

# UNIFORM TITLE STANDARDS

## Foreword To The 1981 Revision

In the Foreword to the 1975 edition it was stated that the Uniform Title Standards would be kept up to date by a continuing revision program, to be implemented by a one-year pilot program of the University of Florida Law Review. That program was instituted and has continued to the present time. It is funded by a substantial annual contribution from the Real Property, Probate and Trust Law Section of The Florida Bar, and last year an additional contribution was received from the George B. Carter Foundation.

The first project undertaken was a revision of Chapter 5 to reflect the changes brought about by the Florida Probate Code as of January 1, 1976. Subsequently Chapter 4, dealing with corporations, was revised to reflect changes in the applicable law. And most recently a revision of Chapter 2 on bankruptcy was completed, with the invaluable assistance of the members of the committee on Bankruptcy Aspects of Real Property Law under the chairmanship of Joel M. Aresty and Harrison K. Chauncey.

In addition, over the years portions of other chapters have been revised and several new standards have been adopted. However, other standards were in need of revision, and in many cases the authorities and references were out of date. This 1981 Revision is the result of an overall updating undertaken to ensure that all standards and citations accurately reflect current statutory and case law.

Since the inception of the continuing revision program, many students have occupied the position of Title Standards Editor. Each one has contributed significantly to the growth and stability of the program. The two editors who were primarily responsible for producing this 1981 Revision deserve special recognition. This revision was initiated by Brian McK. O'Connell, and completed by William C. Nesbitt.

Recognition should also be accorded to the members of the Uniform Title Standards Committee of the Real Property, Probate and Trust law Section of The Florida Bar. Sherwood Spencer was chairman of that committee when the previous edition was undertaken and completed. He was succeeded by David P. Catsman, who served until the appointment of the current chairman, Roger H. Staley, under whose direction the present revision was accomplished.

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Professor of Law

Gainesville, Florida  
July 1981

# UNIFORM TITLE STANDARDS

## FOREWORD

The Real Property, Probate and Trust Law Section of The Florida Bar, under the direction of Chairmen Robert C. Scott, of Palm Beach, and John A. Sutherland, of Vero Beach, and continued under the direction of Robert Arnold of Orlando, appointed a Continuing Committee known as the Uniform Title Standards Committee, composed of Sherwood Spencer, Chairman, James W. Mahoney, Parks M. Carmichael, David P. Catsman, Paul Game, Robert C. Scott, and Paul J. Stichler.

The Uniform Title Standards which follow are the combined work of the Committee and a task work force under the guidance of Professor Mandell Glicksberg of the University of Florida Law School, with the cooperation of Stephen L. Pankau, Michael A. Schroeder, and James B. Tilghman, Jr. Mrs. Evelyn Woodruff did all of the typing, proofing, and other secretarial work in the preparation of the various drafts under the direction of Professor Glicksberg.

The George B. Carter Foundation provided a grant of \$3,500.00, which funds were used in the course of compiling the revised Title Standards. The Section and the Bar are grateful for the use of these funds to help revise out-dated Standards and the creation of new Standards to meet the changes engrafted by new statutory laws and Court decision.

The Uniform Title Standards will be kept to date by a continuing revision program. A loose-leaf system will enable the immediate up-date in one binder. A one year pilot program has been approved by the Law Review of the University of Florida Law School to implement a continuing program of revision.

Accordingly, The Florida Bar and Real Property, Probate and Trust Law Section will continue to meet the needs of the public by providing sufficient and speedy title examinations and to help eliminate title questions which have delayed real estate closings in the past.

Special mention is made of the Standards dealing with the questions relating to probate. It was determined to use existing probate law in promulgating the Standards. When the new Florida Probate Code becomes effective January 1, 1976, the continuing revision program will make provision for the changes in the probate law.

Respectfully,

Sherwood Spencer, Chairman

July 25, 1975

## PREFACE

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

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

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

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

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

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

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

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STANDARD 00

CONSTRUCTION OF TITLE PROBLEMS

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

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

Answer:

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

CHAPTER 1  
AGENCY AND POWERS OF ATTORNEY

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STANDARD 1.1

EXECUTION OF POWER OF ATTORNEY

**STANDARD: WHEN A DEED IS EXECUTED BY VIRTUE OF A POWER OF ATTORNEY, THE POWER OF ATTORNEY MUST BE EXECUTED AND RECORDED IN THE SAME MANNER AS THE DEED.**

Problem 1:           A gives B a power of attorney, duly acknowledged and witnessed, specifically authorizing B to convey Blackacre, but the power of attorney is not recorded. B conveys Blackacre to C under such power of attorney. Is the conveyance valid against subsequent bona fide purchasers and creditors?

Answer:             No.

Problem 2:           A gives B a power of attorney specifically authorizing B to convey Blackacre, but the power of attorney either is not witnessed or not acknowledged. B conveys Blackacre to C under such power of attorney. Is the conveyance valid against subsequent bona fide purchasers and creditors?

Answer:             No.

Authorities & References:   *F.S.* 695.01, 709.015(2) (1979); 2 ADKINS, FLA. REAL ESTATE LAW & PROCEDURE §43.02, n. 19 (1959); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §28.06, n. 4 (1980); 1 FLORIDA REAL PROPERTY PRACTICE §10.52 (CLE 2d ed. 1971); ATIF TN 4.02.01.

Comment:

*F.S. 695.01 (1979)* requires that the power of attorney be recorded to be valid against subsequent bona fide purchasers and creditors. To be recorded it must conform to the requirements of *F.S. 695.03 (1979)* (acknowledgment for recording purposes). The general law is that a power of attorney must be executed with the same formality as the law requires for the instrument to be executed under it. *2A C.J.S. Agency §45(b) (1972)*.

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

With respect to marital property and release of dower, see Title Standards 20.4 (Power Of Attorney — Married Women's Property) and 20.8 (Power Of Attorney — Release Of Dower Prior To October 1, 1970).

STANDARD 1.2

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

**STANDARD: IN THE EXECUTION OF AN INSTRUMENT BY AN ATTORNEY IN FACT, THE NAME OF THE PRINCIPAL MAY BE EITHER WRITTEN, PRINTED OR TYPED.**

Problem: Blackacre was purportedly conveyed by a deed in which the wording of the execution is “John Doe by Richard Roe, as his attorney in fact.” The name of John Doe was typed but Richard Roe's name was signed, and Roe acknowledged that he executed the deed as attorney in fact for John Doe. Roe has a power of attorney in proper form. Did the grantee acquire title?

Answer: Yes.

Authorities  
& References:

*State v. Hickman*, 189 So.2d 254 (2d D.C.A. Fla. 1966), *cert. den.* 194 So.2d 618; *Loizlaux Lumber Co. v. Davis*, 41 N.J. Super. 231, 124 A.2d 593 (1956).

STANDARD 1.3

AUTHORITY TO CONVEY REAL PROPERTY

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

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

Answer: No.

Problem 2: A gives to B a power of attorney authorizing B to “sell and convey any and all land owned by me,” without specifically describing such land. Does B have the authority to convey any part or all of such land?

Answer: Yes.

Authorities & References: 2A C.J.S., *Agency* §§223-227 (1972); ATIF TN 4.02.03; 5 FUND CONCEPT 25 (May 1973).

Comment:

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

With respect to marital property and release of dower, see Title Standards 20.4 (Power Of Attorney — Married Women's Property) and 20.8 (Power Of Attorney — Release Of Dower Prior To October 1, 1970).

CHAPTER 2  
BANKRUPTCY

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STANDARD 2.1

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

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

Problem 1: John Doe held three parcels of property by various tenancies: Blackacre by a tenancy by the entirety, Whiteacre by a joint tenancy, and Greenacre by a tenancy in common. Doe filed a petition in bankruptcy on or after October 1, 1979, and subsequently he and his various co-tenants attempted to convey Blackacre, Whiteacre, and Greenacre to Richard Roe. Doe was later granted a discharge and the proceeding was closed. Is Roe's title valid?

Answer: No. Whether the bankruptcy proceedings are voluntary or involuntary, the filing of the bankruptcy petition creates an estate over which the trustee has dominion. Property held by the entirety by a debtor whose spouse does not also file a petition in bankruptcy will still become property of the estate until an exemption is established. Likewise, interests in tenancies in common or joint tenancies will become property of the estate until such property is exempted.

Problem 2: Same facts as above, except that Doe also holds Blueacre as trustee for the benefit of Marvin Moe. What will happen to Blueacre upon the filing of the petition in bankruptcy?

Answer: The estate will consist only of such right and title to the property as was possessed by the debtor. Generally, the estate will hold such property subject to the outstanding interest of the beneficiary.

Authorities & References: Bankruptcy Code, 11 U.S.C. §541.

Comment:

Section 541 provides that the commencement of a bankruptcy case creates an estate and specifies what property shall comprise the estate. Essentially, the estate is composed of all legal or equitable interests of the debtor in property, wherever located, as of the time the case is filed. This estate includes all types of property, both tangible and intangible, as well as causes of action. Although the estate takes only the interest that the debtor held, §108 of the Code permits the trustee in bankruptcy an extension of time for filing actions where the statute of limitations has not expired before the time the petition is filed. However, under §541 of the Code the trustee does not take title to the property, as he did under §70(a) of the old Bankruptcy Act.

An important provision of §541 is that all interests of the debtor in property as of the commencement of the case become the property of the estate. Once the property comes into the estate, the debtor is permitted to exempt it in accord with §522 of the Code. However, §522(b)(1) gives each state the option to veto the federal statutory scheme of exemptions, and where a state does so residents of that state may claim exemptions only under state law. 3 COLLIER ON BANKRUPTCY ¶522.21 (15th ed. 1980). *F.S.* §222.20 provides, in accordance with §522(b) of the Code, that residents of Florida shall not be entitled to the federal exemptions enumerated in §522(b) of the Code. In any event, under Code §522(b) it appears that the debtor must affirmatively claim any available exemption to release the property from the estate. See 4 COLLIER ON BANKRUPTCY ¶541.02[3] (15th ed. 1980).

After the commencement of the bankruptcy case, protection is afforded a transferee of real property who obtains the property in good faith, without knowledge, and for a fair equivalent value. A purchaser at a judicial sale is also protected against the avoidance of the transfer by the trustee in bankruptcy. However, this protection does not exist if the real property is located in the county where the case is commenced. In addition, in all other counties, a transferee is not protected if a copy of the bankruptcy petition has been filed in the Official Records book before the transferee properly records his interest. If a fair equivalent value is not paid, but some value is given, then a lien arises in favor of the transferee to the extent that some value was present. Code §549(c).

Some protection is afforded the transferees of property from a debtor who is involved in involuntary bankruptcy proceedings. Code §549(b). This provision only applies to transferees who take during the period from the commencement of the case to the order of relief. Code §303. Such a transfer is validated only to the extent that value was given after the commencement of the case under this section; however, knowledge of the bankruptcy proceedings is irrelevant.

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

STANDARD 2.2

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

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

Problem 1: A trustee in bankruptcy to the bankruptcy proceedings of John Doe entered into a contract for the sale of Doe's nonexempt real property to Richard Roe. The sale was not in the ordinary course of business. Notice of the proposed sale was given to Doe's creditors, but no hearing was ever requested by a party in interest and no hearing was ever held on the matter. The sale was subsequently completed. Did valid title pass to Roe?

Answer: Yes. Code §§102(1) and 363(b) simply require notice and an opportunity for a hearing of any sale, lease, or use of property of the estate other than in the ordinary course of business. A court order is not required.

Problem 2: Same facts as above, except that Doe, who is a debtor in possession, himself sells the property to Roe. Did valid title pass?

Answer: Yes.

Authorities & References: Bankruptcy Code, 11 U.S.C. §§102, 361, 363.

Comment:

Code §363 defines the rights and powers of parties with interests in property of the estate. Section 363(b) states that the trustee may, “after notice and a hearing,” use, sell, or lease the property, other than in the ordinary course of business. A court order is not required. Code §102(1) defines “after notice and a hearing” as “after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances,” and authorizes an act without an actual hearing if notice is properly given and if such a hearing is not requested in a timely manner by a party in interest. Thus, the burden is shifted to interested parties to provide the request for a hearing and, should no such request be made, action may be taken without a hearing.

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

- a. A certified copy of the notice filed in the bankruptcy court together with a certificate from the Clerk of the Court stating that the Clerk has reviewed the file and that no request for a hearing was made pursuant to the notice; or,
- b. A certified copy of the notice filed in the bankruptcy court together with a certified copy of any court order entered after a request for a hearing.

Code §363(e) provides that at any time, on request of an entity with an interest in property which has been or is proposed to be used, sold, or leased, the court shall prohibit or condition such use, sale, or lease as necessary to provide adequate protection. Section 361 states that adequate protection may be provided by periodic cash payments to provide for the decrease in value, or by additional replacement security to compensate for the decrease in value, or by other relief which will result in the indubitable equivalent of an interest. The requirement of adequate protection is mandatory and if adequate protection cannot be offered then the proposed use, sale, or lease must be conditioned so as to provide adequate protection. If the proposed use, sale, or lease cannot be so conditioned then it must be prohibited. See 2 COLLIER ON BANKRUPTCY ¶363.06 (15th ed. 1980).

Section 363(h) permits the sale of any interest of a co-owner in property in which the debtor had, at the time of filing of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entireties, provided that certain conditions specified in this section are met. However, partnership property is not specifically discussed.

Purchasers are protected under §363(m) from the effect of a reversal on appeal from the authorization to sell as long as the purchaser acted in good faith. The protection of a good faith purchaser exists regardless of whether the purchaser was aware of the pendency of the appeal. Lessees of the property are similarly protected. However, §363(m) will not protect the purchaser in a sale free and clear of liens where no notice is given to the lienholder. Such a purchaser will be held to have purchased subject to the lien, although actual notice as opposed to written notice may suffice. See 2 COLLIER ON BANKRUPTCY ¶363.13 (15th ed. 1980).

If the trustee or debtor in possession is operating a business, it may sell property in the ordinary course of business without notice and a hearing unless the court orders otherwise. Code §363(c)(1).

STANDARD 2.3

EFFECT OF BANKRUPTCY ON RIGHT TO FORECLOSE

**STANDARD: ON OR AFTER OCTOBER 1, 1979, PRIOR CONSENT OF THE BANKRUPTCY COURT HAVING JURISDICTION OVER THE PROPERTY OF A DEBTOR IS NECESSARY FOR A VALID FORECLOSURE OF A MORTGAGE ENCUMBERING SUCH PROPERTY.**

**Problem:** John Doe, a mortgagor under a conventional mortgage, files a bankruptcy proceeding on or after October 1, 1979, at which time the subject mortgage is in default. The mortgagee desires to foreclose the mortgage without the approval of the bankruptcy court. May the mortgage foreclosure be commenced?

**Answer:** No. The jurisdiction of the bankruptcy court extends to all of the property of the estate, regardless of whether it is located within the district in which the court sits. After this jurisdiction has attached, other courts lack jurisdiction to deal with the land or the lien upon it without the consent of the bankruptcy court.

**Authorities & References:** Bankruptcy Code, 11 U.S.C. §362.

**Comment:**

The automatic stay, which arises upon the filing of a bankruptcy petition, stops all foreclosure actions. Code §362(a). This automatic stay is broader than the stay in the previous Bankruptcy Act and includes a stay against a pending mortgage foreclosure in a liquidation bankruptcy which was not stayed under the old Bankruptcy Act.

Section 362(b) provides a number of exceptions to this stay. A complete discussion may be found in 2 COLLIER ON BANKRUPTCY ¶362.04 (15th ed. 1980). Section 362(e) provides that thirty days after a request for relief from the stay, the stay will be automatically vacated unless the court, after notice and a hearing, orders such stay continued in effect pending a final hearing. In addition, §362(d) provides that, under certain circumstances, the stay may be terminated, annulled, modified, or conditioned upon request of a party in interest after notice and a hearing. If the court does not grant relief from the stay, it will remain in effect. Code §362(c)(2). See 11 FUND CONCEPT 26 (May, 1979). However, if the stay is vacated pursuant to §362(e), no court order is necessary to permit foreclosure.

STANDARD 2.4

EFFECT OF TRUSTEE IN BANKRUPTCY  
ABANDONING PROPERTY OR DEBTOR

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

Problem: After authorization by the bankruptcy court, a trustee in bankruptcy abandoned Blackacre, which was property of the estate. The property was abandoned to John Doe, the debtor, because of his possessory interest in the property. May Doe convey valid title to Blackacre to Richard Roe?

Answer: Yes.

Authorities  
& References: Bankruptcy Code, 11 U.S.C. §554.

Comment:

Section 554 of the Bankruptcy Code provides that after notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate; similarly, upon request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any such property of the estate. Code §554(c) provides that in the absence of a court order to the contrary, any property scheduled under §521(1) and not otherwise administered at the time of closing of a case is deemed abandoned to the debtor and deemed administered for the purpose of §350. Section 554(d) provides that unless the court orders otherwise, property of the estate that is not abandoned and that is not administered in the case remains property of the estate. This subsection recognizes that abandonment requires notice and that there can be no abandonment by mere operation of law of property which is not listed in the debtor's schedules or otherwise disclosed to the creditors, and that such property will remain property of the estate. The unscheduled and unadministered asset remains property of the estate and the estate must be reopened and the property abandoned, sold, or exempted in order to remove it from the estate.

The notice and hearing discussed above have the same construction as discussed in Title Standard 2.2. If these requirements are met, the abandonment takes place and vests title to the abandoned property in the transferee, regardless of whether the transferee receives a deed.

STANDARD 2.5

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

**STANDARD: A JUDGMENT LIEN ACQUIRED BEFORE BANKRUPTCY THAT IS SUBSEQUENTLY DISCHARGED IN BANKRUPTCY AND IS NOT SUBJECT TO EXCEPTIONS TO DISCHARGE IN BANKRUPTCY WILL NOT BECOME A LIEN ON PROPERTY ACQUIRED AFTER DISCHARGE. THEREFORE, A PETITION PURSUANT TO FLORIDA STATUTES, SECTION 55.145 (1981) IS UNNECESSARY TO PROVIDE MARKETABLE TITLE TO REAL PROPERTY ACQUIRED AFTER A DISCHARGE IN BANKRUPTCY.**

Problem: A judgment upon claims not subject to exceptions to discharge in bankruptcy was entered against John Doe on August 1, 1980, and a certified copy was recorded so as to constitute a lien on real property. Doe filed a petition in bankruptcy on January 2, 1981, properly scheduling the judgment, and subsequently received a discharge in the bankruptcy proceeding. Before one year following discharge had elapsed. Doe acquired a parcel of real property. One year following the discharge must Doe file a petition under FLA. STAT. §55.145 (1981) to cancel and discharge the judgment to provide marketable title to the after-acquired property?

Answer:

No. The judgment, properly discharged in the bankruptcy proceeding, does not become a lien against property thereafter acquired by the debtor. The judgment is not a lien against the after-acquired property, and no petition pursuant to FLA. STAT. §55.145 (1981) is necessary.

**ADD MISSING TEXT HERE (second page of 2.5)**

The statute was upheld as constitutional by the Florida Supreme Court in *Albritton v. General Portland Cement Co.*, 344 So.2d 574 (Fla. 1977). The Florida Supreme Court recognized that the bankruptcy discharge did not affect a lien arising from a judgment prior to bankruptcy attaching to pre-bankruptcy property. A judgment debt avoided in bankruptcy and not subject to Bankruptcy Code exceptions, however, cannot constitute a lien on after-acquired property. IA COLLIER ON BANKRUPTCY §17.30. The Florida Supreme Court stated in *Albritton*, “recording of Portland’s judgment, however, places a continuing cloud on Albritton’s title to Lee County real property, even though the judgment does not constitute an enforceable encumbrance against discharged property on property acquired after March 13, 1968.” 344 So.2d at 576. Under the Bankruptcy Act there is no encumbrance upon the after-acquired property and FLA. STAT. §55.145 (1981) is a mere record-clearing device. Such a record-curative statute may have been necessary prior to 1970, where the effect of a discharge in bankruptcy was to create an affirmative defense that the debtor would plead in an action brought on the discharged debt. Following the enactment of section 14(f) of the prior Bankruptcy Act, however, the affirmative defense of discharge was no longer required. Creditors could no longer force the debtor to pay on discharged debts. Section 524 is derived directly from Section 14(f). COLLIER ON BANKRUPTCY §524.01 (15th ed. 1980).

As there is no actual cloud on title to the after-acquired property following discharge in bankruptcy, no action pursuant to FLA. STAT. §55.145 (1981) is necessary. It is recommended that marketable title be reflected in the official records of the county in which the property is located. Therefore, certified copies of the petition in bankruptcy, the schedule of liabilities showing the judgment, and the order of discharge preferably should be recorded in such county.

The after-acquired property must have been purchased with assets acquired after the filing of the petition in bankruptcy which were not part of the estate or exempted in the bankruptcy proceedings. Assets acquired by the debtor within 180 days after filing the petition in bankruptcy are part of the estate if acquired under the circumstances described in Section 541(a)(5) of the Bankruptcy Code.

CHAPTER 3  
CONVEYANCES

---

STANDARD 3.1

CONVEYANCES TO AN UNINCORPORATED VOLUNTARY  
ASSOCIATION

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

Problem: Blackacre was conveyed to Wild Life Hunting and Fishing Association, an unincorporated voluntary association. Later, Blackacre was conveyed by this association by its president and secretary to John Doe. Did Doe acquire marketable title to Blackacre?

Answer: No.

Authorities & References: *Reid v. Barry*, 93 Fla. 849, 112 So. 846 (1927); 1 FLORIDA REAL PROPERTY PRACTICE §10.79-.80 (CLE 2d ed. 1971); 2 PATTON ON TITLES §406 (2d ed. 1957); 15 A.L.R.2d 1451 (1939); ATIF TN 6.01.01, 11.01.05.

Comment:

At common law the courts held that such an association was not a legal entity capable of acquiring or conveying legal title. In Florida, it has been held that a conveyance, under prior law, to a partnership by name was not void, but created a latent ambiguity that could be explained by parol testimony, thus vesting title in the partners individually. *Cawthon v. Stearns Culver Lumber Co.*, 60 Fla. 313, 53 So. 738 (1910). Possibly this same reasoning might be applied to a conveyance to an unincorporated association.

For an example of a statute authorizing an unincorporated association to hold title, see *F.S. 711.12(2)* (Supp. 1974).

With respect to conveyances to partnerships, see Title Standards, Chapter 19 (Partnerships).

STANDARD 3.1-1

CONVEYANCES TO AND BY  
TRUSTEES OF UNINCORPORATED CHURCHES

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

Problem: The deed to Blackacre transfers the property to “the trustees of United Kingdom Church.” United Kingdom Church is an unincorporated church. May the trustees of United Kingdom Church convey the property to John Doe?

Answer: Yes. If the deed transfers the property to named or unnamed trustees of a named unincorporated church, the trustees have full authority to convey or mortgage the property.

Authorities & References: *F.S. 692.101 (1987); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §10.10 (1988).*

Comment:

The pastor, secretary, or other authorized administrative personnel of an unincorporated church may execute an affidavit stating the names of the trustees of the unincorporated church as of the date stated in the affidavit. Such an affidavit is conclusive as to the facts stated therein as to purchasers and mortgagees without notice.

All deeds and mortgages executed by the trustees of an unincorporated church and recorded in the public records of the county where the real property is located prior to the effective date of the statute are good and valid.

STANDARD 3.2

DEED PURPORTING TO CORRECT PREVIOUS EFFECTIVE DEED

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

**Problem:** John Doe duly conveyed the west half of Blackacre to Richard Roe. Doe later conveyed the east half of Blackacre to Roe by a deed containing a recital that it was executed to correct an erroneous description in the previous deed. Doe then executed a deed of the west half of Blackacre to Simon Grant. Did Grant acquire *marketable* title to the west half of Blackacre?

**Answer:** NO. The later conveyance from Doe to Roe of the east half of Blackacre did not nullify the former conveyance of the west half of Blackacre. It is necessary for Grant to obtain a conveyance from Roe.

**Authorities & References:** *Kirkpatrick v. Ault*, 177 Kan. 552, 280 P.2d 637 (1955); 26 C.J.S. *deeds* §§31, 174 (1956).

**Comment:**

The Standard is designed to point out that marketability of title cannot be achieved by the apparent unilateral action of the grantor.

Where the rights of third parties are not involved, the grantee's acceptance of the corrective deed may nullify the effect of the prior deed, as between the parties.

STANDARD 3.3

AFFIDAVIT

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

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

Answer: Yes.

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

Answer: Yes.

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

Answer: Yes.

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

Answer: Yes.

Authorities  
& References:

*Felt v. Morse*, 80 Fla. 154, 85 So. 656 (1920); *Burroughs v. State*, 17 Fla. 643 (1880); Annot., 7 A.L.R. 1166, 1171 (1920); BASYE, CLEARING LAND TITLES §§31-45 (2d ed. 1970); I FLORIDA REAL PROPERTY PRACTICE §9.31 (CLE 2d ed. 1971). See 4 FUND CONCEPT 33 (June 1972).

STANDARD 3.4

ACKNOWLEDGMENT — NECESSITY FOR SEAL  
(FLORIDA AND FOREIGN COUNTRIES)

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

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

Answer: No.

Problem 2: Same facts as in Problem 1 except that the Florida Notary had obtained and attached a prothonotary certificate certifying that the Notary was qualified. The clerk overlooked the omission of the notary's seal and recorded the deed. Was the recordation valid and effective?

Answer: No.

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

Answer: No.

Authorities & References: *F.S.* 695.03(1), (3) (Supp. 1980); *Norris v. Billingsley*, 48 Fla. 102, 37 So. 564 (1904); *Florida Nat'l Bank & Trust Co. v. Hickey*, 263 So.2d 269 (3d D.C.A. Fla. 1972).

Comment:

A prothonotary certificate which merely evidences an officer's authority to act, is not a substitute for the positive statutory requirement of a seal in executing an acknowledgment certificate. But see Title Standard 3.5 (Acknowledgment — Necessity For Seal (Out Of State)).

But see *James v. Gollnick*, 100 Fla. 829, 130 So. 450 (1930) (Authority that the lack of a notary's seal may be cured seven years after recordation by *F.S.* 694.08). See also, *F.S.* 95.231 (1979) (formerly *F.S.* 95.23, 95.26 (1973) as amended by FLA. LAWS 1974, ch. 74-382, §17); ATIF TN 1.02.07.

Exceptions to this Standard are those acknowledgments of members of the Armed Forces and their spouses taken in accordance with *F.S.* 695.031 (1979). Spouses were not included prior to May 2, 1957.

The seal may be of the rubber stamp or impression type. *F.S.* 117.07(2) (Supp. 1980); ATIF TN 1.02.07.

STANDARD 3.5

ACKNOWLEDGMENT — NECESSITY FOR SEAL PRIOR TO  
OCTOBER 1, 1980 (OUT OF STATE)

**STANDARD: A CERTIFICATE OF ACKNOWLEDGMENT MADE OUT OF FLORIDA BUT IN THE UNITED STATES, TO BE VALID AND ENTITLE THE INSTRUMENT TO WHICH IT IS APPENDED TO BE RECORDED PRIOR TO OCTOBER 1, 1980, MUST HAVE THE OFFICER'S SEAL AFFIXED, UNLESS THE ACKNOWLEDGMENT IS MADE BEFORE A NOTARY PUBLIC WHO DOES NOT HAVE OR DOES NOT AFFIX A SEAL, IN WHICH CASE THE ACKNOWLEDGMENT MUST HAVE APPENDED A CERTIFICATE UNDER SEAL BY THE CLERK OF A COURT HAVING A SEAL TO THE EFFECT THAT THE NOTARY PUBLIC WAS DULY AUTHORIZED BY THE LAWS OF THE STATE TO TAKE THE ACKNOWLEDGMENT.**

Problem 1: A certificate of acknowledgment attached to a deed dated in 1979 was duly signed by an out-of-state notary who did not affix a seal. Attached to the acknowledgment was a prothonotary certificate under seal, evidencing the notary's authority. The clerk accepted the deed for recordation. Was the recordation valid and effective?

Answer: Yes.

Problem 2: A certificate of acknowledgment attached to a deed dated in 1979 was duly signed by an out-of-state official, other than a notary public, authorized by *F.S.* 695.03(2) to take acknowledgments. No seal was affixed. Attached to the acknowledgment was a prothonotary certificate under seal evidencing the officer's official capacity. The clerk accepted the deed for recordation. Was the recordation valid and effective?

Answer: No.

Authorities & References: *F.S.* 695.03(2) (1979); I FLORIDA REAL PROPERTY PRACTICE §9.87 (CLE 2d ed. 1971); 4 FUND CONCEPT 57 (Nov. 1972).

Comment:

See Comment, Title Standards 3.4 (Acknowledgment — Necessity For Seal (Florida And Foreign Countries), and 3.5-1 (Acknowledgment — Necessity for Seal On or After October 1, 1980 (Out of State)).

STANDARD 3.5-1

ACKNOWLEDGMENT — NECESSITY FOR SEAL ON OR  
AFTER OCTOBER 1, 1980 (OUT OF STATE)

**STANDARD: A CERTIFICATE OF ACKNOWLEDGMENT MADE OUT OF FLORIDA BUT IN THE UNITED STATES, TO BE VALID AND ENTITLE THE INSTRUMENT TO WHICH IT IS APPENDED TO BE RECORDED ON OR AFTER OCTOBER 1, 1980, MUST HAVE THE OFFICER'S SEAL AFFIXED, UNLESS THE ACKNOWLEDGMENT IS MADE BEFORE A NOTARY PUBLIC WHO DOES NOT AFFIX A SEAL, IN WHICH CASE IT IS SUFFICIENT IF THE NOTARY PUBLIC TYPES, PRINTS, OR WRITES BY HAND ON THE INSTRUMENT, "I AM A NOTARY PUBLIC OF THE STATE OF (STATE), AND MY COMMISSION EXPIRES ON (DATE)."**

Problem: A certificate of acknowledgment attached to a deed dated in 1981 was duly signed by a South Dakota notary who did not affix a seal. However, the instrument included the statement, "I am a notary public of the state of South Dakota, and my commission expires on July 1, 1982." The clerk accepted the deed for recordation. Was the recordation valid and effective?

Answer: Yes.

Authorities & References: *F.S. 695.03(2)* (Supp. 1980).

Comment:

The requirements for acknowledgment by an out-of-state notary public who does not affix a seal were amended by FLA. LAWS 1980, ch. 80-173, §3, effective October 1, 1980.

See Comment, Title Standards 3.4 (Acknowledgment — Necessity For Seal (Florida and Foreign Countries)) and 3.5 (Acknowledgment — Necessity For Seal Prior To October 1, 1980 (Out of State)).

STANDARD 3.6

ERRONEOUS, INCONSISTENT OR OMITTED DATE

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

Problem 1: Doe's deed to Blackacre conveying it to Roe is dated June 1, 1968. The acknowledgment is dated May 31, 1968. Is Roe's title marketable?

Answer: Yes.

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

Answer: Yes.

Problem 3: A deed to Blackacre from Doe to Roe is dated April 31, 1968, an impossible date. The acknowledgment is dated April 20, 1968. Is Roe's title marketable?

Answer: Yes.

Authorities  
& References:

*Douglas v. Tax Equities, Inc.*, 144 Fla. 791, 797, 198 So. 5, 8, *rehearing denied*, 144 Fla. 801, 198 So. 578 (1940); *Moody v. Hamilton*, 22 Fla. 298 (1886); 26 C.J.S. *Deeds* §22 (1956); *Game, Examination of Abstracts*, 6 U.FLA.L.REV. 77, 80 (1953); ATIF TN 1.02.02.

STANDARD 3.7  
OMISSION OF SEAL

**STANDARD: A CONVEYANCE, OTHER THAN ONE CONVEYING A TRUST ESTATE, DELIVERED ON OR AFTER JULY 1, 1941, WHICH IS IN OTHER RESPECTS SUFFICIENT, IS VALID NOTWITHSTANDING THE OMISSION OF A SEAL AFTER THE SIGNATURE OF THE GRANTOR.**

Authorities            *F.S. 689.01 (1979).*  
& References:

Comment:

A conveyance, other than one conveying a trust estate, delivered prior to July 1, 1941, which is in other respects sufficient, is valid notwithstanding the omission of a seal after the signature of the grantor provided it satisfies the requirements of a curative act. See, *e.g.*, *F.S.* 95.231 (formerly *F.S.* 95.23, 95.26 (1973) as amended by FLA. LAWS 1974, ch. 74-382, §17); *F.S.* 694.08 (1979).

The requirement that a conveyance of a trust estate be under seal was deleted by FLA. LAWS 1980, ch. 80-219, effective June 27, 1980, amending *F.S.* 689.06.

With regard to the necessity for a seal in conveyances of corporate property, see Title Standard 4.3 (Conveyance By Corporations).

CHAPTER 4  
CORPORATIONS

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STANDARD 4.1

ACKNOWLEDGMENT OF CORPORATE INSTRUMENTS

**STANDARD: WHERE AN INSTRUMENT OF A CORPORATION IS EXECUTED BY THE PROPER OFFICER OR OFFICERS WHO ARE DESIGNATED IN THE INSTRUMENT AS SUCH, BUT WHOSE CAPACITIES ARE NOT RECITED IN THE ACKNOWLEDGMENT AND THE NOTARY STATED THAT HE KNEW THE PERSONS WHO EXECUTED THE INSTRUMENT AND THAT SUCH PERSONS EXECUTED THE DOCUMENT FOR THE USES AND PURPOSES THEREIN STATED, SUCH ACKNOWLEDGMENT IS VALID.**

**Problem:** A corporate instrument is executed by John Doe as President and Richard Roe as Secretary. Their respective offices are set out under their signatures. The acknowledgment merely recites:

“On this day before me personally appeared John Doe and Richard Roe, well known to me and known to me to be the persons described in and who executed the foregoing instrument, and they acknowledged that they executed same for the purposes therein expressed.”

Is the acknowledgment sufficient to entitle the instrument to be recorded?

**Answer:** Yes.

Authorities  
& References:

*House of Lyons v. Marcus*, 72 So.2d 34 (Fla. 1954). See also *Edenfield v. Wingard*, 89 So.2d 776 (Fla. 1956); *Florida Nat'l Bank & Trust Co. v. Hickey*, 263 So.2d 269 (Fla. 3d DCA 1972); I FLORIDA REAL PROPERTY PRACTICE §10.65 (CLE 2d ed. 1971).

STANDARD 4.2

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

**STANDARD: UNLESS THE RECORD AFFIRMATIVELY SHOWS THAT A CORPORATE DEED IN THE CHAIN OF TITLE CONSTITUTED A CONVEYANCE OF ALL OR SUBSTANTIALLY ALL OF THE PROPERTY AND ASSETS OF THE CORPORATION, AN EXAMINER MAY ASSUME THAT THE TRANSACTION DID NOT REQUIRE AUTHORIZATION BY A MAJORITY OF THE STOCKHOLDERS FOR A SALE OF ALL OR SUBSTANTIALLY ALL OF THE CORPORATE PROPERTY AND ASSETS.**

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

Answer:                No.

Problem 2:            The deed of the corporation recites, or the record shows, that the deed was a conveyance of all or substantially all of the property and assets of the corporation. Must the examiner make an independent inquiry as to whether the corporation had shareholder authorization?

Answer:                Yes. However, if the conveyance was made after the enactment of F.S. 607.1201, the following exception applies: Unless the corporation's articles of incorporation require otherwise, shareholder approval is not necessary for conveyances of all or substantially all of the property and assets of the corporation, when such conveyances are made in the usual and regular course of business.

Authorities  
& References:        *F.S. 607.1201 (1995); F.S. 607.1202 (1995); ATIF TN 11.01.01.*

Comment:

In 1990, the Florida Legislature repealed *F.S. 607.241* (1989), which required shareholder authorization for a conveyance of all, or substantially all, of the property and assets of a corporation. The Florida Business Corporation Act now provides that a corporation may dispose of all, or substantially all, of its property in the usual and regular course of business without shareholder authorization unless the articles of incorporation provide otherwise. *F.S. 607.1201* (1995). However, if the disposition of property is not in the usual and regular course of business, the corporation's board of directors must obtain shareholder authorization of the disposition. *F.S. 607.1202* (1995).

A disposition of corporate assets may be considered a sale of "substantially all" of those assets if the sale substantially limits the corporation's business or serves to destroy the fundamental purpose for which the corporation was organized. *Schwadel v. Uchitel*, 455 So.2d 401 (Fla. 3d DCA 1984); see also *South End Improvement Group, Inc. v. Mulliken*, 602 So.2d 1327 (Fla. 4th DCA 1992) (the test is whether the disposition's quantitative or qualitative impact, or both, would fundamentally change the nature of the corporation); *BSF Co. v. Philadelphia Nat'l Bank*, 204 A.2d 746 (Del. 1964); *National Bank of Commerce v. United States*, 158 F.Supp. 887 (E.D. Va. 1958); *Union-May Stern Co. v. Industrial Commission*, 273 S.W.2d 766 (Mo. Ct. App. 1954); FLORIDA CORPORATE PRACTICE §10.46 (CLE 2d ed. 1990).

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

STANDARD 4.2-1

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

**STANDARD: THE CONVEYANCE OF ALL OR SUBSTANTIALLY ALL OF THE PROPERTY AND ASSETS OF A CORPORATION CONVEYS MARKETABLE TITLE IF IT IS IN THE USUAL AND REGULAR COURSE OF BUSINESS AND THE CORPORATION'S ARTICLES OF INCORPORATION DO NOT REQUIRE SHAREHOLDER AUTHORIZATION.**

Problem 1: ABC Corporation conveyed Blackacre to John Doe by deed signed in the corporate name, executed by its president, and sealed with the corporate seal (or by deed executed in the corporate name by its president in the presence of two subscribing witnesses). Blackacre constituted all or substantially all of the property and assets of the corporation, but this fact does not appear on the face of the deed. The deed does not recite that a majority of shareholders authorized the corporation to convey Blackacre. Should Doe require evidence of this fact before accepting the deed?

Answer: Yes, unless the conveyance is in the usual and regular course of business and the articles of incorporation do not require shareholder authorization.

Problem 2: Same facts as above, except that Blackacre does not constitute all or substantially all of the property and assets of the corporation. Should Doe require evidence of this fact before accepting the deed?

Answer: Yes.

Authorities & References: *F.S. 607.1201 (1995); F.S. 607.1202 (1995); F.S. 692.01 (1995).*

Comment:

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

*F.S. 607.1201 (1995)* does not require majority shareholder authorization of a disposition of all, or substantially all, of the property and assets of a corporation which is in the usual and regular course of business unless authorization is required by the corporation's articles of incorporation. The requirement of majority shareholder authorization does not apply in the case of a mortgage on any or all of the corporate property and assets, whether or not in the usual and regular course of business, unless the articles of incorporation provide otherwise. *F.S. 607.1201 (1995)*.

However, majority shareholder authorization is required for any disposition of all, or substantially all, of the property and assets of a corporation not in the usual and regular course of business. *F.S. 607.1202 (1995)*. The articles of incorporation or the board of directors may require a greater vote than a majority of shareholders, or authorization by a particular voting group. There is not a statutory exception for innocent purchasers who purchase property from a corporation when the shareholders did not authorize the sale. Evidence of shareholder authorization may, among other possibilities, take the form of minutes of the stockholder's meeting at which authorization was given. I FLORIDA REAL PROPERTY PRACTICE §10.61 (CLE 2d ed. 1971).

Finally, the examiner of title should bear in mind that additional limitations on corporate conveyances may exist in the corporate charter or bylaws. *See* I FLORIDA REAL PROPERTY PRACTICE §10.59 (CLE 2d ed. 1971).

### STANDARD 4.3

#### CONVEYANCE BY CORPORATIONS

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

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

Answer: Yes. This assumes the person executing the deed was properly authorized. The authority of the president to bind the corporation may generally be assumed. Evidence of authorization should be obtained when someone other than the president executes the instrument. *See Pan-American Const. Co. v. Searcy*, 84 So.2d 540 (Fla. 1956); I FLORIDA REAL PROPERTY PRACTICE §10.56 (CLE 2d ed. 1971); FLORIDA REAL PROPERTY SALES TRANSACTIONS §6.47 (CLE 2d ed. 1994); ATIF TN 11.05.03.

Problem 2: ABC Corporation conveyed Blackacre by deed sealed with the corporate seal and executed by its president. There were no subscribing witnesses. Is the conveyance valid?

Answer: Yes. Affixing the corporate seal gives the president, vice-president, and chief executive officer prima facie record authority to convey the real property of the corporation. FLORIDA REAL PROPERTY SALES TRANSACTIONS §6.48 (CLE 2d ed. 1994).

Authorities & References: *F.S.* 689.01 (1995); *F.S.* 692.01 (1995); *F.S.* 692.02 (1995); *Adams v. Whittle*, 101 Fla. 705, 135 So. 152 (1931); *Douglass v. State Bank*, 77 Fla. 830, 82 So. 593 (1919); *Campbell v. McLaurin Inv. Co.*, 74 Fla. 501, 77 So. 277 (1917); *Norman v. Beckman*, 58 Fla. 325, 50 So. 876 (1909); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §10.06 (1995); I FLORIDA REAL PROPERTY PRACTICE §§9.76, 10.56-.57, 13.74, 13.76 (CLE 2d ed. 1971); ATIF TN 11.05.02, 11.05.03.

Comment:

If the corporate conveyance is made by an instrument in writing signed by an authorized agent in the presence of two subscribing witnesses, the conveyance is valid. *F.S.* 689.01 (1995) (consideration should be given to Title Standard 3.7 Omission Of Seal). There is uncertainty as to whether a corporation can make a valid conveyance in trust to a trustee without having two subscribing witnesses to the deed. *F.S.* 689.06 requires two witnesses and does not make an exception for corporations. Therefore, caution dictates having two subscribing witnesses on all such conveyances. *FLORIDA REAL PROPERTY SALES TRANSACTIONS* §6.49 (CLE 2d ed. 1994). If a conveyance creates an express trust, it should be executed with a seal and two witnesses. *ATIF TN* 11.05.03. If the corporate conveyance is executed by an instrument sealed with the corporate seal and signed by the president, vice-president, or chief executive officer, no corporate resolution need be recorded to evidence the authority of the party executing the conveyance, and the instrument shall be valid. *F.S.* 692.01 (1995); *FLORIDA REAL PROPERTY COMPLEX TRANSACTIONS* §9.4 (CLE 1993); *I FLORIDA REAL PROPERTY PRACTICE* §10.56 (CLE 2d ed. 1971). The attesting signature of a secretary or assistant secretary is not necessary to the validity of a corporate conveyance, but it serves to identify the seal used and the officers making the conveyance. *I FLORIDA REAL PROPERTY PRACTICE* §10.63 (CLE 2d ed. 1971).

STANDARD 4.3-1

CONVEYANCE BY CORPORATIONS:  
AUTHORITY TO CONVEY; FRAUD

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

**Problem:** On January 1, 1972, John Doe gives valuable consideration in exchange for an instrument conveying Blackacre, owned by ABC Corporation. The instrument is sealed with the common or corporate seal and signed in the corporate name by Richard Roe, the chief executive officer of ABC Corporation. Roe does not have authority from the board of directors to execute such an instrument. Is the deed valid?

**Answer:** Yes, the deed is valid if Doe does not know that Roe is without authority to execute the instrument, or is not aware of any facts that would put Doe on inquiry as to the extent of Roe's authority.

**Authorities & References:** *F.S. 692.01 (1995); F.S. 607.0304 (1995); Jackson v. Citizen's Bank & Trust Co.*, 53 Fla. 265, 44 So. 516 (1907); *Ocean Bank of Miami v. Inv-Uni Investment Corp.*, 599 So.2d 694 (Fla. 3d DCA 1992).

**Comment:**

Whether the person receiving the instrument should inquire as to the authority of the corporate officer to sign for the corporation is necessarily a question of fact in each case. Attorneys for such persons should resolve questions of doubt by requiring evidence of the authority of the corporate officer to convey. *Rothfleisch v. Cantor*, 534 So.2d 823 (Fla. 4th DCA 1988). See I FLORIDA REAL PROPERTY PRACTICE §10.59 (CLE 2d ed. 1971). In the case of fraud, subsequent good faith purchasers for value and without notice of the fraud take free of any defect arising from the fraud. F.S. 692.01 (1995); ATIF 11.05.03; FLORIDA REAL PROPERTY COMPLEX TRANSACTIONS §§9.4, 9.5 (CLE 1993).

STANDARD 4.4

FOREIGN CORPORATIONS

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

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

Answer: Yes.

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

Answer: Yes.

Authorities & References: *F.S. 607.1501(2)(g) (1995); F.S. 607.1501(2)(m) (1995); F.S. 607.1502(5) (1995); see Hogue v. D.N. Morrison Const. Co., 115 Fla. 293, 156 So. 377 (1934); Herbert H. Pape, Inc. v. Finch, 102 Fla. 425, 136 So. 496 (1931); ATIF TN 11.06.01.*

Comment: Upon the issuance of a certificate of revocation, or upon the filing of an application for withdrawal, the authority of a foreign corporation which had previously obtained a permit to transact business in Florida shall cease. *F.S. 607.1531(3) (1995); F.S. 607.1520(1) (1995)*. Because, under the facts of Problem 2, the foreign corporation conveyed the property without having a valid permit to transact business in Florida, the corporation is in the same position as under the facts of Problem 1. *See F.S. 607.1502(5) (1995)*. The examiner of title should note that a foreign corporation may own or create a security interest in real property without obtaining a permit to transact business. *F.S. 607.1501(2)(g) (1995); F.S. 607.1501(2)(m) (1995); FLORIDA REAL PROPERTY SALES TRANSACTIONS §6.58 (CLE 2d ed. 1994)*.

If a foreign corporation conveys property in connection with activities which require a permit to transact business and it does not have the permit, the corporation will be subject to statutory penalties. *F.S. 607.1502 (1995)*. However, the conveyance of title will be valid. *F.S. 607.1502(5) (1995); FLORIDA REAL PROPERTY COMPLEX TRANSACTIONS §9.6 (CLE 1993)*.

STANDARD 4.4-1

DISSOLVED FOREIGN CORPORATION

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

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

Answer: Yes.

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

Answer: No.

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

Answer: Yes.

Authorities & References: *F.S. 607.01401(5) (1995); F.S. 607.1405 (1995); F.S. 607.1501 (1995); F.S. 607.1502(5); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §302 (1971); see Order of United Commercial Travelers v. Wolfe, 331 U.S. 586 (1947); Oklahoma Natural Gas Co. v. Oklahoma, 273, U.S. 257, 260 (1927).*

Comment:

Foreign corporations are excluded from the requirements of Florida law pertaining to transfer of property after dissolution because foreign corporations are excluded from the definition of a corporation under the statute. *F.S.* 607.01401 (1995); *F.S.* 607.1405 (1995). Dissolved foreign corporations are thus governed by the laws of the state of incorporation. Failure to obtain a valid permit to transact business before making the conveyance is of no consequence to the marketability of title. *F.S.* 607.1502(5) (1995); *see F.S.* 607.1501 (1995); Title Standard 4.4 (Foreign Corporations).

*F.S.* 692.03 purports to validate a conveyance executed by the surviving directors or trustees of a dissolved foreign corporation if the conveyance has been of record for at least seven years. FLORIDA REAL PROPERTY COMPLEX TRANSACTIONS §9.6 (CLE 1993); *but see* ATIF TN 11.04.05 (declaring that *F.S.* 692.03 should not be relied upon.)

STANDARD 4.5

CORPORATION DELINQUENT IN FILING ANNUAL  
REPORT OR PAYMENT OF TAXES OR FEES

**STANDARD: THE VALIDITY OF A CONVEYANCE BY A CORPORATION IS NOT AFFECTED BY THE FACT THAT THE CORPORATION AT THE TIME OF THE CONVEYANCE WAS DELINQUENT IN THE FILING OF ITS ANNUAL REPORT AND THE PAYMENT OF ITS CAPITAL STOCK TAX OR ANNUAL REPORT FILING FEE.**

**Problem:** ABC Corporation conveyed a portion of its land. At that time it had not filed its annual report or paid its capital stock tax or annual report filing fee, whichever was required at the time. The corporation had not been dissolved and was an existing corporate entity. Was the conveyance valid?

**Answer:** Yes.

**Authorities & References:** *F.S.* 607.1622 (1995); *see Webb v. Scott*, 129 Fla. 111, 176 So. 442 (1937); *Booske v. Gulf Ice Co.*, 24 Fla. 550, 5 So. 247 (1888); *330 Michigan Avenue, Inc. v. Cambridge Hotel*, 183 So.2d 725 (1966); FLORIDA REAL PROPERTY SALES TRANSACTIONS §6.55 (CLE 2d ed. 1994); FLORIDA REAL PROPERTY COMPLEX TRANSACTIONS §9.3 (CLE 1993); I FLORIDA REAL PROPERTY PRACTICE §10.66 (CLE 2d ed. 1971); ATIF TN 11.01.06.

**Comment:**

*F.S. 607.1622(8) (1995)* prescribes the penalties for failure to file an annual report conforming to the requirements of *F.S. 607.1622(1) (1995)*.

Caution should be exercised, for among the prescribed penalties for failure to file the required annual report is dissolution or cancellation of the corporation's certificate of authority to do business. *F.S. 607.1622(8) (1995)*.

Part of the requirement of filing an annual report is payment of an annual report filing fee. *F.S. 607.1622(8) (1995)*.

STANDARD 4.6

CORPORATION NAME OMITTED FROM SIGNATURE

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

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

**Answer:** Yes.

**Authorities & References:** *See Ballas v. Lake Weir Light and Water Co.*, 100 Fla. 913, 130 So. 421 (1930); *Steele v. Hallandale, Inc.*, 125 So.2d 587 (Fla. 2d DCA 1960); FLORIDA REAL PROPERTY SALES TRANSACTIONS §6.54 (CLE 2d ed. 1994); I FLORIDA REAL PROPERTY PRACTICE §10.65 (CLE 2d ed. 1971); 18B AM.JUR.2d *Corporations* §1665 (1985); ATIF TN 11.07.02.

**Comment:**

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

STANDARD 4.7

USE OF SCROLL SEAL BY CORPORATION

**STANDARD: A CORPORATION MAY USE A SCROLL SEAL IN LIEU OF AN IMPRESSION SEAL WHEREVER A CORPORATE SEAL IS REQUIRED.**

Problem: A deed of ABC Corporation was executed by its president, vice president, or chief executive officer. A scroll seal was used instead of an impression seal. There were no witnesses. Is the deed valid?

Answer: Yes.

Authorities  
& References:

*F.S. 692.01 (1995); F.S. 695.07 (1995); F.S. 695.08 (1995); Sarasota Kennel Club v. Shea*, 56 So.2d 505 (Fla. 1952); *Campbell v. McLaurin Inv. Co.*, 74 Fla. 501, 77 So. 277 (1917); *Cross v. Robinson Point Lumber Co.*, 55 Fla. 374, 46 So. 6 (1908); *Langley v. Owens*, 53 Fla. 302, 42 So. 457 (1906); *Commerford v. Cobb*, 2 Fla. 418 (1859); *Epstein v. Deerfield Beach Bank & Trust Co.*, 280 So.2d 690 (Fla. 4th DCA 1973). See ATIF TN 11.03.02; 5 FUND CONCEPT 29 (June, 1973).

CHAPTER 5  
ESTATES OF DECEDENTS

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STANDARD 5.1

TITLE DERIVED THROUGH INTESTATE DECEDENT

**STANDARD: TITLE TO REAL ESTATE, EXCEPT HOMESTEAD, OF AN INTESTATE DECEDENT PASSES AS OF THE DATE OF DEATH TO THE HEIRS SUBJECT TO: (1) THE SPOUSE'S FILING FOR ELECTIVE SHARE; (2) THE RIGHT AND DUTY OF THE PERSONAL REPRESENTATIVE TO POSSESS SAID REAL ESTATE AND TO RECEIVE THE INCOME THEREFROM; (3) THE POSSIBILITY OF SALE FOR THE PURPOSE OF PAYMENT OF EXPENSES OF ADMINISTRATION, DEBTS AND TAXES, OR FOR DISTRIBUTION; AND (4) THE LIEN OF ESTATE TAXES, IF ANY.**

**Problem:** John Doe, a Florida resident, died intestate and his estate was administered but Blackacre was omitted from the inventory and the order assigning residue. All heirs conveyed Blackacre to Richard Roe. Is Roe's title marketable?

**Answer:** Yes, provided (1) the surviving spouse has waived her elective share or failed to make her election within the statutory period, (2) all expenses of administration and debts and taxes have been paid, and the personal representative discharged and (3) federal and Florida estate taxes have been paid or more than ten years has elapsed since the date of decedent's death. (Twenty years in the case of non-resident decedents.)

**Authorities & References:** *F.S. 732.101(2)* (1979); *Jones v. Federal Farm Mortg. Corp.*, 132 Fla. 807, 182 So. 226 (1938); *Brickell v. McCaskill*, 90 Fla. 441, 106 So. 470 (1925); 1 FLORIDA REAL PROPERTY PRACTICE §§8.45-48, 10.3, 10.19 (CLE 2d ed. 1971); FLORIDA PROBATE PRACTICE §§16.29, 16.33 (CLE 1973).

**Comment:**

An elective share of a spouse would be relinquished by joinder in the conveyance or barred by the running of the statutory period for election. *F.S. 732.212 (1979)*. With respect to the issue of the existence of a dower claim, see Title Standards, Ch. 20 (Marital Property).

Discharge of the personal representative, if the estate has been administered, or the passage of three years from the date of death if the estate has not been administered, is necessary for the heirs to convey marketable title. *F.S. 733.710 (1979)*.

Although “dower” was abolished in Florida as of January 1, 1976, the Standard should not be construed as precluding a dower interest which vested prior to that date. See *F.S. 732.111 (1979)*.

With respect to estate tax liens, see Title Standards, Ch. 12 (Tax Liens).

After October 1, 1976, where the husband died prior to October 1, 1973, inchoate dower in real property is barred unless the widow has filed an instrument in compliance with *F.S. 732.213 (1979)*. See *Creary v. Estate of Creary*, 338 So. 2d 26 (1st D.C.A. Fla. 1976) as to retroactive application of *F.S. 732.213*.

STANDARD 5.2

TITLE DERIVED THROUGH TESTATE DECEDENT

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

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

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

**Authorities & References:** *F.S. 732.6005, 732.514, 733.103 (1979); Palmquist v. Johnson*, 155 Fla. 628, 21 So. 2d 353 (1945); 1 FLORIDA REAL PROPERTY PRACTICE §§10.3, 10.19 (CLE 2d ed. 1971); FLORIDA PROBATE PRACTICE §§16.29, 16.33 (CLE 1973). But see *F.S. 732.4015 (1979)* concerning homestead property.

**Comment:**

Prior to 1976, real property of non-resident decedents apparently passed to the devisees on the date of death of the testator, subject to the same conditions as in the case of intestacy. See Title Standard 5.1 (Title Derived Through Intestate Decedent).

As of January 1, 1976, title passes in accordance with this Standard regardless of the decedent's domicile. *F.S. 733.103* (1979).

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

The Standard is to be construed subject to the intention of the testator as expressed in his will. *F.S. 732.6005* (1979).

STANDARD 5.3

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

**STANDARD: MARKETABLE TITLE EXISTS WHEN TITLE DEPENDS UPON A CONVEYANCE BY A PERSONAL REPRESENTATIVE OF AN ESTATE WITH POWER OF SALE IN THE WILL, BUT WITHOUT AN ORDER OF THE COURT AUTHORIZING OR CONFIRMING THE CONVEYANCE IF: (1) THE DEED WAS EXECUTED ON OR AFTER OCTOBER 1, 1973 OR (2) THE DEED WAS EXECUTED PRIOR TO OCTOBER 1, 1973, THE DEED HAS BEEN OF RECORD FOR 3 YEARS, THE ESTATE HAS BEEN CLOSED, AND THE PROBATE FILE CONTAINS RECEIPTS EXECUTED BY THE DEVISEES FOR THEIR SHARE OF THE DISTRIBUTION OF THE ESTATE.**

**Problem:** In 1960 John Doe was the record owner of Blackacre. John Doe died in 1962. Richard Roe was appointed the personal representative of John Doe's estate in his will. The will contained the following provision: "I confer upon my executor full authority to sell and convey any part or all of my estate, real or personal." In 1962 Richard Roe conveyed Blackacre to Simon Grant, who recorded the deed. No authorization or confirmation of the court appears of record. In 1966 Simon Grant conveyed Blackacre to Frank Thomas. In 1970 does Frank Thomas have marketable title to Blackacre?

**Answer:** Yes, if it appears of record that the estate of John Doe was closed and the devisees executed receipts for their share of the distribution of the estate.

**Authorities & References:** *F.S. 733.613(2)* (1979); *F.S. 733.225, 733.42* (1973) (repealed 1974); *In re Granger*, 318 So. 2d 509 (1st D.C.A. Fla. 1975); 1 FLORIDA REAL PROPERTY PRACTICE §10.5 (CLE 2d ed. 1971); FLORIDA PROBATE PRACTICE §§10.1-10.5 (CLE 1973).

**Comment:**

*F.S. 733.225(1)* (1973), effective October 1, 1973, provided that no court order was required to authorize or confirm a sale pursuant to a power of sale contained in a will. The statute also eliminated the requirement of a showing of necessity. Although *F.S. 733.225* was repealed in 1974, similar provisions are found in *F.S. 733.613(2)* (1979). See *In re Granger*.

It should be noted that although *F.S. 733.225(2)* (1973) purported to give the statute retroactive effect, it should not be relied on for purposes of determining marketability. The provision was not re-enacted in the 1975 Florida Probate Code.

*In re Estate of Smith*, 200 So.2d 547 (2d D.C.A. Fla. 1967), held that court approval of a sale or showing of necessity, even when a general power of sale was involved, was required by Section 733.22 *F.S.* (1973). Hence, executor's deeds executed prior to October 1, 1973, must be authorized or confirmed by the court to insure marketability, unless the deed has been of record for 3 years, the estate has been closed, and the probate file contains receipts executed by the devisees for their share of the distribution of the estate.

The Standard, *F.S. 733.613(2)* (1979) and *F.S. 733.225* (1973) do not address the issue of an apparent general power being construed to be a special or limited power requiring court authorization or confirmation of the sale. See *In re Estate of Gamble*, 183 So. 2d 489 (1st D.C.A. Fla. 1966); *In re Granger*.

With respect to a limited power of sale, see Title Standard 5.7 (Limitation On Power Of Sale).

It appears that neither *F.S. 733.613(2)* (1979) nor *F.S. 733.225* (1973) require a court to approve a sale of real property where a personal representative chooses to seek court authorization. The court may not, however, consider necessity as a factor for denying its approval. *In re Granger*.

STANDARD 5.4

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

**STANDARD: WHETHER OR NOT THE WILL, IF ANY, GIVES TO THE PERSONAL REPRESENTATIVE POWER TO SELL REAL PROPERTY, VALID TITLE WILL PASS WHERE PRIOR AUTHORIZATION OR SUBSEQUENT CONFIRMATION IS OBTAINED FROM THE COURT.**

Problem 1: John Doe appointed Richard Roe as his personal representative in his will which contained the following provision: "I confer upon my personal representative full authority to sell and convey any part or all of my estate, real or personal." During the course of the administration of the estate, Richard Roe sold Blackacre to Simon Grant with authorization of the court. Blackacre was not homestead. Is the title marketable?

Answer: Yes.

Problem 2: Same as above, but with the will silent as to sales by the personal representative.

Answer: Yes.

Authorities & References: *In re Estate of Smith*, 200 So.2d 547 (2d D.C.A. Fla. 1967); *In re Estate of Gamble*, 183 So.2d 849 (1st D.C.A. Fla. 1966); *In re Granger*, 318 So.2d 509 (1st D.C.A. Fla. 1975); 1 FLORIDA REAL PROPERTY PRACTICE §10.5 (CLE 2d ed. 1971); FLORIDA PROBATE PRACTICE §§10.1-10.5 (CLE 1973); *F.S.* 733.613(1) (1979).

Comment:

This standard does not purport to imply that sale without court authorization or confirmation would necessarily make title unmarketable. For conveyances made without court authorization, see Title Standard 5.3 (Sale of Real Property By Personal Representatives Without Court Authorization or Confirmation).

If the personal representative is the purchaser, see Title Standard 5.5 (Acquisition Of Estate Lands By Fiduciaries prior to January 1, 1976) and Title Standard 5.5-1 (Acquisition of Estate Lands by Personal Representatives on or After January 1, 1976).

While *F.S. 733.613(1)* (1979) expressly provides for notice to interested persons of a personal representative's petition for court authorization or confirmation, the last sentence of the subsection reads: "No bona fide purchaser shall be required to examine any proceedings before the order of sale." The full effect of this provision when no notice appears of record is unclear.

STANDARD 5.5

ACQUISITION OF ESTATE LANDS BY  
FIDUCIARIES PRIOR TO JANUARY 1, 1976

**STANDARD: PRIOR TO JANUARY 1, 1976 WHEN THE PERSONAL REPRESENTATIVE, IN AN INDIVIDUAL CAPACITY, PURCHASED REAL PROPERTY OF AN ESTATE, SUCH TITLE WILL BE MARKETABLE PROVIDED THE PERSONAL REPRESENTATIVE WAS INTERESTED IN THE ESTATE IN HIS OWN RIGHT, OR IN THE RIGHT OF HIS SPOUSE OR INFANT CHILD, AS A CREDITOR, DEVISEE, LEGATEE, OR HEIR AT LAW, THE PURCHASE WAS AT A PUBLIC SALE, AND THE COURT CONFIRMED THE SALE.**

**Problem:** The will of John Doe, which was duly probated, empowered Richard Roe, personal representative, to sell real property of the estate. Roe conveyed Blackacre to himself for full consideration. Is Roe's title marketable?

**Answer:** No, unless it can be shown that Roe had an interest in the estate in his own right or in the right of his wife or infant child, as creditor, devisee, legatee, or heir, Roe purchased at a public sale and the court subsequently confirmed the sale.

**Authorities & References:** *F.S. 733.31 (1973); Griffin v. Bolen*, 149 Fla. 377, 5 So.2d 690 (1942); FLORIDA PROBATE PRACTICE §10.3 (CLE 1973).

**Comment:**

The Standard is designed to set forth the requirements of *F.S. 733.31 (1973)*. It is not clear whether a sale not complying with the statute, although approved by the court, would necessarily render the title unmarketable, and no implication to this effect is intended.

Title Standard 5.4 (Sale Of Real Property By Personal Representatives With Court Authorization Or Confirmation) should not be relied on when the personal representative purchases from the estate.

See Title Standard 5.5-1 for acquisition by personal representatives after January 1, 1976.

STANDARD 5.5-1

ACQUISITION OF ESTATE LANDS BY PERSONAL  
REPRESENTATIVES ON OR AFTER JANUARY 1, 1976

**STANDARD: ON OR AFTER JANUARY 1, 1976, WHEN THE PERSONAL REPRESENTATIVE, HIS SPOUSE, AGENT OR ATTORNEY OR ANY CORPORATION OR TRUST IN WHICH HE HAS A SUBSTANTIAL BENEFICIAL INTEREST PURCHASES REAL PROPERTY OF THE ESTATE, SUCH TITLE WILL BE MARKETABLE ONLY IF (1) THE WILL OR A CONTRACT ENTERED INTO BY THE DECEDENT EXPRESSLY AUTHORIZED THE TRANSACTION; OR (2) THE TRANSACTION WAS APPROVED BY THE COURT AFTER NOTICE TO INTERESTED PERSONS.**

Problem 1:           The will of John Doe, which was duly probated, named his creditor, Richard Roe, personal representative. The will also empowered Roe to sell real property of the estate. In 1976, Richard Roe, as personal representative, conveyed Blackacre to his wife, Mary Roe. Does Mary have marketable title?

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

Problem 2:           John Doe's will named Richard Roe as personal representative. Prior to his death, John Doe contracted to sell Blackacre to Richard Roe. In 1976, John Doe died and Richard Roe as personal representative, completed the conveyance of Blackacre to himself according to the terms of the contract. There was no court authorization or confirmation of the sale. Does Richard Roe have marketable title?

Answer:             Yes.

Authorities  
& References:       *F.S. 733.610 (1979).*

Comment:

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

It should be noted that court approval is no longer required where either the will or a separate contract expressly authorizes the transaction, and a public sale is no longer required by the statute. The new statute applies regardless of the independent interest of the personal representative, his spouse, or children.

Where the record does not reveal that the transaction was affected by a possible conflict of interest, either through similarity of names or otherwise, a bona fide purchaser subsequently dealing with the real property would appear to be protected. *F.S. 733.611; F.S. 733.613 (1979)*.

STANDARD 5.6

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

**STANDARD: (1) PRIOR TO JANUARY 1, 1976, ALL QUALIFIED AND SURVIVING PERSONAL REPRESENTATIVES WERE REQUIRED TO UNITE IN EXECUTING A DEED PURSUANT TO A POWER OF SALE UNDER THE TERMS OF A WILL UNLESS THE WILL AUTHORIZED LESS THAN ALL OF THEM TO CONVEY OR THE COURT HAD AUTHORIZED LESS THAN ALL TO EXECUTE THE DEED. (2) ON OR AFTER JANUARY 1, 1976, THE CONCURRENCE OF ALL JOINT PERSONAL REPRESENTATIVES IS REQUIRED UNLESS THE WILL PROVIDES OTHERWISE OR WHEN THE CONCURRENCE OF ALL CANNOT BE OBTAINED IN TIME FOR EMERGENCY ACTION TO PRESERVE THE ESTATE, OR WHEN A JOINT PERSONAL REPRESENTATIVE IS DELEGATED TO ACT FOR THE OTHERS.**

Problem 1: John Doe's will, admitted to probate in 1969, contained a power of sale and named Richard Roe, John James and Henry Smith as executors. It did not provide for any action to be taken by less than all of them. All three qualified. Richard Roe and Henry Smith executed a deed conveying estate property to Simon Grant later that year. Is Grant's title marketable?

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

Problem 2: Same as above, but with John Doe dying after 1976.

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

Authorities & References: *F.S.* 733.615 (1979); *F.S.* 732.50 (1973); *Williams v. Howard Cole & Co., Inc.*, 159 Fla. 151, 31 So.2d 914 (1947); FLORIDA PROBATE PRACTICE §10.21 (CLE 1973); ATIF TN 2.08.03.

Comment:

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

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

Prior to January 1, 1976, the Standard may be applied to administrators with the will annexed and administrators de bonis non if there is court authorization.

Prior to June 8, 1965, the Standard may be applied to situations involving administrators with the will annexed and administrators de bonis non exercising a power of sale. *F.S. 733.22 (1973)*. After such date but before January 1, 1976 it must appear in the will that the testator intended to confer the power of sale to representatives other than the named executor(s). On or after January 1, 1976, the power may be exercised unless it was made personal to the named representative. See Title Standard 5.10 (Powers Of Successor Personal Representatives).

Although it would appear from *F.S. 733.611 (1979)* that a court order, without a showing of emergency action or delegation, would be sufficient to convey marketable title, this Standard takes no position on such a situation.

The Standard also takes no position on the sufficiency of a recital purporting to establish emergency or delegation, nor on the precise definition of those terms.

STANDARD 5.7

LIMITATION ON POWER OF SALE

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

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

**Answer:** No.

**Authorities & References:** *Standard Oil Co. v. Mehrrens*, 96 Fla. 455, 118 So. 216 (1928); *In re Estate of Smith*, 200 So.2d 547 (2d D.C.A. Fla. 1967); *In re Estate of Gamble*, 183 So.2d 849 (1st D.C.A. Fla. 1966); 1 FLORIDA REAL PROPERTY PRACTICE §10.5 (CLE 2d ed. 1971); FLORIDA PROBATE PRACTICE §10.4 (CLE 1973). See also *F.S.* 733.613(1) (1979).

**Comment:**

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

STANDARD 5.8

POWER OF PERSONAL REPRESENTATIVE  
TO MORTGAGE REAL ESTATE

**STANDARD: A GENERAL POWER OF SALE CONTAINED IN A WILL OF A DECEDENT WHO DIED PRIOR TO JANUARY 1, 1976 DID NOT AUTHORIZE THE EXECUTOR TO MORTGAGE REAL ESTATE. A SPECIFIC POWER TO SELL REAL PROPERTY OR A GENERAL POWER TO SELL ANY ASSET OF THE ESTATE CONTAINED IN THE WILL OF DECEDENT DYING AFTER DECEMBER 31, 1975 DOES AUTHORIZE THE PERSONAL REPRESENTATIVE TO MORTGAGE REAL ESTATE.**

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

Answer:             No.

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

Answer:             Yes.

Authorities  
& References:       *F.S.* 733.613(2), 733.611 (1979), 733.22-.25 (1973); *Standard Oil Co. v. Mehrrens*, 96 Fla. 455, 118 So. 216 (1928), *Wilson v. Fridenburg*, 21 Fla. 386 (1885); *In re Estate of Gamble*, 183 So.2d 849 (1st D.C.A. Fla. 1966); 1 FLORIDA REAL PROPERTY PRACTICE §10.5 (CLE 2d ed. 1971).

Comment:

It should be noted that *F.S. 733.613(2)* (1979) expressly states that a specific power to mortgage real property will authorize such action by a personal representative. Under the former Probate Code there was no mention of a specific power to mortgage. See *F.S. 733.22-.25* (1973).

STANDARD 5.9

RELEASE OF DOWER BY SURVIVING SPOUSE

**STANDARD: WHEN A SURVIVING SPOUSE HAS A RIGHT TO CLAIM DOWER, THE SPOUSE SHOULD JOIN IN A SALE OR DISPOSITION OF REAL PROPERTY BY THE PERSONAL REPRESENTATIVE.**

**Problem:** John Doe was survived by his widow, Mary Doe. Richard Roe, the executor of the estate, conveyed certain real property to Simon Grant. Mary Doe had made no election to take dower, but her dower had not been relinquished or barred by law. Did Simon Grant acquire marketable title?

**Answer:** No. Mary Doe must consent to the conveyance and join with the personal representative in the execution of the deed.

**Authorities & References:** *F.S. 733.25* (1973); *In Re Estate of Collin*, 279 So.2d 48 (4th D.C.A. Fla. 1973); FLORIDA PROBATE PRACTICE §§10.16, 20.18 (1973); 1 FLORIDA REAL PROPERTY PRACTICE §10.14 (2d ed. 1971).

**Comment:**

With respect to the issue of the existence of dower, see Title Standards, Ch. 20 (Marital Property).

It should be remembered that the Standard deals with dower rights and not with the elective share as provided by the 1975 Probate Code.

The Standard applies where the spouse has elected to take dower but dower has not been assigned.

STANDARD 5.10

POWERS OF SUCCESSOR PERSONAL REPRESENTATIVES

**STANDARD: A POWER OF SALE CONTAINED IN A WILL AND CONFERRED ON A NAMED PERSONAL REPRESENTATIVE MAY BE EXERCISED BY A SUCCESSOR PERSONAL REPRESENTATIVE WITHOUT COURT APPROVAL: (1) PRIOR TO JUNE 8, 1965: UNLESS THE POWER OF SALE WAS EXPRESSLY LIMITED TO THE NAMED INDIVIDUAL, OR IT CLEARLY APPEARED THAT THE TESTATOR INTENDED TO LIMIT THE POWER OF SALE TO THAT INDIVIDUAL. (2) AFTER JUNE 8, 1965, BUT PRIOR TO JANUARY 1, 1976: ONLY IF IT APPEARS FROM THE WILL THAT THE TESTATOR INTENDED TO CONFER THE POWER OF SALE ON THE SUCCESSOR FIDUCIARY. (3) ON OR AFTER JANUARY 1, 1976, UNLESS THE POWER OF SALE WAS MADE PERSONAL TO THE INDIVIDUAL NAMED IN THE WILL.**

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

Answer: No, regardless of when the sale was made.

Problem 2: John Doe's will named Richard Roe executor and conferred on Richard Roe a power of sale. It did not mention successor personal representatives and contained no further language concerning the power of sale or why it was conferred on Roe. Richard Roe refused to act as executor and Simon Grant was appointed administrator with the will annexed. In 1964, Simon Grant, without court approval, conveyed part of the estate to Frank Thomas. Is Frank Thomas' title marketable?

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

Problem 3: Same as Problem 2, but with the sale in 1968.

Answer: No. It does not appear that John Doe intended to confer the power of sale on a successor personal representative.

Problem 4: Same as Problem 2, but with the sale in 1976.

Answer: Yes. It does not appear that the power of sale was made personal to Richard Roe.

Authorities & References: *F.S. 733.614 (1979); F.S. 733.22 as amended by Fla. Laws 1965, ch. 65-284, §1, effective June 8, 1965 (repealed 1974); FLORIDA PROBATE PRACTICE §10.2 (CLE 1973); 1 FLORIDA REAL PROPERTY PRACTICE §§10.5-.6 (CLE 2d ed. 1971); ATIF TN 2.08.01. See *Standard Oil Co. v. Mehrrens*, 96 Fla. 455, 118 So. 216 (1928).*

Comment:

The problems are not to be construed as implying that *F.S. 733.614* (1979) re-enacts the rule under *733.22* before the 1965 amendment (Problem 2). Caution is advised whenever there is language in a will expressing faith in the judgment or knowledge of a personal representative in connection with a power of sale.

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

STANDARD 5.11

POWERS OF SURVIVING PERSONAL REPRESENTATIVES

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

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

Answer: Yes, unless the will prohibited such action.

Authorities & References: *F.S. 733.616* (1979); *Stewart v. Mathews*, 19 Fla. 752 (1883); 1 FLORIDA REAL PROPERTY PRACTICE §§10.4-10.6 (CLE 2d ed. 1971).

Comment:

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

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

STANDARD 5.12

APPOINTMENT OF PERSONAL REPRESENTATIVE  
NOT HAVING STATUTORY PREFERENCE

**STANDARD: WITH RESPECT TO ALL INTESTATE PROCEEDINGS OR TESTATE PROCEEDINGS ON OR AFTER JANUARY 1, 1976, TITLE DERIVED FROM A PERSONAL REPRESENTATIVE APPOINTED BY THE COURT IS MARKETABLE PROVIDED NO APPLICATION WAS MADE BY ANY PERSON HAVING STATUTORY PREFERENCE TO APPOINTMENT AND FORMAL NOTICE WAS SERVED ON ALL PERSONS QUALIFIED TO ACT AS PERSONAL REPRESENTATIVES AND ENTITLED TO PREFERENCE EQUAL TO OR GREATER THAN THE PERSON APPOINTED, OR SUCH PERSONS WAIVED THEIR PREFERENCE IN WRITING, AND PROVIDED THE PERSONAL REPRESENTATIVE HAD AUTHORITY TO CONVEY THE PROPERTY.**

Problem 1: Mary Roe died intestate leaving a son, Richard Roe, as her only heir at law. The son was stationed overseas with the Navy. Formal notice was served on Richard Roe that Bessie Doe, Mary Roe's neighbor and closest friend, had applied for letters of administration. Bessie Doe was appointed personal representative by the court. May Bessie Doe convey marketable title to Frank Thomas?

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

Problem 2: John Doe died in 1976, leaving a will which named Richard Roe personal representative. The will devised all John Doe's property to his friend Frank Thomas, who was stationed overseas with the Navy. Richard Roe refused the appointment and the court named Simon Grant personal representative. No notice was sent to Frank Thomas, who had not waived his preference. With or without a court order, may Simon Grant convey marketable title to John Doe's real property?

Answer: No. As of January 1, 1976, a devisee has statutory preference, and the Standard applied. See *F.S.* 733.301 (1979).

Authorities & References: *F.S.* 733.203, 733.301 (1979); *In re Estate of Bush*, 80 So. 2d 673 (Fla. 1955); *In re Estate of Raymond*, 237 So. 2d 84 (1st D.C.A. Fla. 1970).

Comment:

Prior to January 1, 1976, this Standard applied only to intestate succession.

Prior to the effective date of the new Probate Code, it appeared that any conveyance made by a personal representative without statutory preference was valid if made pursuant to a court order after the estate proceedings were closed and the time for appeal had expired. See *Goldtrap v. Mancini*, 86 So.2d 141 (Fla. 1956); ATIF TN 2.07.01. A literal reading of *F.S. 733.401* (1979), however, indicates the appointment of a person not entitled to preference is jurisdictional. Until further clarification is obtained it would appear advisable to require that procedural requirements have been met.

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

STANDARD 5.13

PROBATE NON-CLAIM ACT —  
UNITED STATES AND FLORIDA

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

Problem 1: United States asserted a claim against the estate of John Doe, deceased, after the expiration of the notice to creditors period. Is the claim of the United States barred?

Answer: No.

Problem 2: The State of Florida, or one of its agencies, filed a claim against the estate of John Doe, deceased, after the expiration of the notice to creditors period. Is the claim barred?

Answer: Yes.

Authorities  
& References:

31 U.S.C. §§ 191-192 (1976); *F.S.* 733.702 (1980 Supp.); *United States v. Summerlin*, 310 U.S. 414 (1940); *State v. Moore's Estate*, 153 So. 2d 819 (Fla. 1963); *In re Smith's Estate*, 132 So. 2d 426 (2d D.C.A. Fla. 1961); Florida Probate Practice §§8.36, 8.44 (CLE 1973).

STANDARD 5.14

EFFECT OF ORDER OF FINAL DISCHARGE

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

Problem: John Doe died devising Blackacre by his will to his son, Richard Doe. The estate was administered and a final discharge of the personal representative entered. Richard Doe sold Blackacre to Simon Grant. Was Simon Grant's title marketable?

Answer: Yes.

Authorities  
& References:

*F.S. 733.901 (1979); FLORIDA PROBATE PRACTICE §§16.16, 16.29 (CLE 1973).*

STANDARD 5.15

RECITAL OF HEIRSHIP IN DEED

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

Problem: John Doe acquired title to Blackacre in 1960. By deed recorded more than seven years ago, Mary Doe, unmarried, Albert Doe, unmarried, and Sarah Doe, unmarried, conveyed Blackacre to Richard Roe. In the deed there is a recital that the grantors are the sole heirs of John Doe. In the absence of evidence or information to the contrary, may such recital be accepted as sufficient to establish its truth?

Answer: Yes.

Authorities & References: *F.S. 95.22 (1979).*

Comment:

The advantage of the Standard is that it provides that the recitations contained in the deed are sufficient to meet the requirements of *F.S. 95.22* without requiring evidence outside of such instrument.

Prior to January 1, 1975, the limitations period could have been as much as twenty-four years, due to a minority proviso in the statute. Actions not barred under prior law could have been brought until January 1, 1976. As no case has construed the rights of minors with respect to the seven year period, caution should be exercised by the examiner when the possibility of minor heirs exists.

STANDARD 5.16

FOREIGN WILL AS MUNIMENT OF TITLE

**STANDARD: A FOREIGN WILL DULY ADMITTED TO PROBATE IN FLORIDA PURSUANT TO FLORIDA STATUTES, SECTIONS 734.103 OR 734.104 (1979) OR 734.29 OR 736.06 (1973) WILL PERMIT A VALID CONVEYANCE OF FLORIDA REAL ESTATE BY THE DEVISEES NAMED IN SUCH WILL.**

Problem 1: Blackacre was devised to John Doe under the last will of Richard Roe, who died a resident of New York in 1964. Roe's will was admitted to probate in New York in 1964 and a duly authenticated copy thereof was then recorded in the Official Records of the circuit court of the county in Florida where the land is located. Thereafter John Doe conveyed the property to Simon Grant. Is Simon Grant's title marketable?

Answer: No.

Problem 2: Same facts as Problem 1 except that an authenticated copy of Roe's will was admitted to record in Florida in 1968 pursuant to *F.S.* 736.06. Is Simon Grant's title then marketable?

Answer: Yes, and after January 1, 1976, the same is true pursuant to *F.S.* 734.104 (1979).

Problem 3: Same facts as Problem 1 except that a certified or exemplified copy of the transcript of the domiciliary proceedings of the probate of Roe's estate was admitted to record in Florida in 1965 pursuant to *F.S.* 734.29. Is Simon Grant's title then marketable?

Answer: Yes. When a non-resident decedent has died within three years from the date of admitting his will to record in Florida, the procedure set forth in 734.29 applies instead of the provisions of 736.06. Notice to creditors should also be published pursuant to 734.29(3) and an order entered after the expiration of six months, pursuant to 734.29(5). (After January 1, 1976, the period is three months and *F.S.* 734.103, 734.104 and 733.301 bring a similar result).

Authorities & References: *F.S.* 734.103, 734.104, 733.301 (1979); *F.S.* 734.29, 736.06 (1973); 1 FLORIDA REAL PROPERTY PRACTICE §§9.51, 10.23-26 (CLE 2d ed. 1971); FLORIDA PROBATE PRACTICE §§10.31-32, 20.5-6 (CLE 1973).

Comment:

The examiner must also be satisfied that: (1) the estate is cleared as to estate taxes and (2) all specific bequests under the will have been paid if Doe acquired title under the residuary clause of Roe's will rather than by means of a specific devise. If the will is not entitled to be admitted to record in Florida, or if the domiciliary proceedings have not been closed and it is impossible to determine whether or not the specific bequests have been paid, in a situation where the Florida real estate passes under the residuary clause of the will, ancillary administration pursuant to *F.S.* 734.102 (1979) or *F.S.* 734.31 (1973) should be resorted to in order to convey marketable title. If the non-resident's entire estate in Florida is valued less than \$5,000.00 (\$10,000.00 after January 1, 1972) it is also possible to proceed under *F.S.*, Chapter 735, Part II, (1979) whereupon the devisees can convey marketable title, unless it subsequently appears that the court lacked jurisdiction to enter the order declaring administration unnecessary as a result of improper property valuation, or otherwise.

STANDARD 5.17

SATISFACTION OF MORTGAGE HELD  
BY ESTATE OF NON-RESIDENT DECEDENT

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

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

**Answer:** If prior to January 1, 1976, no. The statutory period is 3 months. If after that date, yes. The statutory period is 60 days.

**Authorities & References:** *F.S. 734.101(3), 744.306(3) (1979); F.S. 734.30(3), 744.15(3) (1973); 1 FLORIDA REAL PROPERTY PRACTICE §8.17 (CLE 2d ed. 1971).*

**Comment:**

Effective January 1, 1976, the statutory period was reduced from three months to sixty days.

The authenticated copy of letters or other evidence showing appointment should show that the authority was in full force and effect on the date of the execution of the satisfaction.

CHAPTER 6  
CONCURRENT OWNERSHIP

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STANDARD 6.1

CREATION OF TENANCY BY THE ENTIRETIES

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

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

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

**Authorities & References:** *American Cent. Ins. Co. v. Whitlock*, 122 Fla. 363, 165 So. 380 (1936); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §20.02(1) (1980); 5 FUND CONCEPT 15 (April 1973); 6 FUND CONCEPT 1 (Jan. 1974).

**Comment:**

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

STANDARD 6.2

INTERSPOUSAL CREATION OF TENANCY BY THE ENTIRETIES

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

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

Answer: Yes.

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

Answer: No. Mary obtained sole ownership.

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

Answer: Yes.

Authorities & References: *F.S.* 689.11 (1979); *Baumgardner v. Kennedy*, 343 So. 2d 1323 (3d D.C.A. Fla. 1977); *Schuler v. Claughton*, 248 F.2d 528 (5th Cir. 1957); *Johnson v. Landefeld*, 138 Fla. 511, 189 So. 666 (1939); ATIF TN 20.01.06.

Comment:

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

STANDARD 6.3

CONVEYANCE OF ENTIRETIES PROPERTY  
BY ONE SPOUSE TO A THIRD PERSON

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

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

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

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

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

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

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

Authorities  
& References:

*Newman v. Equitable Life Assur. Soc.*, 119 Fla. 641, 160 So. 745 (1935); *Ohio Butterine Co. v. Hargrave*, 79 Fla. 458, 84 So. 376 (1920); *Hillman v. McCutchen*, 166 So.2d 611 (3d D.C.A. Fla. 1964), *cert. den.* 171 So.2d 391; 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §20.02(3) (1980); Boyer, *Memorandum on Proposed Title Standard Relative to Estate by the Entirety*, 32 FLA.B.J. 136 (1958); ATIF TN 20.01.02. See *Leitner v. Willaford*, 306 So.2d 555 (3d D.C.A. Fla. 1975).

STANDARD 6.4

CONVEYANCE OF ENTIRETIES PROPERTY BY  
ONE SPOUSE TO THE OTHER

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

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

Answer: Yes.

Authorities & References: *Hunt v. Covington*, 145 Fla. 706, 200 So. 76 (1941); I BOYER, FLORIDA REAL ESTATE TRANSACTIONS §20.02(3) (1980).

Comment:

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

STANDARD 6.5

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

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

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

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

**Authorities & References:** *F.S.* 689.15 (1979); *Owen v. Owen*, 284 So.2d 384 (Fla. 1973); *Reid v. Reid*, 68 So.2d 821 (Fla. 1954); *Markland v. Markland*, 155 Fla. 629, 21 So.2d 145 (1945); *Locke v. Locke*, 383 So.2d 273 (3d D.C.A. Fla. 1980); 12 *FUND CONCEPT* 66 (Nov. 1980).

**Comment:**

The court has broad discretion in equity to adjust the property rights of the parties. *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980); I BOYER, FLORIDA REAL ESTATE TRANSACTIONS §20.02[4] (1980).

For tax considerations on the transfer of property when dissolution of marriage converts a tenancy by the entireties to a tenancy in common, see 13 FUND CONCEPT 10 (Feb. 1981).

STANDARD 6.6

PRESUMPTION OF CONTINUATION OF MARRIAGE

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

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

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

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

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

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

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

Authorities & References: Fla. Stat. §689.15 (1993); *General Properties Corp. v. Gore*, 153 Fla. 236, 14 So. 2d 411 (1943); 25 Fla.Jur.2d Family Law §46 (1964); 52 Am.Jur.2d Marriage §137 (1970).

Comment:

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

STANDARD 6.7

TITLE IN SURVIVING TENANT BY  
THE ENTIRETIES — HOMESTEAD

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

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

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

Authorities & References: *F.S.* 732.401(2) (1979); *Regero v. Daugherty*, 69 So.2d 178 (Fla. 1953); *Menendez v. Rodriguez*, 106 Fla. 214, 143 So. 223 (1932); *Kinney v. Mosher*, 100 So.2d 644 (1st D.C.A. Fla. 1958); I BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.03(3) (1980).

Comment:

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

STANDARD 6.8

CREATION OF JOINT TENANCY

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

Problem 1: Blackacre was deeded to John Doe and Richard Roe as joint tenants. John Doe died and Richard Roe conveyed the entire fee to Simon Grant. Is Simon Grant's title marketable?

Answer: No.

Problem 2: Blackacre was deeded to John Doe and Richard Roe as joint tenants, with right of survivorship. John Doe died and Richard Roe conveyed the entire fee to Simon Grant. Is Simon Grant's title marketable?

Answer: Yes.

Authorities  
& References:

*F.S.* 689.15 (1979); *Kozacik v. Kozacik*, 157 Fla. 597, 26 So. 2d 659 (1946); I FLORIDA REAL PROPERTY PRACTICE §§11.42-.43 (CLE 2d ed. 1971); I BOYER, FLORIDA REAL ESTATE TRANSACTIONS §20.01(2) (1980).

STANDARD 6.9

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

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

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

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

Authorities & References: *F.S. 689.115 (1987); IA BOYER, FLORIDA REAL ESTATE TRANSACTIONS §20.02 (1988).*

Comment:

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

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

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

CHAPTER 7

LEASES

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STANDARD 7.1

TRANSFER OF LESSEE'S INTEREST

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

Problem: John Doe leases a building to Richard Roe. The lease is silent on the subject of transfer of the lessee's interest. May Roe sublease or assign his lease?

Answer: Yes. Where the lease is silent there is no restraint upon its alienation.

Authorities  
& References:

*Frissell v. Nichols*, 94 Fla. 403, 114 So. 431 (1927); 1 FLORIDA REAL PROPERTY PRACTICE §15.17 (CLE 2d ed. 1971); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §35.04[2] (1980).

STANDARD 7.2

PRIORITY OF LEASE AS AGAINST  
SUBSEQUENT MORTGAGE

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

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

Answer: No.

Authorities & References: *Jones v. Florida Lakeland Homes Co.*, 95 Fla. 964, 117 So. 228 (1928); I FLORIDA REAL PROPERTY PRACTICE §17.32 (CLE 2d ed. 1971).

Comment:

An unrecorded lease may also be superior to a subsequent mortgage by the lessor if the lessee was in possession of the property at the time the mortgage was executed.

STANDARD 7.3

CANCELLATION OF LEASES

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

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

Answer: No.

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

Comment:

It is unclear whether defects in the execution of a cancellation or assignment of a lease may be cured by *F.S.* 95.231 (1979) (formerly *F.S.* 95.23, 95.26 (1973) as amended by FLA. LAWS 1974, ch. 74-382, §17) or *F.S.* 694.08 (1979).

CHAPTER 8  
MECHANICS' LIENS

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STANDARD 8.1

EFFECTIVE DATES OF MECHANICS' LIENS

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

Problem 1: A notice of commencement for the construction of apartment buildings on Blackacre was recorded Jan. 2, 1973. Construction was clearly visible on Jan. 15, 1973. On March 1, 1973 an architect recorded a claim of lien for services rendered in connection with the landscaping for the apartments. When did the architect's lien attach?

Answer: March 1, 1973.

Problem 2: Same facts as Problem 1 except that on Dec. 10, 1973 a subcontractor timely filed for record a claim of lien for roofing work done on the apartments. When did the subcontractor's lien attach?

Answer: Jan. 2, 1973.

Problem 3: Apartment buildings were being constructed on Blackacre. Construction visibly commenced on Jan. 15, 1973, but no notice of commencement was filed. On Dec. 10, 1973, a subcontractor timely filed for record a claim of lien for roofing work done on the apartments. When did the subcontractor's lien attach?

Answer: Dec. 10, 1973.

Authorities & References: *F.S. 713.07(1)-(2) (1979); F.S. 713.08 (Supp. 1980); Page Heating & Cooling, Inc. v. Goldmar Homes, Inc.*, 338 So.2d 265 (1st D.C.A. Fla. 1976); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §33.08 (1980); I FLORIDA REAL PROPERTY PRACTICE §8.32 (CLE 2d ed. 1971).

Comment:

The visible commencement of improvements is no longer important with respect to the time at which a mechanic's lien attaches.

The notice of commencement, in itself, does not constitute a lien or notice of a lien. *F.S. 713.13(3)* (Supp. 1980).

As regards the time at which a mechanic's lien attaches, no distinction is made between lienors in privity with the owner and those not in privity with the owner. See *F.S. 713.05-.06* (Supp. 1980); *F.S. 713.07(2)* (1979).

If none of the improvements mentioned in the notice of commencement are begun within thirty days after the recording thereof, the notice is void and of no effect. *F.S. 713.13(2)* (Supp. 1980).

Unless otherwise provided in the notice of commencement, such notice is not effective against a conveyance, transfer, or mortgage of or lien on the real property described in the notice, or against creditors or subsequent purchasers for a valuable consideration, after one year from the date of recording the notice of commencement. *F.S. 713.13(5)* (Supp. 1980).

STANDARD 8.2

DURATION OF MECHANICS' LIENS

**STANDARD: MECHANICS' LIENS ON REAL PROPERTY ARE EXTINGUISHED ONE YEAR AFTER THE RECORDING OF THE CLAIM OF LIEN UNLESS WITHIN THAT TIME AN ACTION TO ENFORCE THE LIEN HAS BEEN COMMENCED. HOWEVER, THE CONTINUATION OF THE LIEN BEYOND THE ONE YEAR PERIOD, CAUSED BY THE COMMENCEMENT OF THE ACTION, WILL NOT BE GOOD AGAINST CREDITORS OR SUBSEQUENT PURCHASERS FOR A VALUABLE CONSIDERATION WITHOUT NOTICE UNLESS A NOTICE OF LIS PENDENS HAS ALSO BEEN RECORDED. THE PERIOD DURING WHICH THE ACTION MUST BE COMMENCED IS SHORTENED IF A NOTICE OF CONTEST IS RECORDED AND SERVED, IN WHICH EVENT AN ACTION TO ENFORCE THE LIEN MUST BE COMMENCED WITHIN SIXTY DAYS OR THE LIEN IS EXTINGUISHED.**

Problem 1: A claim of lien is recorded on January 2, 1977. Nothing else appears of record and no action to enforce the lien has been commenced. Can marketable title be conveyed after January 2, 1978?

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

Problem 2: A claim of lien is recorded on January 2, 1978. An action to enforce the lien is commenced on December 5, 1978. No notice of lis pendens is recorded. Can marketable title be conveyed to a purchaser for value without notice on January 8, 1979?

Answer: Yes. Unless a notice of lis pendens is recorded, the lien is extinguished upon such real property held by a subsequent bona fide purchaser.

Problem 3: A claim of lien is recorded on January 2, 1979. A notice of contest is recorded and served upon the lienor on March 1, 1979. No action to foreclose the lien was commenced. Can marketable title be conveyed on May 15, 1979?

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

Problem 4: Same facts as Problem 3 except that the lienor amended his claim of lien on March 20, 1979. Can marketable title be conveyed on May 15, 1979?

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

Authorities & References: *F.S. 713.21(3), .22(1)-(2) (1979); Jack Stilson & Co. v. Caloosa Bayview Corp.*, 278 So. 2d 282 (Fla. 1973); *Kimbrell v. Fink*, 78 So. 2d 96 (Fla. 1955); *Bowery v. Babbit*, 99 Fla. 1151, 128 So. 801 (1930); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§33.19-.20 (1980); 1 FLORIDA REAL PROPERTY PRACTICE §8.43 (CLE 2d ed. 1971).

Comment:

Any interested party may further shorten the period within which a mechanic's lien may be enforced by filing a complaint in the circuit court of the county in which the land is located. Upon the filing of such complaint the clerk will issue a summons to the lienor, and unless the lienor institutes an action to enforce the lien or shows cause why the lien should not be enforced within 20 days, the court will cancel the lien. *F.S. 713.21(4) (1979)*.

STANDARD 8.3

CLAIM OF LIEN — NOTICE

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

Problem: A claim of lien has been recorded on Blackacre. Is a title examiner on constructive notice of the existence of a lien?

Answer: Yes.

Authorities & References: *F.S. 713.08(5)* (Supp. 1980); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §33.15 (1980).

Comment:

Errors or omissions in the claim of lien will not affect its validity as against one not adversely affected by the error or admission. *F.S. 713.08(4)(a), (c)* (Supp. 1980); *Continental Casualty Co. v. Associated Plastics, Inc.*, 347 So.2d 822 (3d D.C.A. Fla. 1977); *Adobe Brick and Supply Co. v. Center-Winston Corp.*, 270 So.2d 755 (3d D.C.A. Fla. 1972); *George J. Motz Const. Corp. v. Coral Pines, Inc.*, 232 So.2d 441 (4th D.C.A. Fla. 1970).

STANDARD 8.4

MECHANICS' LIENS — PRIORITY AS AGAINST  
PURCHASERS AND OTHERS

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

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

Answer: Yes.

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

Answer: Yes.

Authorities & References: *F.S. 697.04, 713.07(3) (1979); Industrial Supply Corp. v. Bricker*, 306 So.2d 133 (2d D.C.A. Fla. 1975); 2 BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* §33.17[2] (1980); *FLORIDA REAL PROPERTY PRACTICE* §17.23 (CLE 2d ed. 1971).

Comment:

Mortgages securing future advances take priority from the date of the recording thereof provided the mortgage instrument complies with *F.S. 697.04*. Advances made within twenty years of the execution of such a mortgage shall be protected as against liens attaching subsequent to the recording of the mortgage instrument. *F.S. 697.04, 713.07(3)* (1979); *Industrial Supply Corp. v. Bricker*, 306 So.2d 133 (2d D.C.A. Fla. 1975).

STANDARD 8.5

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

**STANDARD: MECHANICS' AND MATERIALMEN'S LIENS FOR WORK DONE AND MATERIAL FURNISHED AT THE REQUEST OF A LESSEE MAY ENCUMBER THE TITLE OF THE LESSOR IF THE IMPROVEMENTS ARE MADE IN ACCORDANCE WITH AN AGREEMENT BETWEEN THE LESSEE AND LESSOR.**

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

**Answer:** Yes.

**Authorities & References:** *F.S.* 713.10 (1979); *Anderson v. Sokolik*, 88 So.2d 511 (Fla. 1956); *Edward L. Nezelek, Inc. v. Food Fair Properties Agency, Inc.*, 309 So.2d 219 (3d D.C.A. Fla. 1975); *Robb v. Lott Paving Co.*, 289 So.2d 776 (4th D.C.A. Fla. 1974); *Jenkins v. Graham*, 237 So.2d 330 (4th D.C.A. Fla. 1970); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §33.05[2] (1980); I FLORIDA REAL PROPERTY PRACTICE §16.25 (CLE 2d ed. 1971).

**Comment:**

*F.S. 713.10 (1979)* provides that, in the absence of fraud, the title of the lessor shall not be subject to liens for improvements made by the lessee when the lease is recorded and expressly prohibits such liability. It is not clear whether such an express prohibition will prevent exposure of the lessor's interest where the recorded lease also contains a provision requiring the lessee to make the improvements.

No position is taken with respect to what may be required to constitute a sufficient agreement between the lessee and lessor. Furthermore, although not entirely clear, it would appear that there is no requirement that such agreement be contained in the lease itself. See *F.S. 713.10*; *Brenner v. Smullian*, 84 So.2d 44 (Fla. 1955); *Edward L. Nezelek, Inc. v. Food Fair Properties Agency, Inc.*, 309 So.2d 219 (3d D.C.A. Fla. 1975); *Robb v. Lott Paving Co.*, 289 So.2d 776 (4th D.C.A. Fla. 1974); *Jenkins v. Graham*, 237 So.2d 330 (4th D.C.A. Fla. 1970); *Tom Joyce Realty Corp. v. Popkin*, 111 So.2d 707 (3d D.C.A. Fla. 1959).

STANDARD 8.6

MECHANICS' LIENS — WAIVER

**STANDARD: A LIENOR MAY WAIVE HIS RIGHT TO CLAIM A MECHANIC'S LIEN, AND IF WAIVED A CLAIM OF LIEN BY THAT LIENOR DOES NOT ATTACH TO THE PROPERTY.**

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

Answer: No.

Problem 2: Same facts as Problem 1, but the waiver is given to the contractor by a subcontractor. Is the subcontractor's claim of lien valid?

Answer: No.

Authorities & References: *F.S. 713.20(2) (1979); Jowain, Inc. v. Sudy Realty Corp.*, 73 So.2d 227 (Fla. 1954); *Greco-Davis Contracting Co. v. Stevmier, Inc.*, 162 So.2d 285 (2d D.C.A. Fla. 1964); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §33.25[4] (1980).

Comment:

A laborer may waive his mechanic's lien only to the extent of labor theretofore performed. *F.S. 713.20(2)* (1979).

Acceptance of an unsecured note by the lienor for all or any part of his claim does not constitute a waiver thereof unless expressly so agreed in writing. *F.S. 713.20(1)* (1979); *Ideal Roofing & Sheet Metal Works, Inc. v. Katzentine*, 127 So.2d 116 (3d D.C.A. Fla. 1961).

A lienor may waive any part of his lien, except that a laborer may waive only that part of his lien covering labor already performed. *F.S. 713.20(3)* (1979); *Ideal Roofing & Sheet Metal Works, Inc. v. Katzentine*, 127 So.2d 116 (3d D.C.A. Fla. 1961).

A lienor may waive his right to claim a mechanic's lien by implication, but the implication derived from the lienor's conduct must be clear and unambiguous. *Mills v. Robert W. Gottfried, Inc.*, 272 So.2d 837 (4th D.C.A. Fla. 1973). See *F.S. 713.20(2)* (1979).

STANDARD 9.1  
LIEN OF JUDGMENT

**STANDARD: A JUDGMENT OR DECREE REQUIRING THE PAYMENT OF MONEY RENDERED ON OR AFTER JUNE 5, 1939, WHICH WAS NOT RECORDED IN THE INCLUSIVE PERIOD JUNE 26, 1967 THROUGH DECEMBER 31, 1971, DOES NOT BECOME A LIEN ON THE DEBTOR'S REAL ESTATE UNTIL A CERTIFIED COPY THEREOF IS RECORDED IN THE OFFICIAL RECORDS OR JUDGMENT LIEN RECORD OF THE COUNTY WHERE THE LAND IS LOCATED, WHICHEVER IS MAINTAINED AT THE TIME OF RECORDATION.**

**Problem:** John Doe recovered a judgment in Alachua County against Richard Roe on July 1, 1982. The original judgment was recorded in the Official Records of Alachua County, where Roe's land was located. However, a certified copy of the judgment was not recorded in that county. Roe conveyed his Alachua County land to Mary Loe in 1987. Is Loe's title free from the lien of the judgment?

**Answer:** Yes. Recording a certified copy of a judgment, order, or decree is essential to obtain a valid lien on real estate.

**Authorities & References:** FLA. STAT. §55.10 (1987); *Smith v. Venus Condominium Ass'n.*, 352 So. 2d 1169 (Fla. 1977); *Steinbrecher v. Cannon*, 501 So. 2d 659 (1st D.C.A.), *rev. denied*, 509 So. 2d 1119 (Fla. 1987); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.15 (TS 9.1) (1987); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §34.16 (1987).

**Comment:** FLA. STAT. §55.10 (1987) applies whether the judgment is rendered in a state or federal court. *See* 26 U.S.C. §1962; 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §34.16 (1987), and 1 FLORIDA REAL PROPERTY PRACTICE §9.8 (CLE 2d ed. 1971).

Apparently an *execution* lien on real property cannot attach before a judgment lien attaches. Therefore, the mere act of delivering a writ of execution to and levy by a sheriff cannot alone create a lien on real property. A certified copy of a final judgment must be recorded before an individual can obtain a lien on real property. *See Steinbrecher v. Cannon*, 501 So.2d 659 (Fla. 1st D.C.A. 1987); REAL PROPERTY TITLE EXAMINATION AND INSURANCE IN FLORIDA §5.20 (CLE 2d ed. 1988).

FLA. STAT. §55.10 (1987) states that the certified copy of the judgment can be recorded in the Official Records or Judgment Lien Record. However, the Judgment Lien Record was eliminated as of January 1, 1972 and all circuit courts have been required to adopt Official Records. *See* FLA. STAT. §28.222(2) (1987); FLA. STAT. §28.222(6) (1979).

For a discussion on the creation of a judgment lien recorded during the inclusive period of June 26, 1967 through December 31, 1971, see Title Standard 9.1-1 (Lien of Judgment).

For a discussion of the statute of limitations on this lien, see Title Standard 9.2 (Limitation on Lien of Judgment) and Title Standard 9.2-1 (Limitations on Lien of Judgments on or after July 1, 1987).

STANDARD 9.1-1

LIEN OF JUDGMENT

**STANDARD: A JUDGMENT, ORDER, OR DECREE REQUIRING THE PAYMENT OF MONEY AND RECORDED IN THE INCLUSIVE PERIOD OF JUNE 26, 1967 THROUGH DECEMBER 31, 1971 BECOMES A LIEN ON THE REAL ESTATE OWNED BY THE JUDGMENT DEBTOR WHEN EITHER THE ORIGINAL FINAL JUDGMENT, ORDER, OR DECREE, OR A CERTIFIED COPY THEREOF, HAS BEEN RECORDED IN THE OFFICIAL RECORD OR JUDGMENT LIEN RECORD OF THE COUNTY WHERE THE LAND IS LOCATED, WHICHEVER IS MAINTAINED AT THE TIME OF RECORDATION. HOWEVER, IN ANY COUNTY OTHER THAN THE FORUM COUNTY, RECORDATION OF A CERTIFIED COPY OF THE JUDGMENT, ORDER, OR DECREE IS NECESSARY TO ESTABLISH A VALID LIEN ON LAND OF THE DEBTOR LOCATED IN THE NON-FORUM COUNTY.**

**Problem 1:** John Doe recovered a judgment in Alachua County against Richard Roe on July 1, 1970. The original judgment was recorded in the Official Records of Alachua County, where Roe's land was located. However, a certified copy of the judgment was not recorded in that county. Roe conveyed his Alachua County land to Mary Loe in 1987. Is Loe's title free from the lien of the judgment?

**Answer:** No. Recording a certified copy of a judgment, order, or decree in the forum county is not essential to obtain a valid lien on real estate when the judgment, order, or decree was recorded during the inclusive period of June 26, 1967 through December 31, 1971.

**Problem 2:** John Doe recovered a judgment in Alachua County against Richard Roe on July 1, 1970. The original judgment was recorded in the Official Records of Alachua County. However, a certified copy of the judgment was not recorded in any county in Florida. Roe conveyed land he owned in Dade County to Mary Loe in 1987. Is Loe's title free from the lien of the judgment?

**Answer:** Yes. Recording a certified copy of a judgment, order, or decree in a county other than the forum county is essential to obtain a valid lien on real estate.

**Authorities & References:** FLA. STAT. §55.10 (1971); *Smith v. Venus Condo. Ass'n.*, 352 So. 2d 1169 (Fla. 1977); *Steinbrecher v. Cannon*, 509 So. 2d 1119 (Fla. 1987); *Meadows Dev. Co. v. Ihle*, 345 So. 2d 769 (Fla. 1st D.C.A. 1977), *aff'd* sub nom. *Smith v. Venus Condo. Ass'n.*, 352 So. 2d 1169 (Fla. 1977); FLA. STAT. §55.10 (1971); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.15 (TS 9.1) (1988); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §34.16 (1988).

**Comment:** Caution should be exercised with respect to federal judgments rendered during this time period. Such judgments may have become liens throughout the federal court district where the judgment was rendered. These liens may have attached without recordation in the Official Records of the county where the property is located by the operation of the Federal Conformity Act. *See* 1 FLORIDA REAL PROPERTY PRACTICE §9.8 (CLE 2d ed. 1971). *But see Meadows Dev. Co. v. Ihle*, 345 So. 2d 769 (1st D.C.A.), *aff'd* sub nom. *Smith v. Venus Condo. Ass'n.*, 352 So. 2d 1169 (Fla. 1977).

Examination of titles for this time period should include a review of the judgments on record of the federal district court for any property located in the territorial jurisdiction of that court. This jurisdiction may include counties other than the county in which the court itself is located. *See Doyle v. Wade*, 23 Fla. 90, 1 So. 516 (1887).

For a discussion of the creation of a lien by judgment, order, or decree rendered on or after June 5, 1939, which was not recorded in the inclusive period of June 26, 1967 through December 31, 1971, see Title Standard 9.1 (Lien of Judgment).

For a discussion of the statute of limitation on this lien, see Title Standard 9.2 (Limitation on Lien of Judgment).

## STANDARD 9.2

### LIMITATION ON LIEN OF JUDGMENT

**STANDARD: SUBJECT TO THE PROVISIONS OF FLA. STAT. §55.10 (1987), NO JUDGMENT, ORDER, OR DECREE OR CERTIFIED COPY THEREOF OF ANY COURT SHALL BE A LIEN UPON REAL OR PERSONAL PROPERTY WITHIN THE STATE AFTER THE EXPIRATION OF TWENTY (20) YEARS FROM THE DATE OF THE ENTRY OF SUCH JUDGMENT, ORDER, OR DECREE.**

**Problem:** John Doe recovered a judgment against Richard Roe on July 8, 1983. John Doe did not record a certified copy of his judgment in the Official Records until August 3, 1986. When did the lien of the judgment expire?

**Answer:** On midnight of July 7, 2003, twenty years after the *entry* of the judgment. Note that the twenty-year period is measured from the date of entry of the judgment, not from the date of recording the judgment or certified copy thereof. Also note that, as explained below, FLA. STAT. §55.10 (1987) does not apply retroactively; thus one acquiring a judgment lien before July 1, 1987 does not need to be concerned with the seven-year limitations described in FLA. STAT. §§55.10(1)-(4) (1987), but should apply the rule stated in FLA. STAT. §55.081 (1979). For a discussion of the seven-year limitations in FLA. STAT. §§55.10(1)-(4), see Title Standard 9.2-1 (Limitations on Lien of Judgments on or after July 1, 1987).

**Authorities & References:** FLA. STAT. §55.081 (1987); FLA. STAT. §§55.10(1)-(5) (1987); FLA. STAT. §55.081 (1979). See 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §34.16 (1988); for a discussion of the statute of limitations under FLA. STAT. §55.081 (1987), see REAL PROPERTY TITLE EXAMINATION AND INSURANCE IN FLORIDA §5.28 (CLE 2d ed. 1988).

**Comment:** FLA. STAT. §55.10 (1987) applies prospectively, not retroactively. See FLA. STAT. §55.10(5) (1987).

The twenty-year statute of limitation applies to both decrees in equity as well as judgments at law. See 1 FLORIDA REAL PROPERTY PRACTICE §8.29 (CLE 2d ed. 1971).

The twenty-year limitation period is applicable to judgments entered in federal as well as state courts. See REAL PROPERTY TITLE EXAMINATION AND INSURANCE IN FLORIDA §5.28 (CLE 2d ed. 1988); 1 FLORIDA REAL PROPERTY PRACTICE §8.29 (CLE 2d ed. 1971).

The twenty-year statute of limitation probably applies to judgments entered in favor of the State of Florida. See *Ware v. City of Miami*, 132 So. 2d 446 (3d D.C.A.) (holding the statute applicable to municipal assessment liens), *cert. denied*, 140 So. 2d 302 (Fla. 1962); FLA. STAT. §95.011 (1985); 1 FLORIDA REAL PROPERTY PRACTICE §9.8 (CLE 2d ed. 1971).

It is unclear whether this statute of limitation applies to judgments entered in favor of the United States. See *Custer v. McCutcheon*, 283 U.S. 514 (1931); *United States v. Kellum*, 523 F.2d 1284 (5th Cir. 1975); REAL PROPERTY TITLE EXAMINATION AND INSURANCE IN FLORIDA §5.28 (CLE 2d ed. 1988); ATIF TN 18.03.04.

The twenty-year statute of limitation might be terminated early by the death of the judgment debtor. See *Gilpen v. Bower*, 152 Fla. 733, 12 So. 2d 884 (1943); REAL PROPERTY TITLE EXAMINATION AND INSURANCE IN FLORIDA §5.28 (CLE 2d ed. 1988).

For a discussion of the limitation period on judgments rendered on or after July 1, 1987 under the provisions of FLA. STAT. §55.10 (1987), see Title Standard 9.2-1 (Limitations on Lien of Judgments on or after July 1, 1987).

STANDARD 9.2-1

LIMITATIONS ON LIEN OF JUDGMENTS ON OR AFTER JULY 1, 1987

**STANDARDS: A JUDGMENT, ORDER, OR DECREE RENDERED ON OR AFTER JULY 1, 1987, BECOMES A LIEN ON REAL ESTATE IN ANY COUNTY WHEN A CERTIFIED COPY THEREOF IS RECORDED IN THE OFFICIAL RECORDS OF THAT COUNTY, AND IT SHALL BE A LIEN FOR A PERIOD OF SEVEN (7) YEARS FROM THE DATE OF RECORDING THE CERTIFIED COPY IN THAT COUNTY. THIS SEVEN-YEAR PERIOD MAY BE EXTENDED FOR AN ADDITIONAL SEVEN-YEAR PERIOD BY RE-RECORDING A CERTIFIED COPY OF THE JUDGMENT, ORDER, OR DECREE WITHIN NINETY DAYS PRECEDING THE EXPIRATION OF THE INITIAL SEVEN-YEAR PERIOD. THE ADDITIONAL SEVEN-YEAR PERIOD MAY BE EXTENDED FURTHER BY RE-RECORDING A CERTIFIED COPY OF THE JUDGMENT, ORDER, OR DECREE WITHIN NINETY DAYS PRECEDING THE EXPIRATION OF THE ADDITIONAL SEVEN-YEAR PERIOD. IN NO EVENT, HOWEVER, SHALL THE LIEN UPON REAL ESTATE EXTEND BEYOND THE TWENTY-YEAR PERIOD PROVIDED FOR IN FLA. STAT. §55.081 (1987).**

**Problem:** John Doe recovered a judgment against Richard Roe on July 1, 1987. John Doe did not record a certified copy of his judgment in the Official Records until August 3, 1990. When did the lien of the judgment expire?

**Answer:** On midnight August 2, 1997, seven years after the certified copy of the judgment was *recorded*. However, if John Doe re-recorded a certified copy of the judgment within ninety days preceding midnight August 2, 1997, then the lien would not expire until midnight August 2, 2004. Finally, if John Doe re-recorded a certified copy of the judgment within ninety days preceding midnight August 2, 2004, then the lien would not expire until midnight June 30, 2007, 20 years after the *entry* of the judgment.

**Authorities & References:** FLA. STAT §55.10(1)-(5) (1987); FLA. STAT. §55.081 (1987).

**Comment:** FLA. STAT. §55.10(1)-(4) (1987) applies prospectively, not retroactively. *See* FLA. STAT. §55.10(5) (1987).

For a discussion of the creation of a lien by a judgment, order, or decree recorded during the inclusive period of June 26, 1967 through December 31, 1971, see Title Standard 9.1-1 (Lien of Judgment). For a discussion of the creation of a lien by a judgment, order, or decree rendered on or after June 5, 1939 which was not recorded in the inclusive period of June 26, 1967 through December 31, 1971, see Title Standard 9.1 (Lien of Judgment).

For a discussion of the twenty-year period provided for in FLA. STAT. §55.081, see Title Standard 9.2 (Limitation on Lien of Judgment).

STANDARD 9.3  
SERVICE OF PROCESS

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

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

Answer: No.

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

Answer: Yes.

Authorities & References: *Klosenski v. Flaherty*, 116 So.2d 767 (Fla. 1960); *Largay Enterprises, Inc. v. Berman*, 61 So.2d 366 (Fla. 1952); *International Typographical Union v. Ormerod*, 59 So.2d 534 (Fla. 1952); *Wilmott v. Wilmott*, 119 So.2d 54 (1st D.C.A. Fla. 1960); F.S. 48.21 (1979); Fla. R. Civ. P. 1.070.

STANDARD 9.4

TITLE ACQUIRED BY MORTGAGOR AFTER  
EXECUTION OF MORTGAGE

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

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

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

**Authorities & References:** *Taylor v. Federal Farm Mortg. Corp.*, 141 Fla. 703, 193 So. 758 (1940); *Florida Land Inv. Co. v. Williams*, 84 Fla. 157, 92 So. 876 (1922); *Hillman v. McCutchen*, 166 So.2d 611 (3d D.C.A. Fla. 1964), *cert. den.* 171 So.2d 391.

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

The above Standard may not apply to purchase money mortgages in some situations. See *Florida Land Inv. Co. v. Williams*, 84 Fla. 157, 92 So. 876 (1922); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §15.11[3] (1980).

STANDARD 9.5

MERGER OF TITLE AND MORTGAGE

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

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

**Answer:** Yes.

**Authorities & References:** *Alderman v. Whidden*, 142 Fla. 647, 195 So. 605 (1940); *Stovall v. Stokes*, 94 Fla. 717, 115 So. 828 (1927); *Jackson v. Relf*, 26 Fla. 465, 8 So. 184 (1890); *Floorcraft Distributors, Inc. v. Horne-Wilson, Inc.*, 251 So.2d 138 (1st D.C.A. Fla. 1971); I FLORIDA REAL PROPERTY PRACTICE §8.15 (CLE 2d ed. 1971); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §32.19 (1980); ATIF TN 22.05.10.

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

STANDARD 9.6

IRREGULARITIES AND DISCREPANCIES  
IN SATISFACTIONS OF MORTGAGES

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

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

Answer: Yes.

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

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

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

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

Authorities & References: BASYE, CLEARING LAND TITLES §353 (2d ed. 1970); 59 C.J.S. *Mortgages* §470(e) (1949); 3 FUND CONCEPT 48 (Sept. 1971).

STANDARD 9.7

SATISFACTION OF CORRECTION OR  
RE-RECORDED MORTGAGE

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

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

**Answer:** Yes.

**Authorities & References:** *F.S.* 701.03 (1979); *F.S.* 701.04 (Supp. 1980); *Matheson v. Thompson*, 20 Fla. 790 (1884); *BASYE, CLEARING LAND TITLES* §353 (2d ed. 1970); 2 *PATTON ON TITLES* §567 (2d ed. 1957).

**Comment:** By satisfying the correcting mortgage, the mortgagee acknowledges the modification.

Caution should be exercised when the satisfaction is of the earlier mortgage, rather than the later one. See 6 *FUND CONCEPT* 43 (Aug. 1974).

STANDARD 9.8

PRIORITY OF PURCHASE MONEY  
MORTGAGE OVER DOWER

**STANDARD: THE LIEN OF A PURCHASE MONEY MORTGAGE IS SUPERIOR TO THE DOWER RIGHTS OF THE MORTGAGOR'S SPOUSE, INCLUDING THE INCHOATE DOWER RIGHTS OF A MARRIED WOMAN AUTHORIZED BY LAW PRIOR TO OCTOBER 1, 1973.**

Problem 1: Mary Doe, a married woman, purchased Blackacre in her own name on August 1, 1974, and gave back to Seller a purchase money mortgage. John Doe, her husband, did not join in the execution of the mortgage. Mary Doe died on December 1, 1974. Assuming John Doe elects to take dower, is his dower right superior to the lien of Seller's mortgage?

Answer: No.

Problem 2: John Doe, a married man, purchased Blackacre in his own name on August 1, 1970, and gave back to Seller a purchase money mortgage. Mary Doe, his wife, did not join in the execution of the mortgage. The mortgage was later foreclosed by the holder. Could Mary Doe claim an inchoate right of dower even though not made a party to the foreclosure, assuming John Doe died prior to October 1, 1973?

Answer: No.

Authorities & References: *Hatch v. Trabue*, 99 Fla. 1169, 128 So. 420 (1930); *Lewis v. Belknap*, 96 So.2d 212 (Fla. 1957); I FLORIDA REAL PROPERTY PRACTICE §17.40 (CLE 2d ed. 1971).

CHAPTER 10

NAMES

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STANDARD 10.1

ABBREVIATIONS, DERIVATIVES, AND NICKNAMES

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

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

**Answer:** Yes.

**Authorities & References:** *Johnson v. State*, 51 Fla. 44, 40 So. 678 (1906); *Clinton v. Miller*, 124 Mont. 463, 226 P.2d 487 (1951); 1 PATTON ON TITLES §74 (2d ed. 1957); 4 FUND CONCEPT 1 (Jan. 1972).

**Comment:** As regards the use of initials, variances may be cured ten years subsequent to recording by *F.S.* 689.19 (1979).

STANDARD 10.2

RULE OF IDEM SONANS

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

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

Answer: Yes.

Authorities & References: *Burrows v. Hagerman*, 159 Fla. 826, 33 So.2d 34 (1947); *Altman v. Simon*, 109 Fla. 196, 147 So. 222 (1933); 1 PATTON ON TITLES §77 (2d ed. 1957); 4 FUND CONCEPT 1 (Jan. 1972).

STANDARD 10.3

RECITALS OF IDENTITY IN CONVEYANCES

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

Problem 1: Blackacre was conveyed to Joe Emery. A conveyance is then executed by J. Lawrence Emery, "said J. Lawrence Emery being also known as Joe Emery" as grantor. May identity of the grantee and grantor be presumed?

Answer: Yes.

Problem 2: Blackacre was conveyed to Laura Emery, as grantee. A conveyance is then executed by Laura Graham, formerly Laura Emery, or (nee Laura Emery) as grantor. May identity of the grantee and grantor be presumed?

Answer: Yes.

Authorities & References: *McKay v. Easton*, 86 U.S. (19 Wall.) 619 (1873); 1-2 PATTON ON TITLES §§21, 72, 78, 339 (2d ed. 1957); 4 FUND CONCEPT 1 (Jan. 1972).

STANDARD 10.4

USE OR NON-USE OF MIDDLE  
NAMES AND INITIALS

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

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

Answer: Yes.

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

Answer: Yes.

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

Answer: Yes.

Authorities & References: *Burroughs v. State*, 17 Fla. 643 (1880); 1 PATTON ON TITLES §76 (2d ed. 1957).

Comment: Variances between instruments affecting title with respect to the use or non-use of middle names or initials may be cured 10 years subsequent to the recording thereof. *F.S.* 689.19 (1979).

STANDARD 10.5

EFFECT OF SUFFIX

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

**Problem:** Blackacre was conveyed to John Doe. Later a conveyance thereof was executed by John Doe, Jr., as grantor. May identity of these persons be presumed?

**Answer:** No. The use of the word “Jr.” in the latter conveyance would indicate that there is more than one person bearing the name John Doe. A conveyance will be presumed to have run to the father in the absence of something in the deed evidencing intention to make the son the grantee. It will be necessary to explain the manner in which John Doe, Jr., acquired title as against John Doe.

**Authorities & References:** *State ex rel. Nuccio v. Williams*, 97 Fla. 159, 120 So. 310 (1929); 4 FUND CONCEPT 1 (Jan. 1972).

STANDARD 10.6

NAME VARIANCES IN CORPORATE CONVEYANCES

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

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

Answer: Yes.

Authorities & References: *F.S.* 608.48 (1973) (repealed 1975); *F.S.* 694.12 (1979); BASYE, CLEARING LAND TITLES §19 (2d ed. 1970); ATIF TN 11.07.03.

CHAPTER 11

PLATS

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STANDARD 11.1

CORRECTING ERROR IN NAME OR  
DESIGNATION OF PLAT

**STANDARD: AN ERROR IN A CONVEYANCE WITH RESPECT TO THE NAME OR DESIGNATION OF A RECORDED PLAT MAY BE CORRECTED BY A CERTIFICATE OF THE CLERK OF THE CIRCUIT COURT WHEN THE NATURE OF THE ERROR IS REASONABLY CLEAR.**

**Problem:** John Doe conveyed land describing it as Lot 1, Block A of Blackacres, Plat Book 5, Page 3 of the Public Records of Dade County, Florida, instead of the correct description of Plat Book 5, Page 31. The Clerk of the Circuit Court for Dade County gave a certificate stating that the only plat of record in Dade County under the name of Blackacres is the one recorded in Plat Book 5, Page 31. Is a corrective deed necessary?

**Answer:** No.

**Authorities & References:** BASYE, CLEARING LAND TITLES §237 (2d ed 1970); ATIF TN 13.02.02.

**Comment:** This Standard should be relied upon only when the facts and circumstances, such as the location of the land, references in other recorded documents, etc., make it reasonably clear that the corrected reference is the one intended.

STANDARD 11.2

PRORATING ERRORS IN DIMENSIONS

**STANDARD: WHERE THE TOTAL DISTANCE IN A BLOCK OF A RECORDED PLAT IS GREATER OR LESS THAN THE ACTUAL DISTANCE SHOWN BY AN ACTUAL SURVEY, THE OVERAGE OR SHORTAGE SHOULD BE PRORATED BETWEEN ALL OF THE LOTS IN THE BLOCK.**

Problem: A recorded plat shows a block comprised of seven lots, each having a width of 100 feet. An actual survey shows that the aggregate frontage on the block is 693 feet. What are the actual dimensions of each lot in the block?

Answer: 99 feet. The same rule would apply if the actual survey reveals that the distance in the block is more than 700 feet.

Authorities & References: *Madison v. Haynes*, 264 So.2d 852 (4th D.C.A. Fla. 1972); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §13.08 (1980); CLARK ON SURVEYING AND BOUNDARIES §222 (3d ed. 1959).

STANDARD 11.3

RESERVATION OF REVERSIONARY INTEREST

**STANDARD: A CONVEYANCE BY THE DEDICATOR OF LOTS ABUTTING STREETS DEDICATED IN A PLAT CARRIES THE REVERSIONARY INTEREST IN THE ABUTTING STREETS TO THE CENTER LINE UNLESS THE GRANTOR CLEARLY PROVIDES OTHERWISE IN THE CONVEYANCE, EVEN THOUGH THE DEDICATION CONTAINS A PROVISION RESERVING THE REVERSIONARY INTEREST IN THE STREETS TO THE DEDICATOR, HIS HEIRS, SUCCESSORS, ASSIGNS, OR LEGAL REPRESENTATIVES.**

**Problem:** John Doe subdivided a tract of land and recorded the plat, dedicating the streets. The dedication contained the following language: “and does hereby dedicate to the perpetual use of the public, as public highways, the streets as shown hereon, reserving unto himself, his heirs, successors, assigns, or legal representatives, the reversion or reversions of the same, whenever abandoned by the public or discontinued by law.” John Doe thereafter conveyed lots abutting streets in the subdivision. These deeds referred to the plat but were still silent with respect to the reversionary interest in the streets. Subsequently a street was discontinued. Do the abutting owners now own the fee to the center line of the vacated street?

**Answer:** Yes.

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

**Answer:** No. The fee reverts to John Doe.

**Authorities & References:** *F.S. 177.085 (1979); 5 FUND CONCEPT 45 (Sept. 1973).*

**Comment:** The above Standard is based on *F.S. 177.085*, which became effective on July 1, 1972. The statute purports to be retroactive, but there is some question with respect to the constitutionality of its retroactive application. Therefore, as to Problem 1, caution should be exercised as to plats filed prior to July 1, 1972 which contain reversionary language. See *Peninsula Point, Inc. v. South Georgia Dairy Co-Op*, 251 So. 2d 690 (1st D.C.A. Fla. 1971); 5 FUND CONCEPT 45 (Sept. 1973); ATIF TN 24.01.03.

STANDARD 11.4

ABANDONMENT OF STREET ON PLATTED LAND

**STANDARD: WHEN A STREET IS DEDICATED BY AN OWNER WHO DOES NOT PROPERLY RESERVE THE REVERSIONARY INTEREST, AND THE STREET IS THEREAFTER DISCONTINUED THROUGH LEGAL PROCESS, THE ABUTTING OWNERS TAKE THE FEE TITLE TO THE CENTER OF THE STREET.**

Problem: Veronese Street was legally closed by the city. John Doe owned Blackacre which abutted Veronese Street. There was no effective reservation of the reversionary interest. John Doe claimed fee title to the center of the street. Was his claim of title valid?

Answer: Yes.

Authorities & References: *New Fort Pierce Hotel Co. v. Phoenix Title Corp.*, 126 Fla. 552, 171 So. 525 (1936); *Smith v. Horn*, 70 Fla. 484, 70 So. 435 (1915); *Florida S. Ry. v. Brown*, 23 Fla. 104, 1 So. 512 (1887).

STANDARD 11.5

REVERSIONARY INTERESTS IN ABUTTING STREETS

**STANDARD: WHEN THE OWNER OF A PLATTED SUBDIVISION LOT OWNS AN INTEREST IN AN ABUTTING STREET, SUCH OWNERSHIP IS INCIDENTAL TO THE OWNERSHIP OF THE LOT AND PASSES WITH A CONVEYANCE OF THE LOT AND IS ENCUMBERED BY A MORTGAGE OF THE LOT, UNLESS IT IS PROVIDED OTHERWISE IN THE CONVEYANCE OR MORTGAGE.**

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

Answer: Yes.

Problem 2: John Doe executes a quitclaim deed to Richard Roe of an abandoned street abutting his lot, which lot is subject to a mortgage. The mortgagee neither joins in the deed nor executes a release or mortgage with reference to the street. Is Richard Roe's title marketable?

Answer: No.

Authorities & References: *Servando Building Co. v. Zimmerman*, 91 So.2d 289 (Fla. 1965); *Buckhels v. Tomer*, 78 So.2d 861 (Fla. 1955); *Smith v. Horn*, 70 Fla. 484, 70 So. 435 (1915); ATIF TN 13.01.04, 24.01.03.

STANDARD 11.6

DESCRIPTION MADE BY REFERENCE TO A PLAT

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

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

**Answer:** Yes.

**Authorities & References:** *Kahn v. Delaware Securities Corp.*, 114 Fla. 32, 153 So. 308 (1934); *Lawyers' Title Guaranty Fund v. Milgo Electronics*, 318 So.2d 416 (3d D.C.A. Fla. 1975); 19 FLA. JUR. 2d, *Deeds* §132 (1980); ATIF TN 24.03.01.

CHAPTER 12

TAX LIENS

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STANDARD 12.1

DIVESTMENT OF STATE ESTATE TAX LIEN

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

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

Answer: Yes.

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

Answer: No.

Authorities & References: *F.S.* 198.22 (1979); 2 BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* §34.14[2] (1980); I *FLORIDA REAL PROPERTY PRACTICE* §§8.45-.48 (CLE 2d ed. 1971); ATIF TN 2.10.02.

STANDARD 12.2

FEDERAL ESTATE TAX LIENS

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

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

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

**Authorities & References:** *IRC of 1954* §6325; *Treas. Reg.* §§20.6325-1, 301.6325-1.

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

The federal estate tax lien is divested as to any part of the gross estate used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction. *IRC of 1954* §6324(a)(1). Care should be taken to ensure that the factual basis for such divestment exists.

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

STANDARD 12.3

FEDERAL ESTATE TAX LIEN ON  
SURVIVORSHIP PROPERTY

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

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

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

**Authorities & References:** *IRC of 1954* §6324; *Rev. Rul.* 56-144, 1956-1 CUM.BULL. 563; I FLORIDA REAL PROPERTY PRACTICE §§8.47, 17.27 (CLE 2d ed. 1971); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §34.13[2] (1980); ATIF TN 2.10.02; 4 FUND CONCEPT 15 (Apr. 1972).

**Comment:** The title examiner should satisfy himself that the transfer of the property was bona fide, the consideration was substantially equivalent to the value of the property, and the dealings were at arm's length, "as between strangers."

STANDARD 12.4

ESTATE TAX LIEN — TEN-YEAR LIMITATION

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

**Problem:** In 1960 John Doe, the record owner of Blackacre, died. Blackacre was distributed to Ralph Doe, the devisee under John Doe's will. Nothing appears of record to indicate that title to Blackacre was cleared of any possible estate tax lien. In 1964 Ralph Doe gratuitously conveyed Blackacre to Richard Roe. No notice of an estate tax lien has been filed and nothing appears of record to indicate that such a lien exists. In 1975 is title to Blackacre unmarketable because the clearing of state and federal estate tax liens, if any, does not appear of record?

**Answer:** No.

**Authorities & References:** *IRC of 1954* §6324; *F.S.* 198.22, .33 (1979); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§ 34.13[3], 34.14[3] (1980); I FLORIDA REAL PROPERTY PRACTICE §§8.45-.48 (CLE 2d ed. 1971); ATIF TN 2.10.07.

**Comment:** With respect to *non-resident* decedents, a state estate tax lien may be enforceable more than ten years after the date of the non-resident decedent's death. *F.S.* 198.33 (1979) provides that such lien is discharged only after a lapse of ten years from the date of the filing of notice of death or the date of the filing of an estate tax return, whichever is earlier. ATIF TN 2.10.07. The duration of a state estate tax lien may be extended by the filing of notice by the Department of Revenue. *F.S.* 198.33(1) (1979). No state estate tax lien continues for more than twenty years from the date of death of the decedent. *F.S.* 198.33(2) (1979).

A federal estate tax lien may be unenforceable six years after assessment. *IRC of 1954* §§6324(a)(1), 6502.

STANDARD 12.5

LIEN OF INTANGIBLE PERSONAL PROPERTY TAXES

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

**Problem:** An intangible personal property tax was assessed against John Doe, the owner of Blackacre, for the year 1973. John Doe did not pay the tax. Nothing appears of record with respect to the delinquent tax. In 1975 John Doe conveyed Blackacre to Richard Roe. Did Richard Roe take subject to a lien for the intangible personal property tax.?

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

**Authorities & References:** *F.S.* 199.262 (1979); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§34.11-.12 (1980); 1 FLORIDA REAL PROPERTY PRACTICE §§8.54, 17.26 (CLE 2d ed. 1971); 5 FUND CONCEPT 11 (March, 1973).

**Comment:** The statutes do not specify a limitation period for this lien. It may continue for twenty years, the same as a judgment lien. *See* 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §34.12[2] (1980).

Prior to July 1, 1971, intangible personal property taxes became a lien in the county where levied from the time they became due and continued as a lien for seven years. In other counties they became a lien when a tax execution was recorded, and continued as a lien for seven years after the tax became due. The seven-year limitation period was repealed by the 1971 legislation and no similar provision was enacted. Thus, the limitation period applicable to liens arising under prior law also appears to be uncertain. *See F.S.* 199.241-.251 (1969); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §34.12 (1980).

CHAPTER 13

TRUSTS

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STANDARD 13.1

CONVEYANCES OR MORTGAGES BY OR TO  
TRUSTEES — EFFECT OF DESIGNATION “TRUSTEE”

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

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

Answer: No.

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

Answer: Yes.

Authorities & References: *F.S. 689.07 (1979)*; I FLORIDA REAL PROPERTY PRACTICE §10.36 (CLE 2d ed. 1971); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §10.05[3] (1980); see *Grammer v. Roman*, 174 So.2d 443 (2d D.C.A. Fla. 1965); *Resnick v. Goldman*, 133 So.2d 770 (3d D.C.A. Fla. 1961).

Comment: Section 689.07, prior to the 1959 amendment, only applied to deeds of conveyance. However, the 1959 amendment made section 689.07 applicable to instruments transferring, assigning, or mortgaging any interest in real property. The amendment purports to be retroactive but some question has been raised about its constitutionality in this regard. See ATIF TN 22.03.07.

Section 689.07 expressly provides that nothing therein shall prevent any person from recording a declaration of trust subsequent to the recording of an instrument conveying, transferring, assigning, or mortgaging any interest in real property. In such event any grantee, transferee, assignee, or mortgagee of the “trustee” taking prior to the recording of the declaration takes free from the claims of the beneficiaries. Although not expressly stated in the statute, it seems to be implied that any grantee, transferee, assignee, or mortgagee of the “trustee” taking subsequent to the recording of the declaration would take subject to the claims of the beneficiaries, and caution should be exercised in this situation. *F.S. 689.07(4) (1979)*; ATIF TN 31.04.02.

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

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

STANDARD 13.2

IMPLIED POWER OF SALE

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

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

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

**Authorities & References:** *Jordan v. Landis*, 128 Fla. 604, 175 So. 241 (1937); *Walker v. Close*, 98 Fla. 1103, 125 So. 521 (1929); *First Baptist Church of Jacksonville v. American Bd. of Comm'rs for Foreign Mission*, 66 Fla. 441, 63 So. 826 (1913); *In re Walker's Will*, 258 Wis. 65, 45 N.W.2d 94 (1950); *Annot.*, 23 A.L.R.2d 1000 (1952); I FLORIDA REAL PROPERTY PRACTICE §10.28 (CLE 2d ed. 1971).

**Comment:** *F.S.* 737.402 (1979) and its predecessor, *F.S.* 691.03 (1973) provide that, in the absence of contrary or limiting provisions in the trust instrument, the trustee of a trust is authorized to sell real property. In the absence of court construction, however, there has been a reluctance to rely upon this provision. See I FLORIDA REAL PROPERTY PRACTICE §10.29 (CLE 2d ed. 1971); ATIF TN 31.05.04. But see *In re Will of Jones*, 289 So.2d 42 (2d D.C.A. Fla. 1973) (finding the trustee had the power of sale under section 691.03(2)).

STANDARD 13.3

EXECUTION OF DEED BY TRUSTEES

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

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

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

**Authorities & References:** *F.S. 737.404(1) (1979)*; *see* I FLORIDA REAL PROPERTY PRACTICE §10.38 (CLE 2d ed. 1971) (relying on *F.S. 691.04*, the predecessor of *F.S. 737.404*).

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

STANDARD 13.4

DEED EXECUTED BY THE SURVIVOR  
OF TWO OR MORE TRUSTEES

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

Problem: John Doe and Richard Roe were named as trustees and John Doe, as trustee, executed a deed as survivor to Simon Grant. Attached to the deed is the death certificate of Richard Roe. Is Simon Grant's title marketable?

Answer: Yes.

Authorities & References: *F.S. 737.404(2)* (1979); *see* I FLORIDA REAL PROPERTY PRACTICE §10.38 (CLE 2d ed. 1971) (relying on *F.S. 691.04*, the predecessor of *F.S. 737.404*).

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

CHAPTER 14

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

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SOLDIERS' AND SAILORS' CIVIL RELIEF ACT —  
DEFAULT JUDGMENTS

**STANDARD: IN ANY ACTION INVOLVING THE TITLE TO REAL PROPERTY AFTER OCTOBER 17, 1940, WHEN THERE IS A DEFAULT OF ANY APPEARANCE BY THE DEFENDANT, IT MUST APPEAR THAT THE MOVING PARTY COMPLIED WITH THE PROVISIONS OF TITLE 50, U.S.C. APP. SECTION 520 (SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940).**

Problem 1: John Doe entered military service on June 1, 1967. In 1965 John Doe had mortgaged Blackacre to Richard Roe, who started foreclosure proceedings in 1970 after default in the terms of the mortgage. John Doe still held title to Blackacre or was otherwise a party defendant with a real interest. Blackacre was sold to Richard Roe after foreclosure proceedings based upon a default judgment. There was no affidavit concerning John Doe's military service nor was there an appearance for John Doe. Is Richard Roe's title marketable?

Answer: No.

Problem 2: Same facts as in Problem 1 except that upon application of Richard Roe, the court appointed an attorney to represent John Doe and protect his interest. Is Richard Roe's title marketable?

Answer: Yes.

Authorities & References: Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. §520 (1976); III FLORIDA REAL PROPERTY PRACTICE §§5.6-10 (CLE 2d ed. 1976).

Comment: The safeguards afforded by section 520 do not apply to the modification, termination, or cancellation of any contract, lien, or obligation secured by a mortgage, or to the foreclosure and sale of property which is security for any obligation, where the right is based upon a written agreement executed during or after the period of military service. Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. §517 (1976).

Judgments rendered in disregard of the provision of section 520, while voidable, are not void. If in fact the defendant was not in the military service and no affidavit to that effect was filed, an affidavit filed subsequent to final judgment indicating that at no time during the proceedings was the defendant entitled to the protection of the Soldiers' and Sailors' Civil Relief Act will cure, for title purposes, this defect in the judgment. *See* Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. §520(4) (1976); *Courtney v. Warner*, 290 So.2d 101 (4th D.C.A. Fla. 1974); *Eureka Homestead Soc'y v. Clark*, 145 La. 917, 83 So. 191 (1919).

With respect to the applicability of the Soldiers' and Sailors' Civil Relief Act to persons in the Public Health Service, see 50 U.S.C. App. §511 (Soldiers' and Sailors' Civil Relief Act) and 50 U.S.C. App. §464 (Selective Service Act).

STANDARD 14.2

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT —  
FORECLOSURE OF MORTGAGES

**STANDARD: DURING MILITARY SERVICE OF A MORTGAGOR AND FOR THREE MONTHS THEREAFTER HIS PROPERTY MAY NOT BE SOLD IN FORECLOSURE PROCEEDINGS EXCEPT PURSUANT TO AN AGREEMENT AS PROVIDED IN TITLE 50, U.S.C. APP. SECTION 517, UNLESS UPON AN ORDER PREVIOUSLY MADE BY THE COURT AND A RETURN THERETO MADE AND APPROVED BY THE COURT.**

**Problem:** John Doe was discharged from the service in June, 1966. In July, 1966, Richard Roe started foreclosure proceedings on the mortgage held by him encumbering Blackacre, owned by John Doe. The mortgage was given in 1962 prior to the time of John Doe's military service. John Doe did not appear. A default was entered against him on an affidavit stating that John Doe was not then in the military service. Is the subsequent sale valid?

**Answer:** No, unless the sale was more than three months after Doe's discharge from service.

**Authorities & References:** Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. §532 (1976); III FLORIDA REAL PROPERTY PRACTICE §5.11 (CLE 2d ed. 1976).

CHAPTER 15

TAX TITLES

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STANDARD 15.1

TAX DEED OF RECORD FOR TWENTY YEARS

**STANDARD: A TITLE BASED UPON A TAX DEED ISSUED BY THE CLERK OF THE CIRCUIT COURT IS MARKETABLE IF IT AFFIRMATIVELY APPEARS THAT: (1) THE TAX DEED HAS BEEN OF RECORD FOR MORE THAN 20 YEARS; (2) THE TAXES HAVE BEEN PAID BY THE TAX DEED GRANTEE, OR SUCCESSORS, FOR THAT PERIOD OF TIME; (3) SUBSEQUENT TO THE TAX DEED THERE HAS BEEN NO ADVERSE CLAIM ASSERTED OF RECORD AND NO POSSESSION ADVERSE TO THE TAX DEED GRANTEE, OR SUCCESSORS; (4) THE TAXES FOR WHICH THE TAX DEED WAS ISSUED HAD NOT BEEN PAID BEFORE THE EXECUTION OR ISSUANCE OF THE TAX DEED.**

**Problem:** John Doe received a tax deed from the Clerk of the Circuit Court of Orange County which was recorded on June 26, 1952. The records of the tax collector indicate that John Doe and his successors in title have paid the taxes on the property since that date. There are no deeds or other instruments of record indicating a claim or transfer of interest by the former title holder. Jurisdictional requirements leading up to the issuance of the tax deed, including nonpayment of the taxes on which it is based, appear to be proper. May the title be considered marketable?

**Answer:** Yes.

**Authorities & References:** *F.S. 95.231(2)* (1979) (formerly *F.S. 95.23* (1973) as amended by FLA. LAWS 1974, ch. 74-382, §17); *Baldwin Co. v. Blaisdell*, 82 So.2d 587 (Fla. 1955); *Buck v. Triplett*, 159 Fla. 772, 32 So.2d 753 (1974); ATIF TN 30.01.03; 4 FUND CONCEPT 51 (Oct. 1972). See *Wernle v. Bellemead Dev. Corp.*, 308 So.2d 97 (Fla. 1975).

**Comment:** The payment of taxes by the tax deed grantee, or successors, was, under prior law, specifically set forth by statute. *F.S. 197.610* (1971). This statute was amended and renumbered as *197.316*, and then repealed by FLA. LAWS 1973, ch. 73-332, §34, effective July 1, 1973. However, FLA. LAWS 1973, ch. 73-333, §53, enacted subsequently and effective August 5, 1973, purports to amend the repealed section, and *F.S. 197.326* (1973) deals with the application of the repealed section. However, *F.S. 197.326* was itself repealed by FLA. LAWS 1977, ch. 77-104. Therefore, it appears that the payment of taxes for the twenty-year period is a justifiable requirement for the application of this Standard, although specific statutory authority for it seemingly has been repealed.

If it cannot be determined that the grantee or his successors paid the taxes for 20 years, title will still be marketable provided it appears the taxes have been paid and the former owner, or anyone claiming under him, did not pay the taxes and did not have the property assessed in his name.

STANDARD 15.2

MURPHY DEEDS

**STANDARD: A MURPHY DEED SHALL NOT BE CONSIDERED UNMARKETABLE BY REASON OF BEING A TAX TITLE OR BY REASON OF THE LACK OF A DEED FROM THE FORMER OWNER, PROVIDED IT AFFIRMATIVELY APPEARS THAT:**

1. Title was previously divested out of the sovereign. *F.S.* 197.406(5) (1979); ATIF TN 30.05.01(1).
2. Taxes on the land covered by the tax certificate were, in fact, delinquent and not paid or deferred, and the land was not exempt from taxation at the time of the assessment for which the tax certificate was issued. *F.S.* 197.406(5) (1979); *Wernle v. Bellemead Dev. Corp.*, 308 So.2d 97 (Fla. 1975); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §31.06[1] (1980); ATIF TN 30.05.01(2).
3. The tax collector properly advertised the property prior to issuance of the tax sales certificate. *Wells v. Thomas*, 78 So.2d 378 (Fla. 1955); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §31.06[5] (1980); ATIF TN 30.05.01(3).
4. The tax certificate upon which the deed is based was more than two years old on June 9, 1937. 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §31.06[6] (1980); ATIF TN 30.05.01(4).
5. The land was properly described in the deed and certificate. *Susman v. Pockrus*, 40 So.2d 223 (Fla. 1949); *Allison v. Rogero*, 112 So.2d 578 (3d D.C.A. Fla. 1959), *cert. den.* 115 So.2d 415, *H & H Investment Co. v. Goldberg*, 103 So.2d 682 (3d D.C.A. Fla. 1958); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §31.06[8] (1980); ATIF TN 30.05.01(6).
6. The deed was executed by the requisite number of trustees of the Internal Improvement Trust Fund (three if prior to September 1, 1967, and five on or after such date). *F.S.* 253.02 (1979); *Watson v. Caldwell*, 158 Fla. 1, 27 So.2d 524 (1946); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §31.06[9] (1980); ATIF TN 30.05.01(7)(a).
7. No co-tenant prior to the Murphy deed was eliminated in favor of another co-tenant under the Murphy deed. *Andrews v. Andrews*, 155 Fla. 654, 21 So.2d 205 (1945); *Albury v. Gordon*, 164 So.2d 549 (3d D.C.A. Fla. 1964); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §31.06[4] (1980); ATIF TN 30.05.01(8).
8. The deed has been of record more than one year. *F.S.* 197.406(3) (1979); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §31.06[9] (1980); ATIF TN 30.05.01(7)(6).
9. Prior to the issuance of the Murphy deed:
  - (a) the property was duly advertised by the clerk of the circuit court;
  - (b) a newspaper copy of the advertisement was mailed to the trustees of the Internal Improvement Trust Fund;
  - (c) and posted at the usual place at the courthouse;
  - (d) and notice was given to the former owner, if the deed is dated prior to May 1, 1946.

Where there is no showing of compliance with paragraph 9 above, the Murphy deed may be approved as marketable if it has been on record for more than 20 years and during that time the grantee or his successors have paid the taxes and no adverse claims have been asserted. *F.S.* 95.23 (repealed and replaced by FLA. LAWS 1974, ch. 74-382, §17, codified as *F.S.* 95.231 (1979)); *Baldwin Co. v. Blaisdell*, 82 So.2d 587 (Fla. 1955). Furthermore, even though the deed has not been recorded for over 20 years, the presumption that the clerk complied with the mailing and posting requirements may be relied on, provided the record does not affirmatively show non-compliance. *Shuptrine v. Wohl Holding Corp.*, 147 Fla. 185, 3 So.2d 524 (1941); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §31.06[7] (1980); ATIF TN 30.05.01(5)(c).

No notice is required in sales to governmental units. *F.S.* 197.381(1)(b) (1979).

Authorities & References: *F.S.* 197.361-.441 (1979); IFLORIDA REAL PROPERTY PRACTICE §§9.60-.61, 10.102-.104 (CLE 2d ed. 1971); 2 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §31.06 (1980); ATIF TN 30.05.01.

Comment: A Murphy deed is subject to:

- (1) reservations in the Murphy deed;
- (2) public service easements, restrictions and covenants running with the land contained in a prior recorded instrument;
- (3) and any outstanding tax certificate, or any municipal, special taxing district or special assessment liens against the property. *F.S. 197.276-.281 (1979)*; 2 BOYER, *FLORIDA REAL ESTATE TRANSACTIONS §§31.06[2]-[3] (1980)*; ATIF TN 30.05.01(2), (9), (10).

CHAPTER 16  
RECORDING, NOTICE, AND PRIORITIES

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STANDARD 16.1

REFERENCE TO UNRECORDED OR IMPROPERLY  
RECORDED INSTRUMENT

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

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

Answer: No.

Authorities & References: *Hull v. Maryland Cas. Co.*, 79 So.2d 517 (Fla. 1954); *Pierson v. Bill*, 133 Fla. 81, 182 So. 631 (1938); *Gross v. Hammond*, 123 Fla. 471, 167 So. 373 (1936); *Sapp v. Warner*, 105 Fla. 245, 141 So. 124 (1932); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §27.01 (1980); ATIF TN 22.03.12.

STANDARD 16.2

DELAY IN RECORDING CONVEYANCE

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

Problem: Richard Roe conveyed Blackacre to John Doe. The deed was not recorded until twelve years after its execution and acknowledgment. No question of third party rights is involved. Is the deed valid?

Answer: Yes.

Authorities & References: *F.S.* 695.01 (1979); *Moyer v. Clark*, 72 So.2d 905 (Fla. 1954); *Black v. Skinner Mfg. Co.*, 53 Fla. 1090, 43 So. 919 (1907).

Comment: If the record reflects, or examining counsel should learn, that Roe died or became incompetent prior to the time of recording, then it should be determined that the deed was delivered prior to such death or incompetency. ATIF TN 10.02.02.

STANDARD 16.3

DELAYED RECORDING OF DEED TO MORTGAGOR

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

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

**Answer:** Yes.

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

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

STANDARD 16.3-1

DELAYED RECORDING OF DEED TO MORTGAGOR —  
RIGHTS OF THIRD PARTIES

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

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

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

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

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

**Authorities & References:** 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §27.01[2] (1980); 59 C.J.S. *Mortgages* §260 (1949); ATIF TN 22.03.10; F.S. 695.01 (1979).

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

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

This standard illustrates the doctrine of constructive notice. It should be noted that most instruments that are outside the chain of title, and thus do not give constructive notice, actually will be included in an abstract or other form of title information that is compiled by means of a tract index or a more complete search than is required by the chain of title concept. Such instruments will give actual notice to subsequent parties utilizing such title information. However, in situations where title information is usually not obtained, for example when the subsequent parties utilizing such title information. However, in situations where title information is usually not obtained, for example when the subsequent party is a judgment lien creditor or mechanic's lien claimant, questions of priorities will be decided by the concept of constructive notice as illustrated by this standard.

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

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

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

STANDARD 16.4

POWER OF ATTORNEY — TIME OF RECORDING

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

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

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

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

Answer: No.

Authorities & References: *F.S.* 695.01 (1979); *Huselton v. Liggett*, 110 Kan. 145, 202 P. 972 (1921).

STANDARD 16.5

WILD INSTRUMENTS — STRANGER TO STRANGER

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

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

Authorities & References: *Poladian v. Johnson*, 85 So.2d 140 (Fla. 1955); *Board of Pub. Instruction v. McDonald*, 143 Fla. 377, 196 So. 859 (1940); *Benner v. Kendall*, 21 Fla. 584 (1885); IV AMERICAN LAW OF PROPERTY §18.78 (1952); 2 PATTON ON TITLES §596 (1979 Supp.); BASYE, CLEARING LAND TITLES §137 (2d ed. 1970); ATIF TN 3.02.02, 7.02.02.

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

The seven-year period has been arbitrarily adopted and is not based on statutory or case law.

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

STANDARD 16.6

EFFECT OF POSSESSION ON PRIORITY  
UNDER RECORDING ACT

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

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

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

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

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

**Authorities & References:** *Humble Oil & Refining Co. v. Laws*, 272 So. 2d 841 (1st D.C.A. Fla. 1973); *Carolina Portland Cement Co. v. Roper*, 68 Fla. 299, 67 So. 115 (1914); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §27.03 (1980); 1 FLORIDA REAL PROPERTY PRACTICE §13.36 (CLE 2d ed. 1971). *See also, Denco, Inc. v. Belk*, 97 So. 2d 261 (Fla. 1957).

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

Notice arising from possession has been variously characterized as “constructive,” “inquiry,” “actual,” and “implied actual.” 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §27.03 nn. 2-6 (1980).

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

A reasonable explanation of possession inconsistent with the record, as found in problem 1, does not relieve the purchaser from a duty to inquire of the possessor himself.

The standard takes no position on whether a duty to inquire is imposed by possession consistent with a leasehold interest of record. Some authorities hold that a duty to check beyond the record does exist but there is no Florida case on point. See BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY §134 (3d ed. 1965).

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

CHAPTER 17  
MARKETABLE RECORD TITLE ACT

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STANDARD 17.1

EFFECT OF MARKETABLE RECORD TITLE ACT

**STANDARD: THE ACT SHOULD BE RELIED UPON TO ELIMINATE THOSE IMPERFECTIONS OF TITLE WHICH FALL WITHIN ITS SCOPE.**

Authorities & References: *F.S. 712.01-.10* (1979); *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439 (Fla. 1978); *ITT Rayonier, Inc. v. Wadsworth*, 346 So. 2d 1004 (Fla. 1977); *Marshall v. Hollywood, Inc.*, 236 So. 2d 114 (Fla.), *cert. denied*, 400 U.S. 964 (1970); *Sawyer v. Modrall*, 286 So. 2d 610 (4th D.C.A. Fla. 1973); *cert. denied*, 297 So. 2d 562 (Fla. 1974); *Wilson v. Kelley*, 226 So. 2d 123 (2d D.C.A. Fla. 1969); *Whaley v. Wotring*, 225 So. 2d 177 (1st D.C.A. Fla. 1969); I BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§14.14 to .14-11 (1980).

Comment: For a discussion of the constitutional question involved, see I FLORIDA REAL PROPERTY PRACTICE §6.6 (CLE 2d ed. 1971). See also, *Wichelman v. Messner*, 250 Minn. 88, 83 N.W. 2d 800 (1957); *Annot.*, 71 A.L.R.2d 816 (1960); Boyer & Shapo, *Florida's Marketable Title Act: Prospects and Problems*, 18 MIAMI L. REV. 103 (1963). In *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439 (Fla. 1978), the Florida Supreme Court held that the Marketable Record Title Act is constitutional.

STANDARD 17.2

MARKETABLE RECORD TITLE

**STANDARD: A MARKETABLE RECORD TITLE TO AN ESTATE IN LAND EXISTS, SUBJECT TO THE SPECIFIC EXCEPTIONS OF THE ACT, WHEN A PERSON, ALONE OR TOGETHER WITH PREDECESSORS IN TITLE, HAS BEEN VESTED WITH SUCH ESTATE OF RECORD FOR THIRTY YEARS OR MORE AND NOTHING OF RECORD PURPORTS TO DIVEST THE PERSON OF THE ESTATE.**

Problem 1: The following chain of title appears of record. In 1920 John Doe conveyed Blackacre to “Richard Roe and his heirs for so long as the premises are used for residential purposes.” In 1930 Richard Roe conveyed Blackacre to “Simon Grant and his heirs.” In 1950 Simon Grant conveyed Blackacre to “Thomas Frank and his heirs.” In 1970 did Thomas Frank have marketable record title to Blackacre in fee simple absolute?

Answer: Yes. The 1930 conveyance to Simon Grant purports to transfer the fee simple absolute interest which Thomas Frank claims and was recorded at least thirty years prior to the time marketability is being determined in 1970. Hence the 1930 conveyance is the root of title and all interests not evidenced by it or subsequently created or transferred are extinguished.

Problem 2: Same facts as Problem 1 except that in 1930 Richard Roe delivered the deed of Blackacre to Simon Grant, but the deed was not recorded until 1945. In 1970 did Thomas Frank have marketable record title to Blackacre in fees simple absolute?

Answer: No. The root of title is the last title transaction to have been recorded at least thirty years prior to the time marketability is being determined. The 1920 conveyance is the root of title and it creates the possibility of reverter, hence that interest is not extinguished.

Problem 3: John Doe is the grantee in a deed to Blackacre in fee simple absolute recorded in 1930. Nothing affecting Blackacre has been recorded since then. In 1968 did John Doe have marketable record title to Blackacre?

Answer: Yes. The deed qualifies as a root of title and all interests, unless specifically exempted, arising prior to the recording of the deed in 1930, are extinguished.

Problem 4: John Doe is the last grantee in the regular chain of title to Blackacre by a deed recorded in 1930. John Doe died in 1939. Court proceedings recorded in 1940 involving his estate establish that his sole heir, Ralph Doe, acquired ownership of Blackacre. In 1972 did Ralph Doe have marketable record title to Blackacre?

Answer: Yes. The court proceedings affect title to land and were recorded thirty years prior to the time marketability is being determined, hence they qualify as the root of title.

Authorities & Reference: *F.S.* 712.01-.04 (1979); I FLORIDA REAL PROPERTY PRACTICE §§6.1-.5 (CLE 2d ed. 1971); I BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§14.14-1-.14-7 (1980); ATIF TN 28.03.01.

Comment: A wild or interloping deed may constitute a root of title. *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439 (Fla. 1978). Exceptions to the operation of the Act are contained in *F.S.* 712.03-.04 (1979) and are dealt with specifically in other Title Standards in this Chapter.

STANDARD 17.3

EXTINGUISHMENT OF INTERESTS

**STANDARD: ALL ESTATES, INTERESTS, CLAIMS OR CHARGES WHATSOEVER, THE EXISTENCE OF WHICH DEPENDS UPON ANY ACT, TITLE TRANSACTION, EVENT OR OMISSION THAT OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE ROOT OF TITLE, ARE EXTINGUISHED BY THE ACT UNLESS THEY ARE DISCLOSED BY OR ARE DEFECTS INHERENT IN THE MUNIMENTS OF TITLE BEGINNING WITH THE ROOT OF TITLE, PROVIDED NO OTHER EXCEPTION TO THE ACT IS APPLICABLE.**

Problem 1: A deed to Blackacre executed by John Doe and recorded in 1930 contained: (1) a condition subsequent that the grantor or his heirs could re-enter in the event of a breach of certain specified conditions and (2) a special limitation that the land was conveyed "so long as" it was used for a specified purpose. A deed to Blackacre recorded in 1940 does not mention any conditions or limitations. No notice of a claim based on them has been filed. Marketability of title to Blackacre was sought to be determined in 1972. Were the right of entry for condition broken and the possibility of reverter barred as clouds upon title?

Answer: Yes. The claims would be based on a title transaction occurring prior to 1940, the effective date of the root of title and no exception is applicable.

Problem 2: Same facts as Problem 1 except that the 1940 deed, or a subsequent deed, contained a provision that the conveyance was "subject to conditions and limitations of record." Were the rights thereby preserved?

Answer: No. Interests disclosed by the muniments of title, beginning with the root of title, are preserved but *F.S. 712.03(1)* requires that a general reference to such interests include specific identification by reference to book and page of record or by name of recorded plat.

Problem 3: A deed to Blackacre executed by John Doe and recorded in 1930 reserved an easement. A deed to Blackacre in 1940 does not mention the easement. John Doe and his successors in interest have used the easement, or a part thereof, since 1930. No notice of a claim based on the easement has been filed. Marketability of title to Blackacre was sought to be determined in 1972. Did the easement constitute a cloud upon the title?

Answer: Yes. Easements or rights, interests, or servitudes in the nature of easements, rights of way and terminal facilities and encumbrances thereon are preserved by *F.S. 712.03(5)* so long as they, or any part thereof, are used.

Authorities & References: *F.S. 712.03-.04(1979)*; 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§14.14-4[1]-[2] (1980).

STANDARD 17.4

FILING OF NOTICE TO PROTECT INTERESTS

**STANDARD: ESTATES, INTERESTS, CLAIMS, OR CHARGES MAY BE PROTECTED FROM THE OPERATION OF THE ACT BY THE FILING OF PROPER NOTICE.**

Problem 1: John Doe, the record owner of Blackacre, gave a mortgage to Richard Roe encumbering Blackacre, which was recorded in January, 1942. The last payment was not due until 1982. On June 15, 1942 a deed to Blackacre, which qualified as a root of title, was recorded but it contained no mention of the mortgage. Must Richard Roe file proper notice to preserve the lien of his mortgage by June 15, 1972?

Answer: Yes.

Problem 2: John Doe gave a 99-year lease to Richard Roe on July 1, 1940, at which time the lease was recorded and Roe went into possession of the land. Did John Doe need to file proper notice of his ownership prior to July 1, 1970 to preserve his interest?

Answer: No. The 1940 transaction created a leasehold interest only. John Doe's fee simple interest would not be extinguished. Filing of notice is necessary only when there is a subsequent title transaction that purports to divest the interest claimed.

Authorities & References: *F.S.* 712.03(2), 712.05-.06 (1979), 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.14-4[3] (1980).

Comment: The requirements of the notice filed pursuant to the Act are set forth at *F.S.* 712.06 (1979).

The notice merely protects claims as they otherwise exist and does not validate a claim or create a new claim.

If a false or fictitious claim is asserted by the filing of notice pursuant to the Act, the prevailing party may be entitled to costs and attorney fees arising out of any action related thereto and damages sustained as a result of the filing of such notice. *F.S.* 712.08 (1979).

STANDARD 17.5

RIGHTS OF PERSONS IN POSSESSION

**STANDARD: THE ACT DOES NOT AFFECT OR EXTINGUISH THE RIGHTS OF ANY PERSON IN POSSESSION OF LAND.**

- Problem: John Doe was grantee in a deed to Blackacre recorded in 1940, which constitutes the root of title. Nothing further appears of record, but investigation in 1972 disclosed that Richard Roe was in actual open possession of Blackacre. In 1972 did John Doe have a marketable record title to Blackacre free of the claims of Roe?
- Answer: No. The possession of Roe was inconsistent with the record title in John Doe and was therefore prima facie hostile. Upon satisfactory proof that Roe's possession was in fact held in subordination to the title of John Doe (as, for example, that he was a tenant, licensee, or an employee of Doe), Doe would have had marketable record title under the Act.
- Authorities & References: *F.S.* 712.03(03) (1979); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.14-4[4] (1980).
- Comment: No person can have a marketable record title within the meaning of the Act if the land is in the hostile possession of another person. However, the exception to the Act prevents destruction of existing rights and does not create any new rights.

STANDARD 17.6

SUBSEQUENT RECORDED INSTRUMENTS

**STANDARD: THE ACT DOES NOT AFFECT OR EXTINGUISH ESTATES, INTERESTS, CLAIMS, OR CHARGES ARISING OUT OF A TITLE TRANSACTION RECORDED SUBSEQUENT TO THE RECORDING OF THE ROOT OF TITLE.**

Problem 1: John Doe is the last grantee of record in a regular chain of title to Blackacre by a deed recorded in 1940. A deed to Blackacre recorded in 1950 recites that John Doe died intestate and the grantor therein named, Richard Roe, was the sole heir at law. In 1970 was the 1950 deed a title transaction not affected or extinguished by the Act?

Answer: Yes. Even if the facts recited are not correct it is a recorded instrument that affects title to an estate or interest in land, hence a title transaction. *Any* recorded instrument or court proceeding which affects any estate or interest in land qualifies as a title transaction.

Problem 2: John Doe is the last grantee of record in a regular chain of title to Blackacre by a deed recorded in 1940. In 1950 a stranger to the title executed a deed to Blackacre, at which time the deed was recorded. In 1970 was the 1950 deed a title transaction not affected or extinguished by the Act?

Answer: Yes. With respect to wild deeds, see Title Standard 16.5 (Wild Instruments — Stranger to Stranger).

Authorities & References: F.S. 712.01, 712.03(4) (1979); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.14-4[5] (1980).

Comment: The fact that the Act does not affect or extinguish an estate, interest, claim, or charge arising out of a title transaction does not bear, either favorably or unfavorably, on the validity of such estate, interest, claim, or charge. That is, the Act protects existing rights but does not create new rights.

A wild deed may constitute a root of title. *City of Miami v. St. Joe Paper Co.*, 364 So.2d 439 (Fla. 1978).

STANDARD 17.7

RIGHTS OF PERSONS TO WHOM  
TAXES ARE ASSESSED

**STANDARD: THE ACT DOES NOT AFFECT OR EXTINGUISH THE RIGHTS OF ANY PERSON IN WHOSE NAME THE LAND IS ASSESSED FOR THE PERIOD OF TIME THE LAND IS SO ASSESSED AND THREE YEARS THEREAFTER.**

Problem 1: John Doe was grantee in a deed to Blackacre in 1940 which constitutes the root of title. Nothing further appears of record, but investigation in 1972 disclosed that Blackacre had been assessed on the county tax rolls in the name of Richard Roe since 1970. In 1972 did John Doe have a marketable record title to Blackacre free of the claims of Roe?

Answer: No. The rights of Roe would need to be ascertained. However, this exception to the Act only prevents destruction of existing rights and does not create any new rights.

Problem 2: Same facts as Problem 1 except that 1972 is the last year that Blackacre is assessed in the name of Richard Roe. In 1973 through 1975 Blackacre was assessed in the name of John Doe. In 1976 did John Doe have a marketable record title to Blackacre free of the claims of Roe?

Answer: Yes. Any rights of Roe would be preserved for only three years after Blackacre was last assessed in his name. This assumes that no other exception is applicable to preserve any rights of Roe.

Authorities & References: *F.S. 712.03(6) (1979); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.14-4[6] (1980).*

Comment: This exception necessitates examination of the county tax rolls for the three years prior to the year in which marketability is being determined. See Title Standard 17.11 (Scope Of Title Examination).

STANDARD 17.8

RIGHTS OF THE UNITED STATES AND FLORIDA

**STANDARD: THE ACT DOES NOT AFFECT ANY RIGHT, TITLE, OR INTEREST OF THE UNITED STATES OR FLORIDA RESERVED IN THE PATENT OR DEED BY WHICH THE UNITED STATES OR FLORIDA PARTED WITH TITLE.**

**Problem:** John Doe executed a deed to Blackacre and it was recorded in 1930. No mention of any other interest was contained in the deed. Nothing affecting Blackacre has been recorded since. The title to Blackacre was being examined in 1975. The seller agreed to furnish an abstract of title. The buyer demanded that the seller provide an abstract which included the conveyance by which the United States or Florida parted with title. Was the demand justified?

**Answer:** Yes. The exception includes the interests of any officers, boards, commissions or other agencies of the United States or Florida.

**Authorities & References:** *F.S. 712.04 (1979)*; I BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* §14.14-5 (1980); I *FLORIDA REAL PROPERTY PRACTICE* §§6.4, 9.5 (CLE 2d ed. 1971).

**Comment:** With respect to submerged sovereignty land, see *F.S. 712.03(7) (1979)* (effective June 15, 1978); *Starnes v. Marcon Inv. Group*, 571 F.2d 1369 (5th Cir. 1978); *Odom v. Deltona Corp.*, 341 So. 2d 977 (Fla. 1977); *Sawyer v. Modrall*, 286 So. 2d 610 (4th D.C.A. Fla. 1973), *cert. denied*, 297 So. 2d 562 (Fla. 1974).

STANDARD 17.9

ELIMINATION OF DOWER

**STANDARD: THE ACT CAN BE RELIED UPON TO ELIMINATE OUTSTANDING INCHOATE DOWER IN REAL PROPERTY ARISING OUT OF TITLE TRANSACTIONS PRIOR TO THE ROOT OF TITLE, UNLESS NOTICE IS FILED DURING THE 30 YEAR PERIOD IMMEDIATELY FOLLOWING THE EFFECTIVE DATE OF THE ROOT OF TITLE.**

**Problem 1:** John Doe, a married man and sole owner of Blackacre, conveyed it to Richard Roe in 1935 and the deed was recorded. Mary Doe, John's wife, did not join in the conveyance or otherwise release her dower rights. By a deed recorded in 1940, Richard Roe, a single man, conveyed Blackacre to Simon Grant. Nothing else affecting the title to Blackacre appears of record. Simon Grant sought to determine marketability of his title to Blackacre in 1972. Is his title marketable?

**Answer:** Yes. This result follows whether or not Mary Doe could otherwise assert a valid claim of dower. Marketable record title is free of claims, the existence of which depend upon any event that occurred prior to the effective date of the root of title. The event, within the meaning of *F.S.* 712.04, giving rise to a dower right, is either a woman's marriage to a landowner, or the purchase of land by the husband during the existence of the marriage.

**Problem 2:** John Doe, a married man and sole owner of Blackacre, conveyed it to Richard Roe in 1935 and the deed was recorded. Mary Doe, John's wife, did not join in the conveyance or otherwise release her dower rights. Nothing else affecting the title to Blackacre appears of record. Richard Roe sought to determine marketability of his title to Blackacre in 1972. Is his title marketable?

**Answer:** No. Interests disclosed by and defects inherent in the muniments of title beginning with the root of title are not extinguished.

**Authorities & References:** *F.S.* 712.02-.04 (1979); *BASYE, CLEARING LAND TITLES* §59 (2d ed 1970).

**Comment:** With respect to the issue of the existence of outstanding dower, see Title Standards 20.5 (Elimination Of Inchoate Dower In Real Property Conveyed Before Death), 20.6 (Release Of Dower — Prior To October 1, 1973), and 20.7 (Release Of Dower — On Or After October 1, 1973).

STANDARD 17.10

ELIMINATION OF HOMESTEAD

**STANDARD: THE ACT CAN BE RELIED UPON TO DEFEAT A CLAIM OF HOMESTEAD AGAINST A CONVEYANCE RECORDED PRIOR TO THE ROOT OF TITLE, UNLESS CLAIMANT FILES A NOTICE WITHIN THE 30 YEAR PERIOD AFTER THE EFFECTIVE DATE OF THE ROOT OF TITLE.**

Problem 1: John Doe, a married man with two children, resided at his homestead, Blackacre. In 1923 John Doe conveyed Blackacre to Richard Roe for valuable consideration, but without the joinder of his wife. John Doe died in 1930, survived by his wife and children. Blackacre was conveyed by Roe in 1935. In 1970, Buyer's attorney examined the abstract and objected to the title. No notice of the homestead claim had ever been filed. Was the attorney's objection valid?

Answer: No. The 1935 deed was the root of title, and all claims prior to it are extinguished unless specifically exempted by the Act.

Problem 2: Same facts as Problem 1 except that there were no conveyances of Blackacre after the 1923 conveyance by John Doe. Was the attorney's objection valid?

Answer: Yes. The homestead claim renders the 1923 deed void and this is a defect inherent in the root of title.

Authorities & References: *F.S. 712.01-.04 (1979); ITT Rayonier, Inc. v. Wadsworth*, 386 F.Supp. 940 (M.D. Fla. 1975), accord, *ITT Rayonier, Inc. v. Wadsworth*, 346 So.2d 1004 (Fla. 1977); see *Reid v. Bradshaw*, 302 So. 2d 180 (1st D.C.A. Fla. 1974).

Comment: The answer to Problem 1 would probably be the same without regard to whether the homestead owner died before or after the effective date of the root of title. See *F.S. 712.04*. However, *Reid v. Bradshaw* casts some doubt in the latter instance, and caution should be exercised in such a situation.

STANDARD 17.11

SCOPE OF TITLE EXAMINATION

**STANDARD: THE CHAIN OF TITLE SHOULD BE EXAMINED AS BEFORE THE ACT AND ANY IMPERFECTION OF TITLE CONSIDERED TO DETERMINE WHETHER IT IS ELIMINATED BY THE ACT.**

**Problem:** John Doe agreed to sell Blackacre to Richard Roe in 1974. The contract called for John Doe to furnish an abstract of title showing marketable title. John Doe provided an abstract that went back to his root of title, a title transaction recorded in 1940. The abstract showed no title transactions prior to 1940. Richard Roe objected and requested an abstract going back to the title transaction by which the sovereign originally parted with title. Was the objection valid?

**Answer:** Yes. The Act does not limit the period of title examination but rather eliminates the necessity of curing imperfections of title that fall within its scope. The chain of title must be examined prior to the root of title and imperfections located to determine whether each imperfection is eliminated or whether it is the subject of an exception to the Act.

**Authorities & References:** *F.S. 712.01-.05 (1979); 1 FLORIDA REAL PROPERTY PRACTICE §§6.3-.4, 9.5 (CLE 2d ed. 1971); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.14-11 (1980). See Barnett, Marketable Title Acts — Panacea Or Pandemonium?, 53 CORNELL L. REV. 45 (1967).*

CHAPTER 18

HOMESTEAD

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STANDARD 18.0

HOMESTEAD EXEMPTIONS — HEAD OF FAMILY

**STANDARD: ON OR AFTER JANUARY 8, 1985, HOMESTEAD PROPERTY MAY BE OWNED BY A NATURAL PERSON, WITHOUT REGARD TO THE OWNER'S STATUS AS HEAD OF A FAMILY.**

**Problem:** Mary Doe, a single woman living alone, owned and resided on Blackacre. A money judgment was obtained against her after January 8, 1985. May Mary Doe have her home designated exempt from levy by forced sale to satisfy this judgment?

**Answer:** Yes.

**Authorities & References:** FLA. CONST. art. X, §4(a) (1968) (as amended); F.S. 222.01, 222.02 (1985); ATIF TN 16.04.12.

**Comment:** Effective January 8, 1985, the Florida electors amended the 1968 Florida Constitution, Article X, section 4(a) replacing property owned by the “head of a family” with property owned by a “natural person.” Florida Statutes 222.01 and 222.02 relating to designation by an owner of homestead for an exemption from forced sale were amended to allow a natural person rather than the head of a family to obtain protection from levy. This change also applies to restrictions on alienation and devise of homestead property. The Florida Supreme Court applied the definition of “head of a family” in Florida Constitution Article X, section 4(a) relating to the forced sale exemption, to the restrictions on alienation and devise in section 4(c). *Holden v. Gardner*, 420 So. 2d 1082 (Fla. 1982). Based on this reasoning, it appears the definition of a “natural person” in section 4(a) for the forced sale exemption also applies to the restrictions on alienation and devise in section 4(c). See ATIF TN 16.04.02.

STANDARD 18.1

ALIENATION OF HOMESTEAD PROPERTY  
JOINDER OF SPOUSE

**STANDARD: WHEN THE OWNER OF HOMESTEAD PROPERTY IS MARRIED, THE SPOUSE MUST JOIN IN ANY CONVEYANCE OR ENCUMBRANCE OF THE PROPERTY, UNLESS THE PROPERTY IS HELD AS A TENANCY BY THE ENTIRETIES AND IS CONVEYED TO THE SPOUSE OR IS HELD BY ONE SPOUSE AND IS CONVEYED TO BOTH SPOUSES AS TENANTS BY THE ENTIRETIES.**

Problem 1: John Doe, a married man, owned homestead property. He alone executed a deed in 1965 conveying it to his wife, Mary Doe. Is Mary's title marketable?

Answer: No. Joinder of the spouse was required. The answer might be different if the conveyance occurred on or after the effective date of the 1968 Florida Constitution. See Comment.

Problem 2: John Doe, a married man, owned homestead property. He alone executed a deed in 1975 conveying it to himself and his wife, Mary Doe, as tenants by the entireties. Is the deed valid?

Answer: Yes. See *Jameson v. Jameson*, 387 So. 2d 351 (Fla. 1980).

Problem 3: John Doe, a married man, owned homestead property. He alone executed a deed conveying it to Richard Roe. John's wife, Mary Doe, executed a separate deed purporting to convey the property to Richard Roe. Is Roe's title marketable?

Answer: No. Both spouses must join in a conveyance of homestead property.

Problem 4: Mary Doe, a married woman, owned Blackacre, and resided on it with her husband, Joe Doe. John was an invalid and Mary was the head of the family. Mary Doe alone executed a deed conveying Blackacre to Richard Roe. Is the deed valid?

Answer: No. John Doe must join in the deed. It is immaterial whether the deed was executed prior to or subsequent to the effective date of the 1968 Florida Constitution, or whether Mary Doe, under prior law, was a free dealer. See *Bigelow v. Dunphe*, 143 Fla. 603, 197 So. 328 (1940); ATIF TN 16.01.02, 16.04.05.

Problem 5: Mary Doe owned Blackacre and resided on it with her husband, John Doe, who was the head of the family. In May 1985, Mary executed a deed conveying Blackacre to Richard Roe. Is the deed valid?

Answer: No. John Doe must join in the deed. On or after January 8, 1985, the restriction on alienation of homestead property applies whether or not the owner of the homestead is the head of a family. ATIF TN 20.03.01.

Problem 6:

John and Mary Doe, Answer:  
husband and wife,  
owned homestead  
property as a tenancy  
by the entireties. John  
alone executed a deed  
conveying the  
homestead to Mary. Is  
Mary's title  
marketable?

Yes.

Authorities  
& References:

FLA. CONST. art. X, §4(c) (1968); FLA. CONST. art. X, §§1, 4 (1885); *F.S.* 689.11 (1985);  
*Estep v. Herring*, 154 Fla. 653, 18 So. 2d 683 (1944); *John v. Purvis*, 145 Fla. 354, 199 So. 340  
(1940); *Williams v. Foerster*, 335 So. 2d 810 (Fla. 1976); *Moorefield v. Byrne*, 140 So. 2d 876  
(3d D.C.A.), *cert. denied*, 147 So. 2d 530 (Fla. 1962); *Jameson v. Jameson*, 387 So. 2d 351 (Fla.  
1980); 1A BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.03[2] (1987); I

FLORIDA REAL PROPERTY PRACTICE §9.74 (CLE 2d ed. 1971); ATIF TN 16.02.03; 8 FUND CONCEPT 33 (1976).

Comment:

Joinder is required under both the 1885 and 1968 Florida Constitutions. *F.S.* 689.11(1), however, was amended in 1971 to permit interspousal conveyances of homestead property without joinder. The statute's constitutionality has been upheld with respect to property held as a tenancy by the entireties and applied to a 1965 conveyance. *Williams v. Foerster*, 335 So. 2d 810 (Fla. 1976).

The 1968 Florida Constitution has been construed to permit the interspousal creation of a tenancy by the entireties in homestead property without the joinder of the grantee spouse. See *Jameson v. Jameson*, 387 So. 2d 351 (Fla. 1980). This case also indicates that a conveyance of homestead property from one spouse to the other is valid without the joinder of the grantee spouse. Caution should be exercised in this latter situation, however, as it was not involved in the facts of the *Jameson* case. Neither of these two conveyances of homestead property was valid without spousal joinder if made prior to January 7, 1969, the effective date of the 1968 Florida Constitution.

On or after January 8, 1985, property owned and resided on by a natural person may have homestead status without regard to the owner's status as head of a family. See Title Standard 18.0 (Homestead Exemptions — Head of Family).

For a history of Florida homestead law, see Crosby and Miller, *Our Legal Chameleon, The Florida Homestead Exemption* (pts. I-V), 2 U. FLA. L. REV. 12, 219, 346 (1949); Note, *Our Legal Chameleon is a Sacred Cow: Alienation of Homestead Under the 1968 Constitution*, 24 U. FLA. L. REV. 701 (1972); Maines and Maines, *Our Legal Chameleon Revisited: Florida's Homestead Exemption*, 30 U. FLA. L. REV. 227 (1978).

See also Title Standards 6.4 (Conveyance of Entireties Property By One Spouse To The Other), 18.2 (Gratuitous Alienation Of Homestead Property Before January 7, 1969) and 18.3 (Gratuitous Alienation Of Homestead Property On Or After January 7, 1969).

STANDARD 18.2

GRATUITOUS ALIENATION OF HOMESTEAD PROPERTY  
BEFORE JANUARY 7, 1969

**STANDARD: PRIOR TO JANUARY 7, 1969, HOMESTEAD PROPERTY COULD BE ALIENATED ONLY IN A BONA FIDE TRANSACTION BASED UPON A VALUABLE CONSIDERATION.**

- Problem 1: John Doe owned Blackacre and resided on it as head of his family with his wife, Mary Doe, and their child, Alice. In 1967 John Doe, joined by Mary Doe, made any one of the following gratuitous conveyances: (1) he conveyed Blackacre to Mary Doe; (2) he conveyed Blackacre to himself and Mary as tenants by the entireties; (3) he conveyed Blackacre to Richard Roe who thereupon conveyed it to John and Mary Doe as tenants by the entireties. Subsequently, John Doe died. Was Mary Doe the owner of Blackacre in fee simple absolute?
- Answer: No. All of the gratuitous conveyances would be void. Upon John Doe's death, Mary took a life estate and Alice owned a remainder in fee simple absolute. It is immaterial whether Alice is a minor or an adult at the time of the conveyance or at John's death.
- Problem 2: John Doe and Mary Doe, husband and wife, owned Blackacre as a tenancy by the entireties. They lived on it with their two children, Thomas, age 24, and Alice, age 15. In 1967 John and Mary Doe jointly executed a deed gratuitously conveying Blackacre to their son, Thomas. Was the deed valid?
- Answer: Yes. The requirement of establishing a valuable consideration was for the benefit of those who would take an interest in the homestead property upon the death of the owner. No such interest exists when the homestead is initially owned as a tenancy by the entireties. See *Denham v. Sexton*, cited below.
- Authorities & References: FLA. CONST. art X, §§1, 4 (1885); *Reed v. Fain*, 145 So. 2d 858 (Fla. 1962); *Denham v. Sexton*, 48 So. 2d 416 (Fla. 1950); *Church v. Lee*, 102 Fla. 478, 136 So. 242 (1931); *Pace v. Woods*, 177 So. 2d 779 (3d D.C.A. Fla. 1965); *Gotshall v. Taylor*, 196 So. 2d 479 (4th D.C.A. Fla. 1967), *cert. den.* 201 So. 2d 558; *Betts v. Hawkins*, 202 So. 2d 135 (2d D.C.A. Fla. 1967), *cert. den.* 207 So. 2d 689; 1A BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.03[2] (1987); I FLORIDA REAL PROPERTY PRACTICE §9.74 (CLE 2d ed. 1971).
- Comment: The conveyances in Problem 1 would be valid if made in a bona fide transaction for a valuable consideration. However, although a valuable consideration would be presumed in a transfer to a stranger, the intrafamily conveyance is presumptively void and the existence of a valuable consideration must be established by the party seeking to assert the validity of the deed. But see *Long v. Cavage*, 384 So. 2d 1356 (5th D.C.A. Fla. 1980).



STANDARD 18.3

GRATUITOUS ALIENATION OF HOMESTEAD PROPERTY  
ON OR AFTER JANUARY 7, 1969

**STANDARD: ON OR AFTER JANUARY 7, 1969, HOMESTEAD PROPERTY MAY BE ALIENATED BY GIFT.**

Problem 1: John Doe owned Blackacre and resided on it as head of his family with his wife, Mary Doe, and his minor child, Alice Doe. In 1980 John Doe, joined by Mary Doe, gratuitously conveyed Blackacre to John Doe and Mary Doe as tenants by the entireties. Subsequently, John Doe died. Was Mary Doe the fee owner of Blackacre?

Answer: Yes.

Problem 2: Same facts as above, except that Mary Doe did not join in the conveyance. After John Doe's death, was Mary Doe the fee owner of Blackacre?

Answer: Yes.

Authorities & References: FLA. CONST. art. X, §4(c) (1968); *Jameson v. Jameson*, 387 So. 2d 351 (Fla. 1980); 1A BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.03[2] (1987); 1 FLORIDA REAL PROPERTY PRACTICE §9.74 (CLE 2d ed. 1971); 13 FUND CONCEPT 6 (Feb. 1981).

Comment: In *Jameson v. Jameson*, 369 So. 2d 436 (3d D.C.A. Fla. 1979), the Third District Court of Appeal construed article X, §4(c) of the Florida Constitution to require the spouse of a homestead titleholder to join in an interspousal conveyance of the homestead to the husband and wife as tenants by the entireties and declared *F.S. 689.11(1)* unconstitutional to the extent that it would allow interspousal conveyance of the homestead without joinder. This decision was reversed in *Jameson v. Jameson*, 387 So. 2d 351 (Fla. 1980), in which the Florida Supreme Court held that the Florida Constitution does not require joinder in an interspousal conveyance of solely owned homestead property to the husband and wife as tenants by the entireties, and that *F.S. 689.11(1)* is consistent with the constitutional provision as construed by it.

See Title Standard 18.1 (Alienation of Homestead Property — Joinder of Spouse).

STANDARD 18.4

ALIENATION OF HOMESTEAD PROPERTY — POWER OF ATTORNEY

**STANDARD: A CONVEYANCE OR ENCUMBRANCE OF HOMESTEAD PROPERTY ACCOMPLISHED BY THE EXERCISE OF A POWER OF ATTORNEY OR DURABLE POWER OF ATTORNEY SPECIFICALLY AUTHORIZING A CONVEYANCE OR ENCUMBRANCE OF REAL PROPERTY IS ACCEPTABLE.**

**Problem 1:** John Doe, the homestead owner of Blackacre, resided on it with his wife, Mary Doe. Mary Doe executed a power of attorney with all the formalities of a deed to John Doe. The power of attorney, which was recorded, specifically authorized John Doe to convey real property. John Doe conveyed Blackacre to Richard Roe, executing the deed: “John Doe” and “Mary Doe, by John Doe as her attorney-in-fact.” Does the conveyance to Richard Roe constitute a cloud upon the title to Blackacre?

**Answer:** No.

**Problem 2:** John Doe, the homestead owner of Blackacre, resided on it with his wife, Mary Doe. John Doe executed a power of attorney with all the formalities of a deed to Mary Doe. The power of attorney, which was recorded, specifically authorized Mary Doe to convey real property. Mary Doe conveyed Blackacre to Richard Roe, executing the deed: “John Doe, by Mary Doe as his attorney-in-fact” and “Mary Doe.” Does the conveyance to Richard Roe constitute a cloud upon the title of Blackacre?

**Answer:** No.

**Problem 3:** John Doe, the homestead owner of Blackacre, resided on it with his wife, Mary Doe. John Doe executed a power of attorney with all the formalities of a deed to Richard Roe. Mary Doe executed a power of attorney with all the formalities of a deed to Richard Roe. The powers of attorney, which were recorded, specifically authorized Richard Roe to convey real property. Richard Roe conveyed Blackacre to Stephen Grant, executing the deed: “John Doe, by Richard Roe as his attorney-in-fact” and “Mary Doe, by Richard Roe as her attorney-in-fact.” Does the conveyance to Stephen Grant constitute a cloud upon the title to Blackacre?

**Answer:** No. The same result also follows if Richard Roe was acting under a single power of attorney jointly executed by both John and Mary Doe. Also, the result would be the same if Richard Roe acted as attorney-in-fact for only one spouse and the other spouse executed the deed.

**Authorities** FLA. CONST. art. X, §4(c); F.S. 689.111 (1979); *City National Bank of Florida v. Tescher*, 578 So.2d 701 (Fla. 1991)

**Comment:** F.S. 689.111, which became effective on May 12, 1971, provides that the owner of homestead property may execute a deed or mortgage by virtue of a power of attorney, and joinder may be accomplished by the exercise of a power of attorney. In addition, F.S. 709.015(4), dealing with the exercise of powers of attorney when the principal has been reported by the armed forces as missing, implies that homestead property held as a tenancy by the entireties may be conveyed under a power of attorney after the lapse of one year from the report that the principal is missing. Even though the Constitution requires a joinder of the spouse in an alienation by the owner, such joinder may be by power of attorney.

STANDARD 18.5

ALIENATION OF HOMESTEAD PROPERTY  
BY GUARDIAN PRIOR TO OCTOBER 1, 1970 OR  
FROM JULY 1, 1975 THROUGH OCTOBER 1, 1977

**STANDARD: A CONVEYANCE OR ENCUMBRANCE OF HOMESTEAD PROPERTY BY A GUARDIAN OF THE PROPERTY FOR AN INCOMPETENT OWNER OR SPOUSE, MADE PRIOR TO OCTOBER 1, 1970, OR FROM JULY 1, 1975 THROUGH OCTOBER 1, 1977, SHOULD NOT BE RELIED UPON AS EFFECTIVE.**

Problem 1: John Doe owned Blackacre and resided on it as the head of his family with Mary Doe, his wife, and their minor child. Mary Doe was adjudged incompetent on January 10, 1967, and John Doe was appointed guardian of the property of Mary Doe. John Doe conveyed Blackacre to Richard Roe on June 10, 1967. John Doe joined in the conveyance as guardian of the property of Mary Doe, pursuant to a court order authorizing the sale. Should the conveyance to Richard Roe be relied upon as conveying marketable title to Blackacre?

Answer: No.

Problem 2: John Doe owned Blackacre and resided on it as the head of his family with Mary Doe, his wife, and their minor child. John Doe was adjudged incompetent on January 10, 1967, and Mary Doe was appointed guardian of the property of John Doe. Mary Doe, as guardian, conveyed Blackacre to Richard Roe on June 10, 1967 pursuant to a court order authorizing the sale. Mary Doe joined in the conveyance as the spouse of the homestead owner. Should the conveyance to Richard Roe be relied upon as conveying marketable title to Blackacre?

Answer: No.

Authorities & References: FLA. CONST. art. X, §4(c) (1968); FLA. CONST. art. X, §§1, 4 (1885); *F.S.* 745.15 (1969); 745.15 (1971); 745.15 (1973); *F.S.* 744.441 (1975); 1A BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.03[2] (1987); I FLORIDA REAL PROPERTY PRACTICE §9.74 (CLE 2d ed. 1971); ATIF TN 16.02.01, 16.02.02, 16.04.09.

Comment: Guardian deeds of homestead property were generally not relied upon under the 1885 Florida Constitution. However, pursuant to the 1968 Florida Constitution, which provided for alienation of an incompetent's homestead through statute, *F.S.* 745.15 (1969) was amended effective October 1, 1970, to include alienation of homestead property by guardians. This statute remained valid until subsection (1) was repealed, effective July 1, 1975, to be reenacted as *F.S.* 744.441 (1975), but without a specific provision for the alienation of homestead property. In light of prior (and subsequent) remedial legislation it appears that the legislature intended *F.S.* 744.441 (1975) to provide a means for alienation of an incompetent's homestead property. However, pending judicial clarification of the legislative intent in the repeal of *F.S.* 745.15 and the enactment of *F.S.* 744.441, attorneys should not accept a guardian's deed of homestead executed from July 1, 1975 through October 1, 1977.

*F.S.* 744.441(12) was amended effective October 1, 1977 to state that with court approval the guardian may alienate or encumber real property of the ward's estate, including homestead property.

The factual situations covered by this Standard should not be confused with situations involving property that has lost its status as homestead and is thereafter sought to be alienated by a guardian. See ATIF TN 16.04.09.

STANDARD 18.6

ALIENATION OF HOMESTEAD PROPERTY  
BY GUARDIAN BETWEEN OCTOBER 1, 1970 AND JULY 1, 1975, OR  
ON OR AFTER OCTOBER 1, 1977

**STANDARD: ON OR AFTER OCTOBER 1, 1970, THROUGH JUNE 30, 1975, AND ON OR AFTER OCTOBER 1, 1977, HOMESTEAD PROPERTY MAY BE ALIENATED OR ENCUMBERED BY THE GUARDIAN OF THE PROPERTY OF AN INCOMPETENT OWNER OR SPOUSE ON PETITION AND ORDER OF THE CIRCUIT COURT.**

Problem 1: John Doe owned Blackacre and resided on it as the head of his family with Mary Doe, his wife, and their minor child. Mary Doe was adjudged incompetent on January 10, 1973, and John Doe was appointed guardian of the property of Mary Doe. John Doe conveyed Blackacre to Richard Roe on June 10, 1973. John Doe joined in the conveyance as guardian of the property of Mary Doe, pursuant to an order of the circuit court authorizing the sale. Was the conveyance valid?

Answer: Yes.

Problem 2: John Doe owned Blackacre and resided on it as the head of his family with Mary Doe, his wife, and their minor child. John Doe was adjudged incompetent on December 10, 1977, and Mary Doe was appointed guardian of the property of John Doe. Mary Doe, as guardian, conveyed Blackacre to Richard Roe on June 10, 1978 pursuant to a court order authorizing the sale. Mary Doe joined in the conveyance as the spouse of the homestead owner. Was the conveyance valid?

Answer: Yes.

Authorities & References: FLA. CONST. art. X, §4(c) (1968); *F.S.* 745.15 (1973); *F.S.* 26.012 (1973 & Supp. 1974); *F.S.* 744.441 (1977); 1A BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.03[2] (1978); I FLORIDA REAL PROPERTY PRACTICE §9.74 (CLE 2d ed. 1971); ATIF TN 16.02.01.

Comment: See Title Standard 18.5 Comment for sequence of statutory amendments.

On or after October 1, 1970 through December 31, 1973, statutory authority existed for a guardian of the property of an incompetent to convey homestead property held as a tenancy by the entireties if only *one* spouse was incompetent. *F.S.* 745.15(1), (4) (1971); *F.S.* 745.15(1), (4) (1973). On or after January 1, 1974 through June 30, 1975, and on or after October 1, 1977, statutory authority exists for a guardian to convey such property even when *both* spouses are incompetent. *F.S.* 745.15(1), (4) (1973); *F.S.* 744.441(12) (1985). See ATIF TN 16.02.01.

Except for property owned by the ward in a tenancy by the entireties, statutory authority exists for the encumbrance of homestead by a guardian of the property, with court approval, on or after October 1, 1970 through July 1, 1975 and on or after October 1, 1977. *F.S.* 744.441(12) (1977); 745.15 (1) (1971). On or after January 1, 1974 through July 1, 1975 and on or after October 1, 1977, a guardian could encumber property owned by the ward in a tenancy by the entireties; however, for all other periods statutory authority did not exist that allowed such property to be encumbered. Compare *F.S.* 744.441(12) (1979); *F.S.* 745.15(4) (1973) with *F.S.* 745.15(4) (1971). See ATIF TN 16.02.01.

STANDARD 18.7

DEVISE OF HOMESTEAD PROPERTY BEFORE JANUARY 7, 1969

**STANDARD: A DEVISE OF HOMESTEAD PROPERTY BY ONE DYING BEFORE JANUARY 7, 1969, WAS VALID ONLY IF THE DECEDENT WAS NOT SURVIVED BY EITHER A WIDOW OR LINEAL DESCENDANT.**

Problem 1: John Doe died in 1967 survived by his widow, Mary Doe, and two adult children. By his will he devised his homestead to his widow, Mary. Was the devise valid?

Answer: No. John was survived by a widow and lineal descendants. *F.S.* 731.05(1) (1973) prohibits this devise, and *F.S.* 731.27 (1973) states that the homestead will descend to the widow for life with

a remainder to theProblem 2:  
lineal descendants.

John Doe, a widower,Answer:  
died in 1967 and by his  
will devised his  
homestead to Thomas  
Doe, one of his  
surviving children.  
Was the devise valid?

No. Title wouldProblem 3:  
descend to all his  
children equally. The  
same result would  
follow if John Doe was  
survived only by his  
son, Thomas Doe, to  
whom title would pass  
by descent. The ages  
of the children are  
immaterial, as they are  
all lineal descendants.  
The Problem, of  
course, assumes that  
John Doe was the head  
of a family at the time  
of death.

Mary Doe died in 1967Answer:  
survived by her  
dependent husband,  
John Doe, and an adult  
married daughter,  
Alice Jones. By her  
will she devised her  
homestead to her  
daughter Alice. Was  
the devise valid?

No. Mary was survivedProblem 4:  
by a lineal descendant,  
and therefore could not  
devise the homestead.  
Title would descend to  
her husband John and  
her daughter Alice  
equally. This assumes  
that Mary was the head  
of the family  
composed of herself  
and John.

Mary Doe died in 1967Answer:  
survived solely by her  
dependent husband,  
John Doe. By her will  
she devised her  
homestead to her  
sister, Sally. Was the  
devise valid?

Yes. Mary was notdescendant, and therefore could devise the homestead.  
survived by either a  
widow or lineal

Authorities  
& References:

FLA. CONST. art. X, §4 (1885); *F.S.* 731.05(1), 731.23, 731.27 (1973); *Stephens v. Campbell*, 70 So. 2d 579 (Fla. 1954); 1A BOYER FLORIDA REAL ESTATE TRANSACTIONS §21.03[3] (1987); FLORIDA PROBATE PRACTICE §23.8 (CLE 1973); ATIF TN 16.04.02.

STANDARD 18.8

DEVISE OF HOMESTEAD PROPERTY ON OR AFTER JANUARY 7, 1969

**STANDARD: A DEVISE OF HOMESTEAD BY ONE DYING ON OR AFTER JANUARY 7, 1969, IS VALID IF THE DECEDENT IS NOT SURVIVED BY EITHER SPOUSE OR MINOR CHILD, AND A DEVISE MAY BE MADE TO THE SPOUSE IF THERE IS NO MINOR CHILD.**

Problem 1: John Doe, a widower, died after January 7, 1969, survived by his three adult children. By his will he devised his homestead to one of his children. Was the devise valid?

Answer: Yes. Since John was not survived by a spouse or minor child, there were no restrictions on the devise of his homestead. Presumably he could have excluded all of his children and devised the homestead to anyone else. *In re Estate of McGinty*, 258 So. 2d 450 (Fla. 1971) supports this, although the devise in that case was to one of the children. On or after January 1, 1976, see also F.S. 732.4015 (1985).

The devise would not be valid if John were survived by a minor child. Effective July 1, 1973, the age of majority was changed from 21 years to 18 years of age. F.S. 1.01(14) (1985).

Problem 2: John Doe died after January 7, 1969, survived by his widow, Mary Doe, and two adult children. By his will he devised his homestead to his widow, Mary. Was the devise valid?

Answer: Yes. The 1968 Florida Constitution was amended in 1972 to permit this, effective as of January 2, 1973. In fact, a devise such as this would be valid if made on or after January 7, 1969. See *In re Estate of McCartney*, 299 So. 2d 5 (Fla. 1974) upholding such a devise made in 1970. On or after January 1, 1976, see also F.S. 732.4015 (1985).

Problem 3: John Doe died after January 7, 1969, survived by his widow, Mary Doe, and two minor children. By his will he devised his homestead to his widow, Mary. Was the devise valid?

Answer: No. As John was survived by minor children, the devise was invalid.

Problem 4: Mary Doe died after January 7, 1969, survived by her dependent husband, John Doe, and two adult children, Thomas and Alice. By her will she devised her homestead to her son, Thomas. Was the devise valid?

Answer: No. Mary was survived by a spouse. Since she had no minor children, she could have devised the homestead to her spouse, but not to anyone else. The result would be the same if John was not dependent, and therefore Mary was not the head of a family, provided that Mary died on or after January 8, 1985.

Problem 5: John Doe, a single man living alone on Blackacre, died in May, 1985. He was survived by an adult son and minor daughter, neither of whom lived with nor was dependent on him. By his will, John Doe devised Blackacre to his brother. Was the devise valid?

Answer: No. The devise was not valid because John was survived by a minor child. Effective January 8, 1985, a single person's residence is subject to the restrictions on devise of homestead property. See ATIF TN 16.04.02.

Authorities & References: FLA. CONST. art X, §4(c) (1968); F.S. 732.401, 732.4015 (1985); F.S. 731.05, 731.27 (1973); see also F.S. 732.102, 732.103 (1985); F.S. 731.23 (1973); *In re Estate of McCartney*, 299 So. 2d 5 (Fla. 1974); *In re Estate of McGinty*, 258 So. 2d 450 (Fla. 1971);

1 A B O Y E R ,  
FLORIDA REAL  
E S T A T E  
TRANSACTIONS  
§21.03[3] (1987).  
FLORIDAPROBATE  
PRACTICE §§19.5,  
19.8 (CLE 1976).  
Comment:

On or after January 8, 1985, property owned and resided on by a natural person may have homestead status without regard to the owner's status as head of a family. See Title Standard 18.0 (Homestead Exemptions — Head of Family).

When not devised as permitted by law, as in Problems 3 and 4, the homestead descends under the law of intestate succession. Prior to January 1, 1976, when the decedent was survived by a *widow* and lineal descendants, *F.S.* 731.27 provided a life estate for the *widow* with a vested remainder to the lineal descendants. See *F.S.* 731.05, 731.23, 731.27 (1973); *Stephens v. Campbell*, 70 So. 2d 579 (Fla. 1954); 1A BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.03[3] (1987). On or after January 1, 1976, if the decedent is survived by a *spouse* and lineal descendants, *F.S.* 732.401 provides a life estate for the surviving *spouse* with a vested remainder to the lineal descendants. See *F.S.* 732.401, 732.4015 (1985).

For a chart that outlines the law set forth in the standard, see 1A BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.04 Chart E (1987). See also Title Standard 18.8-1 (Descent Of Homestead Property).

Article X, section 5 of the 1968 Florida Constitution states in part: "There shall be no distinction between married women and married men in holding, control, disposition, or encumbering of their property, both real and personal. . . ." On or after January 1, 1976, this provision is incorporated in *F.S.* 732.401 and *F.S.* 732.4015 (1985), which read "spouse" instead of "widow." The constitutional provision should be considered whenever dealing with a pre-1976 devise of homestead. See ATIF TN 2.06.03.

STANDARD 18.8-1

DESCENT OF HOMESTEAD PROPERTY

**STANDARD: (BEFORE JANUARY 1, 1976) HOMESTEADS DESCEND AS OTHER INTESTATE PROPERTY, BUT IF THE DECEDENT IS SURVIVED BY A WIDOW AND LINEAL DESCENDANTS, THE WIDOW TAKES A LIFE ESTATE WITH A VESTED REMAINDER TO THE LINEAL DESCENDANTS IN BEING AT THE DECEDENT'S DEATH. (ON OR AFTER JANUARY 1, 1976) THE ABOVE RULE APPLIES WHETHER THE SURVIVING SPOUSE IS MALE OR FEMALE.**

Problem 1: John Doe, the owner of homestead property, died intestate, survived only by his wife Mary and son Thomas. May Mary alone convey the homestead in fee simple absolute?

Answer: No. Mary takes a life estate with a vested remainder to Thomas.

Problem 2: Mary Doe, the owner of homestead property, died intestate, survived only by her dependent husband John and son Thomas. May John alone convey a 1/2 interest in the homestead in fee simple absolute?

Answer: (Before January 1, 1976) Yes. John takes a fee simple absolute by intestate succession equally with his son, the other heir, as *F.S. 731.27* applied only to widows. But see FLA. CONST. art. X, §5 on or after January 7, 1969.

(On or after January 1, 1976) No. John takes a life estate with a vested remainder to Thomas as *F.S. 732.401* applies to either spouse.

Problem 3: John Doe, the owner of homestead property, died intestate, survived only by his wife Mary and grandson Stephen. May Mary alone convey the homestead in fee simple absolute?

Answer: No. Mary takes a life estate with a vested remainder to the lineal descendant, Stephen.

Authorities & References: *F.S. 732.410, 732.4015* (1985); *F.S. 731.27, 731.23* (1973); 1A BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.03[3] (1987); I FLORIDA REAL PROPERTY PRACTICE §11.12 (CLE 2d Ed. 1971); ATIF TN 2.06.02.

Comment: Article X, section 5 of the 1968 Florida Constitution states in part: "There shall be no distinction between married women and married men in the holding, control, disposition, or encumbering of their property, both real and personal . . ." On or after January 1, 1976, this provision is incorporated in *F.S. 732.401* and *F.S. 732.4015* (1985), which reads "spouse" instead of "widow."

The constitutional provision should be considered whenever dealing with pre-1976 descent of homestead.

If the homestead is owned as a tenancy by the entireties, on the death of the head of the family the property survives to the other spouse without regard to the law otherwise pertaining to the descent of homestead. *F.S. 732.401(2)* (1985); 1A BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.03[3] (1987).

See also Title Standard 18.8 (Devise Of Homestead Property On Or After January 7, 1969).

STANDARD 18.9

HOMESTEAD — JURISDICTION OF COUNTY JUDGE

**STANDARD: PRIOR TO JANUARY 1, 1973, THE COUNTY JUDGE HAS JURISDICTION TO DETERMINE HOMESTEAD STATUS OF A DECEDENT'S REAL PROPERTY AND THOSE ENTITLED TO IT, BUT AN ADJUDICATION BY THE COUNTY JUDGE OF TITLE OR BOUNDARIES TO REAL PROPERTY WAS VOID SINCE SUCH MATTERS WERE WITHIN THE EXCLUSIVE JURISDICTION OF THE CIRCUIT COURTS.**

Problem:

John Doe died intestate in 1971. He was survived by his widow, Mary Doe, and his adult son, Thomas. Blackacre was John Doe's homestead property, and title was in his name alone. In the probate proceeding the county judge issued an order on May 1, 1971 as follows: Blackacre was the homestead property of John Doe and as such was exempt from the claims of creditors; title to Blackacre did not pass under John Doe's will but descended to Mary Doe and Thomas according to the constitution and statutes of the State of Florida; in accordance with the applicable statutes Mary Doe took a life estate in Blackacre with the remainder interest going to Thomas. Was the order valid?

Answer:

The order was valid insofar as it determined that Blackacre was the homestead property of John Doe, exempt from his creditors, and that it did not pass by the will but descended to Mary Doe and Thomas according to applicable provisions of the constitution and statutes. But it was not valid insofar as it purported to adjudicate the particular estate of Mary Doe and Thomas. If the determination that Mary Doe took a life estate and Thomas took a remainder is called into question, it must be resolved in the circuit court rather than the county judge's court.

FLA. CONST. art V, Comment:  
§§6(3), 7(3); art. X, §1  
(1885); *F.S.* 731.27,  
734.08 (1971); *In re  
Estate of Noble*, 73 So.  
2d 873 (Fla. 1954);  
*First Nat'l. Bank v.  
Broom*, 207 So. 2d 69  
(3d D.C.A. Fla. 1968);  
*In re Estate of Weiss*,  
102 So. 2d 154 (3d  
D.C.A. Fla. 1958);  
ATIF TN 2.06.04.

Effective January 1,  
1973, circuit courts  
have exclusive original  
jurisdiction of  
proceedings relating to  
the settlement of the  
estates of decedents  
and in all actions  
involving title,  
boundaries, or right of  
possession of real  
property. FLA.  
CONST. art. V, §5  
(1968); *F.S.* 26.012  
(1985).

STANDARD 18.10

SALE OF DEVISED HOMESTEAD BY PERSONAL REPRESENTATIVE

**PROPERTY WHICH WAS THE HOMESTEAD OF A TESTATE DECEDENT WHO WAS NOT SURVIVED BY SPOUSE OR MINOR CHILD MAY BE CONVEYED BY THE PERSONAL REPRESENTATIVE, EITHER UNDER POWER OF SALE CONTAINED IN THE WILL, OR UPON ORDER OF THE COURT, PROVIDED THE DEVISEE WOULD NOT BE CONSIDERED AN HEIR AT LAW OF THE TESTATOR UNDER F.S. 732.103 (DESCENT AND DISTRIBUTION).**

Problem 1: John Doe died testate, May 2, 1991, survived only by three adult children. His residence was not specifically devised in the will, and the residuary beneficiaries were three non-profit charitable corporations. The will contains full powers of sale. May the personal representative convey the property without joinder in the deed by the three corporate devisees?

Answer: Yes.

Problem 2: John Doe died testate, May 2, 1991, survived only by three adult children. His residence was specifically devised to a non-profit charitable corporation. The will contains full powers of sale. May the personal representative convey the property without joinder in the deed by the specific devisee?

Answer: Yes, *provided there has been obtained from the specific devisee a consent to the conveyance.*

Problem 3: John Doe died testate, May 2, 1991, survived only by three adult children. His residence was specifically devised to one of the children. The will contains full powers of sale. May the personal representative convey the property without joinder in the deed by the specific devisee?

Answer: No, unless the child to whom the property was devised joins in the conveyances or conveys by separate deed.

Authorities & References: FLA. CONST. Article X §4(b); *City National Bank of Florida v. Tescher*, 578 So. 2d 701 (Fla. 1991).

Comments: A judicial determination that the property was the homestead of the decedent is not necessary. Proof that the decedent was not survived by a spouse or minor child may be by an affidavit of a knowledgeable person. Proof that the devisee of the homestead property is not an heir of the decedent may likewise be by affidavit of a knowledgeable person.

CHAPTER 19  
PARTNERSHIP

STANDARD 19.1

CONVEYANCE OF REAL PROPERTY HELD  
IN PARTNERSHIP NAME

**STANDARD: ON OR AFTER JANUARY 1, 1972, REAL PROPERTY ACQUIRED BY A PARTNERSHIP AND HELD IN THE PARTNERSHIP NAME MAY BE CONVEYED 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 FACTS INDICATING A LACK OF AUTHORITY. THE IDENTITY OF THE PARTNERS AT THE TIME OF THE CONVEYANCE MAY BE ESTABLISHED BY AFFIDAVIT IN ACCORDANCE WITH FLORIDA STATUTES, SECTION 620.605(1) (1979).**

Problem 1: Blackacre was owned by Doe, Roe, & Hoe, a Florida partnership engaged in the real estate business, and had been acquired in the partnership name.

In March, 1974 a conveyance of Blackacre was executed by Doe, Roe & Hoe, a Florida partnership, by Hi Hoe, a partner, to Simon Grant. Grant was aware that no conveyance of partnership property was authorized unless signed by all of the partners. Did Grant acquire valid title?

Answer: No.

Problem 2: In March, 1974 Blackacre was conveyed to Doe, Roe, & Hoe, a Florida partnership, engaged in the real estate business. Later a deed to Blackacre was delivered to Simon Grant and executed as follows:

“Doe, Roe, & Hoe, a partnership, existing under the laws of the State of Florida,

By John Doe “  
Partner, Doe, Roe, & Hoe

In addition to the acknowledgment by John Doe, there was attached to the deed an affidavit in effect stating the following:

“Personally appeared before me, the undersigned authority, Hi Hoe, who being duly sworn, deposes and says he is one of the partners of Doe, Roe, & Hoe, a Florida partnership; that the other partners are Richard Roe and John Doe; that John Doe, the partner executing the conveyance, had the authority to do so and that the conveyance was made for carrying on in the usual way the business of the partnership.”

Did Grant acquire marketable title?

Answer: Yes.

Authorities & References: *F.S.* 620.595(3), 620.60 (1979); *FLA. LAWS* 1971, ch. 71-71, §3; 1 *BOYER, FLORIDA REAL ESTATE TRANSACTIONS* §10.07[2] (Supp. 1980).

Comment: Property acquired by a partnership prior to January 1, 1972 should have been acquired in the partners' names doing business as the partnership. Such property should be conveyed by the partners in whose names the property was taken, acting for the partnership. With respect to property acquired in the partnership name prior to January 1, 1972, see Title Standard 19.2 (Conveyance Of Real Property To A Partnership Prior To January 1, 1972).

Although not necessary, it is the better practice to have the affidavit made by a partner other

than the partner executing the conveyance.

Conveyances during 1972 to which this Standard applies could be made only in the partnership name. FLA. LAWS 1971, ch. 71-71, §3.

STANDARD 19.2

CONVEYANCE OF REAL PROPERTY TO A  
PARTNERSHIP PRIOR TO JANUARY 1, 1972

**STANDARD: THE CONVEYANCE OF ANY ESTATE IN REAL PROPERTY TO A PARTNERSHIP IN THE PARTNERSHIP NAME PRIOR TO JANUARY 1, 1972, CREATES A LATENT AMBIGUITY, BUT EXTRINSIC EVIDENCE MAY BE USED TO IDENTIFY THE ACTUAL GRANTEES.**

**Problem:** In 1935 Blackacre was conveyed to a partnership denominated in the deed by its fictitious name "Gainesville Lumber." Is the conveyance defective?

**Answers:** Not if extrinsic evidence is available to prove the grantee is a partnership composed of those in whom legal title can vest.

**Authorities & References:** *Cawthon v. Stearns Culver Lumber Co.*, 60 Fla. 313, 53 So. 738 (1910); *Lafayette Land Co. v. Caswell*, 59 Fla. 544, 52 So. 140 (1910); I FLORIDA REAL PROPERTY PRACTICE §§9.65, 10.76 (CLE 2d ed. 1971); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §10.07 (Supp. 1980); ATIF TN 23.02.05.

**Comment:** Consideration should be given to FLA. LAWS 1971, ch. 71-71, §4 which purported to validate retroactively all deeds to partnerships in the partnership name which were recorded while the partnership was in existence. The effect of this statute should be evaluated in conjunction with *F.S. 620.575(4)* (1979).

With respect to the use of a fictitious name, see Comment, Title Standard 19.3 (Conveyance Of Real Property To A Partnership On Or After January 1, 1972).

STANDARD 19.3

CONVEYANCE OF REAL PROPERTY TO A  
PARTNERSHIP ON OR AFTER JANUARY 1, 1972

**STANDARD: ANY ESTATE IN REAL PROPERTY MAY BE ACQUIRED BY A PARTNERSHIP IN THE PARTNERSHIP NAME ON OR AFTER JANUARY 1, 1972.**

Problem: In 1974 Blackacre was conveyed to “Doe, Doe & Doe, a partnership.” Did the partnership acquire title?

Answer: Yes.

Authorities & References: *F.S.* 620.595(3) (1979); *FLA. LAWS* 1971, ch. 71-71, §§1—4; *I FLORIDA REAL PROPERTY PRACTICE* §10.73 (CLE 2d ed. 1971); 1 *BOYER, FLORIDA REAL ESTATE TRANSACTIONS* §10.07[2] (Supp. 1980).

Comment: When the conveyance is to a partnership denominated by its fictitious name and such name is not limited to the surnames of all the partners, then consideration should be given to the requirements of the fictitious name statute. *F.S.* 865.09 (1979). See ATIF TN 23.02.01.

STANDARD 19.4

CONVEYANCE OF REAL PROPERTY TO A FLORIDA  
LIMITED PARTNERSHIP ON OR AFTER OCTOBER 1, 1970

**STANDARD: ON OR AFTER OCTOBER 1, 1970, ANY ESTATE IN REAL PROPERTY MAY BE ACQUIRED BY A FLORIDA LIMITED PARTNERSHIP IN THE PARTNERSHIP NAME.**

Problem: In January, 1974 Blackacre was conveyed to “Gainesville Lumber, a Florida limited partnership.” Is the conveyance valid to place title in the limited partnership?

Answer: Yes.

Authorities & References: *F.S.* 620.081(3) (1979); FLA. LAWS 1970, ch. 70-301, §1; 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §10.07[2] (Supp. 1980); 1 FLORIDA REAL PROPERTY PRACTICE §10.77 (CLE 2d ed. 1971); ATIF TN 23.02.01.

Comment: The result of a conveyance of real property to a Florida limited partnership in the partnership name before October 1, 1970 is not entirely clear. *F.S.* 620.081(4) (1979) purports to validate such conveyances retroactively if they were properly recorded while the partnership was in existence. Without use of this statute, such conveyances might be treated in the same manner as conveyances to general partnerships at common law. See ATIF TN 23.02.02. Florida limited partnerships are apparently excluded from the operation of *F.S.* 865.09 (1979) (fictitious names). See [1945-1946] FLA. ATT'Y GEN. BIENNIAL REP. 735.

STANDARD 19.5

CONVEYANCE OF PARTNERSHIP REAL PROPERTY PRIOR TO  
JANUARY 1, 1973 AFTER THE DEATH OF A PARTNER

**STANDARD: PRIOR TO JANUARY 1, 1973, AFTER THE DEATH OF A PARTNER, REAL PROPERTY WHICH WAS A PARTNERSHIP ASSET COULD PROPERLY HAVE BEEN CONVEYED BY THE SURVIVING PARTNER OR PARTNERS FOR PURPOSES OF PAYING AND DISCHARGING THE LIABILITIES OF THE FIRM AND SETTLING PARTNERSHIP ACCOUNTS, INCLUDING ANY BALANCE DUE THE SURVIVING PARTNER. THE PERSONAL REPRESENTATIVE OF THE DECEASED PARTNER HAD NO RIGHT TO CONVEY OR ENCUMBER SUCH PROPERTY, UNLESS THE DECEASED WAS THE LAST SURVIVING PARTNER.**

Problem 1: Blackacre was owned by Gainesville Lumber, a partnership composed of John Doe and Richard Roe. John Doe died in 1968. In 1970 Richard Roe conveyed Blackacre to Simon Grant in order to obtain revenue with which to satisfy liabilities of Gainesville Lumber. Did Grant Acquire marketable title to Blackacre?

Answer: Yes.

Problem 2: Blackacre was owned by Gainesville Lumber, a partnership composed of John Doe and Richard Roe. John Doe died in 1968. In 1970 Blackacre was conveyed to Simon Grant by John Smith, the executor of John Doe's estate. Did Grant acquire marketable title to Blackacre?

Answer: No.

Authorities & References: *Loubat v. Nourse*, 5 Fla. 350 (1853); *Territory ex rel. Smith v. Redding*, 1 Fla. 242 (1847); *County Nat'l Bank v. Stern*, 287 So.2d 106 (3d D.C.A. Fla. 1973).

Comment: On or after January 1, 1972, real property acquired in the partnership name may be conveyed or encumbered in the partnership name. FLA. LAWS 1971, ch. 71-71, §3. See Title Standard 19.1 (Conveyance Of Real Property Held In Partnership Name).

STANDARD 19.6

CONVEYANCE OF PARTNERSHIP REAL PROPERTY  
ON OR AFTER JANUARY 1, 1973 AFTER  
DEATH OF A PARTNER

**STANDARD: ON OR AFTER JANUARY 1, 1973, SUBSEQUENT TO THE DEATH OF A PARTNER, REAL PROPERTY OWNED BY THE PARTNERSHIP AND STANDING IN THE PARTNERSHIP NAME MAY BE CONVEYED IN THE PARTNERSHIP NAME 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.**

Problem 1: Blackacre was owned by Gainesville Lumber, a partnership composed of John Doe, Richard Roe and Hi Hoe. Hi Hoe died in 1974. Later Blackacre was deeded by Gainesville Lumber, a partnership, by John Doe and Richard Roe, surviving partners, to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: Yes. Upon the death of a partner, his right in specific partnership property vests in the surviving partner or partners.

Problem 2: Blackacre was owned by Gainesville Lumber, a partnership composed of John Doe and Richard Roe. John Doe died in 1974. Richard Roe died in 1975. Thereafter, a conveyance of Blackacre was executed on behalf of Gainesville Lumber, a partnership, by John Smith, executor under the will of Richard Roe, to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: Yes. Upon the death of Doe his rights in specific partnership property vested in the surviving partner Roe. Upon the death of Richard Roe, his rights in such property vested in his legal representative.

Authorities & References: *F.S.* 620.68(2)(d) (1979); 1 BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* §10.07[2] (Supp. 1980).

Comment: With respect to the form of conveyance of partnership realty, see Title Standard 19.1 (Conveyance Of Real Property Held In Partnership Name).

STANDARD 19.7

DOWER AND RELATED RIGHTS IN SPECIFIC  
PARTNERSHIP PROPERTY ON OR AFTER  
JANUARY 1, 1972

**STANDARD: ON OR AFTER JANUARY 1, 1972, A PARTNER'S RIGHTS IN SPECIFIC PARTNERSHIP PROPERTY ARE NOT SUBJECT TO DOWER, CURTESY OR ALLOWANCES TO WIDOWS, HEIRS OR NEXT OF KIN.**

**Problem:** In March, 1972 Blackacre was conveyed to John Doe and Richard Roe, partners, doing business as Gainesville Lumber. Later a conveyance thereof was executed by John Doe and Richard Roe, partners, doing business as Gainesville Lumber, in which their wives did not join. Did the grantee acquire title to Blackacre free from dower rights of the wives of the partners?

**Answer:** Yes.

**Authorities & References:** *F.S.* 620.68(2)(e) (1979); *FLA. LAWS* 1971, ch. 71-71, §3; *IFLORIDA REAL PROPERTY PRACTICE* §10.75 (CLE 2d ed. 1971).

**Comment:** If a partner died prior to January 1, 1972 and the proper instruments were recorded a valid dower claim may exist. Consider Title Standard 20.7 (Release Of Dower — On Or After October 1, 1973) and *F.S.* 731.34 — .35 (1973). If title to the property was taken in the names of one or more partners rather than in the partnership name, joinder of the partner's spouse in the conveyance may be desirable for marketability purposes. See 1 *BOYER, FLORIDA REAL ESTATE TRANSACTIONS* §10.07[2] (Supp. 1980).

STANDARD 19.8

DOWER AND RELATED RIGHTS IN SPECIFIC  
LIMITED PARTNERSHIP PROPERTY ON OR AFTER  
JANUARY 1, 1973

**STANDARD: ON OR AFTER JANUARY 1, 1973, NEITHER A GENERAL NOR A LIMITED PARTNER'S RIGHTS IN SPECIFIC LIMITED PARTNERSHIP PROPERTY ARE SUBJECT TO DOWER, CURTESY, OR ALLOWANCES TO WIDOWS, HEIRS OR NEXT OF KIN.**

**Problem:** In 1974 Blackacre was conveyed to "Gainesville Lumber, a Florida limited partnership." Subsequently Blackacre was conveyed in the partnership name but the wives of the partners did not join. Did the grantee acquire title to Blackacre free from the dower rights of the partners' spouses?

**Answer:** Yes.

**Authorities & References:** *F.S.* 620.68(2)(e) (1979); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §10.07[2] (Supp. 1980).

**Comment:** If either a general or a limited partner died prior to January 1, 1973 and the proper instruments were recorded a valid dower claim may exist. Consider Title Standard 20.7 (Release Of Dower — On Or After October 1, 1973) and *F.S.* 731.34 — .35 (1973).

STANDARD 19.9

RIGHTS OF JUDGEMENT CREDITORS

**STANDARD: A JUDGMENT CREDITOR OF A PARTNER HAS NO LIEN UPON PARTNERSHIP PROPERTY.**

Problem 1: John Doe and Richard Roe were partners doing business as Gainesville Lumber. Can Tom Smith protect his interest as a judgment creditor of John Doe personally and not in his partnership capacity by placing a lien upon specific partnership property?

Answer: No.

Problem 2: Can Tom Jones, a judgment creditor of Richard Roe, a limited partner in XYZ Associates, a Florida limited partnership, protect his interests in such judgment by imposing a lien on specific partnership property?

Answer: No.

Authorities & References: *F.S.* 620.22, 620.695 (1979); *Myrick v. Second Nat'l Bank*, 335 So.2d 343 (2d D.C.A. Fla. 1976).

CHAPTER 20  
MARITAL PROPERTY

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STANDARD 20.1

RECITAL OF UNMARRIED STATUS

**STANDARD: THE RECITAL IN AN INSTRUMENT OF RECORD THAT A PERSON IS UNMARRIED MAY BE RELIED UPON IN THE ABSENCE OF ANY EVIDENCE IN THE CHAIN OF TITLE OR OTHER KNOWN FACTS INDICATING THAT THE PERSON WAS MARRIED.**

**Problem 1:** John Doe, and the sole owner of Blackacre, conveyed it, describing himself as a single man. Nothing of record indicates that Doe was married prior to the recording of the deed. Is an examiner justified in relying on the recital of marital status?

**Answer:** Yes.

**Problem 2:** John Doe, the sole owner of Blackacre, conveyed it, describing himself as a single man. Several years previously, John Doe and Mary Doe, his wife, had joined in a mortgage of Blackacre. Nothing of record shows the termination of the marital status or the disposition of Mary's dower rights. Is an examiner justified in assuming that the grantee takes free of any possible dower or homestead rights?

**Answer:** No. An examiner should require satisfactory record evidence of the disposition of the wife's dower interest, if any, and the elimination of any possible homestead problems.

**Problem 3:** Mary Doe, the sole owner of Blackacre, which was not homestead property, conveyed it in 1960, describing herself as a single woman. Several years previously, Mary Doe and John Doe, her husband, had joined in a mortgage of Blackacre. Nothing of record indicates that the requirement of joinder by John Doe was unnecessary or otherwise satisfied. Is the examiner justified in relying on the recital and assuming the conveyance is valid?

**Answer:** No. Since the conveyance was made prior to January 7, 1969, it is not valid unless joinder is unnecessary by reason of death or divorce or if Mary was a free dealer. If the conveyance was invalid, a conveyance from the present title holder would be necessary. With respect to joinder in a conveyance of homestead property, see Title Standard 18.1 (Alienation Of Homestead Property — Joinder Of Spouse).

**Authorities & References:** 2 PATTON ON TITLES §§339, 391-93 (2d ed. 1957); BASYE, CLEARING LAND TITLES §35 (2d ed. 1970); ATIF TN 20.02.03, 20.02.05, 20.02.06.

**Comment:** Although the recital of marital status may be binding as to the grantor or mortgagor, it does not eliminate the rights of one who is not a party. However, the improbability of outstanding interests that are not indicated by the chain of title justifies reliance. Any contrary facts coming to the examiner's attention, although not in the chain of title, cannot be ignored.

A recital that a person is unmarried may include a reference to the person being single, a widow or widower. However, a designation as widow or widower of a particular spouse does not necessarily indicate current marital status. See ATIF TN 20.02.02.

STANDARD 20.2

CONVEYANCES BY MARRIED WOMEN — JOINDER OF  
HUSBAND PRIOR TO JANUARY 7, 1969

**STANDARD: PRIOR TO JANUARY 7, 1969, A CONVEYANCE OR ENCUMBRANCE OF REAL PROPERTY BY A MARRIED WOMAN REQUIRED THE JOINDER OF HER HUSBAND.**

Problem 1: Mary Doe, a married woman, owned Blackacre. In 1960 Mary Doe, acting alone, executed a deed of Blackacre to Richard Roe. Was the conveyance valid?

Answer: No.

Problem 2: Same facts as Problem 1, except that in 1964 Richard Roe obtained from John Doe, Mary's husband, a separate conveyance of any interest he might have in Blackacre. Did this validate the original deed executed by Mary Doe in 1960?

Answer: No. A separate instrument by a husband to confirm his wife's conveyance did not constitute joinder.

Authorities & References: *F.S.* 693.01, 708.04, 708.08 (1969); *Bogle v. Perkins*, 240 So.2d 801 (Fla. 1970); *Zofnas v. Holwell*, 234 So.2d 1 (Fla. 1970); *Carn v. Haisley*, 22 Fla. 317 (1886); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.02[2] (1980); ATIF TN 20.03.02.

Comment: A deed executed by a married woman without the joinder of her husband may be made effective through the operation of the doctrine of estoppel. *Zofnas v. Holwell*, 234 So.2d 1 (Fla. 1970).

Joinder of the husband was not required if the married woman was a free dealer. *F.S.* 62.021 (1969). However, if the property was homestead, joinder would be necessary even though the married woman was a free dealer. *Bigelow v. Dunphe*, 143 Fla. 603, 197 So. 328 (1940); ATIF TN 16.01.02, 16.04.05.

STANDARD 20.3

CONVEYANCES BY MARRIED WOMEN — JOINDER OF  
HUSBAND ON OR AFTER JANUARY 7, 1969

**STANDARD: ON OR AFTER JANUARY 7, 1969, A CONVEYANCE OR ENCUMBRANCE OF REAL PROPERTY, OTHER THAN HOMESTEAD, BY A MARRIED WOMAN DOES NOT REQUIRE THE JOINDER OF HER HUSBAND.**

**Problem:** Mary Doe, a married woman, owned Blackacre, which was not homestead property. In 1974 Mary Doe, acting alone, executed a deed of Blackacre to Richard Roe. Was the conveyance valid?

**Answer:** Yes.

**Authorities & References:** FLA. CONST. art. X, §5; *F.S.* 708.08 (1979); *Emhart Corp. v. Brantley*, 257 So.2d 273 (3d D.C.A. Fla. 1972); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.02[3] (1980); ATIF TN 20.03.01.

**Comment:** The Standard is inapplicable to homestead property. See Title Standard 18.1 (Alienation of Homestead Property — Joinder Of Spouse).

STANDARD 20.4

POWER OF ATTORNEY — MARRIED WOMEN'S PROPERTY

**STANDARD: PRIOR TO JANUARY 7, 1969, A POWER OF ATTORNEY USED TO CONVEY OR ENCUMBER A MARRIED WOMAN'S REAL PROPERTY WAS INEFFECTIVE UNLESS HER HUSBAND JOINED IN THE EXECUTION OF IT, EXCEPT THAT IF THE POWER OF ATTORNEY WAS TO THE HUSBAND, HE NEED NOT JOIN IN ITS EXECUTION ON OR AFTER MAY 14, 1957.**

**Problem 1:** In 1960 Mary Doe, a married woman and the sole owner of Blackacre, gave Richard Roe a power of attorney authorizing him to convey it. The power of attorney was executed with all the formalities of a deed and was recorded. John Doe, Mary's husband, did not join in the execution of the power of attorney. Richard Roe, as attorney-in-fact, executed a deed to Blackacre to Simon Grant in 1961 and John Doe joined in the execution of the deed. Was the deed valid?

**Answer:** No.

**Problem 2:** Same facts as Problem 1 except that they all took place on or after January 7, 1969. Was the deed valid?

**Answer:** Yes, assuming Blackacre was not homestead property. See Title Standard 18.4 (Alienation Of Homestead Property — Power Of Attorney).

**Problem 3:** In 1960 Mary Doe, the sole owner of Blackacre, gave John Doe, her husband, a power of attorney authorizing him to convey it. The power of attorney was executed with all the formalities of a deed and was recorded. John Doe did not join in the execution of the power of attorney. John Doe, as attorney-in-fact, executed a deed to Blackacre to Simon Grant in 1960. John Doe joined in the execution of the deed as the husband of Mary Doe. Was the deed valid?

**Answer:** Yes.

**Authorities & References:** *F.S.* 693.01, 693.14, 708.04, 708.08 (1969); 1 BOYER FLORIDA REAL ESTATE TRANSACTIONS §28.06 (1980).

**Comment:** *F.S.* 693.01, 693.14, and 708.04 were repealed, and 708.08 was amended, effective October 1, 1970. A married woman can convey or encumber her separate non-homestead property without joinder of her husband since January 7, 1969. See Title Standard 20.3 (Conveyances By Married Women — Joinder Of Husband On Or After January 7, 1969).

STANDARD 20.5

ELIMINATION OF INCHOATE DOWER IN REAL  
PROPERTY CONVEYED BEFORE DEATH

**STANDARD: WITH RESPECT TO A MARRIED MAN DYING ON OR AFTER OCTOBER 1, 1973,  
INCHOATE DOWER IN REAL PROPERTY CONVEYED BEFORE DEATH HAS BEEN ELIMINATED.**

- Problem: John Doe, a married man, executed a deed in 1972 conveying Blackacre, his separate non-homestead property, to Richard Roe in which Mary Doe, John's wife, did not join. John Doe died in 1974. Richard Roe desired to sell Blackacre. Did he have marketable title?
- Answer: Yes. Mary Doe's dower claim extended only to the real property owned by John Doe at his death.
- Authorities & References: *F.S. 731.34–.35 (1973); F.S. 732.111, 732.201, 732.213 (1979); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§21.00, 21.01 (1980).*
- Comment: The spouse may still be required to join in the execution of a mortgage of real property for the lien of the mortgage to be free of dower. *F.S. 731.34 (1973); 5 FUND CONCEPT 47 (Sept. 1973); 6 FUND CONCEPT 4 (Jan. 1974).* However, mortgages executed on or after January 1, 1976 are free of dower. *F.S. 732.111 (1979); ATIF TN 2.04.02.*

STANDARD 20.6

RELEASE OF DOWER — PRIOR TO  
OCTOBER 1, 1973

**STANDARD: IN A CONVEYANCE OR MORTGAGE OF REAL PROPERTY BY A MARRIED MAN PRIOR TO OCTOBER 1, 1973, INCHOATE DOWER OPERATED AS AN ENCUMBRANCE UPON THE GRANTEE'S TITLE UNLESS IT WAS RELEASED BY THE JOINDER OF THE GRANTOR'S WIFE IN THE CONVEYANCE OR MORTGAGE, OR OTHERWISE RELINQUISHED OR BARRED.**

Problem 1: John Doe, a married man, executed a deed in 1960 conveying Blackacre to Richard Roe in which Mary Doe, John's wife, did not join. Did Richard Roe acquire marketable title?

Answer: No. Although the conveyance may have been valid, Blackacre may be subject to Mary Doe's claim of dower.

Problem 2: Same facts as Problem 1, except Mary Doe executed a quitclaim deed to Richard Roe in 1962. Did Richard Roe acquire marketable title?

Answer: Yes, Dower could be relinquished by separate instrument. However, if John Doe had died prior to the execution of the quitclaim deed it would be necessary to determine whether Mary Doe had remarried. The dower right could have vested in fee and the joinder of Mary Doe's subsequent husband would have been required.

Problem 3: John Doe, a single man, conveyed Blackacre to Richard Roe in 1960, reserving a life estate. In 1962 John married Mary. In 1964 John Doe conveyed the life estate to Richard Roe without Mary's joinder. Did Richard Roe acquire marketable title in fee?

Answer: Yes. Property conveyed prior to marriage was not subject to dower. Since the life estate would have terminated upon John's death there would be no estate to which Mary's dower interest could attach.

Authorities & References: *F.S.* 693.02–.03 (1969) (repealed 1970); *F.S.* 731.34–.35 (1971); *F.S.* 708.08 (1979); *Gore v. General Properties Corp.*, 149 Fla. 690, 6 So. 2d 837 (1942); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.01 (1980).

Comment: Prior the 1933 Probate Act dower consisted only of a life estate, so proof of the widow's death eliminated any problem. See ATIF TN 2.06.02, 22.03.10.

Dower may be barred by laches or estoppel. See *Johnson v. Hayes*, 52 So.2d 109 (Fla. 1951); *Pingree v. DeHaven*, 90 Fla. 42, 105 So. 147 (1925).

In order to take dower, the widow had to elect within nine months, unless extended, after the first publication of notice to creditors. This did not address the situation where there was no probate proceeding. See *F.S.* 731.35 (1971).

With respect to various methods of extinguishing dower or preventing it from attaching see Boyer & Miller, *Furthering Title Marketability By Substantive Reforms With Regard To Marital Rights*, 18 MIAMI L. REV. 561, 578-86 (1964).

When the wife failed to join in the husband's conveyance, *F.S.* 95.23, the 20-year curative act, cannot be relied on to eliminate her inchoate dower rights, even though the husband's deed has been on record for at least 20 years. See ATIF TN 10.01.04, 27.01.03. A defective joinder, however, may be cured by *F.S.* 95.23, 95.26, or 694.08. (*F.S.* 95.23 and 95.26 have been amended and combined into 95.231, eff. January 1, 1975).

With respect to dower and leases, see Title Standard 20.9 (Dower — Leases).

As to the priority of a purchase money mortgage, see Title Standard 9.8 (Priority Of Purchase Money Mortgage Over Dower).

STANDARD 20.7

RELEASE OF DOWER — ON OR AFTER OCTOBER 1, 1973

**STANDARD: ON OR AFTER OCTOBER 1, 1973, UNRELINQUISHED INCHOATE DOWER IN REAL PROPERTY CONVEYED BEFORE DEATH OPERATES AS AN ENCUMBRANCE UPON THE GRANTEE'S TITLE ONLY IF THE MARRIED GRANTOR DIED PRIOR TO OCTOBER 1, 1973 AND, WITHIN THREE YEARS OF THE DATE OF HIS DEATH, HIS WIDOW CAUSED TO BE RECORDED AN INSTRUMENT INDICATING THAT SHE HAS ELECTED OR MAY ELECT TO TAKE DOWER.**

**Problem 1:** John Doe, a married man, executed a deed in 1972 conveying Blackacre, his separate non-homestead property, to Richard Roe. May Doe, John's wife, did not join in the conveyances. John Doe died in June. Richard Roe desired to sell Blackacre in 1974. Did he have marketable title at that time?

**Answer:** No. Mary Doe could assert her dower claim until June, 1976 unless otherwise barred.

**Problem 2:** Same facts as Problem 1 except John Doe died in December, 1973. Did Richard Roe have marketable title in 1974?

**Answer:** Yes. Inchoate owner in real property conveyed before death was eliminated with respect to married men dying after October 1, 1973.

**Problem 3:** John Doe, a married man, executed a deed in 1967 conveying Blackacre, his separate non-homestead property, to Richard Roe. Mary Doe, John's wife, did not join in the conveyance. John Doe died in 1968. His estate has not been probated. In December, 1972 Mary Doe caused to be recorded in the county in which Blackacre was located an instrument which: (1) gave a specific legal description of Blackacre (2) named Richard Roe as the record owner (3) stated the state of John Doe's death and his place of residence at the time of his death and (4) stated that she may elect to take dower. Richard Roe desired to sell Blackacre in 1974. Did he have marketable title at that time?

**Answer:** No. Assuming Mary Doe's dower had not been otherwise relinquished or barred, the recording of the instrument prior to January 1, 1973 would preserve her dower interests.

**Problem 4:** John Doe, a married man, executed a deed in 1972 conveying Blackacre, his separate non-homestead property, to Richard Roe. May Doe, John's wife, did not join in the conveyance. John Doe died in June, 1973. His estate has not been probated. In 1974 Mary Doe caused to be recorded in the county in which Blackacre was located an instrument which: (1) gave a specific legal description of Blackacre (2) named Richard Roe as the record owner (3) stated the date of John Doe's death and his place of residence at the time of his death and (4) stated that she may elect to take dower. Would Richard Roe have marketable title in 1978?

**Answer:** No. Assuming Mary Doe's dower had not been otherwise relinquished or barred recording of the instrument would preserve her dower interests.

**Authorities & References:** *F.S.* 731.34–.35 (1973); *F.S.* 732.111, 732.201, 732.212–.214 (1979); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.01 (1980).

**Comment:** Dower of a widow of any man dying prior to October 1, 1973 is barred *whether or not her husband's estate is administered* unless the instrument indicating election of or intention to elect dower is filed within three years of the date of her husband's death. However, no dower was barred if the instrument was filed for record before January 1, 1973. *F.S.* 731.35(4) (1973).

This Standard may not apply to unrelinquished inchoate dower rights in real party mortgaged on or after October 1, 1973. See Comment, Title Standard 20.5 (Elimination Of Inchoate Dower In Real Property Conveyed Before Death).

In general, any pre-existing rights to dower have expired as of October 1, 1976 unless the instrument has been filed. *F.S.* 732.213 (1979); ATIF TN 2.04.02. See *Creary v. Estate of Creary*, 338 So. 2d 26 (1st D.C.A. Fla. 1976) as to retroactive application of *F.S.* 732.213.

STANDARD 20.8

POWER OF ATTORNEY — RELEASE OF DOWER  
PRIOR TO OCTOBER 1, 1970

**STANDARD: PRIOR TO OCTOBER 1, 1970, THE RELINQUISHMENT OF DOWER, ACCOMPLISHED BY VIRTUE OF A POWER OF ATTORNEY EXECUTED BY A MARRIED WOMAN TO A THIRD PERSON, WITHOUT THE JOINDER OF HER HUSBAND, IS NOT ACCEPTABLE.**

**Problem:** Mary Doe gave Richard Roe a power of attorney authorizing him to release her dower in the conveyance of Blackacre. The power of attorney was executed with all the formalities of a deed and was recorded. John Doe, Mary's husband, did not join in the execution of the power of attorney. In 1960, John Doe, the sole owner of Blackacre, conveyed it to Stephen Grant. Richard Roe signed the deed "Mary Doe, by Richard Roe, her attorney-in-fact." John Doe died in 1972. Does Stephen Grant have marketable title?

**Answer:** No, provided Mary Doe's dower was not otherwise relinquished or barred by law.

**Authorities & References:** *F.S.* 693.02, 693.14, 708.08 (1969).

**Comment:** Prior to May 14, 1957 the husband was required to join in the execution of the power of attorney even if it was to himself. At that time *F.S.* 693.14 was amended to eliminate this requirement.

*F.S.* 708.08(1) (1979) may retroactively validate relinquishments made between January 7, 1969 and October 1, 1970.

*F.S.* 693.14, expressly requiring the joinder of the husband in the context of this Standard, was repealed, effective October 1, 1970.

STANDARD 20.9  
DOWER — LEASES

**STANDARD: A LEASE OF REAL PROPERTY IS SUBJECT TO THE INCHOATE DOWER RIGHTS OF THE WIFE OF THE LESSOR.**

**Problem:** John Doe, the sole owner of Blackacre, leased it to Richard Roe in 1960 for 99 years. Mary Doe, John's wife, did not join in the lease. John Doe died in 1972. May Mary Doe claim dower in Blackacre?

**Answer:** Yes. This assumes that Mary Doe's dower has not been barred by law or otherwise relinquished.

**Authorities & References:** *Cantor v. Palmer*, 163 So.2d 508 (3d D.C.A. Fla. 1964).

**Comment:** Since the interest of a lessee is considered to be personal property, release of dower by the wife of the lessee upon the cancellation of a lease is not required.

With respect to the issue of the existence of inchoate dower rights, see Title Standard 20.5 (Elimination of Inchoate Dower In Real Property Conveyed Before Death).

STANDARD 20.10

DIVORCE AS BARRING DOWER

**STANDARD: A VALID DIVORCE OR DISSOLUTION OF MARRIAGE BARS DOWER NOTWITHSTANDING THE LACK OF JOINDER BY THE WIFE IN A PRIOR CONVEYANCE OR ENCUMBRANCE OF REAL PROPERTY.**

**Problem:** In 1965, John Doe conveyed Blackacre, which was not homestead property, to Richard Roe. Mary Doe, John's wife, did not join in the conveyance. Subsequently John Doe and Mary Doe were divorced. Did Richard Roe have marketable title, after the divorce, free of any claim of dower?

**Answer:** Yes. Although Mary Doe's inchoate dower right was not eliminated by the conveyance in which she did not join, it was eliminated by the valid divorce decree.

**Authorities & References:** *F.S.* 731.34 (1973); *Simons v. First Nat'l Bank*, 381 U.S. 81 (1965); *Busch v. Busch*, 68 So.2d 350 (Fla. 1953); *Pawley v. Pawley*, 46 So.2d 464 (Fla. 1950), *cert. den.* 340 U.S. 866; *Bowler v. Bowler*, 159 Fla. 447, 31 So.2d 751 (1947); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §21.01[2] (1980); FLORIDA FAMILY LAW §4.40 (CLE 2d ed. 1972).

**Comment:** With respect to the issue of the existence of inchoate dower rights, see Title Standard 20.5 (Elimination Of Inchoate Dower In Real Property Conveyed Before Death).

CHAPTER 21  
DESCRIPTIONS

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STANDARD 21.1

TEST OF SUFFICIENCY OF PROPERTY DESCRIPTION

**STANDARD: IF THE DESCRIPTION OF LAND CONVEYED IN A DEED IS SUCH THAT A SURVEYOR, BY APPLYING THE RULES OF SURVEYING, CAN LOCATE THE SAME, SUCH DESCRIPTION IS SUFFICIENT, AND THE DEED WILL BE SUSTAINED IF IT IS POSSIBLE FROM THE WHOLE DESCRIPTION TO ASCERTAIN AND IDENTIFY THE LAND INTENDED TO BE COVERED.**

Problem 1: The lots in Block 5 of Country Club Estates are numbered consecutively, except for one unnumbered tract lying between Lots 5 and 8 and the plat of the subdivision shows no lots numbered 6 and 7. The original subdivider purported to convey Lot 6, Block 5, Country Club Estates to Richard Roe. Is Roe's title marketable?

Answer: No.

Problem 2: Same facts as above except that the original subdivider attempted to convey Lot 6, Block 5, Country Club Estates to Richard Roe by a metes and bounds description. Is Roe's title marketable?

Answer: Yes.

Authorities & References: *Maynard v. Miller*, 132 Fla. 269, 182 So. 220 (1938); *Burns v. Campbell*, 131 Fla. 630, 180 So. 46 (1938); 19 FLA. JUR. 2d *Deeds* §124 (1980); ATIF TN 13.03.09.

STANDARD 21.2

DESIGNATION OF COUNTY IN METES  
AND BOUNDS DESCRIPTIONS

**STANDARD: A DESCRIPTION OF PROPERTY DESCRIBED AS BEING IN THE STATE OF FLORIDA AND BY METES AND BOUNDS IN A STATED SECTION, TOWNSHIP, AND RANGE WITHOUT ANY COUNTY DESIGNATION IS SUFFICIENTLY DEFINITE.**

**Problem:** John Doe conveyed Blackacre which he owned, describing it as being in the State of Florida and by metes and bounds in Section 12, Township 5 N, Range 29 W. No county was designated in the deed. Is a corrective deed showing the county in which the land lies necessary?

**Answer:** No. Since the section, township and range are definitely given as a part of the description, the location can be ascertained without question as to the county in which the land lies.

**Authorities & References:** *Miller v. Griffin*, 99 Fla. 976, 128 So. 416 (1930); *Black v. Skinner Mfg. Co.*, 53 Fla. 1090, 43 So. 919 (1907); *Peacock v. Feaster*, 52 Fla. 565, 42 So. 889 (1906); 19 FLA. JUR. 2d *Deeds* §125 (1980); ATIF TN 13.03.03.

STANDARD 21.3

EXCEPTION DESCRIBED ONLY BY REFERENCE  
TO PREVIOUS CONVEYANCE

**STANDARD: A CONVEYANCE WHICH CONTAINS A DEFINITE ACREAGE DESCRIPTION BUT EXCEPTS A PORTION OF THE LAND DESCRIBED ONLY BY REFERENCE TO A PREVIOUSLY RECORDED CONVEYANCE, WITHOUT RECITING THE DESCRIPTION SET FORTH IN THE PREVIOUS CONVEYANCE, IS NOT INVALID FOR WANT OF SUFFICIENT DESCRIPTION, EVEN IF THE TITLE EXAMINER MUST GO OUTSIDE OF THE INSTRUMENT TO DETERMINE WHAT IS CONVEYED.**

**Problem:** A recorded conveyance from John Doe to Richard Roe contains the description "the West 1/2 of Section 31, Township 35 South, Range 18 East," and is followed by the language "except what has been previously conveyed by grantor to Simon Grant described in deed recorded in Official Records Book 1, page 2." The deed to Simon Grant conveyed the South 1/2 of the West 1/2 of Sec. 31, Township 35 South, Range 18 East. Is the description in the conveyance to Richard Roe sufficient to convey the North 1/2 of the West 1/2 of the Section?

**Answer:** Yes.

**Authorities & References:** *Gradolph v. Ricou*, 104 Fla. 237, 139 So. 579 (1932); 26 C.J.S. *Deeds* §101 (1956); 19 FLA. JUR. 2d *Deeds* §§132-133 (1980).

**Comment:** It is preferable and the better practice generally to have the complete description, including any exception, set out in the one instrument, but such a description as noted above is sufficient to allow positive identification of the property intended to be conveyed.

STANDARD 21.4

CONFLICT BETWEEN SPECIFIC DESCRIPTION AND  
STATEMENT OF ACREAGE

**STANDARD: IF A DEED CONTAINS A SPECIFIC DESCRIPTION OF THE PROPERTY SUCH AS BY GOVERNMENT SURVEY, METES AND BOUNDS, OR REFERENCE TO A PLAT, TOGETHER WITH A STATEMENT OF THE ACREAGE, THE MORE CERTAIN DESCRIPTION BY BOUNDARIES PREVAILS OVER THE STATEMENT OF ACREAGE UNLESS AN INTENT TO CONVEY A CERTAIN QUANTITY IS MANIFEST.**

**Problem:** A recorded conveyance from John Doe to Richard Roe contains a description by metes and bounds, in a certain Section, Township, Range and County, followed by the words "the same being 33 acres, more or less." A surveyor employed by Roe in anticipation of a subsequent conveyance determines that, in fact, the property described within the stated bounds contains 37 acres. Is a corrective deed necessary to enable Roe to pass marketable title to the described tract including the excess acreage?

**Answer:** No.

**Authorizes & References:** *Benecke v. U.S.*, 356 F.2d 439 (5th Cir. 1966); *U.S. v. 329.22 Acres of Land*, 307 F.Supp. 34 (M.D. Fla. 1968), *aff'd* 418 F.2d 551 (5th Cir. 1969); *Jackson v. Magbee*, 21 Fla. 622 (1885); 19 FLA. JUR. 2d *Deeds* §§126, 139-140 (1980).

**Comment:** The standard applies only to a deed with a specific description accompanied by a statement of acreage. Where the deed indicates an intention to convey a specific number of acres, but the specific description does not coincide with this intention, or where the intention of the parties is in doubt, the standard is not applicable.