

**Presented:**

First Oil, Gas and Mineral Law "Boot Camp"

Thursday, March 26, 2009  
Houston, TX**Texas Title  
Examination Standards --  
Introduction and Practical Exercises****David H.O. Roth**Author contact information:  
David H.O. Roth  
Cox Smith Matthews Incorporated  
San Antonio, TX[dhroth@coxsmith.com](mailto:dhroth@coxsmith.com)  
210.554.5310

**TABLE OF CONTENTS**

---

**Page**

**TEXAS TITLE EXAMINATION STANDARDS – AN INTRODUCTION**

**CHAPTER I TITLE EXAMINER .....6**

Standard 1.10. Purpose of Title Examination ..... 6

Standard 1.20. Review by Examiner ..... 6

Standard 1.30. Consultation with Prior Examiner..... 7

**CHAPTER II MARKETABLE TITLE.....7**

Standard 2.10. Marketable Title Defined ..... 7

**CHAPTER III NAME VARIANCES.....7**

Standard 3.10. Idem Sonans ..... 7

Standard 3.20. Middle Names Or Initials..... 8

Standard 3.30. Abbreviations ..... 8

Standard 3.40. Recitals Of Identity ..... 9

Standard 3.50. Suffixes ..... 10

Standard 3.60. Variance In Name Within An Instrument ..... 11

Standard 3.70. Variances In Name Of Spouse ..... 11

**CHAPTER IV EXECUTION, ACKNOWLEDGMENT, AND RECORDATION .....12**

Standard 4.10. Omissions and Inconsistencies..... 12

Standard 4.20. Defective Acknowledgments ..... 12

Standard 4.30. Delivery; Effective Date; Delay in Recordation ..... 12

**CHAPTER V LAND DESCRIPTIONS.....12**

Standard 5.10. When Defective Land Descriptions do Not Impair Marketability..... 12

**CHAPTER VI CORPORATE CONVEYANCES .....13**

Standard 6.10. Corporate Existence ..... 13

Standard 6.20. Corporate Authority Presumed ..... 13

Standard 6.30. Foreign Corporation..... 13

Standard 6.40. Corporate Seal..... 13

Standard 6.50. Authority of Particular Officers ..... 13

Standard 6.60. Name Omitted from Signature ..... 13

Standard 6.70. Name Variances ..... 13

**CHAPTER VII CONVEYANCES INVOLVING PARTNERSHIPS, JOINT VENTURES, AND UNINCORPORATED ASSOCIATIONS.....14**

Standard 7.10. Conveyance of Real Property Held in Partnership or Joint Venture Name..... 14

Standard 7.20. Authority of Less than All Partners Regarding Transactions that are Not in the Ordinary Course of Business..... 14

Standard 7.30. Prior Conveyance in Chain by Partnership or Joint Venture ..... 14

Standard 7.40. Conveyance of Partnership Property Held in Name of Partners..... 14

Standard 7.50. Conveyance of Real Property Held in Name of Limited Liability Company.. 14

<b>CHAPTER VIII POWERS OF ATTORNEY .....</b>	<b>15</b>
Standard 8.10. Validity of Instrument Executed by Attorney in Fact Regarding Durable Powers of Attorney Executed Before September 1, 1993, and all Non-Durable Powers of Attorney.....	15
Standard 8.20. Validity of Instrument Executed by Attorney in Fact Regarding Durable Powers of Attorney Executed After September 1, 1993 .....	15
<b>CHAPTER IX CONVEYANCES INVOLVING TRUSTEES.....</b>	<b>15</b>
Standard 9.10. Powers of Trustee.....	15
Standard 9.20. Title as "Trustee" Without Further Identification of Trust .....	16
<b>CHAPTER X CAPACITY TO CONVEY.....</b>	<b>16</b>
Standard 10.10. Minority .....	16
Standard 10.20. Mental Capacity .....	16
Standard 10.30. Guardians .....	16
<b>CHAPTER XI DECEDENTS' ESTATES .....</b>	<b>16</b>
Standard 11.10. Passage of Title Upon Death.....	16
Standard 11.20. Estate Proceedings .....	16
Standard 11.30. Conveyances by an Executor .....	17
Standard 11.40. Conveyances by an Administrator .....	17
Standard 11.50. Conveyances by Heirs of an Estate.....	17
Standard 11.60. Liens for Debts and Taxes .....	17
Standard 11.70. Heirship Affidavits.....	18
Standard 11.80. Community Survivors .....	18
Standard 11.90. Community Administration .....	18
Standard 11.100. Foreign Wills.....	18
<b>CHAPTER XII BANKRUPTCIES .....</b>	<b>18</b>
Standard 12.10. Relevance of Bankruptcy Cases to Real Estate Transactions .....	18
Standard 12.20. Authority for Prior Transfer.....	18
Standard 12.30. Reliance Upon Recitals of Authority for Prior Transfer.....	19
Standard 12.40. Authority for Proposed Transfer by Debtor or Trustee.....	19
Standard 12.50. Authority to Convey Exempted Land in Proposed Transaction .....	19
Standard 12.60. Authority to Convey Abandoned Land in Proposed Transaction .....	19
Standard 12.70. Authority to Foreclose Land in Proposed Transaction .....	19
Standard 12.80. Authority to Convey or Lease Property of the Bankruptcy Estate Not in the Ordinary Course of Business in Proposed Transaction.....	20
Standard 12.90. Authority to Convey Property of the Bankruptcy Estate in the Ordinary Course of Business in Proposed Transaction .....	20
Standard 12.100. Authority to Convey Property of the Bankruptcy Estate Free and Clear of Liens in Proposed Transaction.....	20
Standard 12.110. Authority to Convey Property After Confirmation of Plan .....	20
Standard 12.120. Authority to Mortgage in Proposed Transaction.....	21
Standard 12.130. Filings in Violation of the Automatic Stay .....	21
Standard 12.140. The Discharge and Judgment Liens .....	21

Standard 12.150. Extension of Time .....	21
Standard 12.160. Effect of Dismissal of Case.....	21
<b>CHAPTER XIII AFFIDAVITS AND RECITALS .....</b>	<b>22</b>
Standard 13.10. Affidavit Defined .....	22
Standard 13.20. Reliance Upon Affidavits.....	22
Standard 13.30. Affidavits of Non-Production .....	22
Standard 13.40. Reliance Upon Recitals .....	22
<b>CHAPTER XIV MARITAL INTERESTS .....</b>	<b>22</b>
Standard 14.10. Community Property Presumption.....	22
Standard 14.20. Gifts, Devise and Descent .....	22
Standard 14.30. Conveyances Between Spouses .....	22
Standard 14.40. Separate Property Consideration.....	23
Standard 14.50. Community Property Presumption May be Rebutted by Showing of Domicile in Common Law Jurisdiction .....	23
Standard 14.60. Necessity for Joinder When Community Property is in Name of Both Spouses.....	23
Standard 14.70. Necessity for Joinder When Community Property is in Name of Only One Spouse .....	23
Standard 14.80. No Presumption of Marriage.....	23
Standard 14.90. Homestead.....	23
Standard 14.100. Divorce or Annulment .....	24
<b>CHAPTER XV LIENS AND LIS PENDENS .....</b>	<b>24</b>
Standard 15.10. Liens Generally .....	24
Standard 15.20. Involuntary Mechanics' and Materialmen's Liens.....	24
Standard 15.30. Judgment Liens .....	24
Standard 15.40. Implied Vendor's Liens .....	24
Standard 15.50. Other Involuntary Statutory Liens .....	24
Standard 15.60. Federal Tax Liens.....	24
Standard 15.70. Payment of Ad Valorem Taxes .....	24
Standard 15.80. Priority of Ad Valorem Tax Lien.....	25
Standard 15.90. Lien Priority and Subordination.....	25
Standard 15.100. Removal of Lien.....	25
Standard 15.110. Lis Pendens .....	25
<b>CHAPTER XVI FORECLOSURES .....</b>	<b>25</b>
Standard 16.10. Nonjudicial Foreclosure.....	25
Standard 16.20. Judicial Foreclosure and Execution Sales.....	25
Standard 16.30. Foreclosure of Home Equity Loans and Reverse Mortgages .....	25
Standard 16.40. Deeds in Lieu of Foreclosure .....	26

*It is important that the lawyer, in connection with land title examination, have a working and current knowledge of nearly all phases of law because of the numerous legal problems that exist and are reflected in the many transactions vesting title or interests in land. The examining attorney will find that it is necessary that he spend considerable research time in the library to keep abreast of recent legal decisions, as well as to fully inform himself as to the law, its principals, doctrines and reasons, and the applications which have been made of its rules as they rest in statutes and decisions.*

Fred A. Lange, *The Lawyer and Abstract Examination*, Third Revision, Sept. 1952, at 1.

## **TEXAS TITLE EXAMINATION STANDARDS – AN INTRODUCTION**

The Texas Title Examination Standards are the result of a joint project between the Section of Real Estate, Probate and Trust Law and the Oil, Gas and Energy Resources Law Section of the State Bar of Texas. They are loosely patterned on other states and have undergone editorial review for purposes of establishing useable and identifiable standards upon which practitioners have common agreement. Title to land is neither a yes/no nor on/off question. Title speaks to the quality of the claim and defensibility of the claim of possession that a person may have to a particular piece of property. Title for any interest in real property is defined by the number, type and scale of the irregularities, encumbrances or defects that may be found in the written documents that may be relevant to a property. Title can be fixed somewhere along a spectrum of title between perfect title (perhaps a patent from the sovereign), to bare naked title (adverse possession). The Title Examination Standards seek to establish a point along that spectrum by which one can reasonably confirm “marketable” title, if certain of the issues addressed by the Title Examination Standards are raised.

The marketability standard in Texas law has been discussed in numerous articles and is generally viewed as higher than the state of defensible title. *See* Standard 2.1 *infra*. The Title Examination Standards seek to bring a concise statement of the consensus view regarding common issues often revealed in title examination. The point of the Title Examination Standards is to allow the examiner, abstractor, title company or purchaser to feel comfortable that common issues do not constitute material irregularities, defects or encumbrances that actually affect the status of merchantable title.

Over the years, the Title Examination Standards editorial board has enhanced the standards by promulgating new standards addressing different areas that bear on title instruments and title examination.

Although the Title Examination Standards are contained in Title II of the Appendix of Texas Property Code, they do not contain the force of law. These Title Examination Standards have not been approved or set forth as law by the Texas Legislature, nor has any Texas appellate court cited any title examination standard as persuasive authority. They do, however, establish a reasoned standard of care among specialists who commonly practice in the area of title examination or are assisting those purchasing real property. Consequently, they constitute appropriate standards for examining title and, in the parlance of the oil and gas business and examination of mineral title, they establish what a reasonably prudent examiner would accept in the same or similar circumstances and establish those matters that reasoned examiners do not believe constitute a matter bearing on title that requires curative steps.

## **Format of the Texas Title Examination Standards.**

Standard 3.20 is reproduced here in its entirety as an exemplar of the format in which the Texas Title Examination Standards are presented in Title II of the Texas Property Code:

### **Standard 3.20. Middle Names Or Initials**

Unless otherwise put on inquiry, an examiner may presume that the use of a middle name or initial in one instrument and its nonuse in another instrument does not raise an issue of identity that affects title.

#### **Comment:**

Similarity of names is ordinarily sufficient identity in the chain of title. In the absence of evidence casting doubt upon the identity of a party to a conveyance, such similarity is controlling in nearly every instance. *Knox v. Gruhlkey*, 192 S.W. 334 (Tex. Civ. App.—Amarillo 1917, writ ref'd). The similarity of “H. Percy Forster” to “H. P. Forster” was found to be sufficient evidence of identity in a trespass-to-try title action in *Corder v. Foster*, 505 S.W.2d 645, 649 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref'd n.r.e.).

#### **Caution:**

Similarity of names is never more than a mere rebuttable presumption of identity. *Turner v. Roberts*, 513 S.W.2d 957, 959 (Tex. Civ. App.—Fort Worth 1974, no writ).

#### **Source:**

#### **Citations in the Comment.**

Lewis M. Simes & Clarence B. Taylor, *Model Title Standards*, Std. 5.2 (1960).

#### **History:**

Adopted, June 27, 1997.

Generally, after stating each Title Examination Standard, the editorial board has included separate discussions entitled “comment” and “caution.” The comments are much like the comments in the Uniform Commercial Code in that they provide background information, discussion by the Title Examination boards of the underlying case law or statutory basis for the standard itself. Further, the caution fairly delineates the scope of the standard by discussing those cases and circumstances that possibly lay outside the coverage of the standard or where the standard creates a presumption that may be rebutted by extrinsic facts. These cautionary statements are helpful in determining whether there is any factual basis or circumstance where the standard is in fact applicable to what the examiner finds in the documents in the chain of title. In applying any one standard to particular circumstances, an examiner should read both the comment (to understand the source of law for the standard), and the caution (to ensure that applying the standard is reasonable). The caution also provides information to identify when

further diligence is required before a standard may be used to pass on title. After the comments and cautions, the editorial board has also included a list of source materials for each standard. The sources listed in this section include not only the recorded cases and statutes referenced in the comment or caution, but also secondary sources and commentary that may be helpful or of interest to the title examiner.

### **Title Examination Standards in other States.**

The Texas Bar is a relative latecomer in adopting a uniform set of title examination standards. Several state Bars, including those of Oklahoma, Iowa, Missouri, South Dakota, and New Hampshire, have disseminated title examination standards for over fifty years. Like Texas, these standards are not promulgated by the state legislature or state courts and do not have the force of law. However, appellate courts in several states have recognized title examination standards as persuasive secondary authority, thus giving the standards cited the imprimatur of the jurisdiction's common law. The Oklahoma legislature has also incorporated the Oklahoma title examination standards' definition of "marketable title" into at least two statutes. Even in these states, however, reported cases in which the court's application of the jurisdiction's title examination standards is outcome determinative are relatively rare.

In order to be an effective and useful tool for the title examiner, title examination standards are drafted to reflect the current state of the law in the relevant jurisdiction. Because the examination standards "restate" the jurisdiction's body of property law, a reviewing court need not look to the title examination standards to determine the current state of the law if they do not wish to do so. However, several state courts have recognized that title examination standards may be helpful in determining whether a title is marketable. The Texas Title Examination Standards define "marketable title" as follows:

#### Standard 2.10. Marketable Title Defined

All title examinations should be based on marketability of title. A marketable title is *a record title* that is free from reasonable doubt such that a prudent person, with knowledge of all salient facts and circumstances and their legal significance, would be willing to accept it. To be marketable, a title need not be absolutely free from every possible suspicion. The mere possibility of a defect that has no probable basis does not show an unmarketable title.

This definition is substantially similar to that of many other jurisdictions and probably represents the overwhelming majority rule. But what does it mean that a marketable title must be "free from reasonable doubt such that a prudent person . . . would accept it?" Who is this hypothetical "prudent person?" In trying to answer these questions, the Supreme Court of Iowa, in *Siedel v. Snider*, 44 N.W.2d 687 (Iowa 1950), noted that the Iowa Title Examination Standards were an excellent indicator of what it means to be the "prudent person" involved in a real estate transaction. "Our conclusion is somewhat based on judicial knowledge of the practice of lawyers to whom is usually entrusted the duty of examining abstracts and of advising clients as to the merchantability of titles shown by them. That is perhaps the best index to the mental processes of purchasers of real estate as reasonably prudent men." *Id.* at 689.

## Presumptions Created by the Texas Title Examination Standards

The Texas Title Examination Standards set forth many presumptions that the examiner may rely upon when making a determination as to marketability of title. These presumptions allow for the efficient examination of title where ascertaining certain elements of marketability of title would be unnecessarily time consuming, expensive, or impractical. For example, in order for a deed to convey a marketable title to an interest in real property, the grantor must be an adult with the mental capacity to contract. When examining a recorded deed, the Title Examination Standards allow the examiner to presume that a grantor of real property has reached the age of majority and has the mental capacity to convey. Without these presumptions, the examiner would be compelled to investigate records of vital statistics and collect affidavits from persons having knowledge of the grantor's mental capacity. Given that marketable title is based upon probabilities and not possibilities, the Title Examination Standards consider such investigations unnecessary for determining marketability. However, the title examiner should take care to note that all presumptions set forth by the Title Examination Standards are rebuttable and may be overcome by actual or constructive knowledge of facts to the contrary. As the comments to Standard 2.10 make clear, "except as otherwise provided in these standards, if a title examination reveals the need to rely on facts outside of the record, the title is unmarketable."

As an example, Standard 6.50 allows the title examiner to presume that corporate officers are authorized to convey property on behalf of a corporation:

### Standard 6.50. Authority of Particular Officers

Where a corporation is a named party to an instrument in the chain of title, an examiner may presume that the persons executing the instrument were the officers they purported to be and that such officers were authorized to execute the instrument on behalf of the corporation, if the instrument is executed and acknowledged in the proper form.

In resolving a title dispute under a similar title standard, the North Dakota Supreme Court rejected the argument that a deed executed by the officers of a defunct corporation is valid because the title examination standards create a presumption that a deed from the officers of a corporation is valid without further inquiry into the scope of the corporate officers' agency authority. *Brend v. Dome Development, Ltd.*, 418 N.W.2d 610 (N.D. 1988). In *Brend*, the plaintiffs acquired a certain tract of land through a contract for deed from defendant Dome Development, Ltd. in 1975. The contract or deed was not recorded until 1986. In 1980, Dome Development was formally dissolved by the North Dakota Secretary of State. In 1985, the secretary and president of Dome Development purported to convey the plaintiffs' tract to defendants Ronald and Verla Voller. In the subsequent suit to quiet title in the plaintiffs, the Vollers argued that failure to record the 1975 contract for deed until 1986 left them without actual or constructive notice of the earlier conveyance. In response, Plaintiffs argued that the Vollers' status as bona fide purchasers was irrelevant because the 1985 deed was void. The Vollers couldn't acquire any rights in the land through a deed from an entity without legal capacity to convey property. The Vollers countered this assertion by arguing that the deed was presumed valid under the North Dakota Title Examination Standards. In rejecting this argument and quieting title in the plaintiffs, the court noted that the examination standards create mere presumptions that can be overcome by contrary evidence.

[I]t is not a novel proposition that former officers of a dissolved corporation have no power to convey property, except as authorized by statute. While title examiners . . . may be justified in relying on a corporate conveyance . . . recorded in the chain of title . . . those who deal with corporate officers take the risk of reliability of those with whom they deal. A legal presumption may be useful, but it does not function “if facts giving rise to [the] presumption are [not] established.”

418 N.W.2d at 613 (internal citations omitted).

Thus, to take *Brend* as an example, the title examiner is free to presume that a properly executed and acknowledged deed from the officers of a corporation is valid. If the examiner is not actually or constructively aware of any facts challenging the authority of the officers to convey property on behalf of the corporation, the standard imposes no duty to make further inquiries. However, this presumption cannot validate an invalid deed simply because the title examiner may rely upon it when assessing the marketability of title.

### **Recent Cases**

There are two cases on point, both from the Oklahoma Courts of Appeal, that have been handed down in the last several years. The first of these is *Tucker v. New Dominion, LLC*, 182 P.3d 169 (Okla. Civ. App. 2008). In *Tucker*, the court of appeals reversed the district court’s dismissal of the plaintiff’s lawsuit as an improper collateral attack on an order of the Oklahoma Conservation Commission (“OCC”) to force-pool the plaintiff’s mineral interest. One of the issues presented to the court was whether the plaintiff’s predecessor in interest, one Olinka Hrdy, had received proper notice of the OCC’s hearing concerning forced-pooling addressed to “Olinka Hardy.” The defendant argued that, under the doctrine of *idem sonans*, as articulated by the Oklahoma Title Examination Standards (See Standard 3.10 *infra* for the Texas Title Examination equivalent), Hrdy had received proper notice of the proceedings because the verbal pronunciations of “Hrdy” and “Hardy” were nearly identical. Unfortunately, having reversed the district court on other grounds, the court of appeals did not decide whether the title examination standards should be applied to the task of determining whether Mr. Hrdy had received proper notice of the OCC hearing.

In the second case, *Nay v. First Financial Bank*, 79 P.3d 1124 (Okla. Civ. App. 2003), the plaintiffs sought statutory damages for the defendant First Financial Bank’s failure to timely record a release of the plaintiffs’ mortgage as required by law. In attempting to avoid paying statutory damages, the Bank argued that the applicable statute required a prior written request for a release of lien identifying the subject property “with reasonable certainty” before a mortgagee could be held liable for failure to timely record a release of lien. *Id.* at 1126. Because the plaintiffs identified the subject property using only the Bank’s loan number in their written request for release, rather than a full legal description of the property, the plaintiffs failed to identify their property with reasonable certainty. Thus, the statutory requirements had not been fulfilled and the Bank was not liable for failure to record the release of lien. In rejecting the Bank’s argument, the court of appeals cited the Oklahoma Title Examination Standards as supporting the proposition that a legal description of property need only contain “enough correct data to identify the grant[] being released with reasonable certainty.” *Id.* at 1128 (citing Oklahoma Title Examination Standard 24.4). Because the Bank used the loan number (which

was included on the face of the promissory note) to uniquely identify the subject property in all of its prior correspondence with the plaintiffs, the bank was not in a position to credibly argue that the request for release received from Plaintiffs was so lacking in specificity as to prevent reasonably certain identification of the subject property.

## **The Texas Title Examination Standards**

The following sets forth the text of the Title Examination Standards found in an appendix known as Title II to the Texas Property Code. In the interest of brevity, the comment and caution sections have been removed from the body of this paper. However, to give you a flavor of the comment and caution sections as they appear in the Texas Property Code, Sections 3.10 through 3.70 have been reproduced here in their entirety. The full cite is: TEX. PROP. CODE ANN. tit. 2, app. §§ 1.10-16.40 (Vernon 2004).

*For easier reference, the Title Examination Standards appear in their entirety in the pocket part of V.T.C.A., Property Code, Vol. 1.*

*As Initially Adopted by the  
Section of Real Estate, Probate and Trust Law and the  
Oil, Gas and Energy Resources Law Section  
of the State Bar of Texas on June 27, 1997,  
as revised through June 27, 2008*

By  
THE TITLE STANDARDS JOINT EDITORIAL BOARD OF THE  
SECTION OF REAL ESTATE, PROBATE AND TRUST LAW AND  
THE OIL, GAS AND ENERGY RESOURCES LAW SECTION  
OF THE STATE BAR OF TEXAS

(From Westlaw on August 13, 2008)

## **CHAPTER I TITLE EXAMINER**

### **Standard 1.10. Purpose of Title Examination**

The purpose of an examination of title and comments, objections, and requirements is to advise an examiner's client of the status of title and of the methods by which the client may secure marketable title to real property. Based upon the materials examined, the title opinion should advise an examiner's client of all irregularities, defects, and encumbrances that may reasonably be expected to affect materially the value or use of the property or that may expose the owner to litigation or adverse claims even if the litigation or adverse claims can reasonably be expected to be successfully defended. The examiner does not ordinarily determine the validity or priority of irregularities, defects and encumbrances.

### **Standard 1.20. Review by Examiner**

Based upon the intended scope of the examination, an examiner should review any documents, records, deeds, abstracts, affidavits, or other reliable materials that are necessary to form a legal

opinion as to the status of title to the property. The materials that are examined should be set forth in the title opinion or as an exhibit to the opinion.

### **Standard 1.30. Consultation with Prior Examiner**

When an examiner discovers a situation that creates a question regarding the status of title and an examiner has knowledge that another examiner has examined the title, or is familiar with the situation in the context of other property, an examiner may, before preparing the opinion, communicate with the other examiner if such communication is in the best interests of an examiner's client and does not violate the Texas Disciplinary Rules of Professional Conduct.

## **CHAPTER II MARKETABLE TITLE**

### **Standard 2.10. Marketable Title Defined**

All title examinations should be based on marketability of title. A marketable title is *a record title* that is free from reasonable doubt such that a prudent person, with knowledge of all salient facts and circumstances and their legal significance, would be willing to accept it. To be marketable, a title need not be absolutely free from every possible suspicion. The mere possibility of a defect that has no probable basis does not show an unmarketable title.

## **CHAPTER III NAME VARIANCES**

### **Standard 3.10. Idem Sonans**

An examiner may presume that differently spelled names refer to the same person when the names sound alike or when their sounds cannot be distinguished easily or when common usage by corruption or abbreviation has made their pronunciation identical.

Comment:

This standard expresses the common law rule of “idem sonans.” If a name in a legal document is incorrectly spelled but, when commonly pronounced, conveys to the ear a sound practically identical to the correct name as commonly pronounced, then the name thus given can be accepted as sufficient identification. *Means v. Protestant Episcopal Church Council*, 503 S.W.2d 591, 592 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref’d n.r.e.); *Dingler v. State*, 705 S.W.2d 144, 145 (Tex. Crim. App. 1984). Thus, if the grantee in one deed is “John Macomber” and the grantor in the next deed is “John McOmber,” these names are presumed to refer to the same person. Or, if the grantee in one deed is “William Conolly” and the grantor in the next deed is “William Conley,” the same presumption may be made. In *Cockrell v. Estevez*, 737 S.W.2d 138, 139 n.1 (Tex. App.—San Antonio 1987, no writ), the court noted that under the rule of idem sonans, absolute accuracy in the spelling of a name is not required in a legal document. As long as the incorrect spelling sounds practically identical to the correct name (in this instance “Cockrall” and “Cockrell”), there is sufficient identification of the named person. See also *Chumney v. Craig*, 805 S.W.2d 864 (Tex. App.—Waco 1991, writ denied) (“Damon” and “Damond”); *O’Brien v. Cole*, 532 S.W.2d 151 (Tex. Civ. App.—Dallas 1976, no writ) (“O’Brian” and “O’Brien”). In *Hill v. Foster*, 181 S.W.2d 299, 304 (Tex. Civ. App.—Amarillo

1944), *aff'd*, 186 S.W.2d 343 (Tex. 1945), the court applied the rule of *idem sonans* and held that it is immaterial if a slight discrepancy exists between the name used in the body of the deed and the name signed thereto. The court determined that, through typographical error, the name “Barclay” used in the body of the deed was intended to be “Baxley, “ but the two names, although spelled differently, sounded enough alike to be *idem sonans*.

Caution:

Similarity of names is never more than a mere rebuttable presumption of identity. *Turner v. Roberts*, 513 S.W.2d 957, 959 (Tex. Civ. App.—Fort Worth 1974, no writ). Texas law is unclear where the difference in spelling regards the first letter of the surname (e.g., “Pfister” and “Fister,” “Pharnsworth” and “Farnsworth”). Because the official title indices in Texas are grantor-grantee and grantee-grantor (in contrast with a tract index), names like “Fister” and “Pfister” would not be indexed in the same portion of the indices.

### **Standard 3.20. Middle Names Or Initials**

Unless otherwise put on inquiry, an examiner may presume that the use of a middle name or initial in one instrument and its nonuse in another instrument does not raise an issue of identity that affects title.

Comment:

Similarity of names is ordinarily sufficient identity in the chain of title. In the absence of evidence casting doubt upon the identity of a party to a conveyance, such similarity is controlling in nearly every instance. *Knox v. Gruhlkey*, 192 S.W. 334 (Tex. Civ. App.—Amarillo 1917, writ ref’d). The similarity of “H. Percy Forster” to “H. P. Forster” was found to be sufficient evidence of identity in a trespass-to-try title action in *Corder v. Foster*, 505 S.W.2d 645, 649 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ ref’d n.r.e.).

Caution:

Similarity of names is never more than a mere rebuttable presumption of identity. *Turner v. Roberts*, 513 S.W.2d 957, 959 (Tex. Civ. App.—Fort Worth 1974, no writ).

### **Standard 3.30. Abbreviations**

An examiner may presume that any customary and generally accepted abbreviation of a first or middle name is the equivalent of the full name.

Comment:

A commonly known diminutive or abbreviation is sufficient to identify a person in the absence of evidence indicating that a different person was intended. *Salazar v. Tower*, 683 S.W.2d 797, 799 (Tex. App.—Corpus Christi 1984, no writ). “Terry” is a sufficient identification of “Terrance.” *O’Brien v. Cole*, 532 S.W.2d 151 (Tex. Civ. App.—Dallas 1976, no writ).

Caution:

Similarity of names is never more than a mere rebuttable presumption of identity. *Turner v. Roberts*, 513 S.W.2d 957, 959 (Tex. Civ. App.—Fort Worth 1974, no writ).

Source:

### **Standard 3.40. Recitals Of Identity**

An examiner may rely upon a recital of identity contained in a conveyance executed by the party whose identity is recited, unless the examiner has a reasonable basis for questioning the recital. If title is held in a name that appears to be a business name, an examiner may rely on a recital of identity that incorporates the words “doing business as” (“dba”) or similar words (e.g., “John Smith, dba Wholesome Grocery Store”), unless the form of name or other facts appearing from the materials examined raise a contrary inference.

Comment:

An examiner often encounters conveyances in which the grantor’s name is not the same as that of the record owner, but which recite the identity between the two. Frequent examples include instruments using words such as “also known as” (“aka”) (“Robert T. Jones, Jr., aka Bobby Jones”); “formerly” or “formerly known as” (“fka”) (“Mary Smith, formerly Mary Jones”); and “nee,” which means “born as” (“Mary Lincoln, nee Todd”). Even though these instruments are usually executed only by the person whose identity is recited and might technically be regarded as self-serving, such recitals are, practically universally, accepted as fact to complete the chain of title.

The rule here expressed is grounded in the notion that similarity of names is sufficient to establish identity of persons when there is no evidence to the contrary. See *Chamblee v. Tarbox*, 27 Tex. 139, 144–45 (1863). Cf., *Dittman v. Cornelius*, 234 S.W. 880 (Tex. Comm’n App. 1921, judgm’t adopted) (holding that proof of identity need not be conclusive). In *Haney v. Gartin*, 113 S.W. 166 (Tex. Civ. App. 1908, writ denied), the objection was made that “Mary E. Kurtz,” one of the grantors, was not shown to have a connection with the title, although the deed contained a recital that “Mary E. Kurtz” was “formerly Mary E. Newlin.” This recital was sufficient, said the court, to show that “Mary E. Kurtz,” who signed the deed, was the same person as “Mary E. Newlin,” to whom the land had been devised. Recitals of identity were likewise deemed sufficient to explain discrepancies between the names of grantors and the record owners in *Auerbach v. Wylie*, 19 S.W. 856 (Tex. 1892) and *Russell v. Oliver*, 14 S.W. 264 (Tex. 1890). With some exceptions, the Assumed Business or Professional Name Act, Tex. Bus. & Com. Code Ann. Ch. 36, requires persons and entities doing business under an assumed name to file a certificate thereof in specified offices, but one merely owning or holding property under an assumed name is not necessarily required to file a certificate. See Tex. Bus. & Com. Code Ann. § 36.10 comment of bar committee. Failure to file the required certificate does not void or impair transactions by the offending party. *Paragon Oil Syndicate v. Rhoades Drilling Co.*, 277 S.W. 1036 (Tex. 1925). Reference to a county’s assumed name certificate records may be helpful in resolving identity questions and may be relied upon in the absence of inconsistent information. As to the use of recitals generally, see Standard 13.40. For guidance generally concerning conveyances involving business entities, see Chapters VI and VII, *infra*.

#### Caution:

On occasion an examiner may be presented with names which, although recited to be alternative names of the same person, are entirely dissimilar. Under such circumstances the examiner must bear in mind the presumption that names that are not the same refer to different persons. See *Fox v. Grand Union Tea Co.*, 236 S.W.2d 561, 563 (Tex. Civ. App.—Austin 1951, no writ). Unless the instrument recites some further explanation or qualifies as an ancient document (see Comment to Standard 13.40), or supporting facts otherwise appear in the record, an examiner should require further inquiry.

Although recitals of identity may be relied upon for business entities in the chain of title as well as for individuals, authority for reliance may be weaker in the case of business entities. See *Texas Co. v. Lee*, 157 S.W.2d 628, 630–31 (Tex. 1941). Prudence dictates the exercise of greater care in considering recitals of the identity of business entities, particularly when it is practical to obtain documentation. See Standard 6.70. The name of a business entity may raise an inference contrary to a recital of identity. For example, appellations such as “Inc.” or “Corporation,” ordinarily denoting a particular form of organization, would contradict a recital that the entity is an individual, or a different kind of entity, doing business under the corporate name. If a business entity’s name tends to contradict a recital of identity, a requirement of further investigation and proof of identity is warranted. Other examples of words and abbreviations that connote a particular kind of entity are “L.L.C.,” “L.C.,” or “Ltd. Co.” for a limited liability company, “Ltd.” or “L.P.” for a limited partnership; and “L.L.P.” for a limited liability partnership. On the other hand, the word “Company” or “Co.” in the name of a business entity is widely used in many different forms of business and should not be regarded as signifying any particular one. (The examiner should bear in mind that words and abbreviations occurring in the names of entities incorporated or registered in other jurisdictions might have connotations different from those that would apply to Texas entities.)

#### **Standard 3.50. Suffixes**

Although identity of a name raises a presumption of identity of a person, an examiner should take note of the addition of a suffix, such as “Jr.” or “II,” to the name of a subsequent grantor because such a suffix may rebut the presumption of identity with the prior grantee.

#### Comment:

Ordinarily a suffix is not considered a part of the name. Thus, where the grantee in one instrument is “John Doe, M.D.” and the grantor in the next instrument is merely “John Doe,” it would be presumed that they are the same person. However, if the grantee in one instrument is “John Doe, Sr.” and the grantor in the next instrument is “John Doe, Jr.,” the presumption that they are the same person would be rebutted. Or, if the grantee in one instrument is “John Doe,” and in another instrument the grantor is “John Doe, Jr.,” the presumption of identity may be rebutted.

The Texas Supreme Court, in a case concerning service of process, reversed a court of appeals’ decision that had held that the addition or omission of the suffix “Sr.” or “Jr.” was immaterial. *Uvalde Country Club v. Martin Linen Supply Co.*, 690 S.W.2d 884 (Tex. 1985). The issue in the case was whether a citation that had been issued in the name of “Henry Bunting” satisfied the

rules of civil procedure where the registered agent was listed as “Henry Bunting, Jr.” Without elaborating, the Texas Supreme Court held that the discrepancy in names invalidated the service of process under the rules of civil procedure.

### **Standard 3.60. Variance In Name Within An Instrument**

Where a grantor’s signature differs from the grantor’s name as it appears in the body of the deed, but the name given in the acknowledgment agrees with either the signature or the name as it appears in the body of the deed, an examiner should accept the certificate of acknowledgment as providing adequate identification.

Comment:

An officer may not take an acknowledgment unless the officer knows or has satisfactory evidence that the acknowledging person is in fact the person who executed the instrument. Tex. Civ. Prac. & Rem. Code Ann. § 121.005. This requirement is sufficient to create a presumption of identity when the signature differs from the body of the deed but the acknowledgment agrees with one or the other. Numerous cases have held that a certificate of acknowledgment is considered prima facie evidence of all facts therein recited and that the recitals are conclusive unless fraud or duress is shown.

Caution:

This general rule should not be extended beyond relatively minor variances, such as the use of a full given name in one place and initials in another, or a variance between a middle initial used in the body of the deed and a different one in the signature. A deed purporting to be from Robert Jones but signed by John Smith certainly should not be passed.

### **Standard 3.70. Variances In Name Of Spouse**

If a grantee spouse in one instrument of conveyance is identified only by a title and last name (e.g., “John Smith and Mrs. John Smith, grantees”) and such spouse is apparently identified in a succeeding instrument in the chain of title by both a given and last name (e.g., “John Smith and Mary Smith, grantors”), an examiner should require further evidence showing that such spouse (e.g., Mrs. John Smith) in the first instrument is the same person as the spouse (e.g., Mary Smith) in the second instrument. The same requirement should be made if these succeeding forms of identification are reversed (e.g., the grantees in the first instrument are “John Smith and Mary Smith” and the grantors in a succeeding instrument in the chain of title are “John Smith and Mrs. John Smith”).

Comment:

This standard conforms to the practice of Texas title examiners.

Caution:

Although this standard conforms to title examination practice, no Texas cases are directly on point.

## **CHAPTER IV EXECUTION, ACKNOWLEDGMENT, AND RECORDATION**

### **Standard 4.10. Omissions and Inconsistencies**

Omission of the date of execution from an instrument affecting title does not, in itself, impair marketability. An examiner may presume that an undated instrument has been timely executed if the dates of acknowledgment and recordation, and other circumstances of record, support the presumption.

Inconsistencies in recitals or dates (such as among dates of execution, attestation, acknowledgment, or recordation) do not, in themselves, impair marketability, and an examiner may presume that a proper sequence of formalities occurred.

### **Standard 4.20. Defective Acknowledgments**

If a certificate of acknowledgment does not conform to the exact wording of the applicable statute, but shows substantial compliance with the statutory requirements for acknowledgments, an examiner should not require corrective action. If a deed or other instrument contains an acknowledgment in substantial noncompliance with the applicable statute or does not contain any acknowledgment whatever, an examiner should not require that such defects be cured if the instrument has been of record for at least twenty years and no adverse claim appears. Otherwise, the examiner should require a corrected acknowledgment and re-record the instrument, or require and record a new, corrected instrument. A proper jurat may substitute for an acknowledgment for instruments recorded on or after September 1, 1989.

### **Standard 4.30. Delivery; Effective Date; Delay in Recordation**

An examiner may presume the delivery of instruments acknowledged and recorded. Delay in recordation, with or without record evidence of the intervening death of the grantor, does not rebut the presumption or create an unmarketable title; however, as an added exceptional protection to the client, an examiner may choose to make an inquiry outside of the record.

## **CHAPTER V LAND DESCRIPTIONS**

### **Standard 5.10. When Defective Land Descriptions do Not Impair Marketability**

An examiner may presume that errors, irregularities, deficiencies, and inconsistencies in land descriptions in the chain of title do not impair marketability unless, after considering all circumstances of record, (a) a substantial uncertainty exists as to the land involved or (b) the description falls beneath the minimal requirements of sufficiency and definiteness essential to an effective conveyance. When examining marginally sufficient or questionable descriptions, the examiner should consider all relevant factors, including the lapse of time, subsequent conveyances, the manifest or typographical nature of errors or omissions, and accepted rules of construction.

<**Note:** The Title Examination Board is currently working on revisions to this chapter.>

## **CHAPTER VI CORPORATE CONVEYANCES**

### **Standard 6.10. Corporate Existence**

Where a corporation is a named party to an instrument in the chain of title, an examiner may presume that the corporation was legally in existence at the time the instrument took effect, if the instrument is executed and acknowledged in the proper form.

### **Standard 6.20. Corporate Authority Presumed**

In the absence of actual or constructive notice to the contrary, an examiner may presume that the action of the corporation in acquiring or selling the real property affected by an instrument is within its power.

### **Standard 6.30. Foreign Corporation**

Where a corporation organized and doing business under the laws of another state is a named party to an instrument in the chain of title, an examiner may presume that the corporation was authorized to do business in this state or authorized to acquire and dispose of the real property affected by the instrument, if the instrument is executed and acknowledged in the proper form.

### **Standard 6.40. Corporate Seal**

An examiner may presume that a corporate seal does not have to appear on an instrument, unless the examiner has actual or constructive notice that the bylaws of the corporation require the seal to have been placed on the instrument.

### **Standard 6.50. Authority of Particular Officers**

Where a corporation is a named party to an instrument in the chain of title, an examiner may presume that the persons executing the instrument were the officers they purported to be and that such officers were authorized to execute the instrument on behalf of the corporation, if the instrument is executed and acknowledged in the proper form.

### **Standard 6.60. Name Omitted from Signature**

Where a corporation appears as a party in the body of the instrument and the instrument is otherwise properly executed and acknowledged, an examiner may presume that the signature on the instrument by a corporate representative is sufficient notwithstanding the omission of the corporate name over such signature.

### **Standard 6.70. Name Variances**

Although their exact names are not used and variations exist from instrument to instrument, an examiner may presume that a corporation is satisfactorily identified if, from the name(s) used and other circumstances of record, the identity of the corporation can be inferred with reasonable certainty. Variances that an examiner may ordinarily ignore include the addition or omission of the word "the" preceding the name; the use or non-use of the symbol "&" for the word "and";

the use or non-use of abbreviations for "company," "limited," "corporation" or "incorporated"; and the inclusion or omission of all or part of a place or a location. An examiner may exercise a greater degree of liberality with a greater lapse of time and in the absence of circumstances appearing of record that raise reasonable doubt as to the identity of the corporation. An examiner may rely on affidavits and recitals of identity to obviate variances too substantial or too significant to be ignored.

## **CHAPTER VII CONVEYANCES INVOLVING PARTNERSHIPS, JOINT VENTURES, AND UNINCORPORATED ASSOCIATIONS**

### **Standard 7.10. Conveyance of Real Property Held in Partnership or Joint Venture Name**

When title to real property is held in the name of a partnership or joint venture, an examiner may rely upon a conveyance by a general partner on behalf of the partnership or by a joint venturer on behalf of the joint venture if the conveyance appears to be a transfer in the ordinary course of business of the partnership or joint venture.

### **Standard 7.20. Authority of Less than All Partners Regarding Transactions that are Not in the Ordinary Course of Business**

If a conveyance of a joint venture or a partnership that is executed by less than all of the joint venturers or partners appears not to be in the ordinary course of business (such as a sale of the sole asset of the partnership), an examiner should review a copy of the partnership or joint venture agreement or other satisfactory evidence to verify the authority of the signing partner(s) or joint venturer(s) to act on behalf of the partnership or joint venture.

### **Standard 7.30. Prior Conveyance in Chain by Partnership or Joint Venture**

An examiner may assume the authority of an apparent partner or a joint venturer who has executed a prior conveyance in the chain of title on behalf of the partnership or joint venture.

### **Standard 7.40. Conveyance of Partnership Property Held in Name of Partners**

If title to the property is in the name of the partners, the named partners must execute the conveyance.

### **Standard 7.50. Conveyance of Real Property Held in Name of Limited Liability Company**

If title is held by a limited liability company, an examiner may rely upon a conveyance that is executed by an officer, agent, manager, or member thereof if the conveyance appears *to be consistent* with the limited liability company's usual way of doing business.

## **CHAPTER VIII POWERS OF ATTORNEY**

### **Standard 8.10. Validity of Instrument Executed by Attorney in Fact Regarding Durable Powers of Attorney Executed Before September 1, 1993, and all Non-Durable Powers of Attorney**

An examiner should determine that a power of attorney grants sufficient authority to validate the actions of the agent. Any instrument affecting real estate may be executed by an attorney in fact, duly appointed and empowered, unless:

- (1) The power of attorney was not executed in writing;
- (2) The principal has died or an order of a court has appointed a guardian of the principal's person or estate, or both, unless the court order otherwise provides; or
- (3) The power of attorney has expired or terminated by its own terms or by operation of law.

A power of attorney and instruments executed by one having apparent agency power may qualify as "ancient documents."

### **Standard 8.20. Validity of Instrument Executed by Attorney in Fact Regarding Durable Powers of Attorney Executed After September 1, 1993**

An examiner should determine that a power of attorney grants sufficient authority to validate the actions of the agent. Any instrument affecting real estate may be executed by an attorney in fact, duly appointed and empowered, unless the attorney in fact or the third party dealing with the attorney in fact had actual notice that:

- (1) The power of attorney was not executed, acknowledged, and recorded as required by law;
- (2) A revocation of the power of attorney has been recorded in the same office in which the instrument containing the power of attorney was recorded;
- (3) The principal has died or an order of a court has appointed a guardian of the principal's estate, unless the court order otherwise provides;
- (4) The principal was not disabled or incapacitated, as defined by the power; or
- (5) The power of attorney has expired or terminated by its own terms or by operation of law.

## **CHAPTER IX CONVEYANCES INVOLVING TRUSTEES**

### **Standard 9.10. Powers of Trustee**

Unless a trustee's power is restricted by the trust instrument or by law, the trustee of an express trust has the power to convey, lease, and encumber the real property interest that is subject to the trust. A trustee's act binds the trust and all beneficiaries as against successors who are without actual or constructive notice of restrictions or limitations upon the trustee's powers.

### **Standard 9.20. Title as "Trustee" Without Further Identification of Trust**

If property is conveyed to a person identified as "trustee," but the conveyance does not identify the trust or disclose the names of the beneficiaries, an examiner may presume the authority of the trustee to convey, transfer or encumber the title to the property.

## **CHAPTER X CAPACITY TO CONVEY**

### **Standard 10.10. Minority**

In the absence of actual or constructive notice to the contrary, a grantor is presumed to be an adult. If it appears that a person acquired title as a minor, an examiner must first determine that a conveyance from that person occurred after:

- (1) the person obtained the age of majority as defined at the time of the conveyance;
- (2) the person had the disability of minority removed by a court of competent jurisdiction; or
- (3) the person was legally married.

A conveyance that has not been disaffirmed within a reasonable time after the minor attains the age of majority is valid.

### **Standard 10.20. Mental Capacity**

In the absence of actual or constructive notice to the contrary, an examiner may presume that a grantor has the mental capacity to convey. If the lack of capacity has been established, restoration of capacity may be accomplished pursuant to statute.

### **Standard 10.30. Guardians**

In reviewing a sale or encumbrance of property by a guardian, an examiner must determine that all statutory requirements have been met.

## **CHAPTER XI DECEDENTS' ESTATES**

### **Standard 11.10. Passage of Title Upon Death**

A decedent's property passes to his or her heirs at law or devisees immediately upon death, subject in each instance, except for exempt property, to payment of debts, including estate and inheritance taxes.

### **Standard 11.20. Estate Proceedings**

If an owner of property dies, the examiner must determine whether the owner left a will, whether there is a probate proceeding or administration pending, and whether a personal representative is acting. If the records of the county where the land is located do not indicate that a will has been filed for probate, and in the absence of information to the contrary, the affidavit of a person who

has knowledge of the facts is usually accepted as satisfactory evidence that the owner died intestate.

### **Standard 11.30. Conveyances by an Executor**

Before accepting an executor's deed, an examiner must be satisfied that all statutory requirements were met in the appointment of the executor and that the executor is qualified to act.

A qualified executor, even one under court order, may convey property belonging to the estate if authorized to do so by the will. In addition, a qualified independent executor, even though not authorized by will, may convey if not prohibited by the will and if there are one or more unpaid debts of the estate that are not barred by limitations.

In the absence of information to the contrary, the examiner may rely upon an affidavit of an executor or other person who has knowledge of the facts that there are existing debts of the estate.

### **Standard 11.40. Conveyances by an Administrator**

An administrator may convey property of a decedent only with authority of the court. Therefore, before accepting an administrator's conveyance, an examiner must determine that all statutory requirements have been met in the appointment of the administrator and that the administrator is qualified to act and is authorized to make the sale.

### **Standard 11.50. Conveyances by Heirs of an Estate**

If the property owner died intestate, or if the owner died testate but the will is not probated, the examiner must, in the absence of administration, identify the heirs of the decedent, along with the devisees in any unprobated will, and require that all of them join in a conveyance of the property of the decedent.

### **Standard 11.60. Liens for Debts and Taxes**

Property of a decedent passes subject to unpaid debts and taxes of the estate. Therefore, the examiner must determine whether these are unpaid. In the absence of information to the contrary, an examiner may rely upon the affidavit of an executor, administrator, or other person who has knowledge of the facts that all debts of the estate have been paid.

As evidence that an estate is not large enough to incur federal estate and Texas inheritance taxes, an examiner may rely upon a court-approved inventory, or in the absence of an inventory, the affidavit of a person who has knowledge of the facts.

An order of the court probating a will as a muniment of title may be accepted as evidence that all obligations of the estate have been paid other than debts secured by liens on real property. In the latter case, the examiner must determine that the liens do not affect the property under examination.

An examiner may accept, as proof that debts and taxes have been paid, an order closing a court supervised administration or an affidavit closing an independent administration.

If federal estate and Texas inheritance taxes are due, satisfaction of the taxes may be proven by a Federal Estate and Generation-Skipping Transfer Tax Closing Letter together with proof of payment of the taxes shown by the letter to be due to the United States and to the State of Texas.

#### **Standard 11.70. Heirship Affidavits**

In the absence of information to the contrary, an examiner may rely upon an affidavit of heirship with respect to the family history and the identity of heirs of a decedent.

#### **Standard 11.80. Community Survivors**

If no one has qualified as executor or administrator of the estate of a decedent who was married, the examiner may rely upon a conveyance of community property from the surviving spouse, acting as community survivor pursuant to [Tex. Prob. Code Ann. § 160](#), made for the purpose of paying community debts.

#### **Standard 11.90. Community Administration**

If a surviving spouse *of a decedent who died before September 1, 2007*, has qualified as a *statutory* community administrator, an examiner may rely upon a deed of community property from the administrator without further court order.

#### **Standard 11.100. Foreign Wills**

An examiner may rely upon an exemplified copy of a will probated outside of Texas, as being effective to pass title to property in Texas owned by a decedent, if the will and the order admitting the will to probate are probated in Texas pursuant to [Tex. Prob. Code Ann. § 95](#) or are filed in the deed records pursuant to [Tex. Prob. Code Ann. § 96](#).

## **CHAPTER XII BANKRUPTCIES**

#### **Standard 12.10. Relevance of Bankruptcy Cases to Real Estate Transactions**

The examiner should consider whether a person in the chain of title or in a proposed transaction is or was a debtor in a bankruptcy proceeding. If the person in the chain of title has been or is a debtor in a bankruptcy proceeding, the land may have been or may be property of the estate, subject to the jurisdiction and control of the bankruptcy proceeding.

#### **Standard 12.20. Authority for Prior Transfer**

If the examiner has knowledge that the owner or transferor in a prior real estate transaction recorded within two years prior to the current examination was then a debtor in a bankruptcy case, the examiner should determine that the prior transfer was authorized in that case.

If the chain of title discloses that the owner or transferor in a prior real estate transaction in the chain of title was then a debtor in a bankruptcy case, the examiner should determine that the prior transfer was authorized in that case.

### **Standard 12.30. Reliance Upon Recitals of Authority for Prior Transfer**

If a copy of an order in the bankruptcy case authorizing a prior real estate transaction in the chain of title has been recorded, the examiner may rely upon the order to determine that the transaction was authorized in the bankruptcy case. If the instrument evidencing the transaction was recorded more than two years prior to the examination, the examiner may rely upon any recitals in the chain of title that the transaction was authorized in bankruptcy case. Recitals may include a statement in the instrument in the chain of title that the grantor was acting as trustee or debtor in possession, that the property had been exempted or abandoned, that the automatic stay had been lifted or annulled to authorize a foreclosure, or that the transaction evidenced by the instrument had been otherwise authorized in the bankruptcy case.

### **Standard 12.40. Authority for Proposed Transfer by Debtor or Trustee**

If the examiner has knowledge that the owner is the debtor in a bankruptcy case or if the bankruptcy is disclosed in the chain of title in the real property records, the examiner should determine whether the proposed transaction is authorized in that case and should require that a certified copy of the order or other evidence of authority be recorded in the real property records.

### **Standard 12.50. Authority to Convey Exempted Land in Proposed Transaction**

If the examiner has knowledge that the current owner is the debtor in a bankruptcy case and the property is to be sold by the debtor based on the debtor's claim of exemptions in the bankruptcy case, the examiner should require evidence that (1) the land was claimed in the Schedule of Exempt Property as exempt under state law and (2) no objections were made within 30 days after the conclusion of the "first" meeting of creditors or the filing of any amendment to the list or supplemental schedules or such longer time for objection as was granted by the court. The examiner should require that evidence that the property has been exempted be recorded in the real property records.

### **Standard 12.60. Authority to Convey Abandoned Land in Proposed Transaction**

If the examiner has knowledge that the current owner is the debtor in a bankruptcy case and the property is to be sold by the debtor based on abandonment of the property in the bankruptcy case, the examiner should require evidence that (1) the trustee in the bankruptcy case or the debtor in possession gave notice of intent to abandon the property and that no objections were filed within 15 days after the mailing of the notice or such other time fixed by the court, (2) the bankruptcy court ordered the property abandoned, by a final nonappealable court order, or (3) the property is scheduled in the bankruptcy case and is not dealt with prior to the closing of the case. The examiner should require that a certified copy of the order of abandonment or other evidence of authority to abandon be recorded in the real property records.

### **Standard 12.70. Authority to Foreclose Land in Proposed Transaction**

If a deed of trust encumbering property of the estate or property of the debtor is to be foreclosed and the automatic stay has not otherwise terminated, the examiner should require satisfactory evidence that the mortgagee filed a motion to lift stay, that notice of the motion for relief from the automatic stay was served in accordance with the Bankruptcy Rules and applicable local rules, and that the bankruptcy court granted the motion prior to commencement of the

foreclosure. The examiner should require that a certified copy of the order lifting stay or other evidence of lift of stay be recorded in the real property records.

**Standard 12.80. Authority to Convey or Lease Property of the Bankruptcy Estate Not in the Ordinary Course of Business in Proposed Transaction**

If property will be sold or leased by the bankruptcy trustee or debtor in possession, other than in the ordinary course of business, the examiner should require evidence of the following: (1) 20 days' notice of sale to the debtor, the trustee, all creditors and indenture trustees by mail, unless the court orders the time shortened; (2) no objections to the sale were made or the court by order overruled the objections and authorized the sale; and (3) the order of sale, if any, is nonappealable or is not stayed pending appeal. The examiner should require that a certified copy of the order or other evidence of authority to sell or lease be recorded in the real property records.

**Standard 12.90. Authority to Convey Property of the Bankruptcy Estate in the Ordinary Course of Business in Proposed Transaction**

If property will be sold or leased by the bankruptcy trustee or debtor in possession, in the ordinary course of business, the examiner should require evidence of the following: (1) if the trustee is acting in a Chapter 7 case, the court must authorize the trustee to operate the business and should authorize real estate sales in the ordinary course of business; or (2) if the debtor in possession or trustee is acting in a Chapter 11 case, the authority of the debtor or trustee has not been limited by court order (and no plan has been confirmed). The examiner also should require evidence that the sale will be made in the ordinary course of business be recorded in the real property records.

**Standard 12.100. Authority to Convey Property of the Bankruptcy Estate Free and Clear of Liens in Proposed Transaction**

If property will be sold by the bankruptcy trustee or debtor in possession free and clear of liens, the examiner should require evidence that: (1) 20 days' notice of sale disclosing that the sale would be made free and clear of liens was given to the debtor, the trustee, all creditors, including the creditors secured by liens on the land, and indenture trustees by mail, unless the court orders the time shortened; (2) the court by order authorized the sale free and clear of liens; and (3) the order of sale is nonappealable or is not stayed pending appeal. The examiner should require that a certified copy of the order be recorded in the real property records.

**Standard 12.110. Authority to Convey Property After Confirmation of Plan**

If the debtor is selling land and the debtor's bankruptcy plan has been confirmed, the examiner should (1) review the confirmed plan and order confirming plan to determine that the land is revested in the debtor and to determine that the plan and order do not limit the authority of the debtor to convey and (2) determine that the order is final and nonappealable. The examiner should require that a certified copy of the order confirming the plan be recorded in the real property records.

### **Standard 12.120. Authority to Mortgage in Proposed Transaction**

If property will be mortgaged by the bankruptcy trustee or debtor in possession, the examiner should require evidence of the following: (1) notice of the proposed mortgage to interested parties, including the debtor, all creditors and indenture trustees, by mail; (2) no objections to the mortgage were made or the court by order overruled the objections and authorized the mortgage; and (3) the mortgage is nonappealable or is not stayed pending appeal. The examiner should require that a certified copy of the order be recorded in the real property records.

### **Standard 12.130. Filings in Violation of the Automatic Stay**

The examiner should not disregard a judgment lien, tax lien notice, or other instrument filed after the commencement of a bankruptcy case and in apparent violation of the automatic stay, because the filing of the instrument may be treated as voidable and may not be considered void, absent action in the bankruptcy case to avoid the instrument.

### **Standard 12.140. The Discharge and Judgment Liens**

An examiner may assume that an abstract of judgment filed against a person who was a debtor in a bankruptcy case is extinguished as a lien against property of the debtor if: (1) the debtor files a motion in the bankruptcy case pursuant to [11 U.S.C. § 522\(f\)](#) to extinguish the lien as to homestead, notifies the creditor in accordance with the applicable Bankruptcy Rules and local rules, and secures a final order of the bankruptcy court removing the lien; (2) the debtor acquires the property after receiving a discharge from the debt evidenced by the abstract of judgment; or, (3) the property is exempt or is not abandoned in the bankruptcy proceeding, and the debtor receives a discharge from the debt.

### **Standard 12.150. Extension of Time**

An examiner should be aware that the filing of the bankruptcy case tolls the limitation period in which the trustee may commence an action, if the limitation period had not expired at the time of the filing of the case, until the later of (1) the end of the period under other law or (2) two years after the order for relief (filing of voluntary bankruptcy). The filing of the bankruptcy case tolls the period in which the trustee may file a pleading or cure a default until the later of (a) the end of the period under other law or (2) 60 days after the order for relief. If applicable nonbankruptcy law or an agreement fixes a period for commencing an action on a claim against the debtor, then the limitation period does not expire until the later of (1) the end of the period under other law or (2) 30 days after the notice of termination or expiration of the stay as to the claim.

### **Standard 12.160. Effect of Dismissal of Case**

The examiner should be aware that the dismissal of a bankruptcy case reinstates any transfer or lien avoided in the bankruptcy, vacates orders, and reverts the property of the estate in the debtor.

## **CHAPTER XIII AFFIDAVITS AND RECITALS**

### **Standard 13.10. Affidavit Defined**

An affidavit is a written statement, under oath, signed by the affiant and evidenced by a jurat.

### **Standard 13.20. Reliance Upon Affidavits**

An examiner may rely upon an affidavit unless the examiner has a reasonable basis to question its reliability.

### **Standard 13.30. Affidavits of Non-Production**

Concerning an instrument creating an interest that depends upon production (e.g., an oil and gas lease, a mineral or royalty deed, or an assignment), an examiner may rely upon an affidavit which includes facts sufficient to show that the interest has expired by its own terms, although it is preferable to obtain a release from the owner of the interest.

### **Standard 13.40. Reliance Upon Recitals**

Recitals are statements of fact made in deeds, leases, mortgages and other documents. Because documents containing recitals are not typically sworn statements, recitals should generally be regarded as having less probative force than affidavits; however, an examiner having no reasonable basis for doubt or suspicion may rely upon recitals as establishing the recited facts.

## **CHAPTER XIV MARITAL INTERESTS**

### **Standard 14.10. Community Property Presumption**

Except as otherwise provided in this Chapter, an examiner must presume that real property acquired during marriage is community property, whether acquired in the name of one or both spouses.

### **Standard 14.20. Gifts, Devise and Descent**

An examiner must consider property acquired during marriage by gift, devise or descent to be the acquiring spouse's separate property. Where the grantor's donative intent is clearly demonstrated on the face of the deed, an examiner may presume the property conveyed to be the grantee's separate property.

### **Standard 14.30. Conveyances Between Spouses**

An examiner must consider property conveyed by one spouse to another to have become the grantee's separate property regardless of whether consideration is recited. However, effective January 1, 2000, a conveyance or agreement signed by both spouses may convert separate property to community property if such intention is specified.

#### **Standard 14.40. Separate Property Consideration**

If an examiner determines that the consideration for a conveyance came from a married grantee's separate estate, the community property presumption is rebutted, and the examiner should consider the property to be the grantee's separate property. For example, an examiner without knowledge of contrary evidence may rely on a recital in the deed (1) that the consideration was paid out of the grantee's separate property, or (2) that the property is conveyed to the grantee as separate property.

#### **Standard 14.50. Community Property Presumption May be Rebutted by Showing of Domicile in Common Law Jurisdiction**

An examiner may consider the community property presumption to be rebutted if it is shown the acquiring spouse was domiciled in a common law jurisdiction at the time of acquisition and if there is no indication that community funds or credit were used in the purchase.

#### **Standard 14.60. Necessity for Joinder When Community Property is in Name of Both Spouses**

If property is acquired during marriage by a deed naming both spouses as grantees, an examiner may not give effect to a subsequent conveyance of the property unless (1) it is joined by both spouses or (2) it was made by the husband before January 1, 1968, and did not convey homestead property.

#### **Standard 14.70. Necessity for Joinder When Community Property is in Name of Only One Spouse**

Subject to Standard 14.90, where community property has been acquired in the name of only one spouse, an examiner may rely on the grantee's authority to execute a subsequent conveyance as grantor, without joinder of the other spouse; however, the examiner should not pass a conveyance of community property held in the name of the wife made before January 1, 1968, without the husband's joinder or consent.

#### **Standard 14.80. No Presumption of Marriage**

Where the examiner is not aware that the grantor was married at the time of acquisition, the examiner need not inquire into the possible existence of a spouse's community property interest. The examiner should not infer that the grantor was married at the time of acquisition merely from a recital that the grantor is a widow or a widower.

#### **Standard 14.90. Homestead**

If the property conveyed is or may be the homestead of married persons, whether community property or separate property, an examiner must require the joinder of both spouses, unless it is conclusively shown that the property is not, or is no longer, homestead.

### **Standard 14.100. Divorce or Annulment**

Absent a conveyance or agreement between the parties providing otherwise or a judicial decree imposing an equitable lien, the examiner must treat the separate property of each spouse as unaffected by a divorce or annulment. The examiner must examine the judgment of dissolution and any accompanying property settlement agreement for their effect on community property. Community property not divided by the court or by the spouses is owned equally by the former spouses as tenants in common.

## **CHAPTER XV LIENS AND LIS PENDENS**

### **Standard 15.10. Liens Generally**

An examiner should identify all liens, both contractual and statutory, relevant to the interests under examination and advise the client regarding any actions that are appropriate to the purpose of the examination. An examiner need not identify a lien that is barred by limitations or is otherwise unenforceable.

### **Standard 15.20. Involuntary Mechanics' and Materialmen's Liens**

The examiner should identify recorded mechanics' and materialmen's lien affidavits affecting the title under examination.

### **Standard 15.30. Judgment Liens**

An examiner should identify recorded abstracts of judgment affecting the title under examination.

### **Standard 15.40. Implied Vendor's Liens**

Absent an express vendor's lien, if the record indicates, or the examiner otherwise knows that purchase money remains unpaid, the examiner should consider the possible existence of an implied vendor's lien.

### **Standard 15.50. Other Involuntary Statutory Liens**

The examiner should identify other recorded statutory liens affecting the title under examination.

### **Standard 15.60. Federal Tax Liens**

The examiner should determine whether the land under examination is subject to a federal tax lien.

### **Standard 15.70. Payment of Ad Valorem Taxes**

The examiner ordinarily determines the status of payment of ad valorem taxes.

### **Standard 15.80. Priority of Ad Valorem Tax Lien**

The examiner should ordinarily assume that an ad valorem tax lien is superior to any mortgage, judgment, other lien, or homestead right.

### **Standard 15.90. Lien Priority and Subordination**

Subject to exceptions, an examiner may presume that a lien created and filed for record has priority over a subsequently created competing lien or interest in the same property unless the priority has been altered by a subordination agreement.

### **Standard 15.100. Removal of Lien**

Subject to exceptions, an examiner may presume that a lien on real property is extinguished upon establishing that the secured debt (1) has been paid or (2) has become unenforceable upon expiration of the applicable limitations period.

### **Standard 15.110. Lis Pendens**

The existence of a lis pendens notice requires the examiner to inquire as to the nature of the cause of action, evaluate whether the pending litigation may be relevant to the interests under examination, and advise the client regarding any actions that are appropriate to the purpose of the examination.

## **CHAPTER XVI FORECLOSURES**

### **Standard 16.10. Nonjudicial Foreclosure**

An examiner must determine that all statutory and contractual requirements for a nonjudicial foreclosure sale have been satisfied. Specifically, an examiner must determine (1) that the security instrument confers the power of sale; (2) that there has been a default under the terms of the instrument; (3) that the trustee or substitute trustee was properly appointed; (4) that all statutory requirements in effect at the time of sale have been met; (5) that all additional requirements, if any, contained in the security instrument have been met; and (6) that a trustee's deed has been delivered.

### **Standard 16.20. Judicial Foreclosure and Execution Sales**

When title is based on a court's foreclosure of a lien or an execution sale, an examiner may rely on the deed of the officer who conducted the sale only after verifying the existence and apparent validity of the judgment conferring authority to make the sale and of the order of sale or writ of execution and levy.

### **Standard 16.30. Foreclosure of Home Equity Loans and Reverse Mortgages**

An examiner must verify the judicial authority for foreclosures of home equity loans. An examiner must verify the judicial authority for foreclosure of a reverse mortgage unless, before

the foreclosure, (1) all borrowers have died or have ceased to occupy the property for more than twelve consecutive months, or (2) the property has been sold or otherwise transferred.

**Standard 16.40. Deeds in Lieu of Foreclosure**

When examining a deed taken by a lienholder in satisfaction of its secured debt, the examiner should consider the possible right of redemption of a junior lienholder and the validity of a subordinate interest created during the existence of the extinguished debt.