property held in the name of the company. F.S. 605.0302(7) (2017).

When a statement of authority is filed with the Florida Department of State, and a certified copy is recorded in the office for recording transfers of that real property, the statement of authority will be conclusive in favor of a person who gives value in reliance on the statement of authority. F.S. 605.0302(6) (2017).

A statement of authority affects only the power of a person to bind a limited liability company to persons who are not members. F.S. 605.0302(3) (2017).

The recorded statement of authority may be relied upon by third party purchasers for value without knowledge, except to the extent that it has been cancelled or amended and evidence thereof is recorded in the office for recording transfers of the real property; or a more recent statement of authority

conflicts F.S. 605.0302(6) (2017).

A statement of authority may also limit the authority of a person to convey the limited liability company's real property. F.S. 605.0302(7) (2017).

The filing of articles of dissolution cancels the statement of authority. F.S. 605.0302(9) (2017). A statement of authority is canceled by operation of law five years after the statement, or most recent amendment, becomes effective. F.S. 605.0302(10) (2017).

Foreign limited liability companies may not avail themselves of the statement of authority pursuant to this Florida statute because they are not within the definition of Florida limited liability companies. F.S. 605.0302 (2017); F.S. 605.0102 (26) & (36) (2017). Foreign limited liability companies are controlled by the laws of their governing jurisdiction.

STANDARD 4.11

SINGLE MEMBER LIMITED LIABILITY COMPANIES – CREDITOR CLAIMS

STANDARD: IF THE SELLER IS A SINGLE MEMBER LIMITED LIABILITY COMPANY, A PURCHASER FOR VALUABLE CONSIDERATION SHOULD DETERMINE WHETHER THE MEMBER OR THE LIMITED LIABILITY COMPANY ARE SUBJECT TO ANY CREDITOR CLAIMS.

Problem 1: Jane Doe is the sole member of 123 LLC. Richard Roe gives valuable consideration in exchange for an instrument conveying Blackacre, owned by 123 LLC. Should Roe obtain an affidavit from Doe stating that Doe, in her personal capacity, and 123 LLC are not subject to a bankruptcy action or creditor claims?

Answer: Yes.

Authorities & References: F.S. 605.05030 (2017); FUND TN 11.10.01;

Comment: If a member of a limited liability company is subject to a creditor claim, a charging order can be entered against that member's limited liability company interest. For a limited liability company with more than one member, this is the sole and exclusive remedy by which a creditor of a member can satisfy its judgment. F.S. 605.05030(3). However, in the case of a single member limited liability company, a court can potentially order a foreclosure sale of that member's limited liability company membership interest. F.S. 605.0503(4) and (5) (2017); *see also Olmstead v. FTC*, 44 So. 3d 76 (Fla. 2010); *Abukasis v. MTM Finest, Ltd.*, 199 So. 3d 421 (Fla. 3d DCA 2016). A careful practitioner should search for and contemplate the risk associated with any judgment against a member of a limited liability company.

A prudent practitioner may want to obtain an affidavit from the limited liability company, at or prior to closing, stating that neither the limited liability company, any managers, or any members are in bankruptcy.

STANDARD 4.12

CERTIFICATE OF AUTHORITY TO TRANSACT BUSINESS IN FLORIDA
- FOREIGN LIMITED LIABILITY COMPANY

STANDARD: THE FAILURE OF A FOREIGN LIMITED LIABILITY COMPANY TO OBTAIN A CERTIFICATE OF AUTHORITY PRIOR TO TRANSACTING BUSINESS IN FLORIDA DOES NOT PRECLUDE IT FROM ACQUIRING, HOLDING, ENCUMBERING OR DISPOSING OF TITLE TO REAL PROPERTY IN THIS STATE.

Problem 1: ABC LLC, an Ohio limited liability company, was the record owner of a tract of land in Florida. It never obtained a certificate of authority to transact business in Florida. ABC LLC conveyed the land. Was the conveyance valid?

Answer: Yes.

Problem 2: Same facts as above, except that ABC LLC did obtain a certificate of authority to transact business from the Florida Department of State. However, before the conveyance, the certificate was revoked or withdrawn. Was the conveyance valid?

Answer: Yes.

Authorities & References: F.S. 605.0904 (2017); F.S. 605.0905 (2017); F.S. 605.0908 (2017).

Comment: Under the facts of Problem 2, even though the limited liability company conveyed without having a valid certificate of authority, the limited liability company is in the same position as under the facts of Problem 1. F.S. 605.0904(4) (2017). Also, a foreign limited liability company may acquire or create indebtedness, mortgages and security interests in real property without obtaining a certificate of authority to transact business. F.S. 605.0905(1)(g) (2017). If a foreign limited liability company conveys property in connection with activities which require a certificate of authority to transact business from the Florida Department of State when the company does not have a certificate of authority, the limited liability company will be subject to statutory penalties, but the conveyance will be valid. F.S. 605.0904(7) and 605.0904(4) (2017).

STANDARD 4.13

AUTHORITY TO CONVEY PROPERTY
OF FOREIGN LIMITED LIABILITY COMPANIES

STANDARD: TITLE TO FLORIDA REAL PROPERTY HELD BY A FOREIGN LIMITED LIABILITY COMPANY MUST BE CONVEYED BY A PERSON OR PERSONS AUTHORIZED UNDER THE LAWS OF THE FOREIGN STATE OR COUNTRY TO CONVEY PROPERTY OF THE FOREIGN LIMITED LIABILITY COMPANY.

Problem 1: ABC LLC, a Foreign State limited liability company, is the record owner of a tract of land in Florida. The limited liability company conveyed the land to John Doe by a deed signed by two of its three managers. The two managers had the power to convey the property of the limited liability company under Foreign State's laws. Does Doe have marketable title?

Answer: Yes.

Problem 2: Same as Problem 1, except that under Foreign State's laws all managers must sign conveyances of real property. Does Doe have marketable title?

Answer: No.

Problem 3: Same as Problem 1, except that ABC LLC was dissolved at the time of the conveyance to John Doe. The two managers had the power to convey the property of the dissolved limited liability company under Foreign State's laws. Does Doe have marketable title?

Answer: Yes.

Problem 4: Same as Problem 1, except that ABC LLC was dissolved at the time of the conveyance to John Doe. The two managers did not have the power to convey the property of the dissolved limited liability company under Foreign State's laws. Does Doe have marketable title?

Answer: No.

Authorities & References: F.S. 605.0102(26) (2017); F.S. 605.0102(36) (2017); F.S. 605.0901 (2017); F.S. 605.0908 (2017); FUND TN 11.10.02.

Comment: Foreign limited liability companies are excluded from the requirements of Florida law pertaining to the transfer of property before and after dissolution because foreign limited liability companies are excluded from the definition of a limited liability company under the statute. F.S. 605.0102(26) (2017); F.S. 605.0102(36) (2017). Foreign limited liability companies whether active or dissolved are thus governed by the law of the state or other jurisdiction under which the foreign limited liability company exists. F.S. 605.0901 (2017).

CHAPTER 5

ESTATES OF DECEDENTS

STANDARD 5.1

TITLE DERIVED THROUGH INTESTATE DECEDENT

STANDARD: TITLE TO REAL ESTATE OF AN INTESTATE DECEDENT (EXCLUDING SURVIVORSHIP ESTATES) PASSES AS OF THE DATE OF DEATH TO THE HEIRS, SUBJECT TO: (1) THE PERSONAL REPRESENTATIVE'S POSSESSION AND CONTROL OVER REAL ESTATE, OTHER THAN PROTECTED HOMESTEAD, FOR THE PAYMENT OF EXPENSES OF ADMINISTRATION, DEBTS AND TAXES, OR FOR DISTRIBUTION ; AND (2) THE LIEN OF ESTATE TAXES, IF ANY.

Problem 1: John Doe died intestate and, although his estate was fully administered in Florida probate proceedings and the personal representative discharged, Blackacre was omitted from the personal representative's certificate of distribution. All heirs conveyed Blackacre to Richard Roe. Is Roe's title marketable?

Answer: Yes, provided federal and Florida estate taxes have been paid or the appropriate statutes of limitation have run on the state and federal estate tax liens.

Problem 2: John Doe died and, although an Order of Summary Administration was entered, both the petition for summary administration and the order omitted Blackacre. Later, all heirs conveyed Blackacre to Richard Roe, a bona fide purchaser for value. Is Roe's title marketable?

Answer: Yes, provided federal and Florida estate taxes, if any, have been paid or the appropriate statutes of limitation have run on the state and federal estate tax liens. The Order of Summary Administration can be relied upon to establish the identity of the heirs.

Authorities & References: § 732.101(2), Fla. Stat.; § 733.607(1); § 733.608(1), (2), Fla. Stat.; *Jones v. Federal Farm Mortg. Corp.*, 132 Fla. 807, 182 So. 226 (1938); *Spitzer v. Branning*, 135 Fla. 49, 184 So. 770 (Fla. 1938); *Public Health Trust of Dade County v. Lopez*, 531 So. 2d 946 (Fla. 1988); PRACTICE UNDER FLORIDA PROBATE CODE § 4.18 (Fla. Bar CLE 5th ed. 2007); FUND TN 2.09.03.

Comment: Section 732.101(2), Fla. Stat. provides that the decedent's death is the event that vests the heirs' right to the decedent's intestate property. However, for title to be marketable, Florida probate or similar judicial proceedings are necessary to establish the identity of the heirs. In addition, in order to preserve a permanent record of the probate proceedings for *future* marketability purposes, it is strongly recommended that certified copies of the pertinent excerpts be recorded in the official records of the county where the real property is located. Rule 2.075 of the Rules of Judicial Administration permit the destruction of probate proceedings after the lapse of ten years from a final

judgment. At a minimum, the documents to be recorded in an intestate estate are the petition for administration, letters of administration, and order closing the estate and discharging the personal representative if the estate has been closed, as well as the order authorizing the sale by the personal representative if there has been a sale of estate lands.

Under §§ 733.607(1) and 733.608, Fla. Stat., the decedent's real property, except protected homestead, is subject to the possession and control of the personal representative for such purposes as the payment of devises, estate and inheritance taxes, claims, charges, and expenses of the administration and obligations of the decedent's estate.

Protected homestead does not become an asset within the possession and control of the personal representative. *Spitzer v. Branning*, 135 Fla. 49, 184 So. 770 (Fla. 1938); *Public Health Trust of Dade County v. Lopez*, 531 So. 2d 946 (Fla. 1988). Therefore, during the administration of the estate, a conveyance from the heirs would not create a marketable title unless: (1) a final order determining the property to be protected homestead had been entered, or (2) the personal representative relinquishes control, or potential control over the asset by quitclaim deed, certificate of distribution or other similar instrument, and estate taxes cleared.

STANDARD 5.2

TITLE DERIVED THROUGH TESTATE DECEDENT

STANDARD: A WILL IS INEFFECTIVE TO CONVEY TITLE TO REAL PROPERTY UNTIL THE WILL IS ADMITTED TO PROBATE IN FLORIDA, BUT UPON ADMISSION TO PROBATE THE WILL RELATES BACK TO THE DEATH OF THE TESTATOR AND TAKES EFFECT AS OF THAT DATE AS AN INSTRUMENT OF TITLE.

Problem: John Doe owned Blackacre at the time he died testate. His will was duly admitted to probate in Florida, the estate was properly and fully administered and the personal representative was duly discharged. The will contained a devise of Blackacre (non-homestead) to the testator's widow, but the legal description in the petition for discharge and distribution was incorrect. Subsequent to the close of the estate Doe's widow conveyed Blackacre by proper description to Richard Roe. Is Roe's title marketable?

Answer: Yes. Title passed to the widow under the will as of the date of Doe's death.

Authorities & References: §§ 732.6005, .514, Fla. Stat.; § 733.103, Fla. Stat.; *Sorrells v. McNally*, 105 So 106 (Fla. 1925); *Murphy v. Murphy*, 170 So. 856 (Fla. 1936); *Palmquist v. Johnson*, 155 Fla. 628, 21 So. 2d 353 (1945); *U.S. v. 936.71 Acres of Land, More or Less, in Brevard County, Fla.*, 418 F.2d 551 (5th Cir. 1969). *See* § 732.4015, Fla. Stat. concerning homestead property; FUND TN 2.08.02.

Comment: Concerning the devise of homestead property, see Title Standard 18.8.

As to nonresident decedents, see Title Standard 5.15.

The Standard is to be construed subject to the intention of the testator as expressed in his will. § 732.6005, Fla. Stat.

This Title Standard does not address the factors to be reviewed in determining whether a property has homestead status or whether a judicial determination of homestead status is required.

STANDARD 5.3

SALE OF NONHOMESTEAD REAL PROPERTY BY PERSONAL REPRESENTATIVES WITHOUT COURT AUTHORIZATION OR CONFIRMATION

STANDARD: A CONVEYANCE OF NONHOMESTEAD REAL PROPERTY BY A FLORIDA PERSONAL REPRESENTATIVE OF AN ESTATE WITH POWER OF SALE IN THE WILL, BUT WITHOUT A COURT ORDER AUTHORIZING OR CONFIRMING THE CONVEYANCE, CONFERS MARKETABLE TITLE.

Problem: John Doe was the record owner of Blackacre, (nonhomestead) when he died in 2001. Richard Roe was appointed the personal representative of John Doe's estate by a Florida court. The will contained the following provision: "I confer upon my personal representative full authority to sell and convey any part or all of my estate, real or personal." In 2001 Richard Roe, as personal representative, conveyed Blackacre to Simon Grant, who recorded the deed. No authorization or confirmation of the court appears of record. Does Simon Grant have marketable title?

Answer: Yes.

Authorities & References: § 733.613(2), Fla. Stat.; *In re Granger*, 318 So. 2d 509 (Fla. 1st DCA 1975); FUND TN 2.07.05.

Comment: With respect to a limited power of sale, see Title Standard 5.7 (Limitation on Power of Sale).

This Title Standard assumes the power of sale was not personal to the personal representative named in the will. For further discussion, see Title Standard 5.9 (Powers of Successor Personal Representatives).

As to the sale of homestead property by the personal representative, see Title Standard 18.10. For discussion on clearance of estate tax liens, see Chapter 12.

This Title Standard does not address the factors to be reviewed in determining whether a property has homestead status or whether a judicial determination of homestead status is required.

STANDARD 5.4

SALE OF NONHOMESTEAD REAL PROPERTY BY PERSONAL REPRESENTATIVES WITH COURT AUTHORIZATION OR CONFIRMATION

STANDARD: WHERE THERE IS NO WILL, OR THE WILL DOES NOT GIVE THE PERSONAL REPRESENTATIVE POWER TO SELL NONHOMESTEAD REAL PROPERTY, PRIOR AUTHORIZATION OR SUBSEQUENT CONFIRMATION BY THE COURT IS REQUIRED FOR VALID TITLE.

Problem 1: John Doe appointed Richard Roe as the personal representative in his will. The will did not confer a power of sale on the personal representative. During the course of the administration of the estate, Richard Roe, as personal representative, sold Blackacre to Simon Grant with authorization of the court. Blackacre was not the decedent's homestead. Is the title marketable?

Answer: Yes. (The result would be the same if the court confirmed the sale after it had occurred.)

Authorities & References: § 733.613(1), Fla. Stat.; *In re Estate of Smith*, 200 So. 2d 547 (Fla. 2d DCA 1967); *In re Estate of Gamble*, 183 So. 2d 849 (Fla. 1st DCA 1966); *In re Granger*, 318 So. 2d 509 (Fla. 1st DCA 1975); *Anderson v. Johnson*, 732 So. 2d 423 (Fla. 5th DCA 1999).

Comment: For conveyances made without court authorization but under a power of sale in the will, see Title Standard 5.3 (Sale of Nonhomestead Real Property By Personal Representatives Without Court Authorization or Confirmation).

If the personal representative is the purchaser, see Title Standard 5.5 (Acquisition of Estate Lands by Fiduciaries).

As to the sale of homestead property by the personal representative, see Title Standard 18.10. For discussion on clearance of estate tax liens, see Chapter 12.

This Title Standard does not address the factors to be reviewed in determining whether a property has homestead status or whether a judicial determination of homestead status is required.

STANDARD 5.5

ACQUISITION OF ESTATE LANDS BY FIDUCIARIES PRIOR TO JANUARY 1, 1979

{Title Standard deleted. See archived version for text.)

STANDARD 5.5-1

PERSONAL REPRESENTATIVES – CONFLICTS OF INTEREST

STANDARD: ON OR AFTER JANUARY 1, 1976 THE PERSONAL REPRESENTATIVE CANNOT CONVEY MARKETABLE TITLE IN ANY TRANSACTION IN WHICH THE PERSONAL REPRESENTATIVE HAS A CONFLICT OF INTEREST, SUCH AS A TRANSACTION IN WHICH THE PERSONAL REPRESENTATIVE, THE SPOUSE, AGENT OR ATTORNEY OF THE PERSONAL REPRESENTATIVE OR ANY ENTITY OR TRUST IN WHICH THE PERSONAL REPRESENTATIVE HAS A SUBSTANTIAL BENEFICIAL INTEREST PURCHASES REAL PROPERTY OF THE ESTATE, UNLESS (1) THE WILL OR A CONTRACT ENTERED INTO BY THE DECEDENT EXPRESSLY AUTHORIZED THE TRANSACTION; OR (2) THE TRANSACTION WAS APPROVED BY THE COURT AFTER NOTICE TO INTERESTED PERSONS.

Problem 1: In the estate of John Doe, deceased, a Florida court issued letters testamentary to Richard Roe. The will, which was duly admitted to probate, authorized Richard Roe to sell real property of the estate. In 2002, Richard Roe, as personal representative, conveyed Blackacre to his wife, Mary Roe. Does Mary have marketable title?

Answer: No, unless (1) the will empowered Richard Roe to so dispose of the property, or (2) John Doe executed a contract of sale to Mary before his death, or (3) there was a court authorization or confirmation of the sale.

Problem 2: Richard Roe was duly appointed personal representative by a Florida court. Prior to his death, John Doe contracted to sell Blackacre to Richard Roe. In 2002, John Doe died and Richard Roe as personal representative, completed the conveyance of Blackacre to himself according to the terms of the contract. There was no court authorization or confirmation of the sale. Does Richard Roe have marketable title?

Answer: Yes.

Authorities & References: § 733.610, Fla. Stat.; *Taylor v. Hopkins*, 472 So. 2d 1355 (Fla. 5th DCA 1985); *Iandoli v. Iandoli*, 547 So. 2d 666 (Fla. 4th DCA 1989); FUND TN 2.08.05.

Comment: The cited statute provides that any sale involving a conflict of interest on the part of the personal representative is voidable by any interested party, unless one of the specific conditions described by the Standard is met.

Where the record does not reveal that the transaction was affected by a possible conflict of interest, either through similarity of names or otherwise, a bona fide purchaser subsequently dealing with the real property would appear to be protected. §§ 733.611, .613, Fla. Stat.

See UTS 18.10 for discussion of sales of devised homestead by a personal representative.

STANDARD 5.6

DEED UNDER POWER OF SALE GRANTED TO
TWO OR MORE PERSONAL REPRESENTATIVES

STANDARD: IF TWO OR MORE PERSONS ARE APPOINTED JOINT PERSONAL REPRESENTATIVES, AND UNLESS THE WILL PROVIDES OTHERWISE, (1) THE CONCURRENCE OF ALL JOINT PERSONAL REPRESENTATIVES APPOINTED PURSUANT TO A WILL OR CODICIL EXECUTED PRIOR TO OCTOBER 1, 1987, OR APPOINTED TO ADMINISTER AN INTESTATE ESTATE OF A DECEDENT WHO DIED PRIOR TO OCTOBER 1, 1987 IS REQUIRED TO CONVEY PROPERTY OF THE ESTATE; (2) A MAJORITY OF JOINT PERSONAL REPRESENTATIVES APPPOINTED PURSUANT TO A WILL OR CODICIL EXECUTED ON OR AFTER OCTOBER 1, 1987, OR APPOINTED TO ADMINISTER AN INTESTATE ESTATE OF A DECEDENT DYING ON OR AFTER OCTOBER 1, 1987, IS REQUIRED TO CONVEY PROPERTY OF THE ESTATE. THIS RESTRICTION DOES NOT APPLY WHEN THE CONCURRENCE REQUIRED CANNOT BE OBTAINED IN TIME FOR EMERGENCY ACTION TO PRESERVE THE ESTATE, OR WHEN A JOINT PERSONAL REPRESENTATIVE IS DELEGATED TO ACT FOR THE OTHERS.

Problem 1: John Doe's will, admitted to probate in 1973, contained a power of sale and named Richard Roe, John James and Henry Smith as executors. It did not provide for any action to be taken by less than all of them. All three qualified. Richard Roe and Henry Smith executed a deed conveying estate property to Simon Grant later that year. —Was Grant's title marketable?

Answer: No, unless the court authorized the conveyance by Roe and Smith alone.

Problem 2: Same as above, but John Doe's will was executed in 1980 and offered for probate in 1986.

Answer: No, unless this was an emergency action taken to preserve the estate while John James' concurrence could not be obtained or James had delegated his fellow representatives to act in his absence.

Authorities & References: § 733.615, Fla. Stat.; § 732.50, Fla. Stat. (1973); PRACTICE UNDER FLORIDA PROBATE CODE §§ 4.39, 4.42, 13.25 (Fla. Bar CLE 5th ed. 2007).

Comment: Title Standards 5.3 (Sale of Real Property By Personal Representatives Without Court Authorization or Confirmation) and 5.4 (Sale of Real Property By Personal Representatives With Court Authorization or Confirmation) should be considered in applying this Standard.

The surviving qualified personal representatives may exercise a power of sale even though more personal representatives are named in the will. *See* Title Standard 5.11 (Powers of Surviving Personal Representatives).

The Standard takes no position as to what constitutes emergency or delegation nor the means by which that is documented, short of a court order.

STANDARD 5.7

LIMITATION ON POWER OF SALE

STANDARD: A LIMITED POWER OF SALE CONTAINED IN A WILL MAY BE EXERCISED ONLY FOR THE PURPOSES STATED IN THE WILL UNLESS PRIOR AUTHORIZATION OR SUBSEQUENT CONFIRMATION IS OBTAINED FROM THE COURT.

Problem: The will of John Doe gave his personal representative power of sale for purpose of paying debts of John Doe to L. Shark. At the time of probate, there was no indebtedness to L. Shark. The personal representative, for full consideration, but without an order of the court, sold real property of the estate to Richard Roe. Is Roe's title marketable?

Answer: No.

Authorities & References: § 733.613(1), Fla. Stat.; *Standard Oil Co. v. Mehrtens*, 96 Fla. 455, 118 So. 216 (1928); *In re Estate of Smith*, 200 So. 2d 547 (Fla. 2d DCA 1967); *In re Estate of Gamble*, 183 So. 2d 849 (Fla. 1st DCA 1966); PRACTICE UNDER FLORIDA PROBATE CODE § 10.5 (Fla. Bar CLE 5th ed. 2007); FLORIDA REAL PROPERTY SALES TRANSACTIONS § 6.8 (Fla. Bar CLE 4th ed. 2004).

Comment: With respect to a sale without court authorization or confirmation, see Title Standard 5.3 (Sale of Real Property By Personal Representatives Without Court Authorization or Confirmation).

STANDARD 5.8

POWER OF PERSONAL REPRESENTATIVE
TO MORTGAGE REAL ESTATE

STANDARD: THE PERSONAL REPRESENTATIVE OF THE ESTATE OF A DECEDENT DYING AFTER DECEMBER 31, 1975 MAY MORTGAGE REAL ESTATE, EXCEPT PROTECTED HOMESTEAD, WITHOUT COURT AUTHORIZATION OR CONFIRMATION PROVIDED THE WILL CONTAINS A SPECIFIC POWER TO SELL REAL PROPERTY OR A GENERAL POWER TO SELL ANY ASSET OF THE ESTATE.

Problem 1: The will of John Doe, who died prior to January 1, 1976, named Richard Roe as executor and contained a general power of sale. Roe, as executor, borrowed $1,000, which he used for proper estate purposes. To secure this loan, Roe, without an order of the court, executed and delivered a mortgage on real property of the estate. Is the mortgage valid?

Answer: No.

Problem 2: Same as problem 1 except that John Doe died after December 31, 1975.

Answer: Yes.

Authorities & References: § 733.613(2), Fla. Stat; *Standard Oil Co. v. Mehrtens*, 96 Fla. 455, 118 So. 216 (1928); *Wilson v. Fridenburg*, 21 Fla. 386 (1885); *In re Estate of Gamble*, 183 So. 2d 849 (Fla. 1st DCA Fla. 1966); I*n re Estate of Smith*, 200 So. 2d 547 (Fla. 2d DCA 1967); PRACTICE UNDER FLORIDA PROBATE CODE § 4.20 (Fla. Bar CLE 5th ed. 2007); FLORIDA REAL PROPERTY SALES TRANSACTIONS § 6.8 (Fla. Bar CLE 4th ed. 2004).

Comment: It should be noted that § 733.613(2), Fla. Stat. expressly states that a specific power to mortgage real property will authorize such action by a personal representative. Under the former Probate Code there was no mention of a specific power to mortgage. *See* §§ 733.22-.25, Fla. Stat. (1973).

Standard 5.9

RELEASE OF DOWER BY SURVIVING SPOUSE

[Title Standard deleted. See archived version for original text.]

STANDARD 5.10

POWERS OF PERSONAL REPRESENTATIVES

STANDARD: FOR DECEDENTS DYING AFTER DECEMBER 31, 1975, A POWER OF SALE CONTAINED IN A WILL AND CONFERRED ON A NAMED PERSONAL REPRESENTATIVE MAY BE EXERCISED BY A SUCCESSOR PERSONAL REPRESENTATIVE WITHOUT COURT APPROVAL UNLESS THE POWER OF SALE WAS EXPRESSLY MADE PERSONAL TO THE NAMED INDIVIDUAL.

Problem 1: John Doe died leaving a will that named Richard Roe as personal representative. The will empowered "Richard Roe, and no other, to convey all or part of my real estate." Richard Roe did not qualify as personal representative; instead, Simon Grant was appointed personal representative and as such conveyed part of the estate to Frank Thomas without a court order. Is Frank Thomas' title marketable?

Answer: No.

Problem 2: John Doe's will named Richard Roe and conferred on Richard Roe a power of sale. It did not mention successor personal representatives and contained no further language concerning the power of sale or why it was conferred upon Roe. Richard Roe refused to act as personal representative and Simon Grant was personal representative. In 2006, Simon Grant, without court approval, conveyed part of the estate to Frank Thomas. Is Frank Thomas' title marketable?

Answer: Yes. It does not appear that John Doe intended to limit the power of sale to Richard Roe.

Authorities § 733.614, Fla. Stat.; PRACTICE UNDER FLORIDA PROBATE CODE § 10.12 (Fla. Bar CLE 5th ed. 2007); FLORIDA REAL PROPERTY SALES TRANSACTIONS § 6.8 (Fla. Bar CLE 4th ed. 2004); FUND TN 2.08.01.

Comment: Under former § 733.22, Fla. Stat. (1975), a successor personal representative could only exercise a power to sell real estate if the will specifically provided that the power extended to successors, while § 733.614, Fla. Stat. (2009) provides for a successor's exercise of the power to sell real estate unless the power is made personal to the named personal representative.

Caution is advised whenever a will contains language expressing faith in the judgment or knowledge of a personal representative in connection with a power of sale.

A power of sale may be exercised by a successor personal representative with court authorization or confirmation. *See* Title Standard 5.4 (Sale of Real Property by Personal Representatives with Court Authorization or Confirmation).

STANDARD 5.11

POWERS OF SURVIVING PERSONAL REPRESENTATIVES

STANDARD: IF THE APPOINTMENT OF ONE OR MORE JOINT PERSONAL REPRESENTATIVES IS TERMINATED, OR IF ONE OR MORE NOMINATED JOINT PERSONAL REPRESENTATIVES IS NOT APPOINTED, THE REMAINING PERSONAL REPRESENTATIVE(S) MAY EXERCISE A POWER OF SALE CONTAINED IN THE WILL, UNLESS THE WILL PROVIDES OTHERWISE.

Problem: The will of John Doe contained a power of sale and named John Smith, Richard Roe and Henry James as personal representatives. Smith did not qualify. May Roe and James exercise the power?

Answer: Yes, unless the will prohibited such action.

Authorities & References: § 733.616, Fla. Stat.; *Stewart v. Mathews*, 19 Fla. 752 (1883); FLORIDA REAL PROPERTY SALES TRANSACTIONS § 6.8 (Fla. Bar CLE 4th ed. 2004); PRACTICE UNDER FLORIDA PROBATE CODE § 4.42 (Fla. Bar CLE 5th ed. 2007).

Comment: Title Standards 5.3 (Sale of Real Property By Personal Representatives Without Court Authorization or Confirmation) and 5.4 (Sale of Real Property By Personal Representatives With Court Authorization or Confirmation) should be considered when applying this Standard.

With respect to who must join in a deed executed pursuant to a power of sale, see Title Standard 5.6 (Deed Under Power of Sale Granted To Two or More Personal Representatives).

STANDARD 5.12

TITLE DERIVED FROM PERSONAL REPRESENTATIVE
NOT HAVING STATUTORY PREFERENCE IN APPOINTMENT

STANDARD: WITH RESPECT TO ALL INTESTATE OR TESTATE PROCEEDINGS ON OR AFTER JANUARY 1, 1976, TITLE CONVEYED TO A BONA FIDE PURCHASER FROM A PERSONAL REPRESENTATIVE APPOINTED BY THE COURT IS MARKETABLE EVEN THOUGH THE PERSONAL REPRESENTATIVE IS NOT ONE OF THE PARTIES ENTITLED TO PREFERENCE UNDER § 733.301, Fla. Stat.

Problem 1: Mary Roe died intestate leaving a son, Richard Roe, as her only heir at law. The son was stationed overseas with the Navy. Formal notice was not served on Richard Roe that Bessie Doe, Mary Roe's neighbor and closest friend, had applied for letters of administration. Bessie Doe was appointed personal representative by the court. May Bessie Doe convey marketable title to a bona fide purchaser?

Answer: Yes, provided that Bessie Doe also had authority to sell the real property.

Problem 2: John Doe died in 2005, leaving a will which named Richard Roe personal representative and which gave the personal representative the power to sell. The will devised all John Doe's property to his friend, Frank Thomas, who was stationed overseas with the Navy. Richard Roe refused the appointment and the court named Simon Grant personal representative. No notice was sent to Frank Thomas, who had not waived his preference. With or without a court order, may Simon Grant convey marketable title to John Doe's real property to a bona fide purchaser?

Answer: Yes. Even though a devisee has statutory preference, a bona fide purchaser may rely on the propriety of the appointment. *See.* § 733.301, Fla. Stat.

Authorities §§ 733.301, .611, .613, Fla. Stat.; *In re Estate of Bush*, 80 So. 2d 673 (Fla. 1955); *In re Estate of Williamson*, 95 So. 2d 244 (Fla. 1957); *Anderson v. Johnson*, 732 So. 2d 423 (Fla. 5th DCA 1999); *In re Estate of Cunningham*, 104 So. 2d 748 (Fla. 3d DCA 1958); PRACTICE UNDER FLORIDA PROBATE CODE §§ 4.54, 5.5 and 5.6 (Fla. Bar CLE 5th ed. 2007).

Comment: As to whether the personal representative had authority to convey the property, see Title Standards 5.3 (Sale of Real Property By Personal Representatives Without Court Authorization or Confirmation), 5.4 (Sale of Nonhomestead Real Property By Personal Representatives With Court Authorization or Confirmation), 5.6 (Deed Under Power of Sale Granted to Two or More Personal Representatives) and 5.10 (Powers of Successor Personal Representatives).

STANDARD 5.13

PROBATE NON-CLAIM ACT —
UNITED STATES AND FLORIDA

STANDARD: THE PROBATE NON-CLAIM ACT, § 733.702, Fla. Stat. IS NOT BINDING AS TO CLAIMS OF THE UNITED STATES, BUT IS BINDING AS TO THE CLAIMS OF THE STATE OF FLORIDA AND ITS AGENCIES.

Problem 1:	United States asserted a claim against the estate of John Doe, deceased, after the expiration of the notice to creditors' period. Is the claim of the United States barred?
Answer:	No.
Problem 2:	The State of Florida, or one of its agencies, filed a claim against the estate of John Doe, deceased, after the expiration of the notice to creditors period. Is the claim barred?
Answer:	Yes.
Authorities & References:	31 U.S.C., § 3713 (2004); § 733.702, Fla. Stat. (2004); *United States v. Summerlin*, 310 U.S. 414 (1940); *State v. Moore's Estate*, 153 So. 2d 819 (Fla. 1963); *In re Smith's Estate*, 132 So. 2d 426 (Fla. 2d DCA 1961); PRACTICE UNDER PROBATE CODE § 8.1 (Fla. Bar CLE 5th ed. 2007); FUND TN 2.02.04.

STANDARD 5.14

EFFECT OF ORDER OF FINAL DISCHARGE

STANDARD: AN ORDER OF FINAL DISCHARGE DIVESTS THE PERSONAL REPRESENTATIVE OF CONTROL OVER ESTATE PROPERTY.

Problem:	John Doe died devising Blackacre by his will to his son, Richard Doe. The estate was administered and a final discharge of the personal representative entered. Richard Doe sold Blackacre to Simon Grant. Was Simon Grant's title marketable?
Answer:	Yes.
Authorities & References:	§ 733.901, Fla. Stat.; PRACTICE UNDER FLORIDA PROBATE CODE § 14.9 (Fla. Bar CLE 5th ed. 2007).

STANDARD 5.15

RECITAL OF HEIRSHIP IN DEED

STANDARD: WHERE A DEED, WHICH CONTAINS A RECITAL THAT THE GRANTORS ARE THE SOLE AND ONLY HEIRS OF A NAMED DECEDENT, HAS BEEN OF RECORD FOR MORE THAN SEVEN YEARS, SUCH RECITAL MAY BE ACCEPTED AS SUFFICIENT TO ESTABLISH THE TRUTH OF THE RECITAL IN THE ABSENCE OF EVIDENCE OR INFORMATION TO THE CONTRARY.

Problem: John Doe acquired title to Blackacre in 1999. By deed recorded more than seven years ago, Mary Doe, unmarried, Albert Doe, unmarried, and Sarah Doe, unmarried, conveyed Blackacre to Richard Roe. In the deed there is a recital that the grantors are the sole heirs of John Doe. In the absence of evidence or information to the contrary, may such recital be accepted as sufficient to establish its truth?

Answer: Yes.

Authorities & References: § 95.22, Fla. Stat.; FUND TN 10.01.01.

STANDARD 5.16

FOREIGN WILL AS MUNIMENT OF TITLE

STANDARD: A FOREIGN WILL DULY ADMITTED TO RECORD IN FLORIDA WILL PERMIT A VALID CONVEYANCE OF FLORIDA REAL ESTATE BY THE DEVISEES NAMED IN SUCH WILL.

Problem 1: Blackacre was devised to John Doe under the last will of Richard Roe, who died a resident of New York in 1995. Roe's will was admitted to probate in New York in 1995 and a duly authenticated copy thereof was admitted to record in Florida in 1999 pursuant to *F.S.* 734.104. Thereafter John Doe conveyed the property to Simon Grant. Is Simon Grant's title marketable?

Answer: Yes.

Problem 2: Same facts as Problem 1 except that an authenticated copy of Roe's will was recorded in 1999 in the Official Records of the county where the land is located. Is Simon Grant's title marketable?

Answer: No.

Authorities & References: § 734.104, Fla. Stat.; PRACTICE UNDER FLORIDA PROBATE CODE § 17.5 (Fla. Bar. CLE 5th ed. 2007); FUND TN 2.05.04.

Comment: The examiner must also be satisfied that: (1) the estate is cleared as to estate taxes and (2) all specific bequests under the will have been paid if Doe acquired title under the residuary clause of Roe's will rather than by means of a specific devise. If the will is not entitled to be admitted to record in Florida, or if the domiciliary proceedings have not been closed and it is impossible to determine whether or not the specific bequests have been paid, in a situation where the Florida real estate passes under the residuary clause of the will, ancillary administration pursuant to § 734.102, Fla. Stat. should be resorted to in order to convey marketable title. It is also possible to proceed under Chapter 735, Part I, Fla. Stat., provided the value of the estate does not exceed the jurisdictional limits applicable under the statute in force at the date of decedent's death. Claims of creditors should be cleared or otherwise addressed for conveyances made within two years of a decedent's death.

STANDARD 5.17

SATISFACTION OF MORTGAGE HELD
BY ESTATE OF NON-RESIDENT DECEDENT

STANDARD: THE SATISFACTION OF MORTGAGE MADE BY A FOREIGN PERSONAL REPRESENTATIVE OR GUARDIAN TO WHICH IS ATTACHED AN AUTHENTICATED COPY OF LETTERS OR OTHER EVIDENCE SHOWING APPOINTMENT FOR MORE THAN THE STATUTORY PERIOD AND WHERE NO ANCILLARY PROCEDURE HAD BEEN FILED IN THIS STATE MAY BE ACCEPTED AS A SATISFACTION OF MORTGAGE ENCUMBERING LANDS IN THIS STATE.

Problem 1: John Doe, the owner of Blackacre, had mortgaged his property to Richard Roe, a resident of Georgia. Richard Roe died and no ancillary proceedings were taken out in Florida for a period of ninety days. John Doe obtained a satisfaction of mortgage from the foreign personal representative to which was attached a duly authenticated copy of the letters of authority showing appointment more than ninety days prior to the date of the satisfaction of mortgage. Is such satisfaction of mortgage valid in this state without ancillary administration?

Answer: Yes, the statutory period is ninety (90) days for a foreign personal representative.

Problem 2: John Doe, the owner of Blackacre, had mortgaged his property to Richard Roe, a resident Georgia. Richard Roe was declared incompetent and no ancillary proceedings were taken out in Florida for a period of sixty days. John Doe obtained a satisfaction of mortgage from the foreign guardian to which was attached a duly authenticated copy of the letters of authority showing appointment more than sixty days prior to the date of the satisfaction of mortgage. Is such satisfaction of mortgage valid in this state without ancillary proceedings?

Answer: Yes, the statutory period is sixty (60) days for a foreign guardian, curator, or conservator.

Authorities & References: § 734.101(3), .30(3), Fla. Stat.; § 744.306(3), Fla. Stat.;). *See also* former § 744.15(3), Fla. Stat. (1973); PRACTICE UNDER FLORIDA PROBATE CODE § 17.3 (Fla. Bar CLE 5th ed. 2007); FUND TN 2.08.04.

Comment: The authenticated copies of letters or other evidence showing appointment should show that the authority was in full force and effect on the date of the execution of the satisfaction. *See* § 731.201(1), Fla. Stat. for discussion of "authenticated" copies.

CHAPTER 6

CONCURRENT OWNERSHIP

STANDARD 6.1

CREATION OF TENANCY BY THE ENTIRETIES

STANDARD: A DEED TO TWO PERSONS WHO ARE, IN FACT, HUSBAND AND WIFE, EVEN THOUGH NOT SO DESIGNATED, CREATES A TENANCY BY THE ENTIRETIES, ALTHOUGH PROOF OF THE MARITAL RELATIONSHIP SHOULD BE REQUIRED.

Problem: Blackacre was deeded to John Doe and Mary Doe. Later Mary Doe, as the survivor of John Doe, conveyed to Richard Roe by a deed to which a death certificate of John Doe was attached. Is Richard Roe's title to Blackacre marketable?

Answer: Yes, provided an affidavit or other suitable evidence appears of record showing that John Doe and Mary Doe were, in fact, husband and wife when they acquired title.

Authorities & References: *American Cent. Ins. Co. v. Whitlock*, 122 Fla. 363, 165 So. 380 (1936); *Beal Bank SSB v. Almand & Assoc.*, 710 So.2d 608 (Fla. 5th DCA 1998); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §20.03(2) (2004).

Comment: With respect to the necessity of proof of continuous marriage, see Title Standard 6.6 (Deed From Survivor Of a Tenancy By the Entireties).

F.S. 741.211, effective January 1, 1968, invalidates common law marriages entered into in Florida on and after the effective date.

F.S. 741.212, effective June 5, 1997, states that marriages between persons of the same sex, wherever created, are not recognized for any purpose in this state.

STANDARD 6.2

INTERSPOUSAL CREATION OF TENANCY BY THE ENTIRETIES

STANDARD: A SPOUSE HOLDING TITLE MAY CREATE A TENANCY BY THE ENTIRETIES BY A DEED TO THE OTHER SPOUSE IN WHICH THE PURPOSE TO CREATE THE ESTATE IS STATED, OR BY A DEED TO BOTH SPOUSES.

Problem 1: Blackacre was owned by John Doe. He executed a deed direct to Mary Doe, his wife, as grantee, expressly stating the purpose to create a tenancy by the entireties between John and Mary Doe. Was a tenancy by the entireties created?

Answer: Yes.

Problem 2: Same as above, except the deed to Mary Doe did not contain the statement of purpose, although it did describe her as the grantor's wife. Was a tenancy by the entireties created?

Answer: No. Mary obtained sole ownership.

Problem 3: Blackacre was owned by John Doe. He executed a deed to himself and his wife, Mary Doe. Was a tenancy by the entireties created?

Answer: Yes.

Authorities & References: *F.S.* 689.11 (2004); *Baumgardner v. Kennedy*, 343 So. 2d 1323 (3d D.C.A. Fla. 1977); *Schuler v. Claughton*, 248 F.2d 528 (5th Cir. 1957); *Johnson v. Landefeld*, 138 Fla. 511, 189 So. 666 (1939); 25 FLA. JUR. 2d, *Family Law*, § 406 (2004); ATIF TN 20.01.06.

Comment: Caution should be exercised in applying this Standard to conveyances of homestead property executed prior to January 7, 1969, the effective date of the 1968 Florida Constitution. Where the property conveyed is homestead, see Title Standards 18.1 (Alienation of Homestead Property — Joinder of Spouse), 18.2 (Gratuitous Alienation of Homestead Property Before January 7, 1969), and 18.3 (Gratuitous Alienation of Homestead Property On or After January 7, 1969).

STANDARD 6.3

CONVEYANCE OF ENTIRETIES PROPERTY
BY ONE SPOUSE TO A THIRD PERSON

STANDARD: NO INTEREST IN LAND HELD AS A TENANCY BY THE ENTIRETIES CAN BE ENCUMBERED OR CONVEYED TO A THIRD PERSON BY EITHER SPOUSE ACTING ALONE, EXCEPT WHERE ESTOPPEL BY DEED APPLIES.

Problem 1: Blackacre was owned by John Doe and Mary Doe, his wife, as a tenancy by the entireties. Mary Doe, acting alone, executed a deed of Blackacre to Stephen Grant. Subsequently, Mary Doe died, having been continuously married to John. John Doe, as an unmarried man, then conveyed Blackacre to Richard Roe. Did Roe acquire marketable title to Blackacre free from any interest in Grant?

Answer: Yes. The same result would follow if the instrument executed by Mary Doe alone had been a mortgage.

Problem 2: Blackacre was owned by John Doe and Mary Doe, his wife, as a tenancy by the entireties. John Doe, acting alone, executed a mortgage on Blackacre to Stephen Grant. Subsequently, Mary Doe died and John Doe, as an unmarried man, conveyed Blackacre to Richard Roe. Did Roe acquire marketable title to Blackacre free from any interest in Grant?

Answer: No. Estoppel by deed has been held applicable to a mortgage executed solely by one spouse on property held as a tenancy by the entireties. Although there is no direct authority, it is reasonable to assume that estoppel by deed would be applicable to create a cloud upon title had John Doe executed a deed, rather than a mortgage, to Stephen Grant purporting to convey to fee in Blackacre. *Hillman v. McCutchen*, 166 So.2d 611 (3d D.C.A. Fla. 1964), *cert. den.* 171 So.2d 391. But see *Leitner v. Willaford*, 306 So.2d 555 (3d D.C.A. Fla. 1975).

Problem 3: Blackacre was owned by John Doe and Mary Doe, his wife, as a tenancy by the entireties. John and Mary Doe conveyed to Stephen Grant by separate deeds. Did Grant acquire marketable title to Blackacre?

Answer: No. Neither deed should be considered effective to convey an interest in Blackacre. Possibly, the separate deeds could be construed as one, or John or Mary or both could be estopped to assert their interest, but this would not render Grant's title marketable until such determination was made. But see *MacGregor v. MacGregor*, 323 So.2d 35 (4th D.C.A. Fla. 1975).

Authorities & References: *Newman v. Equitable Life Assur. Soc.*, 119 Fla. 641, 160 So. 745 (1935); *Ohio Butterine Co. v. Hargrave*, 79 Fla. 458, 84 So. 376 (1920); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §20.03[3] (a) (2004); ATIF TN 20.01.02.

STANDARD 6.4

CONVEYANCE OF ENTIRETIES PROPERTY BY
ONE SPOUSE TO THE OTHER

STANDARD: A CONVEYANCE OF LAND, HELD AS TENANTS BY THE ENTIRETIES, BY ONE SPOUSE TO THE OTHER VESTS TITLE IN THE GRANTEE.

Problem: Blackacre was owned by John Doe and Mary Doe, husband and wife, as tenants by the entireties. Later John Doe, signing alone, deeded the property to Mary Doe, his wife. Did Mary Doe acquire the fee simple title to Blackacre?

Answer: Yes.

Authorities & References: *Hunt v. Covington*, 145 Fla. 706, 200 So. 76 (1941); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §20.03[3](c) (2004).

Comment: Where the property conveyed is homestead, see Title Standards 18.1 (Alienation of Homestead — Joinder of Spouse), 18.2 (Gratuitous Alienation of Homestead Before January 7, 1969) and 18.3 (Gratuitous Alienation of Homestead On or After January 7, 1969). See also, ATIF TN 16.02.03.

STANDARD 6.5

EFFECT OF DISSOLUTION OF MARRIAGE ON PROPERTY
HELD AS TENANTS BY THE ENTIRETIES

STANDARD: UNLESS PROVIDED OTHERWISE BY THE JUDGMENT DISSOLVING THE MARRIAGE, TITLE TO LAND HELD BY A HUSBAND AND WIFE AS TENANTS BY THE ENTIRETIES VESTS IN THE PARTIES AS TENANTS IN COMMON WHEN THE JUDGMENT BECOMES FINAL.

Problem: Title to Blackacre was vested in John Doe and Mary Doe, husband and wife. Their marriage was later dissolved by a judgment which made no disposition of Blackacre. Thereafter, John Doe conveyed Blackacre to Richard Roe. Is Roe's title marketable?

Answer: No. Mary Doe would still have an undivided one-half interest.

Authorities & References: *F.S.* 689.15 (2004); *Owen v. Owen*, 284 So.2d 384 (Fla. 1973); *Reid v. Reid*, 68 So.2d 821 (Fla. 1954); *Markland v. Markland*, 155 Fla. 629, 21 So.2d 145 (1945); *Locke v. Locke*, 383 So.2d 273 (Fla. 3d DCA 1980); 25A FLA. JUR. 2d, *Family Law*, § 719 (2004); FLORIDA REAL PROPERTY SALES TRANSACTIONS, § 10.18 (CLE 4th ed. 2004); ATIF TN 14.02.01.

Comment: The court has broad discretion in equity to adjust the property rights of the parties. *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §20.05[2] (2004).

STANDARD 6.6

PRESUMPTION OF CONTINUATION OF MARRIAGE

STANDARD: WHERE AN INTEREST IN LAND IS OR WAS PREVIOUSLY VESTED IN TWO PERSONS AS TENANTS BY THE ENTIRETY, THE CONTINUATION OF THE ESTATE BY THE ENTIRETY THROUGH THE DATE OF DIVESTITURE OF THE INTEREST MAY BE PRESUMED IN THE ABSENCE OF RECORD EVIDENCE OF DISSOLUTION OF THE MARRIAGE.

Problem 1: Blackacre was owned by John Doe and Mary Doe as a tenancy by the entireties. Subsequently, John Doe died and Mary Doe recorded a certified copy of the death certificate (or other satisfactory evidence). Mary then conveyed Blackacre to Stephen Grant. Is Grant's title marketable?

Answer: Yes, provided there is no evidence that John and Mary Doe were not continuously married from the inception of their title until his death.

Problem 2: Title vested as above. John Doe and Mary Doe, his wife, conveyed to Richard Roe. A certified copy of a judgment against John Doe was recorded in the county in which the land is situated during the ownership by the Does. No evidence of dissolution of the marriage appears of record. Is Roe's title clouded by the final judgment?

Answer: No. The judgment against one spouse does not attach to entireties property, and the continuation of the marriage throughout ownership may be presumed.

Problem 3: Title vested as above. In a foreclosure action is it necessary to join a judgment creditor of one of the spouses?

Answer: No, absent evidence of termination of the marriage by dissolution of death, the marriage is presumed to have continued throughout ownership.

Authorities & References: Fla. Stat. §689.15 (2004); *General Properties Corp. v. Gore*, 153 Fla. 236, 14 So. 2d 411 (1943); 25 FLA. JUR. 2d, *Family Law* §49 (2004).

Comment: Although the standard indicates that an affidavit of continuous marriage is not necessary, it is always desirable, and should be obtained, particularly in current transactions where one or both of the parties is available. In the case of divestiture by foreclosure, the entire court file, particularly any part relating to service of process, should be examined for indications that the parties are no longer married.

STANDARD 6.7

TITLE IN SURVIVING TENANT BY
THE ENTIRETIES — HOMESTEAD

STANDARD: UPON THE DEATH OF EITHER SPOUSE, FEE SIMPLE TITLE TO PROPERTY HELD AS A TENANCY BY THE ENTIRETIES VESTS IN THE SURVIVING SPOUSE, NOTWITHSTANDING THE STATUS OF THE PROPERTY AS HOMESTEAD.

Problem: John Doe and Mary Doe, husband and wife, acquired title to Blackacre as tenants by the entireties. Thereafter, they resided on the property with their minor children. Upon the death of either John Doe or Mary Doe, does fee simple title to Blackacre vest in the surviving spouse?

Answer: Yes. The stated result depends on the valid establishment of a tenancy by the entireties in the first instance.

Authorities & References: *F.S.* 732.401(2) (2004); *Regero v. Daugherty*, 69 So.2d 178 (Fla. 1953); *Menendez v. Rodriguez*, 106 Fla. 214, 143 So. 223 (1932); *Kinney v. Mosher*, 100 So.2d 644 (1st D.C.A. Fla. 1958); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.24 (2004).

Comment: For questions arising with respect to homestead property, see Title Standards, Ch. 18 (Homestead).

STANDARD 6.8

CREATION OF JOINT TENANCY

STANDARD: A DEED TO TWO OR MORE GRANTEES OTHER THAN HUSBAND AND WIFE, AS "JOINT TENANTS" CREATES A TENANCY IN COMMON UNLESS THE DEED EXPRESSLY PROVIDES FOR THE RIGHT OF SURVIVORSHIP.

Problem 1:	Blackacre was deeded to John Doe and Richard Roe as joint tenants. John Doe died and Richard Roe conveyed the entire fee to Simon Grant. Is Simon Grant's title marketable?
Answer:	No.
Problem 2:	Blackacre was deeded to John Doe and Richard Roe as joint tenants, with right of survivorship. John Doe died and Richard Roe conveyed the entire fee to Simon Grant. Is Simon Grant's title marketable?
Answer:	Yes.
Authorities & References:	*F.S.* 689.15 (2004); *Kozacik v. Kozacik*, 157 Fla. 597, 26 So. 2d 659 (1946); FLORIDA REAL PROPERTY SALES TRANSACTIONS §10.16 (CLE 4th ed. 2004); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §20.02(2) (2004).

STANDARD 6.9

MORTGAGES MADE TO HUSBAND AND WIFE CREATE
A TENANCY BY THE ENTIRETIES

STANDARD: ANY MORTGAGE ENCUMBERING REAL PROPERTY, OR ANY ASSIGNMENT OF A MORTGAGE ENCUMBERING REAL PROPERTY, MADE TO TWO PERSONS WHO ARE HUSBAND AND WIFE, CREATES A TENANCY BY THE ENTIRETIES IN SUCH MORTGAGE AND THE OBLIGATION SECURED THEREBY UNLESS A CONTRARY INTENTION APPEARS IN SUCH MORTGAGE OR ASSIGNMENT OR THE OBLIGATION SECURED THEREBY.

Problem: John Doe holds a mortgage on Blackacre. He assigns the mortgage to X and X's wife. Does the assignment of the mortgage create a tenancy by the entireties?

Answer: Yes. Unless the assignment or mortgage indicates otherwise, a tenancy by the entireties will be created.

Authorities & References: *F.S.* 689.115 (2004); *Vandenberg v. Wells*, 721 So.2d 453 (Fla. 5th DCA 1998); 25 FLA. JUR. 2d, *Family Law*, § 392 (2004).

Comment: The Legislature enacted *F.S.* 689.115 in response to *Great Southwest Fire Ins. Co. v. DeWitt*, 458 So.2d 398 (Fla. 1st D.C.A. 1984). In *DeWitt*, the court held that a mortgage was intangible personal property. As personalty, the mortgage would be held as tenants in common unless the intention of the parties to create a tenancy by the entireties could be proven.

The last five words of this Title Standard ("or the obligation secured thereby") do not appear in *F.S.* 689.115, but were added to indicate the Standard should not be relied on if a contrary intention is stated in the obligation secured.

This Title Standard may not be applicable to notes and mortgages held outside the State of Florida. See *In re Estate of Siegel*, 350 So.2d 89 (Fla. 4th D.C.A. 1977), *cert. den.* 366 So.2d 425; ATIF TN 22.05.03.

STANDARD 6.10

ENHANCED LIFE ESTATE: DEED FOR NON-HOMESTEAD PROPERTY

STANDARD: **THE HOLDER OF A LIFE ESTATE IN NON-HOMESTEAD PROPERTY, COUPLED WITH THE POWER TO SELL, CONVEY, MORTGAGE AND OTHERWISE MANAGE THE FEE SIMPLE ESTATE, CAN CONVEY OR ENCUMBER THE FEE SIMPLE ESTATE DURING THE LIFETIME OF THE HOLDER WITHOUT THE REMAINDERMAN.**

Problem 1: A remainder in Blackacre was conveyed by John Doe to Jane Smith with John Doe reserving for himself without any liability for waste full power and authority in himself to sell, convey, mortgage or otherwise manage and dispose of the property in fee simple with or without consideration without joinder of the remainderman and full power and authority to retain any and all proceeds generated by such action. John Doe died. Is the conveyance to Jane Smith valid?

Answer: Yes.

Problem 2: Same facts as in Problem 1, except that John Doe, during his lifetime and for his own benefit, by a deed reciting the power of disposition, conveyed Blackacre in fee simple to Jeffrey Williams. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith?

Answer: Yes.

Problem 3: Same facts as in Problem 1, except that John Doe, during his lifetime and for his own benefit, by a deed reciting the power of disposition, conveyed Blackacre in fee simple to Jeffrey Williams. At the time of the conveyance Creditor had a judgment lien against Jane Smith. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith and Creditor?

Answer: Yes.

Problem 4: Same facts as in Problem 1, except that Creditor has a judgment lien against John Doe. However, Creditor does not levy and execute on his judgment. John Doe dies without conveying the property. Did Jane Smith acquire title to Blackacre free of the judgment lien of Creditor?

Answer: Yes.

Authorities: F.S. 733.706 (2018), F.S. 733.702(4)(a) (2018), *Oglesby v. Lee*, 73 Fla. 39, 73 So. 840 (1917); *Aetna Ins. Co, v. La Gasse*, 223 So.2d 727 (Fla. 1969); 19 Fla. Jur. 2d *Deeds*, § 170

Secondary Authority: Stephanie Emrick, *Transfer on Death Deeds: Is It Time to Establish the Rules of the Game*, 70 Fla. L. Re. 469 (2018)

Comment: This type of enhanced life estate conveyance is commonly referred to as a "Lady Bird Deed." It is used for various purposes, among which is the avoidance of probate by the holder of the life estate. Attempts by the life tenant with enhanced powers during their lifetime to divest the remainderman of their remainder interest may create questions as to who holds fee simple title after the death of the life tenant. For the record to be clear, the prudent practitioner should have the life tenant retain the power to divest the remainderman in the vesting deed creating the enhanced life estate and any conveyance attempting to divest the remainderman should clearly state the life tenant's intent to do so. The wording of a deed reserving the right to resell the property may create a fee simple determinable or estate upon condition subsequent. In *Oglesby* the conveyance from a father to a daughter reserving the right to sell and place the proceeds of the sale in lieu of the property resulted, upon such sale, in divestment of the daughter's interest. A remainderman as to an enhanced life estate during the lifetime of the life tenant holds a vested remainder interest which is subject to divestment by the life tenant and, therefore, any judgment against the remainderman may be similarly divested. However, upon of the death of the life tenant, the lien of judgment against the remainderman would attach to the property.

A judgment against a decedent is not enforceable against real property owned by the decedent at the time of death, but shall be filed in the same manner as other claims against estates of decedent. *See* F.S. 733.706 If a creditor does not levy and execute on its judgment lien, it is just a general lien on all of the property of the debtor. F.S. 733.702(4)(a) permits enforcement of the lien of mortgages, security instruments or other liens on specific property without the necessity of filing a claim.

Although Lady Bird Deeds are used prevalently in Florida for various purposes among which is the avoidance of probate by the holder of the life estate, there is no Florida Statute governing such conveyances and scant judicial authority supporting the practice. The practitioner should thus be aware that this Standard and its guidance represent the consensus view of the Real Property, Probate, and Trust Law Section of the Florida Bar.

STANDARD 6.11

ENHANCED LIFE ESTATE: LIFE TENANT AND HOMESTEAD PROPERTY

STANDARD: **A LIFE TENANT WITH AN INTEREST IN HOMESTEAD PROPERTY, COUPLED WITH THE POWER TO SELL, CONVEY, MORTGAGE AND OTHERWISE MANAGE THE FEE SIMPLE ESTATE, CAN CONVEY OR ENCUMBER THE FEE SIMPLE ESTATE DURING THE LIFETIME OF THE HOLDER WITHOUT THE REMAINDERMAN.**

Problem 1: A remainder in Blackacre was conveyed by John Doe to Jane Smith with John Doe reserving for himself without any liability for waste full power and authority in himself to sell convey, mortgage or otherwise manage and dispose of the property in fee simple with or without consideration without joinder of the remainderman and full power and authority to retain any and all proceeds generated by such action. During his lifetime and for his own benefit, John Doe by a deed reciting the power of disposition, conveyed Blackacre in fee simple to Jeffrey Williams. John Doe was a single man at the time of the conveyance to Jeffrey Williams. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith?

Answer: Yes.

Problem 2: Same facts as in Problem 1, except that John Doe was married at time of the conveyance to Jeffrey Williams and his spouse joined in that conveyance. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith?

Answer: Yes.

Problem 3: Same facts as in Problem 1, except that at the time of the conveyance Creditor had a judgment lien against Jane Smith. Did Jeffrey Williams acquire title to Blackacre free of the claims of Jane Smith and Creditor?

Answer: Yes.

Authorities: Art. X, Sec. 4(c), Fla. Constitution; F.S. 732.401 (2018), and F.S. 732.4017 (2018); *Oglesby v. Lee*, 73 Fla. 39, 73 So. 840 (1917); 19 Fla. Jur. 2d *Deeds* § 170

Comment: This type of conveyance is commonly referred to as a "Lady Bird Deed". It is used for various purposes among which is the avoidance of probate by the holder of the life estate. Attempts by the life tenant with enhanced powers during their lifetime to divest the remainderman of their remainder interest may create questions as to who holds fee simple title after the death of the life tenant. For the record to be clear, the life tenant must have retained the power to divest the remainderman in the vesting deed creating the enhanced life estate and any conveyance attempting to divest the remainderman should clearly state the life tenant's intent to do so. A conveyance of a homestead residence by the life tenant is subject to the spousal joinder requirements of Art. X, Section 4(c). The restriction on the devise of homestead contained in Art. X, Sec. 4(c), of the Florida Constitution, must be considered after the death of the life tenant if they were survived by a spouse or minor child. Conveyances from all of the heirs of the deceased life tenant, including the surviving spouse, may be required to convey fee simple title to the remainderman named in the vesting deed that created the enhanced life estate.

The wording of a deed reserving of the right to resell the property may create a fee simple determinable or an estate upon condition subsequent. In *Oglesby*, the conveyance from a father to daughter reserving the right to sell and place the proceeds of the sale in lieu of the property resulted in no title interest in the daughter that could be clouded by a subsequent conveyance. Upon a life tenant's conveyance or mortgage of a fee interest to a bona fide purchaser or lender for value, title to the property is free and clear of the lien of the judgment against the remainderman. However, upon the death of the life tenant, the lien of the judgment against the remainderman would attach to the property.

Although Lady Bird Deeds are used prevalently in Florida for various purposes among which is the avoidance of probate by the holder of the life estate, there is no Florida Statute governing such conveyances and scant judicial authority supporting the practice. The practitioner should thus be aware that this Standard and its guidance represents the consensus view of the Real Property, Probate, and Trust Law Section of the Florida Bar.

STANDARD 6.12

ENHANCED LIFE ESTATE: REMAINDERMAN AND HOMESTEAD PROPERTY

STANDARD: **THE REMAINDERMAN IN HOMESTEAD PROPERTY, WHEREIN THE LIFE TENANT RESERVED THE POWER TO SELL, CONVEY MORTGAGE AND OTHERWISE MANAGE THE FEE SIMPLE ESTATE, ACQUIRES FEE SIMPLE TITLE UPON THE DEATH OF THE LIFE TENANT ONLY WHEN NOT IN VIOLATION OF CONSTITUTIONAL RESTRICTION ON DEVISE OF HOMESTEAD.**

Problem 1: A remainder in Blackacre was conveyed by John Doe, a single man, to Jane Smith with John Doe reserving for himself without any liability for waste, full power and authority in himself to sell convey, mortgage or otherwise manage and dispose of the property in fee simple with or without consideration, without joinder of the remainderman, and full power and authority to retain any and all proceeds generated by such action. John Doe died without a spouse or a minor child. Upon the death of John Doe, is fee simple title vested in Jane Smith?

Answer: Yes.

Problem 2: Same facts as in Problem 1, except that John Doe died while married to Sally Brown. Upon the death of John Doe, is fee simple title vested in Jane Smith?

Answer: No.

Problem 3: Same facts as in Problem 2, except that the deed is executed on or after July 1, 2018 and John Doe's spouse, Sally Brown, joined in John Doe's deed to Jane Smith and the deed contained the following statement: "By executing or joining in this deed, I intend to waive homestead rights that would otherwise prevent my spouse from devising the homestead property described in this deed to someone other than me"? John Doe had no minor child at the time of his death. Upon the death of John Doe, is fee simple title vested in Jane Smith?

Answer: Yes.

Problem 4: Same facts as in Problem 1, except that at the time of the conveyance and when John Doe died Jane Smith was his spouse and Jane Smith joined in the deed. John Doe had no minor children at the time of his death. Is the conveyance to Jane Smith valid

Answer: Yes.

Authorities: Art. X, Sec. 4(c), Fla. Constitution (2018); F.S. 732.401 (2018), F.S. 732.4017 (2018), F.S. 732.7025 (2018), F.S. 733.706 (2018); *Oglesby v. Lee*, 73 Fla. 39, 73 So. 840 (1917); 19 Fla. Jur. 2d *Deeds* § 170

Comment: A spouse on or after July 1, 2018, may waive his or her rights as spouse with respect to restrictions on the devise of homestead under Sec. 4(c), Art. X of the State Constitution when language providing for waiver of the right related to devise as set forth in F.S. 732.7025 (2018) is included in the deed. A judgment against a decedent is not enforceable against real property owned by the decedent at the time of death, but shall be filed in the same manner as other claims against estates of decedents. See F.S. 733.706 (2018).

Although Lady Bird Deeds are used prevalently in Florida for various purposes among which is the avoidance of probate by the holder of the life estate, there is no Florida Statute governing such conveyances and scant judicial authority supporting the practice. The practitioner should thus be aware that this Standard and its guidance represent the consensus view of the Real Property, Probate, and Trust Law Section of the Florida Bar.

CHAPTER 7

LEASES

STANDARD 7.1

TRANSFER OF LESSEE'S INTEREST

STANDARD: A LEASEHOLD ESTATE IS FREELY ALIENABLE UNLESS THE LEASE PROVIDES OTHERWISE.

Problem:	John Doe leases a building to Richard Roe. The lease is silent on the subject of transfer of the lessee's interest. May Roe sublease or assign his lease?
Answer:	Yes. Where the lease is silent there is no restraint upon its alienation.
Authorities & References:	*Frissell v. Nichols*, 94 Fla. 403, 114 So. 431 (1927); FLORIDA REAL PROPERTY COMPLEX TRANSACTIONS § 10.12 (Fla. Bar CLE 4th ed. 2005); 4 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 50.21[5] [a] (2004).

STANDARD 7.2

PRIORITY OF LEASE AS AGAINST
SUBSEQUENT MORTGAGE

STANDARD: A RECORDED LEASE IS AN ENCUMBRANCE ON THE TITLE SENIOR TO ALL SUBSEQUENT MORTGAGES BY THE LESSOR, SO THAT A FORECLOSURE OF SUCH SUBSEQUENT MORTGAGE DOES NOT AFFECT THE LESSEE.

Problem: John Doe leased his building to Richard Roe. The lease was recorded. John Doe later mortgaged the property to Simon Grant, who foreclosed for nonpayment of the mortgage. Will the foreclosure proceedings terminate Richard Roe's tenancy?

Answer: No.

Authorities & References: *Jones v. Florida Lakeland Homes Co.*, 95 Fla. 964, 117 So. 228 (1928).

Comment: An unrecorded lease may also be superior to a subsequent mortgage by the lessor if the lessee was in possession of the property at the time the mortgage was executed. *See Marion Mortgage Co. v. Grennan*, 143 So. 761 (Fla. 1932).

STANDARD 7.3

CANCELLATION OF LEASES

STANDARD: A LEASE FOR MORE THAN ONE YEAR MUST BE ASSIGNED OR CANCELLED BY AN INSTRUMENT IN WRITING SIGNED IN THE PRESENCE OF TWO SUBSCRIBING WITNESSES.

Problem: Blackacre was leased to John Doe for 99 years by a recorded lease. Two years later an unwitnessed instrument purporting to assign or cancel the lease was placed on record. Is the instrument sufficient to assign or cancel the lease?

Answer: No.

Authorities & References: § 689.01, Fla. Stat. (1979); *Grable v. Maroon*, 40 So. 2d 450 (Fla. 1949); FUND TN 19.02.01.

Comment: It is unclear whether defects in the execution of a cancellation or assignment of a lease may be cured by § 95.231, Fla. Stat. (2004).

CHAPTER 8

CONSTRUCTION LIENS

STANDARD 8.1

EFFECTIVE DATES OF CONSTRUCTION LIENS

STANDARD: IN ORDER TO PERFECT A CONSTRUCTION LIEN, A CLAIM OF LIEN MUST BE RECORDED. CONSTRUCTION LIENS FOR PROFESSIONAL SERVICES OR SUBDIVISION IMPROVEMENTS ATTACH AND TAKE PRIORITY AT THE TIME THE CLAIM OF LIEN IS RECORDED. ALL OTHER CONSTRUCTION LIENS, WHEN PERFECTED, ATTACH AND TAKE PRIORITY AS OF THE TIME OF RECORDATION OF AN UNEXPIRED NOTICE OF COMMENCEMENT, EXCEPT THAT IN THE EVENT NO NOTICE OF COMMENCEMENT IS RECORDED, SUCH LIENS ATTACH AND TAKE PRIORITY AS OF THE TIME THE CLAIM OF LIEN IS RECORDED.

Problem 1: A notice of commencement for the construction of apartment buildings on Blackacre was recorded Jan. 2, 2004. Construction was clearly visible on Jan. 15, 2004. On March 1, 2004 an architect recorded a claim of lien for services rendered in connection with the landscaping for the apartments. When did the architect's lien attach?

Answer: March 1, 2004.

Problem 2: Same facts as Problem 1 except that on Dec. 10, 2004 a subcontractor timely filed for record a claim of lien for roofing work done on the apartments. When did the subcontractor's lien attach?

Answer: Jan. 2, 2004.

Problem 3: Apartment buildings were being constructed on Blackacre. Construction visibly commenced on Jan. 15, 2004, but no notice of commencement was filed. On Dec. 10, 2004, a subcontractor timely filed for record a claim of lien for roofing work done on the apartments. When did the subcontractor's lien attach?

Answer: Dec. 10, 2004.

Problem 4: A recorded notice of commencement does not contain an effective date. When does it expire?

Answer: If no expiration date is stated in the notice, it expires one year from the date of recording. A claim of lien recorded after the expiration of a notice of commencement will take effect as of the date such lien was recorded.

Authorities & References: §§ 713.07(1), .07(2), Fla. Stat. (2005); § 713.08, Fla. Stat. (2005); *Page Heating & Cooling, Inc. v. Goldmar Homes, Inc.*, 338 So. 2d 265 (Fla. 1st DCA 1976); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§ 33.05, 33.09 (2004).

Comment: The mere visible commencement of improvements, in the absence of a recorded notice of commencement, is no longer important with respect to the time at which a construction lien attaches.

The notice of commencement, in itself, does not constitute a lien or notice of a lien. § 713.13(3), Fla. Stat. (2005).

As regards the time at which a construction lien attaches, no distinction is made between lienors in privity with the owner and those not in privity with the owner. *See* § 713.05, .06, Fla. Stat. (2004); § 713.07(2), Fla. Stat. (2005).

If none of the improvements mentioned in the notice of commencement are begun within ninety days after the recording thereof, the notice is void and of no effect. § 713.13(2), Fla. Stat. (2005).

STANDARD 8.2

DURATION OF CONSTRUCTION LIENS

STANDARD: CONSTRUCTION LIENS ON REAL PROPERTY ARE EXTINGUISHED ONE YEAR AFTER THE RECORDING OF THE INITIAL CLAIM OF LIEN UNLESS WITHIN THAT TIME AN ACTION TO ENFORCE THE LIEN HAS BEEN COMMENCED. THEREAFTER, THE LIEN WILL NOT BE GOOD AGAINST CREDITORS OR SUBSEQUENT PURCHASERS FOR A VALUABLE CONSIDERATION WITHOUT NOTICE UNLESS A NOTICE OF LIS PENDENS HAS ALSO BEEN RECORDED. THE PERIOD DURING WHICH AN ACTION MUST BE COMMENCED IS SHORTENED IF A NOTICE OF CONTEST IS RECORDED AND SERVED ON THE LIENOR, IN WHICH EVENT AN ACTION TO ENFORCE THE LIEN MUST BE COMMENCED WITHIN SIXTY DAYS AFTER SERVICE OF A NOTICE OF CONTEST; OTHERWISE, THE LIEN IS EXTINGUISHED. BANKRUPTCY PROCEEDINGS INVOLVING THE OWNER OR LIENOR MAY CAUSE THESE PERIODS TO BE STAYED OR EXTENDED.

Problem 1: A claim of lien is recorded on January 2, 2004. Nothing else appears of record and no action to enforce the lien has been commenced. Can marketable title be conveyed after January 2, 2005?

Answer: Yes. The lien is extinguished and no action may be brought to enforce it.

Problem 2: A claim of lien is recorded on January 2, 2004. An action to enforce the lien is commenced on December 5, 2004. No notice of lis pendens is recorded. Can marketable title be conveyed to a purchaser for value without notice on January 8, 2005?

Answer: Yes. Unless a notice of lis pendens is recorded, the lien is extinguished upon such real property held by a subsequent bona fide purchaser for value without notice.

Problem 3: A claim of lien is recorded on January 2, 2004. A notice of contest is recorded and served upon the lienor on March 1, 2004. No action to foreclose the lien was commenced. Can marketable title be conveyed on May 15, 2004?

Answer: Yes. An owner may elect to shorten the duration of a construction lien by causing a notice of contest to be recorded and served upon the lienor. If the lienor fails to institute an action to enforce the lien within sixty days after service of such notice the lien is automatically extinguished.

Problem 4: Same facts as Problem 3 except that the lienor amended his claim of lien on March 20, 2004. Can marketable title be conveyed on May 15, 2004?

Answer: Yes. The filing of an amended claim of lien does not toll the running of the sixty day time limitation.

Authorities & References: §§ 713.21(3), .22(1)-(2), Fla. Stat. (2004); *Jack Stilson & Co. v. Caloosa Bayview Corp.*, 278 So. 2d 282 (Fla. 1973); *Kimbrell v. Fink*, 78 So. 2d 96 (Fla. 1955); *Bowery v. Babbit*, 99 Fla. 1151, 128 So. 801 (1930); 11 U.S.C., § 108(c); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 33.11 (2004); FUND TN 21.02.02.

Comment: Any interested party may further shorten the period within which a construction lien may be enforced by filing a complaint in the circuit court of the county in which the land is located. Upon the filing of such complaint the clerk will issue a summons to the lienor, and unless the lienor institutes an action to enforce the lien or shows cause why the lien should not be enforced within 20 days, the court will cancel the lien. § 713.21(4), Fla. Stat. (2004).

STANDARD 8.3

CLAIM OF LIEN -- NOTICE

STANDARD: A CLAIM OF LIEN PROPERLY RECORDED CONSTITUTES CONSTRUCTIVE NOTICE TO ALL PERSONS OF THE CONTENTS AND EFFECT OF SUCH CLAIM.

Problem:	A claim of lien has been recorded on Blackacre. Is a title examiner on constructive notice of the existence of a lien?
Answer:	Yes.
Authorities & References:	§ 713.08(5), Fla. Stat. (2005); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 33.05[3] [c] [i] (2004).
Comment:	Errors or omissions in the claim of lien will not affect its validity as against one not adversely affected by the error or admission. § 713.08(4) (a) (c), Fla. Stat. (2005);

STANDARD 8.4

CONSTRUCTION LIENS - PRIORITY AS AGAINST PURCHASERS AND OTHERS

STANDARD: CONSTRUCTION LIENS HAVE PRIORITY OVER ANY CONVEYANCE OR ENCUMBRANCE NOT RECORDED AS OF THE TIME THE LIEN ATTACHES, BUT CONVEYANCES OR ENCUMBRANCES RECORDED PRIOR TO THE TIME THE LIEN ATTACHES HAVE PRIORITY OVER SUCH LIENS.

Problem 1: Blackacre was being improved and a notice of commencement had been recorded. Subsequently, John Doe, the owner of Blackacre, mortgaged it to Richard Roe. The mortgage was recorded. Thereafter a subcontractor properly recorded a claim of lien for work performed during the construction. Is the mortgagee's interest in Blackacre subordinate to that of the lienor?

Answer: Yes.

Problem 2: John Doe obtains a construction mortgage in order to improve Blackacre. The mortgage contains a valid clause securing future advances. The mortgagee records the mortgage before the notice of commencement or any claims of lien are recorded. Thereafter the mortgagee makes disbursements pursuant to the mortgage subsequent to the recording of the notice of commencement. Are both the mortgagee's interest in Blackacre and the later disbursements protected against the claims of lienors?

Answer: Yes.

Authorities & References: § 697.04, Fla. Stat (2005); § 713.07(3), Fla. Stat. (2005); *Industrial Supply Corp. v. Bricker*, 306 So. 2d 133 (Fla. 2d DCA 1975); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 33.09[3] (2004).

Comment: Mortgages securing future advances take priority from the date of the recording thereof provided the mortgage instrument complies with § 697.04, Fla. Stat. Advances made within twenty years of the execution of such a mortgage shall be protected as against liens attaching subsequent to the recording of the mortgage instrument. § 697.04, Fla. Stat. (2005) § 713.07(3), Fla. Stat. (2005); *Industrial Supply Corp. v. Bricker*, 306 So. 2d 133 (Fla. 2d DCA 1975).

STANDARD 8.5

VALIDITY OF CONSTRUCTION LIENS INCURRED
BY LESSEE AS AGAINST LESSOR'S INTEREST

STANDARD: CONSTRUCTION AND MATERIALMEN'S LIENS FOR WORK DONE AND MATERIAL FURNISHED AT THE REQUEST OF A LESSEE MAY ENCUMBER THE TITLE OF THE LESSOR IF THE IMPROVEMENTS ARE MADE IN ACCORDANCE WITH AN AGREEMENT BETWEEN THE LESSEE AND LESSOR EXCEPT WHEN THE LEASE PROHIBITS SUCH LIENS AND THE LEASE OR A SHORT FORM THEREOF HAS BEEN RECORDED.

Problem: John Doe leased Blackacre to Richard Roe. In accordance with the terms of the lease, Roe caused improvements to be constructed upon Blackacre. A materialman filed a lien against the land for nonpayment by Roe. The lease was recorded but did not expressly provide that Doe's interest would not be subject to liens for improvements made on behalf of the lessee. Is the lien enforceable against Doe's interest?

Answer: Yes.

Authorities & References: § 713.10, Fla. Stat. (2005); *Anderson v. Sokolik*, 88 So. 2d 511 (Fla. 1956); *Edward L. Nezelek, Inc. v. Food Fair Properties Agency, Inc.*, 309 So. 2d 219 (Fla. 3d DCA 1975); *Robb v. Lott Paving Co.*, 289 So. 2d 776 (Fla. 4th DCA 1974); *Jenkins v. Graham*, 237 So. 2d 330 (Fla. 4th DCA 1970); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 33.03[2] [b] (2004).

Comment: § 713.10, Fla. Stat. (2005) provides that, in the absence of fraud, the title of the lessor shall not be subject to liens for improvements made by the lessee when the lease is recorded and expressly prohibits such liability. It is not clear whether such an express prohibition will prevent exposure of the lessor's interest where the recorded lease also contains a provision requiring the lessee to make the improvements. *14th Heinberg v. Henricksen & Co.*, 877 So. 2d 34 (Fla. 1st DCA 2004).

No position is taken with respect to what may be required to constitute a sufficient agreement between the lessee and lessor. Furthermore, although not entirely clear, it would appear that there is no requirement that such agreement be contained in the lease itself. *See* § 713.10, Fla. Stat. (2005).

STANDARD 8.6

CONSTRUCTION LIENS -- WAIVER

STANDARD: A LIENOR MAY WAIVE HIS RIGHT TO CLAIM A CONSTRUCTION LIEN ONLY TO THE EXTENT OF LABOR, SERVICES, OR MATERIAL FURNISHED PRIOR TO THE DATE OF SUCH WAIVER.

Problem 1: A written contract between the owner and contractor prior to the commencement of construction provided that the contractor waived his right to claim a lien pursuant to Chapter 713, Part 1, Florida Statutes. Does a claim of lien thereafter recorded by the contractor constitute a valid construction lien?

Answer: Yes, because lien rights cannot be waived prior to the furnishing of services or materials for which a lien is claimed. *See* UTS 8.3.

Authorities & References: § 713.20(2), Fla. Stat. (2005); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 33.10[1] (2004).

Comment: Acceptance of an unsecured note by the lienor for all or any part of his claim does not constitute a waiver thereof unless expressly so agreed in writing. § 713.20(1), Fla. Stat. (2005); *Ideal Roofing & Sheet Metal Works, Inc. v. Katzentine*, 127 So. 2d 116 (Fla. 3d DCA 1961).

CHAPTER 9

JUDGMENTS AND MORTGAGES

STANDARD 9.1

LIEN OF JUDGMENT

STANDARD: A FLORIDA COURT JUDGMENT, ORDER OR DECREE REQUIRING THE PAYMENT OF MONEY RECORDED ON OR AFTER JANUARY 1, 1972, DOES NOT BECOME A LIEN ON THE DEBTOR'S REAL ESTATE UNTIL A CERTIFIED COPY THEREOF IS RECORDED IN THE OFFICIAL RECORDS OR THE JUDGMENT LIEN RECORDS OF THE COUNTY WHERE THE LAND IS LOCATED, WHICHEVER IS MAINTAINED AT THE TIME OF RECORDATION. EFFECTIVE OCTOBER 1, 1993, THE JUDGMENT DOES NOT BECOME A LIEN UNLESS IT CONTAINS THE ADDRESS OF THE PERSON WHO HAS THE LIEN OR IS RECORDED SIMULTANEOUSLY WITH AN AFFIDAVIT CONTAINING SUCH INFORMATION.

Problem 1 — John Doe recovered a judgment in Alachua County against Richard Roe on July 1, 1984. The *original* judgment was recorded in the Official Records of Alachua County, where Roe's land was located. However, a certified copy of the judgment was not recorded in that county. Roe conveyed his Alachua County land to Mary Loe in 1987. Is Loe's title free from the lien of the judgment?

Answer: Yes. Recording a certified copy of a judgment, order or decree is essential to obtain a valid lien on real estate. Once a certified copy of the judgment is recorded, the lien becomes a general lien on all of the debtor's real estate located in the county of recordation.

Problem 2 — A certified copy of a money judgment was recorded on January 4, 1995, in the county where Richard Roe owned non-homestead real property. The judgment did not contain the address of the judgment creditor, nor did the creditor simultaneously record a separate affidavit stating the creditor's address. Richard Roe sold the property to Mary Loe. Is Loe's title free from the lien of the judgment?

Answer: Yes. A certified copy of a judgment recorded on or after October 1, 1993, becomes a lien provided that (1) it contains the lienor's address, or (2) a separate affidavit stating the lienor's address is recorded simultaneously therewith.

Authorities and References: § 55.07(1), Fla. Stat.; *Steinbrecher v. Cannon*, 501 So. 2d 659 (Fla. 1st DCA 1987), *rev. denied*, 509 So. 2d 1119 (Fla. 1987); *Robinson v. Sterling Door & Window Co., Inc.*, 698 So. 2d 570 (Fla. 1st DCA 1997); *Hott Interiors, Inc. v. Fostock*, 721 So. 2d 1236 (Fla. 4th DCA 1998); *In re Lee*, 223 B.R. 594 (Bkrtcy. M.D. Fla. 1998); *Decubellis v. Ritchotte*, 730 So. 2d 723 (Fla. 5th DCA 1999); *In re Jackie Johns, DMD, P.A.* 267 B.R. 901 (Bkrtcy. S.D. Fla. 2001); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 34.05[1] (2002); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 5.20 (Fla. Bar CLE 4th ed. 1996).

Comment: § 55.10, Fla. Stat. applies whether the judgment is rendered in a state or federal court located within Florida. *See* 28 U.S.C. 1962; 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 34.05[2] (2002); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 5.20 (Fla. Bar CLE 4th ed. 1996).

An *execution* lien on real property cannot attach before a judgment lien attaches. Therefore, the mere act of delivering a writ of execution to and levy by a sheriff cannot alone create a lien on real property. A certified copy of a final judgment must be recorded before a lien on real property is created. *Diaz v. Plumhoff*, 742 So. 2d 846 (Fla. 2d DCA 1999).

For a discussion of the statute of limitations on judgment liens, see for a discussion of the limitations period on judgment liens recorded on or after July 1, 1987, see Title Standard 9.2-1 (Limitations on Lien of Judgments on or after July 1, 1987, and prior to July 1, 1994) and Title Standard 9.2-2 (Limitations on Lien of Judgments on or after July 1, 1994).

STANDARD 9.2

LIMITATION ON LIEN OF JUDGMENT

STANDARD: SUBJECT TO THE PROVISIONS OF § 55.10, Fla. Stat., NO CERTIFIED COPY OF A FLORIDA COURT JUDGMENT, ORDER, OR DECREE SHALL BE A LIEN UPON REAL PROPERTY WITHIN THE STATE AFTER THE EXPIRATION OF TWENTY (20) YEARS FROM THE DATE OF THE ENTRY OF SUCH JUDGMENT, ORDER, OR DECREE.

Problem: John Doe recovered a judgment against Richard Roe on July 8, 1985. John Doe did not record a certified copy of his judgment in the Official Records until August 3, 1986. When will the lien of the judgment expire?

Answer: At midnight on July 8, 2005, twenty years after the *entry* of the judgment. The twenty-year period is measured from the date of entry of the judgment, not from the date of recording the judgment or certified copy thereof.

Authorities & References: § 55.081, Fla. Stat.; § 55.10(1)-(4), Fla. Stat.; 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 34.05[3] (2002); Fla. R. Civ. Pro. 1.090.

Comment: The twenty-year limitation period is applicable to judgments entered in federal as well as state courts, except as otherwise provided below. *See* 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 34.05[2] (2002); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 5.20c (Fla. Bar CLE 4th ed. 1996); FUND TN 18.03.03.

The twenty-year statute of limitations applies to judgments, orders or decrees in favor of the State of Florida in accordance with specific statutory authority. See, for example, § 938.29, Fla. Stat. (public defender liens) and § 775.089, Fla. Stat. (restitution liens).

Federal Debt Collection Procedure Act. A judgment obtained under the Federal Debt Collection Procedure Act of 1990, 28 U.S.C., § 3001, et seq., becomes a lien on real property of the judgment debtor upon filing a certified copy of the abstract of judgment. Said lien has a duration of twenty years from date of recording and may be renewed for an additional twenty year period upon filing of a notice of renewal prior to the expiration of the first twenty-year term and upon court approval of said renewal. 28 U.S.C. § 3201(c); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE, § 5.20c (Fla. Bar CLE 4th ed. 1996). Section 55.081, Fla. Stat. does not apply to judgments obtained under the Act. It is unclear whether § 55.081, Fla. Stat. applies to all other judgments entered in favor of the United States. *See Custer v. McCutcheon*, 283 U.S. 514 (1931); *United States v. Kellum*, 523 F.2d 1284 (5th Cir. 1975); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 3.126 (Fla. Bar CLE 4th ed. 1996).

Florida Enforcement of Foreign Judgments Act. Effective October 1, 1984, under the Florida Enforcement of Foreign Judgments Act, §§ 55.501-.509, Fla. Stat., a lien is created by recording a certified copy of a final judgment from another state in the Official Records of the county where the property sought to be liened is located together with an affidavit and mailing of notice as set forth under § 55.505, Fla. Stat. The statute of limitations for such a lien is the same as §§ 55.10 and 55.081, Fla. Stat. or the statute of limitations of the state where the judgment was rendered, whichever is less.

See In Re Tranter, Bkrptcy 245 B.R. 419 (Bkrtcy. S.D. Fla. 2000) and *Muka v. Horizon Financial Corp*., 766 So. 2d 239 (Fla. 4th DCA 2000). Effective June 2, 1994, this act was amended to include any judgment, decree or order of a court of the United States.

Uniform Out-of-country Foreign Money-Judgment Recognition Act. Effective October 1, 1994, under the Uniform Out-of-country Foreign Money-Judgment Recognition Act, §§ 55.601-.607, Fla Stat., lien on real property is created after recording, in the public records of the county where enforcement is sought, a certified copy of the foreign country judgment together with an affidavit and mailing of notice as required by § 55.604, Fla. Stat. and recording of a clerk's certificate or order recognizing the foreign judgment. The twenty-year statute of limitations in § 95.11(1), Fla. Stat. that applies to actions on state court judgments has been held to apply to actions on foreign country judgments recorded under the Act. *Nadd v. Le Credit Lyonnais, S.A.*, 741 So. 2d 1165 (Fla. 5th DCA 1999) *app'd* 804 So. 2d 1226 (Fla. 2002).

The twenty-year statute of limitations might be terminated early by the death of the judgment debtor. *See* FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 5.28 (Fla. Bar CLE 4th ed. 1996). Further, a judgment lien is not enforceable when the judgment debtor has been dead for two years and administration was not commenced on the estate within two years after debtor's death pursuant to § 733.710, Fla. Stat. This latter statute would not be applicable to eliminate a lien on property that decedent conveyed during his/her lifetime.

For a discussion of the limitations period on certified copies of judgments recorded on or after July 1, 1987, see Title Standard 9.2-1 (Limitations on Lien of Judgments on or after July 1, 1987, and prior to July 1, 1994) and Title Standard 9.2-2 (Limitations on Lien of Judgments on or after July 1, 1994).

STANDARD 9.2-1

LIMITATIONS ON LIEN OF JUDGMENTS RECORDED ON OR AFTER JULY 1, 1987, AND PRIOR TO JULY 1, 1994

STANDARD: A FLORIDA COURT JUDGMENT, ORDER, OR DECREE RECORDED ON OR AFTER JULY 1, 1987, AND PRIOR TO JULY 1, 1994, BECOMES A LIEN ON REAL ESTATE IN ANY COUNTY WHEN A CERTIFIED COPY THEREOF IS RECORDED IN THE OFFICIAL RECORDS OF THAT COUNTY, AND IT SHALL BE A LIEN FOR A PERIOD NOT TO EXCEED SEVEN (7) YEARS FROM THE DATE OF RECORDING THE CERTIFIED COPY IN THAT COUNTY. THE JUDGMENT LIEN MAY BE EXTENDED FOR AN ADDITIONAL PERIOD NOT TO EXCEED TEN YEARS BY RE-RECORDING A CERTIFIED COPY OF THE JUDGMENT, ORDER OR DECREE PRIOR TO THE EXPIRATION OF THE INITIAL SEVEN-YEAR PERIOD. THE JUDGMENT LIEN MAY BE EXTENDED FURTHER BY RE-RECORDING A CERTIFIED COPY OF THE JUDGMENT, ORDER OR DECREE PRIOR TO THE EXPIRATION OF THE ADDITIONAL TEN-YEAR PERIOD. IN NO EVENT, HOWEVER, SHALL THE LIEN UPON REAL ESTATE EXTEND BEYOND THE TWENTY-YEAR PERIOD PROVIDED FOR IN § 55.081, Fla. Stat.

Problem: John Doe recovered a judgment against Richard Roe on July 1, 1986. John Doe did not record a certified copy of his judgment in the Official Records until August 3, 1990. When did the lien of the judgment expire?

Answer: On midnight August 3, 1997, seven years after the certified copy of the judgment was *recorded*. However, if John Doe properly re-recorded a certified copy of the judgment, then the lien would not expire until midnight July 1, 2006, twenty years after the entry of the judgment.

Authorities & References: §§ 55.10(1)-(4), Fla. Stat.; § 55.081, Fla. Stat.; Fla. R. Civ. Pro. 1.090.

Comment: Section 55.10(1)-(4), Fla. Stat. applies prospectively, not retroactively.

For a discussion of the twenty-year period provided by § 55.081, Fla. Stat. *See* Title Standard 9.2 (Limitation on Lien of Judgment).

The requirement for an address affidavit set forth under Title Standard 9.1 also applies to extensions of judgments.

In the absence of case law interpreting the various amendments to § 55.10, Fla. Stat., it is unclear whether a judgment lien re-recorded after expiration of its initial lien period is valid as a new and separate lien.

STANDARD 9.2-2

LIMITATIONS ON LIEN OF JUDGMENTS RECORDED ON OR AFTER JULY 1, 1994

STANDARD: A FLORIDA COURT JUDGMENT, ORDER OR DECREE RECORDED ON OR AFTER JULY 1, 1994, BECOMES A LIEN ON REAL ESTATE IN ANY COUNTY WHEN A CERTIFIED COPY THEREOF IS RECORDED IN THE OFFICIAL RECORDS OF THAT COUNTY, AND IT SHALL BE A LIEN FOR A PERIOD NOT TO EXCEED TEN (10) YEARS FROM THE DATE OF RECORDING THE CERTIFIED COPY IN THAT COUNTY. THE JUDGMENT LIEN MAY BE EXTENDED FOR AN ADDITIONAL PERIOD NOT TO EXCEED TEN YEARS BY RE-RECORDING A CERTIFIED COPY OF THE JUDGMENT, ORDER OR DECREE PRIOR TO THE EXPIRATION OF THE INITIAL TEN-YEAR PERIOD. IN NO EVENT, HOWEVER, SHALL THE LIEN UPON THE REAL ESTATE EXTEND BEYOND THE TWENTY-YEAR PERIOD PROVIDED FOR IN § 55.081, Fla. Stat.

Problem: John Doe recovered a judgment against Richard Roe on July 1, 1993. John Doe did not record a certified copy of his judgment in the Official Records until August 1, 1994. When will the lien of the judgment expire?

Answer: On midnight August 1, 2004, ten years after the certified copy of the judgment was recorded. However, if John Doe properly re-records a certified copy of the judgment, then the lien would not expire until midnight July 1, 2013.

Authorities & References: §§ 55.10(1)-(4), Fla. Stat.; § 55.081, Fla. Stat.; Fla. R. Civ. Pro. 1.090.

Comments: Section 55.10(1)-(4), Fla. Stat. applies prospectively, not retroactively.

For a discussion of the twenty-year period provided by § 55.081, Fla. Stat. see Title Standard 9.2 (Limitation on Lien of Judgment).

The requirement for an address affidavit set forth under Title Standard 9.1 also applies to extensions of judgments.

In the absence of case law interpreting the various amendments to § 55.10, Fla. Stat. it is unclear whether a judgment lien re-recorded after expiration of its initial lien period is valid as a new and separate lien.

STANDARD 9.3

SERVICE OF PROCESS

STANDARD: SINCE IT IS SERVICE OF PROCESS, RATHER THAN RETURN OF PROCESS, WHICH GIVES A COURT JURISDICTION OVER A DEFENDANT, RETURN OF VALIDLY EFFECTIVE SERVICE OF PROCESS CAN BE AMENDED TO SPEAK THE TRUTH. HOWEVER, UNTIL PROPER PROOF OF SERVICE IS MADE, A COURT IS WITHOUT EFFECTIVE JURISDICTION TO ENTER ANY JUDGMENT AGAINST A DEFENDANT WHO HAS NOT APPEARED IN THE CAUSE OR OTHERWISE SUBMITTED TO THE COURT'S JURISDICTION.

Problem 1: Valid service of process was made on John and Jane Doe, defendants in a mortgage foreclosure proceeding. However, the sheriff's return recited only that service was made on Jane Doe. John Doe's name did not appear on the return of service. The sheriff amended the return *after* the judgment was entered to add his name. Is the judgment valid against John Doe?

Answer: No.

Problem 2: Valid service of process is made on John and Jane Doe, defendants in a mortgage foreclosure proceeding. However, the sheriff's return recited only that service was made on Jane Doe. John Doe's name did not appear on the return of service. The sheriff amended the return to add his name *before* the entry of the judgment. Is the judgment valid against John Doe?

Answer: Yes.

Authorities & References: *Klosenski v. Flaherty*, 116 So. 2d 767 (Fla. 1960); *Largay Enterprises, Inc. v. Berman*, 61 So. 2d 366 (Fla. 1952); *International Typographical Union v. Ormerod*, 59 So. 2d 534 (Fla. 1952); *Wilmott v. Wilmott*, 119 So. 2d 54 (Fla. 1st DCA 1960), *aff'd* 122 So. 2d 486 (Fla. 1st DCA 1960); § 48.21, Fla. Stat.; Fla. R. Civ. Pro. 1.070; FUND TN 12.07.06.

STANDARD 9.4

TITLE ACQUIRED BY MORTGAGOR AFTER EXECUTION OF MORTGAGE

STANDARD: A MORTGAGE GIVEN BY A MORTGAGOR THEN HAVING NO TITLE, BUT WHO SUBSEQUENTLY ACQUIRES TITLE, IS VALID EXCEPT TO THE EXTENT THAT RIGHTS OF THIRD PARTIES MAY HAVE INTERVENED.

Problem: John Doe mortgaged Blackacre to Richard Roe. Doe was not then the owner of Blackacre, but subsequently acquired title thereto. Does the lien of Roe's mortgage attach to the after-acquired title?

Answer: Yes. The mortgagor's after-acquired title inures to the benefit of the mortgagee.

Authorities & References: *Taylor v. Federal Farm Mortg. Corp.*, 193 So. 758 (Fla. 1940); *Florida Land Inv. Co. v. Williams*, 92 So. 876 (Fla. 1922); *Hillman v. McCutchen*, 166 So. 2d 611 (Fla. 3d DCA 1964), *cert. den.*, 171 So.2d 391; 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 15.05 (2002).

Comment: This Standard involves only the validity of the mortgage. Caution should be exercised with respect to the rights of third parties.

The above Standard may not apply to purchase money mortgages in some situations. *See Nelson v. Dwiggins*, 149 So. 613 (Fla. 1933); *Florida Land Inv. Co. v. Williams*, 92 So. 876 (Fla. 1922) and further proceedings at 116 So. 642 (Fla. 1928); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 15.05 (2002); FUND TN 22.03.10.

STANDARD 9.5

MERGER OF TITLE AND MORTGAGE

STANDARD: A DEED FROM THE FEE OWNER TO THE MORTGAGE HOLDER, WHICH SHOWS AN INTENTION TO DISCHARGE THE MORTGAGE, CREATES A MERGER AND THE MORTGAGE IS DISCHARGED.

Problem: John Doe conveyed Blackacre to Richard Roe, the holder of a mortgage encumbering Blackacre, reciting therein that said conveyance was given for the purpose of extinguishing the debt. Was the mortgage discharged of record by the merger?

Answer: Yes.

Authorities & References: *Alderman v. Whidden*, 195 So. 605 (Fla. 1940); *Stovall v. Stokes*, 115 So. 828 (Fla. 1927); *Floorcraft Distributors, Inc. v. Horne-Wilson, Inc.*, 251 So. 2d 138 (Fla. 1st DCA 1971); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 5.15 (Fla. Bar CLE 4th ed. 1996); FUND TN 22.05.10.

Comment: The intention that the two estates merge must be clearly indicated on the record, and there should be no indication, from the record or otherwise, that the mortgagor has or claims grounds for setting aside the conveyance.

STANDARD 9.6

IRREGULARITIES AND DISCREPANCIES IN SATISFACTIONS OF MORTGAGES

STANDARD: A SATISFACTION OF MORTGAGE IS SUFFICIENT NOTWITHSTANDING MINOR IRREGULARITIES OR DISCREPANCIES IF THE DESCRIPTIVE DATA REASONABLY DISTINGUISHES THE MORTGAGE BEING SATISFIED FROM ALL OTHER MORTGAGES.

Problem 1: The mortgage satisfaction makes no reference to the book and page where the mortgage on Blackacre is recorded. The satisfaction contains a recital of the date, parties, and a description of Blackacre. The record does not disclose any other mortgage on Blackacre to which the descriptive data could apply. Is the satisfaction sufficient?

Answer: Yes.

Problem 2: The mortgage satisfaction correctly refers to the book and page where the mortgage on Blackacre is recorded. The satisfaction contains a recital of the parties and description of Blackacre but there is a discrepancy in the date recited. Is the satisfaction sufficient?

Answer: Yes. If the satisfaction contains a discrepancy in more than one descriptive item it generally should not be accepted.

Problem 3: Same facts as Problem 2 except that reference to the date is omitted in the satisfaction. Is the satisfaction sufficient?

Answer: Yes. If the mortgage recording information is correct, then omission of other descriptive items can usually be ignored.

Authorities & References: FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 5.13 (Fla. Bar CLE 4th ed. 1996).

STANDARD 9.7

SATISFACTION OF CORRECTIVE OR RE-RECORDED MORTGAGE

STANDARD: WHERE A MORTGAGE IS FOLLOWED BY ANOTHER WHICH CAN BE DETERMINED FROM THE RECORDS TO HAVE BEEN GIVEN TO CORRECT OR MODIFY THE FORMER, OR TO BE A RE-RECORDING OF THE FORMER, AND TO SECURE THE SAME OBLIGATION, MARKETABILITY IS NOT IMPAIRED BY A FAILURE TO SATISFY THE EARLIER OF THE MORTGAGES IF THE LATTER IS SATISFIED OF RECORD. IN CASE OF RE-RECORDING OF THE SAME MORTGAGE, A SATISFACTION REFERRING TO EITHER RECORDED MORTGAGE IS SUFFICIENT.

Problem: John Doe mortgages Blackacre to Richard Roe, the mortgage being properly recorded. Thereafter, John Doe places of record a mortgage in favor of Richard Roe which encumbered only the west one-half of Blackacre. The latter instrument recited that it was given to correct an erroneous description in the earlier mortgage. Subsequently, the latter mortgage was satisfied of record. May the earlier mortgage be disregarded?

Answer: Yes.

Authorities & References: §§ 701.03, .04, Fla. Stat.; *Matheson v. Thompson*, 20 Fla. 790 (1884).

Comment: By satisfying the corrective mortgage, the mortgagee acknowledges the modification.

CHAPTER 10

NAMES

STANDARD 10.1

ABBREVIATIONS, DERIVATIVES, AND NICKNAMES

STANDARD: ALL CUSTOMARY AND GENERALLY ACCEPTED ABBREVIATIONS, DERIVATIVES, AND NICKNAMES OF FIRST NAMES AND MIDDLE NAMES SHOULD BE RECOGNIZED AS THE EQUIVALENT THEREOF.

Problem: Blackacre was conveyed to L. Joseph Emery and Frederick Stephens as grantees. A conveyance was then executed by L. Jos. Emery and Fred Stephens as grantors. May identity of these grantors be presumed?

Answer: Yes.

Authorities & References: *Johnson v. State*, 51 Fla. 44, 40 So. 678 (1906); *Clinton v. Miller*, 124 Mont. 463, 226 P.2d 487 (1951); 1 PATTON AND PALOMAR ON LAND TITLES §§ 73-77 (3d ed. 2003); FUND TN 10.04.07.

Comment: As regards the use of initials, variances may be cured ten years subsequent to recording by § 689.19, Fla. Stat. (2007).

STANDARD 10.2

RULE OF IDEM SONANS

STANDARD: DIFFERENTLY SPELLED NAMES ARE PRESUMED TO BE THE SAME WHEN THEY SOUND ALIKE, OR WHEN THEIR SOUNDS CANNOT EASILY BE DISTINGUISHED, OR WHEN COMMON USAGE HAS, BY CORRUPTION OR ABBREVIATION, MADE THEIR PRONUNCIATION IDENTICAL.

Problem: Blackacre was conveyed to Lawrence Emery and Frederick Stephens as grantees. A conveyance is then executed by Laurence Emory and Frederick Stevens as grantors. May the discrepancy in spelling be disregarded?

Answer: Yes.

Authorities & References: *Burrows v. Hagerman*, 159 Fla. 826, 33 So. 2d 34 (1947); *Altman v. Simon*, 109 Fla. 196, 147 So. 222 (1933); *Myers v. State*, 84 Fla. 508, 94 So. 507 (1922); *Rhodes v. State*, 74 Fla. 230, 76 So. 776 (1917); 1 PATTON AND PALOMAR ON LAND TITLES § 78 (3d ed. 2003); FUND TN 10.04.07.

STANDARD 10.3

RECITALS OF IDENTITY IN CONVEYANCES

STANDARD: A RECITAL OF IDENTITY, CONTAINED IN A CONVEYANCE EXECUTED BY THE PERSON WHOSE IDENTITY IS RECITED, MAY BE RELIED UPON UNLESS THERE IS SOME GENUINE REASON TO DOUBT THE TRUTH OF THE RECITAL.

Problem 1:	Blackacre was conveyed to Joe Emery. A conveyance is then executed by J. Lawrence Emery, "said J. Lawrence Emery being also known as Joe Emery" as grantor. May identity of the grantee and grantor be presumed?
Answer:	Yes.
Problem 2:	Blackacre was conveyed to Laura Emery, as grantee. A conveyance is then executed by Laura Graham, formerly Laura Emery, or (nee Laura Emery) as grantor. May identity of the grantee and grantor be presumed?
Answer:	Yes.
Authorities & References:	*McKay v. Easton*, 86 U.S. (19 Wall.) 619 (1873). 1 PATTON AND PALOMAR ON LANDTITLES § 78 (3d ed. 2003); FUND TN 10.04.07.

STANDARD 10.4

USE OR NON-USE OF MIDDLE
NAMES AND INITIALS

STANDARD: THE USE IN ONE INSTRUMENT AND NON-USE IN ANOTHER OF A MIDDLE NAME OR INITIAL ORDINARILY DOES NOT CREATE A QUESTION OF IDENTITY AFFECTING TITLES.

Problem 1: Blackacre was conveyed to Lawrence Emery. A conveyance was then executed by Lawrence J. Emery. May identity of these persons be presumed?

Answer: Yes.

Problem 2: Blackacre was conveyed to Lawrence Emery. A conveyance is then executed by Lawrence Joseph Emery. May identity of these persons be presumed?

Answer: Yes.

Problem 3: Blackacre was conveyed to Lawrence J. Emery. A conveyance is then executed by Lawrence Joseph Emery. May identity of these persons be presumed?

Answer: Yes.

Authorities & References: *Burroughs v. State*, 17 Fla. 643 (1880); 1 PATTON AND PALOMAR ON LAND TITLES § 77 (3d ed. 2003); FUND TN 10.04.07.

Comment: Variances between instruments affecting title with respect to the use or non-use of middle names or initials may be cured 10 years subsequent to the recording thereof. § 689.19, Fla. Stat. (2007).

STANDARD 10.5

EFFECT OF SUFFIX

STANDARD: ALTHOUGH IDENTITY OF NAME RAISES THE PRESUMPTION OF IDENTITY OF PERSON, THE ADDITION OF A SUFFIX SUCH AS "JR." OR "II" TO THE NAME OF A SUBSEQUENT GRANTOR MAY REBUT THE PRESUMPTION OF IDENTITY WITH THE PRIOR GRANTEE.

Problem:	Blackacre was conveyed to John Doe. Later a conveyance thereof was executed by John Doe, Jr., as grantor. May identity of these persons be presumed?
Answer:	No. The use of the word "Jr." in the latter conveyance would indicate that there is more than one person bearing the name John Doe. A conveyance will be presumed to have run to the father in the absence of something in the deed evidencing intention to make the son the grantee. It will be necessary to explain the manner in which John Doe, Jr., acquired title as against John Doe.
Authorities & References:	*State ex rel. Nuccio v. Williams*, 97 Fla. 159, 120 So. 310 (1929); FUND TN 10.04.07.

STANDARD 10.6

NAME VARIANCES IN CORPORATE CONVEYANCES

STANDARD: CORPORATIONS ARE SATISFACTORILY IDENTIFIED ALTHOUGH THEIR NAMES ARE INCORRECTLY SET OUT OR VARIANCES EXIST FROM INSTRUMENT TO INSTRUMENT DUE TO THE OMISSION, ADDITION, OR MISSPELLING OF ANY PART OF THE CORPORATE NAME IF THE IDENTITY OF THE CORPORATION PLAINLY APPEARS FROM THE CONTENTS OF THE INSTRUMENT; AFFIDAVITS AND RECITALS OF IDENTITY MAY BE USED AND RELIED UPON TO OBVIATE VARIANCES TOO SUBSTANTIAL OR TOO SIGNIFICANT TO BE IGNORED.

Problem: Blackacre was conveyed to A and B Land Development Company, a Florida Corporation, its proper name. Later a conveyance appears by A & B Development Co., a Florida corporation. May the identity of the grantee and grantor be presumed?

Answer: Yes.

Authorities & References: § 694.12, Fla. Stat. (2007); FUND TN 11.07.03.

CHAPTER 11

PLATS

STANDARD 11.1

CORRECTING ERROR IN NAME OR DESIGNATION OF PLAT

STANDARD: AN ERROR IN A CONVEYANCE AS TO THE NAME OF A PLAT MAY BE DISREGARDED IF THE PLAT BOOK AND PAGE REFERENCE ARE CORRECT AND, AT THE TIME OF THE CONVEYANCE, THERE WAS NO RECORDED PLAT WITH THE ERRONEOUS NAME, OR PHASES THEREOF, CONTAINING THE LOT DESIGNATED IN THE CONVEYANCE. AN ERROR IN THE PLAT BOOK OR PAGE REFERENCE IN A CONVEYANCE MAY BE DISREGARDED IF THE NAME OF THE PLAT IS EXACT AND THE NAME OF THE PLAT RECORDED AT THE ERRONEOUS PLAT BOOK AND PAGE IS SUBSTANTIALLY DIFFERENT FROM THE NAME OF THE PLAT ON THE CONVEYANCE OR THE PLAT AT THE ERRONEOUS PLAT BOOK DOES NOT CONTAIN THE LOT DESIGNATED IN THE CONVEYANCE.

Problem 1: John Doe conveyed land describing it as Lot 1, Block A, of Greenacre, Plat Book 4, Page 3, of the Public Records of Orange County, Florida, instead of the correct plat name of Blueacre. There is no plat named Greenacre recorded in Orange County. Is a corrective deed necessary?

Answer: No.

Problem 2: Same facts as Problem 1, except there is a plat named Greenacre recorded in Orange County, which does not contain a lot with the designation "Lot 1, Block A." Is a corrective deed necessary?

Answer: No.

Problem 3: Same facts as Problem 2, except there is a plat named Greenacre, *Phase I* recorded in Orange County which does contain a lot with the designation "Lot 1, Block A." Is a corrective deed necessary?

Answer: Yes, a corrective deed should be obtained where the erroneous plat name refers to a recorded plat, or phase thereof, which contains a lot with the same lot and block designation referenced on the conveyance.

Problem 4: John Doe conveyed land describing it as Lot 1, Block A of Blackacre, Plat Book 5, Page 3, of the Public Records of Miami-Dade County, Florida, instead of the correct description of Plat Book 5, Page 31. The name of the plat actually recorded at Plat Book 5, Page 3 is Whiteacre and the only plat of record in Miami-Dade County named Blackacre is the one recorded at Plat Book 5, Page 31. Is a corrective deed necessary?

Answer: No.

Problem 5: Same facts as Problem 4, except the plat recorded at Plat Book 5, Page 3 is named Blackacre *Phase II*?

Answer: Yes, a corrective deed should be obtained where the name of the plat recorded at the erroneous page is similar to the name of the plat on the conveyance, unless the plat recorded at the erroneous page does not contain the lot and block designated in the conveyance.

Authorities & References: FUND TN 13.02.02.

Comment: This Standard should be relied upon only when the facts and circumstances, such as the location of the land, references in other recorded documents, etc., make it reasonably clear what plat reference was intended. If an index containing the names of all recorded plats for the county is available, the attorney or title examiner may be able to make the necessary determinations without assistance from the official custodian of the public records. While recordation of an affidavit from an attorney, a title examiner, or the official custodian of records is the best practice where there has been an error in the name or designation of the plat, such an affidavit is not required for marketable title.

STANDARD 11.2

PRIVATE DEDICATONS

STANDARD: ABSENT EXPRESS WORDS OF CONVEYANCE, A DEDICATION OF PROPERTY IN A PLAT TO A PRIVATE ENTITY DOES NOT CONVEY THE FEE SIMPLE TITLE TO THE PROPERTY.

Problem 1 — A recorded plat shows a dedication that states as follows: "The Maintenance Tract, as shown hereon, is hereby dedicated and conveyed in fee simple to the Blackacre Landing Property Owners Association, Inc., its successors and/or assigns, for maintenance, utilities, and vehicle storage purposes and shall be the perpetual maintenance obligation of said Association." Is this a good conveyance of the Maintenance Tract to the Association?

Answer: Yes. The language clearly states that it is a conveyance in fee simple of the property.

Problem 2 — A recorded plat shows a dedication that states as follows: "The Maintenance Tract, as shown hereon, is hereby dedicated and reserved to the Blackacre Landing Property Owners Association, Inc., its successors and/or assigns, for maintenance, utilities, and vehicle storage purposes and shall be the perpetual maintenance obligation of said Association." Is this a good conveyance of the Maintenance Tract to the Association?

Answer: No. The language does not clearly state that it is a conveyance in fee simple of the property.

Authorities & References: *City of Miami v. Florida East Coast Railway Company*, 84 So. 2d 726 (Fla. 1920); *Reiger v. Anchor Post Products, Inc.*, 210 So. 2d 283 (Fla. 3d DCA 1968); *Burnham v. Davis Islands, Inc.*, 87 So. 2d 97 (Fla. 1956); 4-120 FLORIDA REAL ESTATE TRANSACTIONS § 120.03.

Comment: A common law dedication requires four elements, one of which is a public use or public purpose. There can be no dedication for private use or to uses public in their nature but the enjoyment of which is restricted to a limited part of the public.

STANDARD 11.3

TITLE TO PUBLIC STREETS ABUTTING PLATTED LOTS

STANDARD: PRIOR TO ANY CONVEYANCE OF LOTS ON A PLAT, THE OWNER AND DEDICATOR OF A PLATTED SUBDIVISION OWNS THE FEE INTEREST IN ALL THE STREETS DEPICTED ON THE PLAT, SUBJECT TO THE EASEMENT CREATED BY THE DEDICATION. A CONVEYANCE OF A LOT BY REFERENCE TO THE PLAT, CARRIES TITLE TO THE CENTERLINE OF AN INTERIOR PUBLIC STREET ABUTTING THE LOT, SUBJECT TO THE EASEMENT, SUCH THAT TITLE TO THE STREET IS ENCUMBERED BY THE PURCHASER'S MORTGAGE OF THE LOT, UNLESS PROVIDED OTHERWISE IN THE CONVEYANCE OR MORTGAGE.

Problem 1: John Doe conveys his subdivision lot, which abuts an abandoned public street, to Richard Roe. Does the conveyance by lot and block number alone carry the interest in the street?

Answer: Yes, subject to any private easement rights in the street.

Problem 2: John Doe mortgages a lot in a platted subdivision by reference to lot and block number alone, without mention of an interest in the street. Subsequently, he executes a quitclaim deed to Richard Roe for the portion of an abandoned public street abutting his mortgaged lot. The mortgagee neither joins in the deed nor executes a release of the mortgage with reference to the abandoned street. Is Richard Roe's title marketable?

Answer: No.

Problem 3: John Doe mortgaged a lot in a platted subdivision by reference to lot and block number alone, without mention of an interest in the interior public street. Subsequently, the interior street abutting his lot was abandoned by the city. Thereafter, the mortgagee foreclosed and obtained a certificate of title which referenced the lot and block number alone, without mention of the vacated interior street. Would the mortgagee's conveyance of the lot include marketable title to the centerline of the vacated street?

Answer: Yes, subject to any private easement rights in the street.

Authorities & References: *Servando Building Co. v. Zimmerman*, 91 So. 2d 289 (Fla. 1956); *Buckels v. Tomer*, 78 So. 2d 861 (Fla. 1955); *Smith v. Horn*, 70 So. 435 (1915); *Joseph v. Duran*, 436 So. 2d 316 (Fla. 1st DCA 1983); 19 Fla. Jur. 2d *Deeds* § 133 (2008); FUND TN 13.01.04, 24.01.03.

Comment: As the conveyance of lots by reference to a plat may create private easement rights in adjoining lot owners, these rights should be considered in addition to public easement rights when analyzing abandonment of a street. *See* Comment to Standard 11.4. This standard is applicable to lots abutting interior streets, and the Comment to Standard 11.5 should be referred to when dealing with periphery streets. Standards 11.3, 11.4 and 11.5 treat closely related issues and should be read together for a full understanding of title to streets dedicated by plat.

STANDARD 11.4

RESERVATION OF PUBLIC STREET DEDICATED BY PLAT

STANDARD: A PROVISION IN THE DEDICATORY LANGUAGE OF A PLAT RESERVING THE STREETS OR THE "REVERSIONARY INTEREST" THEREIN TO THE DEDICATOR DOES NOT PREVENT TITLE TO THE CENTERLINE OF AN INTERIOR ABUTTING PUBLIC STREET FROM PASSING WITH TITLE TO THE LOT, SUBJECT TO PUBLIC AND PRIVATE EASEMENTS, UNLESS OTHERWISE CLEARLY PROVIDED IN THE CONVEYANCE. WHEN THE PUBLIC RIGHTS IN THE STREET ARE VACATED, THE LOT OWNER HOLDS TITLE TO THE CENTERLINE OF THE INTERIOR STREET SUBJECT TO ANY PRIVATE EASEMENT RIGHTS.

Problem 1: John Doe recorded a plat dedicating the streets. The dedication contained the following language: "and does hereby dedicate to the perpetual use of the public, as public highways, the streets as shown hereon, reserving unto himself, his heirs, successors, assigns, or legal representatives, the reversion or reversions of the same, whenever abandoned by the public or discontinued by law." John Doe thereafter conveyed lots abutting interior streets in the subdivision. These deeds referred to the plat but were silent with respect to title to the streets. The streets were subsequently abandoned. Do the abutting owners now own the fee to the centerline of the streets?

Answer: Yes, subject to any private easement rights in the street.

Problem 2: Same facts as Problem 1, except the deeds from John Doe expressly reserve title to or the "reversionary interest" in the streets. Do the abutting owners own the fee to the centerline of the vacated street?

Answer: No, fee title to the street remains with John Doe, subject to any private easement rights.

Authorities & References: § 177.085, Fla. Stat. (2008); *U.S. v. 16.33 Acres of Land in Dade County*, 342 So. 2d 476 (Fla. 1977); FUND TN 24.01.01.

Comment: The above Standard is based on § 177.085, Fla. Stat., which became effective on July 1, 1972. The statute purports to be retroactive, but there is some question with respect to the constitutionality of its retroactive application. Therefore, as to Problem 1, caution should be exercised as to plats filed prior to July 1, 1972 which contain reversionary language. *See Peninsular Point, Inc. v. South Georgia Dairy Co-Op*, 251 So. 2d 690 (Fla. 1st DCA 1971); FUND TN 24.01.03. Dedication of a street by plat and subsequent conveyance of lots by reference to that plat create two independent sets of rights in the street easement: the one in the public, which may be vacated by act of the appropriate local government, the other in the owners who take by reference to the plat and for whom the use of the street is reasonably and materially beneficial. Private rights should therefore also be considered in addition to public rights when analyzing a reservation or reversion. *See Florida E. Coast Ry. Co. v. Worley*, 38 So. 618 (Fla. 1905); *Powers v. Scobie*, 60 So. 2d 738 (Fla.1952); *Highland Const., Inc. v. Paquette*, 697 So. 2d 235 (Fla. 5th DCA 1997); *Easton v. Appler*, 548 So. 2d 691 (Fla. 3d DCA 1989); *Reiger v. Anchor Post Products, Inc.*, 210 So. 2d 283 (Fla. 3d DCA 1968). This standard is applicable to lots abutting interior streets, and the Comment to Standard 11.5 should be referred to when dealing with periphery streets. Standards 11.3, 11.4 and 11.5 treat closely related issues and should be read together for a full understanding of title to streets dedicated by plat.

STANDARD 11.5

ABANDONMENT OF PUBLIC STREET ON PLATTED LAND

STANDARD: WHEN AN INTERIOR PUBLIC STREET DEDICATED BY PLAT IS DISCONTINUED THROUGH LEGAL PROCESS AND TITLE TO, OR THE "REVERSIONARY INTEREST" IN, THE STREET HAS NOT BEEN PROPERLY RESERVED TO THE DEDICATOR, FEE TITLE TO THE CENTERLINE OF THE STREET ABUTTING A LOT IS IN THE LOT OWNER, SUBJECT TO ANY PRIVATE EASEMENT RIGHTS, SUCH THAT TITLE TO THE STREET IS ENCUMBERED BY THE LOT OWNER'S MORTGAGE OF THE LOT, UNLESS PROVIDED OTHERWISE IN THE CONVEYANCE OR MORTGAGE.

Problem: Veronese Street, a dedicated interior public street in the Blackacre subdivision, was vacated by the City. John Doe owned a lot in Blackacre which abutted Veronese Street. There was no effective reservation of title to, or the reversionary interest in, Veronese Street. John Doe claimed fee title to the centerline of the street. Was his claim of title valid?

Answer: Yes, subject to any private easement rights.

Authorities & References: *New Fort Pierce Hotel Co. v. Phoenix Title Corp.*, 171 So. 525 (1936); *Smith v. Horn*, 70 So. 435 (1915); *Florida S. Ry. v. Brown*, 1 So. 512 (1887); *Burkart v. City of Ft. Lauderdale*, 168 So. 2d 65 (Fla. 1964); *Dean v. MOD Properties, Ltd.*, 528 So. 2d 432 (Fla. 5th DCA 1988); *Calvert v. Morgan*, 436 So. 2d 314 (Fla. 1st DCA 1983); *Hurt v. Lenchuk*, 233 So. 2d 350 (Fla. 4th DCA 1969); FUND TN 24.01.01.

Comment: As the conveyance of lots by reference to a plat may create private easement rights in adjoining lot owners, these rights should be considered in addition to public easement rights when analyzing the abandonment of a street. *See* Comment to Standard 11.4. When the street is on the periphery of the plat and the dedicator does not, at the time of the plat, own the land on the other side of the street outside of the plat and does not reserve title to, or the "reversionary interest" in, the street, the abutting lot owner will take the entire width of the street upon vacation of the street, subject to any private easement rights. Title to the underlying fee of a street on the periphery of the plat is otherwise subject to the all of standards applicable to title to interior streets, but caution should be observed when analyzing periphery streets as they frequently run along bodies of water and this may raise separate issues of submerged lands and may implicate riparian rights. *See, e.g., Caples v. Taliaferro*, 197 So. 861 (Fla. 1940). Standards 11.3, 11.4 and 11.5 treat closely related issues and should be read together for a full understanding of title to streets dedicated by plat.

STANDARD 11.6

DESCRIPTION MADE BY REFERENCE TO A PLAT

STANDARD: IF A DEED DESCRIBES PROPERTY CONVEYED BY REFERENCE TO A RECORDED PLAT, THE CONVEYANCE IS TAKEN SUBJECT TO EVERY PARTICULAR SHOWN ON THE PLAT.

Problem: John Doe acquired title by a deed which described the property as Lot 1, Block A, of Blackacre, Plat Book 7, Page 12, of the Public Records of Dade County, Florida. The recorded plat shows a 10 ft. wide easement within the northern boundary of Lot 1. Doe was never made aware of the easement. Is John Doe's title to the property subject to the easement shown on the plat?

Answer: Yes.

Authorities & References: *Sunshine Vistas Homeowners Ass'n v. Caruana*, 623 So. 2d 490 (Fla. 1993)*; Wahrendorff v. Moore*, 93 So. 2d 720 (Fla. 1957); *Lawyers Title Guaranty Fund v. Milgo Electronics*, 318 So. 2d 416 (Fla. 3d DCA 1975); 19 Fla. Jur. 2d *Deeds* § 135 (2008); FUND TN 24.03.01.

CHAPTER 12

TAX LIENS

STANDARD 12.1

DIVESTMENT OF STATE ESTATE TAX LIEN

STANDARD: REAL PROPERTY THAT IS A PART OF THE ESTATE OF A RESIDENT DECEDENT IS DIVESTED OF A STATE ESTATE TAX LIEN IF "TRANSFERRED TO A BONA FIDE PURCHASER, MORTGAGEE OR PLEDGEE FOR AN ADEQUATE AND FULL CONSIDERATION IN MONEY OR MONEY'S WORTH."

Problem 1: John Doe, a Florida resident, was the record owner of Blackacre. The personal representative of John Doe's estate sold Blackacre to Simon Grant pursuant to a court order authorizing the sale. It appears that the sale was bona fide and adequate consideration was given. Is Simon Grant's title free of any state estate tax lien?

Answer: Yes.

Problem 2: John Doe, a Florida resident, was the record owner of Blackacre. The personal representative of John Doe's estate distributed Blackacre to Ralph Doe, a devisee, pursuant to the terms of John's will. Is Ralph Doe's title free of any state estate tax lien?

Answer: No.

Authorities & References: § 198.22, Fla. Stat. (2007); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 34.03[2] [a] (2007); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 3.86 (Fla. Bar CLE 5th ed. 2006); FUND TN 2.10.02.

Comment: Under the Economic Growth and Tax Relief Reconciliation Act of 2001, the estates of resident and nonresident decedents dying on and after Jan. 1, 2005 and before Jan. 1, 2011, are not subject to the Florida estate tax.

STANDARD 12.2

FEDERAL ESTATE TAX LIENS

STANDARD: TITLE TO REAL PROPERTY DERIVED FROM A DECEDENT'S ESTATE IS NOT MARKETABLE UNLESS CLEARED OF THE LIEN OF FEDERAL ESTATE TAXES.

Problem: John Doe was the record owner of Blackacre and died leaving an estate sufficiently large to be subject to federal estate taxes. The personal representative of John Doe's estate, being duly authorized, conveyed Blackacre to Richard Roe before the administration of the estate was completed. The deed contained a recital that all debts and obligations of the estate, including taxes, had been paid in full. Was Richard Roe's title to Blackacre marketable?

Answer: No. The lien of federal estate taxes may be cleared by recording (1) a certificate of release issued by the District Director of the Internal Revenue Service upon a finding that the liability assessed has been fully satisfied or is legally unenforceable; or (2) a certificate of discharge of specific property.

Authorities & References: 26 U.S.C. § 6325; *Treas. Reg.* §§ 20.6325-1, 301.6325-1.

Comment: A showing that the decedent's estate was not subject to federal taxes, or the taxes were otherwise eliminated, as, for example, by the running of any applicable limitations period, will obviate the need to clear title of a federal estate tax lien.

The federal estate tax lien is divested as to any part of the gross estate used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction. 26 U.S.C. § 6324(a) (1). Care should be taken to ensure that the factual basis for such divestment exists.

With respect to property that is subject to a federal estate tax lien but is not derived from a decedent's estate, see Title Standard 12.3 (Federal Estate Tax Lien On Survivorship Property).

STANDARD 12.3

FEDERAL ESTATE TAX LIEN ON
SURVIVORSHIP PROPERTY

STANDARD: REAL PROPERTY IS DIVESTED OF A FEDERAL ESTATE TAX LIEN IF TRANSFERRED BY THE SURVIVING TENANT OF A JOINT TENANCY WITH RIGHT OF SURVIVORSHIP OR A TENANCY BY THE ENTIRETIES TO "A BONA FIDE PURCHASER MORTGAGEE, OR PLEDGEE FOR AN ADEQUATE AND FULL CONSIDERATION IN MONEY OR MONEY'S WORTH."

Problem: John Doe and Mary Doe, husband and wife, owned Blackacre as a tenancy by the entireties. John Doe died and Mary Doe seeks to sell Blackacre. Is a release from federal estate taxes, and any liens thereunder, necessary?

Answer: No. However, upon a conveyance of Blackacre, any estate tax lien would then attach to the sale proceeds and all of the other property of Mary Doe.

Authorities & References: 26 U.S.C. § 6324; *Rev. Rul.* 56-144, 1956-1 CUM.BULL. 563; FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 3.86 (Fla. Bar CLE 5th ed. 2006); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 34.03[1] [b] (2007); FUND TN 2.10.02.

Comment: Title examiners should satisfy themselves that the transfer of the property was bona fide, the consideration was substantially equivalent to the value of the property, and the dealings were at arm's length, "as between strangers."

STANDARD 12.4

ESTATE TAX LIEN — LIMITATIONS

STANDARD: TITLE TO REAL PROPERTY DERIVED FROM A DECEDENT'S ESTATE IS DEEMED TO BE FREE OF: (1) ANY FEDERAL ESTATE TAX LIEN IF THE DECEDENT HAS BEEN DEAD FOR MORE THAN TEN YEARS, AND (2) THE FLORIDA ESTATE TAX LIEN IF THE DECEDENT HAS BEEN DEAD FOR MORE THAN TWELVE YEARS, UNLESS NOTICE OF THE FLORIDA ESTATE TAX LIEN HAS BEEN FILED OR THERE ARE OTHER FACTS OF RECORD TO PUT THE EXAMINER ON NOTICE OF SUCH STATE LIEN.

Problem: In 1995 John Doe, the record owner of Blackacre, died. Blackacre was distributed to Ralph Doe, the devisee under John Doe's will. Nothing appears of record to indicate that title to Blackacre was cleared of any possible estate tax lien. In 1999 Ralph Doe gratuitously conveyed Blackacre to Richard Roe. No notice of an estate tax lien has been filed and nothing appears of record to indicate that such a lien exists. In 2008 is title to Blackacre marketable even though the clearing of state and federal estate tax liens, if any, does not appear of record?

Answer: Yes.

Authorities & References: 26 U.S.C. § 6324; §§ 198.22, .33, Fla. Stat. (2007); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§ 34.03[1] [c], 34.03[2] [b] (2007); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 5.57 (Fla. Bar CLE 5th ed. 2006); FUND TN 2.10.07.

Comment: Unpaid Florida estate taxes are a lien on the gross estate for twelve years. § 198.22, Fla. Stat. (2007). However, liability for Florida estate taxes is discharged after ten years from the date the decedent's Florida estate tax return is filed with the Department of Revenue. § 98.33, Fla. Stat. (2007). The Department may extend the lien for an additional five years by recording a notice of lien in the public records where the property is situated. No Florida estate tax lien may continue longer than twenty years from the decedent's date of death. § 198.33(2), Fla. Stat. (2007).

Under the Economic Growth and Tax Relief Reconciliation Act of 2001, the estates of resident and nonresident decedents dying on and after Jan. 1, 2005 and before Jan. 1, 2011, are not subject to the Florida estate tax.

A federal estate tax lien may be unenforceable ten years after the date of decedent's death. 26 U.S.C. § 6324(a) (1).

STANDARD 12.5

LIEN OF INTANGIBLE PERSONAL PROPERTY TAXES

STANDARD: DELINQUENT INTANGIBLE PERSONAL PROPERTY TAXES ARE A LIEN UPON REAL PROPERTY ONLY WHEN A WARRANT ISSUED BY THE DEPARTMENT OF REVENUE FOR THE FULL AMOUNT DUE IS RECORDED IN THE COUNTY IN WHICH THE PROPERTY IS LOCATED.

Problem: An intangible personal property tax was assessed against John Doe, the owner of Blackacre, for the year 2005. John Doe did not pay the tax. Nothing appears of record with respect to the delinquent tax. In 2007 John Doe conveyed Blackacre to Richard Roe. Did Richard Roe take subject to a lien for the intangible personal property tax?

Answer: No. A lien would not attach until a warrant issued by the Department of Revenue is recorded in the county in which Blackacre is located.

Authorities & References: § 199.262, Fla. Stat. (2007); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 34.02[2] (2007); FLORIDA REAL PROPERTY TITLE EXAMINATION AND Insurance § 5.65 (Fla. Bar CLE 5th ed. 2006); FUND TN 30.06.03.

Comment: The lien for intangible personal property taxes expires twenty years after the last date the tax may be assessed, after the tax becomes delinquent, or after the filing of a tax warrant, whichever is later. § 95.091(1) (b), Fla. Stat. (2007).

CHAPTER 13

TRUSTS

STANDARD 13.1

CONVEYANCES OR MORTGAGES BY OR TO
TRUSTEES — EFFECT OF DESIGNATION "TRUSTEE"

STANDARD: THE WORDS "TRUSTEE" OR "AS TRUSTEE" FOLLOWING THE NAME OF A GRANTEE, TRANSFEREE, ASSIGNEE, OR MORTGAGEE DO NOT, OF THEMSELVES, CONSTITUTE NOTICE OF A TRUST WHERE THE INSTRUMENT CONTAINS NO OTHER REFERENCE TO A TRUST AND NO SUCH TRUST APPEARS OF RECORD.

Problem 1: Blackacre was conveyed to "Richard Roe, trustee" by deed which contained no other reference to a trust. The records fail to disclose a declaration or other evidence of a trust. Does the word "trustee" following the name of the grantee constitute notice of a trust?

Answer: No.

Problem 2: A mortgage was signed to "Richard Roe, as trustee." The instrument contained no other reference to a trust and the records fail to disclose a declaration or other evidence of a trust. May a subsequent assignee treat Richard Roe as holding the mortgage free from a trust?

Answer: Yes.

Authorities & References: § 689.07, Fla. Stat. (2005); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 10.05[3] (2005); FLORIDA REAL PROPERTY SALES TRANSACTIONS § 6.26 (Fla. Bar CLE 4th ed. 2004); *see Buttner v. Talbot*, 784 So. 2d 538 (Fla. 4th DCA 2001); *Grammer v. Roman*, 174 So. 2d 443 (Fla. 2d DCA 1965); *Resnick v. Goldman*, 133 So. 2d 770 (Fla. 3d DCA 1961).

Comment: Under § 689.07, Fla. Stat., the title will vest into the grantee individually if "no beneficiaries are named, the nature and purposes of the trust, if any, are not set forth, and the trust is not identified by title or date. . ." . In reaction to the case of *In re: Douglas K. Raborn*, 16 Fla. Law Weekly Fed. D 257 (S. D. Fla. 2003), the Florida legislature added the last clause in 2004, to clarify existing law and to provide for it to apply retroactively.

Section 689.07, Fla. Stat. expressly provides that nothing therein shall prevent any person from recording a declaration of trust subsequent to the recording of an instrument conveying, transferring, assigning, or mortgaging any interest in real property. In such event any grantee, transferee, assignee, or mortgagee of the "trustee" taking prior to the recording of the declaration takes free from the claims of the beneficiaries. Although not expressly stated in the statute, it seems to be implied that any grantee, transferee, assignee, or mortgagee of the "trustee" taking subsequent to the recording of the declaration would take subject to the claims of the beneficiaries, and caution should be exercised in this situation. § 689.07(4), Fla. Stat. (2005); FUND TN 31.04.02.

Although the point is undecided, there is some question as to whether actual knowledge of the existence of a trust agreement will withdraw from a grantee, transferee, assignee, or mortgagee of the trustee the protection of § 689.07, Fla. Stat., even where the conveyance to the trustee is strictly within the scope of § 689.07, Fla. Stat. FUND TN 31.04.03. In addition, it has been held that § 689.07 does not preclude a court of equity from declaring a resulting trust. In declaring a resulting trust, the court relied, *inter alia*, upon knowledge of the existence of a trust agreement. *Arundel Debenture Corp. v. LeBlond*, 139 Fla. 668, 190 So. 765 (1939).

Under § 689.07, Fla. Stat. a conveyance to a person whose name is followed by the words “trustee” or “as trustee” in which no other reference is made to a trust creates a fee simple title individually in the grantee. The title thereby acquired is subject to whatever homestead rights exist at the time. *See* Uniform Title Standards, Chapter 20 (Marital Property).

STANDARD 13.2

IMPLIED POWER OF SALE

STANDARD: TITLE DERIVED FROM A TRUSTEE UNDER A VALID RECORDED TRUST WHICH CONTAINS NO EXPRESS POWER OF SALE MAY BE MARKETABLE BY REASON OF AN IMPLIED POWER OF SALE IF THE TRUST IMPOSED ON THE TRUSTEE DUTIES WHICH COULD NOT BE PERFORMED IN THE ABSENCE OF SUCH POWER.

Problem: Blackacre was devised to Richard Roe in trust to pay specific amounts in cash to specified beneficiaries within specified times and to distribute the remaining assets of the trust in cash to named beneficiaries in specified proportion. The trust was recorded and valid but contained no express power of sale. Roe, as trustee, conveyed by trustee's deed to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: Yes. Under the circumstances presented in the problem, the trustee could not perform the duties of payment and distribution in cash imposed on him by the trust instrument in the absence of a power sale, which necessarily was implied.

Authorities & References: *Jordan v. Landis*, 128 Fla. 604, 175 So. 241 (1937); *Walker v. Close*, 98 Fla. 1103, 125 So. 521 (1929); *First Baptist Church of Jacksonville v. American Bd. of Comm'rs for Foreign Mission*, 66 Fla. 441, 63 So. 826 (1913); *In re Walker's Will*, 258 Wis. 65, 45 N.W.2d 94 (1950); *Annot.*, 23 A.L.R.2d 1000 (1952).

Comment: Section 737.402, Fla. Stat. (2005) provides that, unless otherwise provided in the trust instrument, the trustee of a trust is authorized to sell property. *See In Re Will of Jones*, 289 So. 2d 42 (Fla. 2d DCA 1973) (finding the trustee had an independent power of sale under § 691.03(2), Fla. Stat. (1973), the predecessor to § 737.402, Fla. Stat.). However, a court order authorizing the sale should be obtained if there is an express limitation of the power of sale in the trust instrument, § 737.402(2), Fla. Stat.; if the sale would create a conflict of interest for the trustee, § 737.403(2), Fla. Stat.; or if a court has prohibited the sale subsequent to execution of the trust instrument but before the sale, § 737.4031(1) (d), Fla. Stat. *See also*, FLORIDA REAL PROPERTY SALES TRANSACTIONS § 6.23 (Fla. Bar CLE 4th ed. 2004); FUND TN 31.05.04.

STANDARD 13.3

EXECUTION OF DEED BY TRUSTEES

STANDARD: WHERE THERE ARE THREE OR MORE TRUSTEES OF A TRUST, A VALID DEED MAY BE EXECUTED BY A MAJORITY UNLESS THE TRUST INSTRUMENT PROVIDES OTHERWISE.

Problem: The trust appointed John Doe, Frank Doe, and Richard Roe as trustees. The trust instrument was silent with respect to the number of trustees needed to act on behalf of the trust. John Doe and Frank Doe executed a deed to Simon Grant. Is Grant's title marketable?

Answer: Yes. The answer assumes that the trustees had the power of sale.

Authorities & References: § 737.404(1), Fla. Stat. (2005); *see* FLORIDA REAL PROPERTY SALES TRANSACTIONS § 6.32 (Fla. Bar CLE 4th ed. 2004).

Comment: Where the trust instrument appoints two trustees, the deed must be executed by both of them unless the trust instrument provides otherwise.

STANDARD 13.4

DEED EXECUTED BY THE SURVIVOR
OF TWO OR MORE TRUSTEES

STANDARD: A DEED EXECUTED BY THE SURVIVOR OR SURVIVORS OF TRUSTEES WHO HAD THE POWER OF SALE IN THE TRUST IS VALID, UNLESS THE TRUST PROVIDES OTHERWISE.

Problem: John Doe and Richard Roe were named as trustees. The trust agreement does not require appointment of a successor trustee to Richard Roe. John Doe, as trustee, executed a deed as survivor to Simon Grant. Attached to the deed is the death certificate of Richard Roe. Is Simon Grant's title marketable?

Answer: Yes.

Authorities & References: § 737.404(2), Fla. Stat. (2005); *see* FLORIDA REAL PROPERTY SALES TRANSACTIONS § 6.32 (Fla. Bar. CLE 4th ed. 2004).

Comment: With respect to the number of trustees, or survivors, who must act, see Title Standard 13.3 (Execution of Deed by Trustees).

CHAPTER 14

SERVICEMEMBERS CIVIL RELIEF ACT

STANDARD 14.1

SERVICEMEMBERS CIVIL RELIEF ACT
DEFAULT JUDGMENTS

STANDARD: A DEFAULT JUDGMENT ENTERED AFTER A SERVICEMEMBER DEFENDANT FAILS TO APPEAR IN AN ACTION INVOLVING TITLE TO REAL PROPERTY IS VOIDABLE IF THE PLAINTIFF DID NOT COMPLY WITH THE PROVISIONS OF SECTION 521 OF THE SERVICEMEMBERS CIVIL RELIEF ACT, FOR ACTIONS FILED AFTER DECEMBER 19, 2003.

Problem 1: John Doe entered military service in 2004 and remained in military service through 2006. In 2002, Doe mortgaged Blackacre to Richard Roe, who started foreclosure proceedings in 2005. Doe still held title to Blackacre, but did not appear in the action and Roe took a default judgment against him. After a final judgment of foreclosure based on the default judgment, Roe purchased Blackacre at the foreclosure sale. Roe did not file an affidavit concerning Doe's military service. Is Roe's title marketable?

Answer: No. The default judgment may be considered validly entered, but the Act gives the servicemember the right to reopen the judgment to defend the action at a later date under certain conditions. Failure to file an affidavit and meet the other requirements of the Act subjects the judgment to being vacated or set aside.

Problem 2: Same facts as in Problem 1 except that Roe filed an affidavit stating that the defendant either was not in military service or that the plaintiff was unable to determine whether the defendant was in military service, after which the court appointed an attorney to represent Doe. Is Roe's title marketable?

Answer: Yes.

Authorities & References: Servicemembers Civil Relief Act, 50 U.S.C. App. § 521 (2011).

Comment: Section 521 of the Act provides protection to members of the armed services from civil default judgments being taken against them during their service in the military or within 60 days after termination of or release from such military service. This section applies only when the defendant service member has not made an appearance. However, an appearance does not include a request for a stay of proceedings. 50 U.S.C. App. § 522 (c).

Judgments rendered in disregard of the Act, while voidable, are not void. If in fact the defendant was not in the military service and no affidavit to that effect was filed, an affidavit filed subsequent to final judgment indicating that at no time during the proceedings was the defendant entitled to the protection of the Act will cure, for title purposes, this defect in the judgment. *See Courtney v. Warner*, 290 So. 2d 101 (Fla. 4th DCA 1974); *Eureka Homestead Soc'y v. Clark*, 145 La. 917, 83 So. 191 (1919).

In order to set aside a default judgment, a servicemember must file an application to set aside the

judgment with the court no later than 90 days after being released from military service and show that he or she was materially affected by reason of such military service in making a defense to the action and has a meritorious or legal defense to the action or some part of it. 50 U.S.C. App. § 521 (2011).

Moreover, the Act contains the following important provision protecting bona fide purchasers:

> If a court vacates, sets aside, or reverses a default judgment against a servicemember and the vacating, setting aside, or reversing is because of a provision of this Act, that action shall not impair a right of title acquired by a bona fide purchaser for value under a default judgment.

STANDARD 14.2

[Title Standard deleted. See archived version for text.]

CHAPTER 15

TAX TITLES

STANDARD 15.1

TAX DEED OF RECORD FOR FOUR YEARS

STANDARD: A TITLE BASED UPON A TAX DEED ISSUED BY THE CLERK OF THE CIRCUIT COURT IS MARKETABLE IF IT AFFIRMATIVELY APPEARS THAT: (1) THE TAX DEED HAS BEEN OF RECORD FOR MORE THAN FOUR YEARS; (2) THE TAXES HAVE BEEN PAID BY THE TAX DEED GRANTEE, OR SUCCESSORS, FOR THAT PERIOD OF TIME; AND (3) SUBSEQUENT TO THE TAX DEED THERE HAS BEEN NO ADVERSE CLAIM ASSERTED OF RECORD AND NO POSSESSION ADVERSE TO THE TAX DEED GRANTEE OR SUCCESSORS.

Problem 1: John Doe received a tax deed for a vacant lot in a residential subdivision which was recorded in 2003. The records of the tax collector indicate that John Doe has paid the taxes on the property since that date. There are no deeds or other instruments of record indicating a claim or transfer of interest by the former title holder. May the title be considered marketable?

Answer: Yes.

Problem 2: Same facts as in Problem 1 except that after acquiring title by tax deed in 2003 John Doe conveyed the property to Richard Roe in 2005. The records of the tax collector indicate that John and Richard paid the taxes on the property during their respective periods of ownership. There are no deeds or other instruments of record indicating a claim or transfer of interest by the former title holder. Richard will execute an affidavit evidencing that during his period of ownership there has been no possession adverse to his. However, a similar affidavit was not recorded by John. May the title be considered marketable?

Answer: Yes.

Problem 3: John Doe received a tax deed of a single family residence in 2003. The official records of the county do not provide any information concerning possible service in the United States military by the prior owner. May the title be considered marketable?

Answer: No, unless an affidavit from a knowledgeable person is recorded negating the possibility that the prior owner has a right to redeem the property under the Servicemembers' Civil Relief Act. Service members have 180 days after the termination of their military service in which to redeem property lost through tax deed. The right is limited to real property occupied for dwelling, professional, business or agricultural purposes by a service member or the service member's dependents or employees (a) before the service member's entry into military service; and (b) during the time the tax or assessment remains unpaid.

Authorities & References: §§ 95.191, .192(1), .192(3), Fla. Stat.; § 197.572, Fla. Stat. (2007). *See* FUND TN 30.01.02.

Comment:

The Standard is designed to point out that marketability can be achieved by reliance on the four-year statute of limitations set forth in §§ 95.191 or 95.192, Fla. Stat. (2007). Section 95.191, Fla. Stat. precludes the former owner or other adverse claimant from filing an action to recover possession after the grantee of the tax deed has been in actual possession for four years. Conversely, the statute provides that when the real property is adversely possessed by any person no action shall be brought by the tax deed grantee unless the action is begun within four years from the date of the deed.

Section 95.192 provides that when a tax deed has been issued for four years, regardless of whether the tax deed grantee or successors have been in possession, no action may be brought by the former owner or parties claiming under the former owner. However, the statute does not apply if the prior owner or any claimant claiming under the former owner continues in actual possession one year after issuance of the tax deed and before an action for ejectment is begun.

Read together, it is clear that it is not necessary for the tax deed grantee or successors to be in actual possession of the property. All that is necessary is that the former owner or parties claiming under the former owner did not remain in unchallenged possession after the issuance of the tax deed. Adverse possession would affect the marketability of any title. Therefore, the Standard uses a broad approach and requires no adverse possession since the issuance of the tax deed. Recordation of a reliable affidavit negating adverse possession is advised.

Caution should be exercised if the former owner owns adjacent property at the time marketability is being evaluated. Such possession would create a factual issue as to whether possession of the adjoining parcel extends to and includes the tax deed parcel.

If it cannot be determined that the grantee or the grantee's successors paid the taxes since issuance of the tax deed, title will still be marketable in the absence of evidence that the former owner, or anyone claiming under the former owner, paid the taxes and/or had the property assessed in his/her name.

Caution should be exercised to determine that the former owner does not have the right to redeem the lost property under the Servicemembers' Civil Relief Act of 2004 ("SCRA"). SCRA is a restatement, clarification and revision of the Soldiers' and Sailors' Civil Relief Act of 1940. It provides that when certain real property owned by the service member is sold or forfeited to enforce the collection of a tax or assessment, a service member shall have the right to redeem or commence an action to redeem the property during the period of military service or within 180 days after termination of or release from military service. This provision may not be construed to shorten any period provided by state or local law for redemption. Application of this provision is limited to real property occupied for dwelling, professional, business or agricultural purposes by a service member or the service member's dependents or employees (a) before the service member's entry into military service; and (b) during the time the tax or assessment remains unpaid. 50 U.S.C. App. 501 et seq. These revisions apply to any case which is not final before December 19, 2003. 50 U.S.C. App. 501 note. However, somewhat similar provisions existed prior to that date.

A tax deed will not eliminate:

1. Any easement for telephone, telegraph, pipeline, power transmission or other public services purpose of record or evidenced by wires, poles, or other visible occupation.
2. Any drainage easement of record or evidenced by a waterway, waterbed, or other visible occupation.

3. Any easement for ingress and egress to and from other land of record or evidenced by a road or other visible occupation to be preserved.
4. Restrictive covenants running with the land.
5. A lien of record held by a municipal or county governmental unit, special district, or community development district, when such lien is not satisfied by the disbursement of proceeds from the tax deed sale.
6. Oil, gas and mineral rights that are assessed separately from the fee.
7. Matters shown on a plat.
8. Previous loss of land to an adjoining property owner, whether adjudicated or not, resulting from establishment of the mutual boundary line by acquiescence. *Euse v. Gibbs*, 49 So. 2d 843 (Fla. 1951).
9. Federal tax liens, unless the federal government received proper notice and the redemption period has expired.

CHAPTER 16

RECORDING, NOTICE, AND PRIORITIES

STANDARD 16.1

REFERENCE TO UNRECORDED OR IMPROPERLY RECORDED INSTRUMENT

STANDARD: AN UNRECORDED OR IMPROPERLY RECORDED INSTRUMENT REFERRED TO IN AN INSTRUMENT RECORDED IN THE CHAIN OF TITLE WILL ORDINARILY CONSTITUTE A CLOUD UPON THE TITLE.

Problem: A conveyance of Blackacre refers to a mortgage, or other instrument, such as an option or a lease, thereon held by Richard Roe. There is no such mortgage or other instrument of record affecting the property. May the reference to the unrecorded instrument be disregarded?

Answer: No.

Authorities & References: *Hull v. Maryland Cas. Co.*, 79 So. 2d 517 (Fla. 1954); *Pierson v. Bill*, 133 Fla. 81, 182 So. 631 (1938); *Gross v. Hammond*, 123 Fla. 471, 167 So. 373 (1936); *Sapp v. Warner*, 105 Fla. 245, 141 So. 124 (1932); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 27.03 (2008); FUND TN 22.03.12.

STANDARD 16.2

DELAY IN RECORDING CONVEYANCE

STANDARD: DELAY IN RECORDING A CONVEYANCE WILL NOT AFFECT THE TITLE THEREBY ACQUIRED EXCEPT WHERE THERE ARE INTERVENING RIGHTS OF A THIRD PERSON.

Problem:	Richard Roe conveyed Blackacre to John Doe. The deed was not recorded until twelve years after its execution and acknowledgment. No question of third party rights is involved. Is the deed valid?
Answer:	Yes.
Authorities & References:	§ 695.01, Fla. Stat. (2008); *Moyer v. Clark*, 72 So. 2d 905 (Fla. 1954); *Black v. Skinner Mfg. Co.*, 53 Fla. 1090, 43 So. 919 (1907); *Becker v. Effenberger*, 458 So. 2d 891 (Fla. 2d DCA 1984).
Comment:	If the record reflects, or examining counsel should learn, that Roe died or became incapacitated prior to the time of recording, then it should be determined that the deed was delivered prior to such death or incapacity. FUND TN 10.02.02.

STANDARD 16.3

DELAYED RECORDING OF DEED TO MORTGAGOR

STANDARD: THE VALIDITY OF A MORTGAGE EXECUTED BY ONE WHO IS, IN FACT, THE OWNER, IS NOT AFFECTED BECAUSE IT IS RECORDED PRIOR TO THE RECORDING OF THE INSTRUMENT BY WHICH OWNERSHIP WAS ACQUIRED, WHERE RIGHTS OF THIRD PARTIES ARE NOT INVOLVED.

Problem: John Doe conveyed Blackacre to Richard Roe, who thereafter mortgaged it to Edward Lane. Recording of the mortgage preceded recording of the deed. No other instrument covering Blackacre was recording during this interval. Is the mortgage valid notwithstanding the delay in recording the deed to the mortgagor?

Answer: Yes.

Authorities & References: *McEwen v. Larson*, 136 Fla. 1, 185 So. 866 (1939); *Southern Bank & Trust Co. v. Mathers*, 90 Fla. 542, 106 So. 402 (1925).

Comment: The Standard involves only the validity of the mortgage. Caution should be exercised with respect to the rights of third parties. *See* FUND TN 22.03.10.

STANDARD 16.3-1

DELAYED RECORDING OF DEED TO MORTGAGOR — RIGHTS OF THIRD PARTIES

STANDARD: A MORTGAGE RECORDED PRIOR TO THE RECORDING OF THE DEED CONVEYING TITLE TO THE MORTGAGOR DOES NOT CONSTITUTE CONSTRUCTIVE NOTICE TO THIRD PARTIES CLAIMING UNDER OR THROUGH THE MORTGAGOR UNLESS THE DEED BEARS A DATE PRIOR TO THE RECORDING DATE OF THE MORTGAGE.

Problem 1: John Doe conveyed Blackacre to Richard Roe who, thereafter, mortgaged it to Edward Lane. The mortgage was dated and recorded May 5. The deed from Doe to Roe, dated May 1, was recorded May 10. On June 1, Richard Roe gave a "first mortgage" to Bank. Is Edward Lane's mortgage given priority over Bank's by the recording act?

Answer: Yes. The Bank was under a duty to examine the records for instruments executed by Richard Roe which were recorded at any time after the date of the deed. Therefore, even though Lane's mortgage was outside the chain of title when it was recorded, the subsequently recorded deed brought the mortgage back within the record chain of title.

Problem 2: Blackacre was owned by John Doe. On May 1 Richard Roe mortgaged Blackacre to Edward Lane by an instrument dated the same day. Lane recorded the mortgage that afternoon. By a deed dated and recorded on May 10, Doe conveyed Blackacre to Roe. On May 25, Roe executed a "first mortgage" to Bank. Is Edward Lane's mortgage given priority over Bank's by the recording statute?

Answer: No. Although after-acquired title operates to make Lane's mortgage valid when Roe becomes the owner, Lane's mortgage is recorded outside the chain of title and does not provide constructive notice to third parties. Therefore Bank, a subsequent bona fide purchaser, has priority.

Authorities & References: § 695.01, Fla. Stat. (2008); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 27.03, 32.60 (2008); 59 C.J.S. *Mortgages* § 241 (2007); FUND TN 22.03.10.

Comment: A mortgage prior to record evidence of the mortgagor's ownership is a "wild instrument" as the mortgagor is a stranger to the record title. Such an instrument does not furnish constructive notice to third parties. *See* Title Standard 16.5 (Wild Instruments — Stranger to Stranger); *Poladian v. Johnson*, 85 So. 2d 140 (Fla. 1955).

The standard is based in part on the principle that a subsequent party has a duty to check the record from the earliest time that the record reflects the possibility of ownership. Application of this principle would appear to apply equally to deeds dated and recorded on the same day. Therefore it is suggested that the prudent title examiner search the record for the entire day on which the deed is dated and recorded for instruments affecting the title which were recorded earlier on the same day.

This standard illustrates the doctrine of constructive notice. It should be noted that most instruments that are outside the chain of title, and thus do not give constructive notice, actually will be included in an abstract or other form of title information that is compiled by means of a

tract index or a more complete search than is required by the chain of title concept. Such instruments will give actual notice to subsequent parties utilizing such title information. However, in situations where title information is usually not obtained, for example when the subsequent party is a judgment lien creditor or a construction lien claimant, questions of priorities will be decided by the concept of constructive notice as illustrated by this standard.

A specific reference in a deed to a mortgage which is recorded outside the chain of title may be adequate to provide constructive notice of the mortgage. *Sapp v. Warner*, 105 Fla. 245, 141 So. 124 (1932). For a discussion of a reference in a deed which is sufficient to provide constructive notice of such a mortgage, see Title Standard 16.1 (Reference To Unrecorded Or Improperly Recorded Instrument). *See also* FUND TN 22.03.10.

Title Standard 9.4 (Title Acquired By Mortgagor After Execution Of Mortgage) should be reviewed in the context of problem 2.

Prior recording of the mortgage does not affect its validity as between the mortgagor and the mortgagee. *See* Title Standard 16.3 (Delayed Recordings of Deed to Mortgagor).

STANDARD 16.4

POWER OF ATTORNEY — TIME OF RECORDING

STANDARD: AN INSTRUMENT DULY EXECUTED BY AN ATTORNEY IN FACT UNDER A PROPER POWER OF ATTORNEY IS NOT AFFECTED BY THE FAILURE TO RECORD THE POWER OF ATTORNEY UNTIL AFTER THE INSTRUMENT EXECUTED THEREUNDER WAS RECORDED, PROVIDED THERE WERE NO INTERVENING EQUITIES.

Problem 1: John Doe and Mary Doe, his wife, by Sam Smith, as their attorney in fact, conveyed Blackacre, non-homestead property, to Richard Roe by deed executed in regular form and promptly recorded in 1972. In 1974 the power of attorney was recorded and there were no intervening claimants to the property. Does Roe have marketable record title?

Answer: Yes, provided the power of attorney was executed prior to the time it was exercised or included words of ratification.

Problem 2: Same facts as above except that in 1973 a judgment was recorded against John Doe and Mary Doe, his wife. Does Richard Roe take free of the judgment?

Answer: No.

Authorities & References: § 695.01, Fla. Stat. (2008); *Huselton v. Liggett*, 110 Kan. 145, 202 P. 972 (1921).

STANDARD 16.5

WILD INSTRUMENTS — STRANGER TO STRANGER

STANDARD: A WILD INSTRUMENT, AS THE TERM IS USED HEREIN, IS A RECORDED INSTRUMENT WHICH PURPORTS TO AFFECT TITLE TO REAL PROPERTY IN WHICH NONE OF THE PARTIES TO THE INSTRUMENT HAVE EVER HAD A RECORD INTEREST. A WILD INSTRUMENT DOES NOT RENDER TITLE TO THE REAL PROPERTY UNMARKETABLE, PROVIDED THAT: (1) IT CAN BE REASONABLY DETERMINED FROM THE RECORD THAT THE WILD INSTRUMENT WAS INTENDED TO DESCRIBE OTHER REAL PROPERTY OR (2) IN INSTANCES WHERE IT CANNOT BE SO DETERMINED, THE WILD INSTRUMENT HAS BEEN OF RECORD FOR AT LEAST SEVEN YEARS AND NO FURTHER INSTRUMENTS HAVE BEEN RECORDED WHICH ARE BASED ON, OR ARISE OUT OF, THE WILD INSTRUMENT.

Authorities & References: *Poladian v. Johnson*, 85 So. 2d 140 (Fla. 1955); *Board of Pub. Instruction v. McDonald*, 143 Fla. 377, 196 So. 859 (1940); *Benner v. Kendall*, 21 Fla. 584 (1885); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 3.99 (Fla. Bar CLE 5th ed. 2006); FUND TN 7.03.01.

Comment: Any wild instrument places the examining attorney on notice of possible outstanding interests and requires a reasonable investigation with respect thereto. Such investigation should always include, but not be limited to, a determination as to possession of the real property and to whom taxes are assessed.

The Standard should not be interpreted to mean that title to real property not meeting the requirements set forth will necessarily be unmarketable.

The seven-year period is based on long-standing custom rather than statutory or case law.

In relying upon this Standard, it must be determined that the competing chain of title commencing with an apparent wild instrument has not ripened into a marketable title as defined in Ch. 712, Fla. Stat. .

If there is a wild chain of title, then the length of such chain may be considered in determining whether the record shows that the wild instrument contains an obviously mistaken description.

STANDARD 16.6

EFFECT OF POSSESSION ON PRIORITY
UNDER RECORDING ACT

STANDARD: POSSESSION BY ONE NOT HOLDING AN INTEREST OF RECORD PUTS SUBSEQUENT CREDITORS AND PURCHASERS ON NOTICE AND REQUIRES THEM TO ASCERTAIN THE FULL EXTENT OF A POSSESSOR'S CLAIM OR LOSE THE PROTECTION OF § 695.01, Fla. Stat.

Problem 1: Oil Co. approached John Doe with an offer to lease oil, gas, and mineral rights to Blackacre. Doe was willing to enter into the lease but told Oil Co. that Richard Roe was presently "renting" Blackacre. After Oil Co. entered into the lease with Doe, it learned that Roe held an unrecorded lease which included an option to purchase. Roe was in possession of Blackacre during the negotiations between Oil Co. and Doe. Is Oil Co. protected by the recording act?

Answer: No. Lessee Oil Co., a subsequent purchaser under the recording act, had a duty to determine the full extent of Richard Roe's rights. Although Roe's lease was unrecorded, his possession of the property was sufficient notice of his rights to defeat Oil Co.'s status as a subsequent purchaser without notice as required by § 695.01, Fla. Stat.

Problem: John Doe conveyed Blackacre to Richard Roe on June 5. Roe took possession, openly and visibly, on June 6. The deed from Doe to Roe was not recorded. Later that year Cement Co., knowing nothing about Roe, obtained a judgment against Doe and a lien on Blackacre. Is Cement Co.'s interest in the property protected by the recording act?

Answer: No. Although Roe failed to record his deed, his possession of Blackacre prior to the judgment lien is notice to Cement Co. of Roe's rights. Cement Co. would lose the protected status of creditor without notice under § 695.01, Fla. Stat.

Authorities & References: *Humble Oil & Refining Co. v. Laws*, 272 So. 2d 841 (1st DCA Fla. 1973); *Carolina Portland Cement Co. v. Roper*, 68 Fla. 299, 67 So. 115 (1914); *Denco, Inc. v. Belk*, 97 So. 2d 261 (Fla. 1957); *Kroitzch v. Steele*, 768 So. 2d 514 (Fla. 2d DCA 2000); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 27.05 (2008); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 3.21 (Fla. Bar CLE 5th ed. 2006).

Comment: The above Standard and Problems are designed solely to illustrate the effect of possession on priority under the Recording Act. It should be recognized that in accepting title under the above circumstances, adequate steps should be taken to establish and preserve the fact of possession and its effect on the priorities. This usually will involve a judicial determination with respect to the fact of possession.

Notice arising from possession has been variously characterized as "constructive," "inquiry," "actual," and "implied actual." *See generally* 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 27.05 (2008).

Actual knowledge of possession inconsistent with the record is not a prerequisite to imposition of the duty to inquire as to the full extent of the possessor's rights. Constructive notice is created by the fact of possession itself.

A reasonable explanation of possession inconsistent with the record, as found in problem 1, does

not relieve the purchaser from a duty to inquire of the possessor himself. *See Mercer v. Miller*, 157 Fla. 78, 24 So. 2d 893 (Fla. 1946); *Denco v. Belk*, 97 So. 2d 261 (Fla. 1957); *Kroitzsch v. Steele*, 768 So. 2d 514 (Fla. 2d DCA 2000).

As to the effective dates of liens, see Title Standard 8.1 (Effective Dates Of Mechanics' Liens) and 9.1 (Lien Of Judgment).

Chapter 17
MARKETABLE RECORD TITLE ACT

Standard 17.1

PURPOSE OF THE MARKETABLE RECORD TITLE ACT

STANDARD: THE ACT SHOULD BE RELIED UPON TO ELIMINATE ALL ESTATES, INTERESTS, CLAIMS, COVENANTS, RESTRICTIONS, OR CHARGES THAT FALL WITHIN ITS SCOPE IN ORDER TO RENDER TITLE MARKETABLE.

Problem 1: In 1919, the State of Florida conveyed to the City of Miami certain submerged lands including the mouth of the Miami River. In 1944, the Florida East Coast Hotel Corporation deeded 14 acres on the north side of the Miami River, including a yacht basin at its mouth, to the St. Joe Paper Company. The Florida East Coast Hotel Corporation did not have title to the land described in the deed at the time, but the face of the deed did not refer to the City's ownership. Thereafter, the St. Joe Paper Company filled in and bulkheaded the yacht basin. In 1974, did the St. Joe Paper Company have marketable title to the 14 acres including the filled in yacht basin?

Answer: Yes.

Authorities & References: F.S. 712.01, et seq. (2020); *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 449 (Fla. 1978) (holding that the Act is constitutional and designed to simplify conveyances, stabilize titles, and give certainty to land ownership; it operates as a curative act, a statute of limitations, and a recording act, is applied retroactively and may even create marketable title in one who claims from a wild or interloping deed as its root of title); *ITT Rayonier, Inc. v. Wadsworth*, 346 So. 2d 1004, 1010 (Fla. 1977) (mother's life estate holder's deed served as root of title to eliminate the remainder interests of her children); *Marshall v. Hollywood, Inc.*, 236 So. 2d 114, 120 (Fla. 1970), *cert. denied*, 400 U.S. 964 (1970) (the Act operates to make title based on a wild deed marketable); *Sawyer v. Modrall*, 286 So. 2d 610, 613 (Fla. 4th DCA 1973); *cert. denied*, 297 So. 2d 562 (Fla. 1974) (the Act operates to eliminate interest created by deed from the Trustees of the Internal Improvement Trust Fund); *Wilson v. Kelley*, 226 So. 2d 123, 128 (Fla. 2d DCA 1969) (quit claim deed may serve as root of title only if it evidences an intent to convey an identifiable interest); *Whaley v. Wotring*, 225 So. 2d 177 (Fla. 1st DCA 1969); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§14.20 to 14.22 (2020).

Comment: Purpose. The chief purpose of the Act is to extinguish – by operation of law – all stale claims to and ancient defects in title to real property and to limit the period of the search. *Marshall*, 236 So. 2d at 119 (quoting, Catsman, The Marketable Record Title Act and Uniform Title Standards, III Florida Real Property Practice (1965), § 6.2). To effect its purpose, the Act is to be "liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record title as described in s. 712.02 subject only to such limitations as appear in s. 712.03." F.S. 712.10 (2020).

Operation. The Act works by operation of law vesting marketable title free and clear of all claims except for the matters set forth in the limited statutory exceptions in those who – together with their predecessors in title – have held record title to property for thirty years or more. F.S. 712.02 (2020). In determining the effect of the Act, the practitioner should first identify a root of title vesting title in the claimant or its predecessors and confirm it has been of record for 30 years or more. F.S. 712.01(6) (2020). If so, the claimant has marketable record title free and clear of all claims. The practitioner should then consider each of the statutory exceptions in F.S. 712.03 (2020), to determine what matters are not affected by the Act.

Constitutionality. For a discussion of the constitutionality of the Act, see FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE §2.1(D)(3) (Fla. Bar CLE 10th ed. 2021). *See also*, *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 449 (Fla. 1978) (holding that the Act is constitutional); *Wichelman v. Messner*, 83 N.W. 2d 800 (Minn. 1957); 71 A.L.R. 2d 816 (1960); Boyer & Shapo, *Florida's Marketable Title Act: Prospects and Problems*, 18 MIAMI L. REV. 103 (1963).

STANDARD 17.2

MARKETABLE RECORD TITLE AND ROOT OF TITLE

STANDARD: A PERSON WHO, ALONE, OR TOGETHER WITH PREDECESSORS IN TITLE, HAS BEEN VESTED WITH AN ESTATE OF LAND OF RECORD FOR 30 YEARS OR MORE, HAS MARKETABLE RECORD TITLE TO THAT LAND FREE AND CLEAR OF ALL CLAIMS EXCEPT THE MATTERS SET FORTH AS EXCEPTIONS TO MARKETABLITY IN THE ACT.

Problem 1: The following chain of title appears of record. In 1955, John Doe deeded Blackacre to Richard Roe "for so long as the premises are used for residential purposes." In 1965, Richard Roe conveyed Blackacre to Simon Grant, without reference to the restriction to residential use. In 2005, is title to Blackacre free and clear of the restriction to residential use contained in the 1955 deed?

Answer: Yes. The 1965 deed constitutes a root of title and the use restrictions contained in the 1955 deed were extinguished by operation of law in 1995.

Problem 2: Same facts as Problem 1 except that in 1994 Simon Grant conveyed Blackacre to Jane Roe "subject to" the 1955 deed, identifying the 1955 deed by official recording book and page. In 2005, is title to Blackacre free and clear of the restriction to residential use contained in the 1955 deed?

Answer: No. The 1965 deed constitutes a root of title and the use restrictions contained in the 1955 deed would only be extinguished by operation of law in 1995. However, restrictions created prior to the root of title shall not be extinguished by law if those restrictions are specifically referenced by book and page of record, instrument number, plat name or there is otherwise an affirmative statement in a muniment of title to preserve such estates recorded subsequent to the root of title but prior to the expiration of the 30-year statutory time period.

Problem 3: Same facts as Problem 1 except that in 1997 Simon Grant deeds Blackacre to Jane Roe "subject to" the 1955 deed, identifying the 1955 deed by official recording book and page. In 2005, is title to Blackacre free and clear of the restriction to residential use contained in the 1955 deed?

Answer: Yes. The 1965 deed constitutes a root of title and the use restrictions contained in the 1955 deed were extinguished by operation of law in 1995, notwithstanding the subsequent specific reference to the 1955 deed in the 1997 deed, a muniment of title.

Problem 4: Same facts as Problem 1 except that the 1965 deed to Simon Grant was not recorded until 1980. In 2005, is title to Blackacre free and clear of the restriction to residential use contained in the 1955 deed?

Answer: No. A root of title must be of record for at least 30 years. Therefore, there is no qualifying root of title that may operate to eliminate the restriction contained in the 1955 deed.

Problem 5: In 1970, Richard Roe owned Blackacre. In 1975, Simon Grant, although he never had title to Blackacre, purported to convey the North half of Blackacre to Thomas Frank. In 2006, does Richard Roe have marketable title to all of Blackacre?

Answer: No. Although the 1975 deed to the North half of Blackacre was a wild deed, it nevertheless ripened into a viable root of title after being of record for 30 years in 2005 and created marketable record title in Thomas Frank free and clear of the claims of Richard Roe.

Problem 6: Same facts as Problem 5. In 2006, does Thomas Frank have marketable record title to the North half of Blackacre?

Answer: Yes. Although the 1975 deed is a wild deed, it purports to create a fee simple estate in Frank in the North half of Blackacre, which sufficiently identifies the land's location and boundaries and has been of record for at least 30 years.

Problem 7: Richard Green is the last grantee in the chain of title to Blackacre by a deed recorded in 1960. John Doe, a stranger to title of Blackacre, died in 1969. John Doe's probate proceedings recorded in 1970 establish that title to Blackacre was transferred to John's sole heir, Ralph Doe. In 2001 is title to Blackacre free and clear of any interest of Richard Green??

Answer: Yes. The court proceedings are a muniment of title to the land and were recorded 30 years prior to the time of determination of marketability. Hence, they qualify as the root of title and Ralph Doe's ownership in Blackacre is free of Richard Green's interest.

Authorities & References: F.S. 712.01, et seq. (2020); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE §§ 2.1-.2 (Fla. Bar CLE 10th ed. 2021); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§ 14.21-.22 (2020); FUND TN 10.01.02.

Comment: A marketable record title is free and clear of all claims except the matters set forth in the limited statutory exceptions. Nevertheless, the careful practitioner may also want to keep in mind the small handful of exceptions based upon judicial interpretations. *See, e.g., Clipper Bay Investments LLC v. State Department of Transportation*, 160 So. 3d 858 (Fla. 2015) (exception for easements in use applies to land owned in fee by the FDOT); *Blanton v. City of Pinellas Park*, 887 So. 2d 1224 (Fla. 2004) (holding that statutory ways of necessity are not subject to the Act because they are not dependent on a review of the historical record but, instead, on the current status of the property); and *Village Carver Phase I, LLC v. Fidelity Nat'l Title Ins.*, 128 So. 3d 107 (Fla. 3d DCA 2013) (rights pursuant to F.S. 704.08 providing relatives and descendants an easement for visitation to a cemetery does not create an interest in real property and therefore such rights are not extinguished by the Act).

Pursuant to the 2022 amendment to the Act, covenants and restrictions that depend upon a zoning requirement, or building or development permit may be extinguished by the Act as long as there is not a statement on the face of the first page of the recorded instrument that it was accepted by a governmental entity as part of, or as a condition of, any such comprehensive plan or plan amendment; zoning ordinance; land development regulation; building code; development permit; development order; or other law, regulation, or regulatory approval. This amendment was adopted to overrule the decision in *Save Calusa Trust v. St. Andrews Holdings, Ltd.*, 193 So. 3d 910 (Fla. 3d DCA 2016) (judicially created exception for restrictive covenants recorded in compliance with government-imposed condition of land use approval). Parties holding an interest not extinguished before July 1, 2022, must file a notice pursuant to s. 712.06, F.S., by July 1, 2023, to preserve such interest. Any county as defined in s. 125.011(1), F.S., must file a notice pursuant to s. 712.06, F.S., by July 1, 2025, to preserve such interest.

The 2022 amendment to the Act also closes the judicial loophole created by *Barney v. Silver Lakes Acres Property*, 159 So. 3d 181 (Fla. 5th DCA 2015). In *Barney*, the court found that a deed stating it was "subject to" the obligations of the lot owners to a specifically named owners association was not a "general reference" to the association's restrictive covenants, notwithstanding the absence of the specific book and page of record of the restrictions, thereby

bringing the restrictions within the exception of F.S. 712.03(1). The 2022 amendment to the Act removes reference to the concept of a "general reference" and, in its place, provides for the only two specific instances in which a muniment of title will serve to preserve an estate, interest, easement, use restriction, or defect. Those two instances are (i) where the interest is referred to in the legal description of the muniment itself by official records book and page number, instrument number, or plat name or (ii) the muniment contains an affirmative statement that it is intended to preserve the interest. This amendment makes clear the deed in the *Barney* case would not have been sufficient to bring the association's restrictive covenants within the scope of the exception contained in F.S. 712.03(1).

Once a marketable record title has been established, the Act eliminates, by operation of law, all estates, interests, claims, covenants, restrictions, or charges, however denominated, and whoever holds them, the existence of which depends upon any act, title transaction, event, or omission that occurred before the effective date of the root of title and declares all such interests to be "null and void." The amendments to ss. 712.03 and 712.04, F.S., are intended to clarify existing law, are remedial in nature, and apply to all estates, interests, claims, covenants, restrictions, and charges, whether imposed or accepted before, on, or after the 2022 amendment. F.S. 712.04 (2020). A judicial determination is not required to establish or confirm the operation of the Act. Once an interest has been eliminated by operation of the Act, that interest cannot be "revived" by a specific reference to the interest in the subsequent muniments in the chain of title or by filing a preservation notice, either of which might have created exceptions to marketability had they been recorded within the initial 30-year period. F.S. 712.03(1) & (2) (2020). However, community covenants, conditions and restrictions may be revived by a property owner's association after the 30-year period if the covenant revitalization procedures are correctly followed. F.S. 712.11-12 (2020) & F.S. 720.403-407 (2020).

The "root of title" concept is a key component in the statutory analysis, and its definition is hard and worthy of attention. A root of title is defined as "any title transaction purporting to create or transfer the estate claimed by any person which is the last title transaction to have been recorded at least 30 years before the time when marketability is being determined. The effective date of the root of title is the date on which it was recorded." F.S. 712.01(6) (2020). In turn, a title transaction is defined as "any recorded instrument or court proceeding that affects title to any estate or interest in land that describes the land sufficiently to identify its location and boundaries." F.S. 712.01(7) (2020).

The phrase "the time marketability is being determined" is what requires some explication. Because the Act operates as a matter of law, without need for any judicial determination, and is to be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions, this phrase must be construed to mean 30 years after the date of the recording of any given root of title. Note that there may be many roots of title in any given chain of title, which may overlap and serve to cut off different interests or claims. In other words, the Act is continually at work, clearing up ancient and stale claims. Any other construction of this phrase – such as one requiring a judicial determination – would actually serve to preserve older, more ancient claims while eliminating more recent claims. Such other constructions are plainly contrary to the legislative intent of simplifying and facilitating land title transactions expressed in the statute.

Note that the definition of a root of title requires that it must describe the property interest being conveyed. The interest may be adequately described by warranty covenants within a warranty deed or a special warranty deed, although the absence of warranty covenants does not necessarily prevent an instrument from serving as a root of title. For the same reason, a quit claim deed can serve as a root of title only if the deed quitclaims an identifiable property interest. On the other hand, a quit claim deed that provides only that the grantors remise, release and quitclaim all the right, title, interest, claim, and demand which the grantors have in the land

cannot serve as a root of title because it is unknown what specific right, title, interest, claim, or demand the grantors intended to quitclaim. *Wilson v Kelley*, 226 So. 2d 123, 128 (Fla. 2d DCA 1969). In the *Wilson* case, the court found that a quit claim deed from one co-tenant to another purporting to generically remise, release and quitclaim all right, title, claim, interest, and demand did not qualify as a root of title for purposes of the Act. The court observed that, had the grantors quitclaimed *their* undivided one-half interest in the property, that would have been a sufficient description to qualify as a root of title. The point being that the instrument must describe the land sufficiently to identify the interest that is conveyed.

A wild or interloping deed may constitute a root of title. *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 446 (Fla. 1978).

Statutory exceptions to the operation of the Act are contained in F.S. 712.03 (2020) and are specifically treated in other Standards in this Chapter.

The Act does not eliminate an interest or claim arising out of a title transaction recorded after a root of title, even if the subsequent interest or claim is outside the chain of title, such as a wild deed. *See, Holland v. Hattaway*, 438 So. 2d 456, 468-470 (Fla. 5th DCA 1983) (the Act did not extinguish an easement purportedly created by a wild deed recorded several years after the root of title, although the court held that the easement was extinguished on other grounds). This exception appears to be less an *exception* to the operation of the Act than a reference to interests that are *created after* a root of title which are not, therefore, affected by the Act in the first place.

STANDARD 17.3

INTERESTS EXTINGUISHED

STANDARD: ALL ESTATES, INTERESTS, CLAIMS, COVENANTS, RESTRICTIONS, OR CHARGES, THE EXISTENCE OF WHICH DEPENDS UPON ANY ACT, TITLE TRANSACTION, EVENT, OR OMISSION THAT OCCURRED BEFORE THE EFFECTIVE DATE OF A ROOT OF TITLE, ARE EXTINGUISHED BY OPERATION OF THE ACT, EXCEPT THOSE RIGHTS SPECIFICALLY EXCEPTED FROM THE ACT.

Problem 1: A deed to Blackacre executed by John Doe and recorded in 1965 contained: (1) a condition subsequent that the grantor or his heirs could re-enter in the event of a breach of certain specified conditions and (2) a special limitation that the land was conveyed "so long as" it was used for a specified purpose. A warranty deed to Blackacre recorded in 1975 does not mention any conditions or limitations. No notice of a claim based on the conditions or limitations has been filed. In 2006, is title to Blackacre free and clear of the condition subsequent and the possibility of reverter by operation of the Act?

Answer: Yes. The existence of the claims depended upon the 1965 deed, a title transaction occurring prior to 1975 effective date of the root of title, and no exception applies.

Problem 2: Same facts as Problem 1 except that the 1975 deed, or a subsequent warranty deed, contained a provision that the conveyance was "subject to conditions and limitations of record." In 2006, is title to Blackacre free and clear of the condition subsequent and the possibility of reverter by operation of the Act?

Answer: Yes. An interest disclosed by the muniments of title, beginning with the root of title, may be preserved from operation of the Act but only if the title transaction imposing, transferring, or continuing such interest is specifically identified by reference to the book and page of record or by the name of the recorded plat. F.S. 712.03(1) (2020).

Problem 3: The plat for Blackacre Subdivision, filed in 1925, contained a setback restriction. A deed to Lot 1 in Blackacre Subdivision recorded in 1953 contained a reference to the name of the recorded plat, as did subsequent deeds, but none specifically referenced the setback restriction. In 1984, is title to Blackacre free and clear of the setback restriction by operation of the Act?

Answer: No. A restriction is preserved if the root of title or any subsequent muniments of title recorded within the 30 years immediately following the recording of the root of title refer to the recorded plat that imposed the restriction by name. F.S. 712.03(1) (2020).

Problem 4: A deed to Blackacre recorded in 1955 contains a condition subsequent and the possibility of reverter described in Problem 1. A subsequent root of title is recorded in 1960, without reference to the restriction. In 1991, a deed within the chain of title specifically identifies the condition subsequent and the possibility of reverter by reference to the book and page of record for the 1955 deed. In 1992, is title to Blackacre free and clear of the restriction by operation of the Act?

Answer: Yes. The restriction had been extinguished by operation of the Act in 1990, and the subsequent reference to the book and page of record of the 1955 deed in the 1991 muniment could have no effect on the already-extinguished restriction. F.S. 712.03(1) (2020).

Problem 5: A deed to Blackacre executed by John Doe and recorded in 1965 reserved an easement. A deed to Blackacre recorded in 1975 does not mention the easement. John Doe and his successors in interest have used the easement, or a part of it, since 1965. No notice of a claim based on the easement has been filed. In 2006, was title to Blackacre free and clear of the easement by operation of the Act?

Answer: No. Easements or rights, interests, or servitudes in the nature of easements, rights of way and terminal facilities and mortgages on such rights are preserved by F.S. 712.03(5) (2020) so long as they, or any part thereof, are used.

Problem 6: A deed to Blackacre executed by John Doe and recorded in 1965 reserved all of the subsurface minerals to Blackacre and the right of entry to explore and extract those minerals. A deed to Blackacre in fee simple is recorded in 1975, and it does not mention the 1965 deed, the mineral reservation, or the right of access. No notice of a claim based on the reservation has been filed. In 2006, was title to Blackacre free and clear of the right of entry to explore and extract mineral rights by operation of the Act?

Answer: Yes. Note that this would be the same result even if the 1965 deed had not expressly reserved the right of entry as such right is implicit with the reservation of the subsurface minerals. *See, P & N Investment Corp. v. Florida Ranchettes, Inc.*, 220 So. 2d 451, 453 (Fla. 1st DCA 1969).

Authorities & References: F.S. 712.03-.04 (2020); F.S. 704.05(1) (2020); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.22 (2020).

Comment: A "root of title" is any title transaction that purports to create or transfer the estate claimed, describes the land sufficiently to identify its location and boundaries, and has been of record for more than 30 years. F.S. 712.01 (2020); *Marshall v. Hollywood, Inc*., 224 So. 2d 743, 750 (Fla. 4th DCA 1969), *aff'd* 236 So. 2d 114 (Fla. 1970) (a void deed may be a root of title); *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 446 (Fla. 1978) (wild deed); *Kittrell v. Clark*, 363 So. 2d 373, 374 (Fla. 1st DCA 1978) (probate); *Mayo v. Owens*, 367 So. 2d 1054, 1057 (Fla. 1st DCA 1979) (judgment determining heirs).

The careful practitioner will be vigilant for defects inherent in a root of title. *See, e.g., Marshall v. Hollywood, Inc*., *supra*, at 751 ("'defects in the muniments of title' do not refer to defects or failures in the transmission of title . . . but refer to defects in the make up or constitution of the deed or other muniments of title on which such transmission depends"). *See* Title Standard 17.10 for discussion of defects inherent in the muniments of title.

A restriction arising prior to the date of a root of title is preserved if the root of title or a subsequent muniment of title within the 30-year period immediately following the recording of a root of title contains a specific identification by reference to the name of the recorded plat or book and page of record of the instrument that imposed the restriction. *Sunshine Vistas Homeowners Association v. Caruana*, 623 So. 2d 490, 492 (Fla. 1993). However, a specific identification by reference to the name of the recorded plat book and page of record, instrument number of the instrument that imposed the restriction or an affirmative statement intent to preserve the restriction in a muniment of title recorded after that restriction has already been extinguished by operation of the Act, has no effect on the already-extinguished restriction. *See*, problem 4 above and comment to Title Standard 17.2.

The Act may operate to extinguish a county's claim of ownership. *Florida DOT v. Dardashti Properties*, 605 So. 2d 120, 122 (Fla. 4th DCA 1992) (County's interest in a strip of land held for right of way was extinguished by the Act).

The Act operates to extinguish an otherwise valid claim of common law way of necessity when such claim is not asserted within 30 years of the recording of a root of title. *H & F Land, Inc. v. Panama City-Bay County Airport and Development District*, 736 So. 2d 1167 (Fla. 1999). The Act does not, however, operate to extinguish statutory ways of necessity. *Blanton v. City of Pinellas Park*, 887 So. 2d 1224, 1233 (Fla. 2004) (receding from *H & F Land, Inc.* to the extent its dicta indicated that the Act applies to statutory ways of necessity).

The Act, subject to its exceptions, serves to eliminate rights of entry to explore and extract mineral rights, whether expressly reserved or implied. *See, Noblin v. Harbor Hills Development, L.P.*, 896 So. 2d 781, 785 (Fla. 5th DCA 1981) (the Act serves to extinguish rights of entry for exploring or mining oil, gas, minerals, or fissionable materials) and F.S. 704.05(1) (2020):

> The rights and interests in land which are subject to being extinguished by marketable record title pursuant to the provisions of s. 712.04 shall include rights of entry or of an easement, given or reserved in any conveyance or devise of realty, when given or reserved for the purpose of mining, drilling, exploring, or developing for oil, gas, minerals, or fissionable materials, unless those rights of entry or easement are excepted or not affected by the provisions of s. 712.03 or s.712.04.

but see, F.S. 704.05 (2020) (excluding the rights of entry held by the state or any of its agencies, boards or departments from operation of the Act).

A mineral estate itself may be subject to being extinguished by operation of the Act, but the prudent practitioner will obtain a determination to that effect from a court of competent jurisdiction before deciding that title is free and clear of the mineral estate. F.S. 712.02 & .04 (extinguishing "all ***estates,*** interests, claims, or charges" (2020, emphasis added)); *see also, Kittrell*, 363 So. 2d at 373 (determining that a mineral estate, which otherwise would have been extinguished by the Act, was preserved by one of the statutory exceptions).

STANDARD 17.4

RECORDING A NOTICE TO PRESERVE INTERESTS

STANDARD: RECORDING A PROPER NOTICE PRESERVES ESTATES, INTERESTS, CLAIMS, COVENANTS, RESTRICTIONS, OR CHARGES FROM THE OPERATION OF THE ACT.

Problem 1: John Doe, the record owner of Blackacre, gave and recorded a mortgage to Richard Roe encumbering Blackacre, which was recorded in January 1975. The last payment was not due until 2010. On June 15, 1975, a deed to Blackacre, which qualified as a root of title, was recorded but it contained no mention of the mortgage. On June 16, 2005, is Roe's mortgage lien extinguished?

Answer: Yes.

Problem 2: John Doe gave and recorded a 99-year lease to Richard Roe on July 1, 1975, at which time the lease was recorded, and Roe went into possession of the land. On July 2, 2006, is John Doe's ownership extinguished?

Answer: No. The 1975 transaction created a leasehold interest only. John Doe's fee simple interest would not be extinguished. Filing of notice is necessary only when there is a subsequent title transaction that purports to divest the interest claimed.

Problem 3: The owner of Blackacre Subdivision as developer, joined by Blackacre Homeowners' Association, Inc., filed a Declaration of Covenants and Restrictions for Blackacre Subdivision in 1975. John Doe conveyed Lot 1 in Blackacre Subdivision to Richard Roe in 1978. That deed did not mention the covenants or restrictions, and there is no subsequent amendment to the Declaration of Covenants and Restrictions and no specific reference to the recording information of the Declaration of Covenants and Restrictions in muniments of title in the public record. In 2009, were the CCRs extinguished by operation of the Act as to Lot 1?

Answer: Yes, unless the Blackacre Homeowners' Association either timely preserved the CCRs by filing the statutory notice pursuant to F.S. 712.05(2) or thereafter accomplishes covenant revitalization.

Problem 4: The owner of Whiteacre Business Park as developer filed a Declaration of Covenants, Conditions and Restrictions (CCRs) for Whiteacre Business Park in January 1989. John Doe conveyed Parcel 3 in Whiteacre Business Park to Richard Roe in March 1989. That deed did not mention the CCRs, and there is no subsequent amendment to the CCRs and no specific reference to the recording information of the CCRs in muniments of title in the public record. In 2020, were the CCRs extinguished by operation of the Act as to Parcel 3?

Answer: Yes, unless the Whiteacre Business Park Property Owners' Association either timely preserved the CCRs by filing the statutory notice pursuant to F.S. 712.05(2) or thereafter accomplishes covenant revitalization.

Problem 5: Same facts as Problem 4, except a notice to preserve the CCRs was recorded in December 2018. In 2020, were the CCRs extinguished by operation of the Act as to Parcel 3?

Answer: No. A property owners' association may preserve its CCRs by recording a notice to preserve and protect CCRs pursuant to F.S. 712.05, 712.06 and 720.3032 (2020).

Problem 6: Same facts as Problem 4, except the Whiteacre Business Park Property Owners' Association filed an amendment to the CCRs in December 2018. In 2020, were the CCRs extinguished by operation of the Act as to Parcel 3 ?

Answer: No. A property owners' association may preserve CCRs by an amendment to the CCRs that is indexed under the legal name of the property owners' association and references the recording information of the CCRs to be preserved pursuant to F.S. 712.05(2)(b) (2020).

Problem 7: Same facts as Problem 4, except the Whiteacre Business Park Property Owners' Association does not file any notice pursuant to F.S. 712.05(2) to preserve and protect covenants and restrictions or amendment to the Declaration of Covenants and Restrictions prior to the expiration of 30 years from the March 1989 deed from John Doe to Richard Roe. In 2020, the Association recorded a revived Declaration of Covenants and other statutorily required documents evidencing covenant revitalization. Are the covenants and restrictions still valid as to Parcel 3?

Answer: Yes. After an interest has been extinguished by operation of the Act, property owners in the Association may revitalize a covenant pursuant to F.S. 720.403 - .407 (2020).

Authorities & References: F.S. 712.03(2), 712.05, 712.06, 712.11, 720.3032(2), 720.403-.407 (2020), 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23 [3] (2020).

Comment: The statutory notices merely protect claims, estates, or interests if they otherwise exist and cannot validate or create a new claim, estate or interest. F.S. 712.05(2), 712.06(1)(b) and 720.3032(2) (2020) outline the mechanism for preserving claims from extinguishment, and what must be included in the notice. Chapter 712 was amended effective October 1, 1997, to allow homeowner associations to file a notice under MRTA to preserve covenants and restrictions. F.S. 712.05(2) (2020).

Chapter 712 was further amended effective October 1, 2018, to allow a property owners' association to preserve an interest by filing notice in the official records in the county where the property is located. Property owners' associations are defined as entities operating a property in which the voting membership is comprised of property owners or their agents, or a combination thereof, and for which membership is mandatory, as well as associations of parcel owners authorized to enforce community covenants or restrictions. F.S. 712.01(5) (2020).

Also, effective October 1, 2018, section 712.05(2) provides options for achieving preservation of community covenants and restrictions as follows: by recording in the official records a written notice in accordance with section 712.06 or 720.3032(2); or an amendment to community covenant or restriction referencing the recording information for the covenant or restriction to be preserved. The 2018 revision to section 712.05(2) is contrary to previous case law. The 2018 statutory revision breaks from the precedent set forth in *Matissek v. Waller*, 51 So. 3d 625 (Fla. 2d DCA 2011). In that case the appellate court held that a post-root of title amendment to restrictions was not a muniment of title and since the amended restrictions could not stand alone, both the pre-root restrictions and the post-root amendment

were extinguished by MRTA. The holding in *Matissek* has continuing application outside of the context of the 2018 revision.

For covenants, conditions and restrictions that have lapsed, property owners may avail themselves of covenant revitalization through the Department of Economic Opportunity pursuant to sections 720.403 - .407. Once MRTA has extinguished a Declaration of Covenants, Conditions and Restrictions, title is marketable free of that Declaration. If the Declaration is later revived, then title is again subject to the Declaration. In no event is the Declaration enforceable for the period of time the Declaration was extinguished. Thus, even if the HOA revives the Declaration, it may not retroactively enforce that Declaration retroactively during the time it was previously extinguished.

Effective October 1, 2018, revitalization of covenants or restrictions is available to all types of communities and property owners' associations and is not limited to residential property. F.S. 712.11 & 720.403(3) (2020). Chapter 720, Part III is the sole means of revitalizing covenants, conditions or restrictions that have been extinguished by operation of the Act.

Effective September 4, 2020, section 712.065(1) defines discriminatory restriction as one that restricts ownership, occupancy or use of real property based upon a natural person's characteristic that is protected by the laws of the United States or the State of Florida. These discriminatory restrictions are thus unenforceable and severed from any recorded title transaction. Recording of any notice to preserve such restrictions does not reimpose any discriminatory restriction. F.S. 712.065(2) (2020). A recorded amendment to covenants or restrictions that removes a discriminatory restriction but changes no other provision does not constitute a title transaction occurring after the root of title. F.S. 712.065(3) (2020).

If a false or fictitious claim is asserted by the filing of notice pursuant to the Act, the prevailing party may be entitled to costs and attorney's fees arising out of any action related thereto and damages sustained as a result of the filing of such notice. F.S. 712.08 (2020). The attorney's fees provision of MRTA "does not require deliberate untruthfulness" but includes "mistaken ideas" and claims that are not "real or genuine claims." An award of attorney's fees against a voluntary homeowners' association that was found to be without authority to file a 2004 MRTA preservation notice was upheld absent a finding of a deliberate untruthful intention. *Sand Hill Homeowners Ass'n v. Busch*, 210 So. 3d 706 (Fla. 5th DCA 2017).

STANDARD 17.5

RIGHTS OF PERSONS IN POSSESSION

STANDARD: THE ACT DOES NOT ELIMINATE THE RIGHTS OF PERSONS IN POSSESSION OF LAND.

Problem 1: John Doe was grantee in a deed to Blackacre recorded in 1970, which constitutes a root of title. Nothing further appears of record, but investigation in 2002 disclosed that Richard Roe was in actual open possession of Blackacre. In 2002 is John Doe's title to Blackacre free of the claims of Roe?

Answer: No. Roe's possession was inconsistent with John Doe's record title and was therefore prima facie hostile. Possession by a party with an interest that is subordinate to John Doe, such as a tenant, licensee, or employee, would not divest Doe of title.

Problem 2: Same facts as problem 1, except that Richard Roe only placed a mobile home on the land but never actually resided on it. Is John Doe's interest free from the claims of Richard Roe?

Answer: Yes. F.S. 712.03(3) (2020) requires "possession of the lands" for the exception to apply. Here, Richard Roe was not occupying the lands and was not living in the mobile home that had been placed on the lands.

Problem 3: Mary Smith conveyed Whiteacre to James Johnson in 1971. In 1974, Mary Smith deeded Whiteacre to Becky Buyer by warranty deed. In 2004 Becky Buyer deeded Whiteacre to Joe Brown. Over the years, James Johnson continued to occasionally cross over Whiteacre to get to a parcel of property he owned which was adjacent to Whiteacre. In 2005, is Joe Brown's interest in Whiteacre free and clear of the claims of James Johnson?

Answer: Yes. The term "possession" is not defined in the Act, so the ordinary definition of that term applies. Possession is demonstrated by power and control over the land, as opposed to periodic use or minimal maintenance. James Johnson's occasional use of the property without evidence of visible control over it does not meet the ordinary definition of "possession."

Authorities & References: F.S. 712.03(3) (2020); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[4] (2020); *Dorsey v. Robinson*, 270 So. 3d 462 (Fla. 1st DCA 2019); *Dept. of Transp. v. Mid-Peninsula Realty Inv. Grp., LLC*, 171 So. 3d 771 (Fla. 2d DCA 2015).

Comment: No person can have a marketable record title within the meaning of the Act if the land is in the hostile possession of another person. The 712.03(3) exception to the Act for parties in possession limits the application of the Act to establish marketable record title. This exception to the Act does not create new interests.

In the *Mid-Peninsula* case, the Department of Transportation ("DOT") had obtained an Order of Taking which gave it "full and complete ownership." Mid-Peninsula acquired title through a wild deed recorded three years after the Order of Taking and sought to quiet title against DOT. The trial court determined DOT's use of the land did not qualify as possession and the appellate court agreed. The appellate court also held that the section 712.03(5) exception may be applied to rights of way held in fee. *See* Title Standard 17.3.

STANDARD 17.6

INSTRUMENTS RECORDED SUBSEQUENT TO A ROOT OF TITLE

STANDARD: THE ACT DOES NOT ELIMINATE ESTATES, INTERESTS, CLAIMS, COVENANTS, RESTRICTIONS, OR CHARGES ARISING OUT OF A TITLE TRANSACTION RECORDED SUBSEQUENT TO THE RECORDING OF A ROOT OF TITLE

Problem 1: John Doe took record title to Blackacre in 1970 by deed which would qualify as a root of title. A deed to Blackacre from Richard Roe to Jane Nokes subsequently recorded in 1980 recites that John Doe died intestate and that Richard Roe was his sole heir at law. No additional instruments have been recorded after the 1980 deed that would qualify as a root of title. In 2007, was title to Blackacre free and clear of Nokes' interest by operation of the Act?

Answer: No. Even if the facts recited in the 1980 deed were not correct – i.e., Doe did not die intestate and Roe was not Doe's sole heir – it is a title transaction (a recorded instrument that affects title to an estate or interest in land, and sufficiently describes the land to identify its location and boundaries). Jane Nokes' interest arose out of and was created by the 1980 deed and is thus not an interest that is extinguished by operation of the Act because it did not arise before or depend upon any act, title transaction, event or omission that occurred before the 1970 root of title.

Problem 2: John Doe took record title to Blackacre in 1970 by a deed which would qualify as a root of title. In 1980, a stranger to title to Blackacre executed and recorded a deed in favor of Jane Nokes. In 2007, was title to Blackacre free and clear of Nokes' interest by operation of the Act?

Answer: No.

Authorities & References: F.S. 712.01, 712.03(4), 712.04 (2020); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[5] (2020).

Comment: The fact that the Act does not eliminate estates, interests, claims, or charges arising out of a title transaction recorded subsequent to the effective date of a root of title underscores the limits of the Act. The Act ***only*** eliminates estates, interests, claims, covenants, restrictions, or charges the existence of which depends upon any act, title transaction, event or omission that occurred ***before*** the effective date of a root of title. F.S. 712.04 (2020). Thus, if an estate, interest, claim, or charge truly "arises out of," i.e., is created by, a title transaction subsequent to the root of title, its existence could not, by definition, depend upon an act, title transaction, event or omission that occurred ***before*** the effective date of a root of title. *See, e.g., Holland v. Hattaway,* 438 So. 2d 456, 467 (Fla. 5th DCA 1983) ("it is clear that MRTA was not intended to and does not make marketable a title as against adverse record claims that first appear, or that are created, or 'arise' during, or subsequent to the commencement of, the operative 30 year period."). In other words, interests that arise out of title transactions recorded after the effective date of a root of title do not come within the scope of the operation of the Act.

However, the exception is limited to estates, interests, claims, or charges that arise out of title transactions recorded after the effective date of a root of title and will not preserve interests that depend upon any act, title transaction, event or omission that occurred before the effective

date of a root of title. For example, in the matter of *Matissek v. Waller*, 51 So. 3d 625, 629 (Fla. 2d DCA 2011), the court found that restrictions recorded in 1971 were eliminated by operation of the Act after the recording of a 1974 root of title, notwithstanding the recording of amended restrictions in 1977 because "the 1977 amendments could not exist independently of the original 1971 restrictions...."

The practitioner should keep in mind that, while F.S. 712.05 was amended after the *Matissek* opinion in order to allow an amendment to a community covenant or restriction to preserve the covenant or restriction, the *Matissek* opinion is still good law and its well-reasoned analysis of how the Act operates may apply in circumstances other than amendments to a community covenant or restriction.

While the Act may not eliminate an estate, interest, claim, or charge arising out of a title transaction recorded subsequent to the effective date of a root of title, it does not affect the validity or invalidity of such estate, interest, claim, or charge.

A wild deed may constitute a root of title. *City of Miami v. St. Joe Paper Co*., 364 So. 2d 439, 446 (Fla. 1978). With respect to wild deeds, *see* Title Standard 16.5.

STANDARD 17.7

RIGHTS OF PERSONS TO WHOM
TAXES ARE ASSESSED

STANDARD: THE ACT DOES NOT ELIMINATE THE RIGHTS OF A PERSON IN WHOSE NAME THE LAND IS ASSESSED FOR THE PERIOD OF TIME THE LAND IS ASSESSED IN THAT PERSON'S NAME AND FOR THREE YEARS THEREAFTER.

Problem 1: John Doe received title to Blackacre by a warranty deed in 1984. In 2019, John Doe conveyed Blackacre to Mary Jones. It was later discovered that Blackacre had been assessed on the county tax rolls in the name of Richard Roe since 2015. In 2020, is Mary Jones's title free and clear of Richard Roe's interest, if any, in the property by operation of the Act?

Answer: No. However, what rights, if any, Roe had in and to the property would need to be ascertained. This exception to the Act only prevents destruction of existing rights and does not create any new rights. Roe would have to establish his purported interest based on something more than the mere payment of property taxes.

Problem 2: Same facts as Problem 1 except that 2016 is the last year that Blackacre is assessed in the name of Richard Roe. During 2017 through 2019 Blackacre was assessed in the name of John Doe. In 2020, is Mary Jones's title free and clear of Richard Roe's interest, if any, in the property by operation of the Act?

Answer: Yes. Jones's title is subject to the rights of Roe, if any, for only three years after Blackacre was last assessed in Roe's name. This assumes that no other exception is applicable to preserve any rights of Roe.

Authorities & References: F.S. 712.03(6) (2020); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[6](2020).

Comment: This exception creates a need to review the county tax rolls for the three years prior to the date that title is being examined. However, it is important to note that the Act does not operate to establish any rights to the property in the party to whom taxes are assessed. Any such rights would have to be established in an appropriate judicial proceeding.

STANDARD 17.8

APPLICATION OF THE ACT TO RIGHTS OF THE UNITED STATES, FLORIDA, TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND AND WATER MANAGEMENT DISTRICTS IS LIMITED

STANDARD: THE ACT DOES NOT ELIMINATE ANY RIGHT, TITLE, OR INTEREST RESERVED BY THE STATE OF FLORIDA OR THE UNITED STATES IN A PATENT OR DEED AND DOES NOT ELIMINATE ANY INTEREST HELD BY THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, WATER MANAGEMENT DISTRICTS CREATED UNDER CHAPTER 373, OR THE UNITED STATES.

Problem 1: John Doe conveyed Blackacre to Richard Roe by warranty deed recorded in 1988. Blackacre lies on a navigable river and is improved with an estate home, seawall and dock that were built on land that was formerly partially submerged. The previous conveyance of Blackacre into private ownership was without express reservation of those portions of the land underlying navigable waters. In 2020, is Richard Roe's interest free and clear of the State of Florida's interest as sovereign in any submerged or formerly submerged lands by operation of the Act?

Answer: No. The Act does not operate to divest the State of Florida of title to sovereignty lands waterward of the ordinary high-water mark of navigable rivers.

Problem 2: The Southwest Florida Water Management District acquired title to Whiteacre in 1983. In 1985, Richard Roe conveyed Whiteacre to Simon Grant by a special warranty deed. In 2020, was Simon Grant's interest free and clear of any interest of the District by operation of the Act?

Answer: No. The Act does not operate to extinguish any right, title or interest held by any water management district created under chapter 373.

Authorities & References: F.S. 712.03(9) & 712.04 (2020).

Comment: With respect to submerged sovereignty land, *see* F.S. 712.03(7) (2020) (effective June 15, 1978); *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 167 (Fla. 1986), cert. den. 479 U.S. 1065 (1987) (holding that the Act as originally enacted and as subsequently amended did not operate to divest the state of title to sovereignty lands, even though conveyances of state lands to private interests encompassed sovereignty lands within the lands being conveyed); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 14.23[7] (2020); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 2.7 (Fla. Bar CLE 10th ed. 2021).

The Act does not affect any right, title, or interest of the United States, Florida, or any of its officers, boards, commissions, or other agencies reserved in the patent or deed by which the United States, Florida, or any of its agencies parted with title. F.S 712.04 (2020). Effective July 1, 2010, section 712.03(9) F.S., created an exception to the Act for any right, title or interest held by the Trustees of the Internal Improvement Trust Fund, any water management district created under chapter 373, or the United States. As amended, the Act does not apply to eliminate those governmental interests whether created by reservation or otherwise. F.S 712.04 (2020).

STANDARD 17.9

Elimination of Dower

[Intentionally Deleted; see archived version for text]

STANDARD 17.10

DEFECTS INHERENT IN MUNIMENTS OF TITLE

STANDARD: THE ACT DOES NOT ELIMINATE ANY DEFECTS INHERENT IN THE MUNIMENTS OF TITLE ON WHICH THE ESTATE IS BASED BEGINNING WITH A ROOT OF TITLE AND FOR THIRTY YEARS FROM THE RECORDING OF A ROOT OF TITLE.

Problem 1: In 1975, ABC Corp. purports to convey Blackacre to John Doe. The deed is signed by "Richard Roe as Secretary of ABC Corp." No corporate resolution was recorded authorizing Richard Roe to execute deeds on behalf of ABC Corp. There is thus a defect on the face of the 1975 deed as it was not signed by a person authorized to do so. Nothing affecting Blackacre has been recorded since then. In 2006, was title to Blackacre free and clear of ABC Corp.'s interest by operation of the Act?

Answer: No. Although the deed may constitute a root of title, it contains a defect inherent on its face because it was signed by an officer who did not have statutory authority to convey ABC Corp.'s real property. Hence, the potential ownership claim of ABC Corp. is not extinguished. F.S. 712.03(1) (2020).

Problem 2: John Doe as the sole owner of Blackacre resided on the property as his homestead with his wife and two children. In 1960 John Doe conveyed Blackacre to Richard Roe for valuable consideration, but without the joinder of his wife. John Doe died in 1969, survived by his wife and children. Blackacre was conveyed by Roe to Sam Smith in 1972. No notice of the homestead claim had ever been filed. In 2021, is Smith's title free and clear of the interests of Doe's wife and children?

Answer: Yes. The 1972 deed was a root of title and there is no defect inherent on the face of that 1972 deed to indicate that John Doe's wife and children may have an outstanding interest.

Problem 3: Same facts as Problem 2 except that Richard Roe did not convey to Sam Smith until 2015. In 2021, is Smith's title free and clear of the interests of Doe's wife and children?

Answer: No. The 2015 deed does not qualify as a root of title. The homestead claim renders the 1960 deed void and the 2015 deed does not yet qualify as a root of title because it has not been of record for 30 years.

Authorities & References: F.S. 712.01-.04 (2020); *ITT Rayonier, Inc. v. Wadsworth*, 386 F. Supp. 940, 942-43 (M.D. Fla. 1975), *accord, ITT Rayonier, Inc. v. Wadsworth*, 346 So. 2d 1004, 1009 (Fla. 1977); *see also, Reid v. Bradshaw*, 302 So. 2d 180, 181 (Fla. 1st DCA 1974) (homestead rights are not eliminated by the mere passage of time).

Comment: The answer to Problem 2 would probably be the same without regard to whether the homestead owner died before or after the effective date of the root of title since no notice of homestead claim was ever filed. *See* F.S. 712.04 (2020). However, the *Reid* opinion casts some doubt in the latter instance, and caution should be exercised in such a situation. *See also Conservatory-City of Refuge, Inc. v. Kinney*, 514 So. 2d 377, 378 (Fla. 2d DCA 1987) (holding that the Act did not apply to eliminate homestead claims where the children's remainder interests did not vest until the homestead owner died, which was after the asserted root of title).

The term "muniments of title" is not defined in the Act. The Fifth District Court of Appeal has defined muniments of title in the context of the Act as "any documentary evidence upon

which title is based... [such as] deeds, wills, and court judgments through which a particular land title passes and upon which its validity is based." *Cunningham v. Haley*, 501 So. 2d 649, 652 (Fla. 5th DCA 1986, *reh'g den.* 1987). The court went on to state that "[m]uniments of title do more than merely 'affect' title; they must carry title and be a vital link in the chain of title." *Id.*

CHAPTER 18

HOMESTEAD

STANDARD 18.0

HOMESTEAD EXEMPTIONS – HEAD OF FAMILY

STANDARD: ON OR AFTER JANUARY 8, 1985, HOMESTEAD PROPERTY MAY BE OWNED BY A NATURAL PERSON, WITHOUT REGARD TO THE OWNER'S STATUS AS HEAD OF A FAMILY.

Problem:	Mary Doe, a single woman living alone, owned and resided on Blackacre. A money judgment was obtained against her after January 8, 1985. May Mary Doe have her home designated exempt from levy by forced sale to satisfy this judgment?
Answer:	Yes.
Authorities & References:	Art. X, § 4(a), FLA. CONST. (1968) (as amended); §§ 222.01, ,02, Fla. Stat.
Comment:	Effective January 8, 1985, the Florida electors amended the 1968 Florida Constitution, Article X, section 4(a) replacing property owned by the "head of a family" with property owned by a "natural person." Sections 222.01 and 222.02, Fla. Stat., relating to designation by an owner of homestead for an exemption from forced sale, were amended to allow a natural person rather than the head of a family to obtain protection from levy. This change also applies to restrictions on alienation and devise of homestead property. The Supreme Court of Florida has applied the definition of "head of a family" in Florida Constitution Article X, section 4(a) relating to the forced sale exemption, to the restrictions on alienation and devise in section 4(c). *See, Holden v. Gardner*, 420 So. 2d 1082 (Fla. 1982). Based on this reasoning, it appears the definition of a "natural person" in section 4(a) for the forced sale exemption also applies to the restrictions on alienation and devise in section 4(c).

STANDARD 18.1

ALIENATION OF HOMESTEAD PROPERTY
JOINDER OF SPOUSE

STANDARD: WHEN THE OWNER OF HOMESTEAD PROPERTY IS MARRIED, THE SPOUSE MUST JOIN IN ANY CONVEYANCE OR ENCUMBRANCE OF THE PROPERTY UNLESS THE PROPERTY IS HELD AS A TENANCY BY THE ENTIRETIES AND IS CONVEYED TO THE SPOUSE OR IS HELD BY ONE SPOUSE AND IS CONVEYED TO BOTH SPOUSES AS TENANTS BY THE ENTIRETIES.

Problem 1: John Doe, a married man, owned homestead property. He alone executed a deed in 1965 conveying it to his wife, Mary Doe. Is Mary's title marketable?

Answer: No. Joinder of the spouse was required. The answer might be different if the conveyance occurred on or after the effective date of the 1968 Florida Constitution. See Comment.

Problem 2: John Doe, a married man, owned homestead property. He alone executed a deed in 1975 conveying it to himself and his wife, Mary Doe, as tenants by the entireties. Is the deed valid?

Answer: Yes. *See Jameson v. Jameson*, 387 So. 2d 351 (Fla. 1980).

Problem 3: John Doe, a married man, owned homestead property. He alone executed a deed conveying it to Richard Roe. John's wife, Mary Doe, executed a separate deed purporting to convey the property to Richard Roe. Is Roe's title marketable?

Answer: No. Both spouses must join in a conveyance of homestead property.

Problem 4: Mary Doe, a married woman, owned Blackacre, and resided on it with her husband, John Doe. John was an invalid and Mary was the head of the family. Mary Doe alone executed a deed conveying Blackacre to Richard Roe. Is the deed valid?

Answer: No. John Doe must join in the deed. It is immaterial whether the deed was executed prior to or subsequent to the effective date of the 1968 Florida Constitution, or whether Mary Doe, under prior law, was a free dealer. *See Bigelow v. Dunphe*, 197 So. 328 (Fla. 1940); FUND TN 16.04.05.

Problem 5: Mary Doe owned Blackacre and resided on it with her husband, John Doe, who was the head of the family. In May 1985, Mary executed a deed conveying Blackacre to Richard Roe. Is the deed valid?

Answer: No. John Doe must join in the deed. On or after January 8, 1985, the restriction on alienation of homestead property applies whether or not the owner of the homestead is the head of a family.

Problem 6: John and Mary Doe, husband and wife, owned homestead property as a tenancy by the entireties. John alone executed a deed conveying the homestead to Mary. Is Mary's title marketable?

Answer: Yes.

Authorities & References: Art. X, § 4(c), FLA. CONST. (1968); Art. X, §§ 1, 4, FLA. CONST. (1885); § 689.11, Fla. Stat.; *Jameson v. Jameson*, 387 So. 2d 351 (Fla. 1980); *Williams v. Foerster*, 335 So. 2d 810 (Fla. 1976); *Estep v. Herring*, 18 So. 2d 683 (Fla. 1944); *John v. Purvis*, 199 So. 340 (Fla. 1940); *Moorefield v. Byrne*, 140 So. 2d 876 (3d DCA 1962), *cert. denied*, 147 So. 2d 530 (Fla. 1962); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 21.03[2] (2008); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 3.122 (Fla. Bar CLE 5th ed. 2006); FUND TN 16.02.03.

Comment: Joinder is required under both the 1885 and 1968 Florida Constitutions. Section 689.11(1), Fla. Stat., however, was amended in 1971 to permit interspousal conveyances of homestead property without joinder. The statute's constitutionality has been upheld with respect to property held as a tenancy by the entireties and applied to a 1965 conveyance. *Williams v. Foerster*, 335 So. 2d 810 (Fla. 1976).

The 1968 Florida Constitution has been construed to permit the interspousal creation of a tenancy by the entireties in homestead property without the joinder of the grantee spouse. *See, Jameson v. Jameson*, 387 So. 2d 351 (Fla. 1980). This case also indicates that a conveyance of homestead property from one spouse to the other is valid without the joinder of the grantee spouse. Caution should be exercised in this latter situation, however, as it was not involved in the facts of the *Jameson* case. Neither of these two conveyances of homestead property was valid without spousal joinder if made prior to January 7, 1969, the effective date of the 1968 Florida Constitution.

On or after January 8, 1985, property owned and resided on by a natural person may have homestead status without regard to the owner's status as head of a family. *See*, Title Standard 18.0 (Homestead Exemptions — Head of Family).

For a history of Florida homestead law, *see*, Crosby and Miller, *Our Legal Chameleon, The Florida Homestead Exemption* (pts. I-V), 2 U. FLA. L. REV. 12, 219, 346 (1949); Note, *Our Legal Chameleon is a Sacred Cow: Alienation of Homestead Under the 1968 Constitution*, 24 U. FLA. L. REV. 701 (1972); Maines and Maines, *Our Legal Chameleon Revisited: Florida's Homestead Exemption*, 30 U. FLA. L. REV. 227 (1978).

See also Title Standards 6.4 (Conveyance of Entireties Property By One Spouse To The Other), 18.2 (Gratuitous Alienation Of Homestead Property Before January 7, 1969 – TITLE STANDARD DELETED) and 18.3 (Gratuitous Alienation Of Homestead Property On Or After January 7, 1969).

STANDARD 18.2

GRATUITOUS ALIENATION OF HOMESTEAD PROPERTY
BEFORE JANUARY 7, 1969

[Title Standard deleted. See archived version for text.]

STANDARD 18.3

GRATUITOUS ALIENATION OF HOMESTEAD PROPERTY
ON OR AFTER JANUARY 7, 1969

STANDARD: ON OR AFTER JANUARY 7, 1969, HOMESTEAD PROPERTY MAY BE ALIENATED BY GIFT.

Problem 1:	John Doe owned Blackacre and resided on it as head of his family with his wife, Mary Doe, and his minor child, Alice Doe. In 1980 John Doe, joined by Mary Doe, gratuitously conveyed Blackacre to John Doe and Mary Doe as tenants by the entireties. Subsequently, John Doe died. Was Mary Doe the fee owner of Blackacre?
Answer:	Yes.
Problem 2:	Same facts as above, except that Mary Doe did not join in the conveyance. After John Doe's death, was Mary Doe the fee owner of Blackacre?
Answer:	Yes.
Authorities & References:	Art. X, § 4(c), FLA. CONST. (1968); *Jameson v. Jameson*, 387 So. 2d 351 (Fla. 1980); 1A BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 21.27[1] (2008).
Comment:	In *Jameson v. Jameson*, 369 So. 2d 436 (Fla. 3d DCA 1979), the Third District Court of Appeal construed article X, § 4(c) of the Florida Constitution to require the spouse of a homestead titleholder to join in an interspousal conveyance of the homestead to the husband and wife as tenants by the entireties and declared § 689.11(1), Fla. Stat. unconstitutional to the extent that it would allow interspousal conveyance of the homestead without joinder. This decision was reversed in *Jameson v. Jameson*, 387 So. 2d 351 (Fla. 1980), in which the Florida supreme court held that the Florida Constitution does not require joinder in an interspousal conveyance of solely owned homestead property to the husband and wife as tenants by the entireties, and that § 689.11(1), Fla. Stat. is consistent with the constitutional provision as construed by it. *See* Title Standard 18.1 (Alienation of Homestead Property — Joinder of Spouse).

STANDARD 18.4

ALIENATION OF HOMESTEAD PROPERTY — POWER OF ATTORNEY

STANDARD: A CONVEYANCE OR ENCUMBRANCE OF HOMESTEAD PROPERTY ACCOMPLISHED BY THE EXERCISE OF A POWER OF ATTORNEY OR DURABLE POWER OF ATTORNEY SPECIFICALLY AUTHORIZING A CONVEYANCE OR ENCUMBRANCE OF REAL PROPERTY IS ACCEPTABLE.

Problem 1:	John Doe, the homestead owner of Blackacre, resided on it with his wife, Mary Doe. Mary Doe executed a power of attorney with all the formalities of a deed to John Doe. The power of attorney, which was recorded, specifically authorized John Doe to convey real property. John Doe conveyed Blackacre to Richard Roe, executing the deed: "John Doe" and "Mary Doe, by John Doe as her attorney-in-fact." Does the conveyance to Richard Roe constitute a cloud upon the title to Blackacre?
Answer:	No.
Problem 2:	John Doe, the homestead owner of Blackacre, resided on it with his wife, Mary Doe. John Doe executed a power of attorney with all the formalities of a deed to Mary Doe. The power of attorney, which was recorded, specifically authorized Mary Doe to convey real property. Mary Doe conveyed Blackacre to Richard Roe, executing the deed: "John Doe, by Mary Doe as his attorney-in-fact" and "Mary Doe." Does the conveyance to Richard Roe constitute a cloud upon the title of Blackacre?
Answer:	No.
Problem 3:	John Doe, the homestead owner of Blackacre, resided on it with his wife, Mary Doe. John Doe executed a power of attorney with all the formalities of a deed to Richard Roe. Mary Doe executed a power of attorney with all the formalities of a deed to Richard Roe. The powers of attorney, which were recorded, specifically authorized Richard Roe to convey real property. Richard Roe conveyed Blackacre to Stephen Grant, executing the deed: "John Doe, by Richard Roe as his attorney-in-fact" and "Mary Doe, by Richard Roe as her attorney-in-fact." Does the conveyance to Stephen Grant constitute a cloud upon the title to Blackacre?
Answer:	No. The same result also follows if Richard Roe was acting under a single power of attorney jointly executed by both John and Mary Doe. Also, the result would be the same if Richard Roe acted as attorney-in-fact for only one spouse and the other spouse executed the deed.
Authorities & References:	Art. X, § 4(c), FLA. CONST. (1968) (as amended); § 689.111, Fla. Stat.; § 709.08(6), Fla. Stat.; *In re Estate of Schriver*, 441 So. 2d 1105 (Fla. 5th DCA 1983); *see also*, *City National Bank of Florida v. Tescher*, 578 So. 2d 701 (Fla. 1991) *James v. James*, 843 So. 2d 304 (Fla. 5th DCA 2003).

Comment: Section 689.111, Fla. Stat. which became effective on May 12, 1971, provides that the owner of homestead property may execute a deed or mortgage by virtue of a power of attorney, and joinder may be accomplished by the exercise of a power of attorney. In 1995, § 709.08(6), Fla. Stat. was amended to specifically include the homestead property. In addition, § 709.015(4), Fla. Stat., dealing with the exercise of powers of attorney when the principal has been reported by the armed forces as missing, implies that homestead property held as a tenancy by the entireties may be conveyed under a power of attorney after the lapse of one year from the report that the principal is missing. Even though the Constitution requires a joinder of the spouse in an alienation by the owner, such joinder may be by power of attorney.

STANDARD 18.5

ALIENATION OF HOMESTEAD PROPERTY BY GUARDIAN PRIOR TO OCTOBER 1, 1970 OR FROM JULY 1, 1975 THROUGH OCTOBER 1, 1977

[Title Standard deleted. See archived version for text.]

STANDARD 18.6

ALIENATION OF HOMESTEAD PROPERTY
BY GUARDIAN BETWEEN OCTOBER 1, 1970 AND JULY 1, 1975, OR
ON OR AFTER OCTOBER 1, 1977

STANDARD: ON OR AFTER OCTOBER 1, 1970, THROUGH JUNE 30, 1975, AND ON OR AFTER OCTOBER 1, 1977, HOMESTEAD PROPERTY MAY BE ALIENATED OR ENCUMBERED BY THE GUARDIAN OF THE PROPERTY OF AN INCAPACITATED OWNER OR SPOUSE ON PETITION AND ORDER OF THE CIRCUIT COURT.

Problem 1: John Doe owned Blackacre and resided on it as the head of his family with Mary Doe, his wife, and their minor child. Mary Doe was adjudged incompetent on January 10, 1973, and John Doe was appointed guardian of the property of Mary Doe. John Doe conveyed Blackacre to Richard Roe on June 10, 1973. John Doe joined in the conveyance as guardian of the property of Mary Doe, pursuant to an order of the circuit court authorizing the sale. Was the conveyance valid?

Answer: Yes.

Problem 2: John Doe owned Blackacre and resided on it as the head of his family with Mary Doe, his wife, and their minor child. John Doe was adjudged incompetent on December 10, 1977, and Mary Doe was appointed guardian of the property of John Doe. Mary Doe, as guardian, conveyed Blackacre to Richard Roe on June 10, 1978 pursuant to a court order authorizing the sale. Mary Doe joined in the conveyance as the spouse of the homestead owner. Was the conveyance valid?

Answer: Yes.

Authorities & References: Art. X, § 4(c), FLA. CONST. (1968) (as amended); § 745.15, Fla. Stat. (1973); § 26.012, Fla. Stat. (1973 & Supp. 1974); § 744.441, Fla. Stat. (1977); § 744.451(1), Fla. Stat.; *In re Guardianship of Tanner*, 564 So. 2d 180 (Fla. 3d DCA 1990); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 3.142 (Fla. Bar CLE 4th ed. 1999); FUND TN 16.02.01.

Comment: On or after October 1, 1970 through December 31, 1973, statutory authority existed for a guardian of the property of an incompetent to convey homestead property held as a tenancy by the entireties if only *one* spouse was incompetent. §§ 745.15(1), (4), Fla. Stat. (1971); §§ 745.15(1), (4), Fla. Stat. (1973). On or after January 1, 1974 through June 30, 1975, and on or after October 1, 1977, statutory authority exists for a guardian to convey such property with court approval even when *both* spouses are incapacitated. §§ 745.15(1), (4), Fla. Stat. (1973); § 744.441(12), Fla. Stat. *See* FUND TN 16.02.01.

Except for property owned by the ward in a tenancy by the entireties, statutory authority exists for the encumbrance of homestead by a guardian of the property, with court approval, on or after October 1, 1970 through June 30, 1975 and on or after October 1, 1977. § 744.441(12), Fla. Stat. (1977); § 745.15(1), Fla. Stat. (1971). On or after January 1, 1974 through June 30, 1975 and on or after October 1, 1977, a guardian could encumber property owned by the ward in a tenancy by the entireties; however, for all other periods statutory authority did not exist that allowed such property to be encumbered. *Compare* § 744.441(12), Fla. Stat. (1979) and § 745.15(4), Fla. Stat. (1973) *with* § 745.15(4), Fla. Stat. (1971). *See* FUND TN 16.02.01.

STANDARD 18.7

DEVISE OF HOMESTEAD PROPERTY BEFORE JANUARY 7, 1969

[Title Standard deleted. See archived version for text.]

STANDARD 18.8

DEVISE OF HOMESTEAD PROPERTY ON OR AFTER JANUARY 7, 1969

STANDARD: A DEVISE OF HOMESTEAD BY ONE DYING ON OR AFTER JANUARY 7, 1969, IS VALID IF THE DECEDENT IS NOT SURVIVED BY EITHER SPOUSE OR MINOR CHILD, AND A DEVISE MAY BE MADE TO THE SPOUSE IF THERE IS NO MINOR CHILD.

Problem 1: John Doe, a widower, died after January 7, 1969, survived by his three adult children. By his will he devised his homestead to one of his children. Was the devise valid?

Answer: Yes. Since John was not survived by a spouse or minor child, there were no restrictions on the devise of his homestead. Presumably he could have excluded all of his children and devised the homestead to anyone else. *In re Estate of McGinty*, 258 So. 2d 450 (Fla. 1971) supports this, although the devise in that case was to one of the children. On or after January 1, 1976, see also § 732.4015, Fla. Stat. (1985).

The devise would not be valid if John were survived by a minor child. Effective July 1, 1973, the age of majority was changed from 21 years to 18 years of age. § 1.01(14), Fla. Stat. (1985).

Problem 2: John Doe died after January 7, 1969, survived by his widow, Mary Doe, and two adult children. By his will he devised his homestead to his widow, Mary. Was the devise valid?

Answer: Yes. The 1968 Florida Constitution was amended in 1972 to permit this, effective as of January 2, 1973. In fact, a devise such as this would be valid if made on or after January 7, 1969. *See In re Estate of McCartney*, 299 So. 2d 5 (Fla. 1974) (upholding such a devise made in 1970). *See also* § 732.4015, Fla. Stat. (1985).

Problem 3: John Doe died after January 7, 1969, survived by his widow, Mary Doe, and two minor children. By his will he devised his homestead to his widow, Mary. Was the devise valid?

Answer: No. As John was survived by minor children, the devise was invalid.

Problem 4: Mary Doe died after January 7, 1969, survived by her dependent husband, John Doe, and two adult children, Thomas and Alice. By her will she devised her homestead to her son, Thomas. Was the devise valid?

Answer: No. Mary was survived by a spouse. Since she had no minor children, she could have devised the homestead to her spouse, but not to anyone else. The result would be the same if John was not dependent, and therefore Mary was not the head of a family, provided that Mary died on or after January 8, 1985.

Problem 5: John Doe, a single man living alone on Blackacre, died in May, 1985. He was survived by an adult son and minor daughter, neither of whom lived with nor was dependent on him. By his will, John Doe devised Blackacre to his brother. Was the devise valid?

Answer: No. The devise was not valid because John was survived by a minor child. Effective January 8, 1985, a single person's residence is subject to the restrictions on devise of homestead property. *See* FUND TN 16.04.02.

Authorities & References: Art. X, § 4(c), FLA. CONST. (1968); §§ 732.401, .4015, Fla. Stat. (1985); §§ 731.05, .27, Fla. Stat. (1973); *see also* §§ 732.102, .103, Fla. Stat. (1985); § 731.23, Fla. Stat. (1973); *In re Estate of McCartney*, 299 So. 2d 5 (Fla. 1974); *In re Estate of McGinty*, 258 So. 2d 450 (Fla. 1971); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 21.24 (2008); FUND TN 2.06.01, 2.06.03.

Comment: On or after January 8, 1985, property owned and resided on by a natural person may have homestead status without regard to the owner's status as head of a family. See Title Standard 18.0 (Homestead Exemptions — Head of Family).

When not devised as permitted by law, as in Problems 3 and 5, the homestead descends under the law of intestate succession. Prior to January 1, 1976, when the decedent was survived by a *widow* and lineal descendants, § 731.27 provided a life estate for the *widow* with a vested remainder to the lineal descendants. *See* §§ 731.05, .23, .27, Fla. Stat. (1973); *Stephens v. Campbell*, 70 So. 2d 579 (Fla. 1954). On or after January 1, 1976, if the decedent is survived by a *spouse* and lineal descendants, § 732.401, Fla. Stat. provides a life estate for the surviving *spouse* with a vested remainder to the lineal descendants. *See* §§ 732.401, .4015, Fla. Stat. (1985).

See Title Standard 18.8-1 (Descent Of Homestead Property).

Article X, section 5 of the 1968 Florida Constitution states in part: “There shall be no distinction between married women and married men in holding, control, disposition, or encumbering of their property, both real and personal. . . .” On or after January 1, 1976, this provision is incorporated in § 732.401 and § 732.4015, Fla. Stat. (2008), which read “spouse” instead of “widow.” The constitutional provision should be considered whenever dealing with a pre-1976 devise of homestead. *See* FUND TN 2.06.03.

STANDARD 18.8-1

DESCENT OF HOMESTEAD PROPERTY

STANDARD: HOMESTEADS DESCEND AS OTHER INTESTATE PROPERTY, BUT IF THE DECEDENT IS SURVIVED BY: (1) A SPOUSE AND LINEAL DESCENDANTS, THE SPOUSE TAKES A LIFE ESTATE WITH A VESTED REMAINDER TO THE LINEAL DESCENDANTS IN BEING AT THE DECEDENT'S DEATH.; OR (2) A SPOUSE BUT NO LINEAL DESCENDANTS, THE SPOUSE TAKES THE FULL FEE SIMPLE TITLE.

Problem 1:	John Doe, the owner of homestead property, died intestate, survived only by his wife Mary and son Thomas. May Mary alone convey the homestead in fee simple absolute?
Answer:	No. Mary takes a life estate with a vested remainder to Thomas.
Problem 2:	Mary Doe, the owner of homestead property, died intestate, survived only by her dependent husband John and son Thomas. May John alone convey a 1/2 interest in the homestead in fee simple absolute?
Answer:	(Before January 1, 1976) Yes. John takes a fee simple absolute by intestate succession equally with his son, the other heir, as § 731.27, Fla. Stat. applied only to widows. *But see* Art. X, § 5, FLA. CONST. (on or after January 7, 1969). (On or after January 1, 1976) No. John takes a life estate with a vested remainder to Thomas as § 732.401, Fla. Stat. applies to either spouse.
Problem 3:	John Doe, the owner of homestead property, died intestate, survived only by his wife Mary and grandson Stephen. May Mary alone convey the homestead in fee simple absolute?
Answer:	No. Mary takes a life estate with a vested remainder to the lineal descendant, Stephen.
Problem 4:	John and Mary Doe owned the homestead property as tenants by the entirety. John died. May Mary alone convey the homestead in fee simple absolute?
Answer:	Yes. Section 732.401(2), Fla. Stat. provides that § 732.401(1), Fla. Stat. shall not apply to property that the decedent and spouse owned as tenants by the entirety.
Problem 5:	John Doe, the owner of homestead property, died intestate, survived only by a nephew who lives out of state and who had very little, if any, contact with Mr. Doe. Can the personal representative of John Doe's estate sell the homestead property?

Answer: No.

Authorities & References: Art. X, § 4(b), FLA. CONST. (1968); §§ 732.401, .4015; §§ 731.27, .23, Fla. Stat. (1973); 1A BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 21.24 (2007); FUND TN 2.06.01, 2.06.02.

Comment: Article X, section 5 of the 1968 Florida Constitution states in part: "There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal . . . ." On or after January 1, 1976, this provision is incorporated in § 732.401, Fla. Stat. and § 732.4015, Fla. Stat. which reads "spouse" instead of "widow." The constitutional provision should be considered whenever dealing with pre-1976 descent of homestead.

A personal representative of an intestate decedent's estate cannot sell the decedent's homestead property if the decedent was survived by one or more heirs at law. *See* §§ 733.607(1), .608(1), Fla. Stat. Title to the homestead property vests at the decedent's death in the heirs at law. *See* §§ 732.101(2), .103 (class of heirs at law). *See also Traeger v. Credit First N.A.* and *Moss v. Estate of Moss* cited in the Comments section of Standard 18.10, Title Standard 18.8 (Devise Of Homestead Property On Or After January 7, 1969), and Title Standard 18.10 (Sale of Devised Homestead by Personal Representative).

STANDARD 18.9

HOMESTEAD — JURISDICTION OF COUNTY JUDGE

[Title Standard deleted. See archived version for text.]

STANDARD 18.10

SALE OF DEVISED HOMESTEAD BY PERSONAL REPRESENTATIVE

STANDARD: PROVIDED A TESTATE DECEDENT IS NOT SURVIVED BY A SPOUSE OR A MINOR CHILD, THE PERSONAL REPRESENTATIVE MAY CONVEY HOMESTEAD PROPERTY PURSUANT TO: (a) A SPECIFIC DIRECTION IN THE WILL TO SELL THE HOMESTEAD; OR (b) A GENERAL POWER OF SALE IN THE WILL OR A RECORDED COURT ORDER IF THE DEVISEES ARE NOT WITHIN THE CLASS OF HEIRS LISTED IN. § 732.103, Fla. Stat.

Problem 1: John Doe died testate survived only by three adult children. His residence was specifically devised to a non-profit charitable corporation. The will contains full powers of sale. May the personal representative convey the property?

Answer: Yes.

Problem 2: John Doe died testate survived only by three adult children. His residence was not specifically devised in the will, and the residuary beneficiaries were three non-profit charitable corporations. The will contains full powers of sale. May the personal representative convey the property?

Answer: Yes.

Problem 3: John Doe died testate survived only by three adult children. His residence was specifically devised to one of the children. The will contains full powers of sale. May the personal representative convey the property?

Answer: No.

Problem 4: John Doe died testate survived only by three adult children. His residence was not specifically devised in the will, and his children are the residuary beneficiaries. The will contains full powers of sale. May the personal representative convey the property?

Answer: No.

Problem 5: John Doe died testate survived only by three adult children. His will directs his residence to be sold with the proceeds to be distributed to his children. May the personal representative convey the property?

Answer: Yes.

Problem 6: John Doe died testate survived only by three adult children. His residence was not specifically devised in the will, and his children and two non-profit corporations are the residuary beneficiaries. The will contains full powers of sale. May the personal representative convey the property?

Answer: No, as to the interest of the children.

Authorities & References:

Art. X § 4(b), FLA. CONST. (constitutional homestead exemptions inure to surviving spouse and heirs); Art. X § 4(c), FLA. CONST. (homestead not subject to devise if there is a surviving spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child); § 732.103, Fla. Stat. (2008) (defining the class of heirs); § 733.607, Fla. Stat. (2008) ("Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except the protected homestead"); *McKean v. Warburton*, 919 So. 2d 341, 347 (Fla. 2005) ("where a decedent is not survived by a spouse or minor children, the decedent's homestead property passes to the residuary devisees, not the general devisees, unless there is a specific testamentary disposition ordering the property to be sold and the proceeds made a part of the general estate."); *Snyder v. Davis*, 699 So. 2d 999, 1005 (Fla. 1997) (homestead protection from forced sale applies to any family member within the class of persons categorized in § 732.103, Fla. Stat.); *City National Bank of Florida v. Tescher*, 578 So. 2d 701, 703 (Fla. 1991) (no restriction on devising homestead property where no surviving minor child and surviving spouse waives homestead rights); *Cutler v. Cutler*, 994 So. 2d 341, 345 (Fla. 3d DCA 2008) (holding that a direction in the will that claims of the estate be paid out of homestead is the equivalent of specific order to sell the homestead); *Harrell v. Snyder*, 913 So. 2d 749, 753 (Fla. 5th DCA 2005) ("homestead does not become a part of the probate estate unless a testamentary disposition is permitted and is made to someone other than an heir, i.e., a person to whom the benefit of homestead protection could not inure"); *Traeger v. Credit First N.A.*, 864 So. 2d 1188, 1190 (Fla. 5th DCA 2004) (holding that it does not matter that a devisee is not the closest heir under the intestacy statute as the homestead protection applies to all members within the class of heirs); *In re Estate of Hamel*, 821 So. 2d 1276, 1279 (Fla. 2d DCA 2002) (holding that "the best, and perhaps the only, recognized exception to the general rule [that homestead property, whether devised or not, passes outside of the probate estate] occurs when the will specifically orders that the property be sold and the proceeds be divided among the heirs."); *Moss v. Estate of Moss*, 777 So. 2d 1110, 1113 (Fla. 4th DCA 2001) (homestead protection inures to heirs of decedent's predeceased spouse); *Knadle v. Estate of Knadel*, 686 So. 2d 631, 632 (Fla. 1st DCA 1996) (where will directs sale of homestead for distribution to residuary devisees, proceeds become asset of estate subject to creditor claims); *Clifton v. Clifton*, 553 So. 2d 192, 194 n. 3 (Fla. 5th DCA 1989) ("[h]omestead property, whether devised or not, passes outside of the probate estate. Personal representatives have no jurisdiction over nor title to homestead, and it is not an asset of the testatory estate. . . . It is only when the testator specifies in the will that the homestead is to be sold and the proceeds to be divided that the homestead loses its "protected" status"); *Estate of Price v. West Fla. Hospital, Inc.*, 513 So. 2d 767 (Fla. 1st DCA 1987) (where will directs sale of homestead with no intent to reinvest the proceeds, the proceeds become asset of estate subject to creditor claims).

Comments:

This Standard and the problems hereunder assume a duly appointed personal representative and a will admitted to probate in a Florida proceeding. See generally, Title Standard 5.2.

Homestead property passes outside of the estate and the personal representative lacks authority to convey such property unless (i) the testator is not survived by a spouse or minor child and (ii) the will expresses the testator's intention that the property lose its homestead character by (a) devising it to someone not within the class of heirs or (b) by specifically directing the personal representative to sell the homestead.

The Constitutional homestead provision "is to be liberally construed in favor of maintaining the homestead property." *Snyder v. Davis*, 699 So. 2d 999, 1002 (Fla. 1997).

It is a common misconception that the absence of an order determining homestead indicates that the property is not "protected homestead." In fact, property which qualifies as protected homestead constitutes protected homestead, even if no order to that effect has been entered.

The practitioner should record proof that the property was not devised to a person within the class of heirs in § 732.103, Fla. Stat. Proof that the decedent was not survived by a spouse or minor child may be by an affidavit of a knowledgeable person. Proof that the devisee of the homestead property is not an heir of the decedent within the class of heirs set forth in § 732.103, Fla. Stat. may likewise be by affidavit of a knowledgeable person.

CHAPTER 19

PARTNERSHIPS

[Title Standards deleted. See archived version for text.]

CHAPTER 20

MARITAL PROPERTY

STANDARD 20.1

RECITAL OF UNMARRIED STATUS

STANDARD: THE RECITAL IN AN INSTRUMENT OF RECORD THAT A PERSON IS UNMARRIED MAY BE RELIED UPON IN THE ABSENCE OF ANY EVIDENCE IN THE CHAIN OF TITLE OR OTHER KNOWN FACTS INDICATING THAT THE PERSON WAS MARRIED.

Problem 1: John Doe conveyed Blackacre by a deed that recited that he was a single man. Nothing of record indicates that Doe was married prior to the recording of the deed. Is an examiner justified in relying on the recital of marital status?

Answer: Yes.

Problem 2: John Doe, the sole owner of Blackacre, conveyed it, describing himself as a single man. Several years previously, John Doe and Mary Doe, his wife, had joined in a mortgage of Blackacre. Nothing of record shows the termination of the marital status. Is an examiner justified in assuming that the grantee takes free of any possible homestead rights?

Answer: No. An examiner should require satisfactory record evidence of elimination of any possible homestead rights.

Authorities & References: FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE § 3.57 (Fla. Bar CLE 6th ed. 2010); FUND TN 20.02.03, 20.02.05.

Comment: Although the recital of marital status may be binding as to the grantor or mortgagor, it does not eliminate the rights of one who is not a party. However, the improbability of outstanding interests that are not indicated by the chain of title justifies reliance. Any contrary facts coming to the examiner's attention, although not in the chain of title, cannot be ignored.

A recital that a person is unmarried may include a reference to the person being single, a widow or widower. However, a designation as widow or widower of a particular spouse does not necessarily indicate current marital status. *See* FUND TN 20.02.03.

TITLE STANDARDS 20.2 – 20.10

[Title Standards deleted. See archived version for text.]

CHAPTER 21

DESCRIPTIONS

STANDARD 21.1

TEST OF SUFFICIENCY OF PROPERTY DESCRIPTION

STANDARD: IF THE DESCRIPTION OF LAND CONVEYED IN A DEED IS SUCH THAT A SURVEYOR, BY APPLYING THE RULES OF SURVEYING, CAN LOCATE THE SAME, SUCH DESCRIPTION IS SUFFICIENT, AND THE DEED WILL BE SUSTAINED IF IT IS POSSIBLE FROM THE WHOLE DESCRIPTION TO ASCERTAIN AND IDENTIFY THE LAND INTENDED TO BE CONVEYED.

Problem 1: The lots in Block 5 of Country Club Estates are numbered consecutively, except for one unnumbered tract lying between Lots 5 and 8 and the plat of the subdivision shows no lots numbered 6 and 7. The original subdivider purported to convey Lot 6, Block 5, Country Club Estates to Richard Roe. Is Roe's title marketable?

Answer: No.

Problem 2: Same facts as above except that the original subdivider attempted to convey Lot 6, Block 5, Country Club Estates to Richard Roe by a metes and bounds description. Is Roe's title marketable?

Answer: Yes.

Problem 3: Title to Blackacre was conveyed to Roe by a deed in which the last call in the metes and bounds legal description read "continue 160 feet to the “point of beginning." The actual distance for the call pursuant to a survey of the property is 200 feet to the point of beginning. Is Roe's title marketable?

Answer: Yes. A surveying rule of construction as well as Florida case law establishes that in locating parcels of land, natural or artificial monuments control over courses and distances. Accordingly, errors in courses or distances in calls that run to a fixed point may be ignored. See *Trustees of Internal Improvement Fund v. Westone*, 222 So. 2d 10 (Fla. 1969) and *Bridges v. Thomas*, 118 So. 2d 549 (Fla. 2d DCA 1960).

Authorities & References: *Maynard v. Miller*, 132 Fla. 269, 182 So. 220 (1938); *Burns v. Campbell*, 131 Fla. 630, 180 So. 46 (1938); 19 Fla. Jur. 2d *Deeds* § 128 (2011); FUND TN 13.03.09.

Comment: The standard uses the example of a deed, but the principle applies to any instrument containing a legal description.

STANDARD 21.2

DESIGNATION OF COUNTY IN METES
AND BOUNDS DESCRIPTIONS

STANDARD: A DESCRIPTION OF PROPERTY DESCRIBED AS BEING IN THE STATE OF FLORIDA AND BY METES AND BOUNDS IN A STATED SECTION, TOWNSHIP, AND RANGE WITHOUT ANY COUNTY DESIGNATION IS SUFFICIENTLY DEFINITE.

Problem: John Doe conveyed Blackacre which he owned, describing it as being in the State of Florida and by metes and bounds in Section 12, Township 5 N, Range 29 W. No county was designated in the deed. Is a corrective deed showing the county in which the land lies necessary?

Answer: No. Since the section, township and range are definitely given as a part of the description, the location can be ascertained without question as to the county in which the land lies.

Authorities & References: *Miller v. Griffin*, 99 Fla. 976, 128 So. 416 (1930); *Black v. Skinner Mfg. Co.*, 53 Fla. 1090, 43 So. 919 (1907); *Peacock v. Feaster*, 52 Fla. 565, 42 So. 889 (1906); 19 Fla. Jur. 2d *Deeds* § 129 (2011); FUND TN 13.03.03.

STANDARD 21.3

CONVEYANCE DESCRIBED ONLY BY REFERENCE
TO PREVIOUS RECORDED DOCUMENT

STANDARD: A CONVEYANCE WHICH DESCRIBES THE LAND ONLY BY A REFERENCE TO A PREVIOUSLY RECORDED INSTRUMENT, WITHOUT RECITING THE DESCRIPTION SET FORTH IN THE PREVIOUS INSTRUMENT, IS VALID, EVEN THOUGH THE TITLE EXAMINER MUST GO TO ANOTHER INSTRUMENT TO IDENTIFY THE PROPERTY CONVEYED.

Problem: A recorded conveyance from John Doe to Richard Roe contains the description, "All of the property conveyed to me in that certain deed from Simon Grant recorded in Official Records Book 47392, Page 798, of the Official Records of Broward County, Florida." The deed from Simon Grant conveyed the South 1/2 of the West 1/2 of Sec. 33, Township 48 South, Range 42 East. Is the description in the conveyance to Richard Roe sufficient?

Answer: Yes.

Authorities & References: *Gradolph v. Ricou*, 104 Fla. 237, 139 So. 579 (1932); *Hutchinson Island Realty, Inc. v. Babcock Ventures, Inc.*, 867 So. 2d 528 (Fla. 5th DCA 2004); 19 Fla. Jur. 2d *Deeds* § 137 (2011); FUND TN 13.03.04.

Comment: It is preferable and the better practice generally to have the complete description, including any exception, set out in the one instrument, but such a description as noted above is sufficient to allow positive identification of the property intended to be conveyed.

The standard uses the example of a deed, but the principle applies to any instrument containing a legal description.

STANDARD 21.4

CONFLICT BETWEEN SPECIFIC DESCRIPTION AND
STATEMENT OF ACREAGE

STANDARD: IF A DEED CONTAINS A SPECIFIC DESCRIPTION OF THE PROPERTY SUCH AS BY GOVERNMENT SURVEY, METES AND BOUNDS, OR REFERENCE TO A PLAT, TOGETHER WITH A STATEMENT OF THE ACREAGE, THE SPECIFIC DESCRIPTION PREVAILS OVER THE STATEMENT OF ACREAGE, UNLESS AN INTENT TO CONVEY A CERTAIN QUANTITY IS CLEARLY STATED.

Problem: A recorded conveyance from John Doe to Richard Roe contains a description by metes and bounds, in a certain Section, Township, Range and County, followed by the words "the same being 33 acres, more or less." A surveyor employed by Roe in anticipation of a subsequent conveyance determines that, in fact, the property described within the stated bounds contains 37 acres. Is a corrective deed necessary to enable Roe to pass marketable title to the described tract including the excess acreage?

Answer: No.

Authorizes & References: *Jackson v. Magbee*, 21 Fla. 622 (1885); *Benecke v. U.S.*, 356 F.2d 439 (5th Cir. 1966); *U.S. v. 329.22 Acres of Land*, 307 F.Supp. 34 (M.D. Fla. 1968), *aff'd* 418 F.2d 551 (5th Cir. 1969); 19 Fla. Jur. 2d *Deeds* § 143 (2011).

Comment: The standard applies only to a deed with a specific description accompanied by a statement of acreage. Where the deed indicates an intention to convey a specific number of acres, but the specific description does not coincide with this intention, or where the intention of the parties is in doubt, the standard is not applicable.

CHAPTER 22

EASEMENTS

STANDARD 22.1

EASEMENTS BY EXPRESS GRANT

STANDARD: AN EASEMENT MAY BE CREATED BY EXPRESS GRANT.

Problem: Blackacre, owned by Simon Grant, abutted the west line of a public road. Grant conveyed the back half of Blackacre to John Doe, together with an easement for ingress and egress across the south 20 feet of the front half of Blackacre for the benefit of the back half of Blackacre. Did Doe acquire an easement across the south 20 feet of the front half of Blackacre?

Answer: Yes.

Authorities: *Jonita, Inc. v. Lewis,* 368 So. 2d 114 (Fla. 1st DCA 1979).

STANDARD 22.2

EASEMENTS BY RESERVATION

STANDARD: AN EASEMENT MAY BE CREATED BY RESERVATION.

Problem 1: Blackacre, owned by Simon Grant, lies west of a public road. Grant conveyed the east half of Blackacre to John Doe. The deed stated, "reserving an easement for ingress to and egress from the west half of Blackacre across the south 20 feet of the east half of Blackacre." Did Grant retain an easement across the south 20 feet of the east half of Blackacre?

Answer: Yes.

Problem 2: Simon Grant conveyed Blackacre to John Doe, "except an easement over the south 20 feet." The circumstances surrounding the deed demonstrated the parties intended to create an easement. Is the easement valid?

Answer: Yes.

Problem 3: Simon Grant conveyed Blackacre to John Doe, "subject to an easement over the south 20 feet." There was no existing easement over the south 20 feet and no circumstances demonstrating that the parties intended to create an easement. Is the easement valid?

Answer: No.

Problem 4: Simon Grant conveyed Blackacre to John Doe, "subject to an easement over the south 20 feet." There was no existing easement over the south 20 feet and but there were circumstances demonstrating that the parties intended to create an easement. Is the easement valid?

Answer: Maybe, as discussed in the comments, the courts look to the intent of the parties and consider the circumstances surrounding the deed.

Problem 5: The City of Good Hope conveyed Greenacre to Janet Jones. The deed reserved to the State of Florida an easement for a state road right-of-way over a portion of Greenacre. Did the reservation create an easement for the State of Florida?

Answer: Yes.

Authorities: *City of Jacksonville v. Shaffer*, 144 So. 888 (Fla. 1932); *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439 (Fla. 1978); *Procacci v. Zacco*, 324 So. 2d 180 (Fla. 4th DCA 1975); *Robertia v. Pine Tree Water Control Dist.*, 516 So. 2d 1012 (Fla. 4th DCA 1987); *Marchman v. Perdue*, 543 So. 2d 1286 (Fla. 1st DCA 1989); *Merriam v. First Nat'l Bank on Akron, Ohio*, 587 So. 2d 584 (Fla. 1st DCA 1991); *Behm v. Saeli*, 560 So. 2d 431 (Fla. 5th DCA 1990); *Walters v. McCall*, 450 So. 2d 1139 (Fla. 1st DCA 1984); *Cartish v. Soper*, 157 So. 2d 150 (Fla. 2d DCA 1963); *Leffler v. Smith*, 388 So. 2d 261 (Fla. 5th DCA 1980); *Dade County v. Little*, 115 So. 2d 19 (Fla. 3d DCA 1959); *Furlong v. Fuller & Johnson, PA*, 492 So. 2d 421 (Fla. 1st DCA 1986); *Estate of Johnson v. TPE Hotels, Inc.*, 719 So. 2d 22 (Fla. 5th DCA 1998); F.S. § 95.361.

Comment: In drafting an easement reservation, the language used should be precise, expressing the type of easement, its extent, location and any other pertinent terms as clearly as possible. Language in a deed merely stating a conveyance is "subject to" an easement is generally insufficient in itself to reserve

an easement for the grantor's property. *Procacci v. Zacco, supra*; *Robertia v. Pine Tree Water Control Dist., supra*; *Marchman v. Perdue, supra.* Terms such as "subject to" or "except" are ambiguous and require parole evidence to determine intent to create an easement, so the prudent practitioner should not rely on instruments containing such language without a judicial determination. *See, e.g., Procacci v. Zacco*; *Merriam v. First Nat'l Bank, supra* ("use of the words 'subject to' in an attempt to create an easement led to unclear and ambiguous results, requiring recourse to surrounding facts and circumstances to determine the intention of the parties."); *Behm v. Saeli, supra* (all evidence including contract providing for easement, survey showing easement, and existence of road along access easement pointed to agreement to create and reserve easement). *See, also,* TN 03.02.03 of The Fund Title Notes.

The common law held that an easement cannot be created by exception, because an exception implies that the grantor is removing from the conveyance some pre-existing right, which would not be the case for a newly created easement. *City of Jacksonville v. Shaffer, supra*. However, the modern approach is to interpret the conveyance consistent with the intention of the parties. *See, Shafer* (language interpreted as a reservation); *City of Miami v. St. Joe Paper Co., supra* (language interpreted as a restriction rather than an improper exception).

While common law held that a reservation to a stranger to the title was invalid, the modern approach is to use estoppel by deed against the grantee and grantee's successors to overcome the common law prohibition. *Dade County v. Little, supra*; *Leffler v. Smith, supra*; *Furlong v. Fuller & Johnson, PA, supra*.

An easement created by a reservation in a deed may be extinguished by the act of platting the lands without reserving or showing the easement on the plat. *Estate of Johnson v. TPE Hotels, Inc., supra*.

Dedications on recorded plats should likewise be drafted with precision; imprecise drafting can present evidentiary and intent issues. It is not uncommon to find plats stating that certain lands are "subject to" an easement for ingress and egress, access to a lake or park or other specified uses, or simply designating certain parcels on the map as "easement," "park," or "access" without being referenced in express dedication language. Although the concepts are similar to those described in this title standard, the determination of rights based on a recorded plat are modified under F.S. Chapter 177, including the possibility that parcels and uses shown on the plat, and not expressly referenced in the dedication language, may nonetheless be "deemed to have been dedicated to the public" under F.S. § 177.081(3).

STANDARD 22.3

EASEMENTS BY IMPLICATION FROM PLAT

STANDARD: AN EASEMENT MAY BE IMPLIED FROM A PLAT.

Problem 1: Julie Developer recorded a plat for a residential subdivision which included an area labeled "Sunnyside Park." The plat did not dedicate the "Sunnyside Park," and reserved the land surrounding the park to the developer. Julie Developer then conveyed lots in the subdivision to new lot owners by reference to the plat. Did the lot owners acquire an implied easement to access and use Sunnyside Park?

Answer: Yes.

Problem 2: Alfred Developer recorded a plat for a residential subdivision which included open spaces marked "Reserved – See Margin." The marginal notation stated "The owner contemplates that the blocks, marked 'Reserved – See Margin' may become a part of the golf course, but the owner expressly reserves the absolute right to prescribe the term of any dedication hereafter made or to subdivide or dispose of the same in such manner as it may determine." In advertising materials for the lots, the developer drew attention to the assets of the subdivision, including the golf course. Do the lot owners have an implied easement over the golf course property?

Answer: No.

Problem 3: Alfred Developer's promotional materials and a large map in his sales office both displayed an "Entrance Road" as the main access into the subdivision. However, the subdivision plat depicted a less attractive alternate access road into the subdivision. Did the lot owners acquire an implied easement for the use of the "Entrance Road"?

Answer: No.

Authorities: *McCorquodale v. Keyton*, 63 So. 2d 906 (Fla. 1953); *Boothby v. Gulf Properties of Alabama, Inc.*, 40 So. 2d 117 (Fla. 1948); *Powers v. Scobie*, 60 So. 2d 738 (Fla. 1952); *Estate of Johnson v. TPE Hotels, Inc.*, 719 So. 2d 22 (Fla. 5th DCA 1998); *Jonita, Inc. v. Lewis*, 368 So. 2d 114 (Fla. 1st DCA 1979); *Powers v. Scobie*, 60 So. 2d 738 (Fla. 1952); *Servando Bldg Co. v. Zimmerman*, 91 So. 2d 289 (Fla. 1956); *Flowers v. Seagrove Beach, Inc.*, 479 So. 2d 841 (Fla. 1st DCA 1985); *Miami-Dade County v. Torbert*, 69 So. 3d 970 (Fla. 3d DCA 2011); *Tallahassee Inv. Corp. v. Andrews*, 185 So. 2d 705 (Fla. 1st DCA 1966).

Comment: Property owners receiving title to subdivision lots by reference to a recorded plat acquire an implied easement over any areas designated on the plat for the lot owners' use or as common areas, such as streets, alleys, parks or beach areas. *See, e.g., McCorquodale v. Key*; *Powers v. Scobie*; *Boothby v. Gulf Properties of Alabama, Inc.*, 40 So. 2d 117 (Fla. 1948). However, the lot owners do not receive an implied easement over areas on the plat reserved by the developer or not designated for the lot owners' use. *Burnham v. Davis Islands, Inc.*, 87 So. 2d 97 (Fla. 1956) (developer reserved the right to subdivide open area on the plat). *See also, Bishop v. Courtney*, 22 So. 3d 117 (Fla. 2d DCA 2009) (lot owners hold no easement over areas on a plat marked "Parking Area" and "Boat Slips" without any indication of an intention to dedicate such areas to the lot owners or the public).

This doctrine creating an implied easement over designated areas applies to rights of way and other uses shown on the recorded plat. *Wilson v. Dunlap*, 101 So. 2d 801 (Fla. 1958). The implied easement is a private property right, separate and distinct from the public's right to use platted roads arising from acceptance of

a dedication of such rights of way by the county. Florida applies an "intermediate" or "beneficial" rule for implied easements over roads, holding that lot owners only have such implied easement rights to the extent they are reasonably and materially beneficial to the lot owner and loss of such rights would reduce the lot's value. *Powers v. Scobie*, 60 So. 2d 738 (Fla. 1952). *See also, White Sands v. Sea Club V Condominium*, 581 So. 2d 589 (Fla. 2d DCA 1990) (intermediate rule does not apply to express easement grants). An implied easement cannot be impressed solely by a developer's unrecorded advertising materials or by representations made in conversations. *Jonita, Inc. v. Lewis*, 368 So. 2d 114 (Fla. 1st DCA 1979). Note that an implied easement is distinct from, but related to, the concept that, unless the developer expressly reserves title to a right-of-way depicted on a plat, the conveyance of a platted lot also conveys title to the centerline of the right-of-way adjacent to that lot. *See* Standards 11.3 and 11.5.

A conveyance without reference to a plat does not create an implied easement for matters reflected on the plat. *Tallahassee Inv. Corp. v. Andrews*, 185 So. 2d 705 (Fla. 1st DCA 1966); *Miami-Dade County v. Torbert*, 69 So. 3d 970 (Fla. 3d DCA 2011). *See also, Flowers v. Seagrove Beach, Inc.*, 479 So. 2d 841 (Fla. 1st DCA 1985) (deed referenced a new plat, not the older plat that included a park).

STANDARD 22.4

EASEMENTS BY IMPLICATION FROM NECESSITY

STANDARD: IF A PARCEL OF LAND IS DIVIDED SO THAT ONE OF THE RESULTING PARCELS IS LANDLOCKED EXCEPT FOR ACCESS ACROSS THE REMAINDER, AN EASEMENT BY NECESSITY MAY BE IMPLIED.

Problem 1: Jane Smith owned a 20-acre parcel of land abutting a road. Smith conveyed 10 landlocked acres of the parcel to Richard Brown. Will a grant of an easement by necessity be implied across Smith's land for access to Brown's landlocked parcel?

Answer: Yes.

Problem 2: John Black owned 40 acres of land abutting a road. Black conveyed 30 acres to Jane Green, including the entire road frontage, retaining 10 landlocked acres. Will a reservation of an easement by necessity be implied across Green's land for access to Black's retained parcel?

Answer: Yes.

Authorities: F.S. § 704.01(1); 20 Fla. Jur. 2d Easements, Sections. 26, 27, 32 and 33; *Palm Beach Polo Holdings, Inc., v. Equestrian Club Estates Property Owners Association, Inc.*, 949 So. 2d 347 (Fla 4th DCA 2007), *PGA North II of Florida, LLC v. Division of Admin., State of Florida Dept. of Transp.*, 126 So. 3d 1150 (Fla 4th DCA 2012).

Comment**:** Unlike an easement based upon an express agreement between owners of affected parcels of property, an easement by necessity may be implied or arise pursuant to applicable facts and circumstances despite the absence of an express easement agreement. The implied easement exists where a grantor conveys lands to which there is no accessible right-of-way except over his or her land, or where a grantor retains land which is inaccessible except over land which the person conveys. Such easements previously existed only in common-law but are now codified into two Florida statutes. F.S. § 704.01(1) states that in Florida "the common-law rule of an implied grant of way of necessity is hereby recognized, specifically adopted, and clarified." Such an easement comes about only where title to the separate parcels is derived from a common source other than the original grant by Florida or the United States. F.S. § 704.01(2) creates a statutory way of necessity for landowners who do not qualify for the common-law way of necessity created in F.S. 704.01 (1).

As noted in *Matthews v. Quarles*, 504 So. 2d 1246 (Fla. 1st DCA 1986), a party seeking a common law way of necessity under F.S. § 704.01(1) must establish the following elements: (1) that, at one time, both properties were once owned by the same party; (2) that a common grantor conveyed the landlocked parcel, thereby causing the need for an easement; and (3) that, at the time the landlocked parcel was conveyed, the grantor's remaining land had access to a public road. F. S. § 704.01(1) states that such an implied easement exists where there is no other reasonable and practicable way of ingress or egress and is reasonably necessary for the beneficial use or enjoyment of the part granted or reserved. If the common source of title requirement has been met, the right of the dominant tenement is not terminated if the title to either the dominant or servient tenement has been transferred for nonpayment of taxes.

F.S. § 704.01(2) provides for a statutory way of necessity, exclusive of any common-law right, when land is hemmed in by lands, fencing, or other improvements by other persons so that no practicable route of ingress or egress is available to the nearest public road, or a private road in which the landlocked owner has vested easement rights. In contrast to a way of necessity codified in F.S. § 704.01(1), a way of necessity

under F. S. § 704.01(2) does not require a common source of title. However, the "landlocked" parcel must be used or desired to be used for dwelling, agricultural, timber raising or cutting, or stock raising purposes. Additionally, the owner of the lands across which a way of necessity under F.S. § 704.01(2) is created may be entitled to compensation under F.S. § 704.04.

Although F.S. § 704.01 states that an implied grant of a way of necessity is presumed or that a statutory way of necessity exists under certain circumstances, the prudent practitioner will not rely on such implied easement or statutory way of necessity for access or other purposes absent a court order establishing the easement. In addition to completing a sufficiently comprehensive title search, the prudent practitioner will also obtain a survey that includes an inspection of easements, rights or claims of parties not recorded in the official records, and ask appropriate follow up questions in order to determine whether there are facts indicating that an implied grant of a way of necessity or a statutory way of necessity may be established through appropriate court proceedings.

STANDARD 22.5

EASEMENTS BY PRESCRIPTION

STANDARD: AN EASEMENT BY PRESCRIPTION MAY BE ACQUIRED BY ACTUAL, CONTINUOUS, AND UNINTERRUPTED USE, ADVERSE TO THE CLAIM OF THE OWNER FOR A PERIOD OF 20 YEARS.

Problem 1: Simon Grant, owner and developer of a parcel consisting largely of mangrove swamp, dammed an outfall ditch the county had built and continuously maintained for 45 years. The dam prevented drainage from John Doe's adjacent uplands parcel. Does Doe have a prescriptive easement?

Answer: Yes.

Problem 2: Simon Grant, owner of Greenacre, and John Doe, owner of the adjacent Blackacre, entered into a reciprocal agreement allowing Doe permissive use of a 10-foot alley on Greenacre for ingress and egress so long as Doe allowed Grant similar permissive use of a like alley over the South 10 feet of Blackacre. Both Greenacre and Blackacre have separate legal access to a public road without use of the alley. After more than 20 years of continuous permissive reciprocal use, Grant conveyed Greenacre to a new purchaser whose tenant blocked the alley on Greenacre. Does Doe have a prescriptive easement?

Answer: No.

Authorities: *Burdine v. Sewell*, 109 So. 648 (Fla. 1926); *J.C. Vereen & Sons, Inc. v. Houser*, 167 So. 45 (Fla. 1936); *Downing v. Bird*, 100 So. 2d 57 (Fla. 1958); *Hunt Land Holding Co. v. Schramm*, 121 So. 2d 697 (Fla. 2d DCA 1960); *Florida Power Corp. v. McNeely*, 125 So. 2d 311 (Fla. 2d DCA 1961); *Florida Power Corp. v. Scudder*, 350 So. 2d 106 (Fla. 2d DCA 1977); *Gibson v. Buice*, 394 So. 2d 451 (Fla. 5th DCA 1981); *Crigger v. Florida Power Corp.*, 436 So. 2d 937 (Fla. 5th DCA 1983); *Phelps v. Griffith*, 629 So. 2d 304 (Fla. 2d DCA 1993); *Dan v. BSJ Realty*, 953 So. 2d 640 (Fla. 3d DCA 2007).

Comment: Prescriptive easements are creations of common law. Florida law does not favor acquisition of prescriptive rights and another's use of property is presumed to be permissive rather than adverse, unless the use is exclusive or inconsistent with the rights of the owner. *Dan v. BSJ Realty*, 953 So. 2d 640 (Fla. 3d DCA 2007). The burden is on the claimant to prove the elements of prescription by clear and positive proof. *Id.*

The prudent practitioner will not rely on an easement by prescription for access or other purposes absent a court order establishing the easement. The prudent practitioner will obtain a survey that includes an inspection of easements, rights or claims of parties not recorded in the official records and will ask appropriate follow up questions in order to determine whether there are any claims of prescriptive easements that might burden the property.

STANDARD 22.6

EASEMENTS APPURTENANT

STANDARD: AN EASEMENT APPURTENANT IS INCLUDED IN A CONVEYANCE OF THE DOMINANT ESTATE IN THE ABSENCE OF EXPRESS LANGUAGE TO THE CONTRARY.

Problem: The owner of Blackacre and Greenacre conveyed Blackacre to Joan Doe together with an easement over the east 12 feet of Greenacre as a driveway for access to Blackacre. Later, Doe conveyed Blackacre to Simon Grant. The deed to Grant did not refer to the easement. Did Grant acquire an easement over the driveway?

Answer: Yes.

Authorities: *Behm v. Saeli*, 560 So. 2d 431, 432 (Fla. 5th DCA 1990); *see Burdine v. Sewell*, 92 Fla. 375, 384, 109 So. 648, 653-54 (1926); *Merriam v. First Nat'l Bank,* 587 So.2d 584 (Fla. 1st DCA 1991); *see also* Powell on Real Property § 34.15 (Michael Allan Wolf, ed., Matthew Bender); 4-110 Florida Real Estate Transactions § 110.15.

Comments: An easement created to benefit the dominant estate is presumed to be appurtenant to the dominant estate if there is nothing indicating the parties intended it to be a mere personal right. *Merriam v. First Nat'l Bank, supra*. An easement appurtenant typically may contain a granting clause that includes the grantee's heirs or successors but such designation is not essential. *Burdine v. Sewell, supra*. Once an easement appurtenant has been created, any subsequent conveyance of the dominant parcel will include the easement even if not mentioned in the conveyance. *Behm v. Saeli, supra* ("Unless prevented by the terms of its creation, an easement appurtenant is transferred with the dominant property even if this is not mentioned in the instrument of transfer.").

STANDARD 22.7

TERMINATION OF EASEMENTS CREATED BY RESERVATION OR GRANT

STANDARD: AN EASEMENT CREATED BY RESERVATION OR GRANT MAY NOT BE TERMINATED BY NON-USE ALONE; IT MAY, HOWEVER, BE TERMINATED BY (A) NON-USE COUPLED WITH ACTION SHOWING AN INTENT TO ABANDON; (B) ADVERSE POSSESSION; OR (C) BY THE OPERATION OF THE MARKETABLE RECORD TITLE ACT.

Problem 1: In 1939, the City received a sidewalk easement, and constructed a sidewalk. In 1948, the City removed the sidewalk as part of a construction project but never replaced it even after many years. Was the sidewalk easement terminated?

Answer: No.

Problem 2: In 1975, ABC Land Company conveyed Blackacre to Simon Grant but reserved an easement for grazing rights for its cattle. Despite having the easement, ABC Land Company leased the same grazing rights from subsequent fee owners of Blackacre until 2000. Was the grazing rights easement terminated?

Answer: No.

Problem 3: In 2000, John Doe granted Steve Smith an access easement. However, in 2005, Doe blocked the access easement so that Smith was unable to use it. Was the easement terminated after 7 years?

Answer: Yes.

Problem 4: In 1975, John Doe's house encroached 18 feet into a 100 foot wide power easement held by XYZ Power Co. but did not interfere with XYZ's present or anticipated future use of the easement. Was the portion of the easement where the house is located terminated after 7 years?

Answer: No.

Authorities: *Wiggins v. Lykes Brothers, Inc.*, 97 So. 2d 273 (Fla. 1957); *Leibowitz v. City of Miami Beach*, 592 So. 2d 1213 (Fla. 3d DCA 1992); *Martin County v. Johnson*, 570 So. 2d 1378 (Fla. 4th DCA 1990); *Kitzinger v. Gulf Power Co.*, 432 So. 2d 188 (Fla 1st DCA 1983); *Mumaw v. Roberson*, 60 So. 2d 741 (Fla. 1952); *Bentz v. McDaniel*, 872 So. 2d 978 (Fla. 5th DCA 2004).

Comment: Abandonment of an easement is a question of intent and the burden of proof is on the person asserting abandonment. The person asserting abandonment must demonstrate that there was a "clear affirmative intent to abandon" the easement. *Leibowitz, supra.*

Fences or other such minor encroachments into power or utility easements are unlikely to result in a wellfounded adverse possession claim. *See, e.g., Bentz, supra* (servient owner must show he or she continuously excluded or prevented the easement's use for 7 years).

The Marketable Record Title Act, Chapter 712, Florida Statutes, will eliminate an easement which has not been used, in whole or in part for a 30-year period after a root of title. The statutory language of the exception for easements in use contained in F.S. § 712.03(5) reads: "[r]ecorded or unrecorded easements or rights, interest or servitude in the nature of easements . . . so long as the same are used and the use of any

part thereof shall except from the operation [of the Marketable Record Title Act] the right to the entire use thereof."

STANDARD 22.8

EXTINGUISHMENT OF EASEMENTS BY MERGER OF DOMINANT AND SERVIENT ESTATES

STANDARD: AN EASEMENT MAY BE EXISTINGUISHED BY MERGER WHEN TITLE TO BOTH THE DOMINANT AND SERVIENT ESTATES BECOME VESTED IN THE SAME OWNER, IN THE ABSENCE OF CONTRARY INTENT.

Problem 1: John Doe owns Blackacre and Greenacre. Subsequently, John Doe conveys Greenacre to Ronald Roe, reserving an easement over the west 20 feet for the benefit of Blackacre. Later, Ronald Roe acquires Blackacre. There is no evidence of intent to preserve the easement. Does the easement continue to exist?

Answer: No

Problem 2: Same facts as Problem 1 above, except that the deed conveying Blackacre to Ronald Roe states the property is conveyed together with the easement. Ronald Roe then sells Greenacre to Jane Smith and the deed to Smith recites an intent to reimpose the easement. Does the easement continue to exist?

Answer: Yes.

Problem 3:
John Doe owns Blackacre and Greenacre. Subsequently, John Doe conveys Greenacre to Ronald Roe, reserving an easement over the west 20 feet for pedestrian access to a lake. Later, Ronald Roe acquires Blackacre with no recorded evidence of intent to preserve the easement. Ronald Roe subsequently conveys Blackacre to Mary Smith. While the purchase contract included the lake access, the deed did not describe the easement. Does Ronald Roe have marketable title to Greenacre without exception for the easement?

Answer: No.

Problem 4: John Doe owns Blackacre and Blueacre. Subsequently, John Doe conveys Blackacre to Ronald Roe, and John Doe reserves an access easement over a portion of Blackacre for the benefit of Blueacre. Blueacre is then divided into 8 parcels without recording a plat, and Ronald Roe acquires 7 of the 8 parcels. Is the easement terminated with respect to the 7 parcels held by Ronald Roe?

Answer: No.

Problem 5: In addition to the easement created across Blackacre in Problem 4, an easement is created across parts of Blueacre to provide access to each of the 8 parcels. Ronald Roe acquires 7 of the 8 parcels. Is the easement terminated across those portions of Roe's 7 parcels not necessary to provide access to the remaining 1 lot not owned by Roe?

Answer: No.

Problem 6: Mary Smith owns Blackacre, which is subject to an easement in favor of Greenacre. Mary Smith and her husband then acquire title to Greenacre as tenants by the entirety. Does the easement continue to exist?

Answer: Yes.

Authority: *Lacy v. Seegers*, 445 So. 2d 400 (Fla. 5th DCA 1984); *Tyler v. Price*, 821 So. 2d 1121 (Fla. 4th DCA 2002); *Jackson v. Relf*, 26 Fla. 465, 8 So. 184 (1890); *Lassiter v. Kaufman*, 581 So. 2d 147 (Fla. 1991); *Contos v. Lipsky*, 433 So. 2d 1242, 1244 (Fla. 3d DCA 1983). *See also Phelan v. Rosener*, 511 S.W.3d 431 (Mo. App. 2017); *Hamilton Court, LLC v. East Olympic, L.P.*, 154 Cal. Rptr. 3d 924 (Cal. App. 2013); *Shah v. Smith*, 908 N.E.2d 983 (Oh. App. 2009).

Comment: Under the doctrine of merger, an easement is generally eliminated if a single party receives title to both the dominant and servient parcels. *Lacy v. Seegers*, *supra*. However, courts appear to be moving away from a mechanical application of this rule and may not apply it when the parties appear to have intended for the easement to continue. The practitioner should use caution where there is evidence of intent to preserve an easement from such merger, especially inasmuch as such intent may not be apparent from the public record. While Florida courts have not specifically held that the intent to preserve an easement prevents it from being eliminated by a merger of the underlying parcels' ownership, Florida law makes clear in other contexts that merger is not mechanically applied without considering the intent of the parties. *See*, e.g., *Jackson v. Relf*, *supra* (mortgage survives lender's purchase of property at tax deed sale); *Lassiter v. Kaufman*, *supra (*option price based on property value unencumbered by long-term lease absent evidence of intent to merge); *Contos v. Lipsky*, *supra* (no evidence of intent to merge leasehold into underlying fee).

Additionally, other states' courts have directly held that an easement survives such merger when so intended by the parties. *See, e.g., Phelan v. Rosener*, supra (roadway easement retained where road maintenance agreement executed contemporaneously with deed merging dominant and servient estates); *Hamilton Court, LLC v. East Olympic, L.P. supra* (easement not extinguished by merger of dominant and servient parcels where extinguishment would affect deed of trust's priority); *Shah v. Smith*, *supra* (driveway easement identified in sales contract and deed exists despite merger of dominant and servient parcels). These courts have not consistently indicated what evidence of intent may be considered and have not limited such evidence to the public record. Thus, a transactional practitioner may wish to specifically recite an intention to preserve or reimpose an easement if there is a question of extinguishment by merger.

For merger to occur, there must also be unity of ownership between the servient estate and every dominant estate. *Tyler v. Price*, *supra* ("The legal and equitable titles were separate and of different quality. As a consequence, no merger of titles occurred, and the easement on Parcel B was not extinguished."). Moreover, there must also be unity of title in the same name. *Lacy v. Seegers*, *supra (*"because title to both tenants was never in the same name . . . there was no unity of title and no merger"*)*.

STANDARD 22.9

ASSIGNABILITY OF COMMERCIAL EASEMENTS IN GROSS

STANDARD: AN EASEMENT IN GROSS USED FOR COMMERCIAL PURPOSES IS ASSIGNABLE AND MAY BE ENFORCED BY THE ASSIGNEE AGAINST A SUBSEQUENT OWNER OF THE BURDENED REAL PROPERTY, IF IT IS RECORDED AND DOES NOT SHOW ON ITS FACE THAT IT IS INTENDED TO BE PERSONAL OR EXCLUSIVE.

Problem 1: John Doe conveyed all of his land (Blackacre) to Simon Grant but reserved a permanent right to use the land for cattle grazing purposes so long as Blackacre was not under actual cultivation. The reservation did not show on its face that it was intended to be personal or exclusive. John Doe later executed a quitclaim deed conveying the easement reservation to ABC Company. Blackacre was never used for farming purposes. May ABC Company enforce the easement?

Answer: Yes.

Problem 2: Before building a beachfront condominium development on Blackacre, ABC Company entered into a "beach service easement" with John Doe, granting Doe an easement over and across the beach for the purpose of providing beach services. After completion of the development and the recording of a declaration of condominium, Doe assigned the easement to XYZ Company. May XYZ Company enforce the easement?

Answer: Yes.

Problem 3: A&P Railroad held title to and then conveyed portions of land used as a railroad to First State Bank while reserving to itself, its successors and assigns, the right to construct, use, maintain, repair and replace electric power lines thereon. A year after the conveyance to the bank, the railroad assigned that easement to ABC Power Co. May ABC Power Co enforce the easement?

Answer: Yes.

Problem 4: In a deed to John Doe, the Trustees of the Internal Improvement Fund reserved an easement permitting them to drain swampland. Later, the trustees assigned this easement to ABC Flood Control District. May ABC Flood Control District enforce the easement?

Answer: Yes.

Authorities: *Wiggins v. Lykes Brothers, Inc.*, 97 So. 2d 273 (Fla. 1957); *Dunes of Seagrove Owners Ass'n v. Dunes of Seagrove Dev., Inc.*, 180 So. 3d 1209 (Fla. 1st DCA 2015); *Dance v. Tatum*, 629 So. 2d 127 (Fla. 1993); *Miller v. Lutheran Conference & Camp Ass'n*, 200 A. 646 (Pa. 1938); Powell on Real Property § 34.16 (Michael Allan Wolf, ed., Matthew Bender). Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land* (West Group 2001). *Central and Southern Fla. Flood Control Dist. v. Dupuis*, 123 So. 2d 34 (Fla. 3d DCA 1960), *cert. denied*, 127 So. 2d 679 (Fla. 1961); *Albury v. Central and Southern Fla. Flood Control Dist.*, 99 So. 2d 248, 252 (Fla. 3d DCA 1957).

Comment: Easements in gross are mere personal interests in land that are not supported by a dominant estate. *Platt v. Pietras*, 382 So. 2d 414, 417 (Fla. 5th DCA 1980) (defining an easement in gross as "an easement unconnected with nor for the benefit of any dominant estate"). "[A]n easement will never be presumed [to be in gross] when it may fairly be construed as appurtenant to some other estate." *Palm Beach County v. Cove Club Investors LTD*, 734 So. 2d 379, fn. 13 (Fla. 1999).

The traditional view in many states was that easements in gross are not assignable. Bruce & Ely, *supra*, § 9:4. This view has given way to a modern view that commercial easements in gross are freely alienable as a matter of law while noncommercial easements in gross are not. *See, e.g., Miller v. Lutheran Conference & Camp Ass'n*, 200 A. 646 (Pa. 1938) ("there is an obvious difference in this respect between easements for personal enjoyment and those designed for commercial exploitation; while there may be little justification for permitting assignments in the former case, there is every reason for upholding them in the latter.")

While Florida has long recognized the assignability of public utility easements and other like easements, authority on the assignability of other easements in gross has been limited. *See, e.g., Wiggins v. Lykes Brothers, Inc.*, 97 So. 2d 273 (Fla. 1957) (assignment of cattle grazing rights); *Dunes of Seagrove Owners Ass'n v. Dunes of Seagrove Dev., Inc.*, 180 So. 3d 1209 (Fla. 1st DCA 2015) (assignment of right to provide beach services). The view represented by these two isolated cases represents a departure from the traditional view mentioned above, conforming more to the modern view concerning the distinction between commercial and noncommercial easements in gross.

A commercial easement in gross, a written instrument, is assignable as long as it does not show on its face that it is intended to be personal or exclusive to the recipient. In contrast, an oral license, even when rendered irrevocable by the licensee's substantial monetary expenditure in reliance upon its continuation, is not an easement. *See, Dance v. Tatum, supra*. Note, however, that a subsequent purchaser who receives title with notice of such license may be burdened with it. *Dance, supra*, at 129.

Florida courts have held that the personal nature of easements in gross make them unavailable for compensation under eminent domain. *See, e.g., Palm Beach County v. Cove Club Invs.*, 734 So. 2d 379, 388-90 (Fla. 1999); *Div. of Admin., Dep't of Transp. v. Ely*, 351 So. 2d 66, 68-69 (Fla. 3d DCA 1977).

An easement in gross for construction and maintenance of public utilities is also assignable if it does not disclose an intention to be personal or exclusive. *See, e.g., Champaign National Bank v. Illinois Power Co.*, 465 N.E.2d 1016, (Ill. 4th Dist. 1984) ("The weight of modern authority supports the position that commercial easements in gross are alienable, especially when the easements are for utility purposes"); *Johnston v. Michigan Consol. Gas Co.*, 60 N.W.2d 464 (Mich. 1953) ("easements for pipe lines, telephone and telegraph lines and railroads are generally held to be assignable even though in gross."); Danaya C. Wright, *Doing a Double Take: Rail-Trail Takings Litigation in The Post-Brandt Trust Era*, 39 Vt. L. Rev. 703 (2015), *available at* https://scholarship.law.ufl.edu/facultypub/682/ ("Public commercial easements in gross were held to be especially valuable and deserving of protection through presumptions of free alienability, divisibility, and apportionability").

Easements in gross have typically been recognized in Florida in situations involving utilities. *See, City of Orlando v. MSD-Mattie, L.L.C.*, 895 So. 2d 1127, 1128 (Fla. 5th DCA 2005) (easement in gross for overhead electric transmission lines); *Div. of Admin., Dep't Transp. v. Ely,* 351 So. 2d 66 (Fla. 3d DCA 1977) (easement in gross to supply liquefied petroleum gas); *N. Dade Water Co. v. Florida State Tpk. Auth.*, 114 So. 2d 458, 459 (easement in gross to furnish water and sewer services).