PREFACE

This is the Eighth Edition of the Iowa Land Title Standards. The purposes of the Iowa Land Title Standards are to encourage consistency among examining attorneys within the State of Iowa and to assist the examining attorney in the examination of abstracts of title.

The Iowa State Bar Association appointed a committee in 1941 to formulate and recommend the adoption of title standards. Fifty-seven standards were adopted in 1944. There are currently 99 standards.

This Edition is dedicated to LeRoy H. Redfern who served on the Title Standards Committee for 37 years and as Chair of the Committee for twenty-two years, retiring from the Committee in 2003. LeRoy died on March 12, 2007 at the age of 87. The Title Standards Committee expresses its sincere appreciation and heartfelt thanks to LeRoy H. Redfern for his outstanding service and leadership to Iowa lawyers.

Title Standard 1.1 continues to be the most important title standard. We encourage all title examiners and abstracters to adhere to both the word and spirit of this first title standard.

The Committee continues updating the standards and adding new standards as the need arises. Members of the Iowa State Bar Association are encouraged to contact members of the Committee if they are aware of recurrent title issues of general concern to members of the Bar Association which can be resolved by amendments or additions to the standards.

Respectfully submitted,

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CHAPTER 1 "ABSTRACTS"

1.1 PROBLEM:

Revised 03/14

What should be the attitude of the attorney in examining abstracts of title as to the making of objections and requirements?

STANDARD:

The purpose of the examination of title should be to secure a title for the examiner's client which is in fact marketable and which is shown by the record to be marketable, subject to no encumbrances other than those expressly provided for by the client's contract. Objections and requirements should be made only when the irregularities or defects can reasonably be expected to expose the purchaser or lender to the hazard of adverse claims or litigation. To render the title to land unmarketable, there must be a reasonable probability of litigation. The mere bare possibility or remote probability that there may be litigation with respect to the title is not sufficient to render it unmarketable.

Authority:

In re Estate of Oppelt, 203 N.W. 2d 213 (Iowa 1972). Standard quoted at page 215.
DeLong v. Scott, 217 N.W. 2d 635 (Iowa 1974).
Wilson v. Fenton, 312 N.W. 2d 524 (Iowa 1981). Standard quoted at page 527.
77 Am. Jur. 2d Vendor and Purchaser § 138 at 219 (2003).
92 C. J. S. Vendor and Purchaser § 326 at 380 (2003).
L. M. Simes & C. B. Taylor, Model Title Standards 2.1 (1960).

COMMENT:

Title standards are primarily intended to eliminate technical objections which do not impair marketability and some common objections which are based upon misunderstanding of the law. The examining attorney, by way of a test, may ask after examining the title what defects and irregularities have been discovered by the examination and, as to each such irregularity or defect, who, if anyone, can take advantage of it as against the purported owner and to what end. The examining attorney should be prepared, prior to objecting to title, to identify who would have standing to file a claim or commence good faith litigation challenging title, and the grounds for such claim or litigation.

1.2 PROBLEM:

Revised 1/06

Is an abstract written in longhand acceptable?

STANDARD:

Yes, if it is legible and not mutilated so that some of the entries cannot be read. If the abstract meets these requirements, there is no justification for requiring the owner to undergo the additional expense of a new typewritten abstract. However, where such entries are prior to the "root of title", an illegible or mutilated longhand portion of an abstract may be omitted or disregarded if the abstract is certified under the Forty Year Marketable Title Act (Iowa Code §§ 614.29-.38). See Chapter 11, Iowa Land Title Standards.

1.3 PROBLEM:

Revised 1/06

Are mimeographed abstracts, printed abstracts or photostatic copies of abstracts acceptable?

STANDARD:

All methods of creating paper abstracts are acceptable if the product is durable, legible and properly certified to be correct and a complete abstract.

1.4 PROBLEM:

Revised 1/06

What kind of abstracter's certificate is acceptable?

STANDARD:

The abstracter's certificate should not be addressed or restricted to any specific person, firm or corporation. It should cover all conveyances, liens, encumbrances and proceedings in the offices of the Recorder, Clerk of Court, Auditor and Treasurer of the county where the property is located. The certificate should be general in character and refer to everything in the public records of the county where the property is located which in any way affects the title. When there is a federal courthouse in a county where the property is located the certificate should also include a statement that everything in the public records in the federal courthouse is included which in any way affects the title.

COMMENT:

The certificate copyrighted by the Iowa Land Title Association and approved by the Title Standards Committee of The Iowa State Bar Association is acceptable. As a part thereof, the abstract should certify the names of the persons against whom searches have been made to enable the examiner to determine whether further searches should be made against additional persons. The names certified as against whom searches have been made should include all persons whose names and variances thereof appear in the chain of title.

1.5 PROBLEM:

Revised 1/06

Is an abstract covering a city lot which is included in a subdivision plat under Chapter 354 of the Iowa Code, or corresponding statutes of earlier codes, satisfactory if it commences with the date of the filing of the plat?

STANDARD:

Yes, it is conclusive evidence that the proprietors had title thereto at that time if:

1. The plat was recorded more than ten years earlier;

2. The plat has not been vacated;

3. The lots or a subdivision of the lots have been sold and conveyed; and

4. For plats filed prior to July 1, 1982, no claim was filed prior to July 1, 1992 as provided for in Iowa Code § 592.3.

Authority:
Iowa Code § 592.3 (2005).

COMMENT:

Iowa Code § 592.3 does not apply to auditor's plats, plats of survey or acquisition plats. Iowa Code § 592.3 has not been updated as the platting requirements have changed.

1.6 PROBLEM:

Revised 1/06

How fully should ancient judicial proceedings be abstracted?

STANDARD:

Judicial proceedings completed more than ten years earlier may be abstracted in a brief manner sufficient only to show their effect on the ownership of the property and the creation of any judgment or other lien on the property which could be enforceable more than 10 years after the proceedings are completed.

Authority:
Iowa Code Chapters 589 and 614 (2005).

1.7 PROBLEM:

Revised 1/06

Assume a tract of land, held in single ownership, to be identified as tract A. Assume a conveyance, by deed of record, of a part of tract A, the part conveyed to be identified as tract B. Let the remainder of tract A be identified as tract C. Assume that in the conveyance of tract B there appear restrictive covenants binding on the grantee. Such covenants do not expressly purport to bind the grantor, nor is there any express statement that they are not intended to bind the grantor. Such covenants restrict the use of the land to residential purposes (for example) or establish a building setback line (for example) and are of such a nature that it might, arguably, be appropriate in a plan designed to benefit both tract B and tract C that the covenants should bind both the grantor and the grantee in the conveyance of tract B.

Under such circumstances, should an abstracter, in compiling or continuing an abstract of title to tract C, show the conveyance of tract B if recorded within the period of the continuation?

STANDARD:

Yes.

Authority:
Restatement (Third) of Property (Servitudes) § 2.14 (2000).
Annotation, Omission from Deed of Restrictive Covenant Imposed by General Plan of Subdivision, 4 A. L. R. 2d 1364 (1949).

COMMENT:

The doctrine of reciprocal negative easements or covenants does, or may, apply. If there is doubt as to the applicability of the doctrine, the doubt should be resolved in favor of showing the conveyance. The question of applicability should be resolved by the title examiner and not by the abstracter, who should act on the principle that matter which reasonably may be considered to be material to title should be shown in an abstract.

1.8 PROBLEM:

Deleted 6/2008

1.9 PROBLEM:

Revised 3/14

Is it necessary for an abstract to show a mortgage or similar security agreement, either satisfied or not satisfied, if more than twenty years old?

STANDARD:

Except as to mortgages and similar security interests to the United States, the abstract does not need to show such a mortgage or similar security instrument unless the record shows that the original debt, or said debt extended by an extension agreement of record, matured within the last ten years (or has not yet matured). Mortgages and similar security instruments to the United States which have not been released of record should always be shown. If a mortgage or similar security instrument to the United States that has been shown has been discharged by legal action, there should be a showing that the court had jurisdiction over its interest in the action in addition to the court decrees and sheriff's deeds, etc., establishing discharge of the mortgage or similar security instrument.

Authority:

Iowa Code §§ 614.21, 614.29 and 614.36 (2013) (claims of United States not subject to marketable title act)

28 U.S.C. § 2410 (2013) (jurisdiction and procedure for in rem state actions against interests of the United States)

U.S. v. Ward, 985 F.2d 500 (10th Cir., 1993) (no statute of limitations on *in rem* enforcement of mortgages to the United States)

U.S. v. Copper, 708 F.Supp. 905 (N.D. Iowa 1988)

COMMENT:

Although the Ward case indicates that there is no statute of limitations on in rem enforcement of a mortgage or similar security instrument to the United States, a title examiner should consider the actual probability of enforcement in conjunction with Title Standard 1.1 in deciding whether an objection to title is appropriate.

Examples of similar security agreements would include deeds of trust, bonds for deed and deeds intended as security.

With regard to the showing of an installment purchase contract, see Title Standard 4.12.

1.10 PROBLEM:

Revised 3/13

What showing should be made in the abstract as to zoning and land use regulations?

STANDARD:

All recorded zoning and land use regulations that specifically refer to the real estate described in the caption of the abstract should be briefly abstracted to alert the examiner to the existence of same. For all other zoning and land use regulations, the following (or similar) notation in an abstract is sufficient: "Various proceedings regarding zoning and land use regulations may affect the real estate described in the caption of this abstract. You may wish to contact the appropriate offices for further particulars to see how they may affect the subject real estate."

Authority:
Iowa Code Chapters 329, 335, 403, 404, 414 (2011).
Iowa Code §331.304 (2011).

1.11 PROBLEM:

Revised 1/06

Is it necessary for an abstract to show that there is access to the property?

STANDARD:

Yes. The abstract should show matters of record which evidence means of access (plat drawings, surveys and public or private right-of-way easements) and the examiner should determine whether the showing constitutes legal access. If legal access to the property cannot be determined from the abstract, the examiner should include a recital in the title opinion to this effect.

Authority:
3 J. Palomar, Patton and Palomar on Land Titles § 611 (3d ed. 2003).

COMMENT:

The Committee recognizes that legal access will not always be apparent from the abstract but may be obvious by visual inspection of the property. Consequently, when legal access is not shown in the abstract, whether further abstracting or corrective action is required depends upon the circumstances.

When an opinion is required as to access to the property by a private ingress and egress easement appurtenant to the property, the abstract must include the servient estate to the date of the recording of the grant of easement. Abstracting of the servient estate subsequent to the recording is not necessary.

See: G. F. Madsen, Marshall's Iowa Title Opinions and Standards § 6.2A (2d ed. 1978).

1.12 PROBLEM:

Revised 1/06

Is an instrument containing a short form acknowledgment pursuant to Iowa Code § 9E.15 sufficient for recording?

STANDARD:

Yes.

Authority:
Iowa Code § 9E.14(2) (2005).
Iowa Code § 558.42 (2005).

COMMENT:

Iowa Code § 558.39 (2003), long form acknowledgment forms, was repealed by the 2004 Acts, Chapter 1052 § 10. However, acknowledgments pursuant to said repealed code section subsequent to its repeal comply with the requirements of Iowa Code § 9E.14(2) (2005).

1.13 PROBLEM:

New 3/14

What is the effect upon marketability of title of residential construction of a notice of commencement or of a preliminary notice posted on the Mechanic's Notice and Lien Registry and shown in an abstract?

STANDARD:

The statutory notice of commencement and preliminary notice are prerequisites to a mechanic's lien, not the perfected mechanic's lien itself. The title examiner should call attention to the existence of a notice of commencement or preliminary notice disclosed in an abstract as the existence of these notices places one upon notice to inquire further and that a mechanic's lien

might be perfected. A notice of commencement or preliminary notice is not a current cloud on the marketability of title, but might mature into a cloud on title.

Authority
Iowa Code § 572.8 (2013) (perfection of lien)
Iowa Code § 572.1(10) (2013) ("residential construction" relates to single- or two-family dwellings used for residential purposes)
Iowa Code § 572.13A (2013) (notice of commencement by contractor)
Iowa Code § 572.13B (2013) (preliminary notice by subcontractor)

COMMENT:

A search of notices of commencement or preliminary notices posted on the Mechanic's Notice and Lien Registry (MNLR) is not required to be included in an abstract, but the abstract should disclose whether or not a search of the MNLR has been made for notices of commencement, preliminary notices, or mechanic's liens. Regardless of whether a notice of commencement or a preliminary notice appears in the abstract, a title examiner should advise one acquiring an interest in real property (a) to inquire into the existence of lienable labor or materials and to obtain lien waivers or to take other appropriate remedial action as necessary or (b) whether or not a search of notices of commencement or preliminary notices posted on the MNLR has been provided or (c) both. 2012 Iowa Acts (84 G.A.) ch. 1104 (H.F. 675) did not change Iowa law in regard to the existence of the unperfected mechanic's liens or to whether diligent inquiry should be made into the existence of recent improvements to the real property or the actions necessary to prevent a mechanic's lien.

CHAPTER 2 "POLITICAL SUBDIVISIONS"

2.1 PROBLEM:

Rev. 4/1998

When a deed is made by a municipal corporation, a county or a school district of the State of Iowa, is it necessary to require that a copy of the resolution approving the execution of said deed by the governing body of said corporation and proof of publication of notice to dispose of said real property, when required, be filed for record?

STANDARD:

Yes, unless Iowa Code §§589.25 or 589.31 apply.

Authority:
Iowa Code §297.22 et seq. (2007) (school district sales).
Iowa Code §331.361 (2007) (county property).
Iowa Code §362.3 (2007) (publication of notices).
Iowa Code §364.7 (2007) (disposal of property-city).
Iowa Code §569.7 (2007) (execution of instruments and recording transcript of minutes).

COMMENT:

A. Publication of notice of proposal to dispose of real property by municipal corporations was not required prior to July 4, 1951. (See Iowa Code §§403.11-.12 (1950) which were repealed by 1951 Iowa Acts (54 G.A.), ch. 151, §41).

B. Publication of notice of proposal to dispose of real property by counties was not required prior to July 1, 1974. Iowa Acts, 65th G.A., ch. 1201 (1974 Ses.). For legalization of certain sales made between June 30, 1974 and July 1, 1975, see Iowa Code §589.28. While not dealing with publication of notice, see Iowa Code §589.2 as to legalizing defects in formality of execution of county deeds, "…executed more than ten years earlier…."

C. In varying circumstances school districts have been authorized for years to convey interests in real property, with differing requirements for publication, appraisal and bidding. Under Iowa Code §589.25, deeds placed of record more than ten years, purportedly executed by a school district, are legalized and validated even though the record fails to disclose compliance with statutory requirements.

D. Pursuant to Iowa Code §589.31, deeds placed of record more than ten years, executed by the city or county, are legalized or validated even though the record fails to disclose compliance with statutory requirements.

E. The provisions of Iowa Code §297.22(1) and (2) do not apply to student – constructed buildings and the property on which student-constructed buildings are located. School districts may sell, lease or dispose of such student-constructed buildings and may purchase sites for the erection of additional structures by any procedure which is adopted by the board of directors of a school district.

CHAPTER 3 "PRIVATE CORPORATIONS"

3.1 PROBLEM:

Revised 1/06

When an instrument affecting real estate is executed by a corporation, is it necessary to require a showing from the articles of incorporation that the corporation was authorized to take such action?

STANDARD:

No. However, if the articles of incorporation are shown in the abstract, they would give notice of any limitation on the powers of the corporation. If the articles of incorporation are not shown in the abstract, the examiner may assume that they are not of record in such county and that there are no limitations on the powers of the corporation.

Authority:
L. M. Simes & C. B. Taylor, Model Title Standards 12.5 (1960).

3.2 PROBLEM:

Revised 1/06

If an instrument affecting real estate is executed by a corporation organized and doing business under the laws of some state other than Iowa, is it necessary to require a showing that said corporation has obtained authority to do business in the State of Iowa?

STANDARD:

No. Such showing of authority is not necessary.

Authority:
L. M. Simes & C. B. Taylor, Model Title Standards 12.6 (1960).
Iowa Code §§ 490.1501(2)(g) and (2)(i) and 490.1502(5) (2005).

3.3 PROBLEM:

Revised 3/14

If an instrument affecting real estate is executed by a corporation, is it necessary to obtain a showing from its articles of incorporation, bylaws or by a duly adopted resolution of its board of directors that the individual who executed the instrument was authorized to do so?

STANDARD:

No. However, if the articles of incorporation are shown in the abstract, the examiner is bound to take notice of any limitations contained in said articles with respect to the powers of the individual to take such action.

Authority:
L. M. Simes & C. B. Taylor, Model Title Standards 12.3 (1960).

COMMENT:

Iowa Code § 614.14A provides a statute of limitations barring claims seeking to invalidate a deed or real estate contract by a corporation based on the allegation that the execution of the instrument was not authorized by the corporation. See Title Standard 10.7 and Comment.

3.4 PROBLEM:

Revised 1/05

What is the effect of a variance in a corporate name?

STANDARD:

Corporations are satisfactorily identified, although their exact names are not used and variations exist from instrument to instrument, if from the names used and other circumstances of record the identity of the corporation can be inferred with reasonable certainty. The following variances are among those that ordinarily may be ignored: punctuation marks; use or nonuse of the symbol "&" or the word "and" or interchanging them; addition or omission of the word "the" preceding the name; use or nonuse of the words "company", "limited", "corporation", "incorporated" or the abbreviations for same, or interchanging them or any such word and the related abbreviation; and inclusion or omission of all or part of a place or location. Affidavits and recitals of identity should be used and may be relied upon to explain variances too substantial or too significant to be ignored.

Authority:
L. M. Simes & C. B. Taylor, Model Title Standards 12.1 (1960).

COMMENT:

Although corporations frequently have closely corresponding names, except in the case of reorganizations or subsidiaries, purported conveyance by an interloper seems extremely unlikely. The significance of variances should be appraised with a view to actual identity of the corporation rather than by a standard of mechanical perfection.

CHAPTER 4 "DEEDS AND CONTRACTS"

4.1 PROBLEM:

Rev. 9/2009

When an instrument filed for record more than ten years ago refers to an unrecorded real estate mortgage, bond for deed, trust deed or contract for the sale or conveyance of real estate (hereafter "document") and such instrument does not disclose the due date of such unrecorded document, is it necessary to require any further explanation?

STANDARD:

No.

COMMENT:

Iowa Code §614.21 applies to such documents which are not of record but which are described or referred to in any other instrument which is filed of record. The limitation is ten years from the due date of such document if disclosed in the record and, if not so disclosed, then ten years from the date of the recording of the instrument containing such reference.

4.2 PROBLEM:

Rev. 9/2009

When the present owner holds title by quit claim deed and proposes to convey by warranty deed or to execute a mortgage containing covenants of warranty, is it proper for the examiner to require an affidavit from the grantor in the quit claim deed stating that, at the time of the execution of the quit claim deed there were no unrecorded deeds, contracts, mortgages or other outstanding claims affecting the title within the knowledge of said grantor?

STANDARD:

No.

Authority:
Bell v. Pierschbacher, 245 Iowa 436, 62 N.W. 2d 784 (1954).
Hannan v. Seidentopf, 113 Iowa 658, 86 N.W. 44 (1901).
Steele v. Sioux Valley Bank, 79 Iowa 339, 44 N.W. 564 (1890).
Winkler v. Miller, 54 Iowa 476, 6 N.W. 698 (1880).
Kitteridge v. Chapman, 36 Iowa 348 (1873).
Iowa Code §558.41 (2009).
3 J. Palomar, Patton and Palomar on Land Titles, § 14 (3d ed. 2003).
L. M. Simes & C. B. Taylor, Model Title Standards 22.3 (1960).

COMMENT:

The grantee in a quit claim deed takes the property subject to prior equities and is not a bona fide purchaser for value without notice, but the marketability of the title is not impaired by a quit claim deed in the chain and no inquiry or corrective action is required. However, if a party proposes to purchase the property on contract from such an owner, then inquiry is warranted since a contract purchaser is not considered a bona fide purchaser for value without notice, except to the extent that consideration has been paid.

4.3 PROBLEM:

Rev. 9/2009

If a deed is given by the mortgagor to the mortgagee, what showing, if any, is required?

STANDARD:

The general rule is that where the mortgagor deeds the property to the mortgagee, the deed is presumed to be a continuation of the security and the right of redemption is presumed to continue. The presumption is against merger and the burden of proof is upon the party (mortgagee) sustaining it. The deed itself or a separate instrument executed by the mortgagor must show that the deed was an absolute conveyance not given as additional security and that the consideration was the release of the grantor from all or a portion of personal liability under the note. If the purchaser or lender is dealing with the grantee in such deed, the showing called for should be required. If the grantee in such deed has already conveyed the property, such showing is not necessary. It would be the duty of the mortgagor-grantor to take some action after the conveyance to the mortgagee-grantee and before further conveyances of the property.

Authority:

Tom Riley Law Firm v. Padzensky, 430 N.W. 2d 416 (Iowa 1988).
Koch v. Wasson, 161 N.W. 2d 173 (Iowa 1968).
Blum v. Keene, 245 Iowa 867, 63 N.W. 2d 197 (1954).
Swartz v. Stone, 243 Iowa 128, 49 N.W. 2d 475 (1951).
Lutz v. Cunningham, 240 Iowa 1037, 38 N.W. 2d 638 (1949).
Holman v. Mason City Auto Co., 186 Iowa 704, 171 N.W. 12 (1919).
3 J. Palomar, Patton and Palomar on Land Titles § 427 (3d ed. 2003).

COMMENT:

Iowa Code Chapter 655A, and §654.18 provide alternative nonjudicial foreclosure procedures. Section 654.19 provides a procedure for deed-in-lieu of foreclosure if the real estate is agricultural land used for farming. Iowa Code §654.18, §654.19 and Chapter 655A do not prohibit a voluntary, absolute conveyance by mortgagor to mortgagee. Except for a deed given pursuant to the alternative nonjudicial voluntary foreclosure procedure (§654.18), and a deed in lieu of foreclosure of agricultural land (§654.19), the showing required pursuant to this Standard must be made when a deed is given by the mortgagor to the mortgagee.

The title standard, until revised to reflect the result of Tom Riley Law Firm, required that the separate instrument or deed executed by the mortgagor show that the deed was given in satisfaction of the mortgage. That is no longer required.

The requirement that the deed itself or a separate instrument executed by the mortgagor must show that the consideration for the conveyance was the release of the mortgagor from all or a portion of personal liability under the note is not universally required. In lieu of that requirement, some examiners will accept a showing from the mortgagor that (1) an absolute sale and not a transfer for security was intended by the mortgagor; (2) the transfer was fair; (3) it was based upon adequate consideration; (4) it was given for specified credit on the debt; (5) possession was transferred; and (6) the grantee has no obligation to reconvey to the grantor.

If the deed is for agricultural land and is given pursuant to §654.19, release of the mortgagor from personal liability under the note is not required since the deed may be in satisfaction of all or part of the mortgage obligation as agreed upon by the parties.

It is important to determine whether the right of first refusal of the mortgagor/grantor under Iowa Code §654.16A applies and, if so, whether it has been exhausted.

4.4 PROBLEM:

Rev. 9/2009

Is it necessary to serve a notice of forfeiture on a contract vendee's spouse if the spouse is not a party to the contract?

STANDARD:

No, unless the spouse is also a party in possession.

Authority:
Goodale v. Bray, 546 N.W.2d 212 (Iowa 1996).
Hansen v. Chapin, 232 N.W. 2d 506 (Iowa 1975).
Eastman v. DeFrees, 235 Iowa 488, 17 N.W. 2d 104 (1945).

4.5 PROBLEM:

Rev. 4/1998

What showing is necessary with respect to so-called stray deeds or mortgages between persons who have no apparent interest in the record title?

STANDARD:
(1) In the case of a deed, if Iowa Code §§614.17 or 614.17A are not applicable, an affidavit or disclaimer showing no interest in the property should be obtained from the grantee.

(2) In the case of a mortgage,

(a) the same showing should be obtained from the mortgagor, if Iowa Code §614.17 or 614.17A are not applicable; and

(b) a release of the mortgage should be obtained from the mortgagee unless the mortgage is barred under the provisions of Iowa Code §614.21.

In lieu of either (1) or (2) above, a corrected deed or mortgage setting out the true facts and stating that the description in the prior deed or mortgage was in error is acceptable. If the affidavit or disclaimer cannot be obtained from the grantee or mortgagor, then an affidavit of a person having personal knowledge of the facts is acceptable.

4.6 PROBLEM:

Rev. 9/2009

Is a notice of forfeiture of a real estate contract under Iowa Code Chapter 656 valid if served upon a minor or other persons under legal disability?

STANDARD:

Yes. Chapter 656 contains no exceptions relating to a minor or other persons under legal disability.

Authority:
Iowa Code §656.3 (2009).

COMMENT:

Notice must be served on the same conditions and in the same manner as is provided for the service of original notices on minors and other persons under legal disability. Iowa Rules of Civil Procedure 1.305(2)-(5).

4.7 PROBLEM:

Rev. 6/2010

What showing should be made of record in connection with a conveyance from the trustee of an inter vivos trust?

STANDARD:

A. Non-Tax Issues:

If Iowa Code Section 614.14 (5) is not applicable, the abstract should show all of the following for all conveyances after July 1, 2008:

1. a recorded affidavit in substantially the form required by Iowa Code Section 614.14(2); and

2. no adverse claim prior to the deed from the trustee; and

3. an affidavit of the immediate purchaser from the trustee, or an affidavit of a subsequent purchaser, stating that it relied on the affidavit and has no notice or knowledge of any adverse claims arising out of the execution and recording of the deed from the trustee.

B. Tax Issues

1. Federal Gift, Estate, Generation Skipping Tax and Estate Tax Deferred Under IRC Section 6166:

Unless a lien has been filed under IRS Section 6321 no showing is required if the trustee transfers an interest in real property and the examination is for a purchaser or for a holder of a security interest for adequate and full consideration.

2. Iowa Inheritance and Estate Tax:

If the grantor to the trust and all beneficiaries are alive, no showing is required with regard to Iowa inheritance or estate tax. If the grantor to the trust or a beneficiary of an irrevocable trust is deceased, an adequate showing must be made with regard to (a) the expiration of the statute of limitations on the lien, or (b) the payment of, or (c) a specific release of, or (d) the non-liability for, Iowa inheritance or estate taxes. (If the grantor to a revocable trust is alive, no showing is required with regard to Iowa inheritance or estate tax.)

Concerning Iowa inheritance taxes, a clearance of inheritance tax (CIT) pursuant to Iowa Code § 450.22 is necessary unless:

(1) The death occurred more than ten years ago, or
(2) The property passed to the surviving spouse of a decedent, or
(3) The property passed to a lineal ascendant or an adopted or biological child, step-child or other lineal descendant of a decedent.

Concerning Iowa estate taxes, a showing of the payment of or non-liability therefore is necessary unless:

(1) The death occurred on or after January 1, 2005, or
(2) The death occurred more than ten years ago, or
(3) A form 706, United States Estate Tax Return, is not required to be filed.

Unless the lien of the tax has been perfected by recording, no showing is required if the transfer is to a bona fide purchaser for value.

4. Iowa Qualified Use Inheritance Tax:

Unless the lien of the tax has been perfected by recording, no showing is required if the transfer is to a bona fide purchaser for value.

Authority:

A. Non-tax

Iowa Code Section 614.14 (2009).
Iowa Code Section 4.13(1)(a) (2009).

B. Tax

1. Federal Gift Tax
IRC Sections 6321, 6323 (h) (6) and 6324.

2. Federal Estate Tax
IRC Sections 2011, 2204, 6321 to 6325.

3. Federal Generation Skipping Tax
IRC Sections 2603 and 2661.

4. Federal Estate Tax Deferred Under Section 6166
IRC Section 6324A.

5. Additional Federal Estate Tax Attributable to Special Use Valuation
IRC Section 6324B.

6. Iowa Inheritance Tax
Iowa Code, Chapter 450 (2009).

7. Iowa Estate Tax
Iowa Code, Chapter 451 (2007), Section 451.12.
Iowa Admin. Code, r. 701-87.1(1) (2008).
I.R.C. § 2011.

8. Iowa Generation Skipping Transfer Tax
Iowa Code, Chapter 450A (2009), Section 450A.6.
I.R.C. § 2604(c).

9. Iowa Qualified Use Inheritance Tax
Iowa Code, Chapter 450B (2009), Section 450B.6.

COMMENT:

A person holding an adverse claim and not already barred arising or existing prior to January 1, 2009, by reason of a transfer of an interest in real estate by a trustee, or a purported trustee, shall not file an action to enforce such claim after December 31, 2010, in any court to recover or establish any interest in or claim to such real estate against the holder of the record title to the real estate. An action based upon an adverse claim arising on or after January 1, 2009, by reason of a transfer of an interest in real estate by a trustee, or a purported trustee, shall not be maintained in any court to recover or establish any interest in or claim to such real estate against the holder of the record title to the real estate more than one year after the date of recording of the instrument from which such claim may arise. For all conveyances prior to July 1, 2008, Section 614.14(5)(1993) would be controlling (see Section 4.13(1)(a) of the Iowa Code (2009).

An interest in real estate currently or previously held of record by a trust shall be deemed to be held of record by the trustee of such trust, pursuant to Iowa Code Section 614.14(6).

The foregoing showing with regard to Iowa inheritance or estate taxes may be either as a part of an estate or CIT proceeding or by affidavit. The showing regarding the grantors and beneficiaries being alive should be made by statement on the instrument of transfer or by affidavit. The trust assets, if not shown in Schedule G of the decedent's estate inventory (gifts within three years of death or with retained income) may be required to be shown on an attached schedule by Questions 2 or 3 of the Questionnaire and the Recapitulation in the inventory (other property reportable for federal estate or inheritance tax, or gifts reducing the unified credit). If the grantor is deceased and there is no release of record for Iowa inheritance and estate tax, and the entire trust agreement is not recorded, sufficient portions of the trust must be recorded in order to enable the examiner to determine if a lien for such taxes exists.

Unless the Internal Revenue Service has filed a lien against real estate, a conveyance by the trustee to a "purchaser" or "holder of a security interest" divests the property of any federal estate, gift or generation skipping tax liens, federal estate tax deferred under section 6166 liens and additional federal estate tax attributable to special use valuation liens. I.R.C. Sections 6323 (a), 6324, 6324A and 6324B. "Purchaser" is defined as one who has paid, or is paying adequate and full consideration to acquire an interest in the real estate which is valid under Iowa law against subsequent purchasers without notice. I.R.C. Section 6323 (h) (6). "[A]dequate and full consideration in money or money's worth" means a consideration in money or money's worth having a reasonable relationship to the value of the interest in the property acquired." Reg. Section 301.6323 (f)(3).

Chapter 451 of the Code of Iowa, which provided for the Iowa estate tax, was repealed in 2008, 2008 Iowa Acts, ch. 1119, § 37. However, the provisions of former Chapter 451 apply in connection with deaths occurring prior to July 1, 2008. See Iowa Admin. Code, r. 701-87.1(1) (2008). ("[Chapter 87 of Rule 701, Iowa Estate Tax] is applicable . . . for dates of death occurring prior to July 1, 2008.") The Iowa estate tax is the amount allowed under the Internal

Revenue Code as a credit against the federal estate tax liability of an estate, less the Iowa inheritance tax paid. Due to the phase out of the federal estate tax credit under the Economic Growth and Tax Relief Act of 2001, the Iowa estate tax is not applicable in connection with deaths on or after January 1, 2005. See I.R.C. § 2011 (eliminating the state death tax credit upon which the Iowa estate tax was based, for deaths after December 31, 2004).

The tax lien resulting from a generation skipping transfer under Chapter 450A of the Code of Iowa encumbers the transferred property for a period of ten years from the date of the transfer. However, unless the lien has been perfected by recording, a transfer to a bona fide purchaser for value divests the property of the lien. Iowa Code §450A.6 (2009). According to Iowa Code § 450A.2, the generation skipping tax liability, if any, is equal to the maximum federal credit allowable under section 2604 of the Internal Revenue Code. Pursuant to its terms, however, Section 2604, and therefore the credit provided for thereunder, does not apply to generation skipping transfers occurring after December 31, 2004. I.R.C. §2604(c).

4.8 PROBLEM:

Rev. 6/2010

When title to real estate is held by a husband and wife as joint tenants with right of survivorship, is a deed to a third party, executed by one of them without joinder of the other and followed by a reconveyance to the one executing the deed, sufficient to terminate the joint tenancy and to create a tenancy in common?

STANDARD:

Yes, if the property was not the homestead. If the property was the homestead, a conveyance by only one of the spouses would be ineffective to terminate the joint tenancy.

Authority:
Iowa Code §561.13 (1993).
3 J. Palomar, Patton & Palomar on Land Titles §223 (3d ed. 2003).
Thayer v. Sherman, 218 Iowa 451, 255 N.W. 506 (1934).

4.9 PROBLEM:

Rev. 6/2010

When real estate is owned by joint tenants who enter into a contract for the sale of it, and one of them dies before title is conveyed to the purchaser, is a conveyance by the survivor or survivors sufficient to vest the entire title in the purchaser, or does the act of entering into the sale contract cause such a severance of the joint tenancy that the interest of the deceased joint tenant will need to be conveyed by the executor, administrator, devisees or heirs?

STANDARD:

The sale contract effects an equitable conversion and a destruction of the joint tenancy unless such contract contains a provision preserving the joint tenancy with right of survivorship. Whether a deed from the survivor or survivors is sufficient depends upon such joint tenancy being expressly preserved by the contract terms.

Authority:
In re Baker's Estate, 247 Iowa 1380, 78 N.W. 2d 863 (1956) (citing this Standard with approval, 78 N.W. 2d at 868).
In re Sprague's Estate, 244 Iowa 540, 57 N.W. 2d 212 (1953).

4.10 PROBLEM:

Rev. 6/2010

When an abstract shows that a deed was not recorded until many years after its execution, what showing, if any, should be required as to delivery of the deed?

STANDARD:

Mere lapse of time between the date of execution and the date of filing of a deed for record does not make a title unmarketable. No objection should be based on it unless other matters warrant inquiry into the question of delivery. The presumption of delivery exists even though the recording is after grantor's death but is rebuttable and the burden is on the party asserting nondelivery to so prove by clear, satisfactory, and convincing evidence.

Authority:
Smith v. Siechert, 253 Iowa 788, 113 N.W. 2d 699 (1962).
Dyson v. Dyson, 237 Iowa 1285, 25 N.W. 2d 259 (1946).
Crawford v. Couch, 234 Iowa 1246, 15 N.W. 2d 633 (1944).
Ferrell v. Stinson, 233 Iowa 1331, 11 N.W. 2d 701 (1943).
Hodgson v. Dorsey, 230 Iowa 730, 298 N.W. 895, 137 A.L.R. 456 (1941).
Jones v. Betz, 203 Iowa 767, 210 N.W. 609 (1927).

4.11 PROBLEM:

Rev. 3/2005

How and under what circumstances may real estate be conveyed when title is held by a life tenant?

STANDARD:

If the remainder interests are vested, marketable title may be conveyed by the life tenants and their spouses, if any, and all remaindermen, and their spouses, if any.

Authority:
Iowa Code § 557.9.
Iowa R. Civ. P. 1.1201 through 1.1228.
Huse v. Noffke, 271 N.W.2d 682 (Iowa 1978).
Long v. Crum, 267 N.W.2d 407 (Iowa 1978).

COMMENT:

If the remainder interests are contingent, then court approval for sale must be obtained under the provisions of Iowa Code § 557.9 in an action for partition. The action must be commenced by the life tenant and must be with the consent of the holder of the reversion.

A life tenant may convey his or her own life estate only.

Example: A conveys real estate to B for life with remainder to C and D upon B's death. B, C, and D, and spouses, if any, can convey marketable title.

Example: Testator devises real estate to her daughter, Jane, for Jane's life, with the remainder at Jane's death to Jane's children. Testator leaves the residue of her estate to her brother, George. The remainder interests are contingent because they cannot be determined and thus cannot vest until Jane's death. George holds the reversion because the real estate will go to George in the event Jane would die without children. To sell the real estate, Jane must petition the court pursuant to Iowa Code § 557.9. George must consent to the action.

4.12 PROBLEM:

New 3/14

Where the record reflects that title to real estate is subject to an outstanding contract for deed, what showing is necessary to ensure a subsequent conveyance of the real estate is free and clear of the contract and includes all of the interest of the parties to the contract?

STANDARD:

A. Proper deeds from the vendor and the vendee conveying all of their respective interests in the real estate are sufficient.

B. A proper deed solely from the vendor conveying all of the vendor's interest in the real estate is sufficient under the following circumstances:

(1) The record reflects a proper forfeiture of the contract pursuant to Chapter 656 of the Code of Iowa; or

(2) The record reflects a defective forfeiture of the contract but also reflects that proof of service of notice of such forfeiture as prescribed under section 656.5 of the Code of Iowa

was recorded prior to July 1, 1991, or has been of record for more than ten years and the vendee is not in possession of the real estate; or

(3) The record reflects all of the following:

(a) The contract was executed more than ten years earlier; and

(b) The record fails to reflect that the contract has been performed and more than ten years has elapsed since the date the contract by its terms was to be performed, or the contract and any extensions thereof fail to state a performance date and more than 20 years have elapsed from the date of execution of the contract; and

(c) The vendee or the vendee's successor in interest is not in possession of the real estate and has not been paying the total amount due of the taxes levied against the property for the preceding five years.

C. A proper deed solely from the vendee conveying all the vendee's interest in the real estate is sufficient under the following circumstances:

(1) The record reflects a proper deed in completion of the contract from the vendor; or

(2) The vendee has filed an affidavit reflecting that no action to foreclose or forfeit the contract was commenced within 45 days following service on the vendor of a demand for issuance of a deed pursuant to section 614.21(4) of the Code of Iowa, and that the vendee was in physical possession of the real estate at the time of service of the demand.

Authority:
Iowa Code § 445.1 (2013).
Iowa Code § 558.5 (2013).
Iowa Code § 558.67 (2013).
Iowa Code § 614.21 (2013).
Iowa Code § 656.5 (2013).
Iowa Code § 656.9 (2013).

COMMENT:

Section 558.5 of the Code of Iowa provides for the presumption of abandonment of ancient contracts. Pursuant to section 558.5, a contract for deed that was executed more than ten years ago is presumed abandoned by the vendee and void, and the real estate shall be considered free of any lien or defect by virtue of the contract in two situations. The first is where the record fails to reflect that the contract has been performed and more than ten years has elapsed since the date the contract by its terms was to be performed. The second is where the record reflects that the contract and any extensions thereof fail to state a performance date and more than 20 years have elapsed from the date of the execution of the contract. The limitations provisions of section 558.5 also apply to an unrecorded contract that is referred to in another instrument that has been filed of record. Section 558.5 does not apply, however, to a vendee or the successor in interest to

a vendee who is in possession of the property, or who continuously has been paying the total amount due, as defined in section 445.1, of the taxes levied against the property for the preceding five years. One may rely upon an affidavit describing the relevant facts relating to possession and payment of taxes.

Section 614.21 provides a bar to the enforcement of ancient contracts. Specifically, an action to foreclose or enforce a contract for the sale or conveyance of real estate shall be barred after 20 years from the date thereof as reflected by the record of such instrument, unless the record of such instrument or a recorded extension of the maturity of the instrument reflects that less than ten years have elapsed since the date of maturity of the indebtedness secured by the contract or since the right of action accrued. If the date of maturity of the contract is different than as appears by the record of the instrument, the date of maturity or any extension thereof may be shown of record by the recording of an extension agreement as provided for under section 614.21(2). The limitations provisions of section 614.21 apply to an unrecorded contract that is referred to in another instrument that has been filed of record. Specifically, in any such case, the limitation period is ten years from the due date of the contract if disclosed in the recorded instrument, or ten years from the date of the recording of the instrument if it fails to disclose the due date of the contract.

A contract vendee or the successor in interest to a contract vendee, under a contract the enforcement of which is barred under section 614.21, or who is entitled to immediate issuance of a deed in fulfillment of the contract and who is in physical possession of the property may serve on the vendor a demand for issuance of a deed as provided for under section 614.21(4). The demand shall state that if a deed is not provided and an action to foreclose or forfeit the contract has not been commenced within 45 days of service of the demand, the vendee may file an affidavit reflecting service and compliance with section 614.21(4) whereupon the auditor shall correct the county records as provided for under section 558.67 to reflect that the rights of the vendor have vested in the vendee.

CHAPTER 5 "HUSBAND AND WIFE"

5.1 PROBLEM:

Revised 1/06

When there is a recitation in the body of a deed or in its acknowledgment that the grantors are husband and wife, may the recitation be relied upon even when it appears from preceding instruments in the chain of title that the name of the spouse of the owner was different?

STANDARD:

Yes.

Authority:
L. M. Simes & C. B. Taylor, Model Title Standards 9.1, 9.2, 9.3 (1960).

COMMENT:

This standard applies only as to reliance on the current identity of the grantor's spouse and not as to whether there has been a proper disposition of any record title interest of the previous spouse.

5.2 PROBLEM:

Revised 1/06

When there is a recitation in the body of a deed or in its acknowledgment that the grantor is single, a widower, a widow or unmarried, may the recitation be relied upon even though other instruments in the chain of title indicate that prior to the date of the deed the grantor was married?

STANDARD:

Yes.

Authority:
Keefe v. Cropper, 196 Iowa 1179, 194 N.W. 305 (1923).
L. M. Simes & C. B. Taylor, Model Title Standards 9.1, 9.2, 9.3 (1960).

COMMENT:

This standard applies only as to reliance on the current marital status of grantor and not as to whether there has been a proper disposition of any record title interest of the previous spouse.

5.3 PROBLEM:

Revised 1/06

If a deed contains no recitation of the marital status of the grantor and no spouse joins in the deed, what showing is necessary?

STANDARD:

If a deed was recorded over ten years ago, no further showing is necessary except when a suit has been commenced or a notice of claim has been filed in accordance with Iowa Code § 614.15. If a deed is recorded less than ten years ago, an affidavit that the grantor was unmarried at the time of the execution and delivery of the deed must be obtained.

If the grantor was married at the time of the execution and delivery of a deed recorded less than ten years ago and the property was not their homestead, an affidavit must be obtained that the property was not their homestead. Further, a conveyance from the spouse will be necessary unless a showing is made that the spouse predeceased the grantor or that there was a dissolution or annulment of the marriage.

If the grantor was married at the time of the execution and delivery of a deed recorded less than ten years ago and the property was their homestead, the deed is not valid under Iowa Code § 561.13 "unless and until the spouse of the owner executes the same or a like instrument." If the spouse is living and there has not been a dissolution or annulment of the marriage, a further conveyance from the spouse will be necessary. If the spouse is no longer living or if there has been a dissolution or annulment of the marriage, a new deed must be obtained from the original grantor or, if deceased, from the original grantor's executor or administrator.

Authority:
Iowa Code §§ 561.13, 614.15 (2005).
Gustafson v. Fogleman, 551 N.W. 2d 312 (Iowa 1996).

COMMENT:

A deed given in satisfaction of a contract is not governed by this standard but is subject to the provisions of Standard 5.7.

If examining for a mortgagee which owns or is to own the mortgage and the mortgage contains no recitation of the marital status of the mortgagor and no spouse joins in the mortgage, the above standard also applies.

If examining for either a buyer or a mortgagee, and a previously recorded mortgage has been foreclosed and such mortgage contains no recitation of the marital status of the mortgagor and no spouse joined in the mortgage, the above standard also applies unless the property was not a homestead or, if the property was a homestead, the spouse was joined as a party in the foreclosure action and the interest was extinguished by the decree.

5.4 PROBLEM:

Revised 1/06

If a deed is made to John Doe and Mrs. John Doe and a later deed is made by John Doe and Mary Doe, husband and wife, is any further showing of the identity of the wife necessary?

STANDARD:

Yes. It should be shown by affidavit that Mary Doe was the wife of John Doe on the date of the execution and delivery of the deed to them.

Authority:
L. M. Simes & C. B. Taylor, Model Title Standards 5.8 (1960).

5.5 PROBLEM:

Revised 1/06

If a deed by husband and wife which is not cured by Iowa Code § 614.15 contains a release of dower by the spouse without release of homestead and the spouse does not join in the granting clause of the deed, is any further showing necessary?

STANDARD:

Yes. It is necessary to obtain proof by affidavit that the property was not occupied by the husband and wife as their homestead on the date of the execution and delivery of the deed.

Authority:
Iowa Code § 561.13 (2005).
Gustafson v. Fogleman, 551 N.W. 2d 312 (Iowa 1996).

5.6 PROBLEM: **Rev. 06/2010**

Is a release of a spouse's statutory share or homestead rights sufficient if made by one spouse acting as an attorney-in-fact for the other under a duly executed power of attorney?

STANDARD:

Yes.

Authority:
Iowa Code §§ 561.13, 597.5, and 633.211(1), .212(1) and .238(1) (2009).

COMMENT:

The legal description of a homestead property no longer needs to be included in the power of attorney as to instruments executed on or after April 16, 2007 (2007 Iowa Acts Chapter 68, H.F. 298). As to instruments executed prior to April 16, 2007, the power of attorney pursuant to which such instruments were executed would need to have the legal description of the homestead included.

The statutory share of the spouse, even though inchoate while the owner spouse is alive, would be property subject to the provisions of Iowa Code § 597.5 allowing one spouse to appoint the other as an attorney-in-fact to dispose of the appointing spouse's property. A power of attorney affecting rights in real estate should be filed of record in the county or counties where the property affected is located, so it will appear of record as evidence of the authority of the attorney-in-fact to convey the interest of the appointing spouse.

The spouse's homestead and statutory share claims become unenforceable if no suit or notice of claim has been filed on behalf of the spouse under Iowa Code § 614.15 within ten years of the date of the conveyance.

A deed given in satisfaction of a contract is not governed by this Standard but is subject to the provisions of Standard 5.7.

5.7 PROBLEM:

Revised 1/06

When an owner and spouse enter into a contract selling real estate and the contract is recorded, is it necessary for the owner's spouse to join in the execution of the deed given to fulfill the contract?

STANDARD:

No. Once a spouse has relinquished homestead rights and statutory share in a real estate contract, it is not necessary for the spouse who has relinquished such rights to execute a second instrument, such as the deed given in fulfillment of the contract. In the event a contract seller is single and marries subsequent to the execution of the contract, or the interest of a contract seller is conveyed or transferred to a married person, nothing is required from the new spouse or the spouse of the married transferee since the legal interest held by the contract seller is only personal property. Because of equitable conversion, the contract seller holds merely a security interest in the property. This Standard applies only to the situation where the spouse has no record title interest.

Authority:
Iowa Code §§ 561.13, 597.5 and 633.211(1), .212(1) and .238(1) (2005).

CHAPTER 6 "JUDICIAL PROCEEDINGS"

6.1 PROBLEM: Rev. 6/2013

When property has been acquired by a judicial foreclosure of a mortgage, trust deed or installment purchase contract, what showing is needed?

STANDARD:

1. The legal description of the property must be clearly indicated in the petition, the decree and the sheriff's deed, and there should be no material variances among them.
2. The mortgagee must be identified as the plaintiff and all other parties with an interest in the property must be identified as defendants, or, if a judgment creditor, served with a notice of pending foreclosure pursuant to §654.15B. For purposes of title, it is not necessary to name a person who does not currently have an interest in the property, such as a cosignor on the note, or a prior mortgagor who conveyed the property subject to the mortgage. (Such persons should be added as defendants if plaintiff desires a deficiency judgment against them.)
3. It is not necessary to include in the foreclosure persons who acquire an interest in the property after proper indexing of the foreclosure in lis pendens. Nor is it necessary to include persons (other than mechanics lien claimants) with a nonpossessory interest who do not record their interests until after a proper lis pendens indexation, and who neither intervened prior to the entry of the foreclosure decree, nor filed an affidavit establishing that the foreclosure plaintiff had actual notice of the claim prior to lis pendens.
4. If "parties in possession" were not named as defendants and served, the purchaser takes title subject to the interest of any parties who were in possession prior to the notation of the foreclosure on the lis pendens index, and who still are in possession of the property.
5. To affect the interests of a person with an interest in the property, the court must have in rem jurisdiction over that person's interest. Proper service of process on all parties who have not appeared in the foreclosure should be shown. Where in personam relief is sought against a person subject to Court Rule 1.211, such as a prisoner or person adjudged to be incompetent, appointment and appearance of a guardian ad litem must be shown.
6. It is common practice to add "Spouse of [mortgagor]" as a defendant and attempt service. If the process server indicates in the return of service that the mortgagor defendant was not married, this can ordinarily be relied upon by the title examiner. If it appears that the mortgagor was married, and a non-owner spouse was not joined as a defendant to the foreclosure:
a. To eliminate the spouse's dower interest in the property, an affidavit that the mortgagor was alive at the time of the sheriff's sale is sufficient.
b. To rule out a homestead interest of the spouse, it is necessary to establish, by affidavit or otherwise, that the spouse does not currently occupy the property as a homestead, and that there is no reason to believe that the spouse's absence from the property is temporary and that spouse intends to return to the property with a claim of homestead rights. This procedure will not clear title if the omitted spouse was married to the named spouse at the time of the mortgage, the mortgage was not a purchase money mortgage, and the omitted spouse did not waive homestead rights in respect of the mortgage.

7. Compliance with the Service Members Civil Relief Act should be shown. To establish that an individual defendant is not on active military service, an affidavit showing that a computerized search from a military website did not list the defendant as being on active duty is sufficient.
8. If the property is used for an agricultural purpose, a mediation release must have issued prior to the filing of the foreclosure.
9. It is not necessary in a foreclosure of nonagricultural land to show service of notices of right to cure or of acceleration of indebtedness.
10. If relief against a person with an interest in the property is granted by default where the person has not appeared, the relief may not exceed that demanded in the original notice.
11. The interest of judgment creditors can be addressed by naming them in the action and serving them with an original notice, or by serving them with a notice of pending foreclosure pursuant to Code §654.15B.
12. Where parties are served by publication, the filing of the prepublication affidavit of Court Rule 1.310, and compliance with Court Rules 1.311 through 1.314 should be shown.
13. Unless 30 days have passed since the recording of the sheriff's deed, service of a timely default notice under Court Rule 1.972 before taking relief by default must be shown.
14. The foreclosing court has authority to resolve all questions of title properly raised in the foreclosure; it is not necessary to do a separate quiet title action. To eliminate a claim against the property, the decree must reflect that the interest of a party is inferior to that of the foreclosing plaintiff, and would be eliminated by the sheriff's sale and issuance of a sheriff's deed.
15. If a person with an interest in the property is not eliminated either by the decree or by failure to timely intervene after service of a §654.15B notice of pending foreclosure, the interest survives the foreclosure. However, the foreclosure may be reopened to address that person's interest, unless an attack on the interest is barred by res judicata.
16. Unless 90 days have passed since the sheriff's sale, the sheriff's notice of sale should be shown in the abstract, showing compliance with Iowa Code §§626.74 and 626.75.
17. If a sheriff's deed was issued prior to the redemption period ordered in the decree, or if a sale was held prior to the expiration of the delay of sale period ordered in the decree, it may be necessary to reopen the foreclosure to obtain an order, after notice and opportunity for hearing, to ratify the improper action.

Authority:

3 & 4. Iowa Code §617.14 (2013) (operation of lis pendens), as amended by 84 G.A. ch. 1053 (H.F. 2370) (2012).

5. Court Rule 1.211 (guardian ad litem required in personal actions against impaired defendants); Property seized from Hickman, 533 N.W.2d 567 (Iowa 1995) (guardian ad litem not required by Court Rule 1.211 where only relief sought against impaired defendant is in rem).

6. Iowa Code §§561.1 and 561.20 (2013) (occupation as homestead necessary to claim homestead exemption, with exception of proceeds of former homestead held with view to purchase new homestead)

Iowa Code §§633.211(1) and 633.212(1) (2013) (sheriff sale eliminates inchoate dower interests).

Francksen v. Miller, 297 N.W. 2d 375 (Iowa 1980) (homestead rights of omitted spouse in possession not cut off by sheriff's sale and deed).

Bowden v. Hadley, 138 Iowa 711, 116 N.W. 689 (1908) (inchoate dower rights of omitted spouse cut off by sheriff's sale).

7. 50 U.S.C. §§501-596 (Service Members Civil Relief Act).

8. Iowa Code chs. 654A, 654B, 654C (2013) (agricultural mediation); Iowa Code §654A.1 (2013) (definition of agricultural property subject mandatory mediation); Iowa Code §654A.6 (2013) (agricultural mediation release jurisdictional requirement for foreclosure on agricultural land); Iowa Code §654A.11 (2013) (agricultural mediation release); Iowa Code §654.2B(2) (2013) (nonagricultural residential mediation).

9. Iowa Code §654.2B (2013) (failure to give notice to cure does not invalidate foreclosure).

10. Court Rule 1.976 (relief granted by default without appearance).

11. Iowa Code §654.15B (2013) (negative notice on judgment creditors).

13. Iowa Code §614.18A (2013) (attack based on failure to comply with 10-day default notice barred 30 days after sheriff's deed recorded).

14. Iowa Code §654.5(1)(c) (2013) (authority of foreclosure court to resolve title issues).

15. Lincoln Joint Stock Land Bank v. Rydberg, 15 N.W.2d 246 (Iowa 1944) (reopening foreclosure against party left out of original foreclosure).

16. Iowa Code §626.79 (2013) (90 day window for setting aside sheriff sales without proper notice).

17. Iowa Code ch. 628 (2013) (redemption); Iowa Code §§654.20 through 654.26 (2013) (foreclosure without redemption).

COMMENT:

Noncompliance with the residential mortgage mediation provisions of Code §654.4B(2) is not an objection to title; that statute specifically limits relief for noncompliance to an additional delay in the foreclosure procedure, and bars any relief unless requested prior to the recording of the sheriff deed.

As of the date of approval of this title standard, the website of the defense department for determining whether a person is on active duty in the military can be found at http://www.defense.gov/faq/pis/pc09sldr.html.

The 2012 legislature enacted 84 G.A. ch 1104 (H.F. 675), a major revision of the mechanics lien law, effective January 1, 2013. The new law moves the filing of most pre-foreclosure mechanics lien documentation from the clerk of the court to a new online state construction registry administered by the secretary of state, and dramatically reduces the window between the date of commencement of work or provision of materials and the date when formal notice is required of the claim. In examining title of foreclosed properties where mechanics liens are involved, the examiner will need to determine whether a particular lien filing is covered by the new act or by pre-2013 law.

It is common for foreclosure plaintiffs to add as defendants and to serve "parties in possession." However, failure to follow this procedure may create an omitted party problem if there are currently parties in possession who obtained that status before the notation of the foreclosure on the lis pendens index.

6.2 PROBLEM:

Revised 1/06

When the holder of a judgment for costs against a titleholder is named as a defendant in a proceeding to foreclose a mortgage, is it necessary to name as additional defendants the persons for whose benefit such costs were taxed, as, for instance, the county, the official shorthand reporter, witnesses, and attorneys entitled to attorney fees?

STANDARD:

No. A judgment is a lien only by operation of some statute, and there is no statute creating a lien in favor of a person who may ultimately become entitled to the costs if the same are paid to the clerk. The judgment creditor is the lienholder and is the only necessary party to the foreclosure.

Authority:
Van Buren County Sav. Bank v. Rockwell, 154 Iowa 26, 134 N.W. 424 (1912).

6.3 PROBLEM:

Rev. 3/12

If a judgment or order has been taken by default against a defendant without proper affidavit as to whether said defendant was in the military service and, in fact, said defendant was not in the military service at the time the judgment or order was entered, what further showing is necessary?

STANDARD:

It will be sufficient if an affidavit is later filed showing that the defendant was not in the military service at the time that judgment or order was entered and no further judgment or order is necessary after the filing of said affidavit.

Authority:
Gibbons v. Belt, 239 Iowa 961, 33 N.W. 2d 374 (1948).
Servicemembers Civil Relief Act, 50 U.S.C.A. app. §§511

6.4 PROBLEM:

Rev. 3/2005

When is the failure to appoint a guardian ad litem for a minor, incompetent or unborn heir defendant a jurisdictional defect?

STANDARD:

A guardian ad litem need not be appointed for a minor or incompetent if there is some other person described in Iowa R. Civ. P. 1.305 who may be served on behalf of the minor or incompetent. If there is no such person, a guardian ad litem must be appointed to be served and to defend for the minor or incompetent.

A guardian ad litem need not be appointed for others later born if the doctrine of virtual representation applies under Iowa R. Civ. P. 1.278. If the doctrine of virtual representation does not apply, a guardian ad litem must be appointed to be served and to defend for others later born.

Authority:

Iowa R. Civ. P. 1.211.
Iowa R. Civ. P. 1.278.
Iowa R. Civ. P. 1.305.
Irwin v. Keokuk Sav. Bank & Trust Co., 218 Iowa 477, 255 N.W. 671 (1934).

COMMENT:

If original notice on the minor or incompetent is served on behalf of one who is the guardian or other fiduciary and the guardian or fiduciary is the only person who would be available upon whom service could be made, Iowa R. Civ. P. 1.305(2) and 1.305(3) provide that the court or a judge shall appoint, without prior notice on the ward, a guardian ad litem upon whom service shall be made and who shall defend for the minor or incompetent. Iowa R. Civ. P. 1.211 provides that no judgment without a defense shall be entered against a minor or incompetent.

Unless services can be made on the guardian, parent or person aged 18 years or more who has care and custody in accordance with Iowa R. Civ. P. 1.305(2), in the case of a minor, a guardian ad litem must be appointed to be served and to defend for the minor in accordance with Iowa R. Civ. P. 1.211.

Unless service can be made on the guardian, spouse or person aged 18 years or more who has care and custody in accordance with Iowa R. Civ. P. 1.305(3), in the case of an incompetent, a guardian ad litem must be appointed to be served and to defend for the incompetent in accordance with Iowa R. Civ. P. 1.211.

Where persons composing a class which may be increased by others later born do or may make a claim affecting specific property involved in an action, a guardian ad litem must be appointed to be served and to defend for others later born in accordance with Iowa R. Civ. P. 1.278, unless all living members of the class are parties to the action.

CAVEAT:

A judgment entered against a minor or incompetent person without appointment of a guardian ad litem is merely voidable under Iowa R.C.P. 1.211 if the minor or incompetent was actually represented by an attorney or court-appointed guardian. The judgment is void only if

the minor or incompetent person received no such representation. The same rules apply to prisoners. In re Marriage of Payne, 341 N.W.2d 772 (Iowa 1983).

6.5 PROBLEM:

Rev. 9/2009

Can a person serving in a representative capacity (such as an executor, conservator or guardian ad litem), or as an officer of a corporation or as a public official, lawfully acknowledge service of notice in a probate proceeding or of an original notice in an action at law or equity or other proceeding, which could be served upon such person in a representative capacity?

STANDARD:

Yes. Anyone serving in a representative capacity which is recognized by law can lawfully acknowledge service of any notice, whether in a probate proceeding or in an action at law or equity or other proceeding, which could be served on such person in a representative capacity, where service is directed or required by either statute of Iowa or by proper order of the court.

Authority:
Collinson v. City of Dubuque, 242 Iowa 986, 47 N.W. 2d 839 (1951).
McCartney v. City of Washington, 124 Iowa 382, 100 N.W. 80 (1904).
Methods of Service of Original Notice and Return of Service, 26 Iowa L. Rev. 96 (1940).
G. F. Madsen, Marshall's Iowa Title Opinions and Standards §9.3(B) (2d ed. 1978).
Iowa R.C.P. 1.305.

6.6 PROBLEM:

Revised 1/06

If a judgment debtor, the record titleholder, appeals from a money judgment and files the required supersedeas bond, can the debtor convey marketable title?

STANDARD:

No. The judgment constitutes a lien on the real estate even though appeal was taken and bond filed. Judgments are liens upon real estate owned by judgment debtors at the time judgment is rendered, and also upon real estate subsequently acquired, for a period of 10 years from date of judgment. An appeal does not vacate or affect the judgment appealed from, but when the appeal bond is filed and approved, further proceedings are stayed. The purpose of the appeal bond is to maintain the status quo. The bond is not superior protection or substitution for

that of the lien. A court is not entitled to discharge the lien because an appeal bond has been filed.

Authority:
Edge v. Harsha, 334 N.W.2d 741 (Iowa 1983).
Iowa Code §§ 624.23(1), .24 (2005).
Iowa R. App. P. 6.7.

6.7 PROBLEM:

Rev. 6/2011

PROBLEM:

May Iowa Code § 624.23(2) be relied upon to remove judgment liens appearing in the chain of title and support a determination that a title is marketable?

STANDARD:

Yes. Iowa Code § 624.23(2) is remedial legislation embodying a procedure to permit transfer of a homestead free of any judgment lien provided:

(1) a proper written demand has been served on the owner of any judgment;

(2) no levy of execution has been made against the real estate within thirty days from the date of service of the demand; and

(3) a copy of the written demand and proof of service has been filed in the court file of the case in which the judgment giving rise to the alleged lien was entered.

Authority: In re Estate of Tolson, 690 N.W.2d 680 (Iowa 2005)
Braunger v. Karrer, 563 N.W.2d 1 (Iowa 1997)
Keane v. United Guar. Indem. Co. (In re Keane), 7 Bankr. 844 (Bankr N.D. Iowa 1980).
Mitchell v. West, 93 N.W. 380 (Iowa 1903).
Lamb v. Shays, 14 Iowa 567 (1863).
Iowa Code §§ 561.21, 624.23(2) (2011).
Redfern, Judgment Lien Does Not Attach to Homestead, 1980 Iowa Land Title News Sept./Oct. at 7.

COMMENT:

Under Iowa Code § 561.21 only a very limited class of judgments are liens against the homestead. Prior to the enactment of Iowa Code § 624.23(2), judgment debtors were unable to convey marketable title to otherwise exempt homestead real estate without a declaratory judgment or quiet title action to establish that a judgment of record was not a lien. Iowa Code §

624.23(2) now provides a procedure for establishing that judgments upon which execution has not been levied within thirty days from the date of service of proper written demand are not liens upon real estate claimed as a homestead.

It should be noted that the enactment of Iowa Code § 624.23(2) did not change existing case law as to what judgments may in fact be liens on a homestead. Unless a judgment arises out of a claim as described in Iowa Code § 561.21 or the real estate claimed as a homestead exceeds the limitations prescribed by Iowa Code §§ 561.1-.3, the judgment is not a lien on the homestead. Presumably judgment creditors whose interest is not a lien on a homestead will not levy execution when notice is served under Iowa Code § 624.23(2) because a wrongful levy would arguably subject the creditor to a claim by the judgment debtor.

CHAPTER 7 "MORTGAGES"

7.1 PROBLEM:

Revised 1/06

When a mortgage is given to two persons in joint tenancy with right of survivorship, can the surviving joint tenant execute a legally sufficient release thereof?

STANDARD:

Yes.

Authority:
Courtney v. Carr, 6 Iowa 238 (1858).
Iowa Code § 557.14 (2005).
P. E. Basye, Clearing Land Titles § 353 (2d ed. 1970).
55 Am. Jur. 2d Mortgages § 409 (1971).

COMMENT:

Upon the death of the first mortgagee there is no requirement that the mortgaged property be cleared from any possible inheritance tax lien or federal estate tax lien. The interest of the mortgagee is personal property rather than a real property interest.

7.2 PROBLEM:

Revised 1/06

Is a mortgage valid as to third parties if the mortgage is executed subsequent to the execution of the instrument by which ownership is acquired but recorded prior to the recording of said instrument of conveyance?

STANDARD:

Yes.

Authority:
Higgins v. Dennis, 104 Iowa 605, 74 N.W. 9 (1898).
Iowa Code § 558.55 (2005).
G. F. Madsen, Marshall's Iowa Title Opinions and Standards §§ 13.8(A), 13.8(A-1)(2d ed. 1978).
L. M. Simes & C. B. Taylor, Model Title Standards 16.1 (1960).

COMMENT:

If the instrument of conveyance is both executed and recorded after the filing date of the mortgage, then such mortgage is invalid as to subsequent purchasers not having actual notice thereof. This is due to Iowa's recording statutes which do not impart constructive notice of an instrument (e.g., mortgage) which is recorded outside the chain of title.

7.3 PROBLEM:

Revised 1/06

Is marketability of title derived through foreclosure of a mortgage impaired by failure to release of record the instrument which created the interest foreclosed, or any instrument which created a junior lien or interest which was extinguished by the foreclosure?

STANDARD:

No.

Authority:
3 J. Palomar, Patton and Palomar on Land Titles, §§ 564-66 (3d ed. 2003).
L. M. Simes & C. B. Taylor, Model Title Standards 16.5 (1960).

7.4 PROBLEM:

Revised 1/06

When a mortgage is followed by another which can be determined by the record to have been given to correct, to modify or to be a rerecording of the former mortgage, is marketability impaired by a failure to discharge one of the mortgages if the other is discharged of record?

STANDARD:

No.

Authority:
L. M. Simes & C. B. Taylor, Model Title Standards 16.7 (1960).

COMMENT:

If the original mortgage is the one released, the possibility exists that the parties were merely attempting to clear the record of it, leaving in force the corrective or rerecorded mortgage. However, as stated by the Model Title Standard cited above, "the record and the circumstances of the case will usually reveal that remote possibility."

7.5 PROBLEM:

Revised 1/06

Is the release of a mortgage sufficient if it correctly states the document reference number and reasonably identifies the mortgagee?

STANDARD:

Yes. The document reference number of the mortgage and the identity of the mortgagee are the most important parts of the mortgage release.

COMMENT:

Minor defects in the description of the mortgage can be disregarded. See Iowa Land Title Standard 1.1.

Pursuant to Iowa Code § 558.49, the document reference number is the number assigned by the county recorder to indicate where the record of the document will appear. This may be volume and page numbers or an instrument number or some other numbering system.

7.6 PROBLEM:

New 12/2010

If a grantee is described as a "nominee," must a subsequent instrument of conveyance, satisfaction, assignment, or release from that grantee also include a recital if that grantee's authority "as nominee"?

STANDARD:

No.

Authority:

Iowa Code § 663A.1102(18)(k)(2009)
Iowa Code § 490.1301(2) (2009)

Comment:

The naming of a grantee "as nominee" in a deed, mortgage, or assignment does not necessarily create or acknowledge the existence of a trust. Iowa Code § 663A.1102(18)(k) ("'Trust' does not include any of the following: …[a]n arrangement under which a person is a nominee or escrow agent for another.") The use of a nominee is a concept borrowed largely from securities law. See Iowa Code § 490.1301(2) ("'Beneficial shareholder' means a person who is the beneficial owner of shares held in a voting trust or by a nominee on the beneficial owner's

behalf."). The purpose of this type of ownership is generally to make the individual grantee the bare legal owner of the interest and to allow the beneficial interest to be owned and transferred through private systems. See Slesinger & McLaughlin, *Mortgage Electronic Registration System, 31* IdahoL. Rev. 805, 806 (1994-95); *Mortgage Electronic Registration Systems, Inc., v. Nebraska Dep't of Banking & Finance,* 704 N.W. 2d 784, 788 (Neb. 2005); see also *Delaware v. New York,* 507 U.S. 490, 495 (1993).

Apart from any issue of the proper parties to litigation, Iowa law protects "subsequent purchasers, without notice," including parties affected by the separation of a mortgage from the underlying indebtedness. Iowa Code § 558.41(1) (2009); *Bank of Indiana v. Anderson,* 14 Iowa 544 (1863); *Day v. Brenton,* 102 Iowa 482, 71 N.W. 538 (1897). Unless other facts in the abstract put the examiner on notice that the nominee's authority is limited, the title examiner may rely upon an instrument given by the grantee as the legal owner of the interest without further recitation of nominee status, even if the identity of the beneficial owner shown on two instruments differs. See *Bank of Indiana v. Anderson,* 14 Iowa 544 (1863); *Day v. Brenton,* 102 Iowa 482, 71 N.W. 538 (1897); *Foy v. Armstrong,* 113 Iowa 629, 85 N.W. 753 (1901).

In particular, when an abstract of title shows that Mortgage Electronic Registration Systems, Inc. (MERS), is the mortgagee and that it is the nominee if a third party lender, a title examiner may rely upon the release given by MERS, with or without further recitation that MERS is the nominee if any particular beneficial owner (even when the lender shown on the release differs from the lender shown on the mortgage). Mortgage documents in common use for MERS specifically recite the borrower's understanding that MERS is empowered to do all of the things that the owner of a mortgage may do, such as give releases.

7.7 PROBLEM:

Revised 3/14

What is necessary to clear title to real property encumbered by a mortgage when an individual mortgagee is deceased?

STANDARD:

The debt and lien of mortgage are personal property in the hands of the mortgagee and have the same character in the hands of the personal representative and successors in interest. Assuming Title Standard 7.1 does not apply:

1. **If there is present estate administration**, a title examiner should require either a release or satisfaction from the personal representative or the recorded assignment of mortgage from the personal representative and a release from the assignee.

2. **If there is completed estate administration or if there has been probate without administration and the record shows proof of notice and that contest thereof is time-barred**, a title examiner should require the release of all persons inheriting the personal

property interest of the decedent as established by a recorded assignment by the personal representative, the will of record, or pursuant to the laws of intestacy. If there is no assignment by the personal representative of record additional proceedings in probate should not be necessary because title to property passes at death and because no other disposition has been provided for. A satisfaction made by persons entitled to receive the personal property of the deceased mortgagee is sufficient.

3. **If there is no estate administration and five or more years have passed from the mortgagee's death**, a title examiner should require an adequate showing of record as to the persons entitled to inherit the personal property interest represented by the mortgage and a release or satisfaction by such persons.

4. **If there is no estate administration and fewer than five years have passed from the mortgagee's death**, a title examiner should require:
   (i) (a) the administration of the decedent's estate and a release or satisfaction from the personal representative or (b) the recorded assignment of mortgage from the personal representative and a release from the assignee; or
   (ii) quiet title or other judicial proceeding; or
   (iii) a record of distribution pursuant to section 633.356, Code of Iowa, and a satisfaction by the successor or successors of the decedent.

   Authority:
   Burton v. Hintrager, 18 Iowa 348 (1865)
   Iowa Code § 633.95 (2013) (fiduciary may release liens without order)
   Iowa Code § 633.144 (2013) (releases by foreign fiduciary without order)
   Iowa Code § 633.211 (2013) (intestate share of spouse, no issue or all issue of spouse)
   Iowa Code § 633.212 (2013) (intestate share of spouse, issue not of surviving spouse)
   Iowa Code § 633.219 (2013) (share of others than surviving spouse)
   Iowa Code § 633.331 (2013) (limitation on probate and administration to five years)
   Iowa Code § 633.350 (2013) (title to decedent's property, when title passes)
   Iowa Code § 633.356 (2013) (distribution of property by affidavit)

COMMENT:

See also Iowa Code § 614.21 (2013) (ancient mortgages).

Title Standard 7.8

New 6/2013

PROBLEM.

What showing is needed where a mortgage granted by a now deceased borrower is foreclosed on *in rem*?

STANDARD.

1. If a foreclosure court had *in rem* jurisdiction of the persons with an interest in the estate of a deceased borrower, and entered a decree of foreclosure, there is generally no need to open an estate for the deceased borrower. Under the doctrine of res judicata, a title problem can only arise in such a case if a person in interest objects to the procedure in the foreclosure case and the court upholds the objection.
2. If the property passes outside the probate estate, such as through a deed of joint tenancy, it is generally sufficient to add the successors in interest of the borrowers as defendants.
3. If the estate is being administered, the foreclosure should name as defendants the personal representative, and those known persons reasonably believed to be entitled under the will or intestacy to inherit. If there is any doubt about who is entitled to inherit the property, the foreclosure also should name as defendants all unknown persons with an interest in the estate.
4. If the estate is not being administered, the foreclosure should name as defendants all known persons who are reasonably believed to have a right to inherit the property, and also all unknown persons with an interest in the estate.
5. Generally, the state should be added as a defendant in respect of death taxes and the estate recovery program. It is generally not necessary to add the federal government in respect of estate taxes, unless it has filed a lien in the office of the county recorder, or unless the examiner had reason to believe that the deceased mortgagor had an estate large enough to be subject to federal estate tax.
6. It is not necessary to add as defendants, or to serve, unsecured creditors of the estate, unless they have requested notice under §633.42.
7. If after a foreclosure is commenced and noted on the *lis pendens* index, and an estate is opened for the deceased mortgagor, it is not necessary to amend to add the personal representative as a defendant.

AUTHORITY:

Iowa Code §§617.11 through 617.15 (operation of *lis pendens*)
Iowa Code §633.350 (vesting of property at death in heirs/beneficiaries of deceased).

Iowa Code §654.4A, subsections (4) and (5) (simplified service on persons interested in estate of deceased mortgagor).
26 U.S.C §6324(a)(1) (automatic estate tax lien divested on property used to pay debts and charges of estate).
Iowa Court Rules 1.310 through 1.315 (service by publication in *in rem* cases).
Iowa Court Rule 1.407(1)(b) (Intervention as a matter of right by person claiming interest in property involved in pending action).

COMMENT:

The State of Iowa should be added as a party in cases where the mortgaged property passes on death to a surviving joint tenant, remainderman, or other beneficiary who takes outside of the probate estate, where the examiner has reasonable grounds to believe that property may be subject to state death taxes or the estate recovery program. Similarly, where the property passes free of death taxes to a beneficiary of the property in probate, and where there are no reasonable grounds to believe that the estate is subject to the estate recovery program, it may not be necessary to add the state as a party to the foreclosure.

Section 654.4A, subsections (4) and (5), Code of Iowa, provide for simplified service of process on persons with an interest in a deceased borrower's estate for foreclosures commenced after June 30, 2009.

Under the doctrine of *res judicata*, a person in interest over whom the foreclosure court has proper jurisdiction who wishes to demand the opening of an estate must do so by a timely objection in the foreclosure, and cannot wait until after the foreclosure to attack it collaterally.

If a foreclosure is commenced against the persons who are entitled to inherit in an estate not currently being administered, and subsequent to the notation of the foreclosure on the *lis pendens* index an estate is opened, the personal representative has constructive notice of the foreclosure and need not be added as a defendant, without prejudice to the right of the personal representative to intervene in the foreclosure to protect the estate's interest. However, it is good practice to make sure that the personal representative's attorney is aware of the pending foreclosure.

The interest of the State of Iowa under the estate recovery program is probably not a lien interest, but since the state will generally have to be added in respect of death taxes, it costs nothing to add the ERP interest to the foreclosure.

The question of whether the automatic estate tax lien of 26 U.S.C. §6324 is divested on foreclosure as a charge against the estate is unsettled; but it is rare to see the federal government attempting to enforce it against property taken back in foreclosure. In the unlikely event that the federal government claims an interest after foreclosure because of the automatic estate tax lien, the foreclosure can be reopened under the doctrine of *Lincoln Joint Stock Land Bank v. Rydberg*, 15 N.W.2d 246 (Iowa, 1944) to clear it.

If an overplus arises at the sheriff's sale, an estate may be necessary to administer it; however, this does not affect title to the real estate foreclosed against. Best practice indicates that if the estate is not being administered, and the United States was not a party to the foreclosure in respect of federal death taxes, the US, through the US Attorney and the Internal Revenue Service, should be served with copies of any application for, and order for hearing on, distribution of any overplus arising at the sheriff sale. Such an application should reasonably identify the deceased mortgagor and indicate that the US is being added in respect of possible death taxes and the automatic lien of 26 U.S.C. §6324.

CHAPTER 8 "NAMES"

8.1 PROBLEM:

Revised 1/06

When the surname of an individual, as it appears in the record title, is spelled in two or more ways that are usually pronounced alike or substantially alike, the given name, names or initials being the same in all cases, is it necessary to require identification?

STANDARD:

No. The doctrine of Idem Sonans (namely, that if two names as commonly pronounced in the English language are sounded alike, a variance in their spelling is immaterial and a slight difference in their pronunciation is unimportant, even though the names are spelled differently, if the attentive ear finds difficulty in distinguishing between the two names when pronounced and in either case they are to be regarded as the same) should be liberally applied and the fact of identity of the party presumed in spite of variations in the spelling of the same, except where a question of constructive service of notice is involved.

Authority:
Webb v. Ferkins, 227 Iowa 1157, 290 N.W. 112 (1940).
Iowa Code § 558.6 (2005).
L. M. Simes & C. B. Taylor, Model Title Standards 5.1 (1960).
57 Am. Jur. 2d Names §§ 60-63 (2003).
1 J. Palomar, Patton and Palomar on Land Titles § 78 (3d ed. 2003).

COMMENT:

The doctrine of Idem Sonans also applies when a given name of an individual, as it appears in the record title, is spelled in two or more ways that are usually pronounced alike or substantially alike, and the surname and initials are the same in all cases.

8.2 PROBLEM:

Revised 1/06

Should proof of identity be required when there is a variance in names resulting from the fact that in one instrument an individual is designated only by a given or first name and the surname and in another by the same first name and surname with the addition of a middle name or initial?

STANDARD:

No. Under the Iowa Code and court decisions, there is a presumption of identity. No affidavit is required.

Authority:
Vanderwilt v. Broerman, 201 Iowa 1107, 206 N.W. 959 (1926).
Iowa Code § 558.6 (2005).
L. M. Simes & C. B. Taylor, Model Title Standards 5.2 (1960).

8.3 PROBLEM:

Revised 1/06

When there is a variance in names resulting solely from the fact that the given name of a party is shown in full in one instrument while in another instrument such name is abbreviated, should evidence of identity be required?

STANDARD:

No. The examiner should rely on all customary and usually recognized abbreviations and deviations of given names. No affidavit is required.

Authority:
State v. Moffit, 155 Iowa 702, 136 N.W. 908 (1912).
Brown v. Piper, 91 U. S. 37 (1875).
1 J. Palomar, Patton and Palomar on Land Titles § 75 (3d ed. 2003).
L. M. Simes & C. B. Taylor, Model Title Standards 5.3 (1960).

COMMENT:

See Iowa Land Title Standard 3.4 regarding corporate names and abbreviations.

8.4 PROBLEM:

Revised 1/06

When a name is changed through marriage subsequent to acquisition of title and then conveyance is by an instrument executed in the married name, is identification sufficient if the instrument contains a recital as to the former name (e.g., "Mary Brown, formerly Mary Smith")?

STANDARD:

Yes. In the absence of any such recital, the fact of the marriage should be independently established by marriage record or affidavit.

Authority:
Keefe v. Cropper, 196 Iowa 1179, 194 N.W. 305 (1923).
1 J. Palomar, Patton and Palomar on Land Titles § 73 (3d ed. 2003).

8.5 PROBLEM:

Revised 1/06

Should an examiner rely upon a recital in a subsequent instrument purporting to overcome an error in the given name, names or initials or a minor error in the surname of the person as the same appears in a prior instrument?

STANDARD:

Yes. In the absence of special circumstances creating suspicion, recitals should be relied upon without requiring additional proof.

Authority:
Keefe v. Cropper, 196 Iowa 1179, 194 N.W. 305 (1923).
L. M. Simes & C. B. Taylor, Model Title Standards 5.4 (1960).
1 J. Palomar, Patton and Palomar on Land Titles § 79 (3d ed. 2003).

8.6 PROBLEM:

Revised 1/06

When the given name or names or the initials as used in a grantor's signature on a deed vary from the name as it appears in the body of the deed, but the name as given in the certificate of acknowledgment agrees with either the signature or the body of the deed, is additional proof of identity necessary?

STANDARD:

No. The certificate of acknowledgment should be accepted as providing adequate identification.

Authority:
Paxton v. Boss, 89 Iowa 661, 57 N.W. 428 (1894).
1 J. Palomar, Patton and Palomar on Land Titles § 79 (3d ed. 2003).
L. M. Simes & C. B. Taylor, Model Title Standards 5.6 (1960).

8.7 PROBLEM:

Revised 1/06

Of what importance are words which are descriptio personae, such as "Mary Green, wife of John Green", and such title prefixes and suffixes as Dr., Jr., Sr., M.D., D.D.S., Mr., Mrs., Miss or Ms.?

STANDARD:

They form no part of the name and may be disregarded except where description personae phrases, prefixes or suffixes are in conflict in a manner which raises a question of identity and except that the words "Senior" and "Junior", and the abbreviations therefor, do have significance and must be observed when both appear in connection with the same name in the chain of title.

Authority:
State v. Dankwardt, 107 Iowa 704, 77 N.W. 495 (1898).
1 J. Palomar, Patton and Palomar on Land Titles § 76 (3d ed. 2003).
L. M. Simes & C. B. Taylor, Model Title Standards 5.5 (1960).
65 C. J. S. Names §§ 3-8 (1966).

8.8 PROBLEM:

Revised 1/06

Whose affidavits or recitals are acceptable?

STANDARD:

Affidavits or recitals should be made by persons competent to testify in court, state facts rather than conclusions and disclose the basis of the maker's knowledge. The value of an affidavit or recital is not necessarily diminished by the fact that the maker is interested in the title or the subject matter of the affidavit or recital. However, the examiner should consider the maker's knowledge and interest in the transaction.

Authority:
Iowa Code § 558.8 (2005).
L. M. Simes & C. B. Taylor, Model Title Standards 8.2 (1960).

8.9 PROBLEM:

Revised 1/06

Since Iowa Code § 558.8 provides that no one except the owner in possession of the real estate shall have the right to file an affidavit explanatory of title, must the record show that the affidavit was filed by, or under the direction of, the owner of the real estate?

STANDARD:

No. No one except the owner of the real estate has any interest in perfecting the title and the statutory provision in that regard is not as strict and explicit as in Iowa Code § 614.17 in connection with affidavits of possession. Therefore, it may safely be presumed that the affidavit was filed by the owner or under authority of the owner.

8.10 PROBLEM:

Revised 1/06

When a discrepancy in a name occurred more than ten years earlier and is of too serious a nature to be ignored, may an examiner rely on an affidavit of possession under Iowa Code § 614.17A to overcome this irregularity provided that the abstract does not show that there are any claims of record under the provisions of said section?

STANDARD:

Yes.

Authority:
Tesdell v. Hanes, 248 Iowa 742, 82 N.W. 2d 119 (1957).
Lane v. Travelers Ins. Co., 230 Iowa 973, 299 N.W. 553 (1941).
G. F. Madsen, Marshall's Iowa Title Opinions and Standards § 12.1 (2d ed. 1978).
Iowa Code § 614.17A (2005).

CHAPTER 9 "PROBATE"

9.1 PROBLEM:

Rev. 9/2009

When a will vests the executor with unrestricted power to sell real estate, is an order of court necessary either in connection with the sale or the execution of the executor's deed?

STANDARD:

No.

Authority:
Iowa Code §633.383 (2009).

COMMENT:

This is true whether the power is mandatory or merely discretionary.

9.2 PROBLEM:

Rev. 9/2009

In proceedings to sell real estate is it necessary to join as a party a person who has filed a claim or a spouse of a distributee or to serve notice upon them?

STANDARD:

No, unless they have requested notice in accordance with Iowa Code § 633.42.

Authority:
Iowa Code § 633.389 (2009).

COMMENT:

A sale by a fiduciary is governed by Iowa Code §§ 633.386 through 633.402. A fiduciary must serve a notice of hearing upon "all persons interested," which Iowa Code § 633.389 defines as including "only distributees in the estate and persons who have requested notice as provided by this probate code." Claimants and spouses of distributees are not necessary parties, and it is not necessary to serve notice upon them.

9.3 PROBLEM:

Rev. 9/2009

When real estate is acquired by a personal representative in the course of the administration of an estate through foreclosure of a mortgage or by forfeiture of a real estate contract, may the personal representative sell such real estate without court approval in absence of such authority to sell in the Will?

STANDARD:

No. The legal representative has authority to sell but a court order is required. The court order may be with or without notice as the court may determine.

Authority:
Iowa Code §§633.385-.389 (2009).

COMMENT:

The real property acquired in this manner is deemed personal property for purpose of administration and distribution. Court approval would be required for its sale.

9.4 PROBLEM:

Rev. 6/2010

Is an order of court necessary to authorize the release of mortgage, judgment or other lien held by the estate?

STANDARD:

No.

Authority:
Iowa Code §633.95 (2009).

9.5 PROBLEM:

Rev. 6/2010

If the owner of real estate dies testate, is a showing required to demonstrate that the executor has given notice of the probate of the Will pursuant to Iowa Code §§633.304 or .305?

STANDARD:

Yes. The probate proceedings must show that notice of admission of the Will to probate was published in accordance with the provisions of Iowa Code §§633.304 or .305. Further, the probate proceedings must show that said notice was mailed to the surviving spouse, each heir of the decedent, and each devisee under the Will whose identities are reasonably ascertainable, at such persons' last known addresses. Notice does not need to be mailed to the executor or to any persons who waived notice.

Such a showing is not required if (a) the estate has been closed over five years or (b) the real estate was sold in the estate proceedings.

Authority:
Iowa Code §§633.44, .304, .305, .488 (2009).

COMMENT:

When notice is given by mail pursuant to Iowa Code §§633.304 or .305 (2009), proof of such mailing should be by affidavit.

If, by virtue of intestate succession, the surviving spouse would receive all of the property, other persons who would have received the decedent's property had the surviving spouse not survived are not "heirs" as that term is defined in Iowa Code §633.304.

See also Iowa Land Title Standard 9.14.

9.6 PROBLEM:

Rev. 6/2010

May Iowa Code §633.93 be relied upon to bar action for recovery of real estate by persons claiming under the deceased, ward or beneficiary when the property has been sold by the fiduciary and when the deed from the fiduciary has been recorded for more than five years?

STANDARD:

Yes.

9.7 PROBLEM:

Rev. 6/2010

Is it necessary that the probate records show the closing of the estate if it appears that the interests of the heirs or devisees entitled to the real estate have been conveyed?

STANDARD:

No. However, it is necessary that all death taxes have been paid or the liens released; that the time for filing claims has lapsed; that all timely filed claims, if any, have been resolved; and that no other reasonable grounds appear for the personal representative to sell or mortgage the real estate.

Authority:
Iowa Code §§ 633.351 and 633.354 (2009).

COMMENT:

If the personal representative is in possession pursuant to Iowa Code §633.351, a court order may be required by Iowa Code §633.354.

9.8 PROBLEM:

Rev. 6/2010

What showing is necessary when title to property is derived through heirs of an intestate decedent when there has been no administration of the decedent's estate?

STANDARD:

A. In the absence of special circumstances putting the examiner on notice, marketable title should be accepted as being established in such cases where it is shown by affidavit that:

(1) the decedent died intestate at least five years prior; and

(2) the estate of the decedent had not been administered upon; and

(3) the decedent was survived by the persons named in the affidavit, specifying their relationship to the decedent; and

(4) a showing of the payment of or nonliability for Iowa inheritance and estate taxes; and

(5) a showing of the payment of or nonliability for federal estate tax.

B. A clearance of inheritance tax (CIT) pursuant to Iowa Code §450.22 is necessary unless any of the following are shown in the abstract:

(1) the death occurred more than ten years ago and the tax was not deferred; or

(2) the property passes to the surviving spouse of a decedent; or

(3) the property passes to a lineal ascendant or an adopted or biological child, stepchild or other lineal descendant of a decedent.

C. A showing that there is no Iowa estate tax lien is necessary unless any of the following are shown in the abstract:

(1) the death occurred on or after January 1, 2005; or

(2) the death occurred more than ten years ago; or

(3) Form 706, United States Estate Tax Return, is not required to be filed.

D. A showing that there is no federal estate tax lien is necessary unless (1) the death occurred more than ten years ago or (2) Form 706, United States Estate Tax Return, is not required to be filed.

Authority:
Siedel v. Snider, 241 Iowa 1227, 44 N.W. 2d 687 (1950).
See, Sorenson v. Wright, 268 N.W. 2d 203 (Iowa 1978).
Iowa Code §§450.7 (lien), 450.9 (family exempt from tax), 450.10 (6) (family exempt from rate) and 450.22 (exemption from return) (2009).
Iowa Code §§451.2 and 451.12 (2007).
I. R. C. §6324.

COMMENT:

Iowa Code §633.413 bars claim after five years from the date of death.

Acts 1999 (78GA) Ch 151, § 45 clarifies that the inheritance tax lien expires after ten years from the date of death, except when tax has been deferred, regardless of date of death.

Chapter 451 of the Code of Iowa, which provided for the Iowa estate tax, was repealed in 2008. 2008 Iowa Acts, ch. 119, § 37. However, the provisions of former Chapter 451 apply in connection with deaths occurring prior to July 1, 2008. See Iowa Admin. Code, r. 701-87.1(1) (2008). ("[Chapter 87 of Rule 701, Iowa Estate Tax] is applicable … for dates of death occurring prior to July 1, 2008".) The Iowa estate tax is the amount allowed under the Internal Revenue Code as a credit against the federal estate tax liability of an estate, less the Iowa inheritance tax paid. Due to the phase out of the federal estate tax credit under the Economic Growth and Tax Relief Act of 2001, the Iowa estate tax is not applicable in connection with deaths on or after January 1, 2005. See I.R.C. § 2011 (eliminating the state death tax credit upon which the Iowa estate tax was based, for deaths after December 31, 2004).

As to federal estate taxes, if the death occurred less than ten years ago and Form 706, United States Estate Tax Return, is required to be filed, a showing should be made that (1) there is no federal estate tax payable; (2) the federal estate tax has been paid; or (3) the lien of the federal estate tax has been released.

The tax lien resulting from a generation skipping transfer under Chapter 450A of the Code of Iowa encumbers the transferred property for a period of ten years from the date of the transfer. However, unless the lien has been perfected by recording, a transfer to a bona fide purchaser for value divests the property of the lien. Iowa Code § 450A.6 (2009). According to Iowa Code § 450A.2, the generation skipping tax liability, if any, is equal to the maximum federal credit allowable under section 2604 of the Internal Revenue Code. Pursuant to its terms, however, Section 2604, and therefore the credit provided for thereunder, does not apply to generation skipping transfers occurring after December 31, 2004. I.R.C. § 2604(c).

9.9 PROBLEM:

Rev. 6/2010

When title is or will be acquired by a bona fide purchaser or when a mortgage is or will be granted to a bona fide mortgagee, for adequate and full consideration in money or money's worth, from a surviving joint tenant who holds title under a deed creating a valid joint tenancy, what showing is necessary as to the deed or mortgage from such survivor?

STANDARD:

A. A showing of the payment of or non-liability for Iowa estate and inheritance taxes is necessary. No showing is necessary as to generation skipping transfer tax unless the lien of the tax has been perfected by recording.

B. Concerning Iowa inheritance taxes, a clearance of inheritance tax (CIT) pursuant to Iowa Code § 450.22 is necessary unless:

(1) the death occurred more than ten years ago, or

(2) the property passed to the surviving spouse of a decedent, or

(3) the property passed to a lineal ascendant or an adopted or biological child, stepchild or other lineal descendant of a decedent.

C. Concerning Iowa estate taxes, a showing of the payment of or non-liability therefore is necessary unless:

(1) the death occurred on or after January 1, 2005, or

(2) the death occurred more than ten years ago, or

(3) a Form 706, United States Estate Tax Return, is not required to be filed.

Authority:
Waterman v. Burbank, 195 N.W. 191 (Iowa 1923).
Eddy v. Short, 179 N.W. 818 (Iowa 1920).
Iowa Code §§ 450.7 (lien), 450.9 (family exempt from tax), 450.10(6) (family exempt from rate), and 450.17 and 450.22 (exemption from return) (2009).
Iowa Code ch. 450A (2009).
Iowa Code §§451.2 and 451.12 (2007).
I.R.C. § 2011.
I.R.C. § 2604.
I.R.C. § 6324.
Rev. Rul. 56-144, 1956-1 C.B. 563.
Iowa Admin. Code, r. 701-87.1(1) (2008).

COMMENT:

Revenue Ruling 56-144 provides that "[a]ny part of such property, which is transferred by the surviving tenant to a bona fide purchaser, mortgagee, or pledgee for an adequate and full consideration in money or money's worth, is divested of the Federal estate tax lien under Section 6324(a)(2) of the Code. … This conclusion is not affected by the fact that a purchaser, mortgagee, or pledgee of property from a surviving tenant is presumed to have knowledge of the estate tax lien by reason of the recital of death of a joint tenant in the chain of title." Rev. Rul. 56-144, 1956-1 C.B. 563.

Chapter 451 of the Code of Iowa, which provided for the Iowa estate tax, was repealed in 2008. 2008 Iowa Acts, ch. 1119, § 37. However, the provisions of former Chapter 451 apply in connection with deaths occurring prior to July 1, 2008. See Iowa Admin. Code, r. 701-87.1(1) (2008). ("[Chapter 87 of Rule 701, Iowa Estate Tax] is applicable … for dates of death occurring prior to July 1, 2008".) The Iowa estate tax is the amount allowed under the Internal Revenue Code as a credit against the federal estate tax liability of an estate, less the Iowa inheritance tax paid. Due to the phase out of the federal estate tax credit under the Economic Growth and Tax Relief Act of 2001, the Iowa estate tax is not applicable in connection with deaths on or after January 1, 2005. See I.R.C. § 2011 (eliminating the state death tax credit upon which the Iowa estate tax was based, for deaths after December 31, 2004).

The tax lien resulting from a generation skipping transfer under Chapter 450A of the Code of Iowa encumbers the transferred property for a period of ten years from the date of the transfer. However, unless the lien has been perfected by recording, a transfer to a bona fide purchaser for value divests the property of the lien. Iowa Code § 450A.6 (2009). According to Iowa Code § 450A.2, the generation skipping tax liability, if any, is equal to the maximum federal credit allowable under section 2604 of the Internal Revenue Code. Pursuant to its terms, however, Section 2604, and therefore the credit provided for thereunder, does not apply to generation skipping transfers occurring after December 31, 2004. I.R.C. § 2604(c).

9.10 PROBLEM:

Rev. 9/2009

When title to real estate is conveyed by the fiduciary pursuant to a contract of sale made by the decedent, is it necessary to require the payment of claims against the estate of the decedent, the payment or showing of nonliability for state inheritance taxes and federal estate taxes, and the closing of the estate?

STANDARD:

No. The equitable title to the property passes to the purchaser upon the execution of the contract of sale. There is no lien for death taxes on the real estate.

9.11 PROBLEM:

Rev. 9/2009

When title to real estate is conveyed by the surviving joint tenant pursuant to a contract of sale in which the contract preserves the joint tenancy of the sellers and the right of the surviving joint tenant to receive the proceeds, is it necessary to require a regular probate proceeding or clearance of inheritance tax (CIT)?

STANDARD:

No. The equitable title to the property passes to the purchaser upon the execution of the contract of sale. There is no lien for death taxes on the real estate.

9.12 PROBLEM:

Rev. 3/2005

When real estate is transferred during the administration of an estate by the personal representative under Iowa Code § 633.386, or under small estate administration, Iowa Code § 635.12, or under power of sale in the will, what showings must be made to clear title with regard to the payment of taxes, administration expenses, and claims filed in the estate?

STANDARD:

(1) An adequate showing must be made with regard to the payment of, or nonliability of the estate for, federal estate taxes, or a specific release of the federal estate tax lien must be obtained.

(2) No showing is required with regard to Iowa inheritance and estate taxes.

(3) Unless notice of tax lien has been filed, no showing is required with regard to federal income taxes or Iowa income taxes.

(4) No showing is required with regard to the payment of costs of administration of the estate.

(5) No showing is required with regard to the existence or payment of claims filed in the estate.

(6) No showing is required with regard to personal taxes, liens and judgments against heirs or beneficiaries.

Authority:

1. United States v. Vohland, 675 F.2d 1071 (9th Cir. 1982).
   I.R.C. §§ 2204, 6325 (West 1989).
2. Iowa Code § 450.7(3) (2003).
   Iowa Code § 451.12 (2003).
3. I.R.C. § 6323(a) (West Supp. 1992).
   Iowa Code § 422.26 (2003).

G.F. Madsen, Marshall's Iowa Title Opinions and Standards §§ 16.9(A), 18.1(B) (2d ed. 1978).

4. & 5. Iowa Code §§ 633.78, .395, .430 (2003)
   Expenses of administration and claims do not constitute liens on real property in the estate.

See G.F. Madsen, Marshall's Iowa Title Opinions and Standards § 16.8(D) (2d ed. 1978).

6. Judgment creditors of heirs and devisees are not necessary parties.
   Iowa Code § 633.389 provides "for purposes of this section, the term 'all persons interested' includes only distributees in the estate and persons who have requested notice as provided by this Code."
   See generally 34 C.J.S. Executors & Administrators § 640 (1942);
   Annotation, Lien of Judgment Against Heir or Devisee as Attaching to Land Sold by Executor or Administrator, 68 A.L.R. 1479 (1930).

9.13 PROBLEM:

Rev. 9/2009

When real estate of decedent is sold or mortgaged under Iowa Code §633.386 to pay debts and charges or for any other purpose, is a notice of hearing thereon directed "to all persons interested in the above described real estate," or by use of words of similar import, sufficient to give the court jurisdiction?

STANDARD:

No. All persons interested must be individually named in the notice. Where there is a devise to a class, all living members of the class should also be individually named.

Authority:

Iowa Code §633.389 (2009).

9.14 PROBLEM:

Rev. 9/2009

Is a showing required to demonstrate that the personal representative has given notice by ordinary mail to each claimant pursuant to Iowa Code §§ 633.230 or 633.304?

STANDARD:

(a) If the real estate is sold during administration of the estate, no.

(b) If the real estate is sold within five years after the estate is closed, yes.

(c) If the real estate is sold five years or more after the estate is closed, no.

Authority:
Iowa Code §633.230 (2009) (notice in intestate estates).
Iowa Code § 633.304 (2009) (notice in testate estates).
Iowa Code § 633.488 (2009) (five-year statute of repose).

COMMENT:

Iowa Code §§ 633.230 and 633.304 require the personal representative to give notice by ordinary mail to a "person believed to own or possess a claim which will not or may not be paid or otherwise satisfied during administration" and to publish a notice of estate administration. When notice is given by mail, proof of such mailing should be by affidavit or certified statement under Iowa Code § 622.1. Likewise, if the personal representative believes there is no such "person believed to own or possess a claim which will not or may not be paid or otherwise satisfied during administration" upon whom to serve a notice, a showing should be made by an affidavit, certified statement, or final report to that effect.

See also Iowa Land Title Standard 9.5.

9.15 PROBLEM:

Rev. 6/2010

What showing is necessary when title is derived through beneficiaries of a nonresident testate decedent who died more than five years ago and there has been foreign administration but no Iowa ancillary administration of the decedent's estate?

STANDARD:

A. In the absence of special circumstances putting the examiner on notice, marketable title should be accepted as being established in such cases where there is shown in the abstract all of the following:

(1) The decedent died testate more than five years ago; and

(2) the decedent's Will has not been denied probate in Iowa; and

(3) the surviving spouse, if any, did not elect to take against the Will; and

(4) no child was born to or adopted by the decedent after execution of the Will; and

(5) a showing of the payment of or nonliability for Iowa estate and inheritance taxes, unless exceptions apply; and

(6) a showing of the payment of or nonliability for federal estate tax; and

(7) an exemplified copy of the decedent's Will, the order admitting it to probate, an inventory or its equivalent and the order closing the foreign probate or an equivalent showing to determine the devisees of the Iowa real estate.

B. A clearance of inheritance tax (CIT) pursuant to Iowa Code §450.22 is necessary unless any of the following are shown in the abstract:

(1) the death occurred more than ten years ago and the tax was not deferred; or

(2) the property passes to the surviving spouse of a decedent; or

(3) the property passes to a lineal ascendant or an adopted or biological child, stepchild or other lineal descendant of a decedent.

C. A showing that there is no Iowa estate tax lien is necessary unless any of the following are shown in the abstract:

(1) the death occurred on or after January 1, 2005; or

(2) the death occurred more than ten years ago; or

(3) Form 706, United States Estate Tax Return, is not required to be filed.

D. A showing that there is no federal estate tax lien is necessary unless any of the following are shown in the abstract:

(1) the death occurred more than ten years ago; or

(2) Form 706, United States Estate Tax Return, is not required to be filed.

Authority:
Iowa Code §§450.7 (lien), 450.9 (family exempt from tax), 450.10 (6) (family exempt from rate) and 450.22 (exemption from return) (2009).
Iowa Code §§451.2 and 451.12 (2007).
Iowa Code §§633.413 and 633.497 (2009).
I. R. C. §6324.

COMMENT:

Iowa Code §633.497 determines the procedure to establish a foreign Will as a muniment of title, after expiration of the five year period from date of death.

Iowa Code §633.413 bars claims after five years from the date of death.

For nonresident intestate decedents, when there has been no administration of the estate, see Iowa Title Standard 9.8.

Acts 1999 (78 GA) Ch. 151 §45 clarifies that the inheritance tax lien expires after ten years from the date of death, except when the tax has been deferred, regardless of date of death.

Chapter 451 of the Code of Iowa, which provided for the Iowa estate tax, was repealed in 2008. 2008 Iowa Acts, ch. 1119, §37. However, the provisions of former Chapter 451 apply in connection with deaths occurring prior to July 1, 2008. See Iowa Admin. Code, r. 701-87.1(1) (2008). ("[Chapter 87 of Rule 701, Iowa Estate Tax] is applicable . . . for dates of death occurring prior to July 1, 2008".) The Iowa estate tax is the amount allowed under the Internal Revenue Code as a credit against the federal estate tax liability of an estate, less the Iowa inheritance tax paid. Due to the phase out of the federal estate tax credit under the Economic Growth and Tax Relief Act of 2001, the Iowa estate tax is not applicable in connection with deaths on or after January 1, 2005. See I.R.C. § 2011 (eliminating the state death tax credit upon which the Iowa estate tax was based, for deaths after December 31, 2004).

As to federal estate taxes, if the death occurred less than ten years ago and Form 706, United States Estate Tax Return, is required to be filed, a showing should be made that:

(1) there is no federal estate tax payable;

(2) the federal estate tax has been paid; or

(3) the lien of the federal estate tax has been released.

The tax lien resulting from a generation skipping transfer under Chapter 450A of the Code of Iowa encumbers the transferred property for a period of ten years from the date of the transfer. However, unless the lien has been perfected by recording, a transfer to a bona fide

purchaser for value divests the property of the lien. Iowa Code § 450A.6 (2009). According to Iowa Code § 450A.2, the generation skipping tax liability, if any, is equal to the maximum federal credit allowable under Section 2604 of the Internal Revenue Code. Pursuant to its terms, however, Section 2604, and therefore the credit provided for thereunder, does not apply to generation skipping transfers occurring after December 31, 2004. I.R.C. § 2604(c).

9.16 PROBLEM:

Rev. 6/2010

What showing is necessary when title is derived through beneficiaries of a resident testate decedent who died more than five years ago and there has been no administration of the decedent's estate?

STANDARD:

A. In the absence of special circumstances putting the examiner on notice, marketable title should be accepted as being established in such cases where all of the following are shown in the abstract:

(1) the decedent died testate more than five years ago; and

(2) the decedent's Will has been admitted to probate without present administration in Iowa; and

(3) compliance with Iowa Code §633.305 pertaining to notice of proof of will without present administration (proof of publication and affidavit of mailing); and

(4) the surviving spouse, if any, did not elect to take against the Will; and

(5) no child was born to or adopted by the decedent after execution of the Will; and

(6) a showing of the payment of or nonliability for Iowa estate and inheritance taxes; and

(7) a showing of the payment of or nonliability for federal estate tax.

B. Concerning Iowa inheritance taxes, a clearance of inheritance tax (CIT) pursuant to Iowa Code §450.22 is necessary unless any of the following are shown in the abstract:

(1) the death occurred more than ten years ago and the tax was not deferred; or

(2) the property passed to the surviving spouse of a decedent; or

(3) the property passed to a lineal ascendant or an adopted or biological child, stepchild or other lineal descendant of a decedent.

C. Concerning Iowa estate taxes, a showing of the payment of or nonliability therefore is necessary unless any of the following are shown in the abstract:

(1) the death occurred more than ten years ago; or

(2) the death occurred on or after January 1, 2005; or

(3) a Form 706, United States Estate Tax Return, is not required to be filed.

D. A showing that there is no federal estate tax lien is necessary unless (1) the death occurred more than ten years ago or (2) a Form 706, United States Estate Tax Return, is not required to be filed.

Authority:
Iowa Code §§450.7 (lien), 450.9 (family exempt from tax), 450.10(6) (family exempt from rate) and 450.22 (exemption from return) (2009).
Iowa Code §§451.2 and 451.12 (2007).
Iowa Code §§633.305 and 633.413 (2009).
I. R. C. §2011.
Iowa Admin. Code, r. 701-87.1(1) (2008).

COMMENT:

Iowa Code §633.413 bars claims after five years from the date of death.

For intestate decedents when there has been no administration of the estate, see Iowa Title Standard 9.8.

For nonresident testate decedents when there has been no administration of the estate, see Iowa Title Standard 9.15.

If the decedent's Will was not admitted to probate under Iowa Code §633.305 within five years of death, the decedent is treated as having died intestate and Iowa Title Standard 9.8 will apply.

Chapter 451 of the Code of Iowa, which provided for the Iowa estate tax, was repealed in 2008. 2009 Iowa Acts, ch 1119, § 37. However, the provisions of former Chapter 451 apply in connection with deaths occurring prior to July 1, 2008. See Iowa Admin. Code, r. 701-87.1(1) (2008). ("[Chapter 87 of Rule 701, Iowa Estate Tax] is applicable … for dates of death occurring prior to July 1, 2008.") The Iowa estate tax is the amount allowed under the Internal Revenue Code as a credit against the federal estate tax liability of an estate, less the Iowa inheritance tax paid. Due to the phase out of the federal estate tax credit under the Economic Growth and Tax Relief Act of 2001, the Iowa estate tax is not applicable in connection with deaths on or after January 1, 2005. See I.R.C. § 2011 (eliminating the state death tax credit upon which the Iowa estate tax was based, for deaths after December 31, 2004).

As to federal estate taxes, if the death occurred less than ten years ago and Form 706, United States Estate Tax Return, is required to be filed, a showing should be made that (1) there is no federal estate tax payable; (2) the federal estate tax has been paid; or (3) the lien of the federal estate tax has been released.

The tax lien resulting from a generation skipping transfer under Chapter 450A of the Code of Iowa encumbers the transferred property for a period of ten years from the date of the transfer. However, unless the lien has been perfected by recording, a transfer to a bona fide purchaser for value divests the property of the lien. Iowa Code § 450A.6 (2009). According to Iowa Code § 450A.2, the generation skipping tax liability, if any, is equal to the maximum federal credit allowable under Section 2604 of the Internal Revenue Code. Pursuant to its terms, however, Section 2604, and therefore the credit provided for thereunder, does not apply to generation skipping transfers occurring after December 31, 2004. I.R.C. § 2604(c).

9.17 PROBLEM:

What showing must be made in the abstract in connection with a conveyance from a conservator?

STANDARD:

The abstract should show:

1. Procedures to Appoint Conservator

A. Petition to appoint the conservator showing the following portions thereof:

1. whether the petition is voluntary of involuntary;

2. whether the proposed ward is a minor or an adult; and

3. whether the proposed ward is married and if so, the name of his or her spouse, and if none, the name of his or her adult children, if this information is contained in the petition, and if it is not stated in the petition, the same must be established and shown in the abstract by other documents of record.

B. Perfection of notice of: (a) the date set for hearing on the petition, (b) the date set for hearing on representation, (c) appointment of counsel, if appropriate, (d) notice of the right to representation, to be personally present and (e) a description of conservatorship's powers.

1. Parties Who Must Receive Notice

a. If the petition is voluntary, no notice is required.

b. If the petition is involuntary and the proposed ward is an adult, the notice should be served upon:

(1) the ward;

(2) the ward's spouse, if any, and if none, then on the ward's adult children, if any; and

(3) the court-appointed representative, if any, or upon the ward's own legal counsel if reflected in the court's order establishing that a representative is not necessary because of existing legal counsel (Iowa Code §633.576).

c. If the proposed ward is a minor, notice to the following:

(1) the ward (Iowa Rule of Civ. P. 1.305(2));

(2) if the court determines the ward is entitled to representation, then to said representative;

(3) if no representative is appointed and if Iowa Rule of Civ. P. 1.305(2) is applicable, then to the guardian ad litem appointed by the court for the minor ward; and

(4) to the parents of the minor ward unless their consent is on file.

2. Manner Notice is Served

a. The manner of service of notice is that of original notice unless otherwise ordered by the court, in which event the notice must comply with said order. Service of notice on required recipient other than the ward is by mailed notice (Iowa Code §633.568 and §633.40(5)).

b. Either included in the notice of the petition to appoint conservator or by separate notice, serve upon the proposed ward notice in compliance with Iowa Code §633.576 advising the proposed ward of the conservatorship's powers and the ward's rights to representation.

C. Orders of the court abstracted briefly:

1. An order indicating whether the court has appointed a representative for the proposed ward plus compliance with the notice requirements, if any, established by the court for a hearing to determine representation and findings of fact regarding notice of right to representation and to be present at said hearing. (Iowa Code §633.575).

2. An order appointing a guardian ad litem on behalf of the ward where the court has determined that no representatives shall be appointed for the proposed ward who is a minor or adult named in an involuntary proceeding.

3. An order by the court appointing the conservator.

D. Letters of Appointment issued by the Clerk of Court under the seal of the court.

E. The report of the attorney representing the ward reflecting compliance with the requirements of Iowa Code §633.575, (4) and (5), if applicable.

II. Procedures to Support Sale of Real Property

A. The procedure to support a court officer's deed by the appointed conservator follows the procedures required for the executor or administrator to sell real property in an intestate estate or where the Last Will and Testament does not contain a power of sale (Iowa Code §633.652).

B. Notice to interested parties of the hearing on the petition for sale of real property includes the ward and such other parties as the court may determine to be interested parties.

COMMENTS

A. For sale by a foreign conservator, see Iowa Code §633.603 et seq.

B. For sale by a temporary conservator, see Iowa Code §633.573. Note that the appointment of the temporary conservator is subject to "such conditions" as the court shall prescribe". These conditions may restrict the power of the temporary conservator to sell real property. The abstract should reflect such conditions.

C. For conservatorship for absentees, see Iowa Code §633.580 et seq.

D. Caveat. This title standard is based upon the provisions of the 2002 Iowa Code

which became effective on July 1, 2002. The conservatorship proceedings involving the sale of the ward's real property should comply with the conservatorship's opening procedures, including the recipients of notice, manner of service of notice and if reflected in the applicable code provisions existing at that time which provided different recipients of notice in the conservatorship's opening procedures and excluded the present provisions for the appointment of a representative of the ward. Note prior amendments occurred in 1985 and 2000.

E. The conservatorship proceedings should be shown briefly by the abstractor where no sale of real property is undertaken by the conservatorship and the ward subsequently attempts to convey real property. The conservatorship removes the ward's ability to sell real property and will place the title examiner on inquiry notice that an attempted sale by the ward is ineffectual. (Iowa Code §633.637 and §633.639).

F. Caveat. Special attention should be given to the role of a representative for the ward and a guardian ad litem appointed for the ward. Iowa R. Civ. P. 1.211 requires in involuntary conservatorship proceedings that a guardian ad litem be appointed to represent the proposed ward. See the caveat and Title Standard 6.4. The court in compliance with Iowa Code §633.575 requires the appointment of a representative for an adult ward in an involuntary conservatorship proceeding. Under the same code section, the court may appoint a representative for an adult under a Standby Petition or a proposed minor ward. Service of notice of the hearing on the Petition may be on the proposed ward pursuant to Iowa Rules of Civ. P. 1.305 and 1.306 or on the attorney appointed to represent the proposed ward if Iowa Code §633.568(2)(a) is applicable or if no representative is appointed then on the guardian ad litem if Iowa R. Civ. P. 1.305(2) or 1.305(3) are applicable. This standard makes no comment as to whether or not the same person can be appointed by the court to serve as a guardian ad litem and the representative of the ward.

G. Title Standard 9.6 (citing Iowa Code §633.93) provides for a five-year statute of limitation from the date of recording a fiduciary deed.

H. Iowa Code §633.572 allows the court to appoint a limited conservatorship and to determine what powers the ward retains to deal with his or her own property. Theoretically this could reserve to the ward the right to convey his or her own property without participation by the conservator. Therefore, if a limited conservatorship is involved, the records should reflect whether or not the order pertains to real property and if so, the precise terms thereof.

9.18 Problem

Is court approval necessary in connection with the sale of real estate by the trustee of a testamentary trust?

STANDARD:

No, unless the trustee's power of sale is limited by the terms of the trust.

Authority:
Iowa Code §§633A.4401 and 633A.4402(5) (2011).

COMMENT:

Whether the terms of the trust limit the authority of the trustee to sell real estate can be determined by reviewing the trust provisions in the will which should be a matter of public record. An express grant of a power of sale is not required.

This standard pertains only to the trustee's power of sale pursuant to a testamentary trust. A showing as to the probate proceedings affecting title are still required pursuant to the Iowa Probate Code and Chapter 9 of the Iowa Title Standards.

CHAPTER 10
"STATUTES OF LIMITATIONS AND MARKETABLE TITLE LEGISLATION"

10.1 PROBLEM:

Rev. 3/2005

To what extent may Iowa Code §§ 614.17 and 614.17A be relied upon as a cure or remedy for imperfections in the chain of title?

STANDARD:

Iowa Code §§ 614.17 and 614.17A are valid marketable title statutes and bar claims as set out therein, excepting claims owned by the State or the United States. As a prerequisite to reliance upon these statutes, it is necessary only to require that the abstract show that the grantor or other person desiring to use the statutes: (1) is the holder of record title, (2) is in possession, (3) has an unbroken chain of record title for the necessary period of time as set forth in the statutes, (4) that the adverse claim arose prior to the cutoff date (either January 1, 1980 or more than ten years prior to any date commencing after July 1, 1992) and (5) such claim has not been preserved of record as required by the statutes. Possession may be shown by the recording of an affidavit of possession as provided in these sections.

Authority:
Tesdell v. Hanes, 248 Iowa 742, 82 N.W.2d 119 (1957).
Lane v. Travelers Ins. Co., 230 Iowa 973, 299 N.W. 553 (1941).
G.F. Madsen, Marshall's Iowa Title Opinions and Standards § 12.1 (2d ed. 1978).

See also:
Texaco, Inc. v. Short, 454 U.S. 516 (1982).
Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232 (Iowa 1975).
Schroeder v. Buegel, 371 N.W.2d 178 (Iowa Ct. App. 1985).

COMMENT:

Iowa Code § 614.17 has long been considered a valid and constitutional limitation statute. The addition of § 614.17A to the Iowa Code adds a rolling ten year limitation on claims against the holder of record title in possession. Note that these sections do not bar foreclosure of mortgages and certain other claims enumerated in Iowa Code § 614.20 arising prior to the ten year cutoff.

One must exercise care, of course, to make certain that the facts of the particular case in which it is proposed to apply the section are such as to bring the case within its scope. For instance, assume the following state of facts: Fifteen years ago a conveyance of record is made to Smith, expressly subject to a contract of sale to Brown. Smith then conveys of record to White eight years ago and his conveyance is not made subject to such contract, nor is it

otherwise qualified. A good record chain of title from White is thereafter made but no conveyance or forfeiture of the contract interest of Brown appears of record. Under this set of facts, § 614.17A does not apply to bar Brown's claim. This is true because it is not the fact that (in the language of the statue) the "holder of the record title to the real estate in possession and the holder's immediate or remote grantors are shown by the record to have held chain of title to the real estate for more than ten years." The case would be otherwise if the assumed facts were altered only in the particular that the conveyance by Smith to White was recorded more than ten years ago rather than less than ten years ago.

CAVEAT:

Notwithstanding the above example of the effect of Iowa Code § 614.17A, under the provisions of Iowa Code § 558.5 the contract to Brown, having been executed over ten years ago, may be deemed to have been abandoned, even if the deed to White was recorded less than ten years ago, if the record does not show when the contract was to have been performed or if the record shows that the contract was to have been performed over ten years ago.

10.2 PROBLEM:

Deleted 6/2008

10.3 PROBLEM:

Deleted 6/2008

10.4 PROBLEM:

Rev. 6/2010

When a mortgage is more than twenty years old, but the record of the mortgage does not show the date of the maturity of the debt secured thereby, and there is no extension agreement of record fixing the maturity of the debt within the last ten years, is the mortgage barred by Iowa Code §614.21?

STANDARD:

Yes.

Authority:
Ramiller v. Ramiller, 236 Iowa 323, 18 N.W. 2d 622 (1945).
Willow Tree Investment, Inc. v. Wilhelm, 465 N.W. 2d 849 (1991).

10.5 PROBLEM:

Rev. 6/2010

If a mortgage is more than twenty years old, secures a principal indebtedness and also future advances and the record shows that more than ten years have elapsed since the date of the maturity of the principal indebtedness secured thereby, but fails to show the date of maturity of the debt represented by future advances, and there is no extension agreement of record fixing the maturity of either the principal indebtedness or future advances within the last yen years, is the mortgage barred by Iowa Code §614.21?

STANDARD:

Yes.

Authority:
Ramiller v. Ramiller, 236 Iowa 323, 18 N.W. 2d 622 (1945).
Willow Tree Investment, Inc. v. Wilhelm, 465 N.W. 2d 849 (1991).

10.6 PROBLEM:

Rev. 6/2010

May Iowa Code §614.24 through §614.28 be relied upon to bar use restrictions, including restrictive covenants, and reversions to land after twenty one years from recording when a verified claim has not been filed within the twenty-one year period?

STANDARD:

Yes. The Stale Uses and Reversions Act constitutes valid marketable title legislation.

Authority:
Amana Soc'y v. Colony Inn, Inc., 315 N.W. 2d 101 (Iowa 1982).
Compiano v. Kuntz, 226 N.W. 2d 245 (Iowa 1975).
Presbytery of Southeast Iowa v. Harris, 226 N.W. 2d 232 (Iowa 1975).
Chicago & N. W. Ry. v. City of Osage, 176 N.W. 2d 788 (Iowa 1970).

COMMENT:

The limitation on "reversion, reverted interests or use restrictions" applies to possibilities of reverter, rights of reentry (powers of termination) and restrictive covenants whether the limitation, condition or restriction has been breached and whether the purpose is obsolete or still beneficial. The limitation applies against municipal corporations. The limitation applies to minors, the mentally ill and persons entitled to relief under the Servicemembers Civil Relief Act (SCRA). 50 US. C. App. §501 et seq. (2006). However, §614.24 now provides that it does not

apply to a reversionary interest in railroad property if the reversion is caused by the abandonment of the property for railroad purposes after July 1, 1980. (This section would not appear to affect reversionary interests which were cut off by operation of Iowa Code §614.24 prior to July 1, 1980.)

These sections do not apply if the interest owned is an easement rather than a possessory estate subject to a reversion or use restriction.

Authority:
Hawk v. Rice, 325 N.W. 2d 97 (Iowa 1982).
Haack v. Burlington N., Inc., 309 N.W. 2d 147 (Iowa Ct. App. 1981).
Johnson v. Burlington N., Inc. , 294 N.W. 2d 63 (Iowa Ct. App. 1980).
See also:
Texaco, Inc. v. Short, 454 U. S. 516 (1982).

10.7 PROBLEM:

New 3/14

To what extent may Iowa Code § 614.14A be relied upon as a statute of limitations to bar claims seeking to invalidate a deed or real estate contract by a corporation, limited liability company, partnership, cooperative or association based on the allegation that the execution of the instrument was not authorized by the entity?

STANDARD:

If a deed or real estate contract was recorded prior to July 1, 2013, an action seeking to invalidate the instrument based on the allegation that it was not authorized by the entity is barred after June 30, 2018.

If a deed or real estate contract was recorded on or after July 1, 2013, an action seeking to invalidate the instrument based on the allegation that it was not authorized by the entity is barred after two years from the date of recording of the instrument.

Authority
2013 Iowa Acts (85 G.A.), ch. 108, § 5 (to be codified as Iowa Code § 558.72)
2013 Iowa Acts (85 G.A.), ch. 108, § 6 (to be codified as Iowa Code § 614.14A)

COMMENT:

Effective on July 1, 2013, the Iowa Code was amended to create two new sections, 558.72 and 614.14A. 2013 Iowa Acts (85 G.A.), chapter 108, §§ 5 and 6, H.F. 566. Section 614.14A establishes statutes of limitations to bar claims seeking to invalidate a deed or real estate contract by a corporation, limited liability company, partnership, cooperative or association based on the allegation that the execution of the instrument was not authorized by the

entity. The statutes of limitations of section 614.14A are applicable to any deed or real estate contract by a corporation, limited liability company, partnership, cooperative or association, as those entities are defined in § 558.72(1)(a).

CHAPTER 11 "FORTY YEAR MARKETABLE TITLE ACT"

11.1 PROBLEM:

Revised 1/06

To what extent may the Forty Year Marketable Title Act (Iowa Code §§ 614.29-.38) be relied upon to cure or remedy imperfections in the chain of title and support a determination that a title is marketable?

STANDARD:

The Forty Year Marketable Title Act is remedial legislation and should be relied upon as a cure or remedy for such imperfections of title as fall within its scope. Any interest in land shall be deemed marketable where the holder has such interest of record and can show an unbroken chain of record title to such interest extending back at least forty years to the root of title, and where none of the matters excepted in Iowa Code § 614.32 appear.

Authority:
L. M. Simes & C. B. Taylor, Improvement of Conveyancing by Legislation 253-92 (1960).

See also:
Fencl v. Harpers Ferry, 620 N.W.2d 808 (Iowa 2000).
Texaco, Inc. v. Short, 454 U. S. 516 (1982).
Presbytery of Southeast Iowa v. Harris, 226 N.W. 2d 232 (Iowa 1975) cert. denied, 423 U.S. 830 (1975).
Tesdell v. Hanes, 248 Iowa 742, 82 N.W. 2d 119 (1957).

COMMENT:

The Forty Year Marketable Title Act is both prospective and retroactive in its operation. Its retroactive application is only limited by the grace period specified in Iowa Code § 614.38 (i.e., if the forty year period would have expired prior to July 1, 1969, it is extended until one year after July 1, 1969).

11.2 PROBLEM:

Revised 1/06

What is an unbroken chain of title of record?

STANDARD:

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

Authority:
City of Marquette v. Gaede, 672 N.W.2d 829 (Iowa 2003).

COMMENT:

(1) Suppose A is the grantee in a deed of a tract of land which was recorded in 1960 and that nothing affecting the chain of title to this land has been recorded since then. In 2000 A has an "unbroken chain of title of record." This is true without regard to whether the deed forming the root of title contained any covenants of title or was a quit claim. The instrument or proceedings which constitutes the root of title may, inter alia, be a deed, a will admitted to probate, an intestate administration or a decree of the Federal or State District Court of record in 1960.

(2) Instead of having only a single link, A's chain of title may contain two or more links. Thus, suppose X is the grantee in a deed of a tract of land which was recorded in 1960, and X conveyed the same tract to Y by deed which was recorded in 1970. Y conveyed the same tract to A by deed which was recorded in 1980. In 2000 A has an "unbroken chain of title of record." Any or all of these links may consist, inter alia, of a deed, a will admitted to probate, an intestate administration or a decree of the Federal or State District Court.

The significant time from which the forty-year record title begins is not the delivery of the instrument, but the date of its recording. Suppose A is the grantee in a deed executed and delivered in 1960, but recorded in 1965. A does not have an "unbroken chain of title of record" in 2000 since forty years have not elapsed subsequent to the recording of the deed in 1965. A will not have the "unbroken chain" required by the statute until 2005.

11.3 PROBLEM:

Revised 1/06

Of what effect are interests which encumber the title created by the instrument which constitutes the root of title?

STANDARD:

The marketable record title is subject to all interests and defects created by or specifically identified in the instrument which constitutes the root of title.

Authority:
Fencl v. Harpers Ferry, 620 N.W.2d 808 (Iowa 2000).

COMMENT:

(1) Suppose a deed from O to A in 1960 forms the root of title. This deed specifically identifies by book and page of record an exception for mineral rights created earlier in favor of X. The exception of the mineral rights is an interest or defect which is inherent in the muniments of the chain of title as provided in Iowa Code § 614.32 (1) and the title is subject to that interest.

(2) Suppose a deed from O to A in 1960 forms the root of title. This deed specifically describes a portion of the property as being originally platted as an alley. The city's interest in the alley is considered inherent in the muniments of the chain of title as provided in Iowa Code § 614.32(1) and title is subject to the city's interest.

11.4 PROBLEM:

Revised 1/06

When does an instrument recorded subsequent to the root of title purport to divest an interest within the meaning of the Marketable Title Act?

STANDARD:

Matters "purporting to divest" are those matters appearing of record which, if taken at face value, warrant the inference that the interest has been divested. Instruments recorded outside the record chain of title are not matters purporting to divest.

COMMENT:

The obvious case in which a recorded instrument purports to divest the forty-year chain of title is that of a conveyance to another person. A is the grantee of a tract of land in a deed of conveyance recorded in 1955. The record shows a conveyance of the same tract from A to B recorded in 1975. There is also a deed of conveyance of the same tract from B to X recorded in 1997. Although B, in 1995, had a forty-year chain of title, the deed to X purports to divest it and B, of course, does not have title.

11.5 PROBLEM:

Revised 1/06

What is the relationship of the Marketable Title Act to other existing title clearing legislation, particularly Iowa Code §§ 614.17 and 614.17A?

STANDARD:

The Marketable Title Act is designed to be supportive of existing title clearing legislation and should not be construed to be in conflict with such other acts. The Act specifically states that it is not intended to affect the operation of other curative acts or statutes of limitation. For example, Iowa Code §§ 614.17 and 614.17A should be used to eliminate title defects occurring within the forty-year chain of title.

COMMENT:

Generally, because it is broader in scope, the Marketable Title Act should be expected to replace Iowa Code §§ 614.17 and 614.17A and other remedial acts as the primary mechanism for eliminating title defects occurring beyond the forty-year chain of title. However, within the forty-year chain of title, the other title clearing acts will continue to be the exclusive basis for removing title defects. For example, suppose A conveyed a fee to B in 1965. In 1972 a deed is recorded showing a conveyance of the premises from B to C. In 1975 a warranty deed from B to D is recorded. D's title is in issue in 1992. The Marketable Title Act is of no relevance because the alleged defect lies within the forty-year chain. However, D may file an affidavit of possession under Iowa Code § 614.17, and since C's claim arose prior to 1980 and no timely notice has been filed to preserve it, D's title is marketable. The result would be the same under Iowa Code § 614.17A if the claim arose more than ten years prior to the date of examination.

11.6 PROBLEM:

Revised 1/06

Is it necessary for an abstract to show the present possession of the record titleholder to rely on the Marketable Title Act to clear title imperfections?

STANDARD:

No.

COMMENT:

The Marketable Title Act is generally designed to extinguish ancient title defects without regard to present possession. The Act specifically excepts any title by adverse possession which accrues at any time subsequent to the effective date of the root of title and also makes special provision for record owners of possessory interests who have been in continuous possession for forty years or more and whose possession continues down to the time at which the marketability of the title is being determined. Except for these two situations, the present possession of the land is not considered in determining the operation of the Act on ancient title imperfections. Of course, because these two possessory situations are excepted from the Act's bar, it is necessary

in each case to ascertain the present possession to assure that all ancient interests have effectively been extinguished. However, this is no different from the usual inquiry that must be made to protect against interests evidenced by possession that arose within the forty-year title chain. Ancient easements which are apparent or can be proved by physical evidence of their use, such as water, sewer lines, electric, telephone and pipelines, are excepted from the operation of the Act and purchasers should inspect the property and check for the existence of such easements.

See: Maddox v. Katzman, 332 N.W.2d 347 (Iowa Ct. App. 1982).

11.7 PROBLEM:

Revised 1/06

Does the Marketable Title Act affect the length of the record title chain for which all matters affecting the title must be shown by the abstract?

STANDARD:

Except as to matters which are excepted from the operation of the Act under Iowa Code § 614.36, the abstract need extend no further beyond forty years from the present time than is necessary to show the "root of title." Beyond this point search should be confined to those interests excepted from coverage by the Act (i.e., rights of reversioners under leases, claims of the United States and easements which are apparent from or can be proved by physical evidence of their use). It is the purpose of the Marketable Title Act to make the use of "forty-year abstracts" standard throughout the state.

COMMENT:

A major purpose of the Marketable Title Act is to limit the examination of the record title to a relatively modern period, as reflected in the forty-year chain requirement. Consistent with this shortening of the period of title examinations is the intent to reduce the record search and shorten abstracts. In all cases, the abstract must go back to the conveyance or other title transaction which is the "root of title". It will rarely occur that this instrument was recorded precisely forty years prior to the present time. In nearly every case the period from the recording of the "root of title" to the present will be somewhat more than forty years. For example, E wishes to have an abstract of title showing the forty-year title required to make title marketable under the Act. The only instruments of record are the following: (1) A patent from the United States to A recorded in 1900; (2) a deed from A to B recorded in 1910; (3) a deed from C to D recorded in 1962; and (4) a deed from D to E recorded in 1990. In 2003 the deed from C to D is the root of title since it is the last instrument recorded forty years or more prior to the present time. Thus, the abstract will show the patent, to extinguish the original claim of the United States, and then start with the deed from C to D.

11.8 PROBLEM:

Revised 1/06

May a mortgage which has been released of record without foreclosure constitute the root of title under the Marketable Title Act?

STANDARD:

No.

COMMENT:

Assume the following facts: A conveyed to B in 1950, B mortgaged to C in 1960 (which mortgage was later released) and B conveyed to D in 1980. In order for a person to have a forty year chain of title under Iowa Code § 614.31, there must exist in the land records "a conveyance or other title transaction, of record not less than forty years . . . which said conveyance or other title transaction purports to create such interest . . ." This section requires that the root of title must purport to create the interest claimed by the present owner. The 1960 transaction only purported to create a mortgage lien. Since this lien was never foreclosed it never became a fee.

The present owner is certainly claiming a far greater interest than a lien. The owner is claiming a fee through the A to B to D chain and not through the mortgage to C. (The result would be different if D claimed through a foreclosure of the B to C mortgage and in that case the mortgage would be the root of title).

The policy of the Act is to require the root of title to create color of title in the claimant. The Act does not create a marketable title if there is no document creating color of title in the claimant. For example, suppose A conveys to B in 1950 and B mortgages to C in 1960. There are no subsequent title transactions. The mortgage to C in 1960 is not the root of title.

CHAPTER 12 "PARTNERSHIPS"

GENERAL COMMENT, CHAPTER 12

Prior to 1999, all Iowa partnerships were governed by Iowa Code Chapter 486 ("IUPA"), which was based on the Uniform Partnership Act ("UPA"). In 1994, the National Conference of Commissioners on Uniform State Laws adopted the Revised Uniform Partnership Act ("RUPA"). Iowa enacted its version of the RUPA in 1998, which was codified as Iowa Code Chapter 486A ("IRUPA"), which governs both general partnerships and so-called limited liability partnerships.

Chapter 486A applies to all partnerships formed after December 31, 1998, and to all pre-1999 partnerships that elect to be governed by it. Commencing January 1, 2001, the IRUPA applies to all Iowa partnerships. See § 80, SF 2311 (1998).

Although the IRUPA controls all partnership transactions after December 31, 2000, and all partnership transactions after December 31, 1998 for partnerships formed thereafter or electing to be governed by the IRUPA, the IUPA may govern transactions by pre-IRUPA partnerships prior to January 2, 2001. Therefore, Chapter 12 has been revised to reflect the different rules that may apply to transactions governed by the IUPA and IRUPA.

12.1 PROBLEM:

Revised 3/14

When real property is held in a partnership's name, how should it be conveyed?

STANDARD:

Real property acquired by a partnership and held in the partnership name may be conveyed only in the partnership name. Any conveyance from the partnership so made and signed by one or more members of the partnership, which conveyance appears to be executed in the usual course of partnership business, shall be presumed to be authorized by the partnership in the absence of knowledge of acts indicating a lack of authority and the recitals in the instrument of conveyance shall be accepted as sufficient evidence of such authority.

Authority:
IRUPA: Iowa Code §§ 486A.203-.204, .301-.302 (2005).
IUPA: Iowa Code §§ 486.9-.10 (1999).
L. M. Simes & C. B. Taylor, Model Title Standards 13.1 (1960).
Kristerin Development Co. v. Granson Investment, 394 N.W.2d 325 (Iowa 1986).

COMMENT:

Iowa Code § 614.14A provides a statute of limitations barring claims seeking to invalidate a deed or real estate contract by a partnership based on the allegation that the execution of the instrument was not authorized by the partnership. See Title Standard 10.7 and Comment.

Elmer Jones and Robert Smith are partners doing business in the name of Enterprise Associates. Real estate is purchased for the partnership and title is taken in the name of "Enterprise Associates, a Partnership". The partnership wishes to sell the land to Henry Green. The deed should be executed in the name of "Enterprise Associates, a Partnership." It may be signed by one or both of the partners. Thus, the signature can read: "Enterprise Associates, a Partnership consisting of Elmer Jones and Robert Smith, by Elmer Jones and Robert Smith", or "Enterprise Associates, a partnership by Elmer Jones." If the latter form of execution is used, the deed should show by its recitals, or evidence should be secured to show, that Elmer Jones is one of the partners. The purchaser should have no knowledge negating the presumption that Elmer Jones was acting with authority of the partnership. If the deed should read "Enterprise Associates, a Partnership, by Elmer Jones, one of the partners", it should be passed by the title examiner in the absence of any knowledge of lack of authority on the part of Jones. Suppose title to partnership real estate has been taken in the name of "Enterprise Associates, a Partnership", and the partnership consists of Elmer Jones and Robert Smith. Suppose Elmer Jones and Robert Smith and their wives execute a conveyance of the property to Henry Green, the deed making no reference to a partnership. Green would have only an equitable title to the land.

IUPA: See Iowa Code § 486.10(2) and Chapter 12, General Comment.
IRUPA: See Iowa Code § 486A.302(1) (2005).

CAVEAT:

Other jurisdictions may have interpreted the term "usual course of partnership business" differently from what appears to be the common interpretation by Iowa practitioners.

See: Ellis v. Mihelis, 60 Cal.2d 206, 384 P.2d 7, 32 Cal. Rptr. 415 (1963).
Lawer v. Kline, 39 Wyo. 285, 270 P. 1077 (1928).

CAVEAT UNDER IRUPA:

Sections 301 and 302 of the IRUPA qualify the statutory rules by making all authority questions subject to the effect of a "statement of partnership authority" under Section 303. Under Section 303, a partnership may file a statement of partnership authority in the office of the Secretary of State that may state the authority, or limit the authority, of some or all of the partners to enter into other transactions on behalf of the partnership. Section 303(1)(a) specifies certain required information, but Section 303(3) states that any statement of partnership authority that is missing some of the required information, but which states the name of the partnership, nevertheless operates to give constructive notice with respect to a person not a partner. Unless

earlier canceled, a filed statement of partnership is canceled by operation of law five years after the date on which the statement, or the most recent amendment, was filed with the Secretary of State.

With respect to transfers of real property, a statement of partnership authority, a grant or limitation of authority is conclusive in favor of a person who gives value without knowledge to the contrary if a certified copy of a filed statement of partnership authority is recorded in the office for recording transfers for that real estate.

Under Section 304 of the IRUPA, a partner may file a statement of denial, which must contain the name of the partnership and the fact that is being denied, including the denial of a person's authority or status as a partner. A statement of denial is a limitation of authority as provided in Iowa Code § 486A.303(4) & (5).

12.2 PROBLEM:

Revised 1/06

Can one partner execute a conveyance on behalf of the partnership?

STANDARD:

Yes. When real property is held by a partnership, and a conveyance is made on behalf of the partnership by one or more but less than all of the partners and the conveyance appears to be executed in the usual course of partnership business, it is presumed, in the absence of evidence to the contrary, that the conveyance was made by the partner or partners executing it for the purpose of carrying on in the usual way the business of the partnership. No further evidence of authority of such partner or partners to execute the instrument should be required by the title examiner.

Authority:
IUPA: Iowa Code § 486.9 (1999).
IRUPA: Iowa Code §§ 486A.301(1) and .303-.304 (2005).
L. M. Simes & C. B. Taylor, Model Title Standards 13.2 (1960).

COMMENT:

This standard is subject to the terms of any statement of partnership authority or statement of denial filed pursuant to Iowa Code § 486A.303 and .304 (2005).

See General Comment to Chapter 12 and Caveat to Standard 12.1.

12.3 PROBLEM:

Revised 1/06

Are there marital rights in partnership real property?

STANDARD:

No. Neither rights of a spouse nor homestead rights attach to the interest of a married partner in specific partnership property. If by recitals in instruments in the chain of title, or otherwise, it appears that partnership real property was conveyed, the title examiner should not require any evidence of release or nonexistence of marital rights.

Authority:
IUPA: Iowa Code § 486.25 (2) (e) (1999).
IRUPA: Iowa Code § 486A.501 (2005).
L. M. Simes & C. B. Taylor, Model Title Standards 13.3 (1960).

COMMENT:

Suppose real property has been conveyed to "Enterprise Associates, a Partnership, consisting of Elmer Jones and Robert Smith," and a conveyance of the same property is then made to Henry Green signed in the name of "Enterprise Associates, a Partnership, by Elmer Jones and Robert Smith, partners". Both Jones and Smith are married but their wives do not join in the conveyance. Green gets marketable title and nothing further is required to explain why the wives did not join.

Suppose real property has been conveyed to "Elmer Jones and Robert Smith, a Partnership". A conveyance of the same property is then made to Henry Green executed by "Elmer Jones and Robert Smith, a Partnership". The wives of Jones and Smith do not join in the conveyance. Green gets a marketable title and nothing further should be required.

Suppose a conveyance to the partnership as in the preceding hypothetical case. In this case the partnership does not sell the real property and Elmer Jones dies leaving a widow. The widow cannot claim rights in the land.

This standard is subject to the terms of any statement of partnership authority or statement of denial filed pursuant to Iowa Code § 486A.303 and .304 (2005).

See General Comment to Chapter 12 and Caveat to Standard 12.1.

12.4 PROBLEM:

Revised 1/06

How is partnership real property conveyed after the death of a partner?

STANDARD:

After the death of a partner real property owned by the partnership may be conveyed in the partnership name and executed by the surviving partner or partners. After the death of the last surviving partner the partnership property may be conveyed in the partnership name by that partner's legal representative, in which case the title examiner should require a showing of the deaths of all of the partners.

Authority:
IUPA: Iowa Code § 486.25(2) (1999).
IRUPA: Iowa Code § 486A.803(2) (2005).
L. M. Simes & C. B. Taylor, Model Title Standards 13.4 (1960).

COMMENT:

This Standard is subject to the terms of any statement of partnership authority or statement of denial filed pursuant to Iowa Code § 486A.303 and .304 (2005).

See General Comment to Chapter 12 and Caveat to Standard 12.1.

CHAPTER 13 "BANKRUPTCY"

GENERAL COMMENTS

Chapter 13 examines various ways in which title to real property may be affected by proceedings under the Federal Bankruptcy Code. The practitioner must be cognizant of the often technical rules under the Federal Bankruptcy Code; Federal Bankruptcy Rules; Local Administrative Orders and Rules and the effective dates of amendments thereto. These standards suggest requirements to assure marketability of title where a titleholder has filed bankruptcy.

These Standards do not address Debtor as Tenant, Debtor as a member of a partnership, single asset estates and leasing.

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 bankruptcy estate, which was or is subject to the jurisdiction and control of the Bankruptcy Court.

A ''debtor'' is a person or municipality concerning which a bankruptcy case has been commenced since October 1, 1979, the effective date of the Bankruptcy Code. 11 U.S.C. § 101(13). Formerly, the person subject to a bankruptcy case was commonly known as a ''bankrupt.'' There are generally four types of bankruptcy cases: a Chapter 7 ''liquidation''; a Chapter 11 ''reorganization''; a Chapter 12 ''adjustment of debts of a family farmer with regular annual income''; and a Chapter 13 ''adjustment of debts of an individual with regular income.'' A Chapter 9 case applies only to a political subdivision or public agency or instrumentality of a state. The commencement of a voluntary case (filed by the debtor alone or jointly with a spouse) or an involuntary case (filed by entities holding claims against the alleged debtor) creates an estate. The estate includes all legal and equitable interests of the debtor in property as of the commencement of the case. The estate also includes property that the debtor acquires or becomes entitled to acquire within 180 days after the commencement of the case by bequest, devise or inheritance, by property settlement agreement with the debtor's spouse or in an interlocutory or final divorce decree, or as a beneficiary of a life insurance policy or death benefit plan. 11 U.S.C. § 541.

The trustee may avoid post-petition transactions (transactions occurring after the commencement of the bankruptcy case of the debtor), unless the transaction is protected under §§ 549 (b) and (c) of Title 11 or unless the transaction is authorized by the bankruptcy court or the Bankruptcy Code. 11 U.S.C. § 549(a). The trustee may not avoid a transfer made by the debtor in an involuntary bankruptcy case before the order for relief, to the extent any value is given in exchange for the transfer, notwithstanding any notice or knowledge of the bankruptcy case that the transferee has. 11 U.S.C. § 549(b). The trustee may not avoid a transfer of real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed in the real property

records before the transfer was perfected. 11 U.S.C. § 549(c). An action or proceeding under 11 U.S.C. § 549 to set aside a post-petition transaction must be commenced no later than the earlier of (1) two years after the date of the transfer or (2) the time the case is closed or dismissed. 11 U.S.C. § 549(d).

While the abstractor is under no obligation to determine whether a conveyance may be a preference under 11 U.S.C. § 547, if the searcher learns of the filing of a bankruptcy petition by or against the transferor within the applicable time period subsequent to the transfer, that fact should be noted in the abstract so that due inquiry may be made by the title examiner as to whether the transfer was subsequently avoided or is subject to avoidance by the trustee.

Source:
Citations in the Comment.
5 Collier on Bankruptcy, Ch. 541, 549 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2009).

13.1 PROBLEM: (Sale by Trustee or Debtor in Possession)

Rev 06/2011

When an interest in real property is transferred in a bankruptcy proceeding, what showing must be made in the abstract?

STANDARD:

The abstract should show:

1. Filing of a petition for relief under the Bankruptcy Code, including the date of filing and the appointment of the trustee.

2. Legal description of the real property on Schedule A filed by the debtor. (See Comment ¶ c.)

3. Notice of intent to sell or dispose of an interest in real property which reasonably identifies the property, (See Comment ¶¶ a, b, c and d).

4. The "certificate of service" giving 21 days notice (unless shortened by Court Order) under Fed. R. Bankr. P. 2002(a)(2) to object to the proposed transfer.

5. Order authorizing sale or disposition.

6. Document of conveyance.

7. Clerk's certificate that no notice of appeal, application to extend time for appeal, motions under Fed. R. Bankr. P. 9023, 9024, or motion to stay has been filed. (See Comment ¶ f.) (If the abstracter's certificate discloses a search of Bankruptcy Court records with no

appeal shown, or more than 1 year after order has passed under Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60, then the Clerk's certificate is not required.)

8. If the transfer is from a debtor-in-possession or a trustee in a Chapter 11, 12 or 13 proceeding, the abstract should also show:

a. If the transfer is made after confirmation of a plan of reorganization, the order confirming plan with plan of reorganization attached. (See Comment ¶ e.)

b. If the transfer is made before confirmation of a plan of reorganization, there need be shown only those items described in paragraphs 1 through 7, above.

Authority:
11 U.S.C. §§ 363(b), (f), (m); 1126 (acceptance of plan); 1128 (confirmation hearing); 1129 (confirmation of plan); 1141 (effect of confirmation(2010)
Fed. R. Bankr. P. 2002(a)(2), (b), (c), (i); 3018; 3020; 6004; 9007; 9014; 9024.
2 Collier onBankruptcy, ¶ 363.03 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2009).
5 Collier onBankruptcy, ¶¶ 1126.01[3], 1128.01[2], 1129.02, 1141.01 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2009).

COMMENT:

a. This Standard encompasses any disposition of real property free and clear of liens pursuant to 11 U.S.C. § 363(f).

b. Within the context of this Standard the term "disposition" encompasses conveyance by deed or contract, leases, mortgages, easements, or the creation of any other interests in real property owned by the debtor which did not exist prior to the filing of the bankruptcy case.

c. The trustee or any other party who proposes to sell real estate shall include a description of the property which reasonably identifies the property to be sold, and such description may be included in the notice by incorporating by reference the description of the property set forth in a document attached to the notice. A defective description in the Debtor's Schedule A may be cured by a description which complies with this paragraph.

d. A sale or disposition under 11 U.S.C. § 363(h) (disposition of property in which another has a co-ownership interest) must be by adversary proceedings. Fed. R. Bankr. P. 7001(3).

e. In some instances the plan will be lengthy, with but a small portion pertaining to the transfer of an interest in real property. Only those portions which affect title to real property need be shown in the abstract. The plan may impose restrictions on the debtor's power to dispose of interests in real property.

f. Under 11 U.S.C. § 363(m), the rights of a good faith purchaser or tenant are not affected by reversal or modification on appeal of an authorization under 11 U.S.C. § 363(b) or (c) unless the authorization and sale or lease were stayed pending appeal. Fed. R. Bankr. P. 9023 adopts Fed. R. Civ. P. 59 which regulates motions for a new trial and amendment of judgment. These motions must be served within 14 days of entry of judgment. Fed. R. Bankr. P. 9024 adopts Fed. R. Civ. P. 60 as to relief from a judgment or order, including relief by an order entered by mistake, inadvertence, or excusable neglect. A motion under Fed. R. Civ. P. 60(b) does not affect the finality of a judgment or suspend its operation.

13.2 PROBLEM: (Automatic Stay, Abstract Showing)

Rev 06/2011

What showing must be made in the abstract that the automatic stay under 11 U.S.C. § 362 is not in force?

STANDARD:

The abstract should show:

1. Filing of petition for relief under the Bankruptcy Code.

2. Appointment of trustee. (Chapter 7.) (See Comment ¶ g.)

3. Legal description of the real property on the appropriate bankruptcy schedule of the debtor. (See Comment ¶ f.)

4. Motion for relief from the automatic stay (See Comment ¶ e).

5. Notice of motion for relief from the stay and proof of service thereof (See Comment ¶ a).

6. Order terminating or modifying the stay, or expiration by operation of law.

7. Clerk's certificate that no notice of appeal, application to extend time for appeal, or motion to stay has been filed or more than 1 year has passed under Fed.R.Bank. P.9024 and Fed.R.Civ 60. If the abstracter's certificate discloses a search of Bankruptcy Court records, Clerk's certificate is not required.

Authority:
11 U.S.C. § 362 (2010).
Fed. R. Bankr. P. 4001, 7004, 9014.
2 Collier on Bankruptcy ¶ 362.08 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2009).

COMMENT:

a. Fed. R. Bankr. P. 9014 requires "…reasonable notice and opportunity for hearing…." Because of the time limitations imposed by Fed. R. Bankr. P. 4001, it is not practical to give a 21-day notice. The manner of service of the motion and notice is governed by Fed. R. Bankr. P. 7004 and 9014.

b. Property which is abandoned or exempt is protected by the stay under 11 U.S.C. § 362(a)(5) against enforcement of lien rights because it remains property of the debtor.

c. The stay under 11 U.S.C. § 362(a) remains in force, unless otherwise terminated, until the case is closed, dismissed or a discharge is granted or denied. 11 U.S.C. § 362(c).

d. The stay may expire by operation of law under 11 U.S.C. § 362(c)-(e).

e. The provisions of 11 U.S.C. § 362 do not apply to transfers by the debtor of abandoned or exempt property.

f. If the legal description in the schedules is defective, such may be cured by a legal description in the order terminating stay which reasonably identifies the real estate. In most instances a copy of the mortgage will be attached to the motion for relief from the stay. Any deficiency in the motion may be cured by a proper order terminating the stay. 11 U.S.C. § 362.

g. In Chapter 12 and 13 cases, trustees are appointed pursuant to a standing appointment issued by the United States Trustee. See 28 U.S.C. § 586(b). A separate order is not entered in each case.

13.3 PROBLEM: (Transferring Exempt Property)

Rev 06/2011

If an interest in real property of the estate has been claimed as exempt, what showing must be made in the abstract before it may be transferred or encumbered by the debtor?

STANDARD:

The abstract should show:

1. Filing of petition for relief under the Bankruptcy Code.

2. Appointment of trustee. (Chapter 7.) (See Comment ¶ f.)

3. Legal description of the real property on the appropriate bankruptcy schedule of the debtor reflecting that exempt status is claimed.

4. Expiration of time to file objections to exemptions and Clerk's certificate that no objections to exemption have been filed. (See Comment ¶ a.) If the abstracter's

certificate discloses a search of Bankruptcy Court records or more than 1 year has passed under Fed.R.Bank. P. 9024, and Fed.R.Civ 60, Clerk's certificate is not required.

5. In the event of enforcement of lien rights, extinguishment of automatic stay under 11 U.S.C. § 362. (See Comment ¶ e.)

Authority:
11 U.S.C. §522 (2010).
Fed. R. Bankr. P. 1007, 4003.
3 Collier on Bankruptcy ¶¶ 522.10, .23, .27 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2009).

COMMENT:

a. Objections to a claimed exemption must be filed "…within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a)…" Fed. R. Bankr. P. 4003(b). If objection is filed, the abstract should show the Order entered on the objection.

b. Official Form B 6C – Property Claimed as Exempt – must include the interest in real property claimed as exempt. Unless the interest is reasonably described, the examiner may not rely on the fact that no objection has been filed.

c. Property set aside as exempt remains property of the debtor subject to the automatic stay under 11 U.S.C. § 362(a)(5) until expiration of the stay under 11 U.S.C. § 362(c)(2). 2 Collier, Bankruptcy ¶ 362.06 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2009).

d. If the conveyance is to be made by the debtor, the examiner need not be concerned with the existence of the automatic stay under 11 U.S.C. § 362. However, the examiner must be mindful that lien rights may exist. See Iowa Land Title Standard 13.5.

e. If lien rights against the real estate are to be enforced, the abstract must show those entries relating to the securing of relief from the automatic stay under 11 U.S.C. § 362 as set out in Iowa Land Title Standard 13.3.

f. In Chapter 12 and 13 cases, trustees are appointed pursuant to a standing appointment issued by the United States Trustee. 28 U.S.C. § 586(b). A separate order is not entered in each case.

13.4 PROBLEM: (Discharge of Personal Liability, Lien of Judgment)

Rev 06/2011

If a judgment debtor secures a discharge of personal liability on a judgment under 11 U.S.C. §524, is the lien of the judgment released?

STANDARD:

No. Under 11 U.S.C. § 524, after discharge, the debtor is not subject to personal liability as to claims which are discharged. However, liens on the property not set aside in the bankruptcy case may be enforced after discharge against exempt and nonexempt property of the debtor.

Authority:
11 U.S.C. § 522(f) (2010).
H. R. Rep. No. 595, 95th Cong., 1st Sess. 3611 (1977).
S. Rep. No. 989, 95th Cong., 2 Sess. 76 (1978).
3 Collier on Bankruptcy ¶ 524.01 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2009).

In re Be-Mac Transport Co., Inc., 83 F.3d 1020, 1025 (8th Cir. 1996). ("A well-established principle of bankruptcy law is that liens pass through bankruptcy proceedings unaffected.")

In re Dahmer, 336 B.R. 784, 789 (Bankr. W.D. Mo. 2006).

COMMENT:

a. If personal liability on a judgment has been discharged, the lien does not attach to the debtor's subsequently acquired real estate. Iowa Code § 624.23(3).

b. By utilizing the procedure set out in Iowa Code § 624.23, a debtor may identify of record what judgments, if any, are liens against real property platted and claimed as a homestead. (See Iowa Land Title Standard 6.7.)

c. In order to determine that a judicial lien upon exempt real estate has been avoided in a bankruptcy case under 11 U.S.C. § 522(f), the abstract should show: The motion in the bankruptcy proceeding to avoid the lien which describes the real estate; a certificate showing service on all affected creditors, the trustee and the U. S. Trustee; either an order avoiding the lien in absence of objections, or an order avoiding the lien after hearing in the event that objections are filed; and certificate of the Clerk that no notice of appeal, application to extend time for appeal, or motion to stay has been filed unless the abstracter's certificate discloses a search of the Bankruptcy Court records.

13.5 PROBLEM: (Abandonment of Property, Abstract Showing)

Rev 06/2011

If property of the estate has been abandoned, what showing must be made in the abstract before it may be transferred or encumbered by the debtor?

STANDARD:

The abstract should show:

1. Filing of petition for relief under Bankruptcy Code.

2. Appointment of trustee. (Chapter 7.)

3. Legal description of the real property on the appropriate bankruptcy schedule of the debtor.

4. In non-Chapter 7 cases, the report, notice or motion by a trustee, debtor, or party in interest of a proposed abandonment or disposition that was given to all creditors and parties in interest.

5. In Chapter 7 cases, with regard to an abandonment or disposition, notice to the U.S. Trustee, debtor(s), debtor's(s') counsel, and any other creditor or party in interest who has requested notice pursuant to Fed. R. Bankr. P. 2002.

6. Extinguishment of automatic stay under 11 U. S. C § 362, unless the disposition of the property is made by the debtor.

7. Expiration of time to file objections to abandonment or disposition and Clerk's certificate that no objection to abandonment or disposition has been filed, and certificate of list of creditors and parties in interest requesting notice under Fed. R. Bankr. P. 2002 and the date of the request. Clerk's certificate that no objection to abandonment or disposition has been filed is not required if the abstracter's certificate discloses a search of Bankruptcy Court records.

Authority:
11 U.S.C. §§ 102(1), 554 (2010).
Fed. R. Bankr. P. 2002 6007, 7001(1), 9006.

COMMENT:

a. Abandonments are not adversary proceedings. Fed. R. Bankr. P. 7001(1).

b.. Abandoned property remains property of the debtor subject to the automatic stay under 11 U.S.C. § 362(a)(5) until termination of the stay under 11 U.S.C. § 362(c)(2). 2 Collier on Bankruptcy ¶ 362.06 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2009).

c.. Procedural defects in an abandonment may be cured as to property scheduled under 11 U.S.C. § 521(1) if the requirements of 11 U.S.C. § 554(c) are satisfied.

d. Dispositions of property under 11 U.S.C. § 725 are not covered by this Standard. Proceedings under this section will be pursuant to ad hoc orders.

13.6 PROBLEM: (When Bankruptcy Creates an Extension of Time)

New 06/2011

How are existing time periods affected by a bankruptcy filing?

STANDARD:

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.

COMMENT:

The Bankruptcy Code tolls the time for enforcement of contracts, options, deeds of trust, mechanic's liens and other claims by or against the debtor and debtor's property if they have not expired at the time of the filing of the bankruptcy case. 11 U.S.C. § 108.

2 Collier on Bankruptcy, Ch. 108 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2009).

After commencement of a bankruptcy case of a mortgagor or land contract vendee, any act by the mortgagee or land contract vendor to commence or continue a foreclosure of the mortgage or land contract or proceeding to recover possession of the real property is stayed. Any such act taken after commencement of a bankruptcy case is void.

Problem A: Robert Brown entered into a contract with Edward Lane to purchase Blackacre. Edward Lane commenced a contract forfeiture proceeding 10 days before Robert Brown filed for bankruptcy protection. Does the forfeiture notice time period continue to run as if no bankruptcy was filed?

Answer: Yes. But see In re Vacation Village Limited Partnership, 49 B.R. 590,592 (Bankr. N.D. Iowa 1984) if less than 60 days has lapsed since the date the Affidavit of Forfeiture is recorded. 11 U.S.C. § 108(b).

Problem B: Robert Brown mortgaged Blackacre to Edward Lane. Lane commenced a judicial action to foreclose the mortgage. After a judgment of foreclosure was entered, but before the foreclosure sale, Brown filed a bankruptcy petition. May the foreclosure sale be held?

Answer: No.

Problem C: Same facts as in Problem B, except that the foreclosure sale was held before the bankruptcy petition was filed. Does the filing of the petition affect the validity of the foreclosure sale?

Answer: No.

Problem D: Same facts as in Problem B, except that the foreclosure sale was held after Brown's bankruptcy petition was filed. Is the foreclosure sale void?

Answer: Yes.

Authorities: 11 U.S.C. § 362. In re Vierkant, 240 B.R. 317, (B.A.P. 8th Cir. 1999).

Comment: The filing of a bankruptcy petition after a foreclosure sale will not toll the statutory redemption period. Johnson v. First Nat'l Bank, 719 F.2d 270, 277 (8th Cir. 1983). However, in that circumstance, the statutory redemption period is extended such that the redemption period will not expire sooner than the 60th day after the date the bankruptcy petition was filed. 11 U.S.C. § 108(b).

Caveat: Any act to commence or continue a foreclosure of a mortgage or land contract or to recover possession of real property of a bankruptcy estate occurring after a bankruptcy petition is filed is valid if the foreclosing party obtained relief from the automatic stay before the act or obtained an annulment of the automatic stay after the act. 11 U.S.C. § 362(d).

13.7 PROBLEM: (Effect of Dismissal)

New 06/2011

What is the effect of a dismissal of a bankruptcy case?

STANDARD:

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

COMMENT:

The dismissal of the bankruptcy case will revest title in the debtor and vacates orders entered in the bankruptcy case. The goal is to undo the bankruptcy case and restore property rights as they were vested before the case. 11 U.S.C. § 349. However, the bankruptcy court has discretion to protect rights acquired in reliance on the case (such as the rights of a purchaser from the estate).

Source:

3 Collier on Bankruptcy, Ch. 349 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2009).

13.8 PROBLEM: (Showing Facts of Record)

New 06/2011

If the record does not show required title documents or bankruptcy proceeding information, may the bankruptcy attorney, bankruptcy trustee or other knowledgeable person certify fact information or supply required documents by affidavit?

STANDARD:

Yes. Iowa Code § 558.8 and 614.22. A bankruptcy transcript may be filed with the clerk of the district court of a county in which real estate affected by the bankruptcy is located. Iowa Code Chapter 626C.

COMMENT:

A knowledgeable affiant may clarify and explain title status. *See* Iowa Code §§558.8 and 614.22.

CHAPTER 14 "CONDOMINIUMS"

14.1 PROBLEM:

Rev. 7/1993

What documentary material should be included with the Declaration of Condominium?

STANDARD:

Iowa Code §499B.4 specifies the contents of the Declaration of Condominium and should be followed. Iowa Code §499B.6 requires "a full and exact copy of the plans of the building" be filed with the Declaration. These plans must be certified by an engineer, architect or land surveyor.

14.2 PROBLEM:

Rev. 3/2005

What should be contained in a deed or mortgage for a condominium unit or apartment?

STANDARD:

1. Description of the land and the document reference number and date of recording of the declaration.

2. Unit or apartment number.

3. Percentage of undivided interest in the common areas and facilities.

Authority:
Iowa Code § 499B.5 (2003).

COMMENT:

The description of the land may be incorporated by reference. This may be particularly desirable when there is a long metes and bounds legal description. The percentage of undivided interest in the common areas and facilities may also be incorporated by reference. See Iowa Code § 499B.7. If the correct document reference number is given, the date of recording the declaration can be determined from the records and the omission of the date of recording the declaration does not make the deed or mortgage defective.

Pursuant to Iowa Code § 558.49, the document reference number is the number assigned by the county recorder to indicate where the complete record will appear. This may be volume and page numbers or an instrument number or some other numbering system.

14.3 PROBLEM:

Rev. 3/12

What showing should be made in the abstract of title if the Condominium Regime is a conversion of an existing structure and the conversion occurred after April 25, 2000?

STANDARD:

There should be filed in the county records where the Declaration of Horizontal Property Regime has been filed an affidavit or certification from the developer or by some other person knowledgeable of the facts stating (i) that the Declaration was filed with the appropriate city, county or state governmental entity referenced in Section 499B.3 and 499B.20 of the Iowa Code as having the reviewing authority at least sixty (60) days prior to the recording of the Declaration in the county records, and (ii) either that the reviewing entity approved the structure as in compliance with the applicable building code or made no finding within the review period of noncompliance.

Authority:
Iowa Code §§ 499B.3 and 499B.20 (2009).

COMMENT:

Section 499B.20 provides that subsequent to April 25, 2000, an existing structure shall not be converted to a Horizontal Property Regime unless the converted structure meets local city, county or state building code requirements, as applicable, in effect on the date of conversion. Section 499B.3 requires filing of the Declaration with the appropriate reviewing governmental entity at least sixty (60) days before the filing of the Declaration with the county recorder. Different reviewing jurisdictions may have very different approaches as to whether or to what extent they will review such Declaration and project in relation to applicable building codes. Therefore, the title examiner should accept a record showing of at least timely submission of the Declaration to the proper reviewing entity for review and confirmation that no finding of noncompliance with the applicable building code was made by the reviewing entity, rather than requiring an affirmative statement from the reviewing entity of compliance with the building code.

CHAPTER 15 "LIMITED LIABILITY COMPANIES"

15.1 PROBLEM:

Rev. 6/2010

Are there marital rights in real property owned by a limited liability company created under the Iowa Limited Liability Company Act?

STANDARD:

No. Neither rights of a spouse nor homestead rights attach to the interest of a married member or manager in specific limited liability company property.

Authority:
Iowa Code §490A.901 and §489.501 (2009).

15.2 PROBLEM:

Rev. 9/2009

If an interest in real estate is conveyed by a limited liability company formed under the law of a jurisdiction other than the State of Iowa, is it necessary to require a showing that said limited liability company has obtained authority to transact business in the State of Iowa?

STANDARD:

No. The failure of a foreign limited liability company to obtain a certificate of authority to transact business in Iowa does not impair the validity of an act of the company.

Authority:
Iowa Code §489.803(2) (2009).
Iowa Code § 489.808(2) (2009).

COMMENT:

Pursuant to Iowa Code § 489.803(2), the ownership in Iowa of income-producing property by a foreign limited liability company constitutes transacting business in the State of Iowa. However, Section 489.808 provides that "[t]he failure of a foreign limited liability company to have a certificate of authority to transact business in [Iowa] does not impair the validity of a contract or act of the company or prevent the company from defending an action or proceeding in this state." Iowa Code § 489.808(2) (2009).

15.3 PROBLEM:

Rev. 3/14

If an instrument affecting real estate is executed by a limited liability company, is it necessary to obtain a showing from its certificate of organization, operating agreement, or a duly authorized company resolution that the individual who executed the instrument was authorized to do so?

STANDARD:

NOTE: There are two standards that follow. Because of substantive Iowa Code amendments that became effective on July 1, 2013, there is a standard applicable to instruments executed on or after July 1, 2013, and a different standard applicable to instruments executed prior to July 1, 2013.

FOR INSTRUMENTS EXECUTED ON OR AFTER JULY 1, 2013:

No. However, if the limited liability company's certificate of organization, operating agreement, statement of authority or a duly authorized company resolution are shown in the abstract, the examiner is bound to take notice of any limitations contained in any such documents with respect to the powers of the individual to execute the instrument on behalf of the company.

Authority:
Iowa Code § 489.407 (2013)
2013 Iowa Acts (85 G.A.), ch. 108, § 2 (amending Iowa Code § 489.302)
2013 Iowa Acts (85 G.A.), ch. 108, § 4 (to be codified as Iowa Code § 489.407A)
2013 Iowa Acts (85 G.A.), ch. 108, § 5 (to be codified as Iowa Code § 558.72)

FOR INSTRUMENTS EXECUTED PRIOR TO JULY 1, 2013:

Real property acquired by a limited liability company ("LLC") and held in the LLC name may be conveyed only in the LLC name. Any conveyance from an LLC that is managed by its members so made and signed by a majority of the members and containing a recitation that the conveyance is being made in the ordinary course of the LLC's business or affairs shall be presumed to be authorized by the LLC in the absence of knowledge of acts, facts, or restrictions indicating a lack of authority. Any conveyance from an LLC that is managed by managers so made and signed by a majority of the managers and containing a recitation that the conveyance is being made in the ordinary course of the LLC's business or affairs shall be presumed to be authorized by the LLC in the absence of knowledge of acts, facts, or restrictions indicating a lack of authority.

The record must disclose: (1) whether the LLC is member-managed or manager-managed; (2) whether the conveyance is in the ordinary course of LLC's business or affairs: and (3) the authority of the signer to act on behalf of the LLC.

Absent actual or constructive knowledge to the contrary, and unless a properly filed and recorded Statement of Authority contradicts any of the following showings, evidence of the foregoing matters may be provided of record by one or more of the following: (a) the LLC's written operating agreement; (b) a duly filed and recorded Statement of Authority ; (c) an affidavit signed by a person with knowledge; or(d) a recitation contained in the instrument of conveyance (including the acknowledgement of such instrument). Any instrument of conveyance signed by the person or persons (whether members, managers, or officers) so authorized of record shall be presumed to be authorized by the LLC. If the transaction is not in the ordinary course of business, the consent of all members is required.

Authority:

Iowa Code §§ 489.407(1) and .302 (2013), prior to the enactment of 2013 Iowa Acts (85 G.A.), ch. 108, H.F. 566.

COMMENT:

Iowa Code Chapter 489 (2009) enacts the Revised Uniform Limited Liability Company Act. After January 1, 2011, Chapter 489 governs LLCs. Effective on July 1, 2013, a number of provisions of the Iowa Code relating to LLCs were amended, including §§ 489.302, 489.407, 489.407A, 558.72 and 614.14A. 2013 Iowa Acts (85 G.A.), ch. 108, H.F. 566.

Real property acquired by a limited liability company ("LLC") and held in the LLC name may be conveyed only in the LLC name. An LLC may be either member-managed or manager-managed. An instrument of conveyance on behalf of an LLC is authorized either: (a) as provided in the operating agreement, (b) as provided in a statement of authority filed with the Secretary of State and county recorder, or (c) with consent of all members in a member-managed LLC or consent of a majority of all managers in a manager-managed LLC. 2013 Iowa Acts (85 G.A.), ch. 108, § 4 (to be codified as Iowa Code § 489.407A).

One of the 2013 amendments was the addition of statutory warranties providing that an instrument of conveyance from an LLC, unless clearly and conspicuously provided to the contrary in the instrument, includes a warranty to the transferee by the person executing the instrument that the person executing the instrument has been duly authorized by the LLC and has the legal capacity to execute the instrument. 2013 Iowa Acts (85 G.A.), ch. 108, § 5 (to be codified as Iowa Code § 558.72). The title examiner may rely upon the statutory warranties as if such warranties were set forth in writing in the conveyance instrument itself.

2013 Iowa Acts (85 G.A.), ch. 108, § 6 (to be codified as Iowa Code § 614.14A) provides a statute of limitations barring claims seeking to invalidate a deed or real estate contract by an LLC based on the allegation that the execution of the instrument was not authorized by the LLC. See Title Standard 10.7 and Comment.

15.4 PROBLEM:

Rev. 3/14

Under what circumstances can a duly recorded Statement of Authority under Iowa Code § 489.302 be relied upon to establish the authority or lack of authority of persons signing on behalf of a limited liability company?

STANDARD:

A Statement of Authority may state the authority, or limitations on the authority, of any person to execute an instrument conveying real estate held in the name of a limited liability company ("LLC"). The Statement of Authority may identify an authorized person either by reference to the name of a specific individual or to a specified position with the LLC without regard to the specific individual holding the position at a particular time.

If the record shows a Statement of Authority filed with the Secretary of State and the recorder of the county in which the real estate is located, an examiner may rely on the authority granted in such Statement of Authority as being conclusive in favor of a person that gives value in reliance on the grant without knowledge to the contrary, except if the Statement of Authority has been canceled or restrictively amended by an instrument filed with the recorder or if a limitation on the grant is contained in a later Statement of Authority filed with the Secretary of State and recorder. If a Statement of Authority is not filed with both the Secretary of State and recorder, it may be relied upon by an examiner, but the presumption of authority granted is not conclusive.

If the record shows a Statement of Authority that does not grant authority, but that limits the authority of a specific person to convey the LLC's real property, an examiner is deemed to know of such limitation of authority.

Authority:
Iowa Code § 489.302 (2013).

COMMENT:

Effective on July 1, 2013, Iowa Code § 489.302(10) was amended to provide that a Statement of Authority is effective indefinitely until amended or cancelled by an instrument filed with the Secretary of State, unless the Statement of Authority by its own terms provides for an earlier cancellation date. 2013 Iowa Acts (85 G.A.), chapter 108, § 1, H.F. 566. The law in effect prior to July 1, 2013, provided that a Statement of Authority was cancelled by operation of law five years after the Statement of Authority, or its most recent amendment, became effective.

CHAPTER 16 "TAX SALE DEEDS"

16.1 PROBLEM:

Rev. 6/2011

When the abstract discloses a tax sales deed, what showing is necessary with regard to the tax sale proceedings?

STANDARD:

A. If the tax sale deed has been placed of record for greater than ten years, no further showing must be made.

Authority:
Iowa Code §589.14 (2011).
Iowa Code §614.22 (2011).

COMMENT:

Section 589.14 provides that a tax deed executed more than ten years earlier is not ineffectual because of the failure of the record to show that any of the steps in the sale and deeding of the property were complied with and said proceedings are legalized and valid as if the record showed full compliance with the law.

Section 614.22(2) bars any action to set aside, cancel, annul, void or redeem from a tax deed that has been recorded for more than ten years. It further provides that any such deed and all the proceedings upon which the deed is based, against which action is not taken within ten years of the recording of said deed, are valid "without exception for infancy, mental illness, absence from the state, or other disability cause." Note, however, that subsection 614.22(2) specifically does not apply to real property described in a tax deed which is not in the possession of the person claiming title under the tax deed.

B. If the tax sale deed has been placed of record for less than ten years, the abstract should disclose the following:

(1) That the tax lists of the relevant taxing district showed that the taxes for those years for which the property was sold remained unpaid as of the date of the sale.

(2) The tax sale register, which should show the date of the tax sale, the name of the tax sale purchaser, the years of delinquent taxes for which the property was sold and that there was no redemption from the sale.

(3) Proper notice of the time and place of the sale, and proper service thereof, pursuant to Iowa Code §§446.9, 446.11 and 446.12.

(4) An affidavit evidencing proper notice of expiration of the right of redemption,

and proper service thereof, pursuant to Iowa Code §§447.9-.12.

(5) Although not required by law for the validity of a tax sale deed, the filing of a 120-day affidavit pursuant to Iowa Code §§448.15 and 448.16 is recommended. Where the tax sale was held after June 1, 2005, and the tax deed conveys an undivided interest in the real estate of less than 100 percent, the abstract also should show an affidavit of service attached to the 120-day affidavit, evidencing notice by regular and certified mail on other parties in possession as required by section 448.15(3).

(6) Although not required by law for the validity of a tax sale deed, the filing of an affidavit of non-military status concerning parties served with notice of expiration of right of redemption is recommended.

Authority:
Iowa Code §§ 446.1, 446.9, 446.11, 446.12, 447.9-12, and 448.15-.16 (2011).

COMMENT:

Pursuant to §446.9 of the Code of Iowa, the county treasurer must serve notice of the time and place of the sale on the person in whose name the property is taxed by sending the notice no later than May 1, by regular first class mail to such person's last known mailing address. Section 446.9 further requires that the treasurer send notice to those persons having an interest of record in the property who, at least one month prior to the date of the tax sale have requested the notice. The Code of Iowa does not prescribe the method or form for the proof of service of the notice of tax sale.

Section 446.9 also requires that the time and place of the sale be published once, not less than one week, nor more than three weeks before the day of the sale, in at least one official newspaper selected by the board of supervisors, and designated by the treasurer. Section 446.10 of the Code of Iowa provides for the posting of the notice of tax sale in lieu of publication under certain circumstances.

Chapter 447 of the Code of Iowa governs tax sale redemption. Section 447.12 prescribes the content of the affidavit of completed service of notice of expiration of right of redemption. Except with regard to those tax sale certificates of purchase held by a county, the affidavit must be filed no more than three years after the date of sale, or the sale is cancelled pursuant to section 446.37. The affidavit of completed service is deemed timely filed where it can be established by competent evidence that it was deposited in the United States mail, addressed to the county treasurer, on the filing deadline. Wright v. Maloney, No. 06-1143, 2007 WL 4191949 (Iowa Ct. App. Nov. 29, 2007) (citing section Iowa Code § 622.105 as authority for this holding).

With regard to tax sales held after July 1, 1998, section 447.9 requires service of notice of expiration of right of redemption by both regular mail and certified mail on persons in possession and on those persons in whose name the property is taxed. Personal service is required on those parties with regard to sales held on or prior to July 1, 1998. See Op. Att'y

Gen. (October 6,1998) (stating that the 1998 amendment to section 447.9, eliminating the requirement of personal service, applies only to those tax sales occurring after July 1, 1998). According to section 447.9, all other persons having an interest of record shall be served by regular mail. Section 447.10 provides for service of notice of expiration of right of redemption by publication where service cannot be served in the manner prescribed in section 447.9.

It is recommended that Rule 1.305 of the Iowa Rules of Civil Procedure be followed in determining who should be served on behalf of various entities. It is recommended that regular mail service be used in addition to certified mail in those instances where certified mail is called for under the Iowa Rules of Civil Procedure.

Although not required for the validity of a tax title, it is recommended that the tax titleholder file a 120-day affidavit pursuant to section 448.15-.16. Effective June 1, 2005, section 448.15 requires that a copy of the 120-day affidavit be mailed by regular and certified mail to all other parties in possession of the real estate where the tax deed conveys an undivided interest in the real estate of less than 100 percent. Pursuant to section 448.15(3) proof of such mailed notice is made by attaching an affidavit of service to the 120-day affidavit.

On January 25, 2008, in Dohrn v. Mooring Tax Asset Group, L.L.C., 743 N.W.2d 857 (Iowa 2008), the Iowa Supreme Court held that a tax deed was absolutely void if notice of expiration of right of redemption was not served on a person in possession under an unrecorded lease. In response to the Dohrn holding, the Iowa legislature enacted the following amendment to Iowa Code § 448.3(2), which became effective on April 8, 2008, and applies to all tax deeds issued on or after that date:

> 2. In the event that an owner of record or a person in whose name the parcel is taxed establishes that such person was not served with notice of expiration of right of redemption in accordance with section 447.9, then the county treasurer's deed is void, subject to the provisions of section 448.15 and 448.16. If a person entitled to service of notice under section 447.9, other than an owner of record or a person in whose name the parcel is taxed, establishes that such person was not served with notice in accordance with section 447.9, the deed is not thereby rendered invalid. However, the deed is subject to all of the right and interest of the person not served with notice, as provided in sections 448.15 and 448.16.

After the amendment to Iowa Code § 448.3, the filing of a 120-day affidavit is recommended in any case where there may have been a person with an unrecorded possessory interest in the subject parcel who was not served with notice of expiration of right of redemption.

It is also recommended that the tax title holder file an affidavit of non-military status so as to eliminate any concerns as to the applicability of the Servicemembers Civil Relief Act. See 50 App. U.S.C. §561; Conroy v. Aniskoff, 507 U.S. 511 (1993).

16.2 PROBLEM:

Rev. 6/2011

To what extent may Iowa Code §§ 448.15 and 448.16 be relied upon as a cure or remedy for imperfections or deficiencies with regard to a tax title, or the proceedings relating thereto?

STANDARD:

Iowa Code §§ 448.15 and 448.16 provide a 120-day limitation period on actions adverse to a tax title. Pursuant to the express language of Iowa Code § 448.16, if no claims adverse to a tax title have been filed within 120 days following the filing of a 120-day affidavit as prescribed under Iowa Code § 448.15, all persons are thereafter barred from commencing an action adverse to the tax title.

Prior to their amendment effective with regard to tax sales after June 1, 2005, sections 448.15 and 448.16 had been interpreted as valid statutes of limitation barring all claims based upon defects in a tax deed, excepting (1) claims owned by the United States, (2) those based upon inadequate legal descriptions, or (3) those based upon lack of, or improper notice of expiration of right of redemption on parties in possession under Iowa Code §447.9.

For all tax sales held after June 1, 2005, sections 448.15 and 448.16 specifically purport to bar any and all claims adverse to the tax title, including but not limited to claims based on improper service of notice of expiration of right of redemption. As discussed in the Comment to this Standard, the Committee advises caution when relying on Iowa Code §§ 448.15 and 448.16 in those situations where the tax deed conveys less than a 100% undivided interest in and to the real estate.

As a prerequisite to reliance upon Iowa Code §§ 448.15 and 448.16, it is necessary to require that the abstract show the recording of the affidavits as provided for under Iowa Code §§ 447.12 and 448.15, and that no claims have been filed thereunder within 120 days after the filing of the Iowa Code § 448.15 affidavit.

In connection with tax sales held after June 1, 2005, an action to enforce a claim filed under section 448.16 must be commenced within sixty days after the date of filing the claim. If any such action is not commenced timely, the underlying claim shall be forfeited and cancelled, and the claimant, or the person under whom the claimant claims the title, thereafter shall be forever barred and stopped from having or claiming any right , title or interest in the parcel adverse to the tax title.

Authority:

Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983).
Dohrn v. Mooring Tax Asst Group, L.L.C., 743 N.W.2d 857 (Iowa 2008)
Nelson v. Forbes, 545 N.W. 2d 576 (Iowa Ct. App. 1996).
Larsen v. Cady, 274 N.W. 2d 907 (Iowa 1979).
Simeon v. City of Sioux City, 108 N.W. 2d 506 (Iowa 1961).

Patterson v. May, 29 N.W. 2d 547 (Iowa 1947).
Swanson v. Pontralo, 27 N.W. 2d 21 (Iowa 1947).
Iowa Code §§ 447.9, 447.12, 448.15, 448.16, 589.14 and 614.22 (2011).
Op. Att'y Gen. No. 98-10-1.

COMMENT:

In 2005, §§ 448.15 and 448.16 were significantly amended insofar as their application to tax sales taking place after June 1, 2005. In connection with sales held after June 1, 2005, a person claiming under a tax title must first take possession of the real estate prior to filing a 120-day affidavit. Prior to their amendment, Iowa Courts had carved out numerous exceptions to the applicability of sections 448.15 and 448.16. The amendments to these statutes make clear the legislature's intent that all claims adverse to the tax title, including but not limited to claims based on improper service of notice of expiration of right of redemption, are barred if not filed prior to expiration of the 120-day limitations period. Also, pursuant to section 448.16, following expiration of 120 days from the filing of the affidavit under section 448.15, and if no claims adverse to the tax title have been filed, the validity of the tax title shall be conclusively established as a matter of law.

The Committee advises caution when relying upon the limitations provisions of Iowa Code §§ 448.15 and 448.16. Despite recent amendments which were intended to promote the constitutional validity of the statutes, such as the addition of a possession prerequisite, Iowa courts have yet to weigh in on their validity or the scope of their validity following those amendments.

The Committee further advises caution when relying on Iowa Code §§ 448.15 and 448.16 in those situations where the tax deed conveys less than an 100% undivided interest in and to the real estate. Iowa Code § 448.15(3) provides that "if a tax deed or instrument purporting to be a tax deed has been issued to convey an undivided interest in the parcel of less than one hundred percent, the owner or holder of the tax title interest or purported tax title interest shall be deemed to be in possession and entitled to file the [120-day] affidavit." Although those claiming tax title by virtue of a tax deed conveying less than one hundred percent undivided interest are conclusively deemed to be in possession pursuant to Iowa Code § 448.15(3), the Committee has concerns as to whether this conclusive presumption of possession, without any affirmative showing of possession, complies with requirements of due process. As such, it is recommended that the title examiner require a record showing of possession prior to reliance on the limitations provisions of Iowa Code §§ 448.15 and 448.16.

If a tax deed issued based on a tax sale held prior to June 1, 2005, contains anerroneous legal description, even if the 120-day affidavit is recorded with a correct legal description, adequate notice is not given to holders of adverse claims and section 448.16 of the Code of Iowa does not become operative.