

PREFACE TO MICHIGAN LAND TITLE STANDARDS

SIXTH EDITION (through Supplement No. 3)

The Sixth Edition of Michigan Land Title Standards (including Supplement No. 1, Supplement No. 2 and Supplement No. 3) has been prepared by the Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan and published by the Real Property Law Section.

First published in the 1950s, the Michigan Land Title Standards is a series of selected statements of the law of land titles, as supported by applicable statutes and case law. Each Standard is a concise statement of a principle of law, accompanied by problems which illustrate the proper application of the principle. Each Standard includes specific references to the statutes and cases which provide the legal authority for the principle addressed. Some of the Standards include explanatory comments by the Committee.

The Committee has taken care to include only those principles of land title law which are clearly supported by the law of Michigan or, where applicable, by the law of the United States, and for which there are supporting statutes or published cases which are definitive in their effect or holding. Points of law that are subject to dispute or uncertainty, or as to which there are conflicting opinions, have not been included in the Standards, even if a particular interpretation may be commonly accepted in practice. The Standards are not intended as a treatise on land title law, but rather consist of selected statements of legal principles to guide lawyers on the legal effect of land title instruments.

The Standards have played a significant role in promoting the certainty and continuity of Michigan's principles of real property law, the importance of which was noted in a recent decision of our Supreme Court:¹

[I]f there is any realm within which the values served by stare decisis -- stability, predictability, and continuity -- must be most certainly maintained, it must be within the realm of property law. For this reason, "[t]his Court has previously declared that stare decisis is to be strictly observed where past decisions establish 'rules of property' that induce extensive reliance."

* * * *

The justification for this rule is not to be found in rigid fidelity to precedent, but conscience. . . . Judicial "rules of property" create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital.

¹ 2000 *Baum Family Trust v Babel*, 488 Mich 136, 172; 793 NW2d 633, (2010), citing *Bott v Natural Resources Comm*, 415 Mich 45, 77-78; 327 NW2d 838 (1982).

During the more than 60 years since their initial publication, the Standards have come to be regarded as an authoritative reference on the law of land titles and other aspects of real property law as developed and interpreted in Michigan. Trial and appellate courts have frequently cited the Standards in support of the legal principles relied upon in decisions in real property cases. Indeed, the Michigan Land Title Standards are generally regarded as among the most complete and authoritative of all the state land title standards in the United States.

The Committee has been ably guided by the following Chairpersons: Ralph W. Aigler (1953-54), James H. Hudnut (1954-55), Ralph Jossman (1955-59), Cyrus M. Poppen (1959-61), Ray L. Potter (1961-63), Clarence W. Videan (1963-64), Reuben M. Waterman (1964-65), F. Norman Higgs (1965-66), T. Gerald McShane (1966-69), Frank L. Charbonneau (1969-71), James W. Draper (1971-74), Myron Winegarden (1974-76), Andrew Cooke (1976-78), Paul A. Ward (1978-80), John R. Baker (1980-83), Carl A. Hasselwander (1983-85), Janet L. Kinzinger (1985-88), Thomas C. Simpson (1988-90), Gerard K. Knorr (1990-91), Russell A. McNair, Jr. (1991-92), Anne H. Hiemstra (1992-93), C. Robert Wartell (1993-95), James R. Brown (1995-98), Dennis W. Hagerty (1998-2001), James E. Reed (2001-04), Robert D. Mollhagen (2004-07), Russell E. Prins (2007-10), James M. Marquardt (2010-13), Brian J. Page (2013-15) and Catharine B. LaMont (2015 -17).

The Committee continuously reviews and revises the Standards and prepares new Standards to include new subject matter and authorities and to reflect changes in the law. New and revised Standards are published in periodic supplements. The Committee welcomes comments and suggestions from all interested members of the Bar.

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Lansing, Michigan
January, 2017

2015 - 2016
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SUPPLEMENT No. 3

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STANDARD 1.1
EFFECT OF THE MARKETABLE RECORD
TITLE ACT

STANDARD: THE MARKETABLE RECORD TITLE ACT REMEDIES TITLE DEFECTS WITHIN ITS SCOPE.

Authorities: MCL 565.101 through 565.109. *Rush v Sterner*, 143 Mich App 672, 373 NW2d 183 (1985); *Strong v Detroit & Mackinac Ry Co*, 167 Mich App 562, 423 NW2d 266 (1988).

Comment: The stated legislative purpose of the Marketable Record Title Act is to simplify and facilitate land title transactions by providing a statutory basis for establishing record title with reference to a period of at least 40 years (at least 20 years for certain mineral interests). The effect of the Act is to extinguish by operation of law certain interests and claims which arise out of any act, transaction, event or omission preceding the 40-year period (or the 20-year period for certain mineral interests), subject to specified exceptions and limitations. The 20-year period applies only to a mineral interest other than an interest in oil, gas, sand, gravel, limestone, clay or marl, owned by a person other than the surface owner.

An interest in land is preserved under the Act by the recording during the 40-year period (or during 20-year period for certain mineral interests) of a notice, verified by oath, setting forth the nature of the interest claimed. A mineral interest other than an interest in oil, gas, sand, gravel, limestone, clay or marl, owned by a person other than the surface owner, is also preserved by the recording within three years after December 22, 1997, of a notice setting forth the nature of the interest claimed. See also Standard 15.4 with respect to certain severed oil and gas interests. The title resulting from application of the Act's remedial provisions is marketable record title. MCL 565.103. Marketable record title under the Act may not be equivalent, however, to a marketable title at common law or to a commercially marketable or merchantable title, as those terms are generally used. One may have a marketable record title under the Act which is still properly subject to objection.

STANDARD 1.2

ELEMENTS OF MARKETABLE RECORD TITLE

STANDARD: A PERSON HAS MARKETABLE RECORD TITLE IF:

(A) THERE IS AN UNBROKEN CHAIN OF RECORD TITLE FOR AT LEAST 40 YEARS (AT LEAST 20 YEARS FOR CERTAIN MINERAL INTERESTS); AND

(B) THERE IS NO ONE IN HOSTILE POSSESSION OF THE LAND.

Authorities: MCL 565.101, 565.101a and 565.103. *Cook v Grand River Hydroelectric Power Co.* 131 Mich App 821, 346 NW2d 881 (1984); *Rush v Sterner* 143 Mich App 672, 373 NW2d 183 (1985); *Strong v Detroit & Mackinac Railway Co.* 167 Mich App 562, 423 NW2d 266 (1988).

Comment: The required period of an unbroken chain of record title is 20 years with respect to a mineral interest other than an interest in oil, gas, sand, gravel, limestone, clay or marl, owned by a person other than the surface owner.

STANDARD 1.3

UNBROKEN CHAIN OF RECORD TITLE

STANDARD: A PERSON HAS AN UNBROKEN CHAIN OF RECORD TITLE IF:

(A) THERE IS EITHER:

(1) A CONVEYANCE OR OTHER TITLE TRANSACTION WHICH PURPORTS TO CREATE AN INTEREST AND HAS BEEN A MATTER OF RECORD FOR AT LEAST 40 YEARS (AT LEAST 20 YEARS FOR CERTAIN MINERAL INTERESTS); OR

(2) A SERIES OF CONVEYANCES OR OTHER TITLE TRANSACTIONS OF RECORD IN WHICH THE FIRST CONVEYANCE OR TITLE TRANSACTION HAS BEEN A MATTER OF RECORD FOR AT LEAST 40 YEARS (AT LEAST 20 YEARS FOR CERTAIN MINERAL INTERESTS); AND

(B) THERE IS NOTHING OF RECORD PURPORTING TO DIVEST THE PERSON OF TITLE.

Problem A: Frank Thomas was the grantee in a deed of Blackacre recorded in 1960. No instrument affecting Blackacre has been recorded since 1960. In 2003, does Thomas have an unbroken chain of record title?

Answer: Yes.

Problem B: Arthur Gates was determined to be the owner of Blackacre by a final court order entered in 1961. A certified copy of the order was recorded in 1962. No other instrument affecting Blackacre has been recorded since 1962. In 2003, does Gates have an unbroken chain of record title?

Answer: Yes.

Problem C: Frank Thomas was the grantee in a deed of Blackacre recorded in 1960. He conveyed Blackacre to Janet Tillson by a deed recorded in 1965. In 1985, a deed of Blackacre from Janet Tillson to Richard Cook was recorded. No other instrument affecting Blackacre has been recorded since 1965. In 2006, does Cook have an unbroken chain of record title?

Answer: Yes.

Problem D: In 1961, the estate of Arthur Gates was probated. Blackacre was included in the inventory of the estate, although Gates did not appear in the chain of record title. A certified copy of the order assigning the residue (specifically describing Blackacre) to his two daughters as sole heirs at law was recorded in 1962. A deed from the heirs at law to Ralph Allan was recorded in 1993. No other instrument affecting Blackacre has been recorded since 1962. In 2003, does Allan have an unbroken chain of record title?

Answer: Yes.

Problem E: Frank Thomas was the grantee in a deed of Blackacre executed in 1960 by a stranger to the title. The deed was recorded in 2001. No other instrument affecting Blackacre has been recorded. In 2003, does Thomas have an unbroken chain of record title?

Answer: No. Thomas's chain of record title begins with the recording of his deed in 2001.

Problem F: Frank Thomas, the owner of Blackacre, conveyed Blackacre to Janet Tillson, but reserved an undivided one-half interest in iron ore and coal. The deed was recorded in 1970. By deed recorded in 1980 Tillson conveyed Blackacre to Richard Cook, but the deed made no reference to Thomas's reserved iron ore and coal interest. There was no production of iron ore or coal from Blackacre. No other instrument affecting Blackacre was recorded after 1980. In 2001, does Cook have an unbroken chain of record title to all interest in Blackacre?

Answer: Yes.

Authorities: Problems A and B: MCL 565.102(a).

Problems C and D: MCL 565.102(b).

Problem E: MCL 565.101.

Problem F: MCL 565.101(a).

Comment: See the Comment in Standard 1.1 with respect to preserving an interest by recording a notice of the interest claimed.

STANDARD 1.4

MATTERS OF RECORD PURPORTING TO DIVEST

STANDARD: MATTERS PURPORTING TO DIVEST WITHIN THE MEANING OF THE MARKETABLE RECORD TITLE ACT ARE THOSE MATTERS APPEARING OF RECORD WHICH, IF TAKEN AT FACE VALUE, INDICATE THAT THE INTEREST HAS BEEN DIVESTED FROM A PERSON.

Problem A: Frank Thomas was the last grantee of record in the chain of title to Blackacre by deed recorded in 1960. In 1999 a warranty deed describing Blackacre and executed by a stranger to the title was recorded. Is this deed an instrument purporting to divest Thomas of his interest within the meaning of the Marketable Record Title Act?

Answer: No. The deed did not purport to divest Thomas of his interest because there is nothing in the deed indicating that the grantor had acquired the interest of Thomas.

Problem B: Frank Thomas was the last grantee of record in the chain of title to Blackacre by deed recorded in 1960. In 1999 a mortgage of Blackacre with covenants of warranty executed by a stranger to the title was recorded. Does the mortgage purport to divest Thomas of any interest within the meaning of the Marketable Record Title Act?

Answer: No. The mortgage did not purport to divest Thomas of his interest because there is nothing in the mortgage indicating that the mortgagor had acquired the interest of Thomas.

Problem C: Frank Thomas was the last grantee of record in the chain of title to Blackacre by deed recorded in 1960. In 1996 the estate of Arthur Gates, a stranger to the title, was probated. By Gates's will, Blackacre was specifically devised to Arthur Gates, Jr. Certified copies of the will and of the order assigning the residue of the estate were recorded in 1998. Do the will and the order assigning residue constitute instruments purporting to divest Thomas of his interest within the meaning of the Marketable Record Title Act?

Answer: No. The reasoning is the same as in the preceding answers.

Problem D: Frank Thomas was the last grantee of record in the chain of title to Blackacre by deed recorded in 1960. A deed of Blackacre from Janet Tillson to Harry Cook, recorded in 1998, recited that Frank Thomas died intestate and that the grantor was his sole heir at law. Does this deed purport to divest Thomas of his interest within the meaning of Marketable Record Title Act?

Answer: Yes. If the recitals in the Tillson deed are true, Cook has acquired the interest once vested in Thomas. Even if the recitals are not factually correct, the deed in question is one purporting to divest within the meaning of the Act.

Problem E: Wendy Thomas was the last grantee of record in the chain of title to Blackacre by deed recorded in 1960. A deed of Blackacre recorded in 1998 was executed by Wendy Thomas, by John Smith, her attorney-in-fact. No power of attorney was recorded. Does this deed purport to divest Thomas of her interest within the meaning of the Marketable Record Title Act?

Answer: Yes.

Problem F: Frank Thomas was the last grantee of record in the chain of title to Blackacre by deed recorded in 1960. A deed of Blackacre executed by Janet Tillson, referring to the land as “being the same land heretofore conveyed to me by Frank Thomas,” was recorded in 1988. No deed from Thomas to Janet Tillson was recorded. Does the deed executed by Janet Tillson purport to divest Thomas of his interest within the meaning of the Marketable Record Title Act?

Answer: Yes.

Problem G: Frank Thomas was the last grantee of record in the chain of title to Blackacre by deed recorded in 1960. In 1998, an affidavit was recorded in which a stranger to the title stated that “he and his predecessors in occupancy have been in continuous, open, notorious and adverse possession of Blackacre as against the world for the preceding 15 years.” Does this instrument purport to divest Thomas of his interest within the meaning of the Marketable Record Title Act?

Answer: Yes. The affidavit indicates that Thomas's interest has been terminated by adverse possession for the statutory period.

Authorities: MCL 565.101 and 565.102.

Comment: Although an instrument may not be one purporting to divest a person of an interest within the meaning of the Marketable Record Title Act, the instrument should not necessarily be disregarded by a title examiner. Thus in Problem A the deed recorded in 1999 is not one purporting to divest Frank Thomas and therefore does not preclude him from having or acquiring a marketable record title. On the other hand, a person cannot have marketable title if the land is in the hostile possession of another. The 1999 deed may give notice of the hostile possession or of some other interest or claim. The deed would also be an instrument purporting to create an interest in the grantee within the terms of Section 2 of the Act. Accordingly, a prudent title examiner would not ignore it. Concerning matters of record purporting to divest, see *Murray v Buikema*, 54 Mich App 382, 221 NW2d 193 (1974).

STANDARD 1.5

HOSTILE POSSESSION OF ANOTHER

STANDARD: NO PERSON CAN HAVE A MARKETABLE RECORD TITLE TO ANY INTEREST IN LAND, WITHIN THE MEANING OF THE MARKETABLE RECORD TITLE ACT, IF THE LAND IS IN THE HOSTILE POSSESSION OF ANOTHER PERSON.

Problem A: Frank Thomas was the last grantee in the chain of title to Blackacre by deed recorded in 1960. In 1998, Ralph Allan entered into and remained in hostile possession of Blackacre. There is nothing else of record. In 2003, does Thomas have a marketable record title within the meaning of the Marketable Record Title Act?

Answer: No.

Problem B: Frank Thomas was the last grantee in the chain of title to Blackacre by deed recorded in 1960. In 1961, a deed executed by a stranger to the title and conveying Blackacre to Ralph Allan was recorded. There is nothing else of record. In 2003, Allan was in actual possession of Blackacre, hostile to Thomas. In 2003, does either Thomas or Allan have a marketable record title within the meaning of the Marketable Record Title Act?

Answer: Allan has marketable record title. Thomas does not have marketable record title because Allan has hostile possession.

Problem C: Same facts as in Problem B, except that Thomas was in actual possession of Blackacre, hostile to Allan. In 2003, does either Thomas or Allan have marketable record title within the meaning of the Marketable Record Title Act?

Answer: Thomas has marketable record title. He has an unbroken chain of title extending back at least 40 years. The deed from the stranger to Allan is not an instrument purporting to divest Thomas of the interest created in him by the deed recorded in 1960. Allan does not have marketable record title because Thomas has hostile possession.

Problem D: Same facts as in Problem B, except that in 2003 Blackacre is unoccupied. In 2003, does either Thomas or Allan have marketable record title within the meaning of the Marketable Record Title Act?

Answer: Yes. Thomas and Allan each have marketable record title. Thomas and Allan each has an “unbroken chain of title” extending back at least 40 years, there is nothing purporting to divest either of them, and there is no one in hostile possession. See Standard 1.7 regarding conflicting marketable record titles.

Problem E: Same facts as in Problem B, except that in 2003 Adam Johnson is in hostile possession of Blackacre. In 2003, does either Thomas or Allan have marketable record title within the meaning of the Marketable Record Title Act?

Answer No.

Problem F: Same facts as in Problem B, except that in 2003 Adam Johnson is in possession of Blackacre, hostile to Allan, and there is a recorded lease from Thomas to Johnson, dated and recorded in 1995, purporting to lease Blackacre to Johnson for 12 years. In 2003, does either Thomas or Allan have marketable record title within the meaning of the Marketable Record Title Act?

Answer: Thomas has marketable record title (subject to the lease), because the possession of Johnson is subordinate to the title of Thomas and therefore is not hostile to him. Because Johnson’s possession is hostile to Allan, Allan does not have marketable record title.

Authorities: MCL 565.101 and 565.102. *Cook v Grand River Hydroelectric Power Co.*, 131 Mich App 821, 346 NW2d 881 (1984); *Rush v Sterner*, 143 Mich App 672, 373 NW2d 183 (1985).

Comment: The Committee expresses no opinion as to what specific acts may constitute hostile possession.

STANDARD 1.6

EFFECT OF THE MARKETABLE RECORD TITLE ACT ON PRIOR INTERESTS

STANDARD: A PERSON WHO HAS MARKETABLE RECORD TITLE HOLDS TITLE FREE OF:

ANY INTEREST, CLAIM OR CHARGE, THE EXISTENCE OF WHICH DEPENDS IN WHOLE OR IN PART UPON ANY ACT, TRANSACTION, EVENT OR OMISSION WHICH PRECEDES AT LEAST A 40-YEAR CHAIN OF RECORD TITLE (AT LEAST A 20-YEAR CHAIN OF RECORD TITLE FOR CERTAIN MINERAL INTERESTS); IF:

(A) THE MINIMUM 40-YEAR CHAIN (MINIMUM 20-YEAR CHAIN FOR CERTAIN MINERAL INTERESTS) INCLUDES NO REFERENCE TO THE INTEREST, CLAIM OR CHARGE, AND NO NOTICE OF CLAIM BASED THEREON HAS BEEN FILED PURSUANT TO SECTIONS 3 AND 5 OF THE ACT; AND

(B) THE INTEREST IS NOT EXCEPTED FROM THE APPLICATION OF THE ACT BY SECTION 4;

BUT THE TITLE IS SUBJECT TO:

ANY INTEREST, CLAIM OR CHARGE WHICH ARISES FROM, OR IS REFERRED TO IN, ANY INSTRUMENT WITHIN THE MINIMUM 40-YEAR CHAIN OF RECORD TITLE (MINIMUM 20-YEAR CHAIN FOR CERTAIN MINERAL INTERESTS).

Problem A: Blackacre was conveyed to John Pond by deed recorded in 1955. The deed stated that Pond or his heirs had the right to re-enter Blackacre in the event of a breach of certain conditions stated in the deed. Pond conveyed Blackacre to Frank Thomas by deed recorded in 1960, but the deed did not state or refer to the right of entry. None of the instruments in the chain of title since 1960 contains a reference to the right of entry. No notice of claim has been recorded.

Thomas is in possession of Blackacre. In 2003, does Thomas hold title to Blackacre free of the right of entry?

Answer: Yes. Thomas holds the title free of the right of entry because it does not appear in any instrument in his 40-year chain of record title.

Problem B: Blackacre was conveyed to John Pond by deed recorded in 1955. The deed stated that Blackacre was conveyed “so long as” it was used for a specified purpose, but if it ceased to be so used, Blackacre would revert to Pond and his heirs. Pond conveyed Blackacre to Paula Bell by deed recorded in 1960. The deed specifically referred to the possibility of reverter. Paula Bell conveyed Blackacre to Frank Thomas by deed recorded in 1980. The deed did not refer to the possibility of reverter. No other instrument affecting Blackacre has been recorded since 1980. Thomas is in possession of Blackacre. In 2003, does Thomas hold title to Blackacre free of the possibility of reverter?

Answer: No. Although Thomas holds marketable record title to Blackacre, he does not hold the title free of the possibility of reverter because it is referred to in the 1960 deed, which is the deed commencing Thomas’s 40-year chain of record title.

Authorities: MCL 565.101 through 565.105.

Comment A: The effect, if any, of MCL 554.61 *et seq.*, relating to the duration of rights of entry and possibilities of reverter, has not been considered in the preparation of this Standard. See, Standards 9.10 and 9.13.

Comment B: Under the facts of Problems B, one of the instruments in the unbroken chain of title of Thomas specifically refers to a possibility of reverter. The Committee expresses no opinion as to whether a general reference, such as “restrictions of record” or “restrictions and easements of record, if any” is effective to preserve the interests.

Comment C: The Marketable Record Title Act is not effective to bar the following interests:

- (a) The right of a lessor, or the lessor’s successor in interest, to possession upon the expiration of a lease;

- (b) The right of a lessee, or the lessee's successor in interest, in and to a lease;
- (c) The interest of a mortgagor or mortgagee until the instrument establishing the interest has become due and payable, "except where such instrument has no due date expressed, where such instrument has been executed by a railroad, railroad bridge, tunnel or union depot company, or any public utility or public service company";
- (d) Any easement, or interest in the nature of an easement, the existence of which is clearly observable by physical evidence of use;
- (e) Any easement, or interest in the nature of an easement, or rights appurtenant to the easement granted, excepted or reserved by the recorded instrument creating it, including any rights for future use, if the existence of the easement, or interest in the nature of an easement, is evidenced "by the location beneath, upon or above any part of the land described in such instrument of any pipe, valves, road, wire, cable, conduit, dock, sewer, tract, pole, tower or other physical facility," whether or not the existence of the facility is observable; and
- (f) Any interest owned by the United States, or by the state of Michigan or any department, commission or political subdivision thereof.

MCL 565.104.

Comment D: The required period of an unbroken chain of record title is 20 years with respect to a mineral interest other than an interest in oil, gas, sand, gravel, limestone, clay or marl, owned by a person other than the surface owner. MCL 565.101.

STANDARD 1.7

CONFLICTING MARKETABLE RECORD TITLES

STANDARD: IF TWO OR MORE MARKETABLE RECORD TITLES EXIST UNDER THE MARKETABLE RECORD TITLE ACT, CONFLICT BETWEEN THEM MAY BE RESOLVED BY THE OPERATION OF SECTION 3 OF THE ACT. UNDER SECTION 3, THE HOLDER OF A MARKETABLE RECORD TITLE HOLDS FREE ONLY OF CLAIMS THE EXISTENCE OF WHICH CANNOT BE DISCOVERED BY AN EXAMINATION OF THE RECORDS COVERING THE PERIOD RELIED UPON TO MAKE UP THE UNBROKEN CHAIN OF TITLE OF RECORD.

Problem A: Blackacre was conveyed to Frank Thomas by deed recorded in 1945. A deed from a stranger to the title conveying Blackacre to Ralph Allan was recorded in 1955. Allan conveyed Blackacre to Iva Grant by a deed recorded in 1975. Iva Grant conveyed Blackacre to Theodore Worth by a deed recorded in 1976. There is nothing else of record since 1945. Blackacre is not occupied. In 2003, does Worth have marketable record title free of the claim of Thomas?

Answer: Yes. Worth has an unbroken chain of title of record, there is nothing of record purporting to divest him of the interest and there is no one in hostile possession. Although the deed from the stranger to Allan does not purport to divest the interest of Thomas, it is nevertheless an instrument which purports to create an interest in Allan and may therefore constitute the basis for the creation of a new marketable record title upon the expiration of 40 years after the date of its recording.

Thomas's deed is an instrument recorded more than 40 years in the past which purports to create an interest in him; the deed to Allan from a stranger to the title does not purport to divest Thomas and there is no one in hostile possession.

Under Section 3 of the Act, these titles are held "free and clear of any interests...the existence of which depends...upon any transaction... that occurred *prior to such 40 year period*..." Thomas must include

the 1945 deed in order to make up his unbroken chain of title of record, because that is the recorded instrument commencing his chain of record title under the Act. The Act benefits Thomas's title by causing it to be free and clear of any claim based on a transaction that occurred before the commencement of his chain of title. However, Thomas's title cannot be held free of claims arising from instruments recorded after the instrument commencing his chain of title. Because the instruments comprising Worth's title would be discovered by an examination of the records covering the period of time upon which Thomas must rely, Thomas's title is not held free of Worth's interest. On the other hand, because Worth's 40-year chain of record title commenced in 1955, he and his successors in interest are entitled to hold the title free and clear of the claim of Thomas, because Thomas's title depends upon the 1945 deed, which evidences a transaction that occurred before Worth's 40-year chain of record title. The existence of Thomas's claim cannot be ascertained by an examination of the records covering the period upon which Worth and his successors would rely to make up the unbroken chain of title of record, because the deed in favor of Thomas was recorded prior to the commencement of Worth's 40-year chain of record title.

Problem B: Same facts as in Problem A, except that a deed from Frank Thomas conveying Blackacre to Burt Tillson was recorded in 1970. In 2003, does either Worth or Tillson have a marketable record title to Blackacre?

Answer: No. Neither party is entitled to the benefit of Section 3 of the Act as against the other. Worth is not entitled to the benefit of Section 3 as against Tillson even though Tillson's title depends in part upon the deed to Thomas in 1945, because the deed from Thomas to Tillson was recorded during the 40-year period relied upon by Worth. The Act bars only those claims the existence of which cannot be ascertained by examination of the records covering the 40-year period being relied upon. Although Tillson has a marketable record title within the meaning of the Act, he is not entitled to the benefit of Section 3 of the Act as against Worth's interest, because the deeds in Worth's chain of title were recorded within the 40-year period relied upon by Tillson. The competing claims must be resolved in accordance with other principles.

Problem C: Same facts as in Problem A, except that a deed from Frank Thomas conveying Blackacre to Burt Tillson was recorded in 1994. In 2003, does either Worth or Tillson have a marketable record title to Blackacre?

Answer: No. Neither party is entitled to the benefit of Section 3 of the Act as against the other. Although the deed to Tillson was recorded more than 40 years after the deed to Thomas, the deed was recorded within Worth's 40-year chain of record title.

Authorities: Problems A, B and C: MCL 565.102 and 565.103.

Comment A: Under MCL 565.101, the requisite period of an unbroken chain of title of record is 20 years with respect to a mineral interest in any land if the mineral interest is owned by a person other than the owner of the surface of the land. As used in the Act, "mineral interest" does not include interests in oil, gas, sand, gravel, limestone, clay or marl.

Comment B: A title, though a marketable record title under the Act, may be extinguished by adverse possession.

CHAPTER II

NAMES

STANDARD 2.1

RULE OF *IDEM SONANS*

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

Problem: Blackacre was deeded to Lawrence Emery and Fredrick Stephens. A deed describing Blackacre was later executed by Laurence Emory and Frederick Stevens as grantors. May the names of the grantees and grantors be presumed to identify the same persons?

Answer: Yes.

Authorities: *Kinney v Harrett*, 46 Mich 87, 8 NW 708 (1881); *Detroit v Macier*, 117 Mich 76, 75 NW 285 (1898); *Ensley v Coolbaugh*, 160 Mich 229, 125 NW 279 (1910); *LeBoeuf v Papp*, 243 Mich 318, 220 NW 792 (1928).

STANDARD 2.2

PRESENCE OR ABSENCE OF MIDDLE NAME AND INITIAL

STANDARD: THE PRESENCE IN ONE INSTRUMENT AND THE ABSENCE IN ANOTHER OF A MIDDLE NAME OR INITIAL DOES NOT ITSELF CREATE A QUESTION OF IDENTITY.

Problem A: Blackacre was deeded to Lawrence Emery. A deed describing Blackacre was later executed by Lawrence J. Emery. May the names of the grantee and grantor be presumed to identify the same person?

Answer: Yes.

Problem B: Blackacre was deeded to Lawrence Emery. A deed describing Blackacre was later executed by Lawrence Joseph Emery. May the names of the grantee and grantor be presumed to identify the same person?

Answer: Yes.

Problem C: Blackacre was deeded to Lawrence J. Emery, of Los Angeles, California. A deed describing Blackacre was later executed by Lawrence Joseph Emery, of Buffalo, New York. May the names of the grantee and grantor be presumed to identify the same person?

Answer: No. Based upon the disparity in the stated addresses, further inquiry into the identity of the grantee and grantor is warranted.

Authorities: *People, ex rel Jochim v Kennedy*, 37 Mich 67 (1877); *Berkery v Wayne Circuit Judge*, 82 Mich 160, 46 NW 436 (1890).

STANDARD 2.3

ABBREVIATIONS

STANDARD: ALL CUSTOMARY AND GENERALLY ACCEPTED ABBREVIATIONS OF FIRST AND MIDDLE NAMES APPEARING IN RECORDED INSTRUMENTS SHOULD BE RECOGNIZED AS EQUIVALENT TO THE FULL NAME.

Problem: Blackacre was conveyed by a deed reciting L. Joseph Emery as the grantee. A deed describing Blackacre was later executed reciting L. Jos. Emery as the grantor. May the names of the grantee and grantor be presumed to identify the same person?

Answer: Yes.

Authorities: *People v Tisdale*, 1 Doug 59 (1843). See also, *Standard v Jewell*, 206 Mich 61, 172 NW 407 (1919).

STANDARD 2.4

RECITAL OF IDENTITY

STANDARD: A RECITAL OF IDENTITY MAY BE PRESUMED TO BE TRUE IF STATED IN AN INSTRUMENT EXECUTED BY THE PERSON WHOSE IDENTITY IS RECITED.

Problem A: Blackacre was deeded to Joe Emery. A deed describing Blackacre was later executed by J. Lawrence Emery, also known as Joe Emery, as grantor. May the names of the grantee and the grantor be presumed to identify the same person?

Answer: Yes.

Problem B: Blackacre was deeded to Laura Emery. A mortgage of Blackacre was later executed by Laura Graham, formerly Laura Emery. May the mortgagor be presumed to be the same person as the grantee of the prior deed?

Answer: Yes.

Authorities: *Botsford General Hospital v Citizens Insurance Co.*, 195 Mich App 127, 489 NW2d 137 (1992). See, MRE 803(15).

STANDARD 2.5

EFFECT OF SUFFIX

STANDARD: AN ADDITION OF A SUFFIX SUCH AS “JR” OR “II” TO THE NAME OF A SUBSEQUENT GRANTOR REBUTS THE PRESUMPTION OF IDENTITY WITH A PRIOR GRANTEE OTHERWISE ARISING FROM IDENTITY OF NAME.

Problem: Blackacre was deeded to Lawrence Emery. A deed describing Blackacre was later executed by Lawrence Emery, Jr. May the names of the grantee and the grantor be presumed to identify the same person?

Answer: No. The use of the word “Jr.” in the later deed warrants further inquiry into the identity of the grantee and grantor.

Authority: *Dehn v Dehn*, 170 Mich 407, 136 NW 453 (1912).

Comment: If a father and son have the same name, a conveyance is presumed to be in favor of the father in the absence of language in the conveyance evidencing intent to make the son the grantee. *Goodell v Hibbard*, 32 Mich 47 (1875).

STANDARD 2.6

VARIANCE IN NAME OF INDIVIDUAL

STANDARD: IF THE SIGNATURE ON A CONVEYANCE IS IDENTICAL TO THE NAME STATED IN THE ACKNOWLEDGMENT, A DISCREPANCY IN THE NAME OF THE CONVEYING PARTY AS STATED IN THE BODY OF THE CONVEYANCE MAY ORDINARILY BE DISREGARDED.

Problem A: A deed describing Blackacre was signed and acknowledged by Helen Stone. The body of the deed identified the grantor as Hilda Stone. May the discrepancy between the name of the grantor as stated in the body of the deed and in the signature and acknowledgment be disregarded?

Answer: Yes.

Problem B: A deed describing Blackacre was signed by Hilda Stone but the name stated in the acknowledgment was Helen Stone. The body of the deed identified the grantor as Helen Stone. May the discrepancy between the signature and the name in the acknowledgment be disregarded?

Answer: No. The deed purporting to be signed by Hilda Stone but acknowledged by Helen Stone is not admissible to prove a conveyance by Helen Stone without proof that the grantor was known by both names. In the absence of such evidence, there can be no presumption that Hilda Stone and Helen Stone are the same person.

Authorities: Problem A: *Cameron v Culkins*, 44 Mich 531, 7 NW 157 (1880); *Donohue v Vosper*, 189 Mich 78, 155 NW 407 (1915); *aff'd* 243 U.S. 59 (1917); *Hall v Hall*, 190 Mich 100, 155 NW 695 (1916).

Problem B: *Boothroyd v Engles*, 23 Mich 19 (1871).

Comment A: An instrument of conveyance containing a discrepancy between (a) the name of the conveying party as stated in the body of the instrument, (b) the signature, or (c) the name stated in the acknowledgment is not entitled to be recorded; but if recorded, the instrument is con-

clusively presumed to comply with the statutory recording requirements as to identity of names. MCL 565.201(1)(b).

Comment B: Evidence that a grantor was known by two different names set forth in an instrument may be established by an affidavit as to the grantor's identity. MCL 565.451a.

STANDARD 2.7

VARIATION IN CORPORATE NAME

STANDARD: A VARIATION IN A CORPORATE NAME ARISING THROUGH THE USE OR NON-USE OF A COMMONLY RECOGNIZED ABBREVIATION SUCH AS “CO.,” “INC.,” “CORP.,” “LTD.,” “P.C.,” OR “&”, OR THE OMISSION OR INCLUSION OF THE WORD “THE”, MAY BE DISREGARDED UNLESS AN EXAMINER IS OTHERWISE PUT ON INQUIRY.

Problem A: Blackacre was deeded to Star Company, a Michigan corporation, which was the correct name of the grantee. A deed describing Blackacre was later executed by The Star Co., a Michigan corporation. May the names of the grantor and grantee be presumed to identify the same corporation?

Answer: Yes.

Problem B: Blackacre was deeded to Stars & Stripes Flag Company, Inc., a Michigan corporation. A deed describing Blackacre was later executed by Stars and Stripes Flag Company, Incorporated, a Michigan corporation, which was the correct name of the grantor. May the names of the grantor and grantee be presumed to identify the same corporation?

Answer: Yes.

Problem C: Star Corp., a Michigan corporation, was the grantee in a deed describing Blackacre and the grantor in a later deed describing Blackacre. The correct corporate name is The Star Corporation, a Michigan corporation. May the names Star Corp. and The Star Corporation be presumed to identify the same corporation?

Answer: Yes.

Authorities: *Bernard & Leas Mfg Co v Packard & Calvin, Ltd*, 64 F 309 (CA 3, 1894); *Beedy v Finney*, 118 Iowa 276, 91 NW 1069 (1902); *Seiberling v Miller*, 207 Ill 443, 69 NE 800 (1904); *Goldberg, Bowen & Co v Dimick*, 169 Cal 187, 146 P 672 (1915); *Seaboard Commercial*

Corp v Leventhal, 120 Conn 52, 178 A 922 (1935).

Comment: The statutes regulating corporate names permit the use of the abbreviations “Co.,” “Inc.,” “Corp.,” “Ltd.,” and “P.C.” MCL 450.1211 and 450.231.

CHAPTER III

EXECUTION, ACKNOWLEDGMENT AND RECORDING OF CONVEYANCES



STANDARD 3.1

OMISSION OF DATE FROM CONVEYANCE

STANDARD: THE OMISSION OF THE DATE OF EXECUTION OR THE DATE OF ACKNOWLEDGMENT DOES NOT INVALIDATE AN OTHERWISE VALID CONVEYANCE.

Problem: Martha Davis executed a deed describing Blackacre. The deed lacked a date of execution and a date of acknowledgment. Is the deed valid?

Answer: Yes.

Authorities: MCL 565.603 and 565.604. *Munroe v Eastman*, 31 Mich 283 (1875).

STANDARD 3.2

EXECUTION AND DELIVERY OF INSTRUMENT ON LEGAL HOLIDAY OR SUNDAY

STANDARD: AN INSTRUMENT AFFECTING REAL PROPERTY MAY BE VALIDLY EXECUTED OR DELIVERED ON A LEGAL HOLIDAY AND, SINCE JUNE 23, 1974, ON A SUNDAY.

Problem A: On Thanksgiving Day, Martha Davis executed and delivered a land contract describing Blackacre. Is the land contract valid?

Answer: Yes.

Problem B: On Labor Day, Martha Davis executed and delivered a deed describing Blackacre to John Doe. Is the deed valid?

Answer: Yes.

Problem C: Same facts as in Problem B, except that the deed was executed on Sunday, December 8, 1974. Is the deed valid?

Answer: Yes.

Authorities: Problems A and B: MCL 435.101.

Problem C: 1974 P.A. 171, repealing former MCL 435.11, 435.12 and 435.13.

STANDARD 3.3

DEED PURPORTING TO CORRECT PREVIOUS DEED

STANDARD: A GRANTOR WHO HAS CONVEYED REAL PROPERTY BY AN EFFECTIVE, UNAMBIGUOUS INSTRUMENT CANNOT, BY EXECUTING A SUBSEQUENT INSTRUMENT, MAKE A SUBSTANTIAL CHANGE IN THE NAME OF THE GRANTEE, DECREASE THE AREA OF THE REAL PROPERTY OR THE EXTENT OF THE ESTATE GRANTED, IMPOSE A CONDITION OR LIMITATION UPON THE INTEREST GRANTED, OR OTHERWISE DEROGATE FROM THE FIRST CONVEYANCE, EVEN THOUGH THE SUBSEQUENT INSTRUMENT PURPORTS TO CORRECT OR MODIFY THE FORMER.

Problem A: George Davis, a single man, who owned the north half of Section 35, deeded the northeast quarter of Section 35 to Henry Parker. Davis later conveyed the northwest quarter of Section 35 to Parker, by a deed containing a recital that it was executed to correct the erroneous description in the previous deed. Davis then executed a deed of the northeast quarter of Section 35 to William Cox. Did Cox acquire marketable title to the northeast quarter of Section 35?

Answer: No. The later deed from Davis to Parker did not divest Parker of his previously acquired title to the northeast quarter.

Problem B: George Davis deeded Blackacre to Jane Doe and Ruth Roe as tenants in common. Later, Davis deeded Blackacre to Jane Doe and Ruth Roe, “as joint tenants with right of survivorship.” Jane Doe then deeded an undivided one-half interest in Blackacre to Simon Grant. Did Grant acquire marketable title to an undivided one-half interest in Blackacre notwithstanding Davis’s later deed?

Answer: Yes. Jane Doe had acquired an undivided one-half interest through Davis’s first deed.

Authorities: *Stead v Grosfield*, 67 Mich 289, 34 NW 871 (1887) and *Akers v Baril*, 300 Mich 619, 2 NW2d 791 (1942).

Comment A: The Committee recognizes that there are circumstances under which a later “corrective” deed, not inconsistent with the prior instrument and intended to clarify some ambiguity contained in the deed, may be effective.

Comment B: An inconsistent subsequent deed may operate to create a cloud upon the title acquired under a prior deed.

Note: See, Standard 23.1.

STANDARD 3.4

FAILURE TO STATE MARITAL STATUS OF MALE GRANTOR

STANDARD: AN INSTRUMENT OF CONVEYANCE WHICH FAILS TO STATE THE MARITAL STATUS OF A MALE GRANTOR, IF RECORDED FOR AT LEAST 10 YEARS, CONSTITUTES CONSTRUCTIVE NOTICE OF THE CONVEYANCE.

Problem: John Doe conveyed Blackacre by a deed which failed to state his marital status. The deed was recorded in 1990. In 2001, is the deed constructive notice of the conveyance?

Answer: Yes.

Authority: MCL 565.221.

Comment: Although an instrument of conveyance lacking a statement of the marital status of a male grantor is not entitled to be recorded, the recording may constitute constructive notice of the interest conveyed before the expiration of 10 years. MCL 565.604. *Aultman v Pettys*, 59 Mich 482 (1886).

STANDARD 3.5

DEED EXECUTED IN MICHIGAN HAVING FEWER THAN TWO WITNESSES

STANDARD: A DEED EXECUTED IN MICHIGAN HAVING FEWER THAN TWO WITNESSES WAS NOT ENTITLED TO BE RECORDED BEFORE MARCH 4, 2002; HOWEVER, IF RECORDED FOR AT LEAST 10 YEARS, THE DEED WILL CONSTITUTE CONSTRUCTIVE NOTICE OF THE CONVEYANCE. A DEED EXECUTED IN MICHIGAN WITHOUT WITNESSES IS ENTITLED TO BE RECORDED ON OR AFTER MARCH 4, 2002.

Problem A: Blackacre was conveyed by deed executed in Michigan without witnesses and recorded on April 1, 1992. On June 21, 2002, is the deed constructive notice of the conveyance?

Answer: Yes.

Problem B: Same facts as in Problem A, except that the deed was recorded on March 4, 2002. On June 1, 2002, is the deed constructive notice of the conveyance?

Answer: Yes

Authorities: Generally: MCL 565.201(4) and 565.604. *Healey v Worth*, 35 Mich 166 (1846).

Problem A: *Brown v McCormick*, 28 Mich 215 (1873).

Problem B: 2002 P.A. 19, amending MCL 565.201(1); and 2002 P.A. 23, amending MCL 565.8 and 565.47.

Comment A: A deed not witnessed will convey title as between the parties. *Fulton v Priddy*, 123 Mich 298, 82 NW 65 (1900).

Comment B: 2002 P.A. 19 and 2002 P.A. 23, both effective March 4, 2002, eliminated any witnessing requirement for the recording of an instrument affecting Michigan real property. See Standard 3.9 as to instruments executed outside of Michigan.

Note: The Committee expresses no opinion with respect to the effect, if any, of 2002 P.A. 23 on a deed with fewer than two witnesses and recorded less than 10 years before March 4, 2002.

STANDARD 3.6

ABSENCE OF FEDERAL DOCUMENTARY STAMPS FROM DEED EXECUTED BEFORE JANUARY 1, 1968

STANDARD: THE ABSENCE OF FEDERAL DOCUMENTARY STAMPS FROM A DEED EXECUTED BEFORE JANUARY 1, 1968 DOES NOT AFFECT MARKETABILITY OF TITLE OR PREVENT THE DEED FROM BEING ENTITLED TO BE RECORDED.

Problem: Blackacre was conveyed by a deed executed in 1967 which recited the consideration to be \$10,000. No federal documentary stamps were affixed to the deed. Is the deed entitled to be recorded?

Answer: Yes.

Authorities: 26 USC 4361. Treas Reg §§43.4361-1, 43.4361-2 and 43.4361-3.

Comment: No statute or reported case in Michigan has required the affixing of federal documentary stamps for valid delivery or recording, and the attorney general has opined that “the affixing of such stamps is no responsibility of the Register as far as recording is concerned.” OAG 1944-1975, No O-2923, p 151 (December 19, 1944).

The tax imposed by 26 USC 4361, payment of which was evidenced by attaching federal documentary stamps, does not apply on or after January 1, 1968.

STANDARD 3.7

ABSENCE OF MICHIGAN DOCUMENTARY STAMPS ON RECORDED INSTRUMENT

STANDARD: THE VALIDITY AS TO NOTICE OF A RECORDED INSTRUMENT IS NOT AFFECTED BY THE ABSENCE OF DOCUMENTARY STAMPS EVIDENCING PAYMENT OF THE MICHIGAN STATE OR COUNTY TRANSFER TAX OR THE ABSENCE OF A STATEMENT OF THE REASON THE INSTRUMENT IS EXEMPT FROM TRANSFER TAX.

Problem A: A deed stating a consideration of \$5,000 was recorded in 1998. No documentary stamps evidencing payment of the Michigan state or county transfer tax were affixed. Is the recorded deed valid as to notice?

Answer: Yes.

Problem B: A deed stating a consideration of “less than \$100” was recorded in 1998. The deed did not contain a statement as to the basis for exemption from payment of Michigan state or county transfer tax. Is the recorded deed valid as to notice?

Answer: Yes.

Authorities: MCL 207.511 and 207.533.

STANDARD 3.8

APPLICABILITY OF MICHIGAN RECORDING REQUIREMENTS TO CONVEYANCE OR MORTGAGE EXECUTED OR ACKNOWLEDGED OUTSIDE OF MICHIGAN

STANDARD: A CONVEYANCE OR MORTGAGE OF MICHIGAN REAL PROPERTY, ALTHOUGH EXECUTED OR ACKNOWLEDGED OUTSIDE OF MICHIGAN, IS SUBJECT TO ALL MICHIGAN RECORDING REQUIREMENTS EXCEPT THOSE MADE INAPPLICABLE BY LAW.

Problem A: George Davis mortgaged Blackacre, a parcel of real property in Michigan, by a mortgage executed and acknowledged in another state in conformity with the laws of that state. The marital status of George Davis is not stated in the mortgage. Is the mortgage entitled to be recorded?

Answer: No. The statute requiring that the marital status of a male grantor and mortgagor be stated applies to instruments executed or acknowledged both within and outside of Michigan.

Problem B: Martha Davis, describing herself as the survivor of George Davis, deceased, conveyed Blackacre, a parcel of real property in Michigan, by a deed executed and acknowledged in another state in conformity with the laws of that state. No certified copy of the death certificate or other recordable proof of George Davis's death was attached to the deed or previously recorded. Is the deed entitled to be recorded?

Answer: No.

Problem C: George Davis, a single man, conveyed Blackacre, a parcel of real property in Michigan, by a deed executed and acknowledged in another state in conformity with the laws of that state. While Davis's marital status is stated in the deed, the address of the grantee is not stated, the name of the notary public is not typed or printed on the instrument, and the first page of the instrument does not contain at least a two-and-one-half-inch top margin. Is the deed entitled to be recorded?

Answer: Yes. The statute which imposes these and certain other recording requirements is expressly made inapplicable to instruments executed or acknowledged outside of Michigan.

Problem D: Same facts as in Problem C, except that the deed is dated May 1, 1997 and purports to evidence more than one recordable event. Is the deed entitled to be recorded?

Answer: No. The statute prohibiting the register of deeds from recording an instrument executed after April 1, 1997 if the instrument purports to evidence more than one recordable event applies to instruments executed or acknowledged both within and outside of Michigan.

Authorities: Problem A: MCL 565.221.

Problem B: MCL 565.48.

Problem C: MCL 565.201, 565.201a and 565.203.

Problem D: MCL 565.201(3).

Comment A: The Attorney General has opined that the statute requiring the marital status of male grantors and mortgagors to be stated in an instrument of conveyance does not apply to a male grantor or mortgagor acting in a representative capacity whose wife holds no interest in the real property conveyed or mortgaged. OAG 1915, p. 166 (September 22, 1915).

Comment B: MCL 565.202 permits certain recording deficiencies to be cured by the recording of an affidavit complying with that provision concurrently with the recording of the instrument containing the recording deficiencies.

Notes: See Standard 3.4 regarding the absence of a statement of the marital status of a male grantor. See Standard 6.13 for the requirements for recording a conveyance by a survivor. See Standard 3.9 regarding requirements for the witnessing of a deed executed outside Michigan.

STANDARD 3.9

WITNESSING OF DEED EXECUTED OUTSIDE OF MICHIGAN

STANDARD: A DEED EXECUTED OUTSIDE OF MICHIGAN HAVING FEWER THAN TWO WITNESSES WAS ENTITLED TO BE RECORDED IN MICHIGAN BEFORE MARCH 4, 2002 IF THE DEED COMPLIED WITH THE WITNESSING REQUIREMENTS OF THE LAW OF THE STATE, TERRITORY, DISTRICT OR COUNTRY IN WHICH IT WAS EXECUTED. A DEED EXECUTED OUTSIDE OF MICHIGAN WITHOUT WITNESSES IS ENTITLED TO BE RECORDED IN MICHIGAN ON OR AFTER MARCH 4, 2002.

Problem A: Michigan real property was conveyed by a deed executed on July 10, 2001 in a jurisdiction in which witnesses were not required. The deed was not witnessed but otherwise complied with Michigan recording requirements and was presented for recording on March 1, 2002. Was the deed entitled to be recorded?

Answer: Yes.

Problem B: Michigan real property was conveyed by a deed executed on March 4, 2002 in a foreign jurisdiction. At the time the deed was executed and when it was presented for recording in Michigan, the foreign jurisdiction required that signatures on deeds be witnessed. The deed was not witnessed but otherwise complied with Michigan recording requirements and was presented for recording on March 14, 2002. Was the deed entitled to be recorded?

Answer: Yes.

Authorities: MCL 565.8, 565.9, 565.11 and 565.201.

Comment: 2002 P.A. 19 and 2002 P.A. 23, both effective March 4, 2002, eliminated any witnessing requirement for the recording of an instrument affecting Michigan real property, regardless of where it was executed. See Standard 3.5 as to instruments executed in Michigan.

STANDARD 3.10

ACKNOWLEDGMENT OF INSTRUMENT EXECUTED IN UNITED STATES OUTSIDE OF MICHIGAN

STANDARD: A CONVEYANCE OF MICHIGAN REAL PROPERTY, ACKNOWLEDGED BEFORE A PERSON AUTHORIZED BY THE LAW OF ANOTHER STATE, TERRITORY OR DISTRICT OF THE UNITED STATES TO PERFORM THE ACKNOWLEDGMENT, IS RECORDABLE IN MICHIGAN IF A CERTIFICATE OF AUTHORITY OR THE SEAL OF OFFICE OF THE PERSON IS ATTACHED TO THE CONVEYANCE.

Problem A: John Doe conveyed Blackacre, a parcel of real property in Michigan, by a deed acknowledged before a Minnesota county auditor, who had authority to perform the acknowledgment, as evidenced by a certificate of a clerk of a court of record attached to the deed. Is the deed entitled to be recorded?

Answer: Yes.

Problem B: John Doe conveyed Blackacre, a parcel of real property in Michigan, by a deed acknowledged before an Illinois notary public. The notary public's seal of office was affixed to the deed. Is the deed entitled to be recorded?

Answer: Yes.

Authorities: MCL 565.9 and 565.10.

Comment: MCL 565.9 provides that acknowledgments may be performed in another state, territory or district of the United States before "any judge of a court of record, notary public, justice of the peace, master in chancery or other officer appointed by the laws of such state, territory or district to take the acknowledgment of deeds, or before any commissioner appointed by the governor of the state for such purpose." (The office of commissioner of deeds was abolished by 1943 P.A. 15.) MCL 565.10 provides that, except for a commissioner of deeds, the officer performing the acknowledgment is to affix his or her seal of office. If the officer is a justice of the peace, or has no seal, then the

deed may be authenticated by an attached certificate of the clerk or other authorized certifying officer of a court of record of the county or district, or the secretary of state of the state or territory.

Because MCL 565.9 and 565.10 are still in effect, an instrument may be acknowledged according to their terms, notwithstanding the simpler procedures authorized by the Uniform Recognition of Acknowledgments Act. See, Standard 3.11.

MCL 565.252 authorized acknowledgments in any other state, territory or district of the United States by any lawfully authorized person. An acknowledgment performed by a notary public could be authenticated by the notarial seal; an acknowledgment performed by any other officer was required to be authenticated by the certificate of a clerk of a court of record in the county in which the officer resided or performed the acknowledgment or the certificate of the secretary of state of the state or territory. MCL 565.252 was repealed, effective March 20, 1970, by the Uniform Recognition of Acknowledgments Act, MCL 565.270.

The Uniform Recognition of Acknowledgments Act has no validating provisions and does not affect notarial acts performed before its effective date, March 20, 1970. MCL 565.268.

STANDARD 3.11

ACKNOWLEDGMENT OF INSTRUMENT WITHIN UNITED STATES AND OUTSIDE OF MICHIGAN ON OR AFTER MARCH 20, 1970

STANDARD: ON OR AFTER MARCH 20, 1970, THE EFFECTIVE DATE OF THE UNIFORM RECOGNITION OF ACKNOWLEDGMENTS ACT, AN INSTRUMENT AFFECTING MICHIGAN REAL PROPERTY MAY BE ACKNOWLEDGED WITHIN THE UNITED STATES AND OUTSIDE OF MICHIGAN:

- (A) BEFORE A NOTARY PUBLIC AUTHORIZED TO PERFORM NOTARIAL ACTS IN THE PLACE WHERE THE ACKNOWLEDGMENT IS TAKEN, OR A JUDGE, CLERK OR DEPUTY CLERK OF ANY COURT OF RECORD IN SUCH PLACE. IN SUCH A CASE, THE SIGNATURE, TITLE, AND SERIAL NUMBER, IF ANY, OF THE PERSON PERFORMING THE ACKNOWLEDGMENT ARE SUFFICIENT PROOF OF AUTHORITY TO PERFORM THE ACT; OR**
- (B) BEFORE ANY OTHER PERSON AUTHORIZED TO PERFORM NOTARIAL ACTS IN THE PLACE WHERE THE ACKNOWLEDGMENT IS TAKEN. IN SUCH A CASE, THE AUTHORITY OF THE PERSON PERFORMING THE ACKNOWLEDGMENT MUST BE EVIDENCED BY THE CERTIFICATE OF THE CLERK OF A COURT OF RECORD IN THE PLACE WHERE THE ACKNOWLEDGMENT OCCURS AS TO THE OFFICIAL CHARACTER OF THE PERSON PERFORMING THE ACKNOWLEDGMENT AND HIS OR HER AUTHORITY TO DO SO; OR**
- (C) IF PERFORMED FOR A MEMBER OF THE ARMED FORCES, A MERCHANT SEAMAN, A PERSON SERVING WITH OR ACCOMPANYING THE ARMED FORCES OR A DEPENDENT OF THE PERSON, BEFORE A COMMISSIONED OFFICER IN ACTIVE SERVICE WITH THE ARMED FORCES OF THE UNITED STATES OR**

ANY OTHER PERSON AUTHORIZED BY REGULATION OF THE ARMED FORCES TO PERFORM NOTARIAL ACTS. IN SUCH A CASE, THE SIGNATURE, RANK OR TITLE, AND SERIAL NUMBER, IF ANY, OF THE PERSON PERFORMING THE ACKNOWLEDGMENT ARE SUFFICIENT PROOF OF AUTHORITY TO PERFORM THE ACT.

Problem A: Blackacre was conveyed in 1998 by a deed acknowledged before a Florida notary public. No notarial seal or other authentication was attached to the deed. Is the deed entitled to be recorded?

Answer: Yes.

Problem B: Blackacre was conveyed by a deed executed in 2000 and acknowledged before the mayor of Gulfport, Mississippi, who under Mississippi law was authorized to perform acknowledgments. Attached to the deed was a certificate of the clerk of a court of record in Gulfport, Mississippi certifying the official capacity of the mayor and the mayor's authority to perform acknowledgments. Is the deed entitled to be recorded?

Answer: Yes.

Authorities: MCL 565.262 and 565.263.

STANDARD 3.12

ACKNOWLEDGMENT OF INSTRUMENT EXECUTED IN FOREIGN COUNTRY BEFORE MARCH 20, 1970

STANDARD: AN INSTRUMENT AFFECTING MICHIGAN REAL PROPERTY, EXECUTED IN A FOREIGN COUNTRY BEFORE MARCH 20, 1970, IS ENTITLED TO BE RECORDED IN MICHIGAN ONLY IF THE INSTRUMENT WAS ACKNOWLEDGED BEFORE ONE OF THE OFFICERS AUTHORIZED BY MICHIGAN STATUTE TO PERFORM ACKNOWLEDGMENTS AND IF THE AUTHORITY OF THE PERSON PERFORMING THE ACKNOWLEDGMENT IS EVIDENCED IN THE MANNER PRESCRIBED BY THE STATUTE.

Problem: Blackacre was conveyed by a deed executed in 1969 in a foreign country. The deed was acknowledged before an officer authorized by Michigan statute to perform acknowledgments in foreign countries and his or her authority to do so was evidenced in the manner prescribed by the statute. Is the deed entitled to be recorded?

Answer: Yes.

Authorities: MCL 565.11. Also, MCL 565.251a and 565.256 (both repealed, effective March 20, 1970, by 1969 P.A. 57, being MCL 565.270).

Comment: Before March 20, 1970, the effective date of 1969 P.A. 57, the Uniform Recognition of Acknowledgments Act (MCL 565.261 through 565.270), an instrument affecting Michigan real property could be acknowledged in a foreign country only before (a) a notary public, (b) certain specified officers in the United States diplomatic and consular service (MCL 565.11 and 565.256), or (c) with respect to persons serving in or with the armed forces of the United States or civilian employees and their dependents, a commissioned officer in the armed forces (MCL 565.251a; see, Standard 3.14).

Acknowledgments performed by a notary public were required to be authenticated by his or her seal. Those performed by a diplomatic or consular officer could be verified by the officer's certificate (MCL 565.11) or his or her seal (MCL 565.256).

As set forth in the Authorities, MCL 565.251a and 565.256 have been repealed. Because MCL 565.11 is still in effect, an instrument may be acknowledged and authenticated pursuant to that statute, notwithstanding the simplified procedures authorized by the Uniform Recognition of Acknowledgments Act. See, Standard 3.13.

The Uniform Recognition of Acknowledgments Act has no validating provision and does not affect notarial acts performed before its effective date, March 20, 1970. MCL 565.268.

STANDARD 3.13

ACKNOWLEDGMENT OF INSTRUMENT EXECUTED IN FOREIGN COUNTRY ON OR AFTER MARCH 20, 1970

STANDARD: AN INSTRUMENT AFFECTING MICHIGAN REAL PROPERTY, EXECUTED IN A FOREIGN COUNTRY ON OR AFTER MARCH 20, 1970 BEFORE A PERSON AUTHORIZED BY THE LAW OF THE FOREIGN COUNTRY TO PERFORM NOTARIAL ACTS IN THE PLACE WHERE THE ACKNOWLEDGMENT IS PERFORMED, IS ENTITLED TO BE RECORDED IN MICHIGAN IF:

- (A) A FOREIGN SERVICE OFFICER OF THE UNITED STATES RESIDENT IN THE FOREIGN COUNTRY WHERE THE ACKNOWLEDGMENT IS PERFORMED, OR A DIPLOMATIC OR CONSULAR OFFICER OF THE FOREIGN COUNTRY RESIDENT IN THE UNITED STATES, CERTIFIES THAT THE PERSON PERFORMING THE ACKNOWLEDGMENT WAS AUTHORIZED TO DO SO;
- (B) THE OFFICIAL SEAL OF THE PERSON PERFORMING THE ACKNOWLEDGMENT IS AFFIXED TO THE INSTRUMENT; OR
- (C) THE TITLE AND INDICATION OF AUTHORITY TO PERFORM ACKNOWLEDGMENTS APPEARS EITHER IN A DIGEST OF FOREIGN LAW OR IN A LIST CUSTOMARILY USED AS A SOURCE OF THE INFORMATION.

Problem A: Blackacre was conveyed by a deed executed in 1998 and acknowledged in a foreign country before a person authorized to perform notarial acts in the place where the acknowledgment was performed, and whose official seal was affixed to the deed. Is the deed entitled to be recorded?

Answer: Yes.

Problem B: Same facts as in Problem A, except that instead of an official seal there was affixed to the instrument a statement of a consular officer

of the foreign country resident in the United States certifying that the person performing the acknowledgment was authorized to do so. Is the deed entitled to be recorded?

Answer: Yes.

Problem C: Blackacre was conveyed by a deed executed in 1996 and acknowledged in Belfast, Northern Ireland before a Commissioner for Oaths. Martindale-Hubbell International Law Digest (1996), NI-1 Northern Ireland Law Digest, states that “Acknowledgment of any instrument may be made in Northern Ireland before a Commissioner for Oaths.” Is the deed entitled to be recorded?

Answer: Yes.

Authorities: MCL 565.262 and 565.263.

Comment: 1969 P.A. 57, the Uniform Recognition of Acknowledgments Act (MCL 565.261 through 565.270), which became effective March 20, 1970, simplified previously existing requirements as to acknowledgment and authentication of instruments in foreign countries. See, Standard 3.12. Under the Act, acknowledgments may be taken in a foreign country by a notary public authorized to perform notarial acts in the place where the acknowledgment is performed, a judge, clerk or deputy clerk of any court of record in such place, an officer of the United States foreign service, a consular officer or any other person authorized by regulation of the U. S. State Department to perform notarial acts there. In addition, a commissioned officer in active service with the armed forces of the United States or any other person authorized by regulations of the armed forces to perform notarial acts may perform acknowledgments for members of the armed forces, merchant seamen, persons serving with or accompanying the armed forces, and their dependents. MCL 565.262. See, Standard 3.14. With respect to acknowledgments performed by notaries public, judges, clerks, deputy clerks, foreign service officers, consular officers, commissioned officers, and persons authorized by regulation of the U. S. State Department or the armed forces to perform notarial acts, the signature, rank or title, and serial number, if any, of the person are sufficient proof of authority to perform the act. The signature and title are *prima facie* evidence that the person performing the acknowledgment had the designated title and that the signature was genuine. MCL 565.263.

STANDARD 3.14

ACKNOWLEDGMENT OF INSTRUMENT BEFORE COMMISSIONED OFFICER

STANDARD: AN INSTRUMENT AFFECTING MICHIGAN REAL PROPERTY, EXECUTED BY A MEMBER OF THE UNITED STATES ARMED FORCES, A MERCHANT SEAMAN, OR A PERSON SERVING WITH OR ACCOMPANYING THE ARMED FORCES, OR THEIR DEPENDENTS, IS RECORDABLE IN MICHIGAN IF ACKNOWLEDGED OUTSIDE OF MICHIGAN BEFORE A COMMISSIONED OFFICER IN ACTIVE SERVICE WITH THE ARMED FORCES. ON OR AFTER MARCH 20, 1970, THE OFFICER'S SIGNATURE, RANK OR TITLE, AND SERIAL NUMBER, IF ANY, ARE SUFFICIENT PROOF OF THE OFFICER'S AUTHORITY.

Problem: George Davis, a single man and a member of the United States armed forces, conveyed Michigan real property by a deed executed in 1998. The deed was acknowledged in Alabama before a major in the United States Army, whose rank and serial number are set forth in the deed. Is the deed entitled to be recorded?

Answer: Yes.

Authorities: MCL 565.262 and 565.263

Comment: The Uniform Recognition of Acknowledgements Act, (MCL 565.261 through 565.270), authorizes the performing of acknowledgments outside of Michigan by commissioned officers in active service with the armed forces, and by any other person authorized by regulation of the armed forces to do so, for members of the armed forces, merchant seamen, or any other person serving with or accompanying the armed forces, and their dependents. MCL 565.262. The signature, rank or title, and serial number, if any, of the person performing the acknowledgment are sufficient proof of his or her authority to do so, and *prima facie* evidence that he or she was a person with the designated title and that the signature was genuine. MCL 565.263.

The Uniform Recognition of Acknowledgments Act pertains only to acknowledgments performed outside of Michigan. There is no statutory authority for a commissioned officer in the armed forces to perform an acknowledgment in Michigan of an instrument affecting Michigan real property.

STANDARD 3.15

DELAY IN RECORDING DEED

STANDARD: DELAY IN RECORDING A DEED WILL NOT AFFECT THE MARKETABILITY OF THE TITLE ACQUIRED BY THE GRANTEE EXCEPT IF THERE ARE INTERVENING RIGHTS OF A THIRD PARTY.

Problem A: Jane Doe, the owner of Blackacre, conveyed Blackacre to Simon Grant by a deed which was not recorded until 12 years after its execution and acknowledgment. No third party rights are involved. Did Grant acquire marketable title to Blackacre?

Answer: Yes. Delivery is presumed from the recording of the deed. As between the parties, the deed is valid upon delivery without recording.

Problem B: Same facts as in Problem A, except that Doe executed a mortgage of Blackacre six months after executing the deed to Grant. The mortgage was recorded. Did Grant acquire marketable title to Blackacre free of the mortgage?

Answer: No.

Authorities: MCL 600.2109 and 600.2110. MRE 803(14). *Wilt v Culver*, 38 Mich 189 (1878); *Sinclair v Slawson*, 44 Mich 123, 6 NW 207 (1880); *Patrick v Howard*, 47 Mich 40, 10 NW 71 (1881); *Sprunger v Ensley*, 211 Mich 103, 178 NW 714 (1920).

Comment: As between the parties, the presumption of delivery afforded by the recording of the deed may be rebutted by competent evidence. *Clarke v Detroit & Security Trust Co*, 257 Mich 416, 241 NW 217 (1932).

STANDARD 3.16

INSTRUMENT OF CONVEYANCE PURSUANT TO DURABLE POWER OF ATTORNEY

STANDARD: AN INSTRUMENT OF CONVEYANCE, EXECUTED PURSUANT TO A POWER OF ATTORNEY STATING THE INTENT OF THE PRINCIPAL THAT THE AUTHORITY CONFERRED IS EXERCISABLE NOTWITHSTANDING SUBSEQUENT DISABILITY OR INCAPACITY OF THE PRINCIPAL, IS EFFECTIVE NOTWITHSTANDING LATER DISABILITY OR INCAPACITY OF THE PRINCIPAL.

Problem A: John Doe executed a deed to Mary Roe describing Blackacre, pursuant to a power of attorney granted to him by Jane Doe, the owner of Blackacre. The power of attorney was signed by Jane Doe and was recorded. It contained language stating the intent of Jane Doe that the authority given to the attorney in fact was exercisable notwithstanding Jane Doe's later disability or incapacity. At the time the deed was given, Jane Doe was under disability, and both John Doe and Mary Roe were aware of the disability. Did Mary Roe acquire marketable title to Blackacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except that before the execution of the deed, but after the execution of the power of attorney, Jane Doe was determined to be incompetent, and a conservator of her estate was appointed and qualified. Did Mary Roe acquire marketable title to Blackacre?

Answer: Yes. Neither the incompetence of Jane Doe nor the appointment of a conservator for her estate automatically revoked the power of attorney. The conservator, however, had the same power Jane Doe had, if the conservator had not been appointed, to revoke the power of attorney.

Problem C: Same facts as in Problem A, except that the power of attorney did not contain language stating the intent of Jane Doe to confer upon the attorney in fact a power exercisable notwithstanding her later

disability or incapacity. Did Mary Roe acquire marketable title to Blackacre?

Answer: No. However, if John Doe and Mary Roe had acted in good faith under the power of attorney without actual knowledge of the disability or incapacity of Jane Doe, the action would have been binding upon Jane Doe, her heirs, devisees and personal representatives.

Comment: Between December 23, 1976 and June 30, 1979, a power of attorney not affected by disability was known as a durable power of attorney and was governed by MCL 556.151 *et seq.* Effective July 1, 1979, MCL 556.151 *et seq.* was repealed by MCL 700.993, under which the former durable power of attorney became known as a power of attorney not affected by disability. Effective April 1, 2000, MCL 700.993 was repealed by MCL 700.8102 and MCL 700.5501 was enacted, defining a durable power of attorney as a power not affected by the principal's subsequent disability or incapacity. The death of a principal who has executed a power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the principal's death, acts in good faith under the power. The disability or incapacity of a principal who has previously executed a power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the principal's disability or incapacity, acts in good faith under the power. MCL 700.5504.

Authorities: MCL 700.5501, 700.5502 and 700.5504.

STANDARD 3.17

POWER OF ATTORNEY FOR CONVEYANCE OF INTEREST IN REAL PROPERTY STRICTLY CONSTRUED

STANDARD: AN INTEREST IN REAL PROPERTY MAY BE CONVEYED OR ENCUMBERED BY AN INSTRUMENT EXECUTED PURSUANT TO A POWER OF ATTORNEY ONLY IF THE POWER OF ATTORNEY SPECIFICALLY AUTHORIZES THE ATTORNEY IN FACT TO CONVEY OR ENCUMBER THE INTEREST ON BEHALF OF THE PRINCIPAL.

Problem A: John Doe executed a mortgage describing Blackacre and given in favor of Richard Roe. The mortgage included a statement that it was given pursuant to a power of attorney granted to John Doe by Mary Smith, the owner of Blackacre. The power of attorney contained language authorizing John Doe to sell and convey all real property owned by Mary Smith, specifically including Blackacre. The power of attorney did not refer, however, to the mortgaging of real property. Is Blackacre subject to the mortgage executed by John Doe?

Answer: No.

Problem B: John Doe gave a power of attorney to Richard Roe granting him the power to sell and convey all real property owned by John Doe. After execution of the power of attorney, John Doe acquired title to Blackacre. Richard Roe subsequently executed a deed describing Blackacre given in favor of James Smith pursuant to the power of attorney. Did Smith acquire marketable title to Blackacre?

Answer: No. The power of attorney did not grant power to the attorney in fact to sell and convey real property acquired by John Doe after he executed the power of attorney.

Problem C: John Doe gave a power of attorney to Richard Roe, granting him the power to sell and convey all real property owned by John Doe and “to perform all acts necessary to effectuate the sale and conveyance.” John Doe was the owner of Blackacre. Richard Roe negotiated a sale

of Blackacre but could not attend the closing of the sale. Roe gave a power of attorney to James Smith authorizing Smith to execute the deed of Blackacre on behalf of John Doe. Smith executed the deed and it was recorded. Did the deed convey marketable title to Blackacre?

Answer: No. The authority to sell and convey Blackacre given by John Doe to Richard Roe was neither delegable nor assignable. James Smith had no authority to execute a deed of Blackacre.

Authorities: Problem A: *Jeffrey v Hursch*, 49 Mich 31, 12 NW 898 (1882); *Long v City of Monroe*, 265 Mich 425, 251 NW 582 (1933).

Problem B: *Penfold v Warner*, 96 Mich 179, 55 NW 680 (1893).

Problem C: *Menenberg v Carl R. Sams Realty Co*, 337 Mich 143, 59 NW2d 125 (1953).

STANDARD 3.18

UNRECORDED CONVEYANCE VOID AGAINST SUBSEQUENT PURCHASER FOR VALUE AND WITHOUT KNOWLEDGE

STANDARD: A CONVEYANCE OF REAL PROPERTY IS VOID AS AGAINST THE GRANTEE IN A SUBSEQUENT RECORDED CONVEYANCE GIVEN FOR A VALUABLE CONSIDERATION, IF THE SUBSEQUENT GRANTEE HAS NO KNOWLEDGE OF THE PRIOR CONVEYANCE AND THE PRIOR CONVEYANCE IS NOT RECORDED OR IS RECORDED AFTER THE RECORDING OF THE SUBSEQUENT CONVEYANCE.

Problem A: George Davis conveyed Blackacre by deed to Simon Grant in 1990. The deed was not then recorded and Grant did not enter into possession. Later, Davis conveyed Blackacre to Mary Smith for valuable consideration by a deed recorded in 1992. Smith had no knowledge of the deed from Davis to Grant. The deed from Davis to Grant was recorded in 1994. Did Smith acquire marketable title to Blackacre?

Answer: Yes.

Authorities: MCL 565.25 and 565.29. *Attwood v Bearss*, 47 Mich 72, 10 NW 112 (1881); *Michigan National Bank v Morren*, 194 Mich App 407, 487 NW2d 784 (1992); *First of America Bank–West Michigan v Alt*, 848 F Supp 1343 (WD Mich 1993).

Comment: The Michigan Recording Act is a race-notice statute: the first interest-holder of record takes priority unless that person has notice of a prior unrecorded interest. Notice on the part of a subsequent grantee includes both imputed and actual knowledge of a prior unrecorded interest. Imputed knowledge, sometimes called inquiry notice or constructive notice, has been defined as having such knowledge as would cause a reasonable person to make further inquiry as to a prior interest. The subsequent grantee is then presumed to have notice of those facts which would have been discovered if the grantee had exercised ordinary diligence. *Lakeside Associates v Toski Sands*, 131 Mich App 292, 346 NW2d 92 (1983).

STANDARD 3.19

RECORDING OF COPY OF LOST OR DESTROYED UNRECORDED MORTGAGE WITH ATTACHED AFFIDAVIT COMPLYING WITH MCL 565.451a(g)

STANDARD: A LOST OR DESTROYED EXECUTED BUT UNRECORDED MORTGAGE, IN RECORDABLE FORM, IS DULY RECORDED AS OF THE DATE OF RECORDING OF A LEGIBLE COPY OF THE MORTGAGE WITH AN ATTACHED AFFIDAVIT COMPLYING WITH MCL 565.451a(g), AND THE LIEN OF THE MORTGAGE IS PERFECTED AS OF THE DATE OF SUCH RECORDING.

Problem A: Jane Doe, the owner of Blackacre, gave a mortgage of Blackacre to Edward Lane. The mortgage complied with the recording requirements of MCL 565.201. Lane lost the mortgage before attempting to record it. Later, he found a legible copy of the unrecorded mortgage signed by the mortgagor. The mortgage was in recordable form. Lane signed and recorded an affidavit, with the copy of the mortgage attached, attesting that the mortgage was a copy of the mortgage Doe gave to him; the affidavit otherwise complied with MCL 565.451a(g). Is the mortgage recorded and is the lien of the mortgage perfected?

Answer: Yes.

Authorities: MCL 565.201 and 565.451a(g).

Comment A: The affidavit to which the legible copy of the lost or destroyed mortgage is attached must include the statements and information required for such an affidavit by MCL 565.451a(g), including (1) the names of the mortgagor and the mortgagee; (2) the legal description of the real property, the property tax identification number and, if applicable, the address of the real property; (3) a statement that the original mortgage was lost or destroyed, that it was signed by the parties to the unrecorded, attached mortgage and that, to the best of the affiant's knowledge, the original mortgage was delivered from the mortgagor to the mortgagee; (4) that the affiant either mailed a copy of the affidavit and the unrecorded mortgage by first class certified or registered mail, return receipt requested, to the mortgagor at the mortgagor's address last known to the affiant, or personally served a copy of the affidavit and the unrecorded mortgage on the mortgagor.

Comment B: The affidavit of the lost or destroyed mortgage may include only one attached mortgage.

Comment C: MCL 565.201(6) provides that the copy of an unrecorded mortgage attached to an affidavit that is recordable under MCL 565.451a shall “meet all requirements for recording;” accordingly, the copy of the unrecorded mortgage must include the signature of the mortgagor and comply with all other requirements for recording under MCL 565.201.

CHAPTER IV

DOWER



STANDARD 4.1

ESTATE TO WHICH DOWER ATTACHES

STANDARD: DOWER ATTACHES ONLY TO REAL PROPERTY IN WHICH THE HUSBAND WAS SEIZED OF AN ESTATE OF INHERITANCE DURING THE MARRIAGE.

Problem A: John Doe, a married man, owned Blackacre subject to a life estate. Doe, as a married man, deeded Blackacre to Richard Roe. Doe's wife did not sign the deed. Is Roe's interest in Blackacre free of any dower of Doe's wife?

Answer: No.

Problem B: John Doe, a married man, was the lessee of Blackacre under a ninety-nine year lease. During the term of the lease, Doe, as a married man, assigned his interest in Blackacre to Richard Roe. Doe's wife did not sign the lease. Is Roe's interest in Blackacre free of any dower of Doe's wife?

Answer: Yes. An estate of inheritance means a fee simple estate. An estate for a term for years is not an estate of inheritance.

Problem C: John Doe, a married man, was the lessee of Blackacre under a ninety-nine year lease. During the term of the lease, Doe died testate. Doe's widow elected to take dower in his estate. The fiduciary of Doe's estate, acting under a testamentary power of sale, assigned Doe's interest to Richard Roe. Is Roe's interest in Blackacre free of the dower of Doe's widow?

Answer: Yes.

Problem D: John Doe, a married man, was the holder of a life estate in Blackacre. Doe, as a married man, conveyed his interest in Blackacre to Richard Roe. Doe's wife did not join in the conveyance. Is Roe's interest in Blackacre free of any dower of Doe's wife?

Answer: Yes. Doe had no estate of inheritance to which dower could attach.

Authorities: Generally: MCL 554.2, 558.1.

Problem B: *Redman v Shaw*, 300 Mich 314, 1 NW2d 555 (1942).

Problem D: *Spears v James*, 319 Mich 341, 29 NW2d 829 (1947); *Case v Green*, 53 Mich 615, 19 NW 554 (1884).

Comment A: See Standard 7.9 as to the effect of dower on probate sales.

Comment B: Other interests in real property, in addition to those set forth above, to which dower will not attach, are tenancies by the entireties (*Agar v Streeter*, 183 Mich 600, 150 NW 160 (1914)); joint tenancies, including joint life estates with remainder to the survivor (*Schmidt v Jennings*, 359 Mich 376, 102 NW2d 589 (1960); see Standard 4.4); estates in partnership (see Standard 11.2); vendor's interests in land contracts (see Standard 4.2); vendee's interests in land contracts (see Standard 4.3); and oil and gas leasehold interests (*Redman v Shaw*, 300 Mich 314, 1 NW2d 555 (1942)). A wife is not entitled to dower in real property to which her husband held title as trustee where the husband is not the sole beneficiary of the trust (*Sagendorph v Lutz*, 286 Mich 103, 281 NW 653 (1938)).

Note: See Chapter V with regard to possible homestead rights.

STANDARD 4.2

DOWER – VENDOR’S INTEREST

STANDARD: A WIFE HAS NO DOWER IN REAL PROPERTY THAT HER HUSBAND OWNS IN FEE IF AT ALL TIMES DURING COVERTURE HIS INTEREST WAS SUBJECT TO AN EXECUTORY LAND CONTRACT.

Problem A: John Doe, a single man, owned Blackacre in fee. Doe sold Blackacre on land contract to Charles Palmer. Later, Doe married. Doe deeded Blackacre to Palmer pursuant to the land contract. Doe’s wife did not sign the deed. Did Palmer acquire title to Blackacre free of the dower of Doe’s wife?

Answer: Yes. Although Doe’s interest in Blackacre was a fee simple during coverture, the sale on land contract effected an equitable conversion of his interest to personalty, rendering the dower statute inapplicable. The same result would follow if Doe, instead of conveying to Palmer in fulfillment of the land contract, had conveyed to some other person subject to the land contract.

Problem B: John Doe, a single man, owned Blackacre. Doe sold Blackacre on land contract. Later, Doe married. The land contract was then terminated. Later, Doe deeded Blackacre to Simon Grant. Doe’s wife did not sign the deed. Did Grant acquire title to Blackacre free of the dower of Doe’s wife?

Answer: No. When the land contract was terminated, the equitable conversion ended and the dower of Doe’s wife attached to Blackacre.

Problem C: John Doe, a single man, owned Blackacre. Doe sold Blackacre on land contract to Charles Palmer. Later, Doe married. After Doe died, his widow elected to take dower in his estate. The personal representative of Doe’s estate, upon receiving the balance secured by the land contract, deeded Blackacre to Palmer. Doe’s widow did not sign the deed. Did Palmer acquire title to Blackacre free of the dower of Doe’s widow?

Answer: Yes. Because at all times during coverture Doe’s title was subject to a valid executory land contract, his interest is regarded as person-

alty, passes to his personal representative and does not descend to his heirs, and is not an interest in real property to which dower can attach.

Authorities: Problem A: *Detroit Trust Co v Baker*, 230 Mich 551, 203 NW 154 (1925), overruling *In re Estate of Pulling*, 97 Mich 375, 56 NW 765 (1893); *In re Estate of McBride*, 253 Mich 305, 235 NW 166 (1931); *Pungs v Hilgendorf*, 289 Mich 46, 286 NW 152 (1939).

Problem B: MCL 558.1.

Problem C: *Detroit Trust Co v Baker*, 230 Mich 551, 203 NW 154 (1925), overruling *In re Estate of Pulling*, 97 Mich 375, 56 NW 765 (1893); *In re Estate of McBride*, 253 Mich 305, 235 NW 166 (1931).

Comment: Although a wife has no dower in her husband's real property that has at all times during the marriage been subject to an executory land contract, an examiner should require some evidence of record of the land contract to establish of record that a conveyance by the husband alone, either in fulfillment of the land contract or subject to the land contract, is free of the wife's dower.

STANDARD 4.3

DOWER – VENDEE’S INTEREST

STANDARD: A WIFE HAS NO DOWER IN HER HUSBAND’S REAL PROPERTY IF AT ALL TIMES DURING COVERTURE HIS INTEREST WAS THAT OF A LAND CONTRACT VENDEE.

Problem A: Charles Palmer, a single man, purchased Blackacre on land contract. Later, Palmer married. Palmer then conveyed his vendee’s interest in Blackacre to Simon Grant. Palmer’s wife did not join in the conveyance. Was Grant’s interest in Blackacre free of any dower of Palmer’s wife?

Answer: Yes. A land contract vendee’s interest in real property is not an estate of inheritance to which dower can attach.

Problem B: Same facts as in Problem A, except that Palmer was married at the time he purchased Blackacre. Was Grant’s interest in Blackacre free of any dower of Palmer’s wife?

Answer: Yes.

Problem C: John Doe, a single man, purchased Blackacre on land contract. Doe assigned his interest in Blackacre to Charles Palmer, a married man. Palmer then assigned his vendee’s interest in Blackacre to Simon Grant. Palmer’s wife did not join in the assignment. Was Grant’s interest in Blackacre free of any dower of Palmer’s wife?

Answer: Yes

Authorities: MCL 558.1. *Stephens v Leonard*, 122 Mich 125, 80 NW 1002 (1899); *Dalton v Mertz*, 197 Mich 390, 163 NW 912 (1917).

Note: See Chapter V with regard to possible homestead rights.

STANDARD 4.4

DOWER – JOINT TENANCY

STANDARD: A WIFE HAS NO INCHOATE DOWER IN REAL PROPERTY THAT HER HUSBAND AND ONE OR MORE OTHER PERSONS OWN AS JOINT TENANTS.

Problem A: John Doe and Richard Roe owned Blackacre as joint tenants. Doe and Roe deeded Blackacre to Lawrence Smith, describing themselves as married men. Their wives did not sign the deed. Did Smith acquire title to Blackacre free of the dower of the wives of Doe and Roe?

Answer: Yes.

Problem B: John Doe and Richard Roe owned Blackacre as joint tenants. Doe died leaving a widow. Later, Roe deeded Blackacre to Sally Smith, describing himself as a married man. Roe's wife did not sign the deed. Did Smith acquire title to Blackacre free of the dower of the wives of Doe and Roe?

Answer: No. Smith's title is free of the consummate dower of Doe's wife, but is subject to the inchoate dower of Roe's wife.

Authorities: MCL 558.1. *Midgley v Walker*, 101 Mich 583, 60 NW 296 (1894); *Smith v Smith*, 290 Mich 143, 287 NW 411 (1939); *Schmidt v Jennings*, 359 Mich 376, 102 NW2d 589 (1960).

STANDARD 4.5

PRIORITY OF PURCHASE MONEY MORTGAGE OVER DOWER

STANDARD: THE LIEN OF A PURCHASE MONEY MORTGAGE EXECUTED BY A MARRIED MAN ALONE HAS PRIORITY OVER HIS WIFE'S DOWER IN THE MORTGAGED REAL PROPERTY.

Problem: In connection with his purchase of Blackacre, John Doe, a married man, gave a purchase money mortgage of Blackacre. Mary Doe, his wife, did not sign the mortgage. The mortgage was later foreclosed and the redemption period expired. Was Mary Doe's dower in Blackacre extinguished?

Answer: Yes.

Authorities: MCL 558.4. *Burrall v Bender*, 61 Mich 608, 28 NW 731 (1886).

Comment: A mortgage is a purchase money mortgage if the mortgage proceeds are applied on the purchase price. But see, *Graves v American Acceptance Mortgage Corp*, 469 Mich 608, 677 NW2d 829 (2004).

STANDARD 4.6

DESIGNATION OF MARRIED MALE GRANTOR AS “UNMARRIED” OR “SINGLE”

STANDARD: NOTWITHSTANDING THE DESIGNATION IN A CONVEYANCE OF A MALE GRANTOR AS “A SINGLE MAN” OR “AN UNMARRIED MAN,” IF HE IS A MARRIED MAN THE DOWER OF HIS WIFE SURVIVES THE CONVEYANCE UNTIL BARRED BY DEATH, DIVORCE, LAPSE OF TIME OR OTHERWISE.

Problem: John Doe deeded Blackacre, designating himself as “a single man,” although at the time of the deed he was married to Mary Doe. Mary did not sign the deed. Does the grantee take title to Blackacre free of Mary’s dower?

Answer: No.

Authorities: MCL 558.1. *Greiner v Klein*, 28 Mich 12 (1873).

Comment A: In the absence of record notice to the contrary, title examiners generally accept a statement in a conveyance that a male grantor is “single” or “unmarried” as establishing a rebuttable presumption of his unmarried status. See MCL 565.221, which provides for the filing of an affidavit as to the marital status of a male grantor whose marital status was not disclosed on a conveyance that had been accepted for recording.

Comment B: Title examiners generally accept a designation of a male grantor as “a widower” as equivalent to a designation as “single” or “unmarried,” although in other contexts a man may still be a widower notwithstanding his remarriage. See, e.g., *In re Rhead’s Estate*, 288 Mich 220, 284 NW 706 (1939), involving the former Michigan inheritance tax statute. The Committee considers the designation of a male grantor as “a single man” or “an unmarried man” preferable to the use of the term “a widower.”

STANDARD 4.7

NONRESIDENT WIFE HAS NO INCHOATE DOWER IN REAL PROPERTY OF HER HUSBAND

STANDARD: A WOMAN WHO IS A VOLUNTARY NON-RESIDENT OF MICHIGAN HAS NO INCHOATE DOWER IN THE REAL PROPERTY OF HER HUSBAND, WHETHER OR NOT HE IS A RESIDENT OF MICHIGAN.

Problem A: John Doe, the sole owner of Blackacre, deeded Blackacre as "a married man" to Frank Smith. Doe's wife, Mary, did not sign the deed. Mary Doe was a voluntary resident of Indiana at the time of the conveyance. Did Frank Smith acquire Blackacre free of any dower of Mary Doe?

Answer: Yes.

Problem B: Same facts as in Problem A, except that John and Mary Doe were voluntary residents of Iowa at the time of the conveyance. Did Frank Smith acquire Blackacre free of any-dower of Mary Doe?

Answer: Yes.

Problem C: John and Mary Doe were residents of Michigan. John Doe, the sole owner of Blackacre, deeded Blackacre as "a married man." Doe's wife, Mary, did not sign the deed. Mary Doe had been involuntarily committed to a mental institution in Indiana where she remained at the time of the conveyance. Did Mary have inchoate dower in Blackacre at the time of the conveyance?

Answer: Yes.

Authorities: Generally: MCL 558.21. *Pratt v Tefft*, 14 Mich 191 (1866); *Putney v Vinton*, 145 Mich 219, 108 NW 655 (1906).

Problems A and B: MCL 565.453. *Ligare v Semple*, 32 Mich 438 (1875); *First National Bank of Buchanan v Twombly*, 265 Mich 555, 251 NW 777 (1933).

Problem C: MCL 565.453. *Gluc v Klein*, 226 Mich 175, 197 NW

691 (1924).

Comment A: The recording of an affidavit to establish recorded evidence of the residence of persons named in deeds, wills and mortgages is permitted. After July 14, 1965, the affidavit must either include a description of the real property or incorporate the description by reference to a recorded instrument containing the description. MCL 565.451a and 565.451c.

Comment B: During her husband's lifetime, a wife who is a nonresident of Michigan has no presently vested expectancy that she will obtain dower in her husband's real Michigan property upon his death if she voluntarily resided outside of Michigan. This expectancy of dower upon her husband's death is referred to as inchoate dower. For this reason, a married man whose wife is a voluntary nonresident of Michigan may convey Michigan real property he solely owns free of dower. A nonresident wife does, however, obtain dower in Michigan property her husband owned at the time of his death if he died seized of an estate of inheritance. The dower a wife obtains upon her husband's death is referred to as choate dower. MCL 558.21 and 700.2202 expressly recognize a nonresident wife's right to choate dower upon the death of her husband if he died seized of an estate of inheritance in Michigan real property.

STANDARD 4.8

BARRING DOWER BY CONVEYANCE TO HUSBAND'S SUCCESSOR IN INTEREST

STANDARD: A MARRIED WOMAN MAY BAR HER DOWER BY JOINING IN HER HUSBAND'S CONVEYANCE OF REAL PROPERTY OR BY A SUBSEQUENT CONVEYANCE TO THE THEN HOLDER OF THE INTEREST CONVEYED.

Problem A: John Doe, a married man, owned Blackacre. Doe deeded Blackacre to Richard Roe. Doe's wife, Mary, did not sign the deed. Later, Mary Doe deeded Blackacre to Roe, reciting in the deed her intention to bar her dower. Does Roe own Blackacre free of the dower of Mary Doe?

Answer: Yes.

Problem B: James Doe, a married man, owned Blackacre. Doe mortgaged Blackacre to Richard Roe, but Doe's wife, Mary, did not sign the mortgage. Later, Mary Doe executed a mortgage of Blackacre to Roe, reciting in the mortgage her intention to bar her dower. Does Roe have a mortgage on Blackacre free of the dower of Mary Doe?

Answer: Yes.

Authorities: Michigan Constitution 1963, Article X, Sec. 1. MCL 557.21 and 558.13.

Note: See Standard 4.9 with regard to the barring of dower by written contract, agreement or waiver.

STANDARD 4.9

BARRING DOWER BY WRITTEN CONTRACT, AGREEMENT OR WAIVER

STANDARD: A MARRIED WOMAN AFTER FAIR DISCLOSURE, AND IN THE ABSENCE OF FRAUD OR DURESS, MAY WAIVE HER DOWER IN WHOLE OR IN PART BY A WRITTEN CONTRACT, AGREEMENT OR WAIVER, WHICH MAY BE SIGNED BY HER EITHER BEFORE OR AFTER MARRIAGE.

Problem A: John Doe, a married man, and the sole owner of Blackacre, deeded Blackacre in 1993 to Richard Roe. Doe's wife, Mary, did not sign the deed. Later, Mary executed a written instrument waiving her dower in Blackacre. The instrument was recorded. Did Roe then hold Blackacre free of the dower of Mary Doe?

Answer: Yes. However, if Roe had knowledge that fair disclosure had not been made to Mary or that she was the victim of fraud or duress, Mary's dower would not be barred as to Roe, but would be barred as to a subsequent bona fide purchaser for value.

Problem B: John Doe, a married man and the sole owner of Blackacre, deeded Blackacre in 1995 to Richard Roe. Doe's wife, Mary, did not sign the deed. In 1997, Mary signed an agreement with her husband waiving her dower in all real property which John Doe owned, previously owned, and which he might subsequently acquire. Fair disclosure was made to Mary and neither fraud nor duress was practiced on her. Later, John Doe acquired title to Greenacre and deeded Greenacre as a married man. Mary did not sign the deed. Still later, John Doe acquired title to Whiteacre and owned it when he died in 2001. Is the dower of Mary in Blackacre, Greenacre and Whiteacre barred?

Answer: Yes.

Problem C: John Doe, a married man and the sole owner of Blackacre, deeded Blackacre in 1993 to Richard Roe. Doe's wife, Mary, did not sign the deed. In 1994, Doe acquired title to Greenacre and Whiteacre. In 1995, Mary Doe deeded Blackacre, Greenacre and Whiteacre to John Doe, reciting in the deed her intention to bar and waive her dower

in Blackacre, Greenacre and Whiteacre. The deed was recorded. In 1996, Doe, as a married man, deeded Greenacre to Richard Roe. Doe owned Whiteacre when he died in 2001. Is the dower of Mary in Blackacre, Greenacre and Whiteacre barred?

Answer: Yes. The waiver is valid, whether or not Doe then owned Blackacre, Greenacre, and Whiteacre and whether or not he later conveyed them without Mary signing the deeds.

Authorities: Michigan Constitution, Article X, Sec 1. MCL 702.74a (repealed by 1962 P.A. 83, being MCL 700.993, effective July 1, 1979); 700.291 (repealed by 1998 P.A. 336, § 8102); 700.2205, effective April 1, 2000.

Comment A: Before March 20, 1970, when MCL 702.74a took effect, a wife could bar dower by joining in her husband's conveyance or releasing it to his successor in interest. See, Standard 4.8. There was, however, no statutory provision expressly authorizing the release of dower, whether inchoate or consummate, to the husband after marriage. MCL 702.74a permitted a married woman to waive her dower by her written agreement or waiver delivered to her husband before or after marriage. The Revised Probate Code, effective July 1, 1979, repealed MCL 702.74a, by MCL 700.993, but enacted MCL 700.291, which contained a like provision. MCL 700.993 was in turn repealed by the Estates and Protected Individuals Code (EPIC) by MCL 700.8102. EPIC included a like provision at MCL 700.2205, effective April 1, 2000. None of the cited statutes contained a requirement that adequate consideration be given for a release of dower, as was the case in certain earlier decisions recognizing the right of the wife to release dower. *Rhoades v Davis*, 51 Mich 306, 16 NW 659 (1883); *Wright v Wright*, 79 Mich 527, 44 NW 944 (1890); *In re Estate of Pulling*, 93 Mich 274, 52 NW 1116 (1892); *Bechtel v Barton*, 147 Mich 318, 110 NW 935 (1907); *Rockwell v Estate of Leon Rockwell*, 24 Mich App 593, 180 NW 2d 498 (1970). But see *In re Greenfield*, 273 BR 128 (ED Mich 2002), in which the court held that the value of dower did not constitute reasonably equivalent value for fraudulent conveyance purposes in connection with the conveyance by one spouse to both spouses as tenants by the entireties.

Comment B: Dower may also be barred by a jointure settled on the wife before marriage. MCL 558.14.

STANDARD 4.10

BARRING DOWER BY EXERCISE OF POWER OF ATTORNEY

STANDARD: A POWER OF ATTORNEY GIVEN BY A MARRIED WOMAN TO HER HUSBAND OR TO SOME OTHER PERSON NEED NOT SPECIFICALLY MENTION DOWER TO AUTHORIZE THE ATTORNEY-IN-FACT TO RELEASE OR SUBORDINATE HER DOWER.

Problem A: John Doe, the owner of Blackacre, was the attorney-in-fact of Mary Doe, his wife, under a power of attorney authorizing him to execute and deliver on her behalf deeds and mortgages of any and all interests in real property she then owned or thereafter acquired. John and Mary Doe, by John Doe, as Mary Doe's attorney-in-fact, deeded Blackacre. Did the grantee acquire Blackacre free of Mary Doe's dower?

Answer: Yes.

Problem B: John Doe, the owner of Blackacre, was the attorney-in-fact of Mary Doe, his wife, under a power of attorney authorizing him to execute and deliver on her behalf deeds and mortgages of any and all interest in real property she then owned or thereafter acquired. John Doe, designating himself as a married man, deeded Blackacre to Richard Roe but did not execute the deed on behalf of Mary. Later, as attorney-in-fact for Mary, John Doe deeded Blackacre to Roe, who still owned Blackacre. The later deed recited that it was given to bar Mary's dower in Blackacre. Was Mary's dower in Blackacre barred?

Answer: Yes.

Authorities: MCL 558.13. *Continental National Bank v Gustin*, 297 Mich 134, 297 NW 214 (1941).

STANDARD 4.11

BARRING DOWER BY LAPSE OF TIME

STANDARD: TWENTY-FIVE YEARS AFTER REAL PROPERTY HAS BEEN CONVEYED BY A MARRIED MAN, HIS WIFE'S DOWER IS FOREVER BARRED UNLESS A CLAIM OF DOWER WHICH DESCRIBES THE REAL PROPERTY IN WHICH DOWER IS CLAIMED HAS BEEN RECORDED IN THE OFFICE OF THE REGISTER OF DEEDS OF THE COUNTY IN WHICH THE REAL PROPERTY IS LOCATED.

Problem: More than 25 years ago John Doe, a married man and the sole owner of Blackacre, deeded Blackacre. His wife, Mary, did not sign the deed. No claim of dower has been recorded. Is the title to Blackacre free of Mary Doe's dower?

Answer: Yes.

Authorities: MCL 558.91 and 558.92, as to real property conveyed or otherwise disposed of on or after August 10, 1892. MCL 558.81 and 558.82, as to real property conveyed or otherwise disposed of before August 10, 1892.

Comment: The 25-year period runs from the effective date of the conveyance, not from the date of its recording.

CHAPTER V

HOMESTEAD



STANDARD 5.1

DEED OR ASSIGNMENT OF HOMESTEAD LAND BEFORE JANUARY 1, 1964

STANDARD: A DEED OR ASSIGNMENT OF ANY INTEREST IN HOMESTEAD LAND EXECUTED BY A MARRIED MAN BEFORE JANUARY 1, 1964 (THE EFFECTIVE DATE OF THE MICHIGAN CONSTITUTION OF 1963), IS INVALID WITHOUT THE SIGNATURE OF HIS WIFE.

Problem A: Richard Roe owned Blackacre, and occupied it with his wife, as a homestead. Roe, as a married man, by a deed in which his wife did not join, conveyed Blackacre in 1960 to Simon Grant for a consideration of \$5,000.00. Did Grant acquire marketable title to Blackacre?

Answer: No. The Michigan Constitution of 1908, like that of 1850, required the signature of the wife to a conveyance of land constituting a homestead as defined therein. Whether the value of the premises conveyed exceeded the amount of homestead exemption allowed under a sale on execution or other final process was immaterial.

Problem B: Richard Roe, a single man, purchased Blackacre from Joan Doe on land contract in 1959. Roe later married. In 1961, while Roe and his wife occupied Blackacre as a homestead, Roe assigned his vendee's interest to Simon Grant. Roe's wife did not join. In 1962, Grant paid the balance owing on the land contract and Joan Doe conveyed Blackacre to him. Did Grant acquire marketable title to Blackacre?

Answer: No. A vendee's interest in a land contract may be the subject of a homestead right. Roe's interest in the homestead could not be alienated without his wife's signature. The same result would follow if Roe had surrendered his vendee's interest to Joan Doe voluntarily.

Authorities: Generally: Mich Const 1908, art XIV, Sec 2 (effective until January 1, 1964); Mich Const 1850, art XVI, Sec 2; CL 1948 623.74 (repealed, effective January 1, 1963, by MCL 600.9901).

Problem A: *Dye v Mann*, 10 Mich 291 (1862); *Ring v Burt*, 17 Mich 465 (1869); *Hall v Loomis*, 63 Mich 709, 30 NW 374 (1886); *Evans v Grand Rapids, Lansing & Detroit R Co*, 68 Mich 602, 36 NW 687 (1888); *Mailhot v Turner*, 157 Mich 167, 121 NW 801 (1909); *Myers v Myers*, 186 Mich 215, 152 NW 934 (1915); *Maata v Kippola*, 102 Mich 116, 60 NW 300 (1894); *Lozo v Sutherland*, 38 Mich 168 (1878); *King v Welborn*, 83 Mich 195, 47 NW 106 (1890).

Problem B: *Ter Keurst v Zinkiewicz*, 253 Mich 383, 235 NW 191 (1931); *Irvine v Irvine*, 837 Mich 344, 60 NW2d 298 (1953); *Adams v Evans*, 343 Mich 94, 72 NW2d 131 (1955).

Comment A: A conveyance of a homestead is rendered invalid by the absence of the wife's signature only where giving validity to such a conveyance would impair or destroy the homestead right. Where a married man, acting alone, conveyed a homestead to a straw man who reconveyed to the married man and his wife, a tenancy by the entirety was created effectively. *Weaver v Michello*, 193 Mich 572, 160 NW 612 (1916).

Comment B: A wife who has never been a resident of Michigan can have no homestead in this state, even though her husband may have one. *Stanton v Hitchcock*, 64 Mich 316, 31 NW 395 (1887); *Leonetti v Tolton*, 264 Mich 618, 250 NW 512 (1933).

Comment C: This Standard deals with the effect of a conveyance of, or a contract to convey, a homestead. This Standard does not address the possible or partial invalidity of conveyances of, or contracts affecting, parcels of land including, but in excess of, a 40-acre homestead, such as are dealt with in *Engle v White*, 104 Mich 15, 62 NW 154 (1895).

STANDARD 5.2

DEED OR ASSIGNMENT OF HOMESTEAD LAND ON OR AFTER JANUARY 1, 1964

STANDARD: A DEED OR ASSIGNMENT OF ANY INTEREST IN HOMESTEAD LAND (EXCEPT ENTIRETIES PROPERTY), EXECUTED BY A MARRIED MAN ON OR AFTER JANUARY 1, 1964 (THE EFFECTIVE DATE OF THE MICHIGAN CONSTITUTION OF 1963), IS NOT RENDERED INVALID BY THE ABSENCE OF THE SIGNATURE OF HIS WIFE. THE TITLE OF THE GRANTEE OR ASSIGNEE MAY, HOWEVER, BE SUBJECT TO THE DOWER OF THE WIFE.

Problem A: Richard Roe purchased Blackacre on land contract, and occupied it with his wife as a homestead. In 1973 Roe, as a married man, assigned his vendee's interest to Simon Grant. Roe's wife did not sign the instrument of assignment. Did Grant acquire Roe's interest in Blackacre?

Answer: Yes.

Problem B: Richard Roe owned Blackacre and occupied it with his wife as a homestead. In 1973 Roe, as a married man, conveyed Blackacre to Simon Grant by deed. Roe's wife did not sign the deed. Did Grant acquire marketable title to Blackacre?

Answer: No. Although the deed was valid to convey Roe's interest to Grant, Grant's interest was subject to the dower of Roe's wife.

Authority: Since January 1, 1964, the effective date of the Michigan Constitution of 1963, there is no requirement that the wife sign an alienation of land constituting a homestead, title to which is vested in the husband.

Comment: Although after 1963 a married man holding title to homestead land in his name alone may validly convey his interest in the land without the signature of his wife, the conveyance does not extinguish the dower of the wife. See, Standard 4.1.

STANDARD 5.3
MORTGAGE OF HOMESTEAD LAND

Standard 5.3 has been withdrawn

STANDARD 5.4

VALIDATION OF MORTGAGES, DEEDS AND ASSIGNMENTS OF HOMESTEAD LAND

Standard 5.4 has been withdrawn

CHAPTER VI
JOINT TENANCY AND TENANCY BY THE
ENTIRETIES



STANDARD 6.1

CONVEYANCE OR DEVISE TO
TWO OR MORE PERSONS

STANDARD: A CONVEYANCE OR DEVISE TO TWO OR MORE PERSONS, UNLESS EXPRESSLY DECLARED TO BE IN JOINT TENANCY, IS BY STATUTORY PRESUMPTION CONSTRUED TO CREATE A TENANCY IN COMMON, EXCEPT IN THE CASE OF:

(A) A MORTGAGE; OR

(B) A CONVEYANCE OR DEVISE MADE IN TRUST OR TO PERSONAL REPRESENTATIVES OR TO A HUSBAND AND WIFE.

Problem: Blackacre was deeded to John Doe, an unmarried man, and Richard Roe. No other language was contained in the granting clause. Doe subsequently died. Richard Roe and Anna Roe, his wife, deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: No. Upon Doe's death, his undivided one-half interest vested in his heirs or devisees because there was nothing in the granting clause to overcome the statutory presumption. The deed from the Roes to Grant conveyed only Richard Roe's one-half interest.

Authorities: MCL 554.44 and 554.45.

Comment: When two or more persons acquire an interest in land by inheritance from an intestate decedent, each takes his or her respective share in common, even in the case of inheritance by a husband and wife from their child. MCL 700.2103.

STANDARD 6.2

CREATION OF JOINT TENANCY

STANDARD: A DEED OR DEVISE TO TWO OR MORE GRANTEES, OTHER THAN HUSBAND AND WIFE, “AS JOINT TENANTS” OR “AS JOINT TENANTS AND NOT AS TENANTS IN COMMON,” CREATES A JOINT TENANCY BECAUSE THE LANGUAGE USED CONSTITUTES AN EXPRESS DECLARATION SUFFICIENT TO OVERCOME THE STATUTORY PRESUMPTION THAT A DEED OR DEVISE CREATES A TENANCY IN COMMON UNLESS EXPRESSLY DECLARED OTHERWISE.

Problem A: Blackacre was deeded to John Doe and Richard Roe, ‘as joint tenants’ or ‘as joint tenants and not as tenants in common.’ Doe subsequently died. Roe and his wife later deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except the first deed named John Doe and Richard Roe, ‘jointly’ as the grantees. Did Grant acquire marketable title to Blackacre?

Answer: No. Ordinarily the word ‘jointly’ alone is not a sufficiently express declaration to overcome the statutory presumption. The word ‘jointly’ has been held to be ambiguous and to justify the admission of parol testimony as to the intent of the parties.

Problem C: Charles Palmer and Flora Vale were deeded Greenacre as tenants by the entireties when in fact they were not married. Palmer then died. Later, Vale conveyed Greenacre to Simon Grant. Did Grant receive marketable title to Greenacre?

Answer: No. Under the common law rule only a husband and wife can hold title by the entireties and, absent a declaration in the deed or evidence of intent to create a joint tenancy, a conveyance to a man and woman not legally married establishes a tenancy in common. Parol evidence may be admitted in some circumstances to establish the intent to create a joint tenancy.

Authorities: Problem A: *Smith v Smith*, 290 Mich 143, 287 NW 411 (1939).

Problem B: *Taylor v Taylor*, 310 Mich 541, 17 NW2d 745 (1945). In *Murray v Kator*, 221 Mich 101, 190 NW 667 (1922), under special circumstances, a joint tenancy was found to have been created.

Problem C: *In re Kappler Estate*, 418 Mich 237, 341 NW 2d 113 (1983). With respect to admission of parol evidence to establish an intent to create a joint tenancy, see *Scott v Grow*, 301 Mich 226, 3 NW2d 254 (1942). In *Beaton v LaFord*, 79 Mich App 373, 261 NW2d 327 (1977), the court regarded the conveyance itself as constituting an apparent attempt to create a joint tenancy.

Note: See Standard 6.1 with respect to the statutory presumption of tenancy in common.

STANDARD 6.3

SEVERANCE OF JOINT TENANCY

STANDARD: A DEED FROM ONE OF TWO OR MORE JOINT TENANTS TO A THIRD PARTY SEVERS THE JOINT TENANCY AS TO THE INTEREST OF THE GRANTOR AND CONSTITUTES THE GRANTEE A TENANT IN COMMON WITH THE OTHER OWNER(S).

Problem A: Blackacre was owned by John Doe and Richard Roe, “as joint tenants” or “as joint tenants and not as tenants in common.” Doe, a married man, deeded an undivided one-half interest in Blackacre to Simon Grant. Doe subsequently died leaving Roe surviving. Did Grant acquire marketable title to an undivided one-half interest in Blackacre?

Answer: Yes. Upon delivery of the deed from Doe to Grant, Grant and Roe became tenants in common.

Problem B: Blackacre was owned by John Doe, Richard Roe and Edgar Poe “as joint tenants” or “as joint tenants and not as tenants in common.” Doe, a single man, deeded to Simon Grant. Subsequently Roe died leaving Poe surviving. Poe and his wife then deeded to Grant. Did Grant acquire marketable title to all interest in Blackacre?

Answer: Yes. Grant acquired an undivided one-third interest in common by the deed from Doe. Roe and Poe remained joint tenants as to an undivided two-thirds interest which, upon the death of Roe, vested in Poe and was later deeded to Grant.

Authority: *Smith v Smith*, 290 Mich 143, 287 NW 411 (1939).

Comment: This Standard relates to the severance of a joint tenancy (see, Standard 6.2) and not to an attempted severance of a joint life estate with remainder to the survivor (see, Standard 6.4).

STANDARD 6.4

CREATION OF JOINT LIFE ESTATE WITH REMAINDER TO SURVIVOR

STANDARD: A DEED OR DEVISE TO TWO OR MORE PERSONS, OTHER THAN HUSBAND AND WIFE, “AS JOINT TENANTS WITH RIGHT OF SURVIVORSHIP,” “AS JOINT TENANTS AND TO THE SURVIVOR,” “AND TO THE SURVIVOR,” OR “OR TO THE SURVIVOR,” OR SOME VARIANT THEREOF, CREATES A JOINT LIFE ESTATE IN ALL OF THE GRANTEES WITH REMAINDER IN FEE TO THE SURVIVOR. THE RIGHT OF THE SURVIVING GRANTEE OR THE ASSIGNEE(S) OF THE GRANTEE TO FULL TITLE CANNOT BE DIVESTED BY ANY ACT OR OMISSION OF ANOTHER GRANTEE.

Problem A: Blackacre was deeded to Jane Doe and Ruth Roe “as joint tenants and to the survivor.” Doe later deeded to Simon Grant. Doe died leaving Roe surviving. Did Roe acquire marketable title to Blackacre?

Answer: Yes. The conveyance by Doe to Grant operated to convey both her life estate and her contingent remainder. However, Roe’s right to full title to Blackacre if she survived Doe was not divested by Doe’s conveyance. Because Doe predeceased Roe, the entire fee vested in Roe and Grant’s interest was terminated.

Problem B: Blackacre was deeded to Jane Doe and Ruth Roe “or to the survivor.” Doe deeded to Simon Grant. Later, Roe died, leaving Doe surviving. Did Grant acquire marketable title to Blackacre?

Answer: Yes. Doe’s deed to Grant conveyed all her interest in Blackacre, consisting of her life estate and contingent remainder. Upon Roe’s death, the entire fee vested in Grant.

Problem C: Blackacre was deeded to Jane Doe and Ruth Roe “as joint tenants with right of survivorship.” Doe later obtained partition of the joint life estates held by Doe and Roe. Doe died leaving Roe surviving. Did Roe acquire marketable title to Blackacre?

Answer: Yes. Roe's right to full title to Blackacre if she survived Doe was not divested by the partition of the joint life estates. Because Doe predeceased Roe, the entire fee vested in Roe upon Doe's death.

Authorities: Problem A: *Schulz v Brohl*, 116 Mich 603, 74 NW 1012 (1898); *Finch v Haynes*, 144 Mich 352, 107 NW 910 (1906); *Jones v Snyder*, 218 Mich 446, 188 NW 505 (1922); *Ames v Cheyne*, 290 Mich 215, 287 NW 439 (1939); *Rowerdink v Carothers*, 334 Mich 454, 54 NW2d 715 (1952); *Ballard v Wilson*, 364 Mich 479, 110 NW2d 751 (1961); *Albro v Allen*, 434 Mich 271, 454 NW2d 85 (1990). See also *Mannausa v Mannausa*, 374 Mich 6, 130 NW2d 900 (1964).

Problem B: *Albro v Allen*, 434 Mich 271, 454 NW2d 85 (1990); *Snover v Snover*, 199 Mich App 627, 502 NW2d 370 (1993).

Problem C: MCL 600.3304 and 600.3308. *Albro v Allen*, 434 Mich 271, 454 NW2d 85 (1990).

STANDARD 6.5

CREATION OF TENANCY BY THE ENTIRETIES

STANDARD: A DEED OR DEVISE TO TWO PERSONS, WHO ARE IN FACT HUSBAND AND WIFE, CREATES A TENANCY BY THE ENTIRETIES, UNLESS A CONTRARY INTENT IS EXPRESSED IN THE DEED OR DEVISE.

Problem: Blackacre was deeded to John Doe and Mary Doe. Later, Mary Doe, as the survivor of herself and John Doe, conveyed Blackacre to Simon Grant by a deed to which a death certificate of John Doe was attached. Did Grant acquire marketable title to Blackacre?

Answer: No. If an affidavit appeared of record showing that John Doe and Mary Doe were in fact husband and wife when they acquired title, title would be marketable in Grant. See, Comment A.

Authorities: MCL 554.44, 554.45 and 565.453. *In re Appeal of Nellie Lewis*, 85 Mich 340, 48 NW 580 (1891); *Jackson City Bank v Fredrick*, 271 Mich 538, 260 NW 908 (1935).

Comment A: The recording of affidavits as to the marital status of persons named in deeds and wills is permitted. Since July 15, 1965, the affidavits must include a description of the real property involved by setting out the description in full or by incorporating the description by reference to a recorded instrument in the chain of title which contains a full and adequate description of the real property. The affidavits are *prima facie* evidence of the facts stated. MCL 565.451a and 565.451c.

Comment B: A conveyance to grantees, “as tenants by the entireties,” if the grantees are not, in fact, husband and wife, creates a tenancy in common absent an express declaration that a joint tenancy was intended. See, *In re Kappler Estate*, 418 Mich 237, 341 NW2d 113 (1983). Under appropriate circumstances, however, Michigan courts have held that the conveyance creates a joint tenancy. See, *Scott v Grow*, 301 Mich 226, 3 NW 2d 254 (1942) and *Beaton v LaFord*, 79 Mich App 373, 261 NW2d 327 (1977).

Comment C: To create a tenancy in a husband and wife other than a tenancy by the entirety, the words of the deed or devise must be clear that the parties did not intend to establish a tenancy by the entirety. In *Hoyt v Winstanley*, 221 Mich 515, 191 NW 213 (1922), a deed identifying the grantees as “Jasper Winstanley and Elizabeth J. Winstanley, his wife, as joint tenants,” was held to create a tenancy by the entirety. The Committee expresses no opinion as to what words in a deed or devise are sufficient to indicate that the parties did not intend to create a tenancy by the entirety.

Note: See Standard 6.2 with respect to creation of a joint tenancy.

STANDARD 6.6

OMISSION OF GIVEN NAME OF SPOUSE

STANDARD: A DEED OR DEVISE TO TWO PERSONS, WHO ARE IN FACT HUSBAND AND WIFE, CREATES A TENANCY BY THE ENTIRETIES UNLESS A CONTRARY INTENT IS EXPRESSED, EVEN THOUGH THE DEED OR DEVISE DOES NOT STATE THE GIVEN NAME OF ONE SPOUSE.

Problem: Blackacre was deeded to Mr. and Mrs. James E. Deer, or to James E. Deer and wife. Later James E. Deer and Mary Deer, husband and wife, deeded Blackacre to J. Ray Brown. Did Brown acquire marketable title to Blackacre?

Answer: No. If an affidavit or other evidence appeared of record showing that the identity of the grantees in the first deed is the same as the identity of the grantors in the second deed, title would be marketable in Grant.

Authority: MCL 565.453.

Comment: The recording of affidavits as to the marital status and identity of persons named in deeds and wills is permitted. Since July 15, 1965 the affidavits must include a description of the real property involved by setting out the description in full or by incorporating the description by reference to a recorded instrument in the chain of title which contains a full and adequate description of the real property. The affidavits are *prima facie* evidence of the facts stated. MCL 565.451a and 565.451c.

STANDARD 6.7

DEED TO HUSBAND AND WIFE, TOGETHER WITH OTHER GRANTEEES

STANDARD: IF THERE ARE SEVERAL GRANTEEES IN A DEED, TWO OF WHOM ARE HUSBAND AND WIFE, IN THE ABSENCE OF A CONTRARY INTENT EXPRESSED IN THE DEED, THE HUSBAND AND WIFE ARE TREATED AS ONE PERSON AND TAKE ONE SHARE AS TENANTS BY THE ENTIRETIES, AS BETWEEN THEMSELVES, AND AS TENANTS IN COMMON WITH THE OTHER GRANTEEES, EACH OF WHOM TAKES ONE SHARE.

Problem A: Blackacre was deeded to James E. Deer and Mary Deer, husband and wife, and Catherine Lemon. Lemon deeded a one-third interest in Blackacre to J. Ray Brown. Later, James E. Deer and Mary Deer, husband and wife, deeded their interest to Brown. Did Brown acquire marketable title to Blackacre?

Answer: No. The deed to James E. Deer and Mary Deer, husband and wife, and Catherine Lemon created a tenancy in common, with the Deers, as tenants by the entireties, and Lemon each owning an undivided one-half interest. Because Lemon deeded only a one-third interest to Brown, she still held title to an undivided one-sixth interest.

Problem B: Blackacre was deeded to Cyrus Greenley and Mary Greenley, husband and wife, Edgar A. Poe and Nancy Poe, husband and wife, and Ruth Whitman. Whitman deeded an undivided one-fifth interest in Blackacre to Simon L. Grant. Later, the Greenleys and the Poes joined in a deed of Blackacre to Grant. Did Grant acquire marketable title to Blackacre?

Answer: No. The deed to Cyrus Greenley and Mary Greenley, husband and wife, Edgar A. Poe and Nancy Poe, husband and wife, and Ruth Whitman created a tenancy in common, with the Greenleys and the Poes, both as tenants by entireties, and Whitman each owning an undivided one-third interest. Because Whitman deeded only an undivided one-fifth interest to Grant, she still held title to an undivided two-fifteenths interest.

STANDARD 6.8

DEED BY ONE SPOUSE TO OTHER SPOUSE

STANDARD: IF TITLE TO REAL PROPERTY IS HELD IN TENANCY BY THE ENTIRETIES, A DEED FROM ONE SPOUSE TO THE OTHER IS EFFECTIVE TO TERMINATE THE TENANCY.

Problem A: Blackacre was owned by J. Ray Brown and Mary Brown, husband and wife, as tenants by the entireties. Later J. Ray Brown, a married man, deeded Blackacre to Mary Brown, his wife, who, in turn, deeded it to James E. Deer. Did Deer acquire marketable title to Blackacre?

Answer: Yes.

Problem B: Blackacre was owned by J. Ray Brown and Mary Brown, husband and wife, as tenants by the entireties. Later Mary Brown deeded Blackacre to J. Ray Brown, without expressing her intent in the deed to bar or waive her dower. J. Ray Brown, in turn, as a married man but without having Mary Brown join, deeded Blackacre to Dennis H. Bagley. Did Bagley acquire title to Blackacre free of the dower of Mary Brown?

Answer: No. Although the deed from Mary Brown to J. Ray Brown was effective to terminate the tenancy by the entireties and vest full title in J. Ray Brown, Mary Brown acquired inchoate dower which was not barred. If, however, Mary Brown had expressed her intent in her deed to J. Ray Brown to bar or waive her dower or had expressed the same intent in a separate contract, agreement or waiver, Bagley would have acquired title to Blackacre free of her dower.

Authorities: MCL 557.101 and 558.1. *Wilkinson v Kneeland*, 125 Mich 261, 84 NW 142 (1900); *Elson v Elson*, 245 Mich 205, 222 NW 176 (1928); *Ash v Ash*, 280 Mich 198, 273 NW 446 (1937); *Hearns v Hearns*, 333 Mich 423, 53 NW2d 315 (1952); *Tamplin v Tamplin*, 163 Mich App 1, 413 NW2d 713 (1987).

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Note: See Standard 4.9 with respect to barring dower by written contract, agreement or waiver.

STANDARD 6.9

CONVEYANCE OF ENTIRETIES PROPERTY BY ONE SPOUSE TO THIRD PERSON

STANDARD: NEITHER SPOUSE, ACTING ALONE, CAN ALIENATE OR ENCUMBER TO A THIRD PERSON AN INTEREST IN THE FEE OF REAL PROPERTY HELD AS TENANTS BY THE ENTIRETIES.

Problem A: Blackacre was owned by Edgar A. Poe and Mary Poe, husband and wife, as tenants by the entireties. Mary Poe, acting alone, deeded Blackacre to Simon L. Grant. Subsequently Mary Poe died and Edgar A. Poe, as an unmarried man, deeded Blackacre to Paul Ingram. Did Ingram acquire marketable title to Blackacre free of any interest in Grant?

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

Problem B: Blackacre was owned by James E. Deer and Mary Deer, husband and wife, as tenants by the entireties. Mary Deer executed a quit claim deed of Blackacre to Simon L. Grant. James E. Deer did not join. Subsequently, James E. Deer predeceased Mary Deer. Did Grant acquire marketable title to Blackacre?

Answer: No. The quit claim deed was not effective to convey any interest. If the deed to Grant had been a warranty deed, it is possible that Mary Deer would be estopped to assert her title as survivor. The Michigan Supreme Court has held that, if one purports to convey by warranty deed real property which he or she does not own, any after-acquired interest inures to the benefit of his or her grantee, but the Court has not yet determined whether this principle applies to a warranty deed executed by only one tenant by the entireties who later becomes the survivor. The Committee therefore expresses no opinion as to the effect of a warranty deed under the facts stated.

Problem C: Blackacre was owned by J. Ray Brown and Sarah Brown, husband and wife, as tenants by the entireties. In 1973, J. Ray Brown, acting alone, leased Blackacre to Les Freebie for a term

of five years. The lease was recorded promptly. Was the lease valid?

Answer: Yes, but it was subject to being terminated if J. Ray Brown predeceased Sarah Brown before the expiration of the five-year term. Before the enactment of MCL 557.71, which became effective December 10, 1975, it had been held that the husband had the exclusive right to the management and control of entireties property and the exclusive right to income derived from the property and any crops grown there. The husband, acting alone, could enter into a valid lease of entireties property, subject only to the limitation that the lease would cease to be valid should the wife become the sole owner through the death of the husband.

Problem D: Same facts as in Problem C, except that the lease was executed on January 2, 1999. Was the lease valid?

Answer: No. A lease of entireties property executed on or after December 10, 1975 must be signed by both husband and wife. MCL 557.71 provides that “A husband and wife shall be equally entitled to the rents, products, income, or profits, and to the control and management of real or personal property held by them as tenants by the entirety.” The Committee has not considered the constitutionality or the effect of MCL 557.71 with respect to a tenancy by the entireties created before that statute’s effective date.

Authorities: Problem A: *Vinton v Beamer*, 55 Mich 559, 22 NW 40 (1885); *Speier v Opfer*, 73 Mich 35, 40 NW 909 (1888); *Ernst v Ernst*, 178 Mich 100, 144 NW 513 (1913); *Truitt v Battle Creek*, 205 Mich 180, 171 NW 338 (1919); *Bailey v Grover*, 237 Mich 548, 213 NW 137 (1927); *Elson v Elson*, 245 Mich 205, 222 NW 176 (1928); *Robinson v Commissioner of Internal Revenue*, 63 F2d 652 (CA 6, 1933); *Nurmi v Beardsley*, 275 Mich 328, 266 NW 368 (1936); *Arrand v Graham*, 297 Mich 559, 298 NW 281 (1941); *French v Foster*, 307 Mich 361, 11 NW2d 920 (1943); *Berman v State Land Office Board*, 308 Mich 143, 13 NW2d 238 (1944); *Schultz v Silver*, 323 Mich 454, 35 NW 2d 383 (1949); *Hearns v Hearns*, 333 Mich 423, 53 NW2d 315 (1952). See also *Williams v De Man*, 7 Mich App 71, 151 NW2d 247 (1967).

Problem B: *Naylor v Minock*, 96 Mich 182, 55 NW 664 (1893); *Duffy v White*, 115 Mich 264, 73 NW 363 (1897); *Dye v Thomp-*

son, 126 Mich 597, 85 NW 1113 (1901); *Ernst v Ernst*, 178 Mich 100, 144 NW 513 (1913); *Agar v Streeter*, 183 Mich 600, 150 NW 160 (1914).

Problems C and D: MCL 557.71. *Morrill v Morrill*, 138 Mich 112, 101 NW 209 (1904); *American State Trust Co of Detroit v Rosenthal*, 255 Mich 157, 237 NW 534 (1931); *Marks v Corliss' Estate*, 256 Mich 460, 240 NW 71 (1932); *Wuerth v Wuerth*, 270 Mich 628, 259 NW 346 (1935); *Dombrowski v Gorecki*, 291 Mich 678, 289 NW 293 (1939); *Arrand v Graham*, 297 Mich 559, 298 NW 281 (1941).

STANDARD 6.10

DEED IN WHICH GRANTOR IS ALSO GRANTEE BEFORE OCTOBER 14, 1955

STANDARD: A JOINT TENANCY, A JOINT LIFE ESTATE WITH REMAINDER TO THE SURVIVOR, OR A TENANCY BY THE ENTIRETIES, COULD NOT BE CREATED BY A DEED DELIVERED BEFORE OCTOBER 14, 1955, IF THE GRANTOR WAS ALSO ONE OF THE GRANTEES.

Problem A: On September 1, 1955, John Doe, a married man and the sole owner of Blackacre, delivered a deed describing Blackacre naming himself and Mary Doe, husband and wife, as grantees. Later John Doe died and Mary Doe delivered a deed describing Blackacre naming Simon Grant as grantee. Did Grant acquire marketable title to Blackacre?

Answer: No, unless Mary Doe succeeded to all of John Doe's interest through his estate. Because the first deed did not produce unity of time or title, it was ineffective to create a tenancy by the entireties. John Doe and Mary Doe became tenants in common. Consequently, an undivided one-half interest vested in John Doe's heirs or devisees.

Problem B: On September 1, 1955, John Doe, a single man and the sole owner of Blackacre, delivered a deed describing Blackacre naming John Doe and Richard Roe "as joint tenants with full right of survivorship and not as tenants in common." Later Doe died and Roe and his wife deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: No. Because the first deed did not produce unity of time or title, it was ineffective to create a joint life estate with remainder to the survivor. John Doe and Richard Roe became tenants in common. Consequently, an undivided one-half interest vested in John Doe's heirs or devisees.

Authorities: *Pegg v Pegg*, 165 Mich 228, 130 NW 617 (1911); *Wright v Knapp*, 183 Mich 656, 150 NW 315 (1915); *Mich State Bank v Kern*, 189 Mich 467, 155 NW 502 (1915); *Howell v Wieas*, 232 Mich 227, 205

6.10

NW 55 (1925); *Union Guardian Trust Co v Vogt*, 263 Mich 330, 248 NW 639 (1933); *Price v National Union Fire Insurance Co*, 294 Mich 289, 293 NW 652 (1940); *Atha v Atha*, 303 Mich 611, 6 NW 2d 897 (1942).

Note: See Standard 6.11 with respect to a deed delivered on or after October 14, 1955.

STANDARD 6.11

DEED IN WHICH GRANTOR IS ALSO GRANTEE ON OR AFTER OCTOBER 14, 1955

STANDARD: A JOINT TENANCY, A JOINT LIFE ESTATE WITH REMAINDER TO THE SURVIVOR, OR A TENANCY BY THE ENTIRETIES, MAY BE CREATED BY A DEED DELIVERED ON OR AFTER OCTOBER 14, 1955, IF THE GRANTOR IS ALSO ONE OF THE GRANTEES.

Problem A: In 1973, John Doe, a married man and the sole owner of Blackacre, delivered a deed describing Blackacre naming himself and Mary Doe, husband and wife, as grantees. Later John Doe died and Mary Doe delivered a deed describing Blackacre naming Simon Grant as grantee. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem B: In 1973, John Doe, a single man and the sole owner of Blackacre, delivered a deed describing Blackacre naming himself and Richard Roe as grantees, “as joint tenants and not as tenants in common” (or “as joint tenants and to the survivor”). Later Doe died and Roe and his wife delivered a deed describing Blackacre naming Simon Grant as grantee. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Authority: MCL 565.49 (effective October 14, 1955), provides, in part: “Conveyances in which the grantor or one or more of the grantors are named among the grantees therein shall have the same force and effect as they would have if the conveyance were made by a grantor or grantors who are not named among the grantees.”

Comment: It is the opinion of the Committee that the cited statute is operative as to deeds delivered on or after its effective date (October 14, 1955) but, for constitutional reasons, does not apply to deeds delivered before October 14, 1955.

Note: See Standard 6.10 regarding a deed delivered before October 14, 1955.

STANDARD 6.12

EVIDENCE OF DEATH OF JOINT TENANT OR TENANT BY ENTIRETIES

STANDARD: WHEN A JOINT TENANCY, A JOINT LIFE ESTATE WITH REMAINDER TO THE SURVIVOR, OR A TENANCY BY THE ENTIRETIES HAS BEEN CREATED, A DEED FROM LESS THAN ALL THE TENANTS NAMED IN THE INSTRUMENTS WHICH CREATED THE TENANCY SHOULD NOT BE ACCEPTED AS CONVEYING FULL MARKETABLE TITLE IN THE ABSENCE OF RECORD PROOF OF THE DEATH OF EACH SUCH TENANT WHO DOES NOT JOIN IN THE DEED.

Problem: Mary Doe and Ruth Roe held title to Blackacre as joint tenants with right of survivorship. Roe executed a deed describing Blackacre naming Simon Grant as grantee. Did Grant acquire marketable title to all of Blackacre?

Answer: No, unless there is satisfactory evidence of record that Doe predeceased Roe.

Authorities: *Hearns v Hearns*, 333 Mich 423, 53 NW2d 315 (1952); *Albro v Allen*, 434 Mich 271, 454 NW2d 85 (1990).

Note 1: See Standard 6.13 as to recordability on or after October 11, 1947 of deeds containing recitals of survivorship.

Note 2: See, MCL 700.2702(3) and *In re Leete Estate*, 290 Mich App 647, 803 NW2d 889 (2010), regarding the effect of joint tenants or tenants by the entireties dying within 120 hours of each other.

STANDARD 6.13

REQUIREMENT FOR RECORDING CONVEYANCE FROM SURVIVOR ON OR AFTER OCTOBER 11, 1947

STANDARD: ON OR AFTER OCTOBER 11, 1947, A CONVEYANCE FROM A PERSON WHICH RECITES THAT THE GRANTOR IS THE SURVIVOR OF A DECEASED JOINT TENANT, JOINT LIFE TENANT WITH REMAINDER TO THE SURVIVOR, OR TENANT BY THE ENTIRETIES, IS NOT ENTITLED TO BE RECORDED UNLESS, FOR EACH FORMER OWNER INDICATED TO BE DECEASED, A CERTIFIED COPY OF THE DEATH CERTIFICATE OR OTHER RECORDABLE PROOF OF DEATH IS RECORDED WITH THE CONVEYANCE, OR EVIDENCE OF DEATH HAS BEEN RECORDED PREVIOUSLY AND REFERENCE IS MADE IN THE CONVEYANCE TO THE LIBER AND PAGE OF THE RECORDING.

Problem A: Blackacre was conveyed to John Doe and Mary Doe, husband and wife. Later, Mary Doe, as survivor of John Doe, executed a deed describing Blackacre which was recorded in 1977. No evidence of John Doe's death, other than the recital, was recorded with or referred to in the deed. Was the deed entitled to be recorded?

Answer: No.

Problem B: Same facts as in Problem A, except that the deed Mary Doe executed recited that John Doe's death certificate had been recorded in Liber 1111 at Page 222 of the records of the register of deeds in the county in which Blackacre was located. Was the deed entitled to be recorded?

Answer: Yes.

Problem C: Same facts as in Problem A, except that an affidavit of Ruth Roe was recorded with the deed executed by Mary Doe, stating that John Doe had died before the execution of the deed. Was the deed entitled to be recorded?

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Answer: Yes.

Authorities: Generally: MCL 565.48.

Problem C: MCL 565.451a, 565.451c and 565.453.

STANDARD 6.14

EFFECT OF FAILURE OF DIVORCE JUDGMENT TO DISPOSE OF REAL PROPERTY

STANDARD: TITLE TO REAL PROPERTY HELD BY HUSBAND AND WIFE AS TENANTS BY THE ENTIRETIES OR AS JOINT TENANTS VESTS IN THEM AS TENANTS IN COMMON IF THEIR JUDGMENT OF DIVORCE FAILS TO DISPOSE OF THE REAL PROPERTY, EVEN IF THE JUDGMENT IS ENTERED IN ANOTHER JURISDICTION.

Problem A: Blackacre was owned by John Doe and Mary Doe, husband and wife, as tenants by the entireties (or as joint tenants). Later, they were divorced in Michigan. The judgment made no disposition of Blackacre but did contain the provision required by statute with respect to the dower of Mary Doe. Mary Doe died. Later, John Doe, a single man, deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: No. Grant acquired an undivided one-half interest as a tenant in common with Mary Doe's heirs or devisees. The divorce destroyed the right of survivorship. The provision with respect to the dower of Mary Doe had no application to the interest formerly held as tenants by the entireties or as joint tenants.

Problem B: Blackacre was owned by John Doe and Mary Doe, husband and wife, as tenants by the entireties (or as joint tenants). Later, they were divorced in Iowa. The judgment made no disposition of Blackacre. Mary Doe died. Later, John Doe, a single man, deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: No.

Authorities: Problem A: MCL 552.101 and 552.102. *Montgomery v Montgomery*, 221 Mich 31, 190 NW 687 (1922); *Angeloff v Smith*, 254 Mich 99, 235 NW 823 (1931); *Sullivan v Sullivan*, 300 Mich 640, 2 NW2d 799 (1942); *Flynn v Flynn*, 367 Mich 625, 116 NW2d 907 (1962).

Problem B: MCL 552.102. *Brown v Prisel*, 97 Mich App 188, 292 NW2d 799 (1980).

Comment: MCL 552.102 provides that unless the divorce judgment provides otherwise, a husband and wife owning real property “as joint tenants or tenants by the entireties,” become tenants in common upon being divorced. This statute does not expressly address the status, upon divorce, of title to real property held by a husband and wife as joint tenants with right of survivorship.

STANDARD 6.15

MARRIAGE OF TENANTS IN COMMON OR JOINT TENANTS

STANDARD: WHEN PERSONS WHO ARE NOT HUSBAND AND WIFE OWN REAL PROPERTY AS TENANTS IN COMMON, AS JOINT TENANTS, OR AS JOINT TENANTS WITH RIGHT OF SURVIVORSHIP, THE OWNERSHIP IS NOT CONVERTED INTO A TENANCY BY THE ENTIRETIES BY THEIR SUBSEQUENT MARRIAGE.

Problem A: Blackacre was deeded to John Doe and Mary Smith, as tenants in common. Later, John Doe and Mary Smith married. Mary Smith Doe then deeded Blackacre to Simon Grant. John Doe did not execute the deed. Did Grant acquire marketable title to any interest in Blackacre?

Answer: Yes. Grant acquired marketable title to an undivided one-half interest.

Problem B: Same facts as in Problem A, except that the first deed conveyed Blackacre to John Doe and Mary Smith as joint tenants with right of survivorship. Did Grant acquire marketable title to any interest in Blackacre?

Answer: Yes. Grant acquired marketable title to a joint life estate with John Doe and a contingent remainder interest in Blackacre. The remainder interest will vest in Grant if Mary Smith Doe survives John Doe.

Problem C: Title to Blackacre, which had been held by John Doe and Mary Doe as tenants by the entireties, became vested in them as tenants in common by a judgment of divorce. Later, John Doe and Mary Doe remarried. Mary Doe then deeded Blackacre to Simon Grant. John Doe did not execute the deed. Did Grant acquire marketable title to any interest in Blackacre?

Answer: Yes. Grant acquired Mary Doe's undivided one-half interest created by the judgment of divorce. The remarriage did not affect the tenancy in common created by the judgment.

Authorities: *McNitt v McNitt*, 230 Mich 303, 203 NW 66 (1925); *Himelson v Galusz*, 309 Mich 512, 15 NW2d 727 (1944); *Cristia v Cristia*, 317 Mich 66, 26 NW2d 869 (1947); *Williams v Dean*, 356 Mich 426, 97 NW2d 42 (1959).

CHAPTER VII

CONVEYANCES BY ESTATE FIDUCIARIES AND TITLES DERIVED FROM ESTATES OF DECEDENTS



STANDARD 7.1

TITLE DERIVED THROUGH INTESTATE DECEDENT

STANDARD: THE TITLE TO REAL PROPERTY OF AN INTESTATE DECEDENT'S TITLE IS VESTED AS OF THE TIME OF DEATH IN THE HEIRS AT LAW, SUBJECT TO:

- (A) THE RIGHTS TO HOMESTEAD, EXEMPT PROPERTY AND FAMILY ALLOWANCES;
- (B) THE WIDOW'S RIGHT TO ELECT DOWER;
- (C) THE RIGHT AND DUTY OF THE PERSONAL REPRESENTATIVE TO POSSESS THE REAL PROPERTY AND TO RECEIVE THE INCOME FROM THE REAL PROPERTY;
- (D) THE POSSIBILITY OF SALE FOR ANY PURPOSE PERMITTED BY THE ESTATES AND PROTECTED INDIVIDUALS CODE (EPIC);
- (E) THE LIEN OF ANY FEDERAL OR MICHIGAN ESTATE TAX; AND
- (F) ANY FEDERAL OR STATE TAX THAT IS REQUIRED TO BE PAID BEFORE THE ESTATE CAN BE CLOSED.

Problems: See, Standard 7.3.

Authorities: (a) As to the vesting of title in the heirs-at-law: *Diel v Diel*, 298 Mich 127, 298 NW 478 (1941); *Fowler v Cornwell*, 328 Mich 89, 43 NW2d 73 (1950); *Pardeike v Fargo*, 344 Mich 518, 73 NW2d 924 (1955).

(b) As to the surviving spouse's and minor children's rights to homestead, exempt property and family allowances: MCL 700.2401 through 700.2405.

(c) As to the widow's right to elect dower: MCL 700.2202.

(d) As to the duty of a personal representative to take possession: MCL 700.3709. *Casper v Ralph*, 323 Mich 173, 35 NW2d 151 (1948).

(e) As to the possibility of sale during administration: MCL 700.3617.

(f) As to the lien of federal estate tax and the statute of limitations applying to the tax: 26 USC 6324(a). See, Standards 20.9 through 20.14. See also, the Uniform Federal Lien Registration Act, MCL 211.661 *et seq.*

(g) As to the lien of Michigan inheritance tax and the statute of limitations applying to the tax: MCL 205.203 and 205.203a. This tax applies to the estates of decedents dying before October 1, 1993. MCL 205.223. As to the lien of Michigan estate tax: MCL 205.243. This tax applies to estates of decedents dying after September 30, 1993. MCL 205.223. As to the lien for other state taxes administered by the Michigan Department of Treasury under the Revenue Act: MCL 205.29. See, Standards 21.1 and 21.2. See also, the State Tax Lien Registration Act, MCL 211.681 *et seq.*

(h) As to the payment of Michigan individual income tax by the estate: MCL 206.451.

Comment A: The former Revised Probate Code (RPC) established a surviving spouse's right to remain in the dwelling house for a period not to exceed one year. MCL 700.282a. Under EPIC, MCL 700.1101 *et seq.*, effective April 1, 2000, which repealed the RPC, there is no parallel provision. But see MCL 700.2403 which may permit the value of continued possession of the home for a definite period to be

established and granted to the surviving spouse as part of the family allowance.

Comment B: Article VIII of EPIC, MCL 700.8101 *et seq.*, provides transition rules for the application of EPIC to proceedings pending on April 1, 2000 or proceedings commenced after March 31, 2000 for a decedent whose death occurred before April 1, 2000.

STANDARD 7.2

TITLE DERIVED THROUGH TESTATE DECEDENT

STANDARD: THE WILL OF A TESTATE DECEDENT, WHEN PROBATED, CONVEYS THE DECEDENT'S TITLE TO REAL PROPERTY AS OF THE TIME OF DEATH SUBJECT TO:

- (A) THE RIGHT OF THE SURVIVING SPOUSE TO ELECT A STATUTORY SHARE;**
- (B) THE RIGHT TO HOMESTEAD, EXEMPT PROPERTY AND FAMILY ALLOWANCE;**
- (C) THE WIDOW'S RIGHT TO ELECT DOWER;**
- (D) THE RIGHT AND DUTY OF THE PERSONAL REPRESENTATIVE TO POSSESS THE REAL PROPERTY AND TO RECEIVE THE INCOME FROM IT;**
- (E) THE POSSIBILITY OF SALE FOR ANY PURPOSE PERMITTED BY THE ESTATES AND PROTECTED INDIVIDUALS CODE (EPIC);**
- (F) THE LIEN OF ANY FEDERAL OR MICHIGAN ESTATE TAX; AND**
- (G) ANY FEDERAL OR STATE TAX THAT IS REQUIRED TO BE PAID BEFORE THE ESTATE CAN BE CLOSED.**

Problems: See, Standard 7.3.

Authorities: (a) As to the conveyance of title by will: *In re Allen's Estate*, 240 Mich 661, 216 NW 446 (1927); *Stewart v Hunt*, 303 Mich 161, 5 NW2d 737 (1942).

(b) As to the surviving spouse's right to elect a statutory share: MCL 700.2202.

(c) As to the surviving spouse's and minor children's right to homestead, exempt property and family allowances: MCL 700.2401 through 700.2405.

(d) As to the widow's right to elect dower: MCL 700.2202.

(e) As to the duty of a personal representative to take possession: MCL 700.3709.

(f) As to the possibility of sale during administration: MCL 700.3902.

(g) As to the lien of federal estate tax and the statute of limitations applying to the tax: 26 USC 6324(a). See, Standards 20.9 through 20.14. See also, the Uniform Federal Lien Registration Act, MCL 211.661 *et seq.*

(h) As to the lien of Michigan inheritance tax and the statute of limitations applying to the tax: MCL 205.203 and 205.203a. This tax applies to the estates of decedents dying before October 1, 1993. MCL 205.223. As to the lien of Michigan estate tax: MCL 205.243. This tax applies to the estates of decedents dying after September 30, 1993. MCL 205.223. As to the lien for other state taxes administered by the Michigan Department of Treasury under the Revenue Act: MCL 205.29. See, Standards 21.1 and 21.2. See also, the State Tax Lien Registration Act, MCL 211.681 *et seq.*

(i) As to the payment of Michigan individual income tax by the estate: MCL 206.451.

Comment A: The former Revised Probate Code (RPC) established a surviving spouse's right to remain in the dwelling house for a period not to exceed one year. MCL 700.282a. Under EPIC, MCL 700.1101 *et seq.*, effective April 1, 2000, which repealed the RPC, there is no parallel provision. But see MCL 700.2403 which may permit the value of continued possession of the home for a definite period to be established and granted to the surviving spouse as part of the family allowance.

Comment B: Article VIII of EPIC, MCL 700.8101 *et seq.*, provides transition rules for the application of EPIC to proceedings pending on April 1, 2000 or proceedings commenced after March 31, 2000 for a decedent whose death occurred before April 1, 2000.

STANDARD 7.3

DISTRIBUTION OF ESTATE REAL PROPERTY BY COURT ORDER

STANDARD: A COURT ORDER OF DISTRIBUTION OF ESTATE REAL PROPERTY DETERMINES:

- (A) THE PERSONS ENTITLED TO THE ESTATE AND THEIR PROPORTIONATE SHARES OF THE ESTATE, WHETHER BY THE LAW OF DESCENT, THE WILL, OR AN AGREEMENT; AND**
- (B) THAT THE ESTATE HAS BEEN FULLY ADMINISTERED SO THAT THE ESTATE REAL PROPERTY, TITLE TO WHICH VESTED AT THE DECEDENT'S DEATH IN HEIRS AT LAW OR THE DEVISEES, IS FREE OF THE DEBTS AND CHARGES TO WHICH IT WAS SUBJECT.**

Problem A: Jane Doe, owner of Blackacre, died testate. Her estate was probated. Blackacre, which was not specifically devised, was not included in the inventory or described in the order distributing the residue. Lucy Doe, sole residuary devisee, deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: No, unless it can be established that there is no lien for federal estate tax or Michigan estate or inheritance tax attaching to Blackacre. If Blackacre had been included as an administered asset there might have been increased liability for estate or inheritance taxes, the lien of which attached at Jane Doe's death.

Problem B: Same facts as in Problem A, except that Jane Doe died intestate and Blackacre was deeded by Lucy Doe, her sole heir, to Grant. Did Grant acquire marketable title to Blackacre?

Answer: No. The reasoning is the same as in the Answer to Problem A.

Problem C: John Doe, owner of Blackacre, died testate. His will was admitted to probate. Blackacre was devised to his widow for life, with a vested remainder to Doe's niece. Blackacre was included in the inventory.

All debts, taxes and administration expenses were paid. Notice of hearing on the final account and on the petition for distribution of the residue was given to all parties in interest. The court entered an order allowing the account and distributing Blackacre to the widow outright. After the death of the widow, the niece deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: No. Although the order of distribution was erroneous, it had the effect of an order construing the will and became *res judicata* unless set aside or reversed. An erroneous order that is no longer appealable conveys title contrary to the laws of descent, the will, or an agreement, as of the date of the decedent's death. Accordingly, title to Blackacre became vested in the widow and, upon her death, vested in her heirs or devisees.

Problem D: John Doe, owner of Blackacre, died intestate leaving his four children, Mary, Jane, Harry and Joseph Doe as his heirs. His estate was probated, Blackacre was inventoried and all debts, taxes and expenses paid. Notice of hearing on the final account and petition for distribution of residue was given. Through error, the order of distribution assigned the residue to Mary Doe and Jane Doe. Three years later they deeded Blackacre to Simon Grant, a good faith purchaser for value. Did Grant acquire marketable title to Blackacre?

Answer: Yes. The order of distribution is, in effect, a determination of heirs and is not subject to collateral attack, as against a good faith purchaser for value.

Problem E: John Doe, owner of Blackacre, died intestate July 1, 1979, leaving his four daughters as his heirs. On July 15, 1979, the daughters deeded Blackacre to Simon Grant. Later Doe's estate was probated and an order of distribution was entered assigning the residue to the four daughters. Did Grant acquire marketable title to Blackacre?

Answer: Yes. Title vested in the heirs upon Doe's death.

Problem F: John Doe, owner of Blackacre, died intestate in 1992. A petition for administration of Doe's estate was filed listing his four sisters as his heirs. A personal representative was appointed and qualified. An inventory was filed listing Blackacre and other property of an aggregate value in excess of \$100,000. A hearing on claims was held but

no claim was presented. In 1999, the four sisters deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: No. The possibility still exists of the entry of an order distributing the estate real property which, through error or otherwise, would constitute a determination of different heirs. Although the statute of limitations may bar the lien of federal estate tax, the lien of Michigan inheritance tax is not barred in the absence of an order determining the tax or an order distributing the estate real property.

Problem G: John Doe, owner of Blackacre, died intestate. His estate was probated. Blackacre was inventoried and all debts, taxes and expenses were paid. The personal representative filed a final account, which was allowed, and an order of distribution was entered assigning the residue to Doe's heirs, but Blackacre was described erroneously. The heirs deeded Blackacre to Simon Grant using the correct description. Did Grant acquire marketable title to Blackacre?

Answer: Yes. Title vested in the heirs upon Doe's death. Misdescription of estate real property in the order of distribution was immaterial. The result would have been the same had Doe died testate.

Problem H: Same facts as in Problem G, except that the order of distribution did not refer to Blackacre. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem I: John Doe, owner of Blackacre, died intestate leaving his four children, Mary, Jane, Harry and Joseph Doe as his heirs. His estate was probated, Blackacre was inventoried and all debts, taxes and expenses paid. Notice of hearing on the final account was given. The order of distribution assigned Blackacre to Mary Doe in accordance with a written agreement signed by all of the heirs which was filed with the court and referred to in the order. The personal representative of the estate deeded Blackacre to Mary Doe. Did Mary Doe acquire marketable title to Blackacre?

Answer: Yes.

Authorities: Generally: MCL 600.841, 700.3501 *et seq.*, 700.3805, 700.3914, 700.3952 and 700.3953.

Problems A and B: 26 USC 6324(a). MCL 205.203. *In re Cress' Estate*, 335 Mich 551, 56 NW2d 380 (1953).

Problem C: *Calhoun v Cracknell*, 202 Mich 430, 168 NW 547 (1918); *Thompson v Thompson*, 229 Mich 526, 201 NW 533 (1924); *Harvey v Security Trust Co*, 242 Mich 284, 218 NW 679 (1928); *Loesch v First National Bank of Ann Arbor*, 249 Mich 326, 228 NW 717 (1930); *In re Dowling's Estate*, 308 Mich 129, 13 NW2d 233 (1944); *Dow v Scully*, 376 Mich 84, 135 NW2d 360 (1965).

Problem D: *Benjamin v Fairchild*, 242 Mich 274, 218 NW 663 (1928); *In re Estate of Taylor*, 271 Mich 404, 260 NW 895 (1935).

Problem E: *In re Allen's Estate*, 240 Mich 661, 216 NW 446 (1927); *Kinne v Farmers Mutual Insurance Co*, 241 Mich 637, 217 NW 755 (1928); *Stewart v Hunt*, 303 Mich 161, 5 NW2d 737 (1942). *Nerreter v Bissell*, 304 Mich 175, 7 NW2d 261 (1943); *Jones v Causey*, 45 Mich App 271, 206 NW2d 534 (1973), leave to appeal denied, 389 Mich 817.

Problem F: MCL 700.3402 and 700.3412.

Problem G: MCL 700.3505; and 700.3908 through 700.3912.

Problem H: MCL 700.3505; and 700.3908 through 700.3912

Problem I: MCL 700.3914. See also, MCL 700.3906, 700.3909, 700.3910 and 700.3912.

Note 1: As to the lien of Michigan inheritance tax and the statute of limitations applying to the tax, see MCL 205.203 and 205.203a. This tax applies to estates of decedents dying before October 1, 1993 (See, MCL 205.223.) As to the lien of Michigan estate tax, see MCL 205.243. This tax applies to estates of decedents dying after September 30, 1993 (See, MCL 205.223.) As to the lien for other state taxes administered by the Michigan Department of Treasury under the Revenue Act, see MCL 205.29. See also, Standards 21.1 and 21.2

and the State Tax Lien Registration Act, MCL 211.681 *et seq.* With respect to federal estate tax liens, see Standards 20.9 through 20.14.

Note 2: After June 30, 1979, probate proceedings can be either independent or supervised.

Caveat: If at the time of entry of an order of distribution of estate real property, the debts, expenses, taxes and other charges against the estate have not been paid or provided for, the entry of the order of distribution will not release or discharge these obligations.

STANDARD 7.4

INSIGNIFICANT IRREGULARITIES IN SUPERVISED PROBATE SALE

STANDARD: NOTWITHSTANDING A NON-JURISDICTIONAL IRREGULARITY IN SUPERVISED PROBATE SALES PROCEEDINGS BEFORE APRIL 1, 2000, A CONVEYANCE OF AN INTEREST IN REAL PROPERTY BY A FIDUCIARY MAY NOT BE AVOIDED IF:

- (A) THE SALE WAS AUTHORIZED BY LAW;
- (B) ANY REQUIRED BOND WAS GIVEN AND APPROVED;
- (C) THE PRESCRIBED NOTICE OF THE SALE WAS GIVEN;
- (D) THE SALE WAS CONFIRMED; AND
- (E) THE REAL PROPERTY IS HELD BY ONE WHO PURCHASED IN GOOD FAITH.

Problem A: Jane Doe, the owner of Blackacre, died intestate. Her estate was probated and Richard Roe qualified as personal representative. Roe as personal representative filed a report of sale of Blackacre to Simon Grant, a purchaser in good faith, for the purpose of paying debts. The report was confirmed and a bond on sale was filed and approved. Roe deeded Blackacre to Grant. Through error Roe was described as executor rather than as personal representative in the petition, the report of sale and the deed. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except that certain of Jane Doe's heirs were minors and no general guardian or guardian ad litem acted or was appointed for them. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem C: Same facts as in Problem A, except that the personal representative failed to give proper notice to the heirs of the hearing on his report of the sale. Did Grant acquire marketable title to Blackacre?

Answer: No. Failure to give the notice was jurisdictional.

Authorities: Generally: *Osman v Traphagen*, 23 Mich 80 (1871); *Goodall v Henkel*, 60 Mich 382, 27 NW 556 (1886); *Fender v Powers*, 67 Mich 433, 35 NW 80 (1887).

Problem A: *Norman v Olney*, 64 Mich 553, 31 NW 555 (1887).

Problem B: *Coon v Fry*, 6 Mich 506 (1859); *Wheelock v Lake*, 117 Mich 11, 75 NW 140 (1898).

Problem C: *Stowell v Johnson*, 280 Mich 627, 274 NW 354 (1937).

Comment A: Problem C does not address the application of MCL 600.5801, the general statute of limitations, or of MCL 565.492, which provides that the recorded fiduciary's deed is *prima facie* evidence of the regularity of the sale.

Comment B: Before July 1, 1979, the effective date of the Revised Probate Code (RPC), validation of fiduciaries' conveyances was governed by MCL 709.38. MCL 709.38 was repealed by MCL 700.993, and replaced by MCL 700.658 of the RPC which contained substantially the same provisions. The Estates and Protected Individuals Code, MCL 700.1101 *et seq.*, effective April 1, 2000, has no provision comparable to MCL 700.658. Transactions authorized for personal representatives are now set forth in MCL 700.3715.

STANDARD 7.5

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

STANDARD: ALL QUALIFIED AND SURVIVING PERSONAL REPRESENTATIVES MUST EXECUTE A DEED PURSUANT TO A TESTAMENTARY POWER OF SALE UNLESS THE WILL AUTHORIZES LESS THAN ALL OF THEM TO CONVEY.

Problem: The will of John Doe naming Richard Roe and Edgar Poe as personal representatives with power of sale was admitted to probate. Roe and Poe both qualified. Richard Roe, as personal representative, deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: No. Unless there is recorded evidence of the prior death or resignation of Poe or some provision in the will authorizing only one personal representative to convey, all personal representatives must join in executing a deed.

Authorities: MCL 700.3715(f). *Nichols v Pospiech*, 289 Mich 324, 286 NW 633 (1939).

Note: See Standards 7.1 and 7.2 for other rights or interests to which any conveyance of a decedent's real property may be subject.

STANDARD 7.6

POWERS OF SUCCESSOR OR SURVIVING PERSONAL REPRESENTATIVES

STANDARD: A SUCCESSOR PERSONAL REPRESENTATIVE HAS THE SAME POWERS AND DUTIES AS THE ORIGINAL PERSONAL REPRESENTATIVE TO COMPLETE THE ADMINISTRATION AND DISTRIBUTION OF THE ESTATE, BUT THE SUCCESSOR PERSONAL REPRESENTATIVE OF A TESTATE ESTATE MAY NOT EXERCISE A POWER EXPRESSLY MADE PERSONAL TO THE PERSONAL REPRESENTATIVE NAMED IN THE WILL.

UNLESS THE WILL PROVIDES OTHERWISE:

- (A) EACH POWER EXERCISABLE BY SURVIVING PERSONAL CO-REPRESENTATIVE(S) MAY BE EXERCISED BY THE REMAINING PERSONAL CO-REPRESENTATIVE(S) AFTER THE APPOINTMENT OF ONE OR MORE IS TERMINATED; AND**
- (B) IF ANY PERSON NOMINATED AS PERSONAL CO-REPRESENTATIVE(S) IS NOT APPOINTED, THE REMAINING APPOINTED PERSONAL CO-REPRESENTATIVE(S) MAY EXERCISE ALL THE POWERS INCIDENT TO THE OFFICE.**

Problem A: The will of John Doe, the owner of Blackacre, was admitted to probate. It contained a valid power of sale and named Richard Roe, Edgar Poe and Samuel Smith as personal representatives. Roe and Poe were appointed and qualified as personal representatives. No rights of a surviving spouse were involved. Smith was not appointed. Poe and Roe, as personal representatives, deeded Blackacre to Simon Grant pursuant to the power of sale. Did Grant acquire marketable title to Blackacre?

Answer: Yes, unless it appears from the will that the testator intended to limit the exercise of the power of sale to all of the named personal representatives acting together.

Problem B: The will of Jane Doe, the owner of Blackacre, was admitted to probate. It contained a valid power of sale and named Richard Roe, Edgar Poe and Samuel Smith as personal representatives. Smith was appointed and qualified but died (or resigned). Poe predeceased Jane Doe, and Roe declined to serve. William West was appointed and qualified as personal representative. No rights of a surviving spouse were involved. West, as personal representative, deeded Blackacre to Simon Grant pursuant to the power of sale. Did Grant acquire marketable title to Blackacre?

Answer: Yes, unless it appears from the will that the testatrix intended to limit the exercise of the power of sale to the named personal representatives.

Problem C: The will of John Doe, the owner of Blackacre, was admitted to probate. It contained a valid power of sale and appointed Richard Roe and Edgar Poe as personal representatives. After Roe and Poe had qualified, Poe died (or resigned). No rights of a surviving spouse were involved. Roe, as surviving personal representative, deeded Blackacre to Simon Grant pursuant to the power of sale. Did Grant acquire marketable title to Blackacre?

Answer: Yes, unless it appears from the will that the testator intended to limit the exercise of the power of sale to both of the named personal representatives acting together.

Problem D: Jane Doe, a resident of Colorado, was the owner of Blackacre, located in Michigan. She died and her will, appointing Richard Roe as personal representative and containing a valid power of sale, was admitted to probate in Colorado. Ancillary administration of the estate occurred in Michigan and the will was admitted to probate. William West was appointed as personal representative and qualified. In this capacity, West deeded Blackacre to Simon Grant pursuant to the power of sale. Did Grant acquire marketable title to Blackacre?

Answer: Yes, unless it appears from the will that the testatrix intended to limit the exercise of the power of sale to the named personal representative.

Authorities: Generally: MCL 700.3716 and 700.3718.

Problem A: MCL 700.3716 and 700.3718.

Problem B: MCL 700.3716, 700.3717 and 700.3618.

Problem C: MCL 700.3613, 700.3718 and 700.7405.

Problem D: MCL 700.3716 and 700.3718.

Comment: An independent personal representative may not exercise a testamentary power expressly made personal to the personal representative named in the will. MCL 700.3613 and 700.3716.

Note: See Standards 7.1 and 7.2 for other rights or interests to which any conveyance of a decedent's real property may be subject.

STANDARD 7.7

TESTAMENTARY POWER TO SELL DOES NOT INCLUDE POWER TO MORTGAGE IN SUPERVISED PROBATE PROCEEDINGS COMMENCED BEFORE APRIL 1, 2000

STANDARD: A TESTAMENTARY POWER TO SELL REAL PROPERTY DOES NOT INCLUDE THE POWER TO MORTGAGE REAL PROPERTY IN SUPERVISED PROBATE PROCEEDINGS COMMENCED BEFORE APRIL 1, 2000.

Problem: The will of John Doe, the owner of Blackacre, was admitted to probate under supervised probate proceedings commenced on March 1, 2000. The will appointed Richard Roe as personal representative and contained a valid power of sale. Roe qualified as personal representative. Roe, as personal representative, borrowed \$10,000 which he used for proper estate purposes. To secure the loan, Roe executed a mortgage describing Blackacre. Is the mortgage valid?

Answer: No.

Authority: *Parkhurst v Trumbull*, 130 Mich 408, 90 NW 25 (1902).

Comment A: See Standard 7.17 with respect to the power to mortgage by an independent personal representative under the Revised Probate Code.

STANDARD 7.8

LIMITATION ON EXERCISE OF TESTAMENTARY POWER OF SALE

STANDARD: A TESTAMENTARY POWER OF SALE, GIVEN FOR A SPECIFIC PURPOSE, MAY BE EXERCISED ONLY FOR THAT PURPOSE.

Problem: The will of John Doe, the owner of Blackacre, was admitted to probate. The will named Richard Roe as personal representative, provided for the support of Doe's children during their minority and contained a valid power of sale of Blackacre, qualified by the phrase "if the sale is necessary to provide funds to support my children while they are minors." The petition for probate disclosed that at the date of Doe's death each of his children had reached majority. No rights of a surviving spouse were involved. Roe was appointed and qualified as personal representative, and gave a deed describing Blackacre to Simon Grant under the power of sale. Did Grant acquire marketable title to Blackacre?

Answer: No.

Authorities: MCL 700.3715. *Petit v Flint & Pere Marquette R. Co*, 114 Mich 362, 72 NW 238 (1897).

STANDARD 7.9

DOWER AS AFFECTING PROBATE SALES

STANDARD: TITLE TO REAL PROPERTY OF A MARRIED MALE DECEDENT DOMICILED IN MICHIGAN AT THE TIME OF HIS DEATH IS SUBJECT TO THE DOWER INTEREST OF HIS WIDOW, UNLESS:

(A) DOWER HAS BEEN BARRED;

**(B) THE WIDOW HAS ELECTED NOT TO TAKE DOWER;
OR**

(C) THE WIDOW HAS FAILED TO MAKE A TIMELY ELECTION AFTER PROPER NOTICE.

Problem A: John Doe, domiciled in Michigan and owner of Blackacre, died intestate leaving Mary Doe, his widow, as one of his heirs. Richard Roe was appointed and qualified as personal representative. Roe negotiated a sale of Blackacre for the purpose of paying debts and expenses of administration except that no notice of right of election was given to the widow. Roe filed a report of sale to Simon Grant, gave notice of hearing on the report of sale and filed and had approved the bond on sale as required by the court. The sale was confirmed and Roe conveyed to Grant by personal representative's deed. Did Grant acquire marketable title to Blackacre?

Answer: No. Under the facts stated, Mary Doe has not barred dower and the statutory notice has not been served upon her; therefore her right to elect to take dower still exists. The result would have been the same if Doe had died testate without specifically devising Blackacre.

Problem B: Same facts as in Problem A, except that Doe, while married to Mary Doe, sold Blackacre on land contract to Simon Grant. Mary Doe did not sign the land contract. Richard Roe, as personal representative, upon receiving the balance due under the land contract, conveyed to Grant by deed pursuant to the land contract as provided by MCL 700.3715. Did Grant acquire marketable title to Blackacre?

Answer: No.

Problem C: Same facts as in Problem A, except that (1) Blackacre was occupied by the widow, (2) the personal representative timely served on the widow statutory notice of right of election, (3) proof of service was filed, and (4) the widow failed to make an election within the statutory period. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem D: Same facts as in Problem A, except that after execution of the personal representative's deed to Simon Grant, the widow gave a quit claim deed of Blackacre to Grant. The deed recited her intent to bar her dower. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Authorities: Problems A and B: MCL 700.2202. *Rosen v Tackett*, 222 Mich 673, 193 NW 192 (1923).

Problem C: MCL 700.2203.

Problem D: MCL 558.13 (as to barring of dower).

Comment: Under certain circumstances, laches or estoppel may bar a widow's claim of consummate dower as against the validity of deeds such as are discussed in this Standard. See, *Rosen v Tackett*, *supra*.

Note: See Standard 4.7 as to the inchoate dower of a non-resident wife.

Caveat: If a decedent was not domiciled in Michigan, the surviving spouse is entitled to elect against the will only as may be provided by the law of the decedent's domiciliary state at the date of death. See, MCL 700.2202(6).

STANDARD 7.10

PURCHASE OF ESTATE REAL PROPERTY BY FIDUCIARY BEFORE JULY 1, 1979

STANDARD: THE TITLE ACQUIRED BY A FIDUCIARY PURCHASING ESTATE REAL PROPERTY IN AN INDIVIDUAL CAPACITY, DIRECTLY OR INDIRECTLY, BEFORE JULY 1, 1979 IS NOT MARKETABLE.

Problem A: The will of John Doe, the owner of Blackacre, was admitted to probate. The will appointed Richard Roe as executor and contained a valid power of sale. On May 2, 1979, Roe, who had qualified as executor, deeded Blackacre pursuant to the power of sale to Simon Grant who, with his wife, then deeded Blackacre to Roe. Did Roe acquire marketable title to Blackacre?

Answer: No.

Problem B: John Doe, the owner of Blackacre, died intestate. Richard Roe was appointed and qualified as administrator of Doe's estate. Roe obtained a license to sell Blackacre and sold it on May 2, 1979 to Simon Grant. The sale was confirmed. Grant and his wife then deeded Blackacre to Roe and Alice Roe, husband and wife. Did the Roes acquire marketable title to Blackacre?

Answer: No.

Authorities: MCL 709.27 (repealed effective July 1, 1979 by 1962 P.A. 83, being MCL 700.993). *Sheldon v Estate of Rice*, 30 Mich 296 (1874); *Houlihan v Fogarty*, 162 Mich 492, 127 NW 793 (1910); *In re Culhane's Estate*, 269 Mich 68, 256 NW 807 (1934); *Schutz v Kalamazoo Improvement Co*, 284 Mich 305, 279 NW 521 (1938); *Smith v Withey*, 309 Mich 364, 15 NW2d 671 (1944); *Carpenter v Mumby*, 86 Mich App 739, 273 NW2d 605 (1978); *Thiele v Cruikshank*, 96 Mich App 7, 292 NW2d 150 (1980).

Comment A: Laches or estoppel may bar claims of heirs or others claiming under the estate, contesting the validity of deeds such as are discussed in this Standard.

Comment B: The Committee expresses no opinion regarding the validity of a conveyance to a fiduciary under a will expressly authorizing the fiduciary to purchase real property from the estate.

Comment C: *Carpenter v Mumby*, 86 Mich App 739, 273 NW2d 605 (1978) and *Thiele v Cruikshank*, 96 Mich App 7, 292 NW2d 150 (1980) held that transactions in violation of MCL 709.27 are merely voidable, not void.

Comment D: The limitations period for actions to recover real property claimed by another through a deed made upon sale by an executor, administrator, guardian or testamentary trustee is five years. MCL 600.5801.

Note: See Standards 7.1 and 7.2 for other rights or interests that may affect a conveyance of real property of a decedent. See Standard 8.7 with respect to self-dealing transactions by non-testamentary trustees.

STANDARD 7.11-1

PURCHASE OF ESTATE REAL PROPERTY BY FIDUCIARY AFTER JUNE 30, 1979 AND BEFORE APRIL 1, 2000

STANDARD: THE TITLE ACQUIRED BY A FIDUCIARY PURCHASING ESTATE REAL PROPERTY IN AN INDIVIDUAL CAPACITY, DIRECTLY OR INDIRECTLY, AFTER JUNE 30, 1979 AND BEFORE APRIL 1, 2000, IS NOT MARKETABLE UNLESS THE SALE WAS MADE WITH EXPRESS COURT AUTHORITY AND AFTER NOTICE TO ALL INTERESTED PARTIES AND A HEARING. IN INDEPENDENT PROBATE PROCEEDINGS FOR A DECEDENT'S ESTATE, TITLE IS ALSO MARKETABLE IF THE WILL OR A CONTRACT ENTERED INTO BY THE DECEDENT EXPRESSLY AUTHORIZED THE TRANSACTION OR ALL INTERESTED PARTIES CONSENTED AFTER FAIR DISCLOSURE.

Problem A: The will of John Doe, the owner of Blackacre, was admitted to probate. The will appointed Richard Roe as personal representative and contained a valid power of sale. Roe, after qualifying as personal representative on November 21, 1999, deeded Blackacre to Simon Grant who, with his wife, then deeded Blackacre to Roe. Did Roe acquire marketable title to Blackacre?

Answer: No.

Problem B: John Doe, the owner of Blackacre, died intestate. Richard Roe was appointed and qualified as personal representative of Doe's estate. On November 21, 1999, Roe sold Blackacre to Simon Grant. The sale was confirmed. Grant and his wife then deeded Blackacre to Roe and Alice Roe, husband and wife. Did the Roes acquire marketable title to Blackacre?

Answer: No.

Problem C: John Doe, the owner of Blackacre, died intestate on July 30, 1999. Richard Roe was appointed and qualified as personal representative of Doe's estate. Roe deeded Blackacre to himself on September 1, 1999 with probate court authority after petition to the court, notice to

all interested parties and a hearing. Did Roe acquire marketable title to Blackacre?

Answer: Yes.

Problem D: Richard Roe, while acting as conservator of the estate of Mary Roe, a minor and the owner of Blackacre, sold Blackacre to himself on August 1, 1999 with probate court authority after petition to the court, notice to all interested parties and a hearing. Did Roe acquire marketable title to Blackacre?

Answer: Yes.

Problem E: Same facts as in Problem C, except Roe, as independent personal representative, deeded Blackacre to himself pursuant to specific authority contained in John Doe's will. Did Roe acquire marketable title to Blackacre?

Answer: Yes.

Problem F: Same facts as in Problem C, except Roe as independent personal representative, deeded Blackacre to himself after a fair disclosure of the pending transaction was made to and written consent was obtained from all interested parties and filed in the proceedings. Did Roe acquire marketable title to Blackacre?

Answer: Yes.

Problem G: Same facts as in Problem C, except Roe, as personal representative in supervised proceedings, deeded Blackacre to himself pursuant to specific authority contained in Doe's will. Did Roe acquire marketable title to Blackacre?

Answer: Yes.

Authorities: Problems A and B: MCL 700.642 (repealed effective April 1, 2000, by 1998 P.A. 386, being MCL 700.1101 *et seq.*). *Sheldon v Estate of Rice*, 30 Mich 296 (1874); *Houlihan v Fogarty*, 162 Mich 492, 127 NW 793 (1910); *In re Culhane's Estate*, 269 Mich 68, 256 NW 807 (1934); *Schutz v Kalamazoo Improvement Co*, 284 Mich 305, 279 NW 521 (1938); *Smith v Withey*, 309 Mich 364, 15 NW2d 671 (1944); *Carpenter v Mumby*, 86 Mich App 739, 273 NW2d 605 (1978); *Thiele v Cruikshank*, 96 Mich App 7, 292 NW2d 150 (1980).

Problem C: MCL 700.642 (repealed effective April 1, 2000, by 1998 P.A. 386, being MCL 700.1101 *et seq.*).

Problem D: MCL 700.482 (repealed effective April 1, 2000, by 1998 P.A. 386, being MCL 700.1101 *et seq.*).

Problems E and F: MCL 700. 345 (repealed effective April 1, 2000, by 1998 P.A. 386, being MCL 700.1101 *et seq.*).

Problem G: MCL 700.664 (repealed effective April 1, 2000, by 1998 P.A. 386, being MCL 700.1101 *et seq.*).

Comment A: Laches or estoppel may bar claims of heirs or others claiming under the estate, contesting the validity of deeds such as are discussed in this Standard.

Comment B: *Carpenter v Mumby*, 86 Mich App 739, 273 NW2d 605 (1978) and *Thiele v Cruikshank*, 96 Mich App 7, 292 NW2d 150 (1980) held that transactions in violation of MCL 709.27, repealed by the Revised Probate Code (RPC), now MCL 700.642 (repealed effective April 1, 2000, by 1998 P.A. 386, being MCL 700.1101 *et seq.*), are merely voidable, not void.

Comment C: MCL 700.992 (repealed effective April 1, 2000, by 1998 P.A. 386, being MCL 700.1101 *et seq.*) provided transition rules for the application of the RPC to proceedings pending on July 1, 1979 or commenced after June 30, 1979 for a decedent whose death occurred before July 1, 1979.

Note: See Standards 7.1 and 7.2 for other rights or interests that may affect a conveyance of real property of a decedent. See Standard 8.7 with respect to self-dealing transactions by non-testamentary trustees.

STANDARD 7.11-2

PURCHASE OF ESTATE REAL PROPERTY BY FIDUCIARY AFTER MARCH 31, 2000

STANDARD: THE TITLE ACQUIRED BY A FIDUCIARY PURCHASING ESTATE REAL PROPERTY IN AN INDIVIDUAL CAPACITY, DIRECTLY OR INDIRECTLY, AFTER MARCH 31, 2000 IS NOT MARKETABLE UNLESS:

- (A) THE SALE IS MADE WITH EXPRESS COURT AUTHORITY AND AFTER NOTICE TO ALL INTERESTED PARTIES AND A HEARING;
- (B) THE WILL OR A CONTRACT ENTERED INTO BY THE DECEDENT EXPRESSLY AUTHORIZED THE TRANSACTION; OR
- (C) ALL INTERESTED PARTIES CONSENT TO THE SALE AFTER FAIR DISCLOSURE.

Problem A: The will of John Doe, the owner of Blackacre, was admitted to probate. The will appointed Richard Roe as personal representative and contained a valid power of sale. Roe, after qualifying as personal representative on November 21, 2000, deeded Blackacre to Simon Grant who, with his wife, then deeded Blackacre to Roe. Did Roe acquire marketable title to Blackacre?

Answer: No.

Problem B: John Doe, the owner of Blackacre, died intestate. Richard Roe was appointed and qualified as personal representative of Doe's estate on November 21, 2000. Roe sold Blackacre to Simon Grant. The sale was confirmed. Grant and his wife then deeded Blackacre to Roe and Alice Roe, husband and wife. Did the Roes acquire marketable title to Blackacre?

Answer: No.

Problem C: John Doe, the owner of Blackacre, died intestate on June 1, 2000. Richard Roe was appointed and qualified as personal representative of Doe's estate. Roe deeded Blackacre to himself with probate court

authority after petition to the court, notice to all interested parties and a hearing. Did Roe acquire marketable title to Blackacre?

Answer: Yes.

Problem D: Richard Roe, while acting as conservator of the estate of Mary Roe, a minor and the owner of Blackacre, deeded Blackacre to himself on August 1, 2000 with probate court authority after petition to the court, notice to all interested parties and a hearing. Did Roe acquire marketable title to Blackacre?

Answer: Yes.

Problem E: Same facts as in Problem C, except Roe, as personal representative acting in informal proceedings, deeded Blackacre to himself pursuant to specific authority contained in Doe's will. Did Roe acquire marketable title to Blackacre?

Answer: Yes.

Problem F: Same facts as in Problem C, except Roe as personal representative in informal proceedings, deeded Blackacre to himself after fair disclosure of the pending transaction was made to and written consent was obtained from all interested parties and filed in the proceedings. Did Roe acquire marketable title to Blackacre?

Answer: Yes.

Problem G: Same facts as in Problem C, except Roe, as personal representative in formal proceedings, deeded Blackacre to himself pursuant to specific authority contained in Doe's will. Did Roe acquire marketable title to Blackacre?

Answer: Yes.

Authorities: Problems A and B: MCL 700.3713. *Sheldon v Estate of Rice*, 30 Mich 296 (1874); *Houlihan v Fogarty*, 162 Mich 492, 127 NW 793 (1910); *In re Culhane's Estate*, 269 Mich 68, 256 NW 807 (1934); *Schutz v Kalamazoo Improvement Co*, 284 Mich 305, 279 NW 521 (1938); *Smith v Withey*, 309 Mich 364, 15 NW2d 671 (1944); *Carpenter v Mumby*, 86 Mich App 739, 273 NW2d 605 (1978); *Thiele v Cruikshank*, 96 Mich App 7, 292 NW2d 150 (1980).

Problem C: MCL 700.3713

Problem D: MCL 700.5421.

Problems E and F: MCL 700.3713.

Problem G: MCL 700.3715(f).

Comment A: Laches or estoppel may bar claims of heirs or others claiming under the estate, as against the validity of deeds such as are discussed in this Standard.

Comment B: *Carpenter v Mumby*, 86 Mich App 739, 273 NW2d 605 (1978) and *Thiele v Cruikshank*, 96 Mich App 7, 292 NW2d 150 (1980) held that transactions in violation of MCL 709.27, repealed by the Revised Probate Code (RPC), now MCL 700.3713, are merely voidable, not void.

Comment C: Article VIII of the Estates and Protected Individuals Code (EPIC), MCL 700.8101 *et seq.*, provides transition rules for the application of EPIC to proceedings pending on April 1, 2000 or commenced after March 31, 2000 for a decedent whose death occurred before April 1, 2000.

Comment D: The limitations period for actions to recover real property claimed by another through a deed made upon sale by an executor, administrator, guardian or testamentary trustee is five years. MCL 600.5801.

Note: See Standards 7.1 and 7.2 for other rights or interests that may affect a conveyance of real property of a decedent. See Standard 8.7 with respect to self-dealing transactions by non-testamentary trustees.

STANDARD 7.12

CONVEYANCE OF MICHIGAN REAL PROPERTY BY FOREIGN FIDUCIARY NOT QUALIFIED IN MICHIGAN

STANDARD: A FIDUCIARY APPOINTED BY A COURT IN A FOREIGN JURISDICTION DURING THE ADMINISTRATION OF AN ESTATE CANNOT CONVEY MARKETABLE TITLE TO MICHIGAN REAL PROPERTY UNLESS QUALIFIED AS A FIDUCIARY IN MICHIGAN.

Problem A: Jane Doe, a resident of Ohio and the owner of Blackacre, a parcel of real property in Michigan, died intestate. Her estate was probated in Ohio. The fiduciary of the estate deeded Blackacre to Simon Grant pursuant to Ohio law. Did Grant acquire marketable title to Blackacre?

Answer: No.

Problem B: Jane Doe, a resident of Utah and the owner of Blackacre, a parcel of real property in Michigan, died testate. Her will, which appointed Richard Roe as personal representative with power of sale, was admitted to probate in Utah. After qualifying in Utah as fiduciary, Roe conveyed Blackacre to Simon Grant by a deed pursuant to the power of sale. Did Grant acquire marketable title to Blackacre?

Answer: No.

Problem C: Same facts as in Problem A or B, except that Jane Doe was the owner of a vendor's or vendee's interest in Blackacre. Did Grant, who was not a party to the land contract, acquire marketable title to Doe's interest in Blackacre?

Answer: No. Neither a vendor's nor a vendee's interest can be conveyed by a foreign fiduciary who is not qualified in Michigan.

Authorities: *Thayer v Lane*, Walk Chan 200 (1843); *Sheldon v Estate of Rice*, 30 Mich 296 (1874); *Dickinson v Seaver*, 44 Mich 624, 7 NW 182

(1880); *Reynolds v McMullen*, 55 Mich 568, 22 NW 41 (1885); *Colvin v Jones*, 194 Mich 670, 161 NW 847 (1917); *Jones v Turner*, 249 Mich 403, 228 NW 796 (1930).

Comment A: Fiduciary, as used in this Standard, is defined in MCL 700.1104(e).

Comment B: This Standard does not address conveyances by trustees under *inter vivos* trusts or transactions in which an interest in Michigan real property is acquired by a foreign testamentary trustee.

Note 1: See Standard 16.8 with respect to discharge or assignment of Michigan mortgages by a foreign fiduciary.

Note 2: After March 28, 1985 and before April 1, 2000, a foreign fiduciary not qualified in Michigan could execute and deliver a deed pursuant to a land contract upon receiving satisfaction of the land contract. See, Standard 12.6.

Note 3: After March 31, 2000, a foreign fiduciary can convey marketable title to Michigan real property upon compliance with MCL 700.4203. See, Standards 7.13-2 and 7.14-2.

STANDARD 7.13-1

CONVEYANCE OF MICHIGAN REAL PROPERTY BY FOREIGN FIDUCIARY QUALIFIED AS PERSONAL REPRESENTATIVE OF INTESTATE ESTATE IN MICHIGAN AFTER JUNE 30, 1979 AND BEFORE APRIL 1, 2000

STANDARD: AFTER JUNE 30, 1979 AND BEFORE APRIL 1, 2000, A FOREIGN FIDUCIARY APPOINTED ADMINISTRATOR OF AN INTESTATE ESTATE IN ANOTHER STATE MAY, MORE THAN 30 DAYS AFTER THE DEATH OF THE DECEDENT, QUALIFY AS A PERSONAL REPRESENTATIVE IN MICHIGAN, PROVIDED NO LOCAL ADMINISTRATION OR PETITION FOR LOCAL ADMINISTRATION IS PENDING IN MICHIGAN, AND MAY IN THAT CAPACITY CONVEY MARKETABLE TITLE TO MICHIGAN REAL PROPERTY.

Problem A: John Doe, a single man and a resident of Pennsylvania, died on July 10, 1979 owning Blackacre, a farm in Michigan. Richard Roe was appointed administrator of Doe's estate in Pennsylvania. More than 30 days after Doe's death, Roe qualified as personal representative in Michigan. No local administration or petition for local administration was pending at that time. On August 20, 1979, Roe deeded Blackacre to Simon Grant for a purpose permitted by statute and the sale was confirmed, no subsequent petition for local administration having been filed. All estate and inheritance taxes were paid. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except that before Roe's sale of Blackacre, a petition for the appointment of a local resident as personal representative was filed in a Michigan court, but Grant had no actual notice of the filing of the petition. Did Grant acquire marketable title to Blackacre?

Answer: Yes. Although Roe's authority to act as personal representative was terminated upon the filing of the petition for local administration,

Grant, who had no actual notice of the filing, was entitled to rely on the authority of Roe.

Authorities: MCL 700.235, 700.236 and 700.237 (all repealed effective April 1, 2000, by 1998 P.A. 386, being MCL 700.1101 *et seq.*).

Comment A: For sales of Michigan land by a foreign fiduciary in independent proceedings, see MCL 700.301, *et seq.* (Repealed effective April 1, 2000, by 1998 P.A. 386, being MCL 700.1101 *et seq.*)

Comment B: MCL 700.992 (repealed effective April 1, 2000, by 1998 P.A. 386, being MCL 700.1101 *et seq.*) provided transition rules for the application of the Revised Probate Code to proceedings pending on July 1, 1979 or commenced after June 30, 1979 for a decedent whose death occurred before July 1, 1979.

Note: See Standards 7.1 and 7.2 for other rights or interests that may affect a conveyance of real property of a decedent.

STANDARD 7.13-2

CONVEYANCE OF MICHIGAN REAL PROPERTY BY DOMICILIARY FOREIGN PERSONAL REPRESENTATIVE QUALIFIED AS PERSONAL REPRESENTATIVE OF INTESTATE ESTATE IN MICHIGAN AFTER MARCH 31, 2000

STANDARD: AFTER MARCH 31, 2000, A DOMICILIARY FOREIGN PERSONAL REPRESENTATIVE APPOINTED ADMINISTRATOR OF AN INTESTATE ESTATE IN ANOTHER STATE MAY QUALIFY AS A PERSONAL REPRESENTATIVE IN MICHIGAN, IF NO LOCAL ADMINISTRATION OR PETITION FOR LOCAL ADMINISTRATION IS PENDING IN MICHIGAN, AND MAY IN THAT CAPACITY CONVEY MARKETABLE TITLE TO MICHIGAN REAL PROPERTY.

Problem A: John Doe, a single man, and a resident of Pennsylvania, died on July 10, 2002 owning Blackacre, a farm in Michigan. Richard Roe was appointed administrator of Doe's estate in Pennsylvania. Roe qualified as personal representative in Michigan. No local administration or petition for local administration was pending in Michigan. Roe deeded Blackacre to Simon Grant on July 20, 2002. No local administration or petition for local administration was pending at the time of the conveyance. All estate taxes were paid. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except that before Roe's conveyance of Blackacre, a petition for the appointment of a Michigan resident as personal representative was filed in Michigan. Grant had no actual notice of the petition. Did Grant acquire marketable title to Blackacre?

Answer: Yes. Although Roe's authority terminated upon the filing of the petition for local administration, Grant was entitled to rely on Roe's apparent authority.

Authorities: MCL 700.4203 and 700.4204.

Comment A: Article VIII of the Estates and Protected Individuals Code (EPIC), MCL 700.8101 *et seq.*, provides transition rules for the application of EPIC to proceedings pending on April 1, 2000 or commenced after March 31, 2000 for a decedent whose death occurred before April 1, 2000.

Comment B: “Foreign personal representative” is defined in MCL 700.1104 as a personal representative appointed in another jurisdiction. Although “domiciliary foreign personal representative” is not defined by statute, the Committee interprets the term as used in EPIC to mean a foreign personal representative appointed by a court in the jurisdiction in which the non-resident decedent resided at the time of death.

Comment C: The provision in MCL 700.4204 that the authority of a domiciliary foreign personal representative may be exercised only if local administration or a petition for local administration “is not pending” in Michigan, is not limited to the county or counties in which the real property is located. Accordingly, a domiciliary foreign personal representative, even if qualified in one county, has no authority to convey estate real property if local administration or a petition for local administration is pending in another county.

Note: See Standards 7.1 and 7.2 for other rights or interests that may affect a conveyance of real property of a decedent.

STANDARD 7.14-1

CONVEYANCE OF MICHIGAN REAL PROPERTY BY FOREIGN FIDUCIARY QUALIFIED AS PERSONAL REPRESENTATIVE OF TESTATE ESTATE IN MICHIGAN AFTER JUNE 30, 1979 AND BEFORE APRIL 1, 2000

STANDARD: AFTER JUNE 30, 1979 AND BEFORE APRIL 1, 2000, A FOREIGN FIDUCIARY APPOINTED PURSUANT TO A WILL ADMITTED TO PROBATE IN ANOTHER STATE MAY, MORE THAN 30 DAYS AFTER THE DEATH OF THE DECEDENT, QUALIFY AS A PERSONAL REPRESENTATIVE IN MICHIGAN AND MAY IN THAT CAPACITY CONVEY MARKETABLE TITLE TO MICHIGAN REAL PROPERTY.

Problem A: John Doe, a single man and a resident of Pennsylvania, died on July 10, 1979 owning Blackacre, a farm in Michigan. His will was admitted to probate in Pennsylvania, where Richard Roe qualified as executor. More than 30 days after Doe's death, Doe's will was admitted to probate in Michigan and Roe qualified as personal representative. Roe deeded Blackacre to Simon Grant on July 20, 1981 for a purpose permitted by Michigan statute and the sale was confirmed. All estate and inheritance taxes were paid. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except that Doe's will contained a power of sale and Roe deeded Blackacre to Grant without any court proceedings relating to the sale. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem C: John Doe, a single man and a resident of Pennsylvania, died on July 10, 1979 owning Blackacre, a farm in Michigan. His will was admitted to probate in Pennsylvania, where Richard Roe qualified as executor. More than 30 days after Doe's death, an authenticated copy

of Doe's will and the order admitting the will were deposited in a Michigan probate court. Richard Roe then qualified as independent personal representative in Michigan. Roe deeded Blackacre to Simon Grant on August 20, 1979. Did Grant acquire marketable title?

Answer: Yes.

Authorities: MCL 700.152, 700.153, 700.235, 700.236, 700.308(2) and 700.664 (all repealed effective April 1, 2000, by 1998 P.A. 386, being MCL 700.1101 *et seq.*).

Comment: MCL 700.992 (repealed effective April 1, 2000, by 1998 P.A. 386, being MCL 700.1101 *et seq.*) provided transition rules for the application of the Revised Probate Code to proceedings pending on July 1, 1979 or commenced after June 30, 1979 for a decedent whose death occurred before July 1, 1979.

Note: See Standards 7.1 and 7.2 for other rights or interests that may affect a conveyance of real property of a decedent.

STANDARD 7.14-2

CONVEYANCE OF MICHIGAN REAL PROPERTY BY DOMICILIARY FOREIGN PERSONAL REPRESENTATIVE QUALIFIED AS PERSONAL REPRESENTATIVE OF TESTATE ESTATE IN MICHIGAN AFTER MARCH 31, 2000

STANDARD: AFTER MARCH 31, 2000, A DOMICILIARY FOREIGN PERSONAL REPRESENTATIVE APPOINTED PURSUANT TO A WILL ADMITTED TO PROBATE IN ANOTHER STATE MAY QUALIFY AS A PERSONAL REPRESENTATIVE IN MICHIGAN, IF NO LOCAL ADMINISTRATION OR PETITION FOR LOCAL ADMINISTRATION IS PENDING IN MICHIGAN, AND MAY IN THAT CAPACITY CONVEY MARKETABLE TITLE TO MICHIGAN REAL PROPERTY.

Problem: John Doe, a single man and a resident of Pennsylvania, died on May 1, 2000 owning Blackacre, a farm in Michigan. His will was admitted to probate in Pennsylvania, where Richard Roe qualified as executor. Doe's will was admitted to probate in Michigan and Roe qualified as personal representative. No local administration or petition for local administration was pending at that time. Roe deeded Blackacre to Simon Grant on July 20, 2002. All estate taxes were paid. No local administration or petition for local administration was pending at the time of the conveyance. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Authorities: MCL 700.3201, 700.3408, 700.3409, 700.3715 and 700.4203.

Comment: Article VIII of the Estates and Protected Individuals Code (EPIC), MCL 700.8101 *et seq.*, provides transition rules for the application of EPIC to proceedings pending on April 1, 2000 or commenced after March 31, 2000 for a decedent whose death occurred before April 1, 2000.

Note: See Standards 7.1 and 7.2 for other rights or interests that may affect a conveyance of real property of a decedent.

STANDARD 7.15

NOTICE OF PROBATE HEARING BEFORE JULY 1, 1979

STANDARD: BEFORE JULY 1, 1979, MARKETABILITY OF TITLE TO REAL PROPERTY ACQUIRED THROUGH PROBATE PROCEEDINGS WAS NOT ADVERSELY AFFECTED BY FAILURE TO GIVE NOTICE OF HEARING ACCORDING TO THE PROBATE CODE, IF THE NOTICE WAS GIVEN PURSUANT TO THE APPLICABLE PROBATE COURT RULE.

Problem A: John Doe, the owner of Blackacre, died intestate on May 7, 1974. His estate was probated. Notices of hearings on the petition for administration, the petition for allowance of claims, the petition for determination of Doe's heirs, and the administrator's final account were given in accordance with Probate Court Rule (PCR) 106. There was only one publication of notice in each instance. Doe's estate was closed in 1975. The residue, including Blackacre, was assigned to Ruth Roe and Nancy Poe, who were determined by the probate court to be Doe's heirs at law. Roe and Poe deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: Yes. The probate court Rules required only one publication of notice for each hearing. The Probate Code required three publications, but the Supreme Court has held that its constitutional power to establish rules of practice and procedure for all state courts supersedes conflicting statutory provisions. Accordingly, one publication of notice for each hearing was sufficient. MCL 702.56, 708.2, 702.76, 704.39 and 701.32, repealed effective July 1, 1979 by MCL 700.993 (Revised Probate Code), repealed effective April 1, 2000 by MCL 700.8102 (Estates and Protected Individuals Code).

Authorities: PCR 106. *Michigan Constitution* 1963, Article VI, Sec 5. *Darr v Buckley*, 355 Mich 392, 84 NW2d 837 (1959); *Perin v Peuler*, 373 Mich 531, 130 NW2d 4 (1964); *Buscaino v Rhodes*, 385 Mich 474, 189 NW2d 202 (1971).

Comment A: The Revised Probate Code (MCL 700.31, repealed effective April 1, 2000, by 1998 P.A. 386, being MCL 700.1101 *et seq.*), effective July 1, 1979, provided as follows: “Except as otherwise provided by law, any notice required by law shall be governed by Supreme Court rule.” See also, PCR 16.

Comment B: The Estates and Protected Individuals Code (MCL 700.1401), effective April 1, 2000, provides as follows: “Unless otherwise provided by supreme court rule, notice must be given by 1 of the following methods:...”

Caveat 1: *Buscaino and Perin, supra*, were overruled by *McDougall v Schanz*, 461 Mich 15, 597 NW2d 148 (1999) to the extent that *Buscaino* and *Perin* held that the Michigan Supreme Court had authority to promulgate rules which superseded conflicting statutory provisions. *McDougall* held that the Supreme Court’s constitutional rule-making authority extended only to matters of practice and procedure, not to adoption of court rules that establish, abrogate, or modify substantive law.

The Committee expresses no opinion as to whether the holding in *McDougall* applies retroactively.

Caveat 2: The U. S. Supreme Court in *Tulsa Professional Collection Services v Estate of Pope, Jr.*, 485 U. S. 478, 108 S. Ct. 1340, 99 L Ed 2d 565, (1988) held that the Oklahoma Probate Code provision stating that publication of a Notice of Requirement to File Claims qualified as sufficient notice to all estate creditors was unconstitutional, as a violation of the Due Process Clause of the Fourteenth Amendment. The Court held that creditors of an estate who are “known or reasonably ascertainable” by the fiduciary must be given notice by mail, or other means sufficient to assure actual notice.

The Committee expresses no opinion as to whether the Michigan court rules and statutory provisions cited in the Standard are consistent with the notice requirements established by the U.S Supreme Court in the *Tulsa* case.

STANDARD 7.16-1

CONVEYANCE OF REAL PROPERTY BY INDEPENDENT PERSONAL REPRESENTATIVE AFTER JUNE 30, 1979 AND BEFORE APRIL 1, 2000

STANDARD: AFTER JUNE 30, 1979 AND BEFORE APRIL 1, 2000, AN INDEPENDENT PERSONAL REPRESENTATIVE MAY CONVEY MARKETABLE TITLE TO REAL PROPERTY TO A GOOD FAITH PURCHASER FOR VALUE, IF THE LETTERS OF AUTHORITY DO NOT RESTRICT THE POWER OF THE INDEPENDENT PERSONAL REPRESENTATIVE TO MAKE THE CONVEYANCE.

Problem: John Doe, the owner of Blackacre, died January 10, 1980. Richard Roe qualified as the independent personal representative of Doe's estate. Roe deeded Blackacre to Simon Grant, a good faith purchaser for value. Roe's letters of authority did not restrict Roe's power to convey real property. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Authorities: MCL 700.331, 700.334, 700.335 and 700.349 (all repealed effective April 1, 2000, by 1998 P.A. 386, being MCL 700.1101 *et seq.*).

Comment: MCL 700.992 (repealed effective April 1, 2000, by 1998 P.A. 386, being MCL 700.1101 *et seq.*) provided transition rules for the application of the Revised Probate Code to proceedings pending on July 1, 1979 or commenced after June 30, 1979 for a decedent whose death occurred before July 1, 1979.

Note: See Standards 7.1 and 7.2 for other rights or interests that may affect a sale of real property of a decedent.

STANDARD 7.16-2

CONVEYANCE OF REAL PROPERTY BY PERSONAL REPRESENTATIVE APPOINTED IN INFORMAL APPOINTMENT PROCEEDINGS AFTER MARCH 31, 2000

STANDARD: AFTER MARCH 31, 2000, A PERSONAL REPRESENTATIVE ACTING IN AN INFORMAL APPOINTMENT PROCEEDING MAY CONVEY MARKETABLE TITLE TO REAL PROPERTY TO A GOOD FAITH PURCHASER FOR VALUE, IF LETTERS OF APPOINTMENT ARE IN EFFECT WHEN THE CONVEYANCE IS MADE AND THE PURCHASER HAS NO ACTUAL KNOWLEDGE OF ANY RESTRICTION AGAINST THE CONVEYANCE.

Problem A: John Doe died May 1, 2002 owning Blackacre. Richard Roe was appointed personal representative of Doe's estate, pursuant to informal appointment proceedings, and his letters of appointment contained no restrictions. Doe left no widow or minor children. Roe deeded Blackacre to Simon Grant, a good faith purchaser for value, on September 10, 2002. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except that Roe's letters of appointment contained restrictions against the sale. Grant had no actual knowledge of the restrictions. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Authorities: MCL 700.3307, 700.3711, 700.3714, 700.3715 and 700.3716.

Comment A: Article VIII of the Estates and Protected Individuals Code (EPIC), MCL 700.8101 *et seq.*, provides transition rules for the application of EPIC to proceedings pending on April 1, 2000 or commenced after March 31, 2000 for a decedent whose death occurred before April 1, 2000.

Comment B: MCL 700.3714 provides that restrictions contained in the letters of appointment of a supervised personal representative are valid, irrespective of whether a third party has actual knowledge of the restrictions.

Note: See Standards 7.1 and 7.2 for other rights or interests that may affect a conveyance of real property of a decedent.

STANDARD 7.17

MORTGAGE OF REAL PROPERTY BY INDEPENDENT PERSONAL REPRESENTATIVE AFTER JUNE 30, 1979 AND BEFORE APRIL 1, 2000

STANDARD: AFTER JUNE 30, 1979 AND BEFORE APRIL 1, 2000, AN INDEPENDENT PERSONAL REPRESENTATIVE MAY GIVE A VALID MORTGAGE OF REAL PROPERTY TO A GOOD FAITH MORTGAGEE FOR VALUE, UNLESS THE LETTERS OF AUTHORITY RESTRICT THE POWER TO MORTGAGE OR THE MORTGAGEE HAS ACTUAL KNOWLEDGE OF LIMITATIONS CONTAINED IN A COURT ORDER OR THE WILL, IF ANY.

Problem: John Doe, the owner of Blackacre, died intestate on March 1, 1991. Richard Roe qualified as independent personal representative of Doe's estate on May 1, 1991. Roe mortgaged Blackacre for value to Simon Grant, a good faith mortgagee. Did Grant obtain a valid mortgage?

Answer: Yes, unless the letters of authority restricted Roe's power to mortgage or unless there was a court order or a will limiting Roe's power to mortgage and Grant had actual knowledge of those limitations.

Authorities: MCL 700.334(w) and 700.349 (both repealed effective April 1, 2000, by 1998 P.A. 386, being MCL 700.1101 *et seq.*).

Note: See Standards 7.1 and 7.2 for other rights or interests which may affect a mortgage of real property of a decedent.

STANDARD 7.18

MORTGAGE OF REAL PROPERTY BY PERSONAL REPRESENTATIVE APPOINTED IN FORMAL OR INFORMAL APPOINTMENT PROCEEDINGS AFTER MARCH 31, 2000

STANDARD: AFTER MARCH 31, 2000, A PERSONAL REPRESENTATIVE ACTING IN FORMAL OR INFORMAL APPOINTMENT PROCEEDINGS MAY GIVE A VALID MORTGAGE OF REAL PROPERTY TO A GOOD FAITH MORTGAGEE FOR VALUE, UNLESS THE LETTERS OF APPOINTMENT RESTRICT THE POWER TO MORTGAGE OR THE MORTGAGEE HAS ACTUAL KNOWLEDGE OF LIMITATIONS CONTAINED IN A COURT ORDER OR THE WILL, IF ANY.

Problem: John Doe, the owner of Blackacre, died intestate on June 1, 2001. Richard Roe qualified as personal representative of Doe's estate. Roe mortgaged Blackacre for value to Simon Grant, a good faith mortgagee. Did Grant obtain a valid mortgage?

Answer: Yes, unless the letters of appointment restricted Roe's power to mortgage or unless there was a court order or a will limiting Roe's power to mortgage and Grant had actual knowledge of those limitations.

Authorities: MCL 700.3501(3), 700.3714 and 700.3715(y).

Comment: With respect to the mortgage of estate real property in independent probate proceedings after June 30, 1979 and before April 1, 2000, see Standard 7.17.

Note: See Standards 7.1 and 7.2 for other rights or interests which may affect a mortgage of real property of a decedent.

CHAPTER VIII
CONVEYANCES BY AND TO TRUSTEES



STANDARD 8.1

DEED CREATING PASSIVE TRUST

STANDARD: A CONVEYANCE TO A TRUSTEE, WHO HAS NO POWER OF ACTUAL DISPOSITION OR MANAGEMENT OR UPON WHOM NO TRUST DUTIES ARE IMPOSED, CREATES A PASSIVE TRUST AND VESTS TITLE IN THE BENEFICIARY, IF LIVING, NOT IN THE NAMED TRUSTEE.

Problem: John Doe deeded Blackacre to “Richard Roe in trust for Mary Doe.” The deed contained no other reference to a trust. Investigation established that there was no will, declaration of trust or other instrument in which Roe was named as trustee for Mary Doe. Later, Mary Doe deeded Blackacre to Simon Grant. Roe did not join, either individually or as trustee. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Authorities: MCL 555.3 and MCL 555.5. *Ready v Kearsley*, 14 Mich 215 (1866); *Everts v Everts*, 80 Mich 222, 45 NW 88 (1890); *Rothschild v Dickinson*, 169 Mich 200, 134 NW 1035 (1912); *Woolfitt v Histed*, 208 Mich 308, 175 NW 286 (1919).

Note: The prudent title examiner should consider requiring a deed from the named trustee in addition to a deed from the beneficiary, because of the difficulty in establishing with certainty whether a trust exists.

Comment: *Nash v Duncan Park Comm*, 304 Mich App 599, 848 NW2d 435 (2014), lv gtd on other grounds Oct 24, 2014 (Docket No.

149168), held that a deed which imposed active duties on the named grantee-trustees created a valid trust, and vested title in the trustees and not the trust beneficiary.

STANDARD 8.2

EFFECT OF DESIGNATION “TRUSTEE”

STANDARD: THE WORD “TRUSTEE” FOLLOWING THE NAME OF A PARTY TO AN INSTRUMENT WHICH CONTAINS NO OTHER REFERENCE TO A TRUST OR TRUST POWERS, DOES NOT OF ITSELF CONSTITUTE NOTICE OF A TRUST.

Problem A: John Doe deeded Blackacre to “Richard Roe, Trustee.” The deed contained no other reference to a trust. Does the word “Trustee” constitute notice of a trust?

Answer: No.

Problem B: Same facts as in Problem A, except that Doe deeded Blackacre to “Ruth Roe, Trustee.” The deed contained no other reference to a trust. Later, “Ruth Roe, Trustee” deeded Blackacre to Simon Grant, who was a purchaser for value with no actual notice of the existence of a trust. Did Grant acquire marketable title to Blackacre?

Answer: Yes. Grant could treat the conveyance as vesting title in Ruth Roe individually and free of any trust. Although there may have been a valid trust, Grant took free of the trust because he had no notice of it.

Authorities: MCL 555.20 and 555.11. *McQuillan v Ayer*, 189 Mich 566, 155 NW 599 (1915).

Comment: MCL 555.20 provides that “[w]hen an express trust is created, but is not contained or declared in the conveyance to the trustees, such conveyance shall be deemed absolute as against the subsequent... purchasers from such trustees, without notice, and for a valuable consideration.” The Committee expresses no opinion as to the meaning of the words “contained” or “declared” in this provision, or as to what additional words, beyond the mere designation of “trustee,” would be sufficient to charge a purchaser with the duty of making inquiry as to whether there is a trust and, if so, what its terms provide.

Note: A deed from “Richard Roe, Trustee” which does not state the grantor’s marital status would not be entitled to be recorded if the deed has no other reference to a trust. MCL 565.221. See, Standard 3.4. In the case of a deed from “Richard Roe, Trustee,” without other reference to a trust, if Roe is married but his wife does not join in the deed, the prudent title examiner should consider requiring a deed from Roe’s wife so as to bar her inchoate dower.

Caveat: This Standard does not address transactions in which a purchaser has actual or constructive notice of a trust derived from a source other than an instrument which only refers to the grantor as “trustee.”

STANDARD 8.3

DEED BY TRUSTEE UNDER EXPRESS TRUST

STANDARD: A DEED BY A TRUSTEE UNDER A TRUST WHOSE NECESSARY TERMS ARE EXPRESSED IN THE INSTRUMENT CREATING THE TRUSTEE'S ESTATE DOES NOT VEST MARKETABLE TITLE OF RECORD IN THE GRANTEE UNLESS THE INSTRUMENT CONTAINING THE TRUST TERMS OR A CERTIFICATE OF TRUST EXISTENCE AND AUTHORITY COMPLYING WITH THE REQUIREMENTS OF ACT 133 OF THE MICHIGAN PUBLIC ACTS OF 1991 (A) IS OF PUBLIC RECORD, (B) ESTABLISHES A VALID TRUST AND (C) CONTAINS A VALID AUTHORITY FOR THE CONVEYANCE.

Problem A: Blackacre was deeded to "Richard Roe as Trustee to collect rents and pay to James Smith for his life." No such trust instrument or certificate appears of public record. Roe, as trustee, deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: No.

Problem B: John Doe, a widower and owner of Blackacre, died testate. Doe's will, which was admitted to probate, created a valid trust for the benefit of Doe's children and appointed Richard Roe, Trustee, with power of sale. Doe's estate was probated, debts, taxes and expenses paid, and an order entered distributing Blackacre to the trustee. Roe, as testamentary trustee, deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem C: Blackacre was owned by Richard Roe as trustee under a trust agreement conferring upon the trustee the express power to sell and convey any real property constituting part of the trust corpus. A certificate of trust existence and authority as to the trust, complying with the requirements of Act 133 of the Michigan Public Acts of 1991, was duly recorded. Roe, as trustee, deeded Blackacre to Simon Grant. Did Grant obtain

marketable title to Blackacre?

Answer: Yes.

Problem D: Blackacre was deeded to Richard Roe as trustee under a valid recorded trust. The trust agreement conferred power of sale only with the consent of the majority of the beneficiaries. Roe, as trustee, deeded Blackacre to Simon Grant, but a majority of the beneficiaries did not join therein or otherwise evidence their consent of record. Did Grant acquire marketable title of record to Blackacre?

Answer: No.

Problem E: John Doe, a widower, the owner of Blackacre, deeded it on December 1, 1988, to Richard Roe as trustee under a recorded declaration of trust containing a power of sale. The trust provided that the corpus was to be retained for 50 years and then distributed to Doe's then-living lineal descendants, the income to be distributed annually to Doe's children and grandchildren. Roe, as such trustee, thereafter deeded Blackacre to Simon Grant. Did Grant acquire marketable title of record to Blackacre?

Answer: No. The trust was void ab initio as violating either the statute prohibiting suspension of the power of alienation (see Standard 9.6) or the common law rule against perpetuities (see Standard 9.4), whichever is applicable. Since the trust was void at its creation, the power of sale therein contained failed. In the absence of a valid trust and power, title acquired through the trustee was not marketable.

Comment: If the trustee's deed had been executed and recorded after December 27, 1988, the effective date of the Uniform Statutory Rule Against Perpetuities, being Act 418 of the Michigan Public Acts of 1988 (MCL 554.71 *et seq.*), it may be valid under the alternative 90-year rule provided by the Act.

Authorities: Generally: MCL 555.11 to 555.23 incl; MCL 565.431 to 555.436 incl.

Problem D: *Palmer v Williams*, 24 Mich 328 (1872).

Problem E: MCL 554.14 to 554.20 incl. (repealed and superseded by 1949 PA 38, MCL 554.51 to 554.53 incl.). *Gardner v City National Bank and Trust Co*, 267 Mich 270, 255 NW 587 (1934); *LaMere v Jackson*, 288 Mich 99, 284 NW 659 (1939); *Grand Rapids Trust Co v Herbst*, 200 Mich 321, 190 NW 250 (1922); *Petit v Flint & Pere Marquette R Co*, 114 Mich 362, 72 NW 238 (1897).

Comment: This Standard does not consider the requirements of MCL 700.162 (now repealed) (pertaining to the recording of wills), nor does it attempt to deal with recording problems such as those arising where the declaring or creating instrument appears of public record only in a county or counties other than that in which the land conveyed is located.

Caveat 1: This Standard deals with the requirements for establishing a marketable title of record in connection with deeds by trustees where the trust terms and existence are sufficiently expressed to constitute notice of the existence of the trust. It does not apply to deeds from so-called naked trustees or other grantors where the trust is not fully expressed. See Standard 8.2.

Caveat 2: Revised Probate Code Section 833 (MCL 700.833, repealed and superseded by MCL 700.7404) seems to protect a third party in dealing with a trustee, allowing the third party to assume the existence and proper exercise of trust powers, even if the trust is fully expressed on the record as long as the third party does not have actual notice that the trustee is exceeding his or her powers or is improperly exercising them. This puts RPC Section 833 (MCL 700.833) and MCL 700.7404 into an apparent conflict with MCL 555.21 and MCL 565.435.

Note: The Michigan Trust Code (MCL 700.7101, *et seq.*) became effective on April 1, 2010. Section 7913 (MCL 700.7913) prescribes the contents and execution of a certificate of trust. The provisions of MCL 700.7913 and MCL 565.432-433 are similar but not exactly the same. Both statutes provide protection to parties that rely in good faith on the provisions contained in a trust certificate.

A significant difference between the two statutes relates to the execution of a trust certificate. MCL 700.7913 provides that a “certificate of trust may be signed or otherwise authenticated by the settlor, any trustee, or an attorney for the settlor or trustee.”

MCL 565.433 provides that a “certificate of trust existence and authority shall be executed by the settlor or grantor; an attorney for the settlor, grantor, or trustee; or an officer of a banking institution or an attorney if then acting as a trustee.” Under MCL 565.433 a trustee would not be a proper person to sign a certificate of trust unless the trustee is one of the persons identified therein.

Section 7913 of the Trust Code is not intended to replace the provisions of MCL 565.432-433, which are intended to apply to real property transactions.

STANDARD 8.4

DEED BY LESS THAN ALL TRUSTEES UNDER EXPRESS TRUST

STANDARD: ALL SURVIVING TRUSTEES MUST EXECUTE A DEED PURSUANT TO A POWER OF SALE CONTAINED IN AN EXPRESS TRUST UNLESS THE TRUST INSTRUMENT PROVIDES OTHERWISE.

Problem A: John Doe, the owner of Blackacre, died testate. Doe's will devised Blackacre to Edgar Poe and Richard Roe as trustees under an express trust containing a power of sale. The order assigning residue entered in Doe's estate assigned Blackacre to Poe and Roe as trustees. Roe, as trustee, deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: No.

Problem B: Same facts as in Problem A, except that Poe died before the execution of the deed and no successor co-trustee was appointed. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Authorities: MCL 555.21 and 700.7406(4). *Nichols v Pospiech*, 289 Mich 324, 286 NW 633 (1939); *Traxler v Rothbart*, 473 Mich 488, 703 NW 2d 796 (2005).

STANDARD 8.5

DEED BY SUCCESSOR TRUSTEE UNDER EXPRESS TRUST

STANDARD: IF AN EXPRESS TRUST CONTAINS A POWER OF SALE WHICH IS NOT LIMITED TO THE NAMED TRUSTEE, A SUCCESSOR TRUSTEE MAY CONVEY REAL PROPERTY PURSUANT TO THE TRUST TERMS. IF A TRUST DOES NOT CONTAIN A POWER OF SALE OR CONTAINS A POWER OF SALE LIMITED TO THE NAMED TRUSTEE, THE PROBATE COURT MAY ENTER AN ORDER REMOVING ANY TRUST PROVISION LIMITING THE SUCCESSOR TRUSTEE'S POWER OF SALE, THEREBY PERMITTING THE SUCCESSOR TRUSTEE TO CONVEY REAL PROPERTY PURSUANT TO THE COURT'S ORDER.

Problem A: Richard Roe, the sole (or surviving) trustee under an express, recorded declaration of trust containing a power of sale, died. The trust instrument did not provide for a successor trustee. Blackacre was part of the corpus of the trust. Later, Alice Roe, widow and sole heir at law of Richard Roe, deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: No. Real property held in trust does not descend to the heirs at law of a deceased trustee.

Problem B: Same facts as in Problem A, except that after Roe's death the probate court appointed Edgar Poe as successor trustee. Poe, as trustee, conveyed Blackacre to Simon Grant pursuant to the power of sale. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem C: Same facts as in Problem A, except that Richard Roe resigned as trustee and the probate court appointed Edgar Poe as successor trustee. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem D: John Doe executed a declaration of trust under which Richard Roe and Edgar Poe were appointed trustees. The trust instrument contained a power of sale which was limited as follows: “Having confidence in the trustees herein named, I declare that the powers granted shall be personal to them and shall not vest in their successors.” The trust instrument was recorded, and Doe deeded Blackacre to the named trustees. Roe and Poe died; the probate court appointed John Jones and Samuel Smith as successor trustees. Jones and Smith, as successor trustees, executed a deed describing Blackacre to Simon Grant pursuant to the power of sale. Did Grant acquire marketable title to Blackacre.

Answer: No. Although the probate court appointed successor trustees, the court’s order did not remove the trust provision limiting the power of sale to the named trustees.

Authorities: MCL 700.1302, 700.7201 and 700.7402.

Comment A: This Standard and the Problems are limited to non-testamentary trusts. The probate court has jurisdiction to appoint a successor trustee under a testamentary trust upon the death, resignation or removal of a sole or surviving trustee. MCL 700.7201 and 700.1302.

Comment B: The Estates and Protected Individuals Code (EPIC) gives the probate court certain powers in the administration of trusts, both testamentary and non-testamentary. Not all trusts, however, meet the definition of a trust for purposes of EPIC. The following trusts are not “trusts” within the meaning of EPIC and therefore the probate court has no jurisdiction over them: resulting trusts; business trusts providing for certificates to be issued to beneficiaries; investment trusts; common trust funds; voting trusts; security arrangements; liquidation trusts; trusts created for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind; and any arrangement under which a person is a nominee or escrow agent for another. See, MCL 700.1107. The jurisdiction to appoint a successor trustee for the above-named types of trusts is vested in the circuit court. MCL 555.24 and 555.27.

STANDARD 8.6

DEED EXECUTED BY TRUSTEE WITHOUT EXPRESS OR IMPLIED POWER OF SALE UNDER EXPRESS TRUST BEFORE APRIL 1, 2000

STANDARD: BEFORE APRIL 1, 2000 A TRUSTEE UNDER AN EXPRESS TRUST WHICH NEITHER CONTAINS NOR IMPLIES A POWER OF SALE BUT DOES NOT RESTRICT SALE, HAD POWER TO CONVEY REAL PROPERTY IF:

- (A) ALL PERSONS HAVING A BENEFICIAL INTEREST JOINED WITH THE TRUSTEE IN THE CONVEYANCE OR CONVEYED BY SEPARATE INSTRUMENT; OR
- (B) THE SALE WAS CONFIRMED BY AN ORDER OF THE PROBATE COURT.

Problem A: John Doe died testate on December 1, 1999. His will devised Blackacre and other real property to Richard Roe as trustee under an express trust. The will did not contain or imply a power of sale, but it did not require that Blackacre be retained in the trust or otherwise restrict the sale of Blackacre. On January 31, 2000 Roe, as trustee, and all persons having a beneficial interest joined in a deed of Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except that Roe, as trustee, reported the facts of the sale to the probate court and requested confirmation of the sale. Notice of hearing was given to all parties in interest. An order confirming the sale was entered, pursuant to which Roe deeded Blackacre to Grant. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem C: Same facts as in Problem A, except that Roe, as trustee, petitioned the probate court for construction of the will and for authority to con-

vey Blackacre. All interested parties were joined in the proceeding. The court entered an order authorizing the sale in order to preserve the assets of the estate, after determining that there was no express power of sale under the will. Roe, as trustee, filed a report of the sale to Grant, and the probate court entered an order confirming the sale. Roe, as trustee, deeded Blackacre to Grant pursuant to the order. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Authorities: Problems A through C: MCL 700.634 (repealed effective April 1, 2000); and 700.643 through 700.647 (repealed effective April 1, 2000). *Jones v Harsha*, 225 Mich 416, 196 NW 624 (1923); *MacKenzie v Union Guardian Trust Co*, 262 Mich 563, 247 NW2d 914 (1933).

Comment: Beginning April 1, 2000, the effective date of the Estates and Protected Individuals Code, the provisions governing the authority of trustees are set forth in MCL 700.7401 through 700.7410. Under 700.7401, a trustee has the power to sell real property unless the trustee's power of sale is restricted by the trust instrument.

Note: See Standard 8.5 regarding conveyances by a successor trustee under an express trust containing a power of sale and, as to trusts on or after April 1, 2000, the authority of the probate court to remove trust provisions limiting the power of sale of a successor trustee.

STANDARD 8.7

ACQUISITION OF TRUST REAL PROPERTY BY NON-TESTAMENTARY TRUSTEE UNDER EXPRESS TRUST

STANDARD: IF THE TRUSTEE OF AN EXPRESS NON-TESTAMENTARY TRUST DIRECTLY OR INDIRECTLY CONVEYS TRUST REAL PROPERTY TO HIMSELF OR HERSELF IN AN INDIVIDUAL CAPACITY, THE TITLE ACQUIRED IS NOT MARKETABLE UNLESS THE TRUST INSTRUMENT AUTHORIZES THE CONVEYANCE.

Problem A: Title to Blackacre was vested in Richard Roe as trustee under an express trust which contained a power of sale but no provision authorizing Roe to acquire an interest in Blackacre. Roe, as trustee, deeded Blackacre to Susan Grant. Later, Grant deeded Blackacre to Richard Roe and Alice Roe, husband and wife. Did the Roes acquire marketable title to Blackacre?

Answer: No.

Problem B: Title to Blackacre was vested in Richard Roe as trustee under an express trust for the benefit of Lucy Doe. Upon the death of Doe, the trust was to terminate and the corpus vest in Roe and Marjorie Poe. After Doe's death, Roe, as trustee, deeded Blackacre to himself and Poe. Did Roe and Poe acquire marketable title to Blackacre?

Answer: Yes.

Authorities: *Campau v Van Dyke*, 15 Mich 371 (1867); *Sheldon v Estate of Rice*, 30 Mich 296 (1874); *In re Culhane's Estate*, 269 Mich 68, 256 NW 807 (1934); *Sprenger v Sprenger*, 298 Mich 551, 299 NW 711 (1941); *Newton v Old Merchants National Bank & Trust Co*, 299 Mich 499, 300 NW 859 (1941).

Comment: The Committee recognizes that laches or estoppel may bar claims of trust beneficiaries challenging the validity of conveyances such as are described in Problem A.

Note: See Standards 7.10 and 7.11 regarding self-dealing transactions by testamentary trustees.

CHAPTER IX
FUTURE INTERESTS



STANDARD 9.1

**ATTEMPTED RESTRAINT ON ALIENATION
OF FEE SIMPLE ESTATE**

STANDARD: A PROVISION IN A WILL OR DEED WHICH ATTEMPTS TO RESTRAIN ALIENATION OF A FEE SIMPLE ESTATE IS VOID.

Problem A: Blackacre was devised in fee simple to Ada Brown subject to a provision that “Ada Brown shall not alienate or mortgage Blackacre until five years after my death.” Before the expiration of the five-year period, Ada Brown deeded Blackacre to Theodore Worth. Did Worth acquire marketable title?

Answer: Yes.

Problem B: Blackacre was devised in fee simple to Ada Bedford and Clare Brown, the only children of the testator, with a provision that “it shall not be competent for any devisee to alienate, mortgage, barter or transfer any portion of the real property until my youngest child reaches the age of 25 years.” Before the youngest child reached the age of 25, Ada Brown, who was of full age, deeded her undivided one-third interest in Blackacre to Theodore Worth. Did Worth acquire marketable title to an undivided one-third interest in Blackacre?

Answer: Yes.

Problem C: Blackacre was conveyed to John Barry by a deed which provided that the grantee was not to alienate Blackacre during the lifetime of the grantor. Before the death of the grantor, Barry, a single man, deeded Blackacre to Theodore Worth. Did Worth acquire marketable title?

Answer: Yes.

Problem D: Blackacre was conveyed to John Barry and David Barry, “as joint tenants and not as tenants in common.” The deed provided that “it is part of the consideration of this deed that neither grantee shall or can sell, deed, mortgage or in any way dispose of his interest without the consent of the other grantee.” John Barry, a single man, deeded his interest to Theodore Worth without the consent of David Barry. Did Worth acquire marketable title to the interest conveyed to him by John Barry?

Answer: Yes.

Authorities: Generally: *Mandelbaum v McDonnell*, 29 Mich 78 (1874); *In re Estate of Schilling*, 102 Mich 612, 61 NW 62 (1894); *Watkins v Minor*, 214 Mich 380, 183 NW 186 (1921), *Porter v Barrett*, 233 Mich 373, 206 NW 532 (1925); *Braun v Klug*, 335 Mich 691, 57 NW2d 299 (1953).

Problem D: *Smith v Smith*, 290 Mich 143, 28 NW 411 (1939).

Note: See Standard 6.3 as to severance of a joint tenancy.

Caveat: MCL 554.381, which became effective on August 27, 1925, provides that “No statutory or common law rule of this state against perpetuities or restraint of alienation shall hereafter invalidate any gift, grant, devise or bequest, in trust or otherwise, for public welfare purposes.”

STANDARD 9.2

RESTRAINT ON ALIENATION OF ESTATE FOR YEARS

STANDARD: ALIENATION OF AN ESTATE FOR YEARS MAY BE EFFECTIVELY RESTRAINED.

Problem: Richard Lambert leased Blackacre to Peter Thomas for a period of 10 years. The lease provided that the tenant could not assign, convey or sublet without the landlord's consent. It also provided that the landlord could re-enter upon breach of the covenant. During the term of the lease, Peter Thomas breached the covenant by assigning the lease to Donald Taylor without Lambert's consent. Can Lambert re-enter and recover possession?

Answer: Yes.

Authorities: *Darmstaetter v Hoffman*, 120 Mich 48, 78 NW 1014 (1899); *Marvin v Hartz*, 130 Mich 26, 89 NW 557 (1902).

Comment: There is authority that, if land is leased to a tenant partnership with a covenant against assignment, the adding of a partner to, or the withdrawal of a partner from, the partnership is not a breach of the covenant. *Miller v Pond*, 214 Mich 186, 183 NW 24 (1921); *Tierney v McKay*, 232 Mich 609, 206 NW 325 (1925). It has also been held that the assignment of a leasehold estate for security purposes does not constitute a breach of a covenant not to assign the lease. *Crouse v Michell*, 130 Mich 347, 90 NW 32 (1902).

STANDARD 9.3

LIFE ESTATE WITH POWER TO CONVEY FEE

STANDARD: THE HOLDER OF A LIFE ESTATE, COUPLED WITH AN ABSOLUTE POWER TO DISPOSE OF THE FEE ESTATE BY INTER VIVOS CONVEYANCE, CAN CONVEY A FEE SIMPLE ESTATE DURING THE LIFETIME OF THE HOLDER. IF THE POWER IS NOT EXERCISED, THE GIFT OVER BECOMES EFFECTIVE.

Problem A: Blackacre was devised to Laura Wales, “for her lifetime, to do with as she pleases, but on her death, if not previously disposed of, Blackacre shall be divided between Gerald Rapp and Ivor Sorenson.” Laura Wales died without having conveyed Blackacre. Is the gift over to Rapp and Sorenson valid?

Answer: Yes.

Problem B: Same facts as in Problem A, except that Laura Wales, during her lifetime and for her own benefit, by a deed reciting the power of disposition, conveyed Blackacre in fee simple to Ralph Oakes. Did Oakes acquire title to Blackacre free of the claims of Rapp and Sorenson?

Answer: Yes.

Authorities: MCL 556.122, 556.123 and 556.129.

Comment: The Committee has not attempted to determine the effect of a conveyance by a life tenant who has a power to dispose of the fee if the conveyance does not indicate clearly that it purports to be an exercise of the power. See, MCL 556.114.

STANDARD 9.4

APPLICATION OF RULE AGAINST PERPETUITIES TO NONVESTED INTERESTS IN LAND CREATED BEFORE MARCH 1, 1847, OR AFTER SEPTEMBER 22, 1949 AND BEFORE DECEMBER 27, 1988

STANDARD: A NONVESTED INTEREST IN LAND, CREATED BEFORE MARCH 1, 1847 OR AFTER SEPTEMBER 22, 1949 AND BEFORE DECEMBER 27, 1988, IS VOID UNLESS IT MUST VEST, IF AT ALL, NOT LATER THAN 21 YEARS AFTER SOME LIFE OR LIVES IN BEING AT THE CREATION OF THE INTEREST.

Problem A: By a will executed in 1948, Blackacre was devised “to the Grace Church, to be used for church purposes, and if it ever ceases to be used for church purposes, then to Ivan Potter and his heirs.” The testator died in 1965. Did the Grace Church acquire title free of the interest of Ivan Potter and his successors in interest?

Answer: Yes. The executory interest of Ivan Potter was “created,” if at all, at the death of the testator, not at the time the will was executed. Hence, the interest is subject to the rule against perpetuities. There is no life in being that may be counted, and therefore the test is whether, at the time of its creation, the interest was certain to vest within 21 years after testator’s death. It is obvious that the condition upon which the executory interest was to vest (that is, the failure to use the land for church purposes) might possibly occur at a later date. Hence, the interest is not certain to vest within the prescribed period and is therefore void. The failure of this interest leaves the Grace Church with an indefeasible fee simple estate which may be conveyed.

Problem B: In 1965 Paula Roberts deeded Blackacre to the Grace Church “so long as it is used for church purposes, and if it ever ceases to be so used the land shall revert to the grantor and her heirs.” Does a grantee of the Grace Church who uses Blackacre for other than church purposes hold title free of the interest of Paula Roberts and her successors in interest?

Answer: No. The interest created in the Grace Church is a determinable fee with a possibility of reverter in the grantor. The latter interest is regarded as a retained portion of the fee simple estate and not a newly created interest. Therefore the rule against perpetuities does not apply. This contrasts with Problem A, where an attempt was made to create a shifting interest in some person other than the testator.

Problem C: In 1965, Ruth Evans deeded Blackacre to the Grace Church “on condition that the land be used for church purposes, and if it ever ceases to be so used, the grantor or her heirs may reenter and take the land.” Does a grantee of the Grace Church who uses Blackacre for other than church purposes hold title free of the interest of Ruth Evans and her successors in interest?

Answer: No. The estate created in the Grace Church is subject to a condition subsequent, leaving in the grantor a right of entry (sometimes called a power of termination). This interest, like the possibility of reverter in Problem B, is regarded as a retained interest and not as a newly created interest. It is therefore commonly held not subject to the rule against perpetuities. The interest of the grantor (a right of entry) differs from the possibility of reverter in that the latter will take effect automatically if the property ceases to be used for church purposes, whereas the former requires that the condition be broken and that the grantor elect to terminate the estate of the Grace Church.

Problem D: In 1960, Blackacre was deeded to George Morton on condition that “if within 20 years the property shall be used for manufacturing purposes, the land shall pass to Ellen Ives.” In 1966, a grantee of Morton used the land for manufacturing purposes. Did the title to Blackacre vest in Ellen Ives?

Answer: Yes. The interest of Ellen Ives is an executory interest, created in someone other than the grantor, and is therefore subject to the rule against perpetuities. The time limitation of 20 years makes certain that the interest will vest, if at all, within 21 years after its creation. It is therefore valid under the rule against perpetuities, and the interest vests immediately upon the happening of the event upon which it was conditioned. Although Morton could convey his interest, his grantee took subject to the same limitation on use for the same 20-year period, and the grantee’s estate was divested by breach of the condition.

Problem E: In 1965, Thomas Oldfather, owner of three contiguous lots, deeded one of the lots to George Morton. The deed recited that the lot was to be used for residential purposes only and that if the lot was ever used for other purposes, the grantor or his heirs might re-enter and take the land. Oldfather deeded one of the remaining lots with a similar provision in the deed, but continued to reside in his house erected on the third lot. In 1974 Morton tore down the house upon his lot, and erected a gasoline station. Can Oldfather re-enter and acquire title to the lot?

Answer: Yes. The condition subsequent in the deed to Morton creates a right of entry (or power of termination) in Oldfather, and is not merely a restrictive covenant. This interest is not subject to the rule against perpetuities. Accordingly, upon breach of the covenant, in the absence of waiver, laches or estoppel, or waiver by operation of law pursuant to MCL 554.62, the grantor has the power to re-enter, and upon the re-entry becomes the owner of the land. Because the grantor still retains the ownership of other land in the vicinity, it is assumed that the provisions of MCL 554.46 (which provides that conditions which are merely nominal and of no substantial benefit to the party in whose favor they are to be performed will not be enforced) are inapplicable.

Authorities: Generally: MCL 554.51, 554.52 and 554.53.

Problem A: *St. Amour v Rivard*, 2 Mich 294 (1852).

Problem B: *Moffit v Sederlund*, 145 Mich App 1, 378 NW 2d 491 (1985). Decisions in other states have sustained the validity of such an interest. See, 3 Simes and Smith, *The Law of Future Interests*, 2nd Ed., Sec 1239; 6 *American Law of Property*, Sec 24.62.

Problem C: See, 3 Simes and Smith, *The Law of Future Interests*, 2nd Ed., Sec 1238.

Problem D: See, 3 Simes and Smith, *The Law of Future Interests*, 2nd Ed., Sec 1236.

Problem E: *Barrie v Smith*, 47 Mich 130, 10 NW 168 (1881); *Smith v Barrie*, 56 Mich 314, 22 NW 816 (1885); *Stahl v Dyer*, 235 Mich 355, 209 NW 107 (1926).

- Comment A:** Before the enactment of Rev Stat 1846, Ch 62, the common law rule against perpetuities was applicable to dispositions of both real and personal property. This chapter, which became effective March 1, 1847, was interpreted to mean that a conveyance of land need satisfy only the statutory requirement which prohibited the suspension of the absolute power of alienation for a period longer than during the continuance of two lives in being (see, Standard 9.6), and that it was not necessary to comply with the common law rule against perpetuities. *Windiate v Lorman*, 236 Mich 531, 211 NW 62 (1926); *Rodey v Stotz*, 280 Mich 90, 273 NW 404 (1937). The statute, however, did not apply to personal property, and therefore the common law rule against perpetuities continued to be applicable to dispositions of personal property. As to cases in which a single limitation created a future interest in both realty and personalty, see Standard 9.8. 1949 P.A. 38, effective September 23, 1949, (being MCL 554.51, 554.52 and 554.53) repealed the provisions of Chapter 62 prohibiting the suspension of the absolute power of alienation for a period longer than during the continuance of two lives in being, and restored the common law rule against perpetuities, which is made applicable to dispositions of both real and personal property made on and after September 23, 1949. Accordingly, any future interest created on or after that date is subject to the rule. Interests created by will are created at the time of the death of the testator, and not at the time of the execution of the will.
- Comment B:** Trusts created by an employer as part of a stock bonus, pension, disability or death plan for the benefit of employees are not deemed invalid as violating the rule against perpetuities. MCL 555.301.
- Comment C:** No gift, grant, bequest or devise, whether in trust or otherwise, for religious, educational, charitable or benevolent uses, or for providing care or maintenance of any part of a cemetery, otherwise valid under state law, is to be deemed invalid by reason of contravening the rule against perpetuities. MCL 554.351.
- Comment D:** Under MCL 554.401 through 554.404, when land is deeded or devised to be held for any religious, educational, charitable, benevolent or public purpose with a condition creating a possibility of reverter in the grantor, so that if the land ever ceases to be so used, title reverts to the grantor or his heirs, the owner may, under specified circumstances, obtain judicial approval to sell an indefeasible estate in the land. In such a case, the proceeds must be reinvested in other land which is then held subject to the same limitations.

Caveat 1: Section 6(2) of the Uniform Statutory Rule Against Perpetuities Act, MCL 554.71, which became effective on December 27, 1988, provides that if a nonvested property interest was created before December 27, 1988 and, in a judicial proceeding commenced on or after December 27, 1988, is determined to violate the rule against perpetuities as it existed before December 27, 1988, an interested person may petition a court to reform the disposition in the manner which most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest was created.

Caveat 2: MCL 554.38 1, which became effective on August 27, 1925, provides that "No statutory or common law rule of this state against perpetuities or restraint of alienation shall hereafter invalidate any gift, grant, devise or bequest, in trust or otherwise, for public welfare purposes."

Note: See Standard 9.12 as to nonvested interests in land created after December 27, 1988.

STANDARD 9.5

APPLICATION OF RULE AGAINST PERPETUITIES TO CLASS GIFTS EFFECTIVE BEFORE MARCH 1, 1847 OR AFTER SEPTEMBER 22, 1949 AND BEFORE DECEMBER 27, 1988

STANDARD: A DEED OR DEVISE OF LAND TO A CLASS EFFECTIVE BEFORE MARCH 1, 1847 OR AFTER SEPTEMBER 22, 1949, AND BEFORE DECEMBER 27, 1988, IS SUBJECT TO THE RULE AGAINST PERPETUITIES. THE DEED OR DEVISE IS VALID ONLY IF THE PRECISE MEMBERSHIP OF THE CLASS IS NECESSARILY ASCERTAINABLE WITHIN LIVES IN BEING PLUS 21 YEARS AFTER THE EFFECTIVE DATE OF THE DEED OR DEVISE EVEN THOUGH SOME OR ALL OF THE POTENTIAL MEMBERS OF THE CLASS ARE IN BEING WITHIN THE PRESCRIBED PERIOD.

Problem A: In 1970, Shane McGerry deeded Blackacre in trust to pay the income to his wife for life, then to pay the income to his daughter, Mary, for her life, with the corpus to be distributed to any children of Mary living 30 years after the death of the wife. Mary and three of her children were living on the date of the trust deed. Was the gift of the corpus valid?

Answer: No. The precise membership of the class cannot be ascertained until 30 years after the death of the wife and, if Mary predeceases the wife, until more than 30 years after the death of Mary. Accordingly, the disposition cannot be validated by using either the wife or Mary as the measuring life. Although some potential members of the class were in being at the date of the deed, the class will include only those children who survive the wife by 30 years. Hence, the size of the class may increase or decrease for a period beyond lives in being plus 21 years. Consequently, Blackacre may not vest in the remaindermen within the period of the lives of the wife and Mary and 21 years thereafter. The disposition cannot be sustained by taking as measuring lives Mary's three children who were living at the effective date of the trust conveyance, for it is possible that Mary may have other children and these may be the only ones who survive the wife by 30

years. Thus, the precise membership of the class of remaindermen is not necessarily ascertainable within the period of the rule against perpetuities. Hence, the gift of the remainder is invalid although the two life estates are valid.

Problem B: Same facts as in Problem A, except that the trust was created by devise, and the daughter Mary was dead at the time of the testator's death. Was the gift of the corpus valid?

Answer: Yes. Because Mary was dead at the time the devise became effective, no more children could be born to her. Hence, the children may now be taken as "the lives in being" and the precise membership will necessarily be ascertained during their respective lifetimes.

Problem C: Shane McGerry died in 1970, devising Blackacre in trust to pay the income to his widow for life, then to his daughter, Mary, for life, and then to the surviving children of Mary, with the corpus to be distributed to Mary's children who are living when the youngest surviving child reaches the age of 21 years. Was the gift of the corpus valid?

Answer: Yes. The precise membership of the class to take the corpus is necessarily ascertained within 21 years after Mary's life (a life in being at the creation of the interest).

Problem D: Shane McGerry died in 1970, leaving a will executed in 1965, by which he devised Blackacre "to such of the children of my daughter, Mary, as shall attain the age of 30 years." At her father's death, Mary was living and had three children, all of whom were under 30 years of age. Was the gift of the corpus valid?

Answer: No. Because the gift is made to the children of a living person, it is possible that the class may increase in size, and it is also possible that later-born children will be the only ones who reach the age of 30 years. The precise membership of the class cannot be ascertained until more than 21 years after the lives in being at the creation of the interest.

Authorities: MCL 554.51, 554.52 and 554.53. 4 Restatement, Property, Sec 383, Comments C and D, Sec 284; 2 Simes and Smith, *The Law of Future*

Interests, 2nd Ed., Sec 636; 3 Simes and Smith, *The Law of Future Interests, 2nd Ed.*, Sec 1265.

Comment: Although the facts under Problems A and D render the gifts invalid, it has been recognized that a testator can so manifest his intention that the ordinary rule of construction will not apply. *Lariverre v Rains*, 112 Mich 276, 70 NW 583 (1897).

Caveat 1: Section 6(2) of the Uniform Statutory Rule Against Perpetuities Act, MCL 554.71, which became effective on December 27, 1988 provides that if a nonvested property interest was created before December 27, 1988 and, in a judicial proceeding commenced on or after December 27, 1988, is determined to violate the rule against perpetuities as it existed before December 27, 1988, an interested person may petition a court to reform the disposition in the manner which most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest was created.

Caveat 2: MCL 554.381, which became effective on August 27, 1925, provides that "No statutory or common law rule of this state against perpetuities or restraint of alienation shall hereafter invalidate any gift, grant, devise or bequest, in trust or otherwise, for public welfare purposes."

Note: See Standard 9.12 as to nonvested interests in land created after December 27, 1988.

STANDARD 9.6

STATUTE LIMITING SUSPENSION OF POWER OF ALIENATION

STANDARD: ANY INTEREST IN LAND, CREATED ON OR AFTER MARCH 1, 1847 AND BEFORE SEPTEMBER 23, 1949, IS INVALID IF IT WOULD OPERATE TO SUSPEND THE ABSOLUTE POWER OF ALIENATION FOR A PERIOD LONGER THAN TWO LIVES IN BEING AT THE CREATION OF THE INTEREST.

Problem A: In 1945, Blackacre was deeded to Daniel Fleet for life, remainder in fee simple to Clarence Stone if he survived Fleet, otherwise remainder in fee simple to Ralph Kline. Is the conveyance valid?

Answer: Yes. (1) During the period specified in this Standard (while Rev Stat 1846, Ch 62, Secs 14, 15, 16, 17, 18, 20 and 23 were in effect), the common law rule against perpetuities was superseded as to land by the statute which limited the creation of interests which would operate to suspend the absolute power of alienation. (2) There is no suspension of the absolute power of alienation in the present case, because all of the parties in interest were in being when the deed became effective and the parties, acting together, could convey an absolute fee in possession. The statute specified that the absolute power of alienation was suspended only “when there are no persons in being, by whom an absolute fee in possession can be conveyed.”

Problem B: In 1945, Jane White conveyed Blackacre to Earl Collins by a deed which provided that should Collins, during his lifetime, ever wish to sell Blackacre, White should have the right of first refusal at a determinable price. Is White’s interest valid?

Answer: Yes. The absolute power of alienation is not suspended for the reasons stated in the Answer to Problem A.

Problem C: Thomas Oldfather died in 1945, devising Blackacre to his wife, Harriet, for life, with remainder to his son, Charles, on the condition that Charles or his representatives pay Grace Oldfather \$500. In the event that Charles predeceased Harriet, Blackacre was devised to Grace. Is the disposition valid?

Answer: Yes. Although the remainders are contingent and a valid charge on the land is created, all interests are owned by persons in being who, by joining in a conveyance, can convey an absolute fee simple, and therefore the absolute power of alienation was not suspended.

Problem D: Thomas Oldfather died in 1945, devising Blackacre to his wife for life, then to his daughter, Alene, for life, with the remainder in fee simple to his granddaughter, Carol, if she survived Alene, and if Carol did not survive Alene, the remainder in fee simple to Alene's children. Is the disposition valid?

Answer: Yes. The absolute power of alienation is suspended under the rule stated in the Answer to Problem A, but only for the consecutive life estates of the widow and the daughter, Alene, each of whom was a life in being when the interests were created. Upon the death of the survivor of the widow and Alene, Blackacre will be owned by persons in being by whom an absolute fee in possession can be conveyed. Thus, the absolute power of alienation is suspended for a legal period only. If the absolute power of alienation is suspended, the legality of the suspension is determined by the number of consecutive life estates between the creation of the interests and the end of the period of suspension and not by the number of people who might share in the devise.

Problem E: In 1945 Blackacre was deeded to Frank Bowman and Joan Bowman, husband and wife, for the lifetime of the survivor of them, and then to John Riggs for life, with remainder in fee simple to the surviving children of Riggs in equal shares. Is the conveyance valid?

Answer: Yes. The estate for the life of the survivor of Frank Bowman and Joan Bowman is construed to be an estate for one life only. Because only two consecutive life estates were created, there is no violation of the statute. An estate for the life of the survivor of a class, all of whose members are in being when the interest is created, is but one life estate.

Problem F: Thomas Oldfather died in 1945, devising Blackacre to his son, Charles, for life, and then to those of Charles's children who survived

Charles for the life of the survivor of them, with remainder in fee simple to the surviving heirs of Charles's children. Is the disposition valid?

Answer: No. The power of alienation would be suspended for the life of Charles plus the life of the survivor of Charles's children. As stated in the Answer to Problem E, the life of the survivor of a class is considered to be one life. In the present case, however, it is possible that children of Charles may be born after the testator's death and therefore, the life estate of Charles's children may be measured by a life not in being at the creation of the interests. This possibility defeats the disposition, because the statute permits suspension only during the continuance of two lives in being at the creation of the interests. The illegality of the suspension is not avoided by the improbability of children being born to Charles after the testator's death or by the fact that no such child was born.

Problem G: Thomas Oldfather died in 1945, devising Blackacre to Charles and Richard Oldfather. A separate provision in the will provided that "the aforesaid devise shall not become operative and effective until one year after the date of my death." Is the provision valid?

Answer: No. The absolute power of alienation could not be suspended for any period of days, months or years, because the period is not measured by lives in being. Because the separate provision in the will prevented the devise from taking effect for one year, the absolute power of alienation would be suspended during that period, and the provision is invalid. However, the invalidity of this separate provision does not necessarily invalidate the devise to Charles and Richard.

Problem H: Thomas Oldfather died in 1945, devising his residuary estate, which included Blackacre, to trustees to hold for the benefit of his two sons for their lives, with a provision that if either died leaving issue, the issue should take the parent's share of the income. The will further provided that the trust should continue for 20 years and that the corpus should then be distributed to the children of the testator's sons. Is the disposition valid?

Answer: No. The power of alienation is suspended, because by statute, under a trust for the receipt of rents and profits of land, the estate of the trustee

and the interest of the beneficiary are inalienable. Because the duration of the trust is a period of years, the disposition fails.

Problem I: Same facts as in Problem H, except that the trustees are given the power to sell Blackacre. Does this power prevent the suspension of the absolute power of alienation?

Answer: No. The existence of a discretionary power of sale does not prevent the application of the statute.

Problem J: Same facts as in Problem H, except that the trustees are directed to sell Blackacre. Does this power prevent the suspension of the absolute power of alienation?

Answer: Yes. The mandatory direction to sell the land works an equitable conversion of the power, so that the estate or trust is considered to consist of only personalty, and is therefore not subject to the statute. The validity of the disposition is governed by the common law rule against perpetuities.

Authorities: Rev Stat 1846, CH 62, Secs 14 through 20 and 23, being CL 1948, 554.14 through 554.20 and 554.23 (now repealed by 1949 P.A. 38, being MCL 554.51, 554.52 and 554.53.

Problem A: (1) *Windiate v Lorman*, 236 Mich 531, 211 NW 62 (1926); *Rodey v Stotz*, 280 Mich 90, 273 NW 404 (1937); *Lantis v Cook*, 342 Mich 347, 69 NW2nd 849 (1955). (2) *Case v Green*, 78 Mich 540, 44 NW 578 (1889); *FitzGerald v Big Rapids*, 123 Mich 281, 82 NW 56 (1900).

Problem B: *Windiate v Lorman*, 236 Mich 531, 211 NW 62 (1926); *Lantis v Cook*, 342 Mich 347, 69 NW2nd 849 (1955). See also, authorities cited for Problem A(2).

Problem C: *Torpy v Betts*, 123 Mich 239, 81 NW 1094 (1900); *FitzGerald v Big Rapids*, 123 Mich 281, 82 NW 56 (1900); *Russell v Musson*, 240 Mich 631, 216 NW 428 (1927).

Problem D: *McInerny v Haase*, 163 Mich 364, 128 NW 215 (1910); *Cary v Toles*, 210 Mich 30, 177 NW 279 (1920).

Problem E: *Woolfitt v Preston*, 203 Mich 502, 169 NW 838 (1918); *Truitt v Battle Creek*, 205 Mich 180, 171 NW 338 (1919); *Allen v Merrill*, 223 Mich 467, 194 NW 131 (1923); *Kemp v Sutton*, 233 Mich 249, 206 NW 366 (1925); *Felt v Methodist Educational Advance*, 247 Mich 168, 225 NW 545 (1929).

Problem G: *DeBuck v Bousson*, 295 Mich 164, 294 NW 135 (1940).

Problem H: MCL 555.19 and 555.21. *Foster v Stevens*, 146 Mich 131, 109 NW 265 (1906); *Otis v Arntz*, 198 Mich 196, 164 NW 498 (1917); *Grand Rapids Trust Co v Herbst*, 220 Mich 321, 190 NW 250 (1922); *Gardner v City National Bank & Trust Co*, 267 Mich 270, 255 NW 587 (1934); *In re Richards' Estate*, 283 Mich 485, 278 NW 657 (1938).

Problem I: *Niles v Mason*, 126 Mich 482, 85 NW 1100 (1901), [overruling *Thatcher v The Wardens & Vestrymen of St. Andrew's Church*, 37 Mich 264 (1877)]; *Grand Rapids Trust Co v Herbst*, 220 Mich 321, 190 NW 250 (1922); *In re Richards' Estate*, 283 Mich 485, 278 NW 657 (1938).

Problem J: *Penny v Croul*, 76 Mich 471, 43 NW 649 (1889); *Ford v Ford*, 80 Mich 42, 44 NW 1057 (1890); *Mich Trust Co v Baker*, 226 Mich 72, 196 NW 976 (1924); *Van Tyne v Pratt*, 291 Mich 626, 289 NW 275 (1939); *Floyd v Smith*, 303 Mich 137, 5 NW2nd 695 (1942).

STANDARD 9.7

APPLICATION TO CLASS GIFTS OF STATUTE LIMITING SUSPENSION OF THE POWER OF ALIENATION

STANDARD: IF A GIFT WAS MADE TO A CLASS ON OR AFTER MARCH 1, 1847 AND BEFORE SEPTEMBER 23, 1949, AND THE ABSOLUTE POWER OF ALIENATION IS SUSPENDED UNTIL THE DEATH OF THE SURVIVOR OF THE CLASS, THE POWER OF ALIENATION IS SUSPENDED FOR ONE LIFE ONLY.

Problem A: Thomas Oldfather died in 1945, devising land to his widow for life, remainder to his three sons for their lives, and after the death of each son, his share to go in fee to his heirs. Is the remainder in fee valid?

Answer: Yes. The devise can be sustained on either of two grounds. One is that the absolute power of alienation is suspended during both life estates (that of the widow and of the children) but that the life estate in the children is deemed only a single life (that of the survivor). The other is that the gift is separable, and that as to each one-third, the absolute power of alienation is suspended for only two lives (the life of the widow to whom it was devised, and the life of the child to whom the one-third share was devised), because at the child's death the child's heirs will be determined and there will therefore be persons in being who can convey an absolute fee.

Problem B: Thomas Oldfather died in 1945, devising land to his widow and three sons for life and for the life of the survivor, and on the death of the survivor to Valerie Richmond in fee. Is the devise valid?

Answer: Yes. The suspension during the joint life estate is a suspension for only the life of the survivor. The devise can also be sustained on the ground that all interests are vested in ascertained persons who by acting together can convey an absolute fee in possession, and therefore there is no suspension of the power of alienation.

Problem C: Thomas Oldfather died in 1945, devising a farm to his daughter, Alice, for life, another farm to his daughter, Betty, for life, and a third farm to his son, Carl, for life. The remainder interest in all farms was devised to the lineal heirs of the son and daughters, in equal shares. The will further provided that if any child died without issue, the farm devised to that child for life would pass to the testator's widow for life, the remainder to the lineal heirs of the children, if any, but otherwise to the heirs of the widow. Is the devise valid?

Answer: No. The lineal heirs of the son and daughters cannot be determined until the deaths of all three children, and therefore the absolute power of alienation is suspended for more than two lives in being.

Authorities: Generally: Rev Stat 1846, Ch 62, Secs 14 through 20 and 23, being CL 1948, 554.14 through 554.20 and 554.23 (now repealed by 1949 P.A. 38, being MCL 554.51, 554.52 and 554.53).

Problem A: *Felt v Methodist Educational Advance*, 247 Mich 168, 225 NW 545 (1929).

Problem B: *Kemp v Sutton*, 233 Mich 249, 206 NW 366 (1925).

Problem C: *Trufant v Nunneley*, 106 Mich 554, 64 NW 469 (1895). See also *Dean v Mumford*, 102 Mich 510, 61 NW 7 (1894) *Niles v Mason*, 126 Mich 482, 85 NW 1100 (1901); *Foster v Stevens*, 146 Mich 131, 109 NW 265 (1906); *Grand Rapids Trust Co v Herbst*, 220 Mich 321, 190 NW 250 (1922).

Note: See, Standard 9.6, Problems A, B, C and F.

STANDARD 9.8

JOINT APPLICATION OF RULE AGAINST PERPETUITIES AND STATUTE LIMITING SUSPENSION OF POWER OF ALIENATION

STANDARD: IF A SINGLE LIMITATION CREATES A FUTURE INTEREST IN BOTH REAL AND PERSONAL PROPERTY ON OR AFTER MARCH 1, 1847, AND BEFORE SEPTEMBER 23, 1949, THE FUTURE INTEREST FAILS IF IT EITHER:

- (A) SUSPENDS THE ABSOLUTE POWER OF ALIENATION FOR A PERIOD LONGER THAN DURING THE CONTINUANCE OF TWO LIVES IN BEING AT THE CREATION OF THE INTEREST; OR**
- (B) MAY VEST LATER THAN 21 YEARS AFTER SOME LIFE OR LIVES IN BEING AT THE CREATION OF THE INTEREST.**

Problem A: Thomas Oldfather died testate in 1945, leaving a residuary estate containing both real and personal property. It was disposed of by a single provision by which the property was left in trust to receive the rents and profits and to apply them to the use of Ada Brown for life, then to Bedford Brown for life, then to Clare Brown for life, and then to be distributed to the children of Clare Brown. All three life tenants survived the testator. Is the disposition valid as to either real or personal property?

Answer: No. The provision does not violate the common law rule against perpetuities because all of the life estates are vested, and the remainder to the children of Clare Brown must vest, if at all, at the end of the three lives. If the estate had been only personal property (to which Rev Stat 1846, Ch 62 did not apply), the disposition would have been valid. Because the interests of the beneficiaries and the trustee are inalienable (MCL 555.19 and 555.21), the provisions of the will operate to suspend the absolute power of alienation for a period longer than during the continuance of two lives in being at the creation of the

interest and are therefore invalid as to the real property. Because the disposition is in part invalid, it fails entirely.

Problem B: Thomas Oldfather died testate in 1945, leaving a residuary estate containing both real and personal property. It was disposed of by a single provision in which the property was left to John Lawson for his life, remainder in fee to Charles Wilson, on the condition that if the real property were ever used for commercial purposes, then both the real and personal property would vest in Roland Hill. Is the disposition valid as to either real or personal property?

Answer: No. The provision does not suspend the absolute power of alienation because all of the interests are owned by persons in being who, by joining together, can convey an absolute fee. If the residue had been only real property, the disposition would have been valid. Because the contingency upon which the residue would vest in Hill is not certain to occur within the period of the rule against perpetuities, the disposition is invalid as to the personal property. Because the disposition is in part invalid, it fails entirely. See, Standard 9.4, Problem A.

Authorities: Generally: Rev Stat 1846, Ch 62, Secs 14 through 20 and 23, being CL 1948, 554.14 through 554.20 and 554.23 (now repealed by 1949 P.A. 38, being MCL 554.51, 554.52 and 554.53).

Problem A: MCL 555.19 and 555.21. *Grand Rapids Trust Co v Herbst*, 220 Mich 321, 190 NW 250 (1922); *In Re Richards' Estate*, 283 Mich 485, 278 NW 657 (1938); *DeBuck v Bousson*, 295 Mich 164, 294 NW 135 (1940).

Problem B: *Gardner v City National Bank & Trust Co*, 267 Mich 270, 255 NW 587 (1934).

Note: See Standard 9.6, Problem J, regarding the effect of a mandatory direction to sell real property.

Caveat 1: Section 6(2) of the Uniform Statutory Rule Against Perpetuities, MCL 554.71, provides that if a nonvested property interest was created before December 27, 1988, and, in a judicial proceeding commenced on or after December 27, 1988, is determined to violate the

rule against perpetuities as it existed before December 27, 1988, an interested person may petition a court to reform the disposition in the manner which most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest was created.

Caveat 2: MCL 554.381, which became effective on August 27, 1925, provides: "No statutory or common law rule of this state against perpetuities or restraint of alienation shall hereafter invalidate any gift, grant, devise or bequest, in trust or otherwise, for public welfare purposes."

STANDARD 9.9

ALIENABILITY OF FUTURE INTERESTS – REVERSIONS, REMAINDERS AND EXECUTORY INTERESTS

STANDARD: ALL REVERSIONS AND REMAINDERS, VESTED OR CONTINGENT, AND ALL EXECUTORY INTERESTS ARE ALIENABLE, DEVISABLE AND DESCENDIBLE.

Problem A: In 1985, Renee Vincent, owner of Blackacre, conveyed to Lois Taylor a life estate in Blackacre. In 1990, Vincent conveyed her remainder interest in Blackacre to Thomas Holden. Taylor died in 1991. Did Holden then have marketable title to Blackacre?

Answer: Yes. Vincent's remainder interest was alienable, even though it was a future, non-possessory interest.

Problem B: In 1985, Blackacre was devised to Lois Taylor for life, remainder to Rachel Miles. In 1990, Miles's interest was devised to Thomas Holden. Taylor died in 1991. Did Holden then have marketable title to Blackacre?

Answer: Yes. The remainder vested in Miles was devisable and descendible, even though it was a future, non-possessory interest.

Problem C: In 1985, Blackacre was devised to "Lois Taylor for life, and if Connie Roberts survives Lois Taylor, remainder to Connie Roberts." In 1990, Connie Roberts conveyed her interest to Thomas Holden. Taylor died in 1991, leaving Connie Roberts surviving. Did Holden then have marketable title to Blackacre?

Answer: Yes. Roberts's contingent remainder was alienable, even though it was a future, non-possessory interest.

Problem D: Same facts as in Problem C, except that Connie Roberts died before Lois Taylor. After Connie Roberts's death, did Holden have any interest in Blackacre?

Answer: No. By the deed from Connie Roberts, Holden acquired only the interest which Connie Roberts had. That interest was a contingent remainder, to take effect only if Connie Roberts survived Lois Taylor.

Problem E: In 1979, Freda Olmstead conveyed Blackacre “on condition that if within 20 years Blackacre is used for other than residential purposes, then Blackacre is to go to Everett Ives.” In 1982, Ives conveyed his interest to Thomas Holden. In 1990 Blackacre was used for other than residential purposes. Did Holden then have marketable title to Blackacre?

Answer: Yes. Ives acquired an executory interest in Blackacre. The interest was alienable. When the condition was breached, title vested in Holden, the grantee of the executory interest.

Authorities: Generally: MCL 554.11 and 554.35.

Problems A and B: *Case v Green*, 78 Mich 540, 44 NW 578 (1889); *Hovey v Nellis*, 98 Mich 374, 57 NW 255 (1894); *Russell v Musson*, 240 Mich 631, 216 NW 428 (1927); *Kerschensteiner v Northern Mich Land Co*, 244 Mich 403, 221 NW 322 (1928); *In re Coots’ Estate*, 253 Mich 208, 234 NW 141 (1931).

Problems C and D: *l’Etourneau v Henequet*, 89 Mich 428, 50 NW 1077 (1891).

Problem E: *Goodell v Hibbard*, 32 Mich 47 (1875). See also *Russell v Musson*, *supra*, and *Defreese v Lake*, 109 Mich 415, 67 NW 505 (1896).

Comment: The alienability of reversions and vested remainders has never been in doubt. Although the alienability of contingent remainders was in doubt in early common law, the modern tendency is toward permitting alienability. 2 Restatement, Property, 162 (1936). MCL 554.11 provides that “[w]hen a future estate is dependent upon a precedent estate, it may be termed a remainder, and may be created and transferred by that name.” MCL 554.35 provides that “[e]xpectant estates are descendible, devisable and alienable, in the same manner as estates in possession.” These two provisions, which have been in effect since March 1, 1847, have been construed to authorize alienation of contingent remainders.

STANDARD 9.10

ALIENABILITY OF FUTURE INTERESTS – RIGHTS OF ENTRY AND POSSIBILITIES OF REVERTER CREATED ON OR AFTER SEPTEMBER 18, 1931

STANDARD: ALL RIGHTS OF ENTRY AND POSSIBILITIES OF REVERTER CREATED ON OR AFTER SEPTEMBER 18, 1931 ARE ALIENABLE, DEVISABLE AND DESCENDIBLE.

Problem A: In 1953, Paula Roberts conveyed one acre of Blackacre to the Homestead School District “so long as the land is used for school purposes, and if it ever ceases to be so used the land shall revert to the grantor and her heirs.” In 1960, Roberts conveyed Blackacre (without excepting her interest in the one-acre tract) to Thomas Holden. The use of the one-acre tract for school purposes ceased in 1977. Did Holden then have marketable title to Blackacre?

Answer: Yes. The possibility of reverter retained by Roberts is alienable and was conveyed to Holden by the 1960 deed. When the special limitation ended, the title reverted to Holden, the holder of the possibility of reverter. The result would be the same if the possibility of reverter had been devised to Holden or had vested in him by intestate succession.

Problem B: In 1954, Ruth Evans conveyed one acre of Blackacre to the Homestead School District “on condition that the land be used for school purposes, and if it ever ceases to be so used, the grantor or her heirs may re-enter and take the land.” In 1960, Evans conveyed Blackacre (without excepting her interest in the one-acre tract) to Thomas Holden. The use of the one-acre tract for school purposes ceased in 1977. Did Holden then have the right to re-enter the one-acre tract?

Answer: Yes. The right of entry retained by Evans is alienable and was conveyed to Holden by the 1960 deed. Although the school district’s estate did not terminate upon breach of the condition in 1977, Holden could then exercise his right of re-entry and acquire the title. The

result would be the same if the right of entry had been devised to Holden or had vested in him by intestate succession.

Authorities: MCL 554.101 and 554.111.

Comment A: The first of the cited statutes provides broadly that when the owner of an “expectant estate, right or interest in real or personal property” dies before the precedent estate terminates, if the contingency arises by which the owner would have been entitled to an estate in possession, “his... grantees and assigns if he shall have... conveyed such right or interest, shall be entitled to the same estate in possession.” The second statute is applicable specifically to the reversionary interest in land conveyed on a condition subsequent and provides for complete alienability. This act, however, is specifically not applicable to any such interest created before its effective date.

Comment B: MCL 554.46 (pertaining to nominal conditions) has not been considered in the above problems.

Note: See Standard 9.11 regarding rights of entry and possibilities of reverter created before September 18, 1931. See Standard 9.13 regarding the period of limitation for enforcement of possibilities of reverter and rights of entry.

STANDARD 9.11

ALIENABILITY OF FUTURE INTERESTS—RIGHTS OF ENTRY AND POSSIBILITIES OF REVERTER CREATED BEFORE SEPTEMBER 18, 1931

STANDARD: ATTEMPTED INTER VIVOS ALIENATION OF EITHER A RIGHT OF ENTRY OR A POSSIBILITY OF REVERTER CREATED BEFORE SEPTEMBER 18, 1931, EXTINGUISHES THE INTEREST, BUT THE INTEREST IS DESCENDIBLE, MAY BE RELEASED TO THE HOLDER OF THE POSSESSORY ESTATE AND, IF HELD IN CONJUNCTION WITH A REVERSION, MAY BE CONVEYED WITH THE REVERSION.

Problem A: In 1930, Ruth Evans conveyed one acre of Blackacre to the Homestead School District “on condition that the land be used for school purposes, and if it ever ceases to be so used, the grantor or her heirs may re-enter and take the land.” In 1940, Evans conveyed Blackacre (without excepting her interest in the one-acre tract) to Thomas Holden. Did the 1940 deed extinguish the right of entry?

Answer: Yes. With limited exceptions (see Problems D and E), rights of entry created before September 18, 1931 (the effective date of MCL 554.101 and 554.111) are inalienable and attempted alienation extinguishes them.

Problem B: In 1930, Paula Roberts conveyed one acre of Blackacre to the Homestead School District “so long as the land is used for school purposes, and if it ever ceases to be so used the land shall revert to the grantor and her heirs.” In 1940 Roberts conveyed Blackacre (without excepting her interest in the one-acre tract) to Thomas Holden. Later in the same year, Roberts died intestate and her entire estate descended to Hubert Finn. Did the 1940 deed extinguish the possibility of reverter?

Answer: Yes. The possibility of reverter was extinguished by the attempted alienation. Neither Holden, the grantee in the 1940 deed, nor Finn, the heir of the original grantor, would be have any interest in the one-acre tract.

Problem C: In 1930, Ruth Evans conveyed Blackacre to the Homestead School District “on condition that the land be used for school purposes, and if it ever ceases to be so used, the grantor or her heirs may re-enter and take the land.” In 1956, Evans died intestate and her estate descended to Hubert Finn. The use of Blackacre for school purposes ceased in 1958. Did Finn then have the right to re-enter Blackacre?

Answer: Yes. Rights of entry and possibilities of reverter are descendible, and may be enforced by intestate successors of the original holder of the interest.

Problem D: In 1930, Ruth Evans conveyed one acre of Blackacre to the Homestead School District “on condition that the land be used for school purposes, and if it ever ceases to be so used, the grantor or her heirs may re-enter and take the land.” In 1940, Evans conveyed her interest in the one-acre tract to the Homestead School District. Did the school district then hold the one-acre tract free of the condition?

Answer: Yes. Although rights of entry and possibilities of reverter created before September 18, 1931 are generally inalienable, they may be effectively released to the holder of the possessory estate.

Problem E: In 1930, Freda Olmstead leased Blackacre (commercial property) to Talbot Cook for 40 years. The lease provided that if Cook failed to keep the premises in proper repair, the landlord might re-enter and terminate the lease. In 1950, Olmstead conveyed her interest in Blackacre to Raymond Lowe. In 1960, Cook failed to make necessary repairs and remained in default. Could Lowe then re-enter and terminate the lease?

Answer: Yes. Although rights of entry created before September 18, 1931 are generally inalienable, when a right of entry is held in conjunction with a reversion, it may be conveyed with the reversion and the grantee may enforce it.

Authorities: *Halpin v Rural Agricultural School District 9*, 224 Mich 308, 194 NW 1005 (1923); *Oakland County v Mack*, 243 Mich 279, 220 NW 801 (1928); *Fractional School District 9, Waterford & Pontiac Townships v Beardlee*, 248 Mich 112, 226 NW 867 (1929); *Avery v Consumers Power Co*, 265 Mich 696, 253 NW 189 (1934); *Dolby v State Highway Commissioner*, 283 Mich 609, 278 NW 694 (1938); *Juif v*

State Highway Commissioner, 287 Mich 35, 282 NW 892 (1938); *Schoolcraft Community School District 50 v Burson*, 357 Mich 682, 99 NW2nd 353 (1959).

Comment A: Michigan decisions have not always distinguished carefully between the right of entry and the possibility of reverter. *Schoolcraft Community School District No. 50 v Burson*, *supra*, contains language generally construed as creating a possibility of reverter, while in *Dolby v State Highway Commissioner*, *supra*, the court construed the language in the original conveyance as a condition subsequent and referred to the interest as a “right of re-entry.” It should be noted that no reported Michigan authority is cited for that part of the Standard which states that these interests “may be released to the holder of the possessory estate and, if held in conjunction with a reversion, may be transferred with the reversion.” These two exceptions to the general rule of inalienability were well recognized at common law. 4 Simes and Smith, *The Law of Future Interests*, Sec 1862. Thus if A conveyed to B a determinable fee, reserving a possibility of reverter, even though A might not be able to make a valid conveyance to a third party, A could release his interest to B, thus turning B’s estate into a fee simple absolute. A right of entry could be similarly released to the holder of the possessory estate on condition subsequent. 2 Restatement, Property, 161(a) (1936). The second exception arises when the right of entry is held in conjunction with a reversion. For example, if A leases land to T for 20 years, and provides in the lease that upon breach of certain specified conditions A may re-enter and terminate the lease, A has both a reversion and a right of entry. If A conveys all his interest to X, the latter would acquire the fee simple estate subject to the lease and would also acquire the right of entry, enabling X to enforce the conditions in the lease. 4 Simes and Smith, *The Law of Future Interests*, Sec 1862. The Committee believes that these exceptions, permitting alienation of the right of entry under these circumstances, were applicable in Michigan even before the 1931 statutes. The descendibility of rights of entry and possibilities of reverter is discussed in *Puffer v Clark*, 202 Mich 169, 168 NW 471 (1918).

Comment B: MCL 554.46 (pertaining to nominal conditions) has not been considered in dealing with the above problems.

Note: See Standard 9.10 regarding rights of entry and possibilities of reverter created on or after September 18, 1931.

STANDARD 9.12

APPLICATION OF UNIFORM STATUTORY RULE AGAINST PERPETUITIES TO NONVESTED INTEREST IN LAND CREATED AFTER DECEMBER 26, 1988

STANDARD: A NONVESTED INTEREST IN LAND CREATED AFTER DECEMBER 26, 1988 IS INVALID UNLESS:

(A) THE INTEREST IS CERTAIN TO VEST OR TERMINATE NO LATER THAN 21 YEARS AFTER THE DEATH OF A PERSON LIVING AT THE TIME THE INTEREST WAS CREATED; OR

(B) THE INTEREST EITHER VESTS OR TERMINATES WITHIN 90 YEARS AFTER IT WAS CREATED.

Problem A: In 1990 John Jones deeded Blackacre to Joseph Smith to be used for educational purposes and if it ever ceased to be so used, then to Richard Johnson or his heirs. In 1995 Smith ceased using Blackacre for educational purposes. Did title to Blackacre vest in Johnson?

Answer: Yes. Although the interest of Johnson was not certain to vest or terminate no later than 21 years after the death of a person living at the time the interest was created, the interest of Johnson did in fact vest within 90 years after it was created.

Problem B: In 1990 John Jones deeded Blackacre to Joseph Smith to be used for educational purposes and if it ever ceased to be so used, then to Richard Johnson or his heirs. Smith conveyed Blackacre to Edward Brown in 1995. Did Brown acquire title to Blackacre free of any interest of Johnson?

Answer: No. Although the interest of Johnson was not certain to vest or terminate no later than 21 years after the death of a person living at the time it was created, the interest may vest within 90 years after the date the interest was created. If Brown ceases to use Blackacre for

educational purposes within 90 years after the date Johnson's interest was created, title to Blackacre would vest in Johnson or his heirs.

Comment A: Even if a disposition violates the Uniform Statutory Rule Against Perpetuities, MCL 554.74 provides that on the petition of an interested person, a court may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90-year limitation provided in the statute.

Comment B: As to nonvested interests for "public welfare purposes", MCL 554.381, effective August 27, 1925, provides: "No statutory or common law rule of this state against perpetuities or restraint of alienation shall hereafter invalidate any gift, grant, devise or bequest, in trust or otherwise, for public welfare purposes."

Note: See Standards 9.4 and 9.5 as to nonvested interests in land created before December 27, 1988.

STANDARD 9.13

PERIOD OF LIMITATION FOR ENFORCEMENT OF POSSIBILITIES OF REVERTER AND RIGHTS OF ENTRY

STANDARD: A POSSIBILITY OF REVERTER OR A RIGHT OF ENTRY TO TERMINATE A POSSESSORY OR OWNERSHIP INTEREST IN REAL PROPERTY ON THE OCCURRENCE OF A SPECIFIED CONTINGENCY IS UNENFORCEABLE IF THE SPECIFIED CONTINGENCY DOES NOT OCCUR WITHIN 30 YEARS AFTER THE DATE OF CREATION OF THE INTEREST TO BE TERMINATED UNLESS:

(A) THE SPECIFIED CONTINGENCY MUST OCCUR, IF AT ALL, WITHIN THE PERIOD OF THE RULE AGAINST PERPETUITIES; OR

(B) THE INTEREST TO BE TERMINATED IS:

(1) A LEASE FOR A TERM OF YEARS;

(2) AN INTEREST HELD FOR PUBLIC, EDUCATIONAL, RELIGIOUS OR CHARITABLE PURPOSES; OR

(3) AN INTEREST CREATED IN A CONVEYANCE FROM THE UNITED STATES OF AMERICA, THE STATE OF MICHIGAN OR ANY AGENCY OR POLITICAL SUBDIVISION OF EITHER OF THEM; OR

(C) THE POSSIBILITY OF REVERTER OR RIGHT OF ENTRY IS PRESERVED BY THE RECORDING, WITHIN A PERIOD OF NOT LESS THAN 25 NOR MORE THAN 30 YEARS AFTER CREATION OF THE TERMINABLE INTEREST OR WITHIN ONE YEAR AFTER MARCH 29, 1968, WHICHEVER IS LATER, OF A WRITTEN NOTICE THAT THE OWNER OF THE POSSIBILITY OF REVERTER OR RIGHT OF ENTRY DESIRES TO PRESERVE IT. THE NOTICE MUST BE RECORDED IN

**THE OFFICE OF THE REGISTER OF DEEDS OF THE
COUNTY IN WHICH THE REAL PROPERTY SUBJECT
TO THE POSSIBILITY OF REVERTER OR RIGHT OF
ENTRY IS LOCATED.**

Problem A: On June 29, 1952, James Farmer conveyed Blackacre to the Michigan Railway Company “so long as it is used for railroad purposes and, if the land shall cease to be used for railroad purposes, the land shall revert to grantor or his heirs.” In 1987, the Michigan Railway Company ceased railroad operations and no longer used Blackacre for railroad purposes. Farmer did not record any written notice of his desire to preserve his possibility of reverter. The Michigan Railway Company later conveyed Blackacre to Robert Jones. Did Jones acquire title to Blackacre free of any interest of Farmer or his heirs?

Answer: Yes.

Problem B: Same facts as in Problem A, except that on July 20, 1980, Farmer recorded a notice of his desire to preserve his possibility of reverter in the office of the register of deeds in the county in which Blackacre is located. Did Jones acquire title to Blackacre free of any interest of Farmer or his heirs?

Answer: No.

Problem C: On January 15, 1948, Patricia Smith conveyed Whiteacre to the Westland School District “on condition that the land shall be used for educational purposes, and if it ever ceases to be so used, the grantor or her heirs may enter and take the land.” In 1996 Whiteacre ceased to be used for educational purposes. On March 15, 1998, Westland School District conveyed Whiteacre to Steven Young. Did Young acquire title to Blackacre free of the right of entry of Smith or her heirs?

Answer: No.

Authorities: Generally: MCL 554.61 through 554.65.

Problem A: MCL 554.63. *Ludington & Northern Railway v The Epworth Assembly*, 188 Mich App 25, 468 NW2d 884 (1991).

Problem B: MCL 554.64.

Problem C: MCL 554.65.

Comment A: The constitutionality of MCL 554.61 *et seq.*, as it affects interests created before the effective date of the Act, was upheld in *Ludington & Northern Railway v The Epworth Assembly*, 188 Mich App 25, 468 NW2d 884 (1991).

MCL 554.65 provides that a right of termination created before the effective date of the Act may be preserved by the recording of a written notice that the owner desires to preserve the same “within a period of not less than 25 nor more than 30 years after creation of the terminable interest or within 1 year after the effective date of this act, whichever is later.”

Comment B: The term “terminable interest” under MCL 554.61 *et seq.* is defined as “a possessory or ownership interest in real property which is subject to termination by a provision in a conveyance or other instrument which either creates a right of reversion to a grantor or his heirs, successors or assigns or creates a right of entry on the occurrence of a specified contingency.” Under *Ludington & Northern Railway v The Epworth Assembly*, *supra*, it is clear that the limitation period on the duration of possibilities of reverter and rights of entry is enforceable in certain cases. Although not essential to the holding of the case, the Court of Appeals in *Ludington & Northern Railway v The Epworth Assembly*, *supra*, distinguished between a “true reversion,” in which a qualified fee is determinable upon the occurrence of an event which is ‘certain’ to happen, and a possibility of reverter, in which a fee is subject to termination upon the occurrence of an event which is not certain to happen. The Committee expresses no opinion whether the Act is effective to limit the time period within which a “true reversion” must occur.

CHAPTER X
CORPORATE CONVEYANCES

STANDARD 10.1

**DEFECTIVE EXECUTION OF CORPORATE
CONVEYANCE**

STANDARD: THE VALIDITY OF A CORPORATE CONVEYANCE IS NOT AFFECTED BY FAILURE OF THE CORPORATE NAME TO BE INCLUDED AS PART OF THE SIGNATURE, PROVIDED THE CORPORATION IS NAMED AS GRANTOR IN THE BODY OF THE INSTRUMENT AND THE CONVEYANCE IS PROPERLY ACKNOWLEDGED.

Problem: A conveyance purporting to be from Star Corporation as grantor was signed by Joe Doe, president, and Richard Roe, secretary. The name of the corporation was not included in the signature. The acknowledgment was in proper form. Is the instrument valid?

Answer: Yes.

Authorities: MCL 565.604. *Archbold v Industrial Land Co*, 264 Mich 289, 249 NW 858 (1933).

STANDARD 10.2

ABSENCE OF CORPORATE SEAL FROM CORPORATE CONVEYANCE

STANDARD: THE ABSENCE OF THE CORPORATE SEAL FROM A CORPORATE CONVEYANCE DOES NOT AFFECT THE VALIDITY OF THE CONVEYANCE.

Problem: Star Corporation deeded Blackacre to Richard Smith. The corporate seal did not appear on the deed. The signature and acknowledgment were in proper form. Is Smith's deed valid?

Answer: Yes.

Authorities: MCL 565.241 and 600.1401.

Comment: The Revised Judicature Act provides that the use of a seal constitutes presumptive evidence of consideration and of the lawful execution of a corporate instrument. MCL 600.2139 and 600.2142. *American Employers Insurance Co v H G Christman & Bros Co*, 284 Mich 36, 278 NW 750 (1938).

STANDARD 10.3

ACKNOWLEDGMENT OF CORPORATE CONVEYANCE

STANDARD: A CORPORATE CONVEYANCE IS NOT ENTITLED TO BE RECORDED UNLESS IT IS ACKNOWLEDGED ON BEHALF OF THE CORPORATION.

Problem: Star Corporation deeded Blackacre to Robert Miller. The deed was signed by John Doe, president, and Richard Roe, secretary. Doe and Roe each acknowledged their execution of the deed, but the acknowledgment did not refer to their respective corporate capacities. Is Miller's deed entitled to be recorded?

Answer: No.

Authorities: MCL 565.267(3) and 565.8.

Comment A: If, through error, an instrument not entitled to recording is recorded, the record itself may not be introduced in evidence to establish the instrument, but the instrument may constitute constructive notice of the interest described in the instrument. MCL 565.604. *Brown v McCormick*, 28 Mich 215 (1873).

Comment B: An acknowledgment is not necessary to give validity to a conveyance. The purpose of an acknowledgment is to entitle the instrument to be recorded. *Turner v Peoples State Bank*, 299 Mich 438, 300 NW 353 (1941).

Note: See Chapter III concerning execution, acknowledgment and recording of conveyances.

STANDARD 10.4

CONVEYANCE TO UNINCORPORATED VOLUNTARY ASSOCIATION

STANDARD: A CONVEYANCE TO AN UNINCORPORATED VOLUNTARY ASSOCIATION DOES NOT OPERATE TO VEST TITLE IN THE ASSOCIATION, EXCEPT A CONVEYANCE TO AN UNINCORPORATED RELIGIOUS, FRATERNAL, SCIENTIFIC OR BENEVOLENT SOCIETY WILL VEST TITLE IN THE SOCIETY UPON ITS SUBSEQUENT ORGANIZATION OR INCORPORATION IN COMPLIANCE WITH APPLICABLE STATUTORY PROVISIONS, SUBJECT TO THE RIGHTS OF AN INTERVENING GOOD FAITH PURCHASER FOR VALUE.

Problem A: James Smith deeded Blackacre to the Wild Life Hunting and Fishing Association, an unincorporated voluntary association. Later, the association deeded Blackacre to Charles Gray. Did Gray acquire title to Blackacre?

Answer: No.

Problem B: James North deeded Blackacre to The Disciples, an unincorporated religious society. Later, The Disciples was incorporated as an ecclesiastical corporation. Did title to Blackacre vest in The Disciples upon its incorporation?

Answer: Yes.

Authorities: Problem A: MCL 565.604.

Problem B: MCL 565.604. *Badeaux v Ryerson*, 213 Mich 642, 182 NW 22 (1921); *Russian All Saints Orthodox Church v Darin*, 222 Mich 35, 192 NW 697 (1923).

STANDARD 10.5

TITLE TO REAL PROPERTY OF DISSOLVED MICHIGAN CORPORATION

STANDARD: UPON DISSOLUTION OF A MICHIGAN CORPORATION AFTER DECEMBER 31, 1972, ANY INTEREST OF THE CORPORATION IN REAL PROPERTY REMAINS VESTED IN THE CORPORATION UNTIL CONVEYED IN THE CORPORATE NAME.

Problem A: Star Company, a Michigan corporation, owned Blackacre. Star was dissolved on June 10, 1974. On October 23, 1974, Star conveyed Blackacre to Simon Grant by a deed executed by an authorized officer. Did Grant acquire title to Blackacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except that the deed was not executed in the corporate name but was executed by Joe Johnson as a shareholder of Star. Did Grant acquire title to Blackacre?

Answer: No.

Authority: MCL 450.1834(b).

Comment A: Before January 1, 1973, the effective date of the Michigan Business Corporation Act, title to corporate real property remained vested in the corporation for a period of three years after its charter became void, whether due to expiration of the corporate term, failure to file an annual report, or otherwise. During the three-year period, a deed of corporate real property could be executed in the corporate name by either an authorized officer or by a majority of the members of the corporation's last board of directors. After the expiration of the three-year period, title to corporate real property vested in the surviving members of the corporation's last board of directors as trustees for the creditors and shareholders of the corporation.

If the directors did not convey the corporate real property or if there were no surviving directors, the circuit court of the county in which the registered office of the corporation was last located could appoint

a trustee who would be vested with title to the corporate real property with power to administer the real property as the court directed. MCL 450.2098 repealed these provisions, effective January 1, 1973.

The Michigan Business Corporation Act provides that for the purpose of winding up its affairs, unless otherwise directed by court order, a dissolved corporation and its officers, directors and shareholders shall continue to function in the same manner as though dissolution had not occurred, and that title to the corporation's assets remains in the corporation until conveyed by it in the corporate name.

Comment B: Upon dissolution of a foreign corporation which owns Michigan real property, title to the real property vests in the manner prescribed by the law of the jurisdiction in which the corporation was incorporated. *Weber v Roberts Iron Ore Co.*, 270 Mich 38, 258 NW 408 (1935).

STANDARD 10.6

AUTHORITY TO CONVEY INTEREST IN CORPORATE REAL PROPERTY

STANDARD: AN INTEREST IN CORPORATE REAL PROPERTY MAY BE CONVEYED BY AN INSTRUMENT EXECUTED BY A PERSON AUTHORIZED TO ACT ON BEHALF OF THE CORPORATION.

Problem A: By a resolution not inconsistent with its articles of incorporation and bylaws, the board of directors of Star Corporation, a Michigan corporation which owned Blackacre, approved the sale and authorized John Doe, its president and Richard Roe, its secretary, to execute a deed of Blackacre to Simon Grant. Later, Star Corporation conveyed Blackacre to Simon Grant pursuant to a deed executed by John Doe, president and Richard Roe, secretary, of Star Corporation. Did Grant acquire marketable title to Blackacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except that the deed was executed by Alex Smith, vice-president and John Keys, treasurer, of Star Corporation. Did Grant acquire marketable title to Blackacre?

Answer: No.

Problem C: Ace Manufacturing Company, a Michigan corporation, adopted a corporate bylaw not inconsistent with its articles of incorporation conferring on its president the authority to approve sales of real property and to execute deeds and other instruments to effectuate the sales. The corporation owned Blackacre. The board of directors of the corporation did not adopt a resolution approving a sale of Blackacre. Sam Phillips, as the corporation's president, executed a deed of Blackacre to George Williams. Did Williams acquire marketable title to Blackacre?

Answer: Yes.

Problem D: Same facts as in Problem C, except that Ace Manufacturing Company is in the business of buying and selling real property and the

corporation's bylaws confer on the president unrestricted power as its general manager to perform any act in the ordinary course of the corporation's business. Did Williams acquire marketable title to Blackacre?

Answer: Yes.

Authorities: MCL 450.1231, 450.1261, 450.1501 and 450.1531. *Dickinson Island Land Co. v Hill*, 210 Mich 53, 177 NW 142 (1920); *Cope-Swift Co. v John Schlaff Creamery Co.*, 223 Mich 543, 194 NW 550 (1923); *In re Lee Ready Mix & Supply Co*, 437 F2d 497 (6th Cir 1971).

Comment: This Standard does not apply to the conveyance of corporate real property as a part of the disposition of all or substantially all of the corporation's assets, whether or not in the usual and regular course of business. As to the authority for a conveyance of all or substantially all of the corporate assets in the usual and regular course of business, see MCL 450.1751. As to the conveyance of all or substantially all of the corporate assets not in the usual and regular course of business, see MCL 450.1751 and 450.1753.

CHAPTER XI
PARTNERSHIP CONVEYANCES

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STANDARD 11.1

**CONVEYANCE OF REAL PROPERTY
HELD IN PARTNERSHIP NAME**

STANDARD: REAL PROPERTY ACQUIRED IN THE NAME OF A PARTNERSHIP MAY BE CONVEYED ONLY IN THE PARTNERSHIP NAME.

Problem A: Blackacre was deeded to Eagle Company, a Michigan co-partnership. Later, a deed of Blackacre was given by Eagle Company, a co-partnership, by Sam Phillips and James Peters, the sole co-partners, to George Williams. Did Williams acquire marketable title to Blackacre?

Answer: Yes.

Problem B: Blackacre was deeded to Eagle Company, a Michigan co-partnership consisting of Sam Phillips and James Peters. Later, a deed of Blackacre was given by Phillips and Peters to George Williams. Did Williams acquire marketable title to Blackacre?

Answer: No.

Authorities: MCL 449.8, 449.10. *Scheurman v Farbman*, 245 Mich 688, 224 NW 604 (1929).

Comment A: This Standard applies also to a conveyance of real property held in the name of a limited partnership.

Comment B: Michigan courts recognize the judicially created legal concept of a joint venture (or joint adventure), under which persons agree to undertake a single project for profit, share in the profits and losses, contribute skills or property, and together exercise control

over the enterprise. See, e.g., *Berger v Mead*, 127 Mich App 209, 338 NW2d 919 (1983), and *Kay Investment Co, LLC v Brody Realty No. 1, LLC*, 273 Mich App 432, 731 NW2d 777 (2006). A joint venture creates a different legal relationship from that of a partnership, the principal difference being that a joint venture is for a single project and not a general business enterprise. *Kay Investment, supra*, at 437. A joint venture and a partnership also have different legal consequences, the most significant being that joint venturers hold real property as tenants in common, in contrast to a partnership which holds title to real property in the partnership name. *Kay Investment, supra*, at 440-441, citing *Swan v Ispas*, 325 Mich 39, 37 NW2d 704 (1949).

STANDARD 11.2

NO DOWER IN PARTNERSHIP REAL PROPERTY

STANDARD: THERE IS NO DOWER IN PARTNERSHIP REAL PROPERTY.

Problem A: Blackacre was deeded to Eagle Company, a Michigan co-partnership composed of Sam Phillips and James Peters, who were married during the entire time that Eagle Company owned Blackacre. Later, Eagle Company conveyed Blackacre to George Williams by a deed executed by Peters, who had authority to convey real property owned by Eagle Company. Did Williams acquire title to Blackacre free of any dower of the wives of Phillips and Peters?

Answer: Yes.

Problem B: Blackacre was deeded to Sam Phillips and James Peters, co-partners, doing business as Eagle Company, a Michigan co-partnership. Phillips and Peters were married during the entire time that they owned Blackacre as co-partners of Eagle Company. Later, Phillips and Peters, co-partners, doing business as Eagle Company, executed a deed of Blackacre to George Williams. The wives of Phillips and Peters did not sign the deed. Did Williams acquire title to Blackacre free of any dower of the wives of Phillips and Peters?

Answer: Yes.

Authorities: MCL 449.10 and 449.25. *Scheurman v Farbman*, 245 Mich 688, 224 NW 604 (1929).

Comment: This Standard applies also to real property held in the name of a limited partnership.

STANDARD 11.3

CONVEYANCE OF CO-PARTNERSHIP REAL PROPERTY BEFORE DISSOLUTION

STANDARD: A CONVEYANCE OF CO-PARTNERSHIP REAL PROPERTY BEFORE PARTNERSHIP DISSOLUTION EXECUTED IN THE PARTNERSHIP NAME IS BINDING UPON THE PARTNERSHIP IF:

(A) EXECUTED BY ALL PARTNERS; OR

(B) EXECUTED BY ONE OR MORE BUT LESS THAN ALL PARTNERS; AND:

(1) THE EXECUTING PARTNER OR PARTNERS HAVE EXPRESS AUTHORITY TO MAKE THE CONVEYANCE; OR

(2) THE CONVEYANCE APPARENTLY CARRIES ON IN THE USUAL WAY THE BUSINESS OF THE PARTNERSHIP AND THE GRANTEE DOES NOT HAVE KNOWLEDGE THAT THE EXECUTING PARTNER OR PARTNERS ARE NOT AUTHORIZED TO MAKE THE CONVEYANCE; OR

(3) THE CONVEYANCE IS AUTHORIZED OR RATIFIED BY ALL OF THE OTHER PARTNERS.

Problem A: Blackacre, a vacant lot, was owned by Eagle Company, a Michigan co-partnership engaged in the business of developing and selling real property. Blackacre was conveyed to George Williams by a deed signed on behalf of Eagle by James Smith, a partner of Eagle. Smith was not authorized to sign the deed on behalf of Eagle, but Williams did not have knowledge of this fact. Did Williams acquire marketable title to Blackacre?

Answer: Yes. Because the conveyance apparently carried on Eagle's real property development business in the usual way and Williams did

not know of Smith's lack of authority, the conveyance is binding upon Eagle.

Problem B: Same facts as in Problem A, except that Williams knew the Eagle partnership agreement required that all real property conveyances made by Eagle be executed by all of the partners. Did Williams acquire marketable title to Blackacre?

Answer: No. Because Williams had knowledge of Smith's lack of authority to make the conveyance, the conveyance is voidable by Eagle.

Problem C: Whiteacre was owned by Falcon Company, a Michigan co-partnership engaged in the retail furniture business. Whiteacre was conveyed to John Jones by a deed signed on behalf of Falcon by Robert Smith, a partner of Falcon. Jones made no inquiry as to Smith's authority to make the conveyance on behalf of Falcon. The Falcon partnership agreement required that all real property conveyances be approved in writing by all of the partners. The approvals were not obtained. Did Jones acquire marketable title to Whiteacre?

Answer: No. Because the conveyance did not apparently carry on Falcon's retail furniture business in the usual way and the conveyance was not authorized by all partners, the conveyance is voidable by Falcon.

Problem D: Same facts as in Problem C, except that the Falcon partnership agreement provided that any one partner of Falcon was authorized to sign and deliver a deed conveying title to partnership real property. Did Jones acquire marketable title to Whiteacre?

Answer: Yes.

Problem E: Greenacre was owned by Hawk Company, a Michigan co-partnership. Greenacre was conveyed to Wanda West by a deed signed on behalf of Hawk by Edna East, a partner of Hawk. West knew that East lacked authority to make the conveyance on behalf of Hawk. West subsequently deeded Greenacre to Sandra South. South paid fair value for Greenacre and had no knowledge of East's lack of authority. Did South acquire marketable title to Greenacre?

Answer: Yes. South was a bona fide purchaser for value without knowledge of East's lack of authority. Therefore, the original conveyance is not voidable by Hawk as against South.

Authorities: MCL 449.9 and 449.10. *Moran v Palmer* 13 Mich 367 (1865); *Back-*

owski v Solecki, 112 Mich App 401, 316 NW2d 434 (1982); *Omnicom v Giannetti Investment*, 221 Mich App 341, 561 NW2d 138 (1997). See also, *City Nat'l Bank of Detroit v Westland Towers Apartments*, 107 Mich App 213, 309 NW2d 209 (1981), *rev'd in part on other grounds and remanded*; 413 Mich 938, 320 NW2d 881, *aff'd judgment on remand*; 152 Mich App 136, 393 NW2d 554.

Comment: A conveyance not meeting the test of this Standard might nevertheless be binding upon the partnership under theories of estoppel or implied authority. See, e.g., *Moran v Palmer*, *supra*.

STANDARD 11.4

CONVEYANCE OF PARTNERSHIP REAL PROPERTY AFTER DEATH OF ONE OR MORE PARTNERS

STANDARD: AFTER THE DEATH OF A PARTNER, PARTNERSHIP REAL PROPERTY MAY BE CONVEYED BY THE SURVIVING PARTNER OR PARTNERS. AFTER THE DEATH OF THE LAST SURVIVING PARTNER, PARTNERSHIP REAL PROPERTY MAY BE CONVEYED BY THE LEGAL REPRESENTATIVE OF THE LAST SURVIVING PARTNER.

Problem A: Blackacre was owned by Eagle Company, a Michigan co-partnership composed of Sam Phillip, James Smith and John Pierce. Phillip died. Later, Blackacre was deeded by Eagle Company, a Michigan co-partnership, by Smith and Pierce, surviving partners, to George Williams. Did Williams acquire marketable title to Blackacre?

Answer: Yes.

Problem B: Blackacre was owned by Eagle Company, a Michigan co-partnership composed of Sam Phillip and James Smith. First Phillip, then Smith, died. Later, Blackacre was deeded to George Williams by Eagle Company, a Michigan co-partnership, by Harry Ross, executor under Smith's will. Did Williams acquire marketable title to Blackacre?

Answer: Yes.

Problem C: Blackacre was owned by Eagle Company, a Michigan co-partnership composed of Sam Phillip and James Smith. Phillip died. The administrator of Phillip's estate included Blackacre in the inventory of the estate assets, and was authorized by the probate court to sell the estate's interest in Blackacre. The administrator conveyed Blackacre to George Williams. Did Williams acquire marketable title to any interest in Blackacre?

Answer: No. Partnership assets are to be administered by the surviving partner(s) and not through a decedent's estate, except the estate of

the last partner to die. Accordingly, Williams could acquire title to Blackacre only by a deed from Eagle Company as grantor and signed by Smith as surviving partner.

Authorities: MCL 449.25 and 449.37. *Dwyer v Bohan*, 214 Mich 290, 183 NW 40 (1921); *Kent Probate Judge v American Employers Insurance Co*, 283 Mich 328, 278 NW 85 (1938); *Grigg v Hanna*, 283 Mich 443, 278 NW 125 (1938); *Taylor v Lint*, 338 Mich 673, 62 NW2d 453 (1954).

STANDARD 11.5

CONVEYANCE OF LIMITED PARTNERSHIP REAL PROPERTY BEFORE DISSOLUTION

STANDARD: A CONVEYANCE OF LIMITED PARTNERSHIP REAL PROPERTY BEFORE PARTNERSHIP DISSOLUTION EXECUTED IN THE PARTNERSHIP NAME IS BINDING UPON THE PARTNERSHIP IF:

- (A) EXECUTED, AUTHORIZED OR RATIFIED BY ALL GENERAL PARTNERS; OR
- (B) EXECUTED BY ONE OR MORE BUT LESS THAN ALL GENERAL PARTNERS; AND EITHER:
 - (1) THE EXECUTING GENERAL PARTNER OR PARTNERS HAVE EXPRESS AUTHORITY TO MAKE THE CONVEYANCE; OR
 - (2) THE CONVEYANCE APPARENTLY CARRIES ON IN THE USUAL WAY THE BUSINESS OF THE LIMITED PARTNERSHIP AND THE GRANTEE DOES NOT HAVE KNOWLEDGE THAT THE EXECUTING GENERAL PARTNER OR PARTNERS ARE NOT AUTHORIZED TO MAKE THE CONVEYANCE;

SUBJECT IN ALL CASES TO THE RIGHT OF THE LIMITED PARTNERSHIP TO RECOVER TITLE IF THE CONVEYANCE WAS CONTRARY TO THE PARTNERSHIP AGREEMENT. TITLE DERIVED THROUGH A LATER CONVEYANCE TO A BONA FIDE PURCHASER FOR VALUE, HOWEVER, IS NOT SUBJECT TO RECOVERY BY THE PARTNERSHIP, EVEN IF EXECUTION OF THE INSTRUMENT OF CONVEYANCE WAS CONTRARY TO THE PARTNERSHIP AGREEMENT.

Problem A: Blackacre Plat was owned by Lion Associates Limited Partnership, a Michigan limited partnership engaged in the residential subdivision development business. On February 7, 1997, a deed to Harry Pitts describing Lot 6 in Blackacre Plat was executed on behalf of the partnership by Joe Woodward, a general partner. Woodward's execution

of the deed on behalf of the partnership was not expressly authorized (a fact of which Pitts did not have knowledge), nor was it contrary to the partnership agreement. Did Pitts acquire marketable title to Lot 6?

Answer: Yes.

Problem B: Tiger Limited Partnership, a Michigan limited partnership engaged in the manufacturing business, owned Blackacre, along with other real property. The partnership agreement provided that no conveyance of Blackacre was to be executed without the consent of the limited partners. On July 7, 2000, Guy Perry, in his capacity as the sole general partner, executed a deed describing Blackacre to George Williams. The limited partners had not consented to the conveyance. Did Williams acquire marketable title to Blackacre?

Answer: No.

Problem C: Same facts as in Problem B, except that on February 7, 2001, Williams, a single man, deeded Blackacre to Roger Bowman, a purchaser for value. Bowman was not aware that the deed to Williams was executed contrary to the partnership agreement. Did Bowman acquire marketable title to Blackacre?

Answer: Yes.

Authorities: MCL 449.9, 449.10, 449.1403 and 449.2106.

Comment A: The Michigan Revised Uniform Limited Partnership Act, effective January 1, 1983, provides: "Except as provided in this act or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions and liabilities of a partner in a partnership without limited partners". MCL 449.1403.

Comment B: Partnership agreement, as used in this Standard, is defined in MCL 449.1101(10).

Comment C: Before January 1, 1983, the effective date of the Michigan Uniform Revised Limited Partnership Act, MCL 449.1101 *et seq.*, conveyances of real property of a limited partnership were governed by the Michigan Uniform Limited Partnership Act, MCL 449.201 *et seq.* (repealed by 1982 P.A. 213, being MCL 449.2104).

STANDARD 11.6

CONVEYANCE OF CO-PARTNERSHIP REAL PROPERTY SUBSEQUENT TO ASSIGNMENT OF PARTNERSHIP INTEREST

STANDARD: AN OTHERWISE BINDING CONVEYANCE OF CO-PARTNERSHIP REAL PROPERTY MADE IN THE PARTNERSHIP NAME IS NOT AFFECTED BY THE PRIOR ASSIGNMENT OF AN INTEREST IN THE PARTNERSHIP BY A PARTNER WHO WAS A PARTNER AT THE TIME THE PARTNERSHIP ACQUIRED THE PROPERTY IF THE ASSIGNMENT DID NOT CAUSE DISSOLUTION OF THE PARTNERSHIP OR THE PARTNERSHIP HAS NOT OTHERWISE BEEN DISSOLVED.

Problem A: Blackacre was acquired by Eagle Company, a Michigan co-partnership composed of Samantha Phillips, Janine Peters and Joan Pierce. Later, Phillips and Pauline Gibson entered into a written assignment pursuant to which Phillips assigned her economic interest in Eagle to Gibson, but Gibson was not substituted as a partner of Eagle in the place of Phillips nor was Gibson granted rights to participate in the management or administration of Eagle's business and affairs. After the assignment, Eagle conveyed Blackacre to Georgina Williams by a deed signed on behalf of Eagle by Peters. The Eagle partnership agreement required that all real property conveyances be approved in writing by all of the partners, and Williams had knowledge of this fact. The conveyance was authorized in writing by Peters, Pierce and Phillips, but not by Gibson. Did Williams acquire marketable title to Blackacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except that Gibson, but not Phillips, authorized the conveyance in writing. Did Williams acquire marketable title to Blackacre?

Answer: No.

Authorities: MCL 449.9, 449.10, 449.27 and 449.29. *Backowski v Solecki*, 112 Mich App 401, 316 NW2d 434 (1982).

STANDARD 11.7

PARTNERS' AUTHORITY TO CONVEY CO-PARTNERSHIP REAL PROPERTY AFTER PARTNERSHIP DISSOLUTION

STANDARD: AFTER DISSOLUTION, A CONVEYANCE OF CO-PARTNERSHIP REAL PROPERTY SIGNED BY LESS THAN ALL OF THE PARTNERS IS BINDING UPON THE PARTNERSHIP IF:

- (A) THE CONVEYANCE IS APPROPRIATE FOR:**
- (1) COMPLETING A TRANSACTION UNFINISHED AT DISSOLUTION (EXCEPT IF THE PARTNERSHIP IS DISSOLVED BECAUSE IT IS UNLAWFUL TO CARRY ON ITS BUSINESS); OR**
 - (2) WINDING UP PARTNERSHIP AFFAIRS; OR**
- (B) (1) THE CONVEYANCE WOULD BE BINDING UPON THE PARTNERSHIP IF DISSOLUTION HAD NOT OCCURRED;**
- (2) THE PARTNERSHIP IS NOT DISSOLVED BECAUSE IT IS UNLAWFUL TO CARRY ON ITS BUSINESS; AND**
- (3) THE GRANTEE EITHER:**
- (i) EXTENDED CREDIT TO THE PARTNERSHIP BEFORE DISSOLUTION AND HAD NO KNOWLEDGE OR NOTICE OF THE DISSOLUTION; OR**
 - (ii) KNEW OF THE PARTNERSHIP BEFORE DISSOLUTION AND DID NOT HAVE KNOWLEDGE OR NOTICE OF THE DISSOLUTION AND THE FACT OF DISSOLUTION WAS NOT ADVERTISED IN A NEWSPAPER OF**

**GENERAL CIRCULATION IN THE PLACE
(OR IN EACH PLACE IF MORE THAN ONE)
AT WHICH THE PARTNERSHIP BUSINESS
WAS REGULARLY CARRIED ON;**

**PROVIDED, HOWEVER, THAT ACTS OF THE FOLLOWING
DESCRIBED PARTNERS WILL NOT BIND THE PARTNER-
SHIP:**

- (1) PARTNERS WHO HAVE BECOME BANKRUPT;
AND**
- (2) PARTNERS WHO HAVE NO AUTHORITY TO WIND
UP PARTNERSHIP AFFAIRS, EXCEPT THAT THIS
LIMITATION DOES NOT APPLY IF THE GRANTEE
EITHER:**
 - (i) EXTENDED CREDIT TO THE PARTNER-
SHIP BEFORE DISSOLUTION AND HAD NO
KNOWLEDGE OR NOTICE OF THE PART-
NERS' LACK OF AUTHORITY; OR**
 - (ii) DID NOT HAVE KNOWLEDGE OR NOTICE
OF THE PARTNERS' LACK OF AUTHORITY
AND THE FACT OF THE PARTNERS' LACK
OF AUTHORITY WAS NOT ADVERTISED IN
A NEWSPAPER OF GENERAL CIRCULATION
IN THE PLACE (OR IN EACH PLACE IF MORE
THAN ONE) AT WHICH THE PARTNERSHIP
BUSINESS WAS REGULARLY CARRIED ON.**

Problem A: Whiteacre was owned by Falcon Company, a Michigan co-partnership composed of Robert Smith, Thomas Jones and Edward Andrews. On May 1, 1999, Falcon entered into a binding purchase agreement to sell Whiteacre to Harvey Hansen. On May 30, 1999, the day before closing, Smith died. On May 31, 1999, the closing occurred as scheduled and in the manner required by the purchase agreement, at which time a deed conveying Whiteacre to Hansen was signed on behalf of Falcon by Jones. The conveyance of Whiteacre to Hansen was not appropriate for winding up the affairs of Falcon nor would

the conveyance have been binding upon Falcon if dissolution had not taken place. Did Hansen acquire marketable title to Whiteacre?

Answer: Yes. The deed to Hansen completed the transaction for the sale of Whiteacre, which was unfinished at the time Falcon was dissolved due to Smith's death.

Problem B: Same facts as in Problem A, except that Smith did not die and Falcon was dissolved because it was unlawful for Falcon to carry on its business. Did Hansen acquire marketable title to Whiteacre?

Answer: No.

Problem C: Same facts as in Problem B, except that the conveyance of Whiteacre to Hansen was appropriate for winding up the affairs of Falcon. Did Hansen acquire marketable title to Whiteacre?

Answer: Yes.

Problem D: Same facts as in Problem C, except that Jones had no authority to wind up Falcon's affairs. Did Hansen acquire marketable title to Whiteacre?

Answer: No.

Problem E: Same facts as in Problem D, except that Hansen extended credit to Falcon before Falcon's dissolution and had no knowledge or notice of Jones's lack of authority to wind up Falcon's partnership affairs. Did Hansen acquire marketable title to Whiteacre?

Answer: Yes.

Problem F: Same facts as in Problem E, except that Jones filed for bankruptcy the day before the scheduled closing. Did Hansen acquire marketable title to Whiteacre?

Answer: No.

Authorities: MCL 449.31, 449.33 and 449.35.

Comment: The Committee expresses no opinion as to who must consent to a conveyance of co-partnership real property if, before the conveyance, a partner sells his or her partnership interest to a third party (includ-

ing the partner's rights in partnership property and his or her right to participate in the management and administration of partnership business and affairs), the third party is admitted as a substitute partner in the co-partnership, and the business of the partnership is continued without liquidation of the partnership's affairs.

STANDARD 11.8

EFFECT OF STATUTORY CONVERSION OF PARTNERSHIP TO LIMITED LIABILITY COMPANY ON TITLE TO REAL PROPERTY

STANDARD: UPON CONVERSION OF A PARTNERSHIP TO A LIMITED LIABILITY COMPANY IN ACCORDANCE WITH MCL 450.4707, ALL INTERESTS OF THE PARTNERSHIP IN REAL PROPERTY BECAME VESTED IN THE LIMITED LIABILITY COMPANY.

Problem: Holmes & Sons, a Michigan co-partnership, owned Blackacre in fee simple. Holmes & Sons approved, executed and filed a certificate of conversion, together with articles of organization, to convert Holmes & Sons to Holmes & Sons, L.L.C., a Michigan limited liability company. No deed or other instrument of conveyance of Blackacre was given. Is fee simple title to Blackacre vested in Holmes & Sons, L.L.C.?

Answer: Yes.

Authority: MCL 450.4707.

Comment: The requirements for certificates of conversion are set forth in MCL 450.4707, and for articles of organization in MCL 450.4203. These provisions do not require that these documents, an instrument of conveyance, an affidavit or any other notice of the conversion be recorded.

CHAPTER XII

LAND CONTRACTS



STANDARD 12.1

LAND CONTRACT VENDOR'S TITLE IMPERFECT AT TIME OF EXECUTION OF LAND CONTRACT

STANDARD: A LAND CONTRACT IS NOT INVALID BECAUSE THE LAND CONTRACT VENDOR HAD IMPERFECT TITLE AT THE TIME OF EXECUTION OF THE CONTRACT IF THE VENDOR:

- (A) ENTERED INTO THE CONTRACT IN GOOD FAITH;
AND
- (B) HAD AN INTEREST IN THE REAL PROPERTY SUCH THAT THE VENDOR COULD CONVEY TITLE PURSUANT TO AND AT THE TIME STATED IN THE CONTRACT.

Problem: Robert Brown sold Blackacre to John Green by land contract. At the time of the execution of the contract, Brown held only an option to purchase Blackacre. Did Green acquire an interest in Blackacre?

Answer: Yes.

Problem B: Robert Brown sold Blackacre to Sam Black by land contract. Before receiving a deed to Blackacre, Black sold Blackacre to John Green by land contract. Did Green acquire an interest in Blackacre?

Answer: Yes.

Authorities: Problem A: *Silfver v Daenzer*, 167 Mich 362, 133 NW 16 (1911); *Rogers v Eaton*, 181 Mich 620, 148 NW 348 (1914); *Soloman v Shewitz*, 185 Mich 620, 152 NW 196 (1915).

Problem B: *Adadow v Perry*, 225 Mich 286, 196 NW 190 (1923).

Comment: Rescission may be available to a land contract vendee if the vendor did not enter into the contract in good faith, even though the vendor could convey the requisite title at the time stated in the contract. *Allen v Talbot*, 170 Mich 664, 137 NW 97 (1912).

Note: If there is no recorded evidence of a vendor's interest in the real property described in a land contract, the unrecorded interest is void against a subsequent purchaser for value and without notice. See, Standard 3.18.

STANDARD 12.2

RECORDED REFERENCE TO UNRECORDED LAND CONTRACT

STANDARD: A RECORDED REFERENCE TO AN UNRECORDED LAND CONTRACT CONSTITUTES CONSTRUCTIVE NOTICE OF THE CONTRACT.

Problem A: John Doe sold Blackacre to Edward Lane by land contract. The land contract was not recorded. Doe later conveyed Blackacre to Richard Roe by recorded deed. The deed stated that it was subject to the land contract. Does the reference in the deed constitute constructive notice of Lane's interest?

Answer: Yes.

Problem B: John Doe sold Blackacre to Edward Lane by land contract. The land contract was recorded. Doe later conveyed Blackacre to Richard Roe by recorded deed. The deed stated that it was subject to the land contract. Lane later assigned his vendee's interest to Arthur Mills. Does the reference in the deed constitute constructive notice of Mills's interest?

Answer: Yes.

Problem C: John Doe sold Blackacre to Simon Grant by land contract. Later, Grant assigned his vendee's interest to Edward Lane. The assignment was recorded. After the assignment, Doe conveyed Blackacre to Richard Roe by deed. The deed stated that it was subject to Lane's vendee's interest. Does the reference in the deed constitute constructive notice of the assignment by Grant to Lane?

Answer: Yes.

Authorities: *Fitzhugh v Barnard*, 12 Mich 104 (1863); *Baker v Mather*, 25 Mich 51 (1872); *Houseman v Gerken*, 231 Mich 253, 203 NW 841 (1925).

STANDARD 12.3

CONVEYANCE OF VENDOR'S INTEREST IN LAND CONTRACT

STANDARD: A CONVEYANCE OF THE FEE TITLE INCLUDES THE GRANTOR'S INTEREST IN A LAND CONTRACT WITHOUT IDENTIFICATION OR ASSIGNMENT OF THE CONTRACT, UNLESS THE INSTRUMENT OF CONVEYANCE EVIDENCES A CONTRARY INTENT.

Problem: Ruth Roe sold Blackacre on land contract. Later, Roe deeded Blackacre to Simon Grant. The deed did not refer to the land contract, nor did Roe make a separate assignment of the contract. Did Grant acquire the vendor's interest in the land contract?

Answer: Yes.

Authorities: *Vos v Dykema*, 26 Mich 399 (1873); *American Cedar & Lumber Co v Gustin*, 236 Mich 351, 210 NW 300 (1926); *Mundy v Mundy*, 296 Mich 578, 296 NW 685 (1941); *Mulvihill v Westgate*, 306 Mich 202, 10 NW2d 827 (1943); *Kramer v Davis*, 371 Mich 464, 124 NW2d 292 (1963).

Comment: Although under some circumstances a land contract vendor's conveyance of fee title may permit the vendee to rescind, the vendor's interest in the contract will nevertheless vest in the grantee. *Walcrath Realty Co v Van Dyke*, 263 Mich 316, 248 NW 634 (1933); *In re Reason's Estate*, 276 Mich 376, 267 NW 863 (1936); *Hornbeck v Midwest Realty, Inc*, 287 Mich 230, 283 NW 39 (1938).

STANDARD 12.4

VENDEE'S INTEREST IN LAND CONTRACT HELD BY HUSBAND AND WIFE

STANDARD: A HUSBAND AND WIFE WHO ACQUIRE A VENDEE'S INTEREST IN A LAND CONTRACT HOLD THE INTEREST AS TENANTS BY THE ENTIRETIES UNLESS THE LAND CONTRACT EVIDENCES A CONTRARY INTENT.

Problem: Edward Lane and Elsie Lane, husband and wife, entered into a land contract for the purchase of Blackacre. Edward Lane died. Later, Elsie Lane conveyed Blackacre to Simon Grant by quit claim deed. Did Grant acquire the vendee's interest in Blackacre?

Answer: Yes.

Authorities: MCL 554.44, 554.45 and 565.152. *Auditor General v Fisher*, 84 Mich 128, 47 NW 574 (1890); *Zeigen v Roiser*, 200 Mich 328, 166 NW 886 (1918); *Stevens v Wakeman*, 213 Mich 559, 182 NW 73 (1921); *In re Selle Estate*, 96 Mich App 373, 292 NW2d 147 (1980).

STANDARD 12.5

DEED PURSUANT TO LAND CONTRACT BY MICHIGAN PERSONAL REPRESENTATIVE IN DECEDENT'S ESTATE

STANDARD: A DEED PURSUANT TO A LAND CONTRACT EXECUTED BY A PERSONAL REPRESENTATIVE OF A DECEDENT'S ESTATE QUALIFIED IN MICHIGAN IS VALID IF THE LAND CONTRACT WAS IN EXISTENCE AT THE DATE OF DEATH OF THE VENDOR.

Problem A: Edward Lane, a Michigan resident, sold Blackacre on land contract to Simon Grant. Lane died. Fred Adams was appointed and qualified in Michigan as personal representative of Lane's estate. Adams, as personal representative, deeded Blackacre to Grant. Did Grant acquire title to Blackacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except Lane was an Arizona resident. Did Grant acquire title to Blackacre?

Answer: Yes. The answer is the same whether Adams was appointed in regular or ancillary probate proceedings.

Authority: MCL 700.3715.

Comment: Personal representative, as used in this Standard, includes a Michigan personal representative appointed in formal or informal probate proceedings and a foreign personal representative qualified in Michigan pursuant to MCL 700.3101, 700.3919, 700.4203 and 700.4301.

STANDARD 12.6

DEED PURSUANT TO LAND CONTRACT OF MICHIGAN REAL PROPERTY IN DECEDENT'S ESTATE BY FOREIGN PERSONAL REPRESENTATIVE NOT APPOINTED IN MICHIGAN

STANDARD: A DEED OF MICHIGAN REAL PROPERTY IN A DECE-
DENT'S ESTATE PURSUANT TO A LAND CONTRACT BY
A FOREIGN PERSONAL REPRESENTATIVE NOT APPOINT-
ED IN MICHIGAN, VESTS TITLE IN THE GRANTEE IF AU-
THENTICATED COPIES OF THE REPRESENTATIVE'S
APPOINTMENT AND ANY BOND ARE FILED WITH THE
APPROPRIATE MICHIGAN COURT.

Problem: Edward Lane, a resident of Ohio, entered into a land contract to sell Blackacre to Simon Grant. Blackacre was located in Alcona County, Michigan. Lane died and his estate was probated in Ohio. Fred Adams was appointed and qualified in Ohio as the personal representative of Lane's estate. Adams, as the personal representative, deeded Blackacre to Grant, but did not file with the Alcona County Probate Court an authenticated copy of his Ohio appointment as personal representative of Lane's estate. Did Grant acquire title to Blackacre?

Answer: No.

Authority: MCL 700.4203.

Comment A: Before March 29, 1986, a foreign fiduciary could not maintain proceedings to foreclose a Michigan land contract in behalf of the estate of a deceased vendor. A vendee who had fulfilled a land contract held by a foreign fiduciary of the deceased vendor's estate could, however, obtain a judicial conveyance of the real property pursuant to MCL 600.3175 or could seek other equitable relief in a Michigan court.

Comment B: Foreign personal representative, as used in this Standard, is defined in MCL 700.1104(g). See also, MCL 700.4101.

Note: See Standard 7.12 with respect to conveyances by foreign probate fiduciaries.

STANDARD 12.7

FORFEITURE OR FORECLOSURE OF LAND CONTRACT OF REAL PROPERTY IN POSSESSION OF RECEIVER

STANDARD: A FORFEITURE OR FORECLOSURE OF A LAND CONTRACT OF REAL PROPERTY IN THE POSSESSION OF A RECEIVER, WITHOUT THE APPROVAL OF THE COURT, IS VOIDABLE.

Problem: Edward Lane sold Blackacre to Brown Corporation on land contract. By circuit court proceedings, Brown Corporation's interest in Blackacre was placed in receivership. While the receivership was pending, Lane forfeited the land contract without court approval. Did Lane acquire marketable title to Blackacre?

Answer: No.

Authorities: *Campau v Detroit Driving Club*, 130 Mich 417, 90 NW 49 (1902); *In re Petition of Chaffee*, 262 Mich 291, 247 NW 186 (1933).

STANDARD 12.8

MISDESCRIPTION IN NOTICE OF SALE IN JUDICIAL FORECLOSURE OF LAND CONTRACT

STANDARD: THE NOTICE OF SALE PURSUANT TO A JUDGMENT OF FORECLOSURE OF LAND CONTRACT MUST DESCRIBE THE REAL PROPERTY BEING SOLD WITH COMMON CERTAINTY SUCH THAT THE PUBLIC BY EXERCISING ORDINARY INTELLIGENCE CAN IDENTIFY THE REAL PROPERTY AND MAY BE DIRECTED TO A MEANS OF OBTAINING AN EXACT DESCRIPTION.

Problem: In foreclosure of a land contract by judicial proceedings, the real property was described in the notice of sale as “Lot 26 of Long Pines Subdivision, according to the recorded plat thereof.” No such platted subdivision exists. Is the notice valid?

Answer: No.

Authorities: MCL 600.6052 and 600.6091. *Provident Mutual Life Insurance Co v Vinton Co*, 282 Mich 84, 275 NW 776 (1937); *Guardian Depositors Corp v Keller*, 286 Mich 403, 282 NW 194 (1938).

STANDARD 12.9

PUBLICATION OF NOTICE OF SALE IN JUDICIAL FORECLOSURE OF LAND CONTRACT

STANDARD: PUBLICATION OF NOTICE OF SALE IN JUDICIAL FORECLOSURE OF A LAND CONTRACT MAY NOT BE INITIATED UNTIL AFTER THE TIME FIXED FOR PAYMENT BY THE JUDGMENT, NOR WITHIN THREE MONTHS AFTER COMMENCEMENT OF THE ACTION. THE NOTICE MUST BE PUBLISHED ONCE EACH WEEK FOR AT LEAST SIX SUCCESSIVE WEEKS, AND THE SALE MUST BE HELD NOT LESS THAN 42 DAYS AFTER THE FIRST NOTICE OF SALE.

Problem: Blackacre was sold on land contract. The land contract was foreclosed by judicial proceedings. The affidavit of publication showed that notice of sale was published once each week for six successive weeks. The notice was first published after the time fixed for payment by the judgment had expired, and more than three months after commencement of the action, but the sale was held less than 42 days after the first publication and posting of the notice of sale. Is the sale valid?

Answer: No.

Authorities: MCR 3.410(c)(2). MCL 600.6052 and 600.3115. *Carpenter v Smith*, 147 Mich App 560, 383 NW2d 248 (1985).

Comment A: The 42-day period is calculated by excluding the day of first publication of notice and including the day of the foreclosure sale. *Wesbrook Lane Realty Corp v Pokorny*, 250 Mich 548, 231 NW 66 (1930). In *Carpenter v Smith*, 147 Mich App 560, 383 NW2d 248 (1985), the court held that, even if the time from first publication of notice to the date of sale is less than 42 days, the notice of foreclosure is sufficient if it is posted more than 42 days before the sale and is published once in each of the six weeks before the sale.

Comment B: MCL 600.6091 requires that the person authorized by the court to sell real property pursuant to a judgment of foreclosure shall give notice of the sale in the same manner as is required for notice of sale of real property on execution.

STANDARD 12.10

AFFIDAVIT OF POSTING OF NOTICE OF SALE IN JUDICIAL LAND CONTRACT FORECLOSURE

STANDARD: AN AFFIDAVIT OF POSTING OF A NOTICE OF SALE MUST BE FILED WITH THE COURT IN A JUDICIAL LAND CONTRACT FORECLOSURE. THE AFFIDAVIT MUST DISCLOSE THAT A NOTICE OF SALE WAS POSTED IN THE TOWNSHIP OR CITY WHERE THE SALE WAS HELD AND, IF THE REAL PROPERTY PROPOSED TO BE SOLD IS LOCATED IN ANOTHER TOWNSHIP OR CITY, THEN ALSO IN THAT TOWNSHIP OR CITY.

Problem: Blackacre was sold at a judicial land contract foreclosure sale which was held in a city other than that where Blackacre was located. The report of sale stated that notices of sale were posted in both cities; however, the affidavit filed with the court disclosed the posting of the notice of sale only in the city where the sale occurred. Was the sale valid?

Answer: No, because the affidavit of posting did not show compliance with the statutory requirement that notice of the sale be posted in both cities. While the recital in the report of sale did not take the place of any affidavit showing proper posting, there are circumstances under which the requirements of the statute have been held inapplicable.

Authorities: MCL 600.6052. *New York Baptist Union v Atwell*, 95 Mich 239, 54 NW 760 (1893).

Comment: MCL 600.6054 provides that the failure of any officer to give the notice of sale required by MCL 600.6052 does not affect the validity of a sale made to a purchaser in good faith without notice of the omission. The courts have applied earlier similar statutory provisions to validate a judicial sale when it was alleged that the notice of sale had not been properly posted. See *Kelso v Coburn*, 334 Mich 43, 53 NW2d 686 (1952), which holds that a party attacking a judicial sale for want of posting, but making no showing of injury, may not obtain equitable relief. See also, *Cross v Fruehauf Trailer Co*, 354 Mich 455, 92 NW2d 233 (1958).

STANDARD 12.11

CONFIRMATION OF REPORT OF SALE IN JUDICIAL LAND CONTRACT FORECLOSURE

STANDARD: CONFIRMATION OF A REPORT OF SALE MAY BE NECESSARY IN A LAND CONTRACT FORECLOSURE BY JUDICIAL PROCEEDINGS.

Authorities: *Wilson v Boyer*, 275 Mich 667, 267 NW 760 (1936); *Schmeltz v Rowen*, 287 Mich 657, 284 NW 597 (1939); *Teetzel v Atkinson*, 292 Mich 592, 291 NW 18 (1940); *Gordon Grossman Building Company v Elliott*, 382 Mich 596, 171 NW2d 441 (1969); *Colby v Tobba, Inc.*, 146 Mich App 592, 381 NW2d 411 (1985).

Comment: No specific statute, court rule or opinion requires confirmation of land contract foreclosure sales; however, confirmation of sale in mortgage foreclosure proceedings has been held to be necessary. See, *Demaray v Little*, 17 Mich 386 (1868); *Howard v Bond*, 42 Mich 131, 3 NW 289 (1879); *Mich Trust Co v Cody*, 264 Mich 258, 249 NW 844 (1933); *Detroit Trust Co v Hart*, 277 Mich 561, 269 NW 598 (1936). Although not explicitly required by Michigan law for land contract foreclosure proceedings, the practice of judicial confirmation of sale in land contract foreclosures is consistent with the requirements for mortgage foreclosures. See, Standard 16.33.

STANDARD 12.12

MISDESCRIPTION IN DEED PURSUANT TO JUDICIAL LAND CONTRACT FORECLOSURE

STANDARD: THE DESCRIPTION IN A DEED GIVEN PURSUANT TO A JUDICIAL LAND CONTRACT FORECLOSURE MUST IDENTIFY THE REAL PROPERTY WITH REASONABLE CERTAINTY, BUT A CLERICAL ERROR MAY BE CORRECTED.

Problem: A land contract described lots numbered consecutively from 74 through 93. The land contract was foreclosed by judicial proceedings and the judgment and notice of sale contained the correct description. The report of sale and the deed described the real property as lots numbered consecutively from 79 through 93, and the court confirmed the sale. Later, upon discovery of the error, the court, after notice, confirmed the sale *nunc pro tunc*, based on a corrected report, and ordered the recording of a correcting deed. Was the sale valid?

Answer: Yes. It was apparent on the face of the record that the error was only clerical.

Authority: *Walsh v Colby*, 153 Mich 602, 117 NW 207 (1908).

STANDARD 12.13

TIME TO CONTEST JUDICIAL LAND CONTRACT FORECLOSURE

STANDARD: A LAND CONTRACT VENDEE MAY NOT CONTEST THE VALIDITY OF A DEED GIVEN PURSUANT TO A LAND CONTRACT FORECLOSURE SALE AFTER FIVE YEARS FROM THE DATE THE REDEMPTION PERIOD EXPIRES.

Problem: Robert Brown was the vendee of a land contract foreclosed by judicial proceedings in 1998. Brown brought an action in 2005 against the purchaser at the foreclosure sale, alleging that the sale was invalid. Was Brown's action barred?

Answer: Yes.

Authorities: MCL 600.5801. *Craig v Black*, 249 Mich 485, 229 NW 411 (1930).

Comment: MCL 600.5801 applies only if the foreclosure proceedings are claimed to be invalid by the land contract vendee or a person claiming through the vendee. A vendor may not assert MCL 600.5801 as a defense against a claim of title which is adverse to the vendor. *Showers v Robinson*, 43 Mich 502, 5 NW 988 (1880); *Donovan v Ward* 100 Mich 601, 59 NW 254 (1894); *Lau v Pontiac Commercial & Savings Bank*, 260 Mich 73, 244 NW 233 (1932).

STANDARD 12.14

REDEMPTION PERIOD FROM JUDICIAL LAND CONTRACT FORECLOSURE SALE TOLLED DURING MILITARY SERVICE

STANDARD: THE MILITARY SERVICE OF A LAND CONTRACT VENDEE TOLLS THE RUNNING OF THE PERIOD OF REDEMPTION FROM A JUDICIAL LAND CONTRACT FORECLOSURE SALE.

Problem A: Edward Lane, as vendor, and Robert Brown, as vendee, executed a land contract for the sale of Blackacre in 2000. In 2002, Lane brought judicial proceedings to foreclose the land contract. At the foreclosure sale on December 10, 2002, Blackacre was sold to Lane. In January 2003, Brown entered military service. Lane deeded Blackacre to Simon Grant on June 11, 2003. Did Grant acquire marketable title to Blackacre?

Answer: No. The redemption period would not run against Brown during his military service.

Authorities: 50 USC App 526 and 533.

Comment A: The recording of an affidavit as to the military service of a person named in an instrument affecting title to real property is permitted. After July 14, 1965, the affidavit must include a description of the foreclosed real property, by either a recital of the description or by reference to some other recorded instrument that contains the description. The affidavit is *prima facie* evidence of the facts stated. MCL 565.451a, 565.451c and 565.453.

Comment B: Unless the court issues a waiver pursuant to 50 USC App 517, no sale, foreclosure or seizure made during or within 90 days after a person's military service will be upheld as valid. 50 USC App 533.

A false affidavit of non-military service is ineffective to support an otherwise valid foreclosure proceeding. *Wilkin v Shell Oil Co*, 197 F2d 42 (CA 10, 1951), *cert den*, 344 US 854, 73 S Ct 92, 97 L Ed 663 (1952), *reh den*, 344 US 888, 73 S Ct 183, 97 L Ed 687 (1952).

STANDARD 12.15

FORFEITURE OF LAND CONTRACT AND RECOVERY OF POSSESSION BY SUMMARY PROCEEDINGS

STANDARD: THE VENDOR MAY FORFEIT A LAND CONTRACT AND RECOVER POSSESSION OF THE REAL PROPERTY BY SUMMARY PROCEEDINGS FOR NONPAYMENT OR OTHER MATERIAL BREACH IF THE LAND CONTRACT AUTHORIZES FORFEITURE.

Problem: Robert Brown sold Blackacre to Edward Lane on land contract. The land contract authorized Brown to declare a forfeiture after nonpayment or other material default. After Lane failed to make the required payments, Brown served Lane with a notice of forfeiture. Lane did not cure the default. Brown commenced summary proceedings to recover possession of Blackacre in the district court and obtained a judgment for possession. Lane failed to redeem from the judgment and the district court issued a writ of restitution. Was Lane's interest in Blackacre terminated?

Answer: Yes.

Authorities: MCL 600.5726 through 600.5744. *Dershetski v Kudner*, 279 Mich 35, 271 NW 543 (1937); *Tilchin v Boucher*, 328 Mich 355, 43 NW2d 885 (1950).

Comment: Under some circumstances a land contract vendor may, after forfeiture, lawfully retake possession of the real property by self-help rather than by summary proceedings. See, *Rothenberg v Follman*, 19 Mich App 383, 172 NW2d 845 (1969), *lv den*, 383 Mich 770, 179 NW2d 20 (1970); *Emmons v Easter*, 62 Mich App 226, 233 NW2d 239 (1975); *Day v Lacchia*, 175 Mich App 363, 437 NW2d 400 (1989).

STANDARD 12.16

FORECLOSURE OF LAND CONTRACT BY MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY

STANDARD: A FORECLOSURE OF A LAND CONTRACT BY THE MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY COMMENCED AFTER DECEMBER 9, 1981 MUST COMPLY WITH THE PROCEDURES SET FORTH IN THE MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY ACT.

Authorities: MCL 125.1448 and 600.3101.

Comment: Before December 10, 1981, the Michigan State Housing Development Authority could foreclose a land contract pursuant to MCL 600.3101, *et seq.*, in the same manner as other land contracts. Under 1981 P.A. 173, effective December 10, 1981, specific and mandatory foreclosure procedures were included in the Michigan State Housing Development Authority Act. See, MCL 125.1448a through 125.1448p.

CHAPTER XIII
RECORDED PLATS



STANDARD 13.1

**EFFECT OF DEDICATION OF LAND FOR PUBLIC
PURPOSE IN A RECORDED PLAT**

STANDARD: ACCEPTANCE OF A DEDICATION OF LAND DESIGNATED FOR PUBLIC USE IN A PLAT RECORDED IN COMPLIANCE WITH THE PLAT ACT THEN IN EFFECT CONVEYS A QUALIFIED FEE TITLE IN THE PARCELS OF LAND DESIGNATED FOR PUBLIC USE TO THE MUNICIPALITY IN WHICH THE PLATTED LAND IS LOCATED, IN TRUST ONLY FOR THE USES AND PURPOSES DESIGNATED.

Problem A: The plat of Whiteacres Subdivision, recorded in compliance with the Plat Act as it existed at the time of recording, identified part of Whiteacres as Oak Street and specifically dedicated it for use by the public. After the plat was recorded, the public dedication of Oak Street was accepted by Center City, the municipality in which Whiteacres was located. After the acceptance, the proprietor of Whiteacres executed and recorded a deed purporting to convey Oak Street to John Doe. Did John Doe acquire marketable title to Oak Street?

Answer: No.

Problem B: Same facts as in Problem A, except that after accepting the public dedication of Oak Street, Center City executed and recorded a deed purporting to convey to ABC Oil Co. all of the oil and gas interests under Oak Street. Did ABC Oil Co. obtain any interest in the oil and gas under Oak Street?

Answer: No. By accepting the dedication of Oak Street, Center City

acquired only a qualified fee, which did not include any interest in the oil or gas. See Comment B.

Authorities: MCL 560.253; *Edison Illuminating Co v Misch*, 200 Mich 114, 166 NW 944 (1918); *Eyde Brothers Dev Co v Roscommon Co Bd of Rd Comm'rs*, 161 Mich App 654, 411 NW2d 814 (1987); *Kalkaska v Shell Oil Co*, 433 Mich 348, 446 NW2d 91 (1989).

Comment A: Before 1887 the Plat Act referred to public dedications being a sufficient conveyance to vest title in trust in the county within which the platted land is located. Act 309 of 1887 revised the statute to provide that public dedications vested title in trust in the city or village within which the platted land is located or, if the lands are not in a city or village, in the township within which it is located. Since 1887 there has been no substantive change in the vesting of title provisions. The Plat Act has been known as the Land Division Act since March 31, 1997, the effective date of 1996 P.A. 591. MCL 560.101 *et seq.*

Comment B: The fee acquired by a municipality in land designated for public use in a plat is of a qualified nature. Michigan courts have variously described the qualified nature of the fee as: “such a title as would enable the public authorities to devote the lands to all the public uses contemplated,” *Wayne Co v Miller*, 31 Mich 447, 448 (1875); “a fee in trust for the public,” *Edison Illuminating Co v Misch*, *supra* at 122, 166 NW at 947 (1918); “a fee which has a qualification annexed to it,” *West Michigan Park Ass'n v Conservation Dep't*, 2 Mich App 254, 263, 139 NW2d 758, 762 (1966); and lacking “the usual rights of a proprietor,” *Kalkaska v Shell Oil Co*, *supra* at 357, 446 NW2d at 95 (1989). The qualified fee the municipality acquires in a publicly dedicated street within a recorded plat does not include riparian rights where the street is parallel to the water's edge and separates the waterfront lots within the plat from the water's edge. *2000 Baum Family Trust v Babel*, 488 Mich 136, 793 NW2d 633 (2010).

Note: See Standard 13.2 for what constitutes acceptance of a dedication of platted land for a public purpose.

STANDARD 13.2

ACCEPTANCE OF DEDICATION OF LAND FOR PUBLIC USE IN RECORDED PLAT

STANDARD: ACCEPTANCE OF A DEDICATION OF LAND FOR PUBLIC USE IN A RECORDED PLAT OCCURS WHEN, BEFORE WITHDRAWAL OF THE DEDICATION AND WITHIN A REASONABLE TIME AFTER THE RECORDING OF THE PLAT:

- (A) THE MUNICIPALITY IN WHICH THE LAND IS LOCATED ADOPTS A RESOLUTION OR ORDINANCE ACCEPTING THE DEDICATION;**
- (B) THE MUNICIPALITY IN WHICH THE LAND IS LOCATED EXPENDS PUBLIC FUNDS FOR MAINTENANCE OR IMPROVEMENT OF THE LAND; OR**
- (C) AS TO LAND DEDICATED FOR USES OTHER THAN STREETS, ROADS, AND ALLEYS, THERE IS PUBLIC USE OF THE LAND FOR THE SPECIFIED PURPOSE.**

ACCEPTANCE OF A DEDICATION OF LAND FOR PUBLIC USE IS PRESUMED TO OCCUR 10 YEARS AFTER THE PLAT IS FIRST RECORDED, UNLESS THE PRESUMPTION IS REBUTTED BY COMPETENT EVIDENCE.

Problem A: The recorded plat of Whiteacres Subdivision located in the City of Acorn dedicated the “streets” in the plat to the use of the public. Within a reasonable time after the plat was first recorded, the Acorn City Commission adopted a resolution accepting the dedication of the streets in Whiteacres. Was there an acceptance of the dedication?

Answer: Yes.

Problem B: The recorded plat of Whiteacres Subdivision located in the City of Acorn dedicated the “streets” within the plat to the use of the public. Although the Acorn City Commission did not adopt a resolution accepting the dedication, after the recording of the plat the City of Acorn

expended public funds to maintain and improve the streets located in the plat. Was there an acceptance of the dedication?

Answer: Yes.

Problem C: The recorded plat of Whiteacres Subdivision located in the City of Acorn dedicated the “parks” within the plat to the use of the public. Although the Acorn City Commission did not adopt a resolution accepting the dedication and the City of Acorn did not expend public funds to maintain or improve the parks located in the plat, after the recording of the plat the public began using the parks in the plat. Was there an acceptance of the dedication?

Answer: Yes.

Authorities: Problem A: *In re Vacation of Cara Avenue*, 350 Mich 283, 86 NW2d 319 (1957) and *Rice v Clare County Road Commission*, 346 Mich 658, 78 NW2d 651 (1956).

Problem B: *Hooker v City of Grosse Pointe*, 328 Mich 621, 44 NW2d 134 (1950).

Problem C: *West Michigan Park Assn v Conservation Department*, 2 Mich App 254, 139 NW2d 758 (1966); *State Highway Commission v St Joseph Township*, 48 Mich App 230, 210 NW2d 251 (1973); and *Village of Lakewood Club v Rozek*, 51 Mich App 602, 215 NW2d 780 (1974).

Comment A: This Standard is limited to what constitutes acceptance of a dedication of land for public use. The Standard does not address withdrawal of a dedication before acceptance, what constitutes withdrawal of a dedication, or when an offer of dedication can be withdrawn. For a discussion of these issues, see *Kraus v Michigan Department of Commerce*, 451 Mich 420, 547 NW2d 870 (1996) and *Vivian v Roscommon County Road Commission*, 433 Mich 511, 446 NW2d 161 (1989).

Comment B: This Standard does not address the question of when a dedication to the public has lapsed due to the public’s failure to accept the dedication within a reasonable time after the recording of the plat. Compare *Shewchuck v City of Cheboygan*, 372 Mich 110, 125 NW2d 273 (1963) and *Marx v Department of Commerce*, 220 Mich App 66, 558 NW2d 460 (1996), holding that dedications had lapsed, with *In re*

Vacation of Cara Avenue, 350 Mich 283, 86 NW2d 319 (1957) and *Ackerman v Spring Lake Township*, 12 Mich App 498, 163 NW2d 230 (1968), in which dedications to the public were deemed continuing until sufficient actions were taken to withdraw the offers.

Comment C: This Standard does not address whether mere use by the public of a platted street, road or alley dedicated to the public is sufficient to constitute acceptance of the dedication. In *Regan v St. Joseph County Conservation Club*, 5 Mich App 686, 147 NW2d 738 (1967), the court held that mere use of a platted public street is insufficient for acceptance of the dedication. See also, *Village of Lakewood Club v Rozek*, 51 Mich App 602, 215 NW2d 780 (1974). However, in *Rice v Clare County Road Commission*, 346 Mich 658, 78 NW2d 651 (1956), the court stated that acceptance of a platted public street may occur formally, by resolution, or informally, by expenditure of public funds for repair, improvement or other control of the street, or through use of the street by the public. See also, *Eyde Brothers Development Co. v Roscommon County Road Commission*, 161 Mich App 654, 664; 411 NW2d 814, 818 (1987).

Note: See Standard 13.3 concerning dedication of land for other than public use.

Caveat: MCL 560.255b (effective December 22, 1978) provides that 10 years after a plat is first recorded, land dedicated for the use of the public in the plat will be presumed to have been accepted unless the presumption is rebutted. The effect of this provision on plats recorded before December 22, 1978 is uncertain. See, *Vivian v Roscommon County Road Commission*, 433 Mich 511, 446 NW2d 161 (1989).

Even if the public does not accept a dedication for public use within a reasonable time after the dedication, the title to the land so dedicated may remain subject to the rights of lot owners to use the dedicated land for the purposes designated if lots in the plat have been conveyed with reference to the recorded plat. See, *Schurtz v Wescott*, 286 Mich 691, 282 NW 870 (1938) and *Kirchen v Remenga*, 291 Mich 94, 288 NW 344 (1939).

STANDARD 13.3

DEDICATION OF LAND IN RECORDED PLAT FOR OTHER THAN PUBLIC USE

STANDARD: A DEDICATION OF LAND IN A RECORDED PLAT FOR THE USE OR BENEFIT OF OWNERS OF LOTS IN THE PLAT BECOMES IRREVOCABLE UPON THE CONVEYANCE OF ANY LOT OR PORTION OF A LOT WITH REFERENCE TO THE RECORDED PLAT.

Problem: The recorded plat of Whiteacres Subdivision included a dedication of certain land designated as a “park” for the use and benefit of the owners of lots in the plat. Later, Lot 5 of the plat was conveyed with reference to the recorded plat. Did the dedication of the “park” for the use and benefit of the owners of lots in Whiteacres become irrevocable upon conveyance of Lot 5 of Whiteacres Subdivision with reference to the recorded plat?

Answer: Yes.

Authorities: MCL 560.253. *Kirchen v Remenga*, 291 Mich 94, 288 NW 344 (1939); *Little v Hirschman*, 469 Mich 553, 677 NW2d 319 (2004); and *Martin v Beldean*, 469 Mich 547, 677 NW2d 312 (2004).

Comment: The Land Division Act, MCL 560.101 *et seq.*, effective January 1, 1968, expressly authorizes dedications of land for private as well as public use. The acceptance of a dedication for other than public use in a plat recorded after December 31, 1967 operates to convey fee simple title to the dedicated land to the named donees of the dedication “for their use for the purposes therein expressed.” MCL 560.253(1). See, *Martin v Beldean*, 469 Mich 547, 677 NW2d 312 (2004). The Michigan Supreme Court has held that dedications for other than public use in plats recorded before the effective date of the Land Division Act are valid. The plat acts in effect before the Land Division Act did not contain a provision for the vesting of fee simple title to land dedicated for other than public use. Accordingly, before January 1, 1968, the effective date of the Land Division Act, the donees of private dedications acquired an easement in or right to use the dedicated land for the stated purpose, but not fee simple title to the land. See, *Little v Hirschman*, 469 Mich 553, 667 NW2d 319 (2004).

STANDARD 13.4

VACATION OF STREETS AND ALLEYS IN RECORDED PLAT

STANDARD: AFTER ENTRY OF A JUDGMENT OF A CIRCUIT COURT VACATING ALL OR PART OF A STREET OR ALLEY WHICH WAS DEDICATED AS PART OF A RECORDED PLAT, TITLE TO THE VACATED PORTION VESTS IN THE OWNERS OF THE ABUTTING LOTS IN THE PLAT AND BECOMES PART OF THE ABUTTING LOTS. IF A DEDICATED STREET OR ALLEY IN A RECORDED PLAT IS VACATED AND THE STREET OR ALLEY IS ABUTTED ON OPPOSITE SIDES BY LOTS IN THE SAME PLAT, THE CENTER LINE OF THE VACATED STREET OR ALLEY BECOMES THE BOUNDARY LINE BETWEEN THE LOTS. IF THE VACATED PORTION OF A DEDICATED STREET OR ALLEY IS ABUTTED ON ONLY ONE SIDE BY LOTS IN THE PLAT, ALL OF THE VACATED PORTION BECOMES PART OF THE ABUTTING LOTS. A DESCRIPTION OF A LOT BY ITS LOT NUMBER INCLUDES ANY PORTION OF A VACATED STREET OR ALLEY THAT HAS BECOME PART OF THE LOT.

Problem A: Lot 16 of a recorded plat measures 50 feet from north to south, and is abutted on the south by a dedicated 60-foot-wide street, south of which lies another lot in the same plat. The circuit court entered a judgment vacating the street in its entirety. Later, Mary Doe, the owner of Lot 16, conveyed “Lot 16” to Richard Roe. Did Roe acquire marketable title to Lot 16 including the abutting north half of the vacated street?

Answer: Yes. After the vacation, title to the north half of the vacated street vested in Mary Doe, as the owner of Lot 16, and the north half of the vacated street became part of Lot 16. Thus, the description “Lot 16” is equivalent to “Lot 16 including the north one-half of the vacated street abutting the south side of Lot 16.”

Problem B: Same facts as in Problem A, except that the deed described “the south 40 feet of Lot 16.” Did Roe acquire marketable title to the north 30

feet of the vacated street and the south 10 feet of Lot 16 as originally platted?

Answer: Yes. After the vacation of the street, the north 30 feet of Lot 16 became part of Lot 16 so that Lot 16 had a north and south dimension of 80 feet. Accordingly, the south 40 feet of Lot 16 is measured from the center of the vacated street and thus includes the north 30 feet of the vacated street and the south 10 feet of the original Lot 16.

Problem C: Same facts as in Problem A, except that the deed described “the south one-half of Lot 16.” Did Roe acquire marketable title to the south half of Lot 16 as originally platted?

Answer: No. After vacation of the street, the north 30 feet of the street became part of Lot 16 so that Lot 16 had a north and south dimension of 80 feet. Roe acquired marketable title to the south half of the 80 feet and Doe retained title to the north 40 feet of the original Lot 16.

Problem D: Same facts as in Problem A, except that the circuit court judgment vacated only the north 10 feet of the street. Later, Mary Doe conveyed the north half of Lot 16 to Richard Roe. Did Roe acquire marketable title to the north 30 feet of Lot 16 as originally platted?

Answer: Yes. After vacation of the north 10 feet of the street, the vacated portion of the street became part of Lot 16 so that Lot 16 had a north and south dimension of 60 feet.

Problem E: Lot 21 of a recorded plat measures 150 feet from east to west and is abutted on the west by a dedicated 20-foot-wide alley, the west line of which is the west line of the plat. The circuit court entered a judgment vacating the alley in its entirety. Later, Mary Doe, the owner of Lot 21, conveyed the west 85 feet of Lot 21 to Richard Roe. Did Mary Doe retain title to the east 85 feet of Lot 21 as originally platted?

Answer: Yes. Because the vacated alley is abutted on only one side by a lot in the same plat, all of the adjoining part of the vacated alley became part of Lot 21. Accordingly, the east and west dimension of Lot 21 became 170 feet and the west 85 feet conveyed to Roe is measured from the west line of the vacated alley.

Authorities: MCL 560.227a. *Gazley v Koepke*, 195 Mich 509, 162 NW 85 (1917); *Valoppi v Detroit Engineering & Machine Co*, 339 Mich 674, 645 NW2d 884 (1954).

Comment: This Standard applies to vacation of streets and alleys in recorded plats accomplished through judicial proceedings and, before January 1, 1968, to vacations accomplished by legislative or administrative bodies having jurisdiction even in the absence of concurring judicial proceedings. 1839 P.A. 91 §6, as first amended by 1867 P.A. 189 and under subsequent statutes; 1857 CL 1137, 1871 CL 1349, How. 1478, 1915 CL 3355 (repealed by 1929 P.A. 172, §80, 1929 CL 13277 effective August 28, 1929). 1929 P.A. 172, §§65, 66, 1929 CL 13262, 13263, 1948 CL 560.65, 560.66 (repealed by 1967 P.A. 288, §293, being MCL 560.293, effective January 1, 1968).

This Standard does not address: (1) the status of title to real property within that part of a street or alley vacated by a legislative or administrative body on or after January 1, 1968, the effective date of the Land Division Act, MCL 560.101 *et seq.*, without concurring judicial proceedings; or (2) the effect of vacation of a street or alley not located in a recorded plat.

Caveat: *Nelson v Roscommon County Road Commission*, 117 Mich App 125, 323 NW2d 621 (1982), suggests that the vacation of a platted street may not affect the right to use the street by lot owners not made parties to the vacation action.

CHAPTER XIV

EASEMENTS

STANDARD 14.1

EASEMENT APPURTENANT

STANDARD: AN EASEMENT APPURTENANT IS INCLUDED IN A CONVEYANCE OF THE DOMINANT ESTATE IN THE ABSENCE OF EXPRESS LANGUAGE TO THE CONTRARY.

Problem: The owner of Blackacre and Greenacre deeded Blackacre to Joan Doe together with an easement to use the east 12 feet of Greenacre as a driveway for access to Blackacre. Later, Doe deeded Blackacre to Simon Grant. The deed did not refer to the easement. Did Grant acquire an easement to use the driveway?

Answer: Yes.

Authorities: *Greve v Caron*, 233 Mich 261, 206 NW 334 (1925); *Myers v Spencer*, 318 Mich 155, 27 NW2d 672 (1947); *Von Meding v Strahl*, 319 Mich 598, 30 NW2d 363 (1948); *Haab v Moorman*, 332 Mich 126, 50 NW2d 856 (1952); *Dyer v Thurston*, 32 Mich App 341, 188 NW2d 633 (1971).

STANDARD 14.2

ASSIGNABILITY OF EASEMENT IN GROSS

STANDARD: AN EASEMENT IN GROSS IS NOT ASSIGNABLE, EXCEPT AN EASEMENT WHICH IS COMMERCIAL IN NATURE, SUCH AS AN EASEMENT FOR PIPELINES, TELEPHONE OR TELEGRAPH LINES, OR RAILROADS.

Problem A: Paul Mann, the owner of Blackacre, conveyed an easement for a bicycle path across Blackacre to John Doe, who owned no interest in adjacent real property. Doe assigned the easement to Richard Roe. Did Roe acquire the easement?

Answer: No.

Problem B: Paul Mann, the owner of Blackacre, conveyed an easement for pipeline purposes across Blackacre to Peerless Pipe Line Company. Peerless then assigned the easement to Orient Gas Company. Did Orient Gas Company acquire the easement?

Answer: Yes.

Authorities: Problem A: *Stockdale v Yerden*, 220 Mich 444, 190 NW 225 (1922).

Problem B: *Johnston v Mich Consolidated Gas Co*, 337 Mich 572, 60 NW2d 464 (1953). See also *Mumaugh v Diamond Lake Area Cable TV Company*, 183 Mich App 597, 456 NW2d 425 (1990), suggesting that an electric power line easement was an assignable easement in gross.

Comment A: The law does not favor an easement in gross, and a mere personal right will not be presumed when an easement can be construed as appurtenant to some other estate. *Todd v Nobach*, 368 Mich 644, 118 NW2d 402 (1962).

Comment B: Various statutes provide for the voluntary preservation of certain characteristics existing on a parcel of real property, such as structures of historic significance or natural conditions. These statutes may refer to “historic preservation easements” or “conservation easements.”

However, the devices are not easements, but instead restrictive covenants granting rights of enforcement, which may be transferable, but are beyond the scope of this Standard. See, Restatement of Property: Servitudes, section 1.2, comment h.

Easements granted to public agencies, such as water and sewer easements granted to municipalities, may be in the nature of easements in gross, but they are not entirely commercial in nature. The Committee expresses no opinion as to the assignability of easements in gross held by public agencies.

The reported Michigan cases addressing the transferability of easements in gross predate the advent of wireless communication, cable television and the like. Accordingly, the Committee expresses no opinion as to the assignability of easements for these types of purposes.

STANDARD 14.3

TERMINATION OF EASEMENT CREATED BY RESERVATION OR GRANT

STANDARD: AN EASEMENT CREATED BY RESERVATION OR GRANT MAY NOT BE TERMINATED BY NONUSER ALONE; IT MAY, HOWEVER, BE TERMINATED BY:

(A) NONUSER COUPLED WITH ACTION SHOWING AN INTENT TO ABANDON THE EASEMENT; OR

(B) ADVERSE POSSESSION.

Problem A: Paul Mann deeded the east half of Blackacre to Simon Grant in 1973, reserving an easement for ingress and egress over the south 33 feet. As of 2006 Mann had never used the easement and had taken no action showing an intent to abandon it. Does Blackacre remain subject to the easement?

Answer: Yes.

Problem B: The manufacturing plant of Atlas Company was located on Greenacre, adjacent to Blackacre, over which Atlas had been granted an easement for a private road. After constructing the road and using it for some years, Atlas ceased operations, its buildings were torn down, the road was removed, and Greenacre was sold for non-manufacturing purposes. Is Blackacre subject to the easement?

Answer: No.

Problem C: Paul Mann, the owner of Blackacre, granted an easement to John Doe over a 50-foot-wide strip of land across Blackacre in 1986. Mann deeded Blackacre to Simon Grant in 1987. Grant fenced in all of Blackacre in a manner which adversely prevented Doe's use of the easement for the next 19 years. Does Blackacre remain subject to the easement?

Answer: No.

Authorities: Generally: *McDonald v Sargent*, 308 Mich 341, 13 NW2d 843 (1944); *Kraft v Miller*, 314 Mich 390, 22 NW2d 857 (1946).

Problem A: *Lathrop v Elsner*, 93 Mich 599, 53 NW 791 (1892); *Jones v Van Bochove*, 103 Mich 98, 61 NW 342 (1894); *First National Trust & Savings Bank v Smith*, 284 Mich 579, 280 NW 57 (1938); *Choals v Plummer*, 353 Mich 64, 90 NW2d 851 (1958).

Problem B: *Jones v Van Bochove*, 103 Mich 98, 61 NW 342 (1894); *MacLeod v Hamilton*, 254 Mich 653, 236 NW 912 (1931); *Bricault v Cavanaugh*, 261 Mich 70, 245 NW 573 (1932); *Michigan Department of Natural Resources v Carmody-Lahti Real Estate Inc*, 472 Mich 359, 699 NW2d 272 (2005).

Problem C: MCL 600.5801. *Matthews v Lake Shore & Mich Southern R Co*, 110 Mich 170, 67 NW 1111 (1896); *Carr v Bartell*, 305 Mich 317, 9 NW2d 556 (1943).

Comment: An action showing intent to abandon an easement can be (1) an act that abandons the purpose for which the easement was created or (2) the act of employing some other means to accomplish the purpose of the easement. *Jones v Van Bochove*, 103 Mich 98, 61 NW 342 (1894); *MacLeod v Hamilton*, 254 Mich 653, 236 NW 912 (1931).

Caveat: The termination of a railroad easement by nonuser may require additional acts not otherwise required for non-railroad easements. See, *Michigan Dept of Natural Resources v. Carmody-Lahti Real Estate Inc*, *supra*.

Note: See Standard 14.4 regarding the termination of a prescriptive easement by nonuser alone. See also Standard 14.5 regarding termination of an easement by merger of the dominant and servient estates.

STANDARD 14.4

TERMINATION OF PRESCRIPTIVE EASEMENT

STANDARD: A PRESCRIPTIVE EASEMENT IS TERMINATED BY CONTINUOUS NONUSER FOR THE PERIOD REQUIRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

Problem: John Doe, the owner of Blackacre, dammed a stream on Blackacre in 1969, causing water to flow onto Whiteacre, owned by Richard Roe. Roe did not grant flowage rights over Whiteacre. The dam was maintained until 1989 when it washed out. Doe rebuilt the dam in 2006, claiming a prescriptive easement for the flowage of water over Whiteacre. Does Doe have a prescriptive easement over Whiteacre?

Answer: No. Doe's prescriptive easement was terminated by nonuser for a period of more than 15 years.

Authorities: MCL 600.5801. *McDonald v Sargent*, 308 Mich 341, 13 NW2d 843 (1944); *Kraft v Miller*, 314 Mich 390, 22 NW2d 857 (1946); *Cook v Grand River Hydroelectric Power Co*, 131 Mich App 821, 346 NW2d 881 (1984).

Comment A: A prescriptive easement may also be terminated in the same way as an easement created by reservation or grant. See, Standard 14.3. See also Standards 1.5 and 1.6.

Comment B: Unlike easements created by reservation or grant, a prescriptive easement may be terminated by continuous nonuser alone.

STANDARD 14.5

EXTINGUISHMENT OF EASEMENT BY MERGER OF DOMINANT AND SERVIENT ESTATES

STANDARD: AN EASEMENT IS EXTINGUISHED BY MERGER WHEN TITLE TO BOTH THE DOMINANT AND SERVIENT ESTATES BECOMES VESTED IN THE SAME OWNER. HOWEVER, A LATER CONVEYANCE OF EITHER ESTATE, WITHOUT REFERENCE TO AN EASEMENT, MAY INCLUDE AN IMPLIED EASEMENT.

Problem A: Blackacre lies west of a public highway which is the only access to Blackacre. By a recorded easement, John Doe, the owner of the west half of Blackacre, owned an easement for ingress and egress over a clearly visible paved road located across the east half of Blackacre. Doe later acquired title to the east half of Blackacre. Was the easement extinguished?

Answer: Yes.

Problem B: Same facts as in Problem A, except that Doe and his wife later deeded the west half of Blackacre to Paul Mann. The deed did not refer to an easement. The paved road was continuously used in the same manner as a means of access to the west half of Blackacre. Does Mann have an easement to use the paved roadway as a means of access to the west half of Blackacre?

Answer: Yes. Because the visible paved roadway was continuously used in the same manner as a means of access to the west half of Blackacre, the deed to Mann included an implied easement over the road.

Problem C: John Doe, the owner of Blackacre, deeded the west half of Blackacre to James Jones. There was no means of access to the west half of Blackacre except over the east half of Blackacre. Does Jones have an easement over the east half of Blackacre as a means of access to the west half of Blackacre?

Answer: Yes. Jones had an implied easement by necessity because he had no access to the west half of Blackacre except over the east half of Blackacre.

Authorities: Problem A: *Morgan v Meuth*, 60 Mich 238, 27 NW 509 (1886); *Bri-cault v Cavanaugh*, 261 Mich 70, 245 NW 573 (1932); *Dimoff v Laboroff*, 296 Mich 325, 296 NW 275 (1941).

Problem B: *Bean v Bean*, 163 Mich 379, 128 NW 413 (1910); *Kamm v Bygrave*, 356 Mich 189, 96 NW2d 770 (1959); *Rannels v Marx*, 357 Mich 453, 98 NW2d 583 (1959); *Harrison v Heald*, 360 Mich 203, 103 NW 2d 348 (1960); *Ketchel v Ketchel*, 367 Mich 53, 116 NW2d 219 (1962); *Siegel v Renkiewicz Estate*, 373 Mich 421, 129 NW2d 876 (1964).

Problem C: *Moore v White*, 159 Mich 460, 124 NW 62 (1909); *Goodman v Brenner*, 219 Mich 55, 188 NW 377 (1922); *Waubun Beach Ass'n v Wilson*, 274 Mich 598, 265 NW 474 (1936).

Comment: The Committee expresses no opinion as to the scope of an easement created by implication or whether the easement is considered a new easement or a revival of an old easement.

STANDARD 14.6

EASEMENT CREATED BY GRANT

STANDARD: AN EASEMENT MAY BE CREATED BY GRANT.

Problem A: Whiteacre, owned by Simon Jones, abutted the west line of a public highway. Jones deeded the back half of Whiteacre to Paul Pack, together with an easement for ingress and egress across the south 20 feet of the front half of Whiteacre for the benefit of the back half of Whiteacre. Did Pack acquire an easement across the south 20 feet of the front half of Whiteacre?

Answer: Yes.

Authorities: *Tappert v Detroit G. H. & M. Co*, 50 Mich 267, 15 NW 450 (1883); *Von Medling v Strahl*, 319 Mich 598, 30 NW2d 363 (1948).

STANDARD 14.7

EASEMENT CREATED BY RESERVATION

STANDARD: AN EASEMENT MAY BE CREATED BY RESERVATION.

Problem: Whiteacre, owned by Paul Mann, lies west of a public highway. Mann deeded the east half of Whiteacre to Simon Grant. The deed stated “reserving an easement for ingress to and egress from the west half of Whiteacre across the south 20 feet of the east half of Whiteacre.” Did Mann retain an easement across the south 20 feet of the east half of Whiteacre?

Answer: Yes.

Authorities: *Von Meding v Strahl*, 319 Mich 598, 30 NW2d 363 (1948); *Choals v Plummer*, 353 Mich 64, 90 NW2d 851 (1958); *Mott v Stanlake*, 63 Mich App 440, 234 NW2d 667 (1975).

Comment: A reservation for the benefit of a stranger to the conveyance is ineffective. *Peck v McClelland*, 247 Mich 369, 225 NW 514 (1929); *Choals v Plummer*, 353 Mich 64, 90 NW2d 851 (1958).

STANDARD 14.8

EASEMENT IMPLIED BY NECESSITY

STANDARD: IF A PARCEL OF LAND IS DIVIDED SO THAT ONE OF THE RESULTING PARCELS IS LANDLOCKED EXCEPT FOR ACCESS ACROSS THE REMAINDER, AN EASEMENT BY NECESSITY MAY BE IMPLIED.

Problem A: Jane Smith owned a 40-acre parcel of land abutting a private road. Smith conveyed 10 landlocked acres of the parcel to Richard Brown. May a grant of an easement by necessity be implied across Smith's land for access to Brown's landlocked parcel?

Answer: Yes.

Problem B: Ralph Kline owned 40 acres of land abutting a private road. Kline conveyed 30 acres to Paula Fleet, including the entire private road frontage, retaining 10 landlocked acres. May a reservation of an easement by necessity be implied across Fleet's land for access to Kline's retained parcel?

Answer: Yes.

Authorities: *Moore v White*, 159 Mich 460, 124 NW 62 (1909); *Goodman v Brenner*, 219 Mich 55, 188 NW 377 (1922); *Waubun Beach Ass'n v Wilson*, 274 Mich 598, 265 NW 474 (1936); *Chapdelaine v Sochocki*, 247 Mich App 167, 635 NW2d 339 (2001); *Murray Trust v Futrell*, 303 Mich App 28, 840 NW2d 775 (2013).

Comment A: An easement implied by necessity requires strict necessity; mere convenience or even reasonable necessity will not suffice. *Murray Trust v Futrell*, *supra*.

Comment B: An easement implied by necessity is appurtenant to the dominant parcel. *Bean v Bean*, 163 Mich 379, 128 NW 413 (1910).

STANDARD 14.9

CESSATION OF AN EASEMENT IMPLIED BY NECESSITY

STANDARD: AN EASEMENT IMPLIED BY NECESSITY CEASES WHEN THE NECESSITY ENDS.

Problem A: Jane Smith owned a 40-acre parcel of land abutting a private road. Smith conveyed 10 landlocked acres of the parcel to Richard Brown. For many years, Brown used the resulting easement by necessity granted by implication across Smith's land to provide access to Brown's landlocked parcel. Later, the county constructed a public road abutting and providing access to Brown's parcel. Did the easement by necessity over Smith's land cease?

Answer: Yes.

Problem B: Ralph Kline owned a 40-acre parcel of land abutting a private road. Kline conveyed 30 acres to Paula Fleet, including the entire private road frontage, retaining 10 landlocked acres. Kline later acquired an additional parcel, adjacent to his 10-acre landlocked parcel, that abutted and had access to a public road. Did the easement by necessity over Fleet's land cease?

Answer: Yes.

Authorities: *Waubun Beach Ass'n v Wilson*, 274 Mich 598, 265 NW 474 (1936); *Murray Trust v Futrell*, 303 Mich App 28, 840 NW2d 775 (2013).

CHAPTER XV

MINERAL INTERESTS



STANDARD 15.1

CREATION OF MINERAL INTEREST

STANDARD: A MINERAL INTEREST MAY BE CREATED BY GRANT OR BY RESERVATION. THE MINERAL INTEREST MAY BE THE ENTIRE MINERAL INTEREST IN THE REAL PROPERTY OR AN UNDIVIDED INTEREST IN THE MINERALS.

Problem A: John Doe and Jane Doe owned Blackacre as tenants by the entirety. The Does deeded an undivided one-half interest in all the oil, gas and other minerals in and under Blackacre to Simon Grant. Did Grant acquire an undivided one-half interest in all the oil, gas and other minerals in and under Blackacre?

Answer: Yes.

Problem B: John Doe and Jane Doe owned Blackacre as tenants by the entirety. The Does deeded Blackacre to Simon Grant, reserving all the oil, gas and other minerals in and under Blackacre for a term of 10 years and so long thereafter as oil, gas and other minerals might be produced. Did the Does retain title to the oil, gas and other minerals in and under Blackacre for a term of 10 years and so long thereafter as oil, gas and other minerals might be produced?

Answer: Yes.

Problem C: Same facts as in Problem B, except that the Does deeded Blackacre to Simon Grant, reserving a life estate in all oil, gas and other minerals in and under Blackacre. Later, the Does deeded all their interest in the oil, gas and other minerals in and under Blackacre to Richard

Roe. Did Roe acquire any interest in the oil, gas and other minerals in and under Blackacre?

Answer: Yes. Roe acquired an estate for the lives of the Does in all the oil, gas and other minerals in and under Blackacre.

Authorities: *Krench v Mich*, 277 Mich 168, 269 NW 131 (1936); *Rathbun v Mich*, 284 Mich 521, 280 NW 35 (1938); *Stevens Mineral Co v Mich*, 164 Mich App 692, 418 NW2d 130 (1987); *Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 686 NW2d 770 (2004).

STANDARD 15.2

OIL AND GAS LEASE – PRIMARY TERM

STANDARD: IF, WITHIN THE PRIMARY TERM OF AN OIL AND GAS LEASE, A WELL HAS NOT BEEN COMMENCED ON LAND COVERED BY THE LEASE OR UPON A DRILLING UNIT THAT INCLUDES ALL OR A PART OF THE LAND, THE LEASE EXPIRES UNLESS ITS PROVISIONS STATE OTHERWISE.

Problem A: On January 2, 1988, Jane Farmer, the owner of Blackacre, executed an oil and gas lease covering Blackacre to State Oil Company. The lease contained the following provision:

“It is agreed that this lease shall remain in force for a primary term of five years after this date and, if lessee shall commence operations for the drilling of a well within the primary term or any extension, the lessee shall have the right to continue drilling to completion with reasonable diligence, and the primary term shall extend as long thereafter as oil and gas, or either of them, is produced from the above-described land or from a communitized unit as provided in this lease.

“For the purpose of oil and/or gas development and production under this lease, lessor grants to lessee the right to pool or communitize the above-described land, or any part of the land, with other land to comprise an oil development unit of not more than approximately forty (40) acres and/or a gas development unit of not more than approximately one hundred sixty (160) acres, but lessee shall not be required to drill more than one well on the unit. If an oil or gas well shall not be drilled on the land described in this lease, it shall nevertheless be deemed to be upon the leased land within the meaning of all the covenants, expressed or implied, in this lease, and lessor shall participate in the royalty from such oil and/or gas development unit only in the proportion that the number of acres owned by the lessor within the development unit bears to the total number of acres included in the unit.”

State Oil Company did not commence operations for the drilling of a well on Blackacre during the five-year term. Blackacre, in whole or in part, was not pooled or unitized with any other land.

Does Jane Farmer hold title to Blackacre free of the lease on January 3, 1993?

Answer: Yes. If operations for the drilling of a well have not been commenced within the primary term, the lease ends, not by forfeiture, but by its own terms.

Problem B: Same facts as in Problem A, except that on December 1, 1992, State Oil Company commenced operations for the drilling of a well on Blackacre which was completed as a producing oil well on January 31, 1993. Is the lease to State Oil Company in effect on February 3, 1993?

Answer: Yes. The commencement of operations for the drilling of a well within the primary term continues the term of the lease so long as the well is producing, even though the well was completed after the primary term would otherwise have expired.

Problem C: Same facts as in Problem A, except that on December 1, 1992, State Oil Company pooled 20 acres from Blackacre with 20 acres from adjoining Whiteacre to create a 40-acre oil development unit. State Oil Company was the lessee of an oil and gas lease covering Whiteacre, and the lease had a pooling clause identical to that in the lease of Blackacre. State Oil Company commenced a well within the unit on December 30, 1992; it was completed as a producing oil well on January 31, 1993. The well was located on Whiteacre. Is the lease of Blackacre to State Oil Company in effect on February 3, 1993?

Answer: Yes. By the terms of the lease, if a development unit includes land covered by two or more leases, operations for the drilling of a well on the unit or a well producing from any part of the unit are deemed occurring on or producing from land covered by each of the leases.

Authorities: Problems A and B: *McClanahan Oil Co. v Perkins*, 303 Mich 448, 6 NW2d 742 (1942); *Leonard Crude Oil Co. v Walton*, 39 Mich App 293, 197 NW2d 503 (1972); *Michigan Wisconsin Pipeline Co. v Michigan Nat'l Bank*, 118 Mich App 74, 324 NW2d 541 (1982), leave to appeal denied, 418 Mich 957, 343 NW2d 495 (1984).

Problem C: *Manufacturers Nat'l Bank v DNR*, 420 Mich 128, 362 NW2d 572 (1984); *West Bay Exploration Co. v Amoco Production Co.* 148 Mich App 197, 384 NW2d 407 (1986).

- Comment A:** Most oil and gas leases are for a stated duration, called the primary term, but with the provision that the term continues for so long thereafter as oil or gas is produced. Leases usually contain a provision for continuation of the primary term when operations for the drilling of a well are commenced within the primary term, and production results, even though the well is not completed until after the stated expiration date of the primary term. Leases typically authorize the pooling of all or part of the leased land with other land to form a development unit, so that commencement of a well within the unit and production from the well are deemed to occur on or from all of the leased land comprising the unit, irrespective of the actual location of the well within the unit.
- Comment B:** A well may be “commenced” even though actual drilling has not occurred. Preparatory work such as digging pits, assembling equipment at the drill-site, delivering supplies and similar activities have been held to constitute commencement of a well. *Robinson v Gordon Oil Co*, 258 Mich 643, 242 NW 795 (1932); *Walton v Zatkoff*, 372 Mich 491, 127 NW2d 365 (1964).
- Comment C:** MCL 319.23 provides that no person shall begin the drilling of a well without first having received a permit from the supervisor of wells. In *Leonard Crude Oil Co. v Walton*, *supra*, and *Walton v Zatkoff*, *supra*, the receiving of a drilling permit by the lessee was one of the actions, among others, held to constitute “operations for the drilling of a well” before expiration of the primary term. But see *Goble v Goff*, 327 Mich 549, 42 NW2d 845 (1950), in which an equally divided court affirmed the circuit court’s decision that the lessee had failed timely to commence a well because he had not received a drilling permit, though he had moved a drilling rig to the well-site, dug pits and commenced actual drilling before the expiration of the primary term.
- Comment D:** If there is no recorded discharge of an oil and gas lease, there may be no evidence of record that the lease has expired, even though the stated duration of the primary term has ended. In such a case, a recorded affidavit attesting that no drilling permit has been issued and that drilling or preparations for drilling have not occurred on the leased land or on any land pooled or unitized with the leased land, is usually considered sufficient recorded evidence that the lease has expired.

STANDARD 15.3

OIL AND GAS LEASE FORFEITURE BY STATUTORY PROCEDURE

STANDARD: IF THE LESSEE OF AN OIL AND GAS LEASE FAILS TO PERFORM IN ACCORDANCE WITH THE TERMS OF THE LEASE, THE LESSOR MAY SERVE A NOTICE OF FORFEITURE UPON THE LESSEE AND, AT LEAST 30 DAYS AFTER THE NOTICE IS SERVED, FILE AN AFFIDAVIT OF FORFEITURE, WITH THE NOTICE AND PROOF OF SERVICE IN THE OFFICE OF THE REGISTER OF DEEDS. UNLESS WITHIN 30 DAYS AFTER THE FILING OF THE AFFIDAVIT THE LESSEE GIVES NOTICE TO THE REGISTER OF DEEDS THAT THE LEASE HAS NOT BEEN FORFEITED AND THAT THE LESSEE CLAIMS THAT THE LEASE IS IN FULL FORCE AND EFFECT, THE REGISTER OF DEEDS SHALL RECORD THE AFFIDAVIT. THE LEASE IS THEN NULL AND VOID, AND THE RECORD OF THE LEASE DOES NOT CONSTITUTE NOTICE OF THE LEASE OR ANY INTEREST IN IT.

Problem: On January 2, 1989, John Farmer leased Blackacre to State Oil Company for oil and gas purposes for a primary term of 10 years. The oil and gas lease required that the lessee commence a well on the leased land on or before the first annual anniversary date of the lease. On January 2, 1994, State Oil Company had neither commenced the drilling of a well nor surrendered the lease. Farmer served upon State Oil Company, by registered mail, at its last known address, a notice stating that he was the owner of Blackacre, describing the land and giving notice that the terms of the lease had not been complied with by the lessee and declaring the lease forfeited and void. The notice demanded that State Oil Company execute a discharge of the lease and stated that Farmer would file an affidavit of forfeiture with the register of deeds unless State Oil Company notified the register of deeds that the lease had not been forfeited. More than 30 days after the date of the mailing of the notice of forfeiture to State Oil Company, Farmer filed with the register of deeds of the county in which the Blackacre was located an affidavit stating that he was the owner of Blackacre, that the lessee had failed and neglected to comply with the terms of the lease and that the lease had been forfeited and was

void. A copy of the notice served on State Oil Company was attached to the affidavit, as was proof of the manner and time of the mailing of the notice. State Oil Company did not, within 30 days after the filing of the affidavit, give notice in writing to the register of deeds regarding the forfeiture or the lack of forfeiture of the oil and gas lease. More than 30 days after the filing of the affidavit the register of deeds recorded the affidavit. Does Farmer hold title to Blackacre free of the oil and gas lease?

Answer: Yes.

Authorities: MCL 554.281 and 554.282. *Toles v Maneikis*, 162 Mich App 158, 412 NW2d 263 (1987); *Erickson v Dart Oil & Gas Corp.*, 189 Mich App 679, 474 NW2d 150 (1991), leave to appeal denied, 439 Mich 970, 483 NW2d 366 (1992).

Comment A: Under MCL 554.282, if an oil and gas lessee neglects or refuses to execute a release of the oil and gas lease after the lease has become forfeited, the owner of the leased land may, after giving the notice of forfeiture described in MCL 554.281, bring an action against the lessee in order to obtain the release, instead of the procedures specified in the Standard.

Comment B: Instead of the mailing of a notice of forfeiture under MCL 554.281, the notice may be published for three consecutive weeks in a newspaper of general circulation in the county in which the leased land is located.

Comment C: The Committee expresses no opinion concerning what facts, if any, other than those stated in the Problem, would be sufficient to cause an oil and gas lease to become forfeited.

STANDARD 15.4

ABANDONMENT OF DORMANT OIL AND GAS INTEREST

STANDARD: TITLE TO AN INTEREST IN OIL AND GAS OWNED BY A PARTY OTHER THAN THE OWNER OF THE SURFACE IS DEEMED ABANDONED AND VESTS IN THE OWNER OF THE SURFACE IF, FOR A PERIOD OF 20 YEARS:

- (A) THE INTEREST HAS NOT BEEN SOLD, LEASED, MORTGAGED OR TRANSFERRED BY INSTRUMENT RECORDED IN THE COUNTY WHERE THE INTEREST IS LOCATED;**
- (B) NO OIL OR GAS DRILLING PERMIT HAS BEEN ISSUED AS TO THE INTEREST;**
- (C) THERE HAS BEEN NO ACTUAL PRODUCTION OR WITHDRAWAL OF OIL OR GAS FROM THE LAND IN WHICH THE INTEREST IS HELD OR FROM LANDS COVERED BY A LEASE TO WHICH THE INTEREST IS SUBJECT OR FROM LAND POOLED OR UNITIZED THEREWITH; AND**
- (D) THE INTEREST HAS NOT BEEN USED IN UNDERGROUND GAS STORAGE OPERATIONS;**

UNLESS:

- (A) THE OWNER OF THE INTEREST HAS RECORDED A NOTICE OF INTENT TO PRESERVE THE INTEREST:**
 - (1) WITHIN THREE YEARS AFTER SEPTEMBER 6, 1963;**
 - (2) WITHIN 20 YEARS AFTER THE LAST RECORDED SALE, LEASE, MORTGAGE OR TRANSFER OF THE INTEREST;**

- (3) WITHIN 20 YEARS AFTER THE LAST ISSUANCE OF A DRILLING PERMIT AS TO THE INTEREST;
- (4) WITHIN 20 YEARS AFTER ACTUAL PRODUCTION OR WITHDRAWAL OF OIL OR GAS FROM LAND IN WHICH THE INTEREST IS HELD, OR FROM LAND COVERED BY A LEASE TO WHICH THE INTEREST IS SUBJECT OR FROM LAND POOLED, UNITIZED OR INCLUDED IN UNIT OPERATIONS THEREWITH; OR
- (5) WITHIN 20 YEARS AFTER THE USE OF THE INTEREST IN UNDERGROUND GAS STORAGE OPERATIONS;

WHICHEVER IS LATER; OR

(B) THE OWNER OF THE OIL AND GAS INTEREST IS A GOVERNMENTAL BODY OR AGENCY THEREOF.

Problem A: On January 2, 1960, John Farmer, the owner of Blackacre, conveyed an undivided one-half interest in oil and gas in Blackacre to Mineral Investment Company. The deed was recorded on January 2, 1960. On January 10, 1980, Farmer was still the owner of the surface of Blackacre. On January 10, 1980, does Farmer own the oil and gas interest conveyed to Mineral Investment Company on January 2, 1960?

Answer: Yes.

Problem B: Same facts as in Problem A, except that on January 2, 1978, Mineral Investment Company gave an oil and gas lease covering its interest in Blackacre to Gusher Oil Company. The lease was recorded on January 2, 1978. On January 10, 1980, does John Farmer own the oil and gas interest conveyed to Mineral Investment Company on January 2, 1960?

Answer: No. The recorded lease to Gusher Oil Company tolled the period of dormancy of Mineral Investment Company's one-half oil and gas interest. A new 20-year period as to that interest was commenced on January 2, 1978.

Problem C: Same facts as in Problem A, except that on January 2, 1978, Mineral Investment Company gave an oil and gas lease covering Blackacre to Gusher Oil Company. The lease was recorded on January 2, 1978 and had a primary term of 10 years. The lease provided for its termination after the first year or during any later year in which drilling or production operations were not undertaken unless annual delay rental payments were made by the lessee. There were no drilling or production operations, but the lessee timely paid all annual delay rental payments during the 10-year primary term, which ended on January 2, 1988. On January 10, 1998, does John Farmer own the one-half oil and gas interest conveyed to Mineral Investment Company in 1978?

Answer: No. Although more than 20 years elapsed following the recorded lease of the one-half oil and gas interest of Mineral Investment Company, the termination of the 10-year primary term of the lease on January 2, 1988, commenced a new 20-year period of dormancy as to the one-half interest, because the termination of the lease was a transfer of the oil and gas interest from Gusher Oil Company, the lessee, to Mineral Investment Company.

Problem D: Same facts as in Problem A, except that the deed of an undivided one-half interest in oil and gas in Blackacre was given by Farmer to Mineral Investment Company, and was recorded, on January 2, 1940, and except that on September 1, 1966, Mineral Investment Company recorded a verified notice in the office of the register of deeds for the county in which Blackacre was located, giving its name and address, describing Blackacre, stating the nature and extent of its oil and gas interest and stating that Mineral Investment Company desired to preserve its oil and gas interest and did not intend to abandon it. In 1980, is Mineral Investment Company still the owner of the oil and gas interest conveyed to it in 1940?

Answer: Yes. The recording of the notice of intent to preserve the oil and gas interest preserved the interest of Mineral Investment Company for the ensuing 20 years, because the recording of the notice occurred within three years after the effective date of the Dormant Minerals Act.

Problem E: Same facts as in Problem A, except that the deed of an undivided one-half interest in oil and gas in Blackacre was given by Farmer to Mineral Investment Company, and was recorded, on January 2, 1940, and

except that on August 15, 1966, by a mineral deed recorded on that date, Mineral Investment Company conveyed its one-half interest in the oil and gas in Blackacre to Gusher Oil Company. On September 7, 1966, does Gusher Oil Company own the one-half interest in oil and gas in and under Blackacre conveyed to it by Mineral Investment Company?

Answer: Yes. The recording of the mineral deed from Mineral Investment Company to Gusher Oil Company preserved the one-half oil and gas interest because the recording of the deed occurred within three years after the effective date of the Dormant Minerals Act.

Problem F: Same facts as in Problem A, except that the recorded conveyance of the oil and gas interest from Farmer to Mineral Investment Company occurred on January 2, 1970. On December 1, 1989, Mineral Investment Company recorded the notice described in Problem D. On January 3, 1990, does Farmer own the oil and gas interest conveyed to Mineral Investment Company on January 2, 1970?

Answer: No. The notice of intent to preserve the oil and gas interest was recorded within 20 years after the conveyance of the interest to Mineral Investment Company. The recorded notice commenced a new 20-year period which would end December 1, 2009, and as of that date the oil and gas interest of Mineral Investment Company would be deemed abandoned and vest in the surface owner.

Authorities: Generally: MCL 554.291 through 554.294. *Texaco, Inc v Short*, 454 US 516, 102 S Ct 781, 70 L Ed 2d 738 (1982); *Van Slooten v Larsen*, 410 Mich 21, 299 NW2d 704 (1980), app dismissed, 455 US 901, 102 S Ct 1242, 71 L Ed 2d 440 (1982); *Energetics v Whitmill*, 442 Mich 38, 497 NW2d 497 (1993); *Mask v Shell Oil Co*, 77 Mich App 25, 257 NW2d 256 (1977), leave to appeal denied, 402 Mich 835 (1977); *Wagner v Dooley*, 90 Mich App 759, 282 NW2d 469 (1979), leave to appeal denied, 410 Mich 896 (1981); *Walch v Crandall*, 164 Mich App 181, 416 NW2d 375 (1987); *Bates v Keso*, 187 Mich App 402, 468 NW2d 265 (1991); and, *Gibbs v Smock*, 195 Mich App 450, 491 NW2d 614 (1992).

Problems A and B: MCL 554.291 through 554.294. *Texaco, Inc v Short*, 454 US 516, 102 S Ct 781, 70 L Ed 2d 738 (1982); *Van Slooten*

v Larsen, 410 Mich 21, 299 NW2d 704 (1980), app dismissed, 455 US 901, 102 S Ct 1242, 71 L Ed 2d 440 (1982); *Wagner v Dooley*, 90 Mich App 759, 282 NW2d 469 (1979), leave to appeal denied, 410 Mich 896 (1981); *Walch v Crandall*, 164 Mich App 181, 416 NW2d 375 (1987); *Bates v Keso*, 187 Mich App 402, 458 NW2d 265 (1991); and *Gibbs v Smock*, 195 Mich App 450, 491 NW2d 614 (1992).

Problem C: MCL 554.291. *Energetics v Whitmill*, 442 Mich 38, 497 NW2d 497 (1993).

Problems D, E and F: *Van Slooten v Larsen*, 410 Mich 21, 299 NW2d 704 (1980), app dismissed, 455 US 901, 102 S Ct 1242, 71 L Ed 2d 440 (1982); *Energetics v Whitmill*, 442 Mich 38, 497 NW2d, 497 (1993); *Mask v Shell Oil Co*, 77 Mich App 25, 257 NW2d 256 (1977), leave to appeal denied, 402 Mich 835 (1977); *Oberlin v Wolverine Gas & Oil Co*, 181 Mich App 506, 450 NW2d 68 (1989).

- Comment A:** The Committee expresses no opinion as to what type of recorded instrument or what unrecorded facts, other than those stated in MCL 554.291, would be sufficient to accomplish a “transfer” within the meaning of the Dormant Minerals Act. See, *Energetics v Whitmill*, 442 Mich 38, 497 NW2d, 497 (1993) and *Mask v Shell Oil Co*, 77 Mich App 25, 257 NW2d 256 (1977), leave to appeal denied, 402 Mich 835 (1977).
- Comment B:** The term “drilling permit” as used in the Dormant Minerals Act means a permit to drill an oil or gas well issued by the Department of Natural Resources. MCL 554.291.
- Comment C:** In *Energetics v Whitmill*, 442 Mich 38, 497 NW2d 497 (1993), the court held that “where a severed oil and gas interest in land is leased by recorded instrument for a primary term of less than twenty years, a new twenty-year dormancy period commences when the reversionary interest is transferred at the termination of the lease,” even though there is no recorded instrument evidencing the termination. The court reasoned that “the reversion that occurs at the termination of a recorded lease” constitutes a ‘transfer’ by recorded instrument within the meaning of the Dormant Minerals Act.
- Comment D:** A person holding an oil and gas interest for use in underground gas storage operations may preserve the interest by recording a notice,

defining the boundaries of the underground gas storage field or pool and the formations included, without the necessity of describing each separate mineral interest used in the gas storage field operations. MCL 554.292. A person using an oil and gas interest in underground gas storage operations may record a good faith affidavit in the office of the register of deeds for the county in which the pertinent land is located, defining the boundaries of the underground gas storage field or pool and the geological formations included. The affidavit is *prima facie* evidence of the use of oil and gas interests in underground gas storage operations. MCL 554.293. See, *Southwestern Oil Company v Wolverine Gas & Oil Co, Ltd*, 181 Mich App 589, 450 NW2d 1 (1989).

CHAPTER XVI

MORTGAGES AND MORTGAGE FORECLOSURES



STANDARD 16.1

LIEN OF MORTGAGE ON AFTER-ACQUIRED TITLE

STANDARD: A MORTGAGE, EXECUTED BY A MORTGAGOR BEFORE ACQUISITION OF TITLE TO THE MORTGAGED REAL PROPERTY, BECOMES A VALID LIEN WHEN THE MORTGAGOR ACQUIRES TITLE TO THE REAL PROPERTY, SUBJECT TO INTERVENING RIGHTS OF THIRD PARTIES, IF ANY.

Problem A: Robert Brown executed a mortgage of Blackacre which contained a warranty of title and was recorded. Brown subsequently acquired record title to Blackacre. Is the mortgage a valid lien on Blackacre?

Answer: Yes. By virtue of the warranty contained in the mortgage, Brown's after-acquired title inured to the benefit of the mortgagee.

Problem B: Same facts as in Problem A, except that the mortgage contained no warranty of title. Is the mortgage a valid lien on Blackacre?

Answer: Yes. A mortgagor who acquires title to mortgaged real property after executing the mortgage may not avoid the lien of the mortgage because of lack of title at the time of execution. Moreover, if the mortgage were foreclosed, whether by judicial proceedings or advertisement, the deed given at foreclosure sale would convey Brown's after-acquired title to the grantee of the sheriff's deed.

Authorities: Problem A: MCL 565.154. *Caple v Switzer*, 122 Mich 636, 81 NW 560 (1900); *Jacobsen v Nieboer*, 299 Mich 116, 299 NW 830 (1941).

Problem B: MCL 600.3130 and 600.3236. *Brayton v Merithew*, 56 Mich 166, 22 NW 259 (1885); *Clark v Daniels*, 77 Mich 26, 43 NW 854 (1889); *Gray v Franks*, 86 Mich 382, 49 NW 130 (1891); *West Mich Park Association v Pere Marquette R Co*, 172 Mich 179, 137 NW 799 (1912).

Comment: Before Brown's title was evidenced of record, a third party could have acquired an interest in Blackacre superior to the rights of Brown and, consequently, to those of his mortgagee. If, however, Brown were in possession of Blackacre, a third party would be charged with constructive notice of Brown's interest and of the existence of the mortgage. *Balen v Mercier*, 75 Mich 42, 42 NW 666 (1889).

STANDARD 16.2

EFFECT OF MORTGAGE PURPORTING TO CORRECT OR MODIFY REAL PROPERTY DESCRIPTION IN PRIOR MORTGAGE

STANDARD: A MORTGAGE RECITING THAT IT IS GIVEN TO CORRECT OR MODIFY THE REAL PROPERTY DESCRIPTION IN A PREVIOUSLY EXECUTED MORTGAGE DOES NOT RELEASE THE REAL PROPERTY COVERED BY THE PRIOR MORTGAGE UNLESS THERE IS EVIDENCE THAT THE MORTGAGEE AGREED TO THE CORRECTION OR MODIFICATION.

Problem A: Robert Brown executed a mortgage of Blackacre to Edward Lane. Subsequently, without Lane's consent, Brown executed another mortgage to Lane covering only the south half of Blackacre, which recited that it was given to correct an error in the real property description in the prior mortgage. Is the north half of Blackacre released from the prior mortgage?

Answer: No.

Problem B: Robert Brown executed a mortgage of Blackacre to Edward Lane. Subsequently, without Lane's consent, Brown executed another mortgage to Lane of Whiteacre, which recited that it was given to correct an error in the real property description in the prior mortgage. Later, Lane discharged the mortgage describing Whiteacre. Are both Blackacre and Whiteacre released from Lane's mortgage lien?

Answer: Yes. Lane's execution of the discharge evidenced his agreement to the correction.

Authority: *Hurst v Beaver*, 50 Mich 612, 16 NW 165 (1883).

STANDARD 16.3

REFERENCE TO MORTGAGE IN CHAIN OF TITLE

STANDARD: A RECORDED REFERENCE TO A MORTGAGE WHICH CANNOT BE IDENTIFIED WITH ANY RECORDED MORTGAGE IN THE CHAIN OF TITLE CONSTITUTES A CLOUD ON THE TITLE.

Problem A: John Doe deeded Blackacre expressly subject to a mortgage described as being held by Edward Lane. The mortgage referred to in the deed has not been recorded. May the reference to the mortgage be disregarded?

Answer: No.

Problem B: John Doe mortgaged Blackacre to Edward Lane. Lane assigned the mortgage to Arthur Mills. The mortgage and assignment were recorded. Doe then deeded Blackacre expressly subject to a mortgage described as being held by Edward Lane. May the reference in the deed be assumed to identify the mortgage now held by Mills?

Answer: Yes.

Problem C: John Doe executed a mortgage of Blackacre in the amount of \$45,000 to Edward Lane. The mortgage was recorded. Doe then deeded Blackacre expressly subject to a mortgage described as being in the amount of \$30,000 and held by Edward Lane. May the reference in the deed be assumed to identify the \$45,000 mortgage to Lane?

Answer: Yes.

Authorities: *Fitzhugh v Barnard*, 12 Mich 104 (1863); *Baker v Mather*, 25 Mich 51 (1872); *Houseman v Gerken*, 231 Mich 253, 203 NW 841 (1925); *Winkworth Fuel & Supply Co. v Bloomsbury Corp.*, 266 Mich 298, 253 NW 304 (1934).

STANDARD 16.4

EFFECT OF SUBSEQUENT CONVEYANCE BY MORTGAGE HOLDER WHO ACQUIRES FEE TITLE

STANDARD: A DEED FROM A TITLE HOLDER, WHO IS ALSO THE HOLDER OF A MORTGAGE COVERING THE SAME REAL PROPERTY, CONVEYS TITLE FREE OF THE MORTGAGE, IF THE CONVEYANCE IS TO A BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE OF A CONTRARY INTENT.

Problem A: Edward Lane, a single man, held a mortgage covering Blackacre. Later, Lane acquired fee title to Blackacre and conveyed Blackacre to Samuel Peck by a warranty deed containing no reference to the mortgage. The mortgage was then still of record. Peck was a bona fide purchaser for value without notice of any intent not to merge the fee title and mortgage. Did Peck take free of the mortgage?

Answer: Yes.

Problem B: Same facts as in Problem A, except that the deed from Lane to Peck contained the following exception: "Subject to a mortgage of record held by grantor, which mortgage grantee hereby assumes and agrees to pay." Did Peck take free of the mortgage?

Answer: No.

Authorities: *Anderson v Thompson*, 225 Mich 155, 195 NW 689 (1923); *First Nat'l Bank of Utica v Ramm*, 256 Mich 573, 240 NW 32 (1932); *Vollmer v Coenis*, 309 Mich 319, 15 NW2d 654 (1944); *Union Bank v Farmwald*, 181 Mich App 538, 450 NW2d 274 (1989); *Byerlein v Shipp*, 182 Mich App 39, 451 NW2d 565 (1990).

Comment A: The general rule that the mortgage interest is merged into the fee when the holder of a real property mortgage becomes the owner of the fee is subject to the exception that, when it is in the interest of the mortgagee and it is the mortgagee's intention to preserve the mortgage, there is no merger, unless the rights of the mortgagor or third persons are adversely affected thereby. A creditor of the owner of the fee whose lien is junior to the mortgage is not adversely affected because its position is not

made worse. *Union Bank, supra*. However, notwithstanding expressions of intention not to merge, merger may occur if a holding of non-merger would adversely affect a mortgagee's creditor whose lien attaches after the mortgagee acquires the fee. See, *The Reserve at Heritage Village Ass'n v Warren Financial Acquisition, LLC, et al.*, 305 Mich App 92, 850 NW2d 649 (2014); *lv den* 497 Mich 1010 (2015), *recon den* 497 Mich 1043 (2015).

Comment B: Recorded evidence of intent with respect to merger may appear from instruments other than deeds, such as land contracts, assignments of mortgage, partial releases of mortgage or subordination agreements.

Comment C: Although the intent not to merge is determined at the time the fee is acquired by the mortgagee, the effect on lienholders is determined at the time of the foreclosure. *The Reserve, supra*.

STANDARD 16.5

EFFECTIVENESS OF DISCHARGE OF MORTGAGE

STANDARD: A DISCHARGE OF MORTGAGE WHICH REASONABLY IDENTIFIES THE MORTGAGE TO BE DISCHARGED IS EFFECTIVE NOTWITHSTANDING MINOR DISCREPANCIES.

Problem A: A discharge of mortgage correctly recites all information necessary to reasonably identify the mortgage, but recites an incorrect date of the mortgage. Is the discharge valid?

Answer: Yes.

Problem B: Arthur Mills, the assignee of a mortgage given to Edward Lane, executed a discharge of the mortgage in which Mills referred to the mortgage as being given to himself. Is the discharge valid?

Answer: Yes.

Problem C: Robert Brown mortgaged Blackacre to Edward Lane and then deeded Blackacre to Samuel Peck. Lane executed a discharge of the mortgage, correctly reciting all information necessary to reasonably identify the mortgage, but referring to the mortgage as having been executed by Peck. Is the discharge valid?

Answer: Yes.

Problem D: Robert Brown mortgaged Blackacre to Edward Lane. Lane executed a discharge of mortgage which incorrectly states the liber and page of the mortgage. Is the discharge valid?

Answer: No. The erroneous recording information raises sufficient doubt and requires further inquiry.

Authorities: *Reading v Waterman*, 46 Mich 107, 8 NW 691 (1881); *Brown v Burney*, 128 Mich 205, 87 NW 221 (1901).

STANDARD 16.6

MORTGAGE HELD BY HUSBAND AND WIFE

STANDARD: A MORTGAGE HELD BY HUSBAND AND WIFE IS HELD AS TENANTS BY THE ENTIRETIES UNLESS OTHERWISE EXPRESSLY PROVIDED.

Problem: A mortgage executed in 1980 was given (or was assigned) to Edward Lane and Jennifer Lane, husband and wife. Jennifer Lane died in 1990. Edward Lane discharged the mortgage in 1992. Is the discharge valid?

Answer: Yes.

Authorities: MCL 557.151 and 557.81.

Comment: While a mortgage is held by tenants by the entireties, neither spouse, acting alone, may convey any interest in the mortgage. After the death of either spouse, the survivor may assign or discharge the mortgage. *Hoyt v Winstanley*, 221 Mich 515, 191 NW 213 (1922); *De Young v Mesler*, 373 Mich 499, 130 NW2d 38 (1964).

STANDARD 16.7

DISCHARGE OR ASSIGNMENT OF MORTGAGE BY MICHIGAN PROBATE FIDUCIARY

STANDARD: A DISCHARGE OR ASSIGNMENT OF A MORTGAGE COVERING MICHIGAN REAL PROPERTY, EXECUTED BY A PROBATE FIDUCIARY WHO IS QUALIFIED IN MICHIGAN, IS VALID.

Problem A: Edward Lane, a Michigan resident, held a mortgage covering Michigan real property. Lane died and Fred Adams was appointed and qualified in Michigan as the personal representative of Lane's estate. Adams, as personal representative, executed a discharge of the mortgage. Is the discharge valid?

Answer: Yes. The personal representative could also validly assign the mortgage.

Problem B: Same facts as in Problem A, except that Edward Lane was an Arizona resident. Is the discharge valid?

Answer: Yes. The answer is the same whether Adams was appointed in regular or ancillary proceedings.

Authorities: MCL 700.3601 *et seq.* (as to fiduciaries of decedents' estates generally); 700.4201 *et seq.* (as to foreign personal representatives generally); 700.3715 (as to powers of personal representatives generally); 700.5423 (as to conservators generally).

Comment A: As used in this Standard, "probate fiduciary" means those Michigan fiduciaries defined in MCL 700.1104, and foreign fiduciaries qualified in Michigan pursuant to MCL 700.4203.

Comment B: With respect to the obligation of a mortgagee to discharge a mortgage, see MCL 565.41.

STANDARD 16.8

DISCHARGE OR ASSIGNMENT OF MORTGAGE BEFORE APRIL 1, 2000 BY FOREIGN PROBATE FIDUCIARY NOT QUALIFIED IN MICHIGAN

STANDARD: A DISCHARGE OR ASSIGNMENT OF A MORTGAGE COVERING MICHIGAN REAL PROPERTY, EXECUTED BY A FOREIGN PROBATE FIDUCIARY NOT QUALIFIED IN MICHIGAN, IS INVALID IF EXECUTED BEFORE MARCH 29, 1985. ON OR AFTER MARCH 29, 1985, AND BEFORE APRIL 1, 2000, A FOREIGN PROBATE FIDUCIARY IN A DECEDENT'S ESTATE MAY EXECUTE AND DELIVER A DISCHARGE OF MORTGAGE UPON PAYMENT OF THE MORTGAGE DEBT.

Problem A: A mortgage of Michigan real property was given to Edward Lane, an Ohio resident. Lane died and his estate was probated in Ohio. Fred Adams qualified in Ohio as fiduciary of Lane's estate. Adams, as fiduciary, executed a discharge of the mortgage on December 1, 1981. Is the discharge valid?

Answer: No. Before April 1, 2000, a foreign probate fiduciary, not qualified in Michigan, had no authority to assign a mortgage and, before March 29, 1985, had no authority to discharge one.

Problem B: Same facts as in Problem A, except that the fiduciary received payment of the mortgage debt and executed a discharge of the mortgage on May 1, 1985. Is the discharge valid?

Answer: Yes. The Revised Probate Code was amended, effective March 29, 1985, to permit a foreign probate fiduciary in a decedent's estate to execute and deliver a discharge of mortgage upon payment of the mortgage debt.

Authorities: Problem A: *Reynolds v McMullen*, 55 Mich 568, 22 NW 41 (1885); *McIntire v Conrad*, 93 Mich 526, 53 NW 829 (1892).

Problem B: MCL 700.234, as amended by 1984 P.A. 377 (repealed effective April 1, 2000 by 1998 P.A. 36, being MCL 700.8102).

Comment A: Before April 1, 2000, a foreign probate fiduciary, not qualified in Michigan, was not authorized to maintain proceedings to foreclose a mortgage of Michigan real property on behalf of the decedent. *Weaver v Shevitz*, 253 Mich 535, 233 NW 244 (1931).

Comment B: Although a mortgagor could pay the mortgage debt to a foreign probate fiduciary in accordance with MCL 700.232, 700.233 and 700.234, the Revised Probate Code, before March 29, 1985, provided no authority for a foreign probate fiduciary, not qualified in Michigan, to execute and deliver a discharge of a mortgage. A mortgagor who paid the mortgage debt to a foreign fiduciary could, however, obtain a judicial discharge of the mortgage pursuant to MCL 600.3175. The Revised Probate Code was amended by 1984 P.A. 377, effective March 29, 1985, to permit a foreign probate fiduciary in a decedent's estate to execute and deliver a discharge of mortgage in satisfaction of the mortgage debt, but it did not provide authority to the fiduciary to execute and deliver an assignment of a mortgage.

Comment C: Foreign fiduciary, as used in this Standard, is defined in MCL 700.231

Note: See Standard 16.9 with respect to the execution and delivery of a discharge or assignment of a mortgage by a foreign probate fiduciary on and after April 1, 2000. Also see Standard 7.12 with respect to conveyances by foreign probate fiduciaries.

STANDARD 16.9

DISCHARGE OR ASSIGNMENT OF MORTGAGE BY DOMICILIARY FOREIGN PERSONAL REPRESENTATIVE ON OR AFTER APRIL 1, 2000

STANDARD: A DISCHARGE OR ASSIGNMENT OF A MORTGAGE COVERING MICHIGAN REAL PROPERTY, EXECUTED BY A DOMICILIARY FOREIGN PERSONAL REPRESENTATIVE ON OR AFTER APRIL 1, 2000 IS VALID IF:

- (A) ESTATE ADMINISTRATION OR AN APPLICATION FOR ADMINISTRATION IS NOT PENDING IN MICHIGAN; AND
- (B) THE DOMICILIARY FOREIGN PERSONAL REPRESENTATIVE HAS FILED WITH A COURT IN THE COUNTY IN WHICH THE REAL PROPERTY IS LOCATED AUTHENTICATED COPIES OF THE REPRESENTATIVE'S APPOINTMENT AND ANY OFFICIAL BOND THE REPRESENTATIVE HAS GIVEN.

Problem: A mortgage covering Michigan real property was given to Edward Lane, an Ohio resident. Lane died and his estate was probated in Ohio. Fred Adams qualified in Ohio as the personal representative of Lane's estate. No petition for local administration of Lane's estate was filed in Michigan. Adams filed authenticated copies of his Ohio appointment and official bond with the probate court in the county in which the real property was located. Adams executed a discharge of mortgage as the domiciliary foreign personal representative of Lane's estate on December 1, 2000. Is the discharge valid?

Answer: Yes.

Authorities: MCL 700.4203 and 700.4204.

Comment A: "Foreign personal representative" is defined in MCL 700.1104 as a personal representative appointed by another jurisdiction. Although "domiciliary foreign personal representative" is not statutorily defined, the Committee interprets the term "domiciliary foreign per-

sonal representative” as used in the Estates and Protected Individuals Code to mean a foreign personal representative appointed by a court in the jurisdiction in which the non-resident decedent resided at the time of death.

Comment B: The statutory requirement that administration “is not pending in Michigan” is not limited to the county or counties in which mortgaged real property is located, and a domiciliary foreign personal representative has no authority to discharge or assign a mortgage if an estate administration is pending in any county in Michigan. Similarly, the statute does not identify the court in which copies of the appointment and official bond of the domiciliary foreign personal representative are to be filed.

STANDARD 16.10

RECORDED MORTGAGE OVER 30 YEARS OLD

STANDARD: A RECORDED MORTGAGE, NOT RENEWED OR EXTENDED OF RECORD, IS CONSIDERED TO BE DISCHARGED AFTER 30 YEARS HAVE ELAPSED SINCE ITS DUE DATE, OR SINCE ITS DATE OF RECORDING IF NO DUE DATE IS RECITED IN THE MORTGAGE.

Problem: A mortgage, dated and recorded in 1955, was due 15 years after its date. No renewal affidavit, extension agreement or discharge relating to the mortgage was recorded. In 2001, may the mortgage be disregarded?

Answer: Yes.

Authorities: MCL 565.382. *Austin v Anderson*, 279 Mich 424, 272 NW 730 (1937).

Comment: Under MCL 565.382, a mortgage may be renewed by the recording of (1) an affidavit of the owner of the mortgage or any one of the owners of the mortgage (if more than one), or an affidavit of the agent or attorney of the owner of the mortgage or any one of the owners of the mortgage (if more than one), which affidavit shows the amount remaining unpaid on the mortgage, or (2) an extension agreement between the mortgagor and the owner of the mortgage.

STANDARD 16.11

EFFECT OF RECEIVERSHIP ON RIGHT TO FORECLOSE

STANDARD: PRIOR CONSENT OF THE COURT HAVING CUSTODY OVER THE REAL PROPERTY OF A PARTY IN RECEIVERSHIP IS NECESSARY FOR A VALID FORECLOSURE OF A MORTGAGE COVERING THE REAL PROPERTY.

Problem: Brown Corporation mortgaged Blackacre to Edward Lane. By circuit court proceedings, Brown was placed in receivership. While the receivership was pending, Lane foreclosed his mortgage by advertisement and obtained a deed to Blackacre at the foreclosure sale. Upon expiration of the redemption period, did Lane acquire marketable title to Blackacre?

Answer: No. Because the receiver has custody of Blackacre in the receivership proceedings, a foreclosure sale held without consent of the court is voidable.

Authorities: *Campau v Detroit Driving Club*, 130 Mich 417, 90 NW 49 (1902); *In Re Petition of Chaffee*, 262 Mich 291, 247 NW 186 (1933); *Kuschinski v Equitable & Central Trust Co.*, 277 Mich 23, 268 NW 797 (1936).

STANDARD 16.12

ATTEMPTED FORECLOSURE BY ADVERTISEMENT OF MORTGAGE NOT CONTAINING VALID POWER OF SALE

STANDARD: A MORTGAGE CANNOT BE VALIDLY FORECLOSED BY ADVERTISEMENT UNLESS IT CONTAINS A VALID POWER OF SALE.

Problem A: A mortgage was foreclosed by advertisement. The mortgage did not contain a power of sale. Was the foreclosure valid?

Answer: No.

Problem B: A mortgage was foreclosed by advertisement. The mortgage contained a power of sale which provided that the power could be exercised by the mortgagee without giving any notice of the foreclosure sale. Was the foreclosure valid?

Answer: No. A power of sale which attempts to dispense with the notice is not a valid power of sale.

Authorities: Generally: MCL 600.3201.

Problem A: *Hebert v Bulte*, 42 Mich 489, 4 NW 215 (1880); *Larivierre v Rains*, 112 Mich 276, 70 NW 583 (1897).

Problem B: *Pierce v Grimley*, 77 Mich 273, 43 NW 932 (1889); *Gehrke v Janowitz*, 55 Mich App 643, 223 NW2d 107 (1974).

Comment: A mortgage which does not contain a valid power of sale may be foreclosed only by judicial proceedings. *Cowles v Marble*, 37 Mich 158 (1877).

STANDARD 16.13

RECORDING OF MORTGAGE AND ASSIGNMENT OF MORTGAGE IN FORECLOSURE BY ADVERTISEMENT

STANDARD: A MORTGAGE MAY BE FORECLOSED BY ADVERTISEMENT IF ALL OF THE FOLLOWING EXIST:

- (A) THE MORTGAGE CONTAINING A POWER OF SALE HAS BEEN RECORDED;
- (B) THE PARTY FORECLOSING THE MORTGAGE IS EITHER:
 - (1) THE OWNER OF THE INDEBTEDNESS OR OF AN INTEREST IN THE INDEBTEDNESS SECURED BY THE MORTGAGE; OR
 - (2) THE SERVICING AGENT OF THE MORTGAGE; AND
- (C) A RECORD CHAIN OF TITLE EXISTS BEFORE THE DATE OF SALE EVIDENCING THE ASSIGNMENT OF MORTGAGE TO THE PARTY FORECLOSING THE MORTGAGE, IF THAT PARTY IS NOT THE ORIGINAL MORTGAGEE.

Problem A: Robert Brown mortgaged Blackacre to Edward Lane. The mortgage contained a power of sale and was recorded. Lane assigned the mortgage to Arthur Mills, but the assignment was not recorded. Mills subsequently assigned the mortgage to William Smith, and the assignment was recorded. Smith foreclosed the mortgage by advertisement. Was the foreclosure valid?

Answer: No. If the mortgage is not foreclosed by the original mortgagee, then the mortgage and any assignments of the mortgage

necessary to establish a record chain of title in the foreclosing party must be recorded.

Problem B: Robert Brown mortgaged Blackacre to Edward Lane. The mortgage contained a power of sale and was recorded. Lane died July 1, 1990. Lane's estate was probated and William Miller was appointed administrator. No instrument evidencing an assignment of the mortgage to Miller was recorded. In 1991 Miller foreclosed the mortgage by advertisement. Was the foreclosure valid?

Answer: Yes. A transfer of a mortgage by operation of law is not an assignment required to be recorded for the foreclosure to be valid.

Problem C: Robert Brown mortgaged Blackacre to Northern Bank. The mortgage contained a power of sale and was recorded. Northern Bank assigned the mortgage to Holdings Company, as security for a loan by Holdings Company to Northern Bank. The assignment was not recorded. Northern foreclosed the mortgage by advertisement. Was the foreclosure valid?

Answer: Yes. Northern Bank remained the record holder of the mortgage and its right to foreclose the mortgage was not affected by the unrecorded assignment for security only.

Problem D: Robert Brown mortgaged Blackacre to Northern Bank. The mortgage contained a power of sale and was recorded. Northern Bank assigned the mortgage to Holdings Company, but continued to service the mortgage as servicing agent for Holdings Company. The assignment to Holdings Company was recorded. The mortgage was foreclosed by advertisement in the name of Holdings Company by Northern Bank, its servicing agent. Was the foreclosure valid?

Answer: Yes. A servicing agent may foreclose a mortgage by advertisement in the name of the record holder of the mortgage.

Problem E: Same facts as in Problem D, except that the mortgage was foreclosed by advertisement in the name of Northern Bank, the servicing agent, and no evidence of an assignment to Northern Bank was recorded. Was the foreclosure valid?

Answer: No. A servicing agent may not foreclose a mortgage by

advertisement in its own name unless evidence of an assignment of the mortgage to the servicing agent is recorded.

Problem F: Hometown Financial Company made a mortgage loan to Robert Brown secured by a mortgage on Blackacre. The mortgage contained a power of sale and was recorded. The mortgage identified the Mortgage Electronic Registration Systems, Inc. ("MERS") as the mortgagee, granted the mortgage to MERS solely as nominee for Hometown Financial Company and provided MERS with the right to foreclose Blackacre. MERS foreclosed the mortgage by advertisement. Was the foreclosure valid?

Answer: Yes. MERS was the record holder of the mortgage and owned an interest in the indebtedness.

Authorities: Generally: MCL 600.3204(1)(d) and 600.3204(3).

Problem A: *Dohm v Haskin*, 88 Mich 144, 50 NW 108 (1891); *Arnold v DMR Financial Services*, 448 Mich 671, 532 NW2d 852 (1995).

Problem B: MCL 600.3204. *Miller v Clark*, 56 Mich 337, 23 NW 35 (1885).

Problem C: *Feldman v Equitable Trust Co*, 278 Mich 619, 624, 270 NW2d 809 (1937); *Arnold v DMR Financial Services*, 448 Mich 671, 532 NW2d 852 (1995).

Problems D and E: MCL 600.3204(1)(d) and 600.3204(3).

Problem F: MCL 600.3204(1)(d). *Residential Funding Co v Saurman*, 490 Mich 909, 805 NW2d 183 (2011).

Comment A: If the foreclosing assignee is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage at the time of the first published notice, then evidence of the assignment of the mortgage creating a "record chain of title" in the foreclosing assignee may be recorded at any time before the date of sale. See, MCL 600.3204(3). See, Standard 16.19 with respect to the necessity to include the name of the foreclosing assignee in the published notice of sale.

Comment B: It is the opinion of the Committee that the change in the statutory

language in MCL 600.3204(3), effective December 29, 1994, does not affect the holding in *Miller v Clark, supra*, that a transfer of a mortgage effected by operation of law is not an assignment required to be recorded for a foreclosure to be valid. *See, Kim v JPMorgan Chase Bank*, 493 Mich 98, 825 NW2d 329 (2012).

Comment C: Section 9-607(b) of the Uniform Commercial Code permits a secured party who has a security interest in an obligation of a debtor/mortgagee secured by a mortgage to record the security agreement creating the security interest and a sworn affidavit to satisfy the requirement that an assignment of the mortgage be recorded to foreclose the mortgage by advertisement. The recorded sworn affidavit must include a statement that a default has occurred and that the secured party is entitled to foreclose the mortgage by advertisement. The recorded security agreement and sworn affidavit may be used to create the necessary record chain of title evidencing the assignment of the mortgage to the foreclosing party. MCL 440.9607(b) and Official Comment 8.

Comment D: The Committee expresses no opinion as to what constitutes an interest in the indebtedness sufficient to permit the party foreclosing the mortgage to foreclose the mortgage pursuant to MCL 600.3201(d). *See, Residential Funding Co v Saurman, supra*.

Comment E: In *Kim v JPMorgan Chase Bank, supra*, the Supreme Court held that (1) “defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void ab initio,” and (2) “to set aside the foreclosure sale, plaintiffs must show that they were prejudiced by defendant’s failure to comply with MCL 600.3204.” *Id.* at 115. The Committee expresses no opinion as to whether defects or irregularities resulting from the failure to comply with any of the requirements of MCL 600.3204 other than MCL 600.3204(3) or any of the statutory requirements for foreclosure referred to in other Standards in this Chapter 16 would render a foreclosure voidable as opposed to void ab initio. The Committee also expresses no opinion as to the nature of the specific facts which would support a claim of prejudice sufficient to render a foreclosure voidable because of defects or irregularities in the foreclosure proceeding. *See, Diem v Sallie Mae Home Loans, Inc*, Oct 16, 2014 (Mich App Docket No. 317499).

STANDARD 16.14

LEGAL PROCEEDINGS THAT BAR FORECLOSURE BY ADVERTISEMENT

STANDARD: FORECLOSURE BY ADVERTISEMENT IS BARRED IF LEGAL PROCEEDINGS ARE PENDING IN WHICH JUDGMENT ON THE MORTGAGE DEBT MAY BE RENDERED OR IF A JUDGMENT HAS BEEN RENDERED AND EXECUTION HAS NOT BEEN RETURNED UNSATISFIED IN WHOLE OR IN PART.

Problem A: A mortgage given by Robert Brown to Edward Lane was in default. Brown died and his estate was probated. At the hearing on claims, Lane's claim for the mortgage debt was allowed, but it was never paid. Lane later foreclosed the mortgage by advertisement. Was the foreclosure valid?

Answer: Yes. The filing of a claim against the estate of a mortgagor is not a "suit or proceeding at law" within the meaning of the statute setting forth the prerequisites for foreclosure of mortgages by advertisement.

Problem B: A mortgage given by Robert Brown to Edward Lane was in default. Lane sued to collect the mortgage debt and obtained a judgment for the amount owing on the debt. Execution on the judgment was returned unsatisfied. Lane later foreclosed the mortgage by advertisement. Was the foreclosure valid?

Answer: Yes. After execution on the judgment was returned unsatisfied, the mortgagee was entitled to foreclose by advertisement.

Problem C: Same facts as in Problem B, except that while the suit was pending Lane foreclosed his mortgage by advertisement. Was the foreclosure valid?

Answer: No. Until the suit is discontinued or, if judgment is rendered, execution upon the judgment is returned unsatisfied, in whole or in part, foreclosure of the mortgage by advertisement is barred.

Authorities: Generally: MCL 600.3204(1)(b).

Problem A: *Larzelere v Starkweather*, 38 Mich 96 (1878).

- Comment A:** In construing a predecessor statute to MCL 600.3204(1)(b), the Supreme Court has stated that the object of the statute "is to prevent proceedings, at the same time to prosecute the personal liability of the mortgagor and pursue the land." *Lee v Clary*, 38 Mich 223, 227 (1878).
- Comment B:** In *United States v Leslie*, 421 F2d 763 (CA 6, 1970), the court held that a suit against a guarantor of the mortgage debt pursuant to a guaranty which is not conditioned on the mortgagee proceeding against the mortgagor or the property is not an action or proceeding to recover the mortgage debt, and a suit against the guarantor may proceed while foreclosure by advertisement is pending. See also, *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 818 NW2d 460 (2012).
- Comment C:** In *Calvert Assoc v Harris*, 469 F Supp 922 (ED Mich, 1979), the court held that a suit for appointment of a receiver during the pendency of a foreclosure by advertisement is not a suit brought to recover the mortgage debt and does not bar foreclosure by advertisement.

STANDARD 16.15

EFFECT ON JUNIOR FEDERAL TAX LIEN OF MORTGAGE FORECLOSURE BY ADVERTISEMENT WITH SALE HELD ON OR BEFORE NOVEMBER 2, 1966

STANDARD: FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT WITH THE FORECLOSURE SALE HELD ON OR BEFORE NOVEMBER 2, 1966, AND FAILURE TO REDEEM FROM THE SALE, DIVESTS THE MORTGAGED PREMISES OF ANY FEDERAL TAX LIEN OVER WHICH THE MORTGAGE HAD PRIORITY WITHOUT THE NECESSITY OF GIVING ANY NOTICE TO THE UNITED STATES.

Problem: Blackacre was encumbered by a recorded mortgage and a filed and indexed junior federal tax lien. The mortgage was foreclosed by advertisement, the foreclosure sale was held before November 2, 1966, and no redemption occurred. Did the purchaser at the foreclosure sale hold Blackacre free of the junior federal tax lien?

Answer: Yes.

Authorities: *United States v Brosnan* and *Bank of America v United States*, 363 US 237, 80 S Ct 1108, 4 L Ed 2d 1192 (1960).

STANDARD 16.16

EFFECT ON JUNIOR FEDERAL TAX LIEN OF MORTGAGE FORECLOSURE BY ADVERTISEMENT WITH SALE HELD ON OR AFTER NOVEMBER 3, 1966 AND INITIAL PUBLICATION OF NOTICE OF SALE BEFORE NOVEMBER 3, 1966

STANDARD: FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT WITH THE FORECLOSURE SALE HELD ON OR AFTER NOVEMBER 3, 1966, AND FAILURE TO REDEEM FROM THE SALE, DIVESTS THE MORTGAGED PREMISES OF ANY FEDERAL TAX LIEN OVER WHICH THE MORTGAGE HAD PRIORITY, IF THE FIRST EFFECTIVE NOTICE OF THE FORECLOSURE SALE WAS PUBLISHED BEFORE NOVEMBER 3, 1966.

Problem: A mortgage covering Blackacre, recorded on May 19, 1964, was foreclosed by advertisement. A notice of foreclosure was first published on August 15, 1966, and the sale was held on November 19, 1966. A notice of a federal tax lien against the owner was recorded on October 22, 1964. The redemption period expired without redemption occurring. Does the purchaser at the foreclosure sale hold Blackacre free of the junior federal tax lien?

Answer: Yes.

Authority: Treas Reg §301.7425-1(b).

Comment: Treasury Regulation 301.7425-1(b) states that the notice of sale provision of 26 USC 7425(c)(1) does not apply to sales occurring after November 2, 1966 if, before November 3, 1966, an act was performed which was required and effective under local law with respect to the sale. The publication of notice of sale is given in the regulation as an example of such an act.

STANDARD 16.17

EFFECT ON JUNIOR FEDERAL TAX LIEN OF MORTGAGE FORECLOSURE BY ADVERTISEMENT INITIATED ON OR AFTER NOVEMBER 3, 1966

**STANDARD: FORECLOSURE OF A MORTGAGE BY
ADVERTISEMENT INITIATED ON OR AFTER
NOVEMBER 3, 1966, AND FAILURE TO REDEEM FROM
THE SALE, DIVESTS THE MORTGAGED PREMISES OF
ANY JUNIOR FEDERAL TAX LIEN, IF:**

- (A) NO NOTICE OF FEDERAL TAX LIEN WAS FILED
FOR RECORD AND INDEXED (IN ACCORDANCE
WITH 26 USC 6323 AND MCL 211.661) MORE
THAN 30 DAYS BEFORE THE FORECLOSURE
SALE;**
- (B) PROPER NOTICE OF THE SALE WAS GIVEN TO
THE UNITED STATES NOT LESS THAN 25 DAYS
BEFORE THE SALE; OR**
- (C) THE UNITED STATES CONSENTS TO THE SALE
FREE OF THE LIEN.**

**OTHERWISE, THE SALE IS MADE SUBJECT TO AND
HAS NO EFFECT ON THE FEDERAL TAX LIEN.**

Problem A: A mortgage covering Blackacre, recorded in 1998, was foreclosed by advertisement at a foreclosure sale held on May 18, 1999. The redemption period was six months after the date of the sale. A notice of federal tax lien against the owner was filed for record and indexed in the office of the register of deeds for the county in which Blackacre is located on May 9, 1999. No notice of the foreclosure sale was given to the United States. The redemption period expired without redemption. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

Answer: Yes. Because the notice of federal tax lien was not filed for record and indexed more than 30 days before the sale, the sale and expiration of the right to redeem divested Blackacre of the federal tax lien.

Problem B: Same facts as in Problem A, except that the notice of federal tax lien against the owner was filed for record and indexed on April 12, 1999. The redemption period expired without redemption. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

Answer: No. Because the notice of federal tax lien was filed for record and indexed more than 30 days before the foreclosure sale, and because no notice of the sale was given to the United States, the sale was made subject to and would not affect the federal tax lien.

Problem C: Same facts as in Problem B, except that proper notice of the foreclosure sale was given to the United States 25 days or more before the sale. The redemption period expired without redemption having been made. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

Answer: Yes. Because the notice of federal tax lien was filed for record and indexed more than 30 days before the sale, to divest Blackacre of the federal tax lien, it was necessary that the United States be given notice of the sale.

Problem D: Notice of a foreclosure sale to be held on May 18, 1999 to foreclose a mortgage covering Blackacre was published. Notice of the sale was given to the United States 25 or more days before May 18, 1999 in reference to a notice of federal tax lien against the owner filed for record and indexed on April 12, 1999. The sale was adjourned to and held on May 25, 1999, without notice to the United States. The redemption period was six months. The redemption period expired without redemption. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

Answer: Yes. Because notice of the sale scheduled for May 18, 1999 had been given to the United States, the only notice of postponement of the sale required to be given was that required by local law.

Problem E: Notice of a foreclosure sale to be held on May 18, 1999 to foreclose a mortgage covering Blackacre was published. A notice of a federal tax lien against the owner was filed for record and indexed April 23, 1999. No notice of the sale was given to the United States. The sale was adjourned to and held on May 25, 1999. The redemption period was six months. The redemption period expired without redemption. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

Answer: Yes. Had the sale been held on the originally scheduled date, no notice to the United States would have been required because no notice of a federal tax lien was filed for record and indexed more than 30 days before the sale date. If the sale is actually held no more than 30 days after the originally scheduled date, no notice to the United States, pursuant to 26 USC 7425(c)(1), is required even though notice of the federal tax lien is filed for record and indexed more than 30 days before the actual sale.

Problem F: Same facts as in Problem E, except that, as a result of one or more adjournments, the sale was held on June 22, 1999. The redemption period expired without redemption. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

Answer: No. Because the sale was held more than 30 days after the originally scheduled date and because notice of a federal tax lien was filed for record and indexed more than 30 days before the sale, notice of the adjournment must be given to the United States pursuant to 26 USC 7425(c)(1).

Problem G: Notice of a foreclosure sale to be held on May 18, 1999 to foreclose a mortgage covering Blackacre was published. The sale was adjourned to and held on June 25, 1999. A notice of a federal tax lien against the owner was filed for record and indexed on June 8, 1999. No notice of the sale was given to the United States. The redemption period expired without redemption. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

Answer: Yes. Although the sale was held more than 30 days after the originally scheduled date, it was not necessary to give notice to the United States because no notice of a federal tax lien was filed for record and indexed more than 30 days before the sale.

Problem H: Blackacre was a residential parcel less than three acres in size on which a single family dwelling was located. A mortgage of Blackacre recorded in 1999 was foreclosed by advertisement at a foreclosure sale on June 29, 2000. The mortgagee proceeded under MCL 600.3241, and the redemption period was 30 days after the sale date. A federal tax lien against the owner was filed for record and indexed on May 18, 2000. Notice of the foreclosure sale was given to the United States. Did the purchaser at the foreclosure sale acquire Blackacre free of the federal tax lien after expiration of the 30-day redemption period?

Answer: No. The United States had 120 days to redeem from the foreclosure sale.

Authorities: 26 USC 7425(b), (c)(1) and (2) and (d). Treas Reg §301.7425-2 and 3.

Comment A: Notice of Foreclosure Sale.

26 USC 7425(c)(1) provides that notice of sale “shall be given (in accordance with regulations prescribed by the Secretary) in writing by registered or certified mail or by personal service, not less than 25 days prior to such sale, to the Secretary.”

Treasury Regulation §301.7425-3(d) provides:

Contents of Notice

A notice will be considered adequate if it contains the following information:

1. Name and address of the person submitting the notice of sale.
2. A copy of each Notice of Federal Tax Lien (Form 668) affecting the real property to be sold or the following as shown on each such notice:
 - (a) The Internal Revenue District named thereon;
 - (b) The name and address of the taxpayer; and
 - (c) The date and place of filing of the notice.
3. With respect to the property to be sold, the following:

- (a) A detailed description – “in the case of real property, the street address, city and State, and the legal description contained in the title or deed to the property and, if available, a copy of the abstract of title.”
 - (b) The date, time and place and terms of the proposed sale.
4. “The approximate amount of the principal obligation, including interest, secured by the lien sought to be enforced and a description of the other expenses (such as legal expenses, selling costs, etc.) which may be charged against the sale proceeds.”

Upon Whom is Notice to be Served?

Notice shall be given to the Area Director for the Internal Revenue District in which the sale is to be conducted, marked for the attention of the Technical Support Group.

Time of Service

Although the Internal Revenue Code provides that notice shall be given not less than 25 days before a foreclosure sale, the Treasury Regulation §301.7502-1(c)(2) provides that 26 USC 7502 and 7503 shall apply. The former provides that the date of registering a letter shall be deemed to be the date of delivery. The latter section specifies that if the last day for performing any prescribed act falls on Saturday, Sunday or a legal holiday, the performance of such act will be considered timely if performed on the next succeeding day which is not Saturday, Sunday or a legal holiday. With respect to certified mail, the postmark date is likewise deemed to be the date of delivery if the postmark is made by a postal employee.

If a notice of sale is submitted in duplicate to the Area Director and a written request that receipt be acknowledged is made, the Area Director will so acknowledge, indicating the date and time of receipt of the notice.

Inadequate Notice

If the Area Director determines that a notice is inadequate, the Area Director will give notice of the inadequate items to the

person who submitted the notice. In any case where a notice of a foreclosure sale given after December 31, 1976 does not contain the information required under No. 2 above, the Area Director may give written notification of such omission without specification of any other inadequacy. In either event, an adequate notice must be given at least 25 days before the sale date. But if one who submits a timely notice does not receive written notification that the notice is inadequate more than five days before the sale date, the notice is considered adequate.

Disclosure of Adequacy of Notice

Upon receipt of a written request indicating the reason therefore, the Area Director is authorized to disclose to any person who has a proper interest whether an adequate notice of sale was given.

Comment B: Recorded Evidence of Notice to the United States and Service

For the purpose of evidencing that proper and timely notice of mortgage foreclosure sale was given to the United States, the Committee recommends that an affidavit stating that proper notice of the foreclosure sale was given to the United States not less than 25 days before the sale date by personal service, or by registered or certified mail, be recorded. The affidavit, to which a copy of the notice given should be attached, may be recorded with the sheriff's deed or separately, and it should state the date and manner of service, and that no notice of inadequacy as provided for in Treasury Regulation §301.7425-3(d)(2) was received. If service was by registered or certified mail, the receipt or a copy of the notice should be attached to the affidavit and should show timely receipt by the United States. If the receipt does not show timely receipt by the United States, the delivery may still have been made more than 25 days before the sale date if the registered or certified receipt bears a postmark made by a postal employee which postmark was not less than 25 days before the sale date. 26 USC 7502; Treas Reg §301.7502-1(c)(2).

Caveat: 26 USC 7425(d) provides in part that “the Secretary may redeem such property within the period of 120 days after the date of such sale or the period allowable for redemption under local law, whichever is longer.”

STANDARD 16.18

OMISSION OF OR ERROR IN MORTGAGOR'S NAME IN NOTICE OF SALE IN FORECLOSURE BY ADVERTISEMENT

STANDARD: IN FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT, THE CORRECT NAMES OF ALL MORTGAGORS MUST BE INCLUDED IN THE PUBLISHED NOTICE OF SALE.

Problem A: Robert Brown, the owner of Blackacre, and Rose Brown, his wife, who had no interest in Blackacre other than her inchoate dower, executed a mortgage of Blackacre. In a foreclosure by advertisement, Rose Brown was not named in the published notice of sale. Is the notice sufficient?

Answer: No.

Problem B: Robert Brown and Rose Brown, husband and wife, executed a mortgage of Blackacre. In a foreclosure by advertisement, the name of Rose Brown was given as Jane Brown in the published notice of sale. Is the notice sufficient?

Answer: No.

Authorities: Generally: MCL 600.3212.

Problem A: *Oades v Standard Savings & Loan Association*, 257 Mich 469, 241 NW 262 (1932).

Problem B: *Lee v Clary*, 38 Mich 223 (1878); *Zlotoeczski v Smith*, 117 Mich 202, 75 NW 470 (1898).

Note: See Standards 2.1, 2.2 and 2.3 regarding the rule of *idem sonans*, the use of middle names and initials, and abbreviations of first and middle names.

STANDARD 16.19

OMISSION OF NAME OF FORECLOSING ASSIGNEE OF RECORD IN PUBLISHED NOTICE OF SALE ON FORECLOSURE BY ADVERTISEMENT

STANDARD: THE PUBLISHED NOTICE OF SALE ON FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT MUST INCLUDE THE NAME OF THE FORECLOSING ASSIGNEE OF RECORD.

Problem: A mortgage was assigned of record to Arthur Mills. Mills foreclosed the mortgage by advertisement. The published notice of sale did not name Mills. Was the notice sufficient?

Answer: No.

Authority: MCL 600.3212(a).

Comment A: The words “the assignee” as used in MCL 600.3212(a) designate the foreclosing assignee and not mesne assignees. Mortgage foreclosures were sustained in *Fox v Jacobs*, 289 Mich 619, 286 NW 854 (1939), and *Peterson v Jacobs*, 303 Mich 329, 6 NW2d 533 (1942), where mesne assignments were not set forth in the notice, and in *Guardian Depositors Corp v Keller*, 286 Mich 403, 282 NW 194 (1938), where the name of a mesne assignee was set forth erroneously.

Comment B: A foreclosure by advertisement pursuant to a published notice of sale that is defective for failure to include the name of the foreclosing assignee as required by MCL 600.3212(a) is voidable. See, *Kim v JPMorgan Chase Bank*, 493 Mich 98, 825 NW2d 329 (2012).

Comment C: See Standard 16.13 with respect to recording evidence of the assignment of the mortgage, ownership of an interest in the indebtedness secured by the mortgage, and the Comments thereto regarding MCL 440.9607(b).

STANDARD 16.20

INCLUSION OF LENGTH OF REDEMPTION PERIOD IN PUBLISHED NOTICE OF SALE IN FORECLOSURE BY ADVERTISEMENT

STANDARD: IN FORECLOSURE BY ADVERTISEMENT OF A MORTGAGE EXECUTED ON OR AFTER JANUARY 1, 1965, THE LENGTH OF THE REDEMPTION PERIOD MUST BE INCLUDED IN THE PUBLISHED NOTICE OF SALE.

Problem A: A mortgage executed in 1958 was foreclosed by advertisement in 1962. The published notice of sale did not include the length of the redemption period. Is the notice sufficient?

Answer: Yes.

Problem B: A mortgage executed in 1989 was foreclosed by advertisement in 1992. The published notice of sale did not state the redemption period. Is the notice sufficient?

Answer: No.

Authority: MCL 600.3212.

Comment: MCL 600.3232 provides that the officer making the foreclosure sale shall endorse on the deed the time when it will become operative unless redeemed. MCL 600.3248 provides that in making the endorsement the officer may rely conclusively on the redemption period included in the notice of sale. In cases where abandonment is claimed, the length of the redemption period is sometimes stated in the notice of sale in the alternative. See, MCL 600.3204(9), (10) and (11), 600.3241 and 600.3241a. The Committee expresses no opinion as to whether the inclusion of the length of the redemption period in the alternative complies with MCL 600.3212.

STANDARD 16.21

IRREGULARITIES IN PUBLISHED NOTICE OF SALE IN FORECLOSURE BY ADVERTISEMENT

STANDARD: SLIGHT AND INCONSEQUENTIAL IRREGULARITIES IN THE PUBLISHED NOTICE OF SALE IN FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT DO NOT INVALIDATE THE FORECLOSURE SALE.

Problem A: The published notice of sale to foreclose a mortgage by advertisement identified the mortgagee as “Dixon,” but the correct name was “Dickson.” The notice was otherwise correct. Is the notice sufficient?

Answer: Yes. By the rule of *idem sonans*, the names are deemed to be the same.

Problem B: The published notice of sale in a foreclosure by advertisement described a *mesne* assignee as Union Guardian Trust Company, but the correct name of the assignee was Union Guardian Trust Company of Detroit, a Michigan corporation, Trustee. The mortgage was foreclosed by advertisement by a subsequent assignee. Is the notice sufficient?

Answer: Yes. The name of a *mesne* assignee, if included, need not be stated with absolute accuracy.

Problem C: The published notice of sale to foreclose a mortgage by advertisement incorrectly states the date of the mortgage. The date, liber and page of its recording were correctly stated. Is the notice sufficient?

Answer: Yes. The correct recording information is sufficient to identify the mortgage.

Problem D: The published notice of sale to foreclose a mortgage by advertisement failed to state the recording date of the mortgage, but correctly stated the liber and page. Is the notice sufficient?

Answer: Yes. The recording date can be ascertained from the recorded mortgage.

Problem E: The published notice of sale to foreclose a mortgage by advertisement stated that the sale will be held on Thursday, March 10, 1993, which date was actually a Friday. Is the notice sufficient?

Answer: Yes. There is no requirement that the day of the week be stated. In case of any discrepancy, the day of the month is controlling.

Problem F: The published notice of sale to foreclose a mortgage by advertisement described the real property as being situated at the northwest corner of a certain street intersection. The real property was situated at the northeast corner of the intersection. The liber and page of the recorded plat which includes the real property were correctly stated. Is the notice sufficient?

Answer: Yes. The correct reference to the recorded plat is sufficient.

Problem G: The published notice of sale to foreclose a mortgage by advertisement was signed in the name of First State Bank of Newton as mortgagee. The name of the bank was First State Savings Bank of Newton. The name of the bank was correctly stated in that part of the notice describing the parties to the mortgage. Is the notice sufficient?

Answer: Yes. The notice is sufficient if it correctly names the foreclosing mortgagee; signing of the notice is not required.

Authorities: Generally: MCL 600.3212.

Problem A: *Reading v Waterman*, 46 Mich 107, 8 NW 691 (1881).

Problem B: *Guardian Depositors Corp v Keller*, 286 Mich 403, 282 NW 194 (1938).

Problem C: *Reading v Waterman*, 46 Mich 107, 8 NW 691 (1881); *Brown v Burney*, 128 Mich 205, 87 NW 221 (1901).

Problem D: *Lau v Scribner*, 197 Mich 414, 163 NW 914 (1917).

Problem E: *State Savings Bank v Wayne Circuit Judge*, 95 Mich 100, 54 NW 632 (1893); *First State Bank of Decatur v Day*, 188 Mich 228, 154 NW 101 (1915).

Problem F: *Guardian Depositors Corp v Keller*, 286 Mich 403, 282 NW 194 (1938).

Problem G: *Mich State Insurance Co v Soule*, 51 Mich 312, 16 NW 662 (1883).

STANDARD 16.22

MATTERS REQUIRED TO BE INCLUDED IN NOTICE OF SALE IN FORECLOSURE BY ADVERTISEMENT

STANDARD: THE PUBLISHED NOTICE OF SALE IN FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT NEED INCLUDE ONLY THOSE MATTERS REQUIRED BY THE FORECLOSURE STATUTE.

Problem A: In foreclosure of a mortgage by advertisement, the liber and page of the recorded mortgage are not included in the published notice of sale. Is the notice sufficient?

Answer: Yes.

Problem B: In foreclosure of a mortgage by advertisement, the published notice of sale includes the recording date of the mortgage, but not the hour and minute of recording. Is the notice sufficient?

Answer: Yes.

Problem C: In foreclosure of a mortgage by advertisement, the names of the grantees of the mortgagor, including the owner at the time of foreclosure, are not included in the published notice of sale. Is the notice sufficient?

Answer: Yes.

Problem D: In foreclosure of a mortgage by advertisement, the published notice of sale fails to state that no legal proceedings to enforce the mortgage debt are pending. Is the notice sufficient?

Answer: Yes.

Problem E: In foreclosure of a mortgage by advertisement, the published notice of sale does not include any reference to previous foreclosures by advertisement which were either defective or not carried to completion. Is the notice sufficient?

Answer: Yes. Foreclosure by advertisement is not a suit or proceeding at law within the meaning of the foreclosure statute.

Problem F: In foreclosure of a mortgage by advertisement, the published notice of sale identifies the mortgagee by its name in the recorded mortgage, rather than the different name subsequently adopted by the mortgagee. Is the notice sufficient?

Answer: Yes.

Authorities: Generally: MCL 600.3212.

Problem A: *McCammom v Detroit, Lansing & Northern R Co*, 103 Mich 104, 61 NW 273 (1894).

Problem B: *Lee v Clary*, 38 Mich 223 (1878).

Problem D: *Guardian Depositors Corp v Keller*, 286 Mich 403, 282 NW 194 (1938).

Problem E: *Lee v Clary*, 38 Mich 223 (1878).

Problem F: *Union Guardian Trust Co v Kowalsky*, 267 Mich 110, 255 NW 171 (1934).

STANDARD 16.23

TIME REQUIRED BETWEEN FIRST PUBLICATION AND FORECLOSURE SALE

STANDARD: IN FORECLOSURE OF A MORTGAGE BY ADVERTISE-
MENT, THE NOTICE MUST BE PUBLISHED ONCE EACH
WEEK FOR AT LEAST FOUR SUCCESSIVE WEEKS AND
THE SALE MUST BE HELD NOT LESS THAN 28 DAYS AF-
TER THE FIRST PUBLICATION.

Problem A: The sheriff's deed in foreclosure by advertisement of a mortgage executed on April 1, 1992 shows publication once each week for four successive weeks with the sale being held on the day following the fourth publication, 22 days after the first publication. Is the foreclosure valid?

Answer: No.

Problem B: A mortgage executed and recorded in 1990 was foreclosed by advertisement in 1993. The sheriff's deed shows publication of the notice of sale once each week for four successive weeks with the sale being held 28 days after the first publication. Is the foreclosure valid?

Answer: Yes.

Authorities: Generally: MCL 600.3208.

Problem A: *Gantz v Toles*, 40 Mich 725 (1879); *Bacon v Kennedy*, 56 Mich 329, 22 NW 824 (1885); *Casey v Goetzen*, 240 Mich 41, 214 NW 948 (1927).

Problem B: *State Savings Bank v Matthews*, 123 Mich 56, 81 NW 918 (1900); *Grand River Avenue Church of Christ v Berkshire Life Insurance Co*, 254 Mich 480, 236 NW 881 (1931).

Comment A: In *Jackson Investment Corporation v Pittsfield Products, Inc.*, 162 Mich App 750, 413 NW2d 99 (1987), the Court of Appeals held that the failure of the notice of sale to satisfy the requirements of

MCL 600.3208 renders a subsequent foreclosure sale voidable, not void.

Comment B: Publication may be in any newspaper published in the county where the premises included in the mortgage and intended to be sold, or some part of them, are situated. MCL 600.3208. The term “newspaper,” as used in the foreclosure statute, is defined in MCL 600.1461.

For cases involving compliance of particular newspapers with statutory requirements, see *Hoock v Sloman*, 155 Mich 1, 118 NW 489 (1908); *Lau v Scribner*, 197 Mich 414, 163 NW 914 (1917); and *Moss v Keary*, 231 Mich 295, 204 NW 93 (1925).

STANDARD 16.24

POSTING OF NOTICE OF SALE IN FORECLOSURE BY ADVERTISEMENT

STANDARD: IN FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT, A TRUE COPY OF THE PUBLISHED NOTICE OF SALE MUST BE POSTED IN A CONSPICUOUS PLACE UPON ANY PART OF THE REAL PROPERTY BEING FORECLOSED WITHIN 15 DAYS AFTER THE FIRST PUBLICATION OF THE NOTICE OF SALE.

Problem: In foreclosure of a mortgage by advertisement, the first notice of sale was published on September 6, 1992. The published notice of sale was posted on the mortgaged real property on September 26, 1992. The sale was held on the day specified in the notice. Is the sale valid?

Answer: No.

Authority: MCL 600.3208.

Comment A: For an example of what may qualify as a conspicuous place for the posting of the notice of sale, see *Jennings v Arnold*, 272 Mich 599, 262 NW 419 (1935).

Comment B: In *Jackson Investment Corporation v Pittsfield Products, Inc.*, 162 Mich App 750, 413 NW2d 99 (1987), the Court of Appeals held that a defect in the notice of sale renders a subsequent foreclosure sale avoidable, not void. Although the question before the court concerned adequacy of the published notice, the court's opinion encompassed all requirements of notice under MCL 600.3208 and 600.3212.

STANDARD 16.25

SALE OF DISTINCT TRACTS IN FORECLOSURE BY ADVERTISEMENT

STANDARD: IN FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT, MORTGAGED REAL PROPERTY CONSISTING OF DISTINCT FARMS, TRACTS, OR LOTS, NOT OCCUPIED AS ONE PARCEL, MUST BE SOLD SEPARATELY IF THERE IS NO PROVISION IN THE MORTGAGE FOR SALE EN MASSE. NO MORE OF SUCH DISTINCT FARMS, TRACTS, OR LOTS MAY BE SOLD THAN NECESSARY TO SATISFY THE AMOUNT DUE.

Problem: Robert Brown mortgaged Blackacre to Edward Lane by a metes and bounds description and then sold several tracts, each having an area of 11 acres, under land contracts. Lane released some but not all of these tracts from the mortgage. In a foreclosure of the mortgage by advertisement, Blackacre, excluding the tracts previously released, was sold as one parcel. Is the foreclosure sale valid?

Answer: No. The contract purchasers were in at least constructive possession of the tracts which they had purchased. This negated the possibility of the unreleased portion of Blackacre being occupied as one parcel.

Authorities: MCL 600.3224. *Lee v Mason*, 10 Mich 403 (1862); *O'Connor v Keenan*, 132 Mich 646, 94 NW 186 (1903); *Walker v Schultz*, 175 Mich 280, 141 NW 543 (1913); *Jerome v Coffin*, 243 Mich 324, 220 NW 675 (1928); *Northwestern Loan & Discount Corp v Scully*, 256 Mich 202, 239 NW 352 (1931); *Masalla v Bisson*, 359 Mich 512, 102 NW2d 468 (1960).

Comment A: In sale on foreclosure by advertisement, the controlling factor in determining how the real property should be sold is not whether it is separately described, but whether it is occupied as a single parcel. *Larzelere v Starkweather*, 38 Mich 96 (1878). Although the cited statutory provision is otherwise mandatory in foreclosure by advertisement of separate parcels, the Committee believes, on the authority

of *Metropolitan Life Insurance Co v Foote*, 95 Mich App 399, 290 NW2d 158 (1980), leave to appeal denied, 412 Mich 889 (1981), that if the mortgage authorizes a foreclosure sale *en masse*, it will be binding on the parties to the mortgage, in the absence of third party interests or bad faith on the part of the mortgagee.

Comment B: With respect to sales of distinct tracts in foreclosure by advertisement of mortgages held by Michigan State Housing Development Authority, see MCL 125.1449(f).

STANDARD 16.26

SALE OF DISTINCT TRACTS IN JUDICIAL FORECLOSURE

STANDARD: IN A SALE ON JUDICIAL FORECLOSURE OF A MORTGAGE, MORTGAGED REAL PROPERTY CONSISTING OF DISTINCT FARMS, TRACTS, OR LOTS SHALL BE SOLD SEPARATELY, UNLESS IT APPEARS TO THE COURT THAT:

- (A) SALE OF INDIVIDUAL PARCELS WILL INJURE THE INTERESTS OF THE PARTIES;
- (B) SALE OF THE WHOLE PREMISES WILL BE MOST BENEFICIAL TO THE PARTIES; OR
- (C) THE MORTGAGE PERMITS THE SALE TO BE HELD *EN MASSE* AND THERE IS NO SHOWING THAT SUCH A SALE IS BEING MADE IN BAD FAITH.

IF THE REAL PROPERTY IS SOLD SEPARATELY, NO MORE OF THE DISTINCT FARMS, TRACTS, OR LOTS MAY BE SOLD THAN NECESSARY TO SATISFY THE AMOUNT DUE.

Problem A: Robert Brown owned Blackacre, a platted subdivision containing four lots, each improved with a free standing office building leased to various tenants. Brown mortgaged Blackacre to Edward Lane. In a judicial foreclosure of the mortgage, Brown objected to the sale of the lots individually. However, the court found that neither party's interest would be injured by the sale of individual lots and entered an order providing for the lots to be sold separately. Is the foreclosure sale valid?

Answer: Yes.

Problem B: Same facts as in Problem A, except that the mortgage permits Lane to elect to have the lots sold *en masse* rather than individually. In the judicial foreclosure, Brown objected to the sale of the lots *en masse* but

did not show that such a sale would be in bad faith. The court entered an order providing for the lots to be sold *en masse*. Is the foreclosure sale valid?

Answer: Yes.

Authorities: Generally: MCL 600.3165. *Vaughn v Nims*, 36 Mich 297 (1877); *Masella v Bisson*, 359 Mich 512, 102 NW2d 468 (1960).

Problem B: *Metropolitan Life Insurance Co v Foote*, 95 Mich App 399, 290 NW2d 158 (1980); *lv den*, 412 Mich 889 (1981).

Comment: With respect to sales of distinct tracts in judicial foreclosure of mortgages held by the Michigan State Housing Development Authority, see MCL 125.1448n.

STANDARD 16.27

EFFECT OF MILITARY SERVICE ON VALIDITY OF SALE IN FORECLOSURE BY ADVERTISEMENT

STANDARD: UNLESS THE FORECLOSURE SALE IS MADE PURSUANT TO EITHER AN ORDER PREVIOUSLY GRANTED BY A COURT AND A RETURN THERETO MADE AND APPROVED BY THE COURT OR AN AGREEMENT EXECUTED DURING OR AFTER THE PERIOD OF MILITARY SERVICE OF THE OWNER, A SALE ON FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT IS INVALID AS AGAINST THE OWNER IF THE OWNER WAS IN MILITARY SERVICE ON THE DATE OF SALE OR WITHIN THREE MONTHS PRIOR THERETO, IF:

- (A) THE OWNER OF THE MORTGAGED PROPERTY HELD TITLE AT THE COMMENCEMENT OF THE MILITARY SERVICE AND ON THE DATE OF THE SALE; AND
- (B) THE OBLIGATION SECURED BY THE MORTGAGE ORIGINATED BEFORE THE OWNER'S PERIOD OF MILITARY SERVICE.

Problem A: A mortgage covering Blackacre was foreclosed by advertisement in 1993. The record does not disclose whether any owner of Blackacre was in the military service of the United States. Is the sale valid?

Answer: The validity of the sale cannot be determined, because the owner's military service status is unknown. A recorded affidavit would provide *prima facie* evidence of the owner's military service status.

Problem B: Amanda Brown mortgaged Blackacre to Edward Lane in 1990. Brown has been in military service since 1991. In 1993, Lane foreclosed the mortgage by advertisement and the sale was held on December 10, 1993. Is the foreclosure valid?

Answer: No.

Problem C: Same facts as in Problem B, except that Brown was honorably discharged from military service on September 1, 1993. Is the foreclosure sale valid?

Answer: Yes.

Problem D: Same facts as in Problem B, except that Brown was in the U.S. Navy Reserves and was ordered to active duty on November 1, 1993. Is the foreclosure valid?

Answer: No.

Authorities: 50 USC App 511, 516, 517 and 532.

Comment A: The benefits of 50 USC App 532 extend to any person on active duty or recently released from active duty, any person who has been ordered to report for induction under the Military Selective Service Act (50 USC App 451 *et seq.*), any member of a reserve component of the Armed Forces who is ordered to report for military service, and certain others as provided in the Soldiers' and Sailors' Civil Relief Act of 1940, as amended. 50 USC App 501 *et seq.*

Comment B: The recording of an affidavit as to the military service of a person named in a mortgage is permitted. The affidavit must include a description of the real property involved by setting out the description in full or by incorporating the same by reference to a recorded instrument in the chain of title which contains a description of the real property. The affidavit is *prima facie* evidence of the facts stated. MCL 565.451a, 565.451c and 565.453.

Comment C: A false affidavit as to military service cannot be used as the basis of a valid foreclosure. *Wilkin v Shell Oil Co.*, 197 F2d 42 (CA 10, 1951), *cert den*, 344 US 854, 73 S Ct 92, 97 L Ed 663 (1952), *rehearing den* 344 US 888, 73 S Ct 183, 97 L Ed 687 (1952).

STANDARD 16.28

EFFECT OF FAILURE TO RECORD DEED WITHIN 20 DAYS AFTER SALE IN FORECLOSURE BY ADVERTISEMENT

STANDARD: FAILURE TO RECORD THE DEED GIVEN AT A SALE IN FORECLOSURE BY ADVERTISEMENT WITHIN 20 DAYS AFTER SALE DOES NOT INVALIDATE THE SALE, BUT CAUSES THE PERIOD OF REDEMPTION TO RUN FROM THE DATE OF RECORDING.

Problem: Robert Brown, a single man, mortgaged Blackacre to Edward Lane. The mortgage was foreclosed by advertisement, and sale was held on January 16, 1995. On that day, the officer who conducted the sale executed a deed of Blackacre to Lane. The deed stated that it would become effective six months after the date of sale, which was the applicable redemption period. The deed was not recorded until April 16, 1995. On August 1, 1995, Edward Lane and Elsie Lane, husband and wife, deeded Blackacre to Simon Grant. Did Grant acquire title to Blackacre free of the interest of Brown?

Answer: No. Because the deed was not recorded within 20 days after the sale, MCL 600.3232, Brown or his successors in interest can redeem Blackacre through October 16, 1995.

Authorities: MCL 600.3232 and 600.3240. *Perkins v Keller*, 43 Mich 53, 4 NW 559 (1880); *Mills v Jirasek*, 267 Mich 609, 255 NW 402 (1934).

Comment: If failure to record the foreclosure sale deed within the 20-day period adversely affects the rights of third parties, the deed might not be valid as to them. *Mills v Jirasek, supra*.

STANDARD 16.29

TIME TO CONTEST SALE IN FORECLOSURE BY ADVERTISEMENT

STANDARD: THE VALIDITY OF A SALE IN FORECLOSURE BY ADVERTISEMENT MAY NOT BE CONTESTED BY THE MORTGAGOR OR THOSE IN PRIVITY WITH THE MORTGAGOR AFTER FIVE YEARS AFTER EXPIRATION OF THE REDEMPTION PERIOD.

Problem: Robert Brown mortgaged Blackacre to Edward Lane. The mortgage was foreclosed by advertisement in 1987. Lane purchased Blackacre at the sale. In 1994, Lane brought an action to quiet title. Brown's answer asserted that the foreclosure proceedings were invalid. Is Brown's defense barred?

Answer: Yes. The statutory five-year period bars not only actions challenging a foreclosure sale, but also defenses asserting irregularities in a sale.

Authorities: MCL 600.5801. *Olmstead v Johnson*, 313 Mich 57, 20 NW2d 809 (1945); *US v Garno*, 974 F Supp 628 (ED Mich 1997).

Comment: MCL 600.5801 applies where the foreclosure sale is claimed to be invalid, but does not bar a claim of title adverse to that of the mortgagor. *Lau v Pontiac Commercial & Savings Bank*, 260 Mich 73, 244 NW 233 (1932).

STANDARD 16.30

MISDESCRIPTION IN NOTICE OF SALE IN JUDICIAL MORTGAGE FORECLOSURE

STANDARD: THE NOTICE OF SALE PURSUANT TO A JUDGMENT OF FORECLOSURE MUST DESCRIBE THE REAL PROPERTY TO BE SOLD WITH COMMON CERTAINTY BY SETTING FORTH THE NAME OR NUMBER OF THE TOWNSHIP IN WHICH IT IS LOCATED, AND THE NUMBER OF THE LOT, OR BY OTHER APPROPRIATE DESCRIPTION.

Problem: In foreclosure of a mortgage by judicial proceedings, the real property was described in the notice of sale as Lot 97 of Sweetwater Subdivision, according to the recorded plat thereof. No such plat exists. Was the notice valid?

Answer: No.

Authorities: MCL 600.6052 and 600.6091.

Comment: A description of the real property with common certainty, has been interpreted to mean a description with sufficient accuracy to enable the public by exercise of ordinary intelligence to identify the property or to be directed to a means of obtaining an exact description. *Provident Mutual Life Insurance Co v Vinton Co*, 282 Mich 84, 275 NW 776 (1937); *Guardian Depositors Corp v Keller*, 286 Mich 403, 282 NW 194 (1938).

STANDARD 16.31

PUBLICATION AND POSTING OF NOTICE OF SALE IN JUDICIAL MORTGAGE FORECLOSURE

STANDARD: IN FORECLOSURE OF A MORTGAGE BY JUDICIAL PROCEEDINGS, PUBLICATION OF THE NOTICE OF SALE MAY NOT BE COMMENCED UNTIL THE TIME FIXED BY THE JUDGMENT FOR PAYMENT HAS EXPIRED AND SIX MONTHS AFTER COMMENCEMENT OF THE ACTION. THE NOTICE MUST BE POSTED NOT LESS THAN 42 DAYS BEFORE THE SALE AND PUBLISHED ONCE EACH WEEK FOR AT LEAST SIX SUCCESSIVE WEEKS BEFORE THE SALE.

Problem: In foreclosure of a mortgage by judicial proceedings, the notice of sale was published once each week for six successive weeks before the sale. It was first published after the time fixed by the judgment for payment had expired, and more than six months after commencement of the action. The notice of sale was posted more than 42 days before the sale, but the sale was held less than 42 days after the first publication. Is the sale valid?

Answer: Yes. Notice must be posted no less than 42 days before the sale but publishing the notice each week for six successive weeks in advance of the sale is sufficient to comply with the statute and court rule, even though the sale occurred less than 42 days after the first publication.

Authorities: MCR 3.410(C); 600.6052 and 600.6091. *Carpenter v Smith*, 147 Mich App 560, 383 NW2d 248 (1985).

Comment: The 42-day period for the posting of notice excludes the day of posting and includes the day of sale. *Wesbrook Lane Realty Corp v Pokorny*, 250 Mich 548, 231 NW 66 (1930).

STANDARD 16.32

AFFIDAVIT OF POSTING OF NOTICE OF SALE IN JUDICIAL MORTGAGE FORECLOSURE

STANDARD: TO ACQUIRE VALID TITLE UNDER A MORTGAGE FORECLOSURE DEED ON A SALE HELD PURSUANT TO A JUDGMENT OF FORECLOSURE, AN AFFIDAVIT MUST BE FILED WITH THE COURT, DISCLOSING THAT NOTICE OF SALE HAS BEEN POSTED IN ACCORDANCE WITH THE STATUTE IN THE TOWNSHIP OR CITY WHERE THE SALE WAS HELD AND, IF THE FORECLOSED REAL PROPERTY IS LOCATED IN ANOTHER TOWNSHIP OR CITY, THEN ALSO IN THE OTHER TOWNSHIP OR CITY.

Problem: Blackacre was sold at a judicial mortgage foreclosure sale. The sale was held in a township other than that in which the mortgaged premises were located. The report of sale stated that notices of the sale were posted in both townships; however, the attached affidavits disclosed posting only in the township where the sale occurred. Was the sale valid?

Answer: No. The recital contained in the report of sale that there had been a posting in both townships did not eliminate the need for an affidavit disclosing proper posting.

Authorities: MCL 600.6052 and 600.6091. *New York Baptist Union v Atwell*, 95 Mich 239, 54 NW 760 (1893).

Comment: This Standard is to be considered in connection with MCL 600.6054, which provides that the failure of any officer to give the notice of sale required by MCL 600.6052 shall not affect the validity of any sale made to a purchaser in good faith without notice of the omission.

See also *Kelso v Coburn*, 334 Mich 43, 53 NW2d 686 (1952).

STANDARD 16.33

NECESSITY OF CONFIRMATION OF REPORT OF SALE IN JUDICIAL MORTGAGE FORECLOSURE

STANDARD: CONFIRMATION OF A REPORT OF SALE IS NECESSARY TO VALIDATE A DEED GIVEN PURSUANT TO A MORTGAGE FORECLOSURE BY JUDICIAL PROCEEDINGS.

Problem: A mortgage was foreclosed by judicial proceedings. A judgment of foreclosure was entered, a foreclosure sale was properly held, a report of sale was filed and a deed recorded, but the sale was not confirmed by the court. Did the purchaser acquire good title subject only to the right of redemption?

Answer: No.

Authorities: *Demaray v Little*, 17 Mich 386 (1868); *Howard v Bond*, 42 Mich 131, 3 NW 289 (1879); *Gerasimos v Wartell*, 244 Mich 588, 222 NW 211 (1928); *Mich Trust Co v Cody*, 264 Mich 258, 249 NW 844 (1933); *Detroit Trust Co v Hart*, 277 Mich 561, 269 NW 598 (1936).

Comment: No specific statute requires confirmation of a mortgage foreclosure sale. It is not required by any court rule, but it has always been held to be necessary. Confirmation of sale is not a matter of right, even if unopposed, and the court may in the exercise of its equitable powers refuse to confirm a sale and order a resale.

STANDARD 16.34

MISDESCRIPTION IN DEED PURSUANT TO JUDICIAL MORTGAGE FORECLOSURE

STANDARD: THE DESCRIPTION IN A DEED GIVEN PURSUANT TO A MORTGAGE FORECLOSURE BY JUDICIAL PROCEEDINGS MUST IDENTIFY THE REAL PROPERTY WITH REASONABLE CERTAINTY, BUT A CLERICAL ERROR MAY BE CORRECTED.

Problem: A mortgage covered lots numbered consecutively from 74 through 93. The mortgage was foreclosed by judicial proceedings, and the judgment and notice of sale contained the correct description. The report of sale and the deed described the property as lots numbered consecutively from 79 through 93. Upon discovery of the error, the court, after notice, confirmed the sale, *nunc pro tunc*, in a corrected report. May the report of sale and the deed be corrected?

Answer: Yes. The error was clerical and was apparent from the court records. The corrections did not disturb the judgment and proceedings thereunder, but merely made the record conform to the facts.

Authority: *Walsh v Colby*, 153 Mich 602, 117 NW 207 (1908).

STANDARD 16.35

TIME TO CONTEST SALE PURSUANT TO JUDICIAL MORTGAGE FORECLOSURE

STANDARD: THE VALIDITY OF A DEED GIVEN PURSUANT TO JUDICIAL MORTGAGE FORECLOSURE PROCEEDINGS MAY NOT BE CONTESTED BY THE MORTGAGOR OR THOSE IN PRIVITY WITH THE MORTGAGOR AFTER FIVE YEARS AFTER THE EXPIRATION OF THE REDEMPTION PERIOD, IF THE COURT HAD JURISDICTION AND THE REPORT OF SALE WAS CONFIRMED.

Problem: A mortgage executed by Robert Brown was foreclosed by judicial proceedings and the report of sale confirmed in 1988. In 1995 Brown brought an action against the purchaser at the sale alleging that the sale was invalid because of certain irregularities in the foreclosure. Does the statute of limitations bar Brown's action?

Answer: Yes.

Authorities: MCL 600.5801. *West Michigan Park Association v Pere Marquette Railroad Co*, 172 Mich 179, 137 NW 799 (1912).

Comment: MCL 600.5801 applies only where the foreclosure proceedings are claimed to be invalid. It cannot be used as a defense against a claim of title adverse to that of the mortgagor. *Donovan v Ward*, 100 Mich 601, 59 NW 254 (1894).

STANDARD 16.36

EFFECT OF MILITARY SERVICE ON REDEMPTION FROM FORECLOSURE SALE

STANDARD: THE RUNNING OF THE REDEMPTION PERIOD FROM A MORTGAGE FORECLOSURE SALE IS TOLLED BY THE MILITARY SERVICE OF THE OWNER.

Problem A: A mortgage covering Blackacre was foreclosed by advertisement. At the foreclosure sale on December 1, 1992, Blackacre was sold to Edward Lane. The sheriff's deed to Lane was recorded the same day. The record does not disclose whether the owner was in the military service of the United States at any time during the redemption period. In 1994, Lane deeded Blackacre to Samuel Peck. Did Peck acquire marketable title to Blackacre?

Answer: No. The sheriff's deed may not have become absolute. An affidavit that there were no parties as to whom the redemption period was extended on account of military service is *prima facie* evidence thereof and should be recorded.

Problem B: Robert Brown mortgaged Blackacre to Edward Lane in 1990. Brown has been in military service since 1991. In 1992, Lane brought judicial proceedings to foreclose the mortgage. The court determined that Brown's military service did not materially affect his ability to make payments and entered a judgment of foreclosure. At the foreclosure sale on December 10, 1993, Blackacre was sold to Lane. The sale was confirmed and the deed to Lane recorded. After expiration of the statutory redemption period, Lane deeded Blackacre to Samuel Peck. Did Peck acquire marketable title to Blackacre?

Answer: No. The redemption period would not begin to run against Brown until the end of his military service.

Problem C: Same facts as in Problem B, except that Brown enlisted in the U.S. Army on December 30, 1993. Did Peck acquire marketable title to Blackacre?

Answer: No. No part of Brown's time in military service may be included in computing the redemption period.

Problem D: Same facts as in Problem B, except that Brown was in the U.S. Army Reserves and on December 30, 1993, received an order to report for active duty. Did Peck acquire marketable title to Blackacre?

Answer: No.

Authorities: 50 USC App 525 and 517.

Comment A: Although 50 USC App 532 permits a court in a judicial proceeding to order a foreclosure sale if in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of the defendant's military service, the provisions of 50 USC App 525 concerning the tolling of the redemption period are mandatory and may not be abridged by a court. See, Standard 16.25 as to 50 USC App 532.

Comment B: The recording of an affidavit as to the military service of a person named in a mortgage is permitted. The affidavit must include a description of the real property involved by setting out the description in full or by incorporating the description by reference to a recorded instrument in the chain of title which contains a description of the real property. The affidavit is *prima facie* evidence of the facts stated. MCL 565.451a, 565.451c and 565.453.

Comment C: A false affidavit as to military service cannot be used as the basis of a valid foreclosure. *Wilkin v Shell Oil Co.*, 197 F2d 42 (CA 10, 1951), *cert den*, 344 US 854, 73 S Ct 92, 97 L Ed 663 (1952), *reh den*, 344 US 888, 73 S Ct 183, 97 L Ed 687 (1952).

STANDARD 16.37

ASSIGNMENT OF RENTS SECURING TRUST MORTGAGE

STANDARD: AN ASSIGNMENT OF RENTS CONTAINED IN, OR GIVEN IN CONNECTION WITH, A TRUST MORTGAGE IS ENFORCEABLE UPON DEFAULT, AFTER RECORDING OF A NOTICE OF DEFAULT IN THE OFFICE OF THE REGISTER OF DEEDS FOR THE COUNTY IN WHICH THE MORTGAGED PROPERTY IS SITUATED AND SERVICE OF A COPY OF THE NOTICE UPON THE OCCUPANTS OF THE PROPERTY.

Problem: A trust mortgage to Security Trust Company, as trustee, covering Blackacre, on which a five-unit apartment building was located, was executed and recorded on September 1, 1995. The mortgage contained an assignment of the rents and profits of the mortgaged property. On June 1, 1997, upon default under the mortgage, the trustee recorded a notice of default in the office of the register of deeds for the county in which Blackacre was situated, and also served a copy of the notice upon the occupants of the apartment building. Is the assignment enforceable against the occupants?

Answer: Yes.

Authorities: MCL 554.211, 554.212 and 554.213. *Guaranty Trust Co v Feldman*, 247 Mich 524, 226 NW 233 (1929); *Security Trust Co v Sloman*, 252 Mich 266, 233 NW 216 (1930); *Abrin v Equitable Trust Co*, 271 Mich 535, 261 NW 85 (1935).

Comment A: Discharge of a trust mortgage operates as a release of an assignment of rents contained in, or given in connection with, the trust mortgage.

Comment B: An assignment of rents contained in, or given in connection with, a trust mortgage executed before August 16, 1925 is not enforceable. *Central Trust Co v Wolf*, 262 Mich 209, 247 NW 159 (1933).

STANDARD 16.38

ASSIGNMENT OF RENTS SECURING MORTGAGE WHICH IS NOT TRUST MORTGAGE

STANDARD: AN ASSIGNMENT OF RENTS CONTAINED IN, OR GIVEN IN CONNECTION WITH, A MORTGAGE WHICH IS NOT A TRUST MORTGAGE, COVERING INDUSTRIAL OR COMMERCIAL REAL PROPERTY OTHER THAN AN APARTMENT BUILDING CONTAINING LESS THAN SIX UNITS, IS ENFORCEABLE UPON DEFAULT, AFTER RECORDING OF A NOTICE OF DEFAULT IN THE OFFICE OF THE REGISTER OF DEEDS FOR THE COUNTY IN WHICH THE MORTGAGED PROPERTY IS SITUATED AND SERVICE OF A COPY OF THE NOTICE, TOGETHER WITH A COPY OF THE INSTRUMENT UNDER WHICH THE ASSIGNMENT IS MADE, UPON THE OCCUPANTS OF THE PROPERTY.

Problem A: A mortgage given by Roberta Brown, covering Blackacre, on which a 100 unit apartment building was located, was executed and recorded on May 26, 1991. The mortgage was not a trust mortgage and contained an assignment of rents of the mortgaged real property. On March 20, 1994, Roberta Brown deeded Blackacre to Samuel Peck. On June 1, 1998, upon default under the mortgage, the mortgagee recorded a notice of default in the office of the register of deeds for the county in which Blackacre was situated, and served a copy of the notice and of the mortgage containing the assignment upon the occupants of the apartment building. Is Peck bound by the assignment of rents?

Answer: Yes.

Problem B: Same facts as in Problem A, except that the apartment building contained five units. Is Peck bound by the assignment of rents?

Answer: No, but Peck would have been bound if the mortgage had been a trust mortgage. See, Standard 16.37.

Authorities: Problem A: MCL 554.231, 554.232 and 554.283. *Smith v Mutual Benefit Life Insurance Co*, 362 Mich 114, 106 NW2d 515 (1960).

Problem B: MCL 554.231 and 600.2932. *Hazeltine v Granger*, 44 Mich 503, 7 NW 74 (1880); *Nusbaum v Shapero*, 249 Mich 252, 228 NW 785 (1930); *American Trust Co v Mich Trust Co*, 263 Mich 337, 248 NW 829 (1933).

Comment A: Even if no assignment of rents was contained in, or given in connection with, a mortgage, an assignment of rents subsequently entered into for a separate consideration may be enforceable. *Central Trust Co v Wolf*, 262 Mich 209, 247 NW 159 (1933); *Mass Mutual Life Insurance Co v Reutter*, 268 Mich 175, 255 NW 754 (1934); *Mass Mutual Life Insurance Co v Sutton*, 278 Mich 457, 270 NW 748 (1936).

Comment B: Discharge of a mortgage operates as a release of an assignment of rents contained in or given in connection with the mortgage.

Comment C: Before June 24, 1966, an assignment of rents given in connection with a mortgage that was not a trust mortgage was effective only as to those leases in effect when the mortgage was given. 1966 P.A. 151, effective June 24, 1966, amended MCL 554.232 to make such an assignment also effective as to leases entered into after execution of the mortgage.

STANDARD 16.39

FORECLOSURE OF MORTGAGE HELD BY MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY

STANDARD: ON OR AFTER DECEMBER 10, 1981, FORECLOSURE OF A MORTGAGE HELD BY THE MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY MUST COMPLY WITH THE PROCEDURES PROVIDED IN THE MICHIGAN STATE HOUSING DEVELOPMENT AUTHORITY ACT.

Authorities: MCL 125.1448, 600.3101 and 600.3201.

Comment: Before December 10, 1981, a mortgage held by the Michigan State Housing Development Authority could be foreclosed under the general foreclosure statutes.

STANDARD 16.40

LAND CONTRACT MORTGAGE

STANDARD: A LAND CONTRACT MORTGAGE IS AN APPROPRIATE INSTRUMENT TO ENCUMBER A LAND CONTRACT VENDOR'S OR VENDEE'S INTEREST IN REAL PROPERTY TO SECURE A DEBT OR OBLIGATION.

Problem A: Ruth Roe sold Blackacre on land contract to John Smith. Roe later granted a mortgage on Blackacre to Bank to secure the repayment of a debt. Is Roe's vendor's interest in Blackacre a real property interest which may be encumbered by a mortgage?

Answer: Yes.

Problem B: Same facts as in Problem A, except that Smith later granted a mortgage to Bank to secure repayment of a loan from Bank. Is Smith's vendee's interest in Blackacre a real property interest which may be encumbered by a mortgage?

Answer: Yes.

Problem C: Same facts as in Problem A, except that Roe defaulted on the land contract mortgage. Is Smith obligated to continue to make payments on the land contract?

Answer: Yes.

Problem D: Same facts as in Problem A, except that Smith fulfilled his obligations under the land contract. Is Roe obligated to convey Blackacre to Smith?

Answer: Yes.

Problem E: Same facts as in Problem D. Is Bank obligated to discharge the land contract mortgage?

Answer: Yes.

Authorities: Problems A and B: MCL 565.357; *Graves v American Acceptance Mortgage Corp*, 469 Mich 608, 677 NW2d 829 (2004).

Problem C: MCL 565.360(3).

Problem D: MCL 565.361(2).

Problem E: MCL 565.361(4).

Comment A: 1998 P.A. 106 resolved any uncertainty as to whether the interests created by a land contract should be treated as personal property or real property. The statute states, “[a] vendor or vendee under a land contract may grant a land contract mortgage to secure any debt or obligation that may be secured by a real estate mortgage.” MCL 565.357(1). In addition, the statute provides that “the interests of vendors and vendees subject to a land contract mortgage are real property interests.” MCL 565.357(2).

Comment B: With respect to Problem C, Smith must continue to make payments on the land contract until he receives notice that Bank has foreclosed on the land contract mortgage and Roe has not redeemed her interest. At that time, Smith must continue to make payments to the new owner (i.e., the successful bidder at foreclosure sale, its successors or assigns). MCL 565.360(3). However, if Smith has actual notice of the foreclosure sale, he must make any payments due during the redemption period to the register of deeds in accordance with MCL 600.6058.

Comment C: With respect to Problem D, unless Bank assumes the obligation, Roe remains obligated to deliver the deed to Smith. MCL 565.361(2).

Comment D: With respect to Problem E, the statute requires that the mortgagee “execute a discharge of the land contract mortgage or a release of the security assignment in the same manner as now provided by law for the discharge of mortgages.” MCL 565.361(4).

STANDARD 16.41

DEED IN LIEU OF FORECLOSURE

STANDARD: A DEED IN LIEU OF FORECLOSURE OF A MORTGAGE GIVEN FOR NEW CONSIDERATION, VOLUNTARILY AND WITHOUT FRAUD OR DURESS, IS VALID.

Problem A: In February 2000, Henry Roe mortgaged Blackacre to Abigail Lane. Later, Roe defaulted on the mortgage. The mortgage debt exceeded the value of the property. In August 2002, Roe deeded Blackacre to Lane in lieu of foreclosure in consideration of Lane's agreement not to sue Roe on the mortgage debt. Roe did so voluntarily and without fraud or duress. Was the deed valid?

Answer: Yes.

Problem B: Same facts as in Problem A, except that concurrent with Roe's execution of the mortgage, Roe executed a deed in lieu of foreclosure to Lane for Blackacre which was escrowed with an escrow agent. Under the mortgage, Lane had the right to delivery of the deed after a default in consideration of Lane's agreement not to sue Roe on the mortgage debt. Roe also agreed in the mortgage to waive his right of redemption. In August 2002, Lane obtained the deed from the escrow agent and recorded it. Was the deed valid?

Answer: No.

Authorities: Problem A: *Batty v Snook*, 5 Mich 231 (1858); *Gillam v Michigan Mortgage Inv Corp*, 224 Mich 405, 194 NW 981 (1923); *Russo v Wolbers*, 116 Mich App 327, 323 NW2d 385 (1982); *Oakland Hills Dev Corp v Lueders Drainage Dist*, 212 Mich App 284, 537 NW2d 258 (1995).

Problem B: *Oakland Hills Dev Corp v Lueders Drainage Dist*, *supra*.

Comment A: A deed of mortgaged property which is not given for new consideration, voluntarily and without fraud or duress is insufficient to waive the mortgagor's equitable or statutory right of redemption and violates the doctrine against clogging the

equity of redemption. Courts will scrutinize any transaction in which a mortgagor waives its equitable or statutory right of redemption. See, *Russo v Wolbers, supra*.

- Comment B:** To avoid application of the general rule that when a mortgagee acquires the fee, the mortgage and fee are merged and the mortgage is extinguished, it is common for a deed in lieu of foreclosure to include a non-merger clause containing a statement of intent that the mortgage and fee do not merge. See the Comment to Standard 16.4 and the authorities cited therein with regard to the merger doctrine. Preservation of the mortgage lien enables the mortgagee to foreclose and extinguish any subordinate liens or encumbrances.
- Comment C:** The adequacy of the new consideration is determined by the courts on a case by case basis.
- Comment D:** As a condition to insuring the mortgagee's title under a deed in lieu of foreclosure, title companies often require that the mortgagor furnish written confirmation of the existence of the default, the consideration for the deed and the adequacy thereof, and that the deed was given voluntarily and without fraud or duress. Such written confirmation typically is not recorded.
- Comment E:** In addition to conveying mortgaged property to a mortgagee before or "in lieu" of foreclosure, a deed given after the foreclosure sale for new consideration, voluntarily and without fraud or duress, is also sufficient to waive the statutory right of redemption.

STANDARD 16.42

PURCHASE BY MORTGAGEE AT SALE ON FORECLOSURE BY ADVERTISEMENT

STANDARD: A MORTGAGEE MAY PURCHASE THE MORTGAGED PROPERTY AT THE SALE ON FORECLOSURE BY ADVERTISEMENT.

Problem: John Smith mortgaged Blackacre to Robert Jones. The mortgage was foreclosed by advertisement. Jones was the successful bidder at the foreclosure sale. Was the sale valid?

Answer: Yes.

Authority: MCL 600.3228.

Comment A: A mortgagee may credit the amount of the mortgage debt to the amount of its bid, and if the amount of the mortgagee's bid equals or is less than the amount of the debt, it need not tender cash at the sale. *Feldman v Equitable Trust Co*, 278 Mich 619, 270 NW 809 (1937).

Comment B: If the mortgagee bids the full amount of the mortgage debt at the foreclosure sale and is the successful bidder, the debt is satisfied and the lien of the mortgage is extinguished. *Smith v General Mortgage Corp*, 402 Mich 125, 261 NW2d 710 (1978); *Bank of Three Oaks v Lakefront Properties*, 178 Mich App 551, 444 NW2d 217 (1989); *Pulleyblank v Cape*, 179 Mich App 690, 446 NW2d 345 (1989); *Emmons v Lake States Ins Co*, 193 Mich App 460, 284 NW2d 712 (1992); *Bank of America, N. A. v First American Title Ins Co*, 499 Mich 74, 878 NW2d 816 (2016).

STANDARD 16.43

INADEQUACY OF BID PRICE AT SALE ON FORECLOSURE BY ADVERTISEMENT

STANDARD: MERE INADEQUACY OF THE BID PRICE AT A SALE ON FORECLOSURE BY ADVERTISEMENT IS NOT ITSELF SUFFICIENT TO INVALIDATE THE SALE.

Problem: Munising Bank made a \$500,000 loan to Shipwreck Inc. secured by a mortgage on Blackacre. Shipwreck defaulted, and Munising foreclosed the mortgage by advertisement. Munising purchased Blackacre at the foreclosure sale by credit bidding \$100,000 of the \$500,000 in outstanding debt. The true value of Blackacre at the time of the sale was \$500,000. Shipwreck sued to set aside the sale because the bid price was less than the true value of the property. Was the sale valid?

Answer: Yes.

Authorities: MCL 600.3280. *Cameron v Adams*, 31 Mich 426 (1875); *Chabut v Chabut*, 66 Mich App 440, 239 NW2d 401 (1976).

Comment A: A sale on foreclosure by advertisement will not be set aside based on an inadequate sale price absent fraud or irregularity. *Cameron v Adams, supra; Macklem v Warren Construction Co*, 343 Mich 334, 72 NW2d 60 (1955).

Comment B: In a foreclosure by advertisement, the mortgagor or other person liable on the mortgage debt may have a defense and right of set-off to a deficiency claim under MCL 600.3280, if the property sold was fairly worth the amount of the debt at the time and place of sale or the amount bid was substantially less than its true value.

STANDARD 16.44

REDEMPTION PERIODS AFTER MORTGAGE FORECLOSURE SALE

STANDARD: (A) IF A MORTGAGE EXECUTED ON OR AFTER JANUARY 1, 1965 IS FORECLOSED BY ADVERTISEMENT, THE PROPERTY SOLD MAY BE REDEEMED FROM FORECLOSURE WITHIN THE FOLLOWING PERIODS FROM THE DATE OF SALE:

- (1) FOR COMMERCIAL OR INDUSTRIAL PROPERTY, OR MULTIFAMILY RESIDENTIAL PROPERTY IN EXCESS OF FOUR UNITS, SIX MONTHS;**
- (2) FOR RESIDENTIAL PROPERTY NOT EXCEEDING FOUR UNITS, IF THE AMOUNT CLAIMED TO BE DUE ON THE MORTGAGE AT THE DATE OF THE FORECLOSURE NOTICE IS MORE THAN 66-2/3% OF THE ORIGINAL DEBT SECURED BY THE MORTGAGE, SIX MONTHS UNLESS SUBPARAGRAPHS (3) OR (4) APPLY;**
- (3) FOR RESIDENTIAL PROPERTY NOT EXCEEDING FOUR UNITS, IF THE AMOUNT CLAIMED TO BE DUE ON THE MORTGAGE ON THE DATE OF THE FORECLOSURE NOTICE IS MORE THAN 66-2/3% OF THE ORIGINAL DEBT SECURED BY THE MORTGAGE AND THE PROPERTY IS ABANDONED UNDER MCL 600.3241, ONE MONTH;**
- (4) FOR RESIDENTIAL PROPERTY NOT EXCEEDING FOUR UNITS AND THE PROPERTY IS ABANDONED UNDER MCL 600.3241a, THE LATER OF 30 DAYS OR UNTIL THE TIME TO PROVIDE**

**NOTICE UNDER MCL 600.3241a(c)
EXPIRES; AND**

- (5) IF SUBPARAGRAPHS (1) THROUGH (4) DO NOT APPLY OR THE PROPERTY IS USED FOR AGRICULTURAL PURPOSES, ONE YEAR;**

PROVIDED, HOWEVER, THE REDEMPTION PERIOD CAN BE EXTINGUISHED EARLY UNDER SUBPARAGRAPHS (1), (2) AND (5) ABOVE BY ENTRY OF A DISTRICT COURT JUDGMENT FOR POSSESSION IN FAVOR OF THE PURCHASER UNDER MCL 600.3238(10) IF THE MORTGAGOR UNREASONABLY REFUSES AN INSPECTION OR IF DAMAGE TO THE PROPERTY IS IMMINENT OR HAS OCCURRED.

- (B) IF A MORTGAGE IS FORECLOSED BY JUDICIAL PROCEEDINGS, THE REAL PROPERTY SOLD MAY BE REDEEMED FROM FORECLOSURE WITHIN SIX MONTHS FROM THE DATE OF SALE.**

Problem A: In 2013, Acme Corporation granted a mortgage to State Bank on a manufacturing facility. State Bank foreclosed the mortgage by advertisement and was the successful bidder at the sale held on June 15, 2014. When did the redemption period expire?

Answer: December 15, 2014.

Problem B: Same facts as in Problem A, except that the property was an apartment project with 100 units. When did the redemption period expire?

Answer: December 15, 2014.

Problem C: In 2013, John and Mary Doe granted a mortgage to State Bank on their personal residence on a half-acre lot, securing a \$1,000,000 loan. State Bank foreclosed the mortgage by advertisement and was the successful bidder at the sale held on June 15, 2014. The foreclosure notice stated that the amount claimed to be due was \$900,000. When did the redemption period expire?

Answer: December 15, 2014.

Problem D: Same facts as in Problem C, except that the foreclosure notice stated that the amount claimed to be due was \$500,000. When did the redemption period expire?

Answer: June 15, 2015.

Problem E: Same facts as in Problem C, except that the Does abandoned their residence. Before commencing foreclosure, State Bank satisfied the inspection, notice and recording requirements of MCL 600.3241. No affidavit was given to State Bank or recorded within one month of the sale stating that anyone was occupying or intended to occupy the property. When did the redemption period expire?

Answer: July 15, 2014.

Problem F: Same facts as in Problem C, except that the Does abandoned their residence. State Bank did not satisfy the inspection, notice and recording requirements of MCL 600.3241 before commencing foreclosure. On August 15, 2014 (60 days after the foreclosure sale) State Bank satisfied the inspection, posting and notice requirements of MCL 600.3241a. No notice was given to State Bank by August 30, 2014 stating that the property was not abandoned. When did the redemption period expire?

Answer: August 30, 2014.

Problem G: In 2013, Acme Corporation granted a mortgage to State Bank on a manufacturing facility. State Bank foreclosed the mortgage by judicial proceedings, and was the successful bidder at the sale held on June 15, 2014. When did the redemption period expire?

Answer: December 15, 2014.

Authorities: (A) For foreclosure by advertisement, MCL 600.3240(7) through (13), 600.3241 and 600.3241a.

(B) For judicial foreclosure, MCL 600.3140.

- Comment A:** This Standard is limited to the statutes in effect as of June 19, 2014, because the statutes applicable to redemption periods have been amended frequently.
- Comment B:** In a foreclosure by advertisement, the mortgagor and its “heirs or personal representative, or any person that has a recorded interest in the property lawfully claiming under” them, are entitled to redeem the property from foreclosure, by paying the bid amount plus interest at the mortgage rate, plus certain fees. MCL 600.3240(1) and (2). In a judicial foreclosure, the mortgagor, its “heirs, executors, or administrators, or any person lawfully claiming” under them may redeem. 600.3140(1). Persons entitled to redeem have been held to include a second mortgagee, and a wife with a dower interest in the property foreclosed. *Chauvin v American State Bank*, 242 Mich 269 (1928) and *Tuller v Detroit Trust Co*, 259 Mich 670 (1932) (in the case of a judicial foreclosure), respectively. The redemption amount may be paid to the purchaser or its assigns or to the register of deeds. MCL 600.3240(1) and 600.3140(1). The purchaser must provide an affidavit with the sheriff’s deed stating the amount required to redeem, including a per diem amount. MCL 600.3240(2) and 600.3140(3).
- Comment C:** In computing the redemption period, the first day is excluded and the last day is included. If the last day is a Saturday, Sunday or legal holiday, the redemption period is extended to include the next day which is not a Saturday, Sunday or legal holiday. MCL 8.6 and MCR 1.108.
- Comment D:** MCL 600.3241 provides that abandonment is conclusively presumed upon satisfaction of the following: (a) within 30 days before commencing foreclosure, the mortgagee mails by certified mail, return receipt requested, to the mortgagor’s last known address, a notice that the mortgage is in default and that the mortgagee intends to foreclose; (b) before commencing foreclosure, the mortgagee executes and records an affidavit stating that the notice was mailed and the mortgagor has not responded; (c) before commencing foreclosure, the mortgagee mails the recorded affidavit to the mortgagor at the mortgagor’s last known address; and (d) before expiration of the applicable redemption period, the mortgagor or anyone else entitled to redeem does not give a written affidavit to the mortgagee and record a duplicate original stating that the mortgagor or person

claiming under the mortgagor is occupying or intends to occupy the premises.

MCL 600.3241a provides that abandonment is conclusively presumed upon satisfaction of the following requirements before the end of the redemption period: (a) personal inspection by the mortgagee which does not reveal that the mortgagor or persons claiming under the mortgagor are occupying or will occupy the premises; (b) posting of a notice at the time of the personal inspection, and mailing of a notice to the mortgagor by certified mail, return receipt requested, stating that the mortgagee considers the premises abandoned and that the mortgagor will lose all rights of ownership 30 days after the foreclosure sale or when the time to provide notice under subsection (c) expires, whichever is later, unless the mortgagor or its heirs, executors or administrators, or a person lawfully claiming under any of them provides notice that the premises are not abandoned; and (c) within 15 days after the notice required by subsection (b) was posted and mailed, the mortgagor or its heirs, executors or administrators, or a person lawfully claiming under any of them, has not given written notice by mail to the mortgagee at the address provided in the mortgagee's notice stating that the premises are not abandoned.

The Committee expresses no opinion as to whether a purchaser at a foreclosure sale who is not the mortgagee may claim the redemption periods under MCL 600.3241 and 600.3241a.

Comment E: MCL 600.3240(7) through (13), 600.3241 and 600.3241a do not define the terms “commercial or industrial property,” “multifamily residential property,” “units” or “residential property.” It is not clear from the statutes or case law whether these terms pertain to the actual, intended or legally permitted use of a property, or at what point in time the use is determined (e.g., on the date the mortgage is granted, the date the foreclosure notice is published or the date of the foreclosure sale). Also, the statutes and case law do not explain what is meant by the term “original indebtedness secured by the mortgage.” The Committee expresses no opinion on the meaning of any of these terms.

Comment F: There is a rebuttable presumption that property is used for agricultural purposes if the requirements of MCL 600.3240(17) are satisfied.

- Comment G:** The purchaser at a foreclosure sale by advertisement has the right to inspect the interior and exterior of the property after the foreclosure sale, and to request information or evidence regarding the condition of the property, provided certain notices are given. MCL 600.3237. The mortgagor's unreasonable refusal to allow such inspections or imminent or actual damage to the property can be grounds for a district court action granting the purchaser possession and early extinguishment of the right of redemption. MCL 600.3238.
- Caveat A:** If the sheriff's deed is not recorded within 20 days after the foreclosure sale, the redemption period commences when the sheriff's deed is recorded. See Standard 16.28.
- Caveat B:** Military service of a mortgagor tolls the redemption period. See Standard 16.36.
- Caveat C:** If the United States has a junior lien on foreclosed property, the redemption period and redemption amount may be affected. 26 USC 7425(d)(1); 26 CFR 301.7425-4; 28 USC 2410(c) and (d). See Standard 16.17.

CHAPTER XVII
CONSTRUCTION LIENS



STANDARD 17.1

**DURATION OF ENFORCEABILITY OF
CONSTRUCTION LIEN**

STANDARD: A CONSTRUCTION LIEN CEASES TO BE ENFORCEABLE ONE YEAR AFTER THE DATE OF RECORDING OF THE CLAIM OF LIEN, UNLESS A FORECLOSURE PROCEEDING HAS BEEN COMMENCED; PROVIDED, HOWEVER, THAT IF A NOTICE OF LIS PENDENS WITH RESPECT TO THE PROCEEDING HAS NOT BEEN RECORDED, THE LIEN MAY NOT BE FORECLOSED AGAINST THE INTEREST OF A PARTY NOT TIMELY SERVED IN THE PROCEEDING.

Problem A: On March 20, 2005, Jones Construction Company recorded a claim of lien against Blackacre. As of May 3, 2006, there was no suit to enforce the lien. May Jones enforce the lien against Blackacre?

Answer: No.

Problem B: On March 20, 2005, Jones Construction Company recorded a claim of lien against Blackacre. Jones filed a complaint to foreclose the lien on March 1, 2006, but did not record a notice of lis pendens. Jones timely served the complaint on John Doe, owner of Blackacre, on March 30, 2006. May Jones enforce the lien against Blackacre?

Answer: Yes.

Problem C: On March 20, 2004, Jones Construction Company recorded a claim of lien against Blackacre. On March 28, 2005, a certificate of the county clerk dated March 21, 2005 was recorded, stating that no suit to foreclose the lien was then pending in the circuit court. May Jones enforce the lien against Blackacre?

Answer: No.

Authorities: Problem A: MCL 570.1117. *Fox v Martin*, 287 Mich 147, 283 NW 9 (1938); *Yerrington v Miller*, 325 Mich 193, 38 NW2d 84 (1949).

Problem B: MCL 570.1117 and 600.2701. *Wallich Lumber Co v Golds*, 375 Mich 323, 134 NW2d 722 (1965); *Troy W Maschmeyer Co v Haas*, 376 Mich 289, 136 NW2d 902 (1965).

Problem C: MCL 570.1128.

Comment A: The Construction Lien Act, MCL 570.1101 *et seq.*, repealed the former mechanic's lien statute. The sections of the Construction Lien Act addressed in this Standard are substantially unchanged from the applicable sections of the former mechanic's lien statute.

Comment B: Timely commencement of a suit to enforce a construction lien and the recording of a notice of lis pendens operate to continue the lien (but see Comment C). MCL 570.1117, 600.2701. *Washtenaw Lumber Co v Belding*, 233 Mich 608, 208 NW 152 (1926); *Whitehead & Kales Co v Taan*, 233 Mich 597, 208 NW 148 (1926).

A construction lien may also be continued by the timely filing of a cross-claim or counter-claim. Compare, *Guerra v Bar-Har Investments, Inc*, 112 Mich App 302, 315 NW2d 921 (1982).

Comment C: *Troy W Maschmeyer Co v Haas*, 376 Mich 289, 136 NW2d 902 (1965) addressed the question of how long a mechanic's lien is continued by the commencement of a foreclosure suit. In that case, the claim of lien had been recorded on March 19, 1962, and the complaint was filed on February 28, 1963. The defendants were served on July 9, 1963. Four justices were of the opinion that under the provisions of MCL 600.5856, the statute of limitations was tolled for a period not exceeding 90 days by the filing of the complaint, and that the cause of action was therefore barred before the defendants were served. The other four justices, while agreeing that service on the defendants occurred after the termination of the lien, held that because then-applicable MCL 570.10 (repealed by 1980 P.A. 497, being MCL 570.1303; cf. MCL 570.117) provided for the filing of a notice of lis

pendens in a mechanic's lien case, the lis pendens provisions of the Revised Judicature Act, being MCL 600.2701, applied, instead of MCL 600.5856. Under the lis pendens statute, service of process is to be made within 60 days after the filing of the notice of lis pendens, a shorter period than that allowed by MCL 600.5856. There has been no later reported decision determining which of the two periods is controlling in actions to foreclose a mechanic's lien or a construction lien.

Comment D: The Committee expresses no opinion on the issue of whether the interest of a bona fide purchaser of real property who acquired the interest after the commencement of a construction lien foreclosure proceeding with respect to which no notice of lis pendens was recorded and who has no actual notice of the proceeding would be subject to the construction lien foreclosure case.

STANDARD 17.2

RIGHT TO CONSTRUCTION LIEN FOR IMPROVEMENT OTHER THAN TO RESIDENTIAL STRUCTURE OR PUBLIC BUILDING

STANDARD: A CONTRACTOR, SUBCONTRACTOR, SUPPLIER OR LABORER WHO PROVIDES AN IMPROVEMENT THAT IS INCORPORATED INTO REAL PROPERTY (OTHER THAN A RESIDENTIAL STRUCTURE OR PUBLIC BUILDING) HAS A RIGHT TO A CONSTRUCTION LIEN ON THE INTEREST OF THE OWNER OR LESSEE WHO CONTRACTED FOR THE IMPROVEMENT.

Problem A: Smith Contracting Company entered into a contract with Spartan Corporation, the owner of Blackacre, to construct a commercial building on Blackacre. Smith provided labor and materials for the construction of the building. Does Smith have a right to a construction lien on Blackacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except that Smith entered into a contract with Star Corporation, which was leasing Blackacre from Spartan. Does Smith have a right to a construction lien on Spartan's interest in Blackacre?

Answer: No, but Smith has a right to a construction lien on Star's leasehold interest.

Problem C: Same facts as in Problem B, except that the lease required Star to construct the building. Does Smith have a right to a construction lien on Spartan's interest in Blackacre?

Answer: Yes.

Problem D: Same facts as in Problem B, except that during construction Spartan terminated Star's leasehold interest because of a default by Star. Does Smith have a right to a construction lien on either Spartan's or Star's interest in Blackacre?

Answer: No, but Smith has a right to a construction lien on the building. In addition, Smith's interest will be subrogated to the pre-termination rights of Star under the lease if Smith cures the lease default within 30 days of actual notice of the termination.

Problem E: Star Corporation was purchasing Blackacre on land contract from Spartan Corporation. Star entered into a contract with Smith Contracting Company to construct a commercial building on Blackacre. The land contract did not require Star to construct the building. Does Smith have a right to a construction lien on Spartan's vendor's interest in Blackacre?

Answer: No, but Smith has a construction lien on Star's vendee's interest.

Problem F: Smith Contracting Company entered into a contract with Spartan Corporation, the owner of Blackacre, to construct a commercial building on Blackacre. Smith contracted with Superior Door Company to supply door hardware for the building. Superior supplied door hardware for the building. Does Superior have a right to a construction lien on Blackacre?

Answer: Yes.

Problem G: Same facts as in Problem F, except that Superior delivered the door hardware to Smith's warehouse where it was placed in Smith's general inventory. Later, Smith installed door hardware from its general inventory in the building. Does Superior have a right to a construction lien on Blackacre?

Answer: Yes, if the door hardware installed by Smith was the door hardware supplied by Superior.

Problem H: Brown Engineering Company entered into a contract with Spartan Corporation, the owner of Blackacre, to perform architectural and engineering services for a commercial building to be constructed on Blackacre. Brown prepared plans for a building that was constructed on Blackacre. Does Brown have a right to a construction lien on Blackacre?

Answer: Yes.

Problem I: Smith Contracting Company entered into a contract with the City of East Lansing, the owner of Blackacre, to construct a public

building on Blackacre. Smith commenced construction of the building. Does Smith have a right to a construction lien on Blackacre?

Answer: No.

Authorities: Problems A and B: MCL 570.1107(1).

Problem C: MCL 570.1107(1). *Sewell v Nu Markets*, 353 Mich 553, 91 NW2d 861 (1958).

Problem D: MCL 570.1107(3) and (4). *Lazenby v Wright*, 250 Mich 203, 229 NW 437 (1930).

Problem E: MCL 570.1107(2).

Problems F: MCL 570.1107(1).

Problem G: *People for Use of Belson Mfg Co v Wayne Electric Motor Co.*, 269 Mich 537, 257 NW 877 (1934).

Problem H: MCL 570.1104(7).

Problem I: *Ford v State Board of Education*, 166 Mich 658, 132 NW 467 (1911); *Kammer Asphalt v East China Twp*, 443 Mich 176, 504 NW2d 635 (1993).

Comment: A supplier providing materials to a supplier does not have a right to a construction lien. MCL 570.1106(6).

Note: See Standard 17.3 regarding the right to a construction lien on a residential structure and Standard 17.4 regarding the right to a construction lien on a condominium.

STANDARD 17.3

RIGHT TO CONSTRUCTION LIEN FOR IMPROVEMENT TO RESIDENTIAL STRUCTURE

STANDARD: A CONTRACTOR, SUBCONTRACTOR, SUPPLIER OR LABORER WHO PROVIDES AN IMPROVEMENT THAT IS INCORPORATED INTO A RESIDENTIAL STRUCTURE HAS A RIGHT TO A CONSTRUCTION LIEN ON THE INTEREST OF THE OWNER OR LESSEE WHO CONTRACTED IN WRITING FOR THE IMPROVEMENT.

Problem A: James Mann, the owner of Blackacre, entered into a written contract with Star Contracting Company to construct a house on Blackacre in which Mann intended to reside. Star provided labor and materials for the construction of the house. Does Star have a right to a construction lien on Blackacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except that the contract was not in writing. Does Star have a right to a construction lien on Blackacre?

Answer: No.

Authorities: MCL 570.1106(4) and 570.1114.

Comment A: A residential structure is “an individual residential condominium unit or a residential building containing not more than 2 residential units, the land on which it is or will be located, and all appurtenances, in which the owner or lessee contracting for the improvement is residing or will reside upon completion of the improvement.” MCL 570.1106(4).

Comment B: A prospective owner under a purchase agreement for real property is a “lessee” for purposes of MCL 570.1106(4) and 570.1114. *Kitchen Suppliers v Erb Lumber*, 176 Mich App 602, 440 NW2d 50 (1989).

Comment C: A written contract with a contractor must comply with MCL 570.1114, which includes the following: (i) the contract, includ-

ing all amendments or additions, must be in writing; (ii) the contract must contain a statement that a residential builder, a residential maintenance and alteration contractor, an electrician, a plumbing contractor and a mechanical contractor are required to be licensed, and (iii) if the contractor is required to be licensed, a statement that contractor is licensed and the contractor's license number.

Note: See Standard 17.2 regarding the right to a construction lien for an improvement to a non-residential structure and Standard 17.4 regarding the right to a construction lien for an improvement to a condominium.

Caveat: The construction lien rights of an unlicensed contractor providing an improvement to a structure that is not a residential structure under the Michigan Construction Lien Act may be adversely affected by Chapter 24 of the Michigan Occupational Code (MCL 339.2401 *et seq.*). The Michigan Occupational Code applies to contractors who meet the definition of a residential builder contained in MCL 339.2401(a) and prohibits an action by an unlicensed residential builder to collect “compensation for the performance of an act or contract for which a license is required ...”. The Michigan Occupational Code and the Michigan Construction Lien Act each define “residential structure” differently. MCL 339.2401(c) and 570.1106(4). Thus, a contractor who is an unlicensed residential builder may be precluded from enforcing a construction lien against a structure that meets the definition of a “residential structure” under the Michigan Occupational Code but does not meet the definition of a “residential structure” under the Michigan Construction Lien Act. See, *84 Lumber Company, LP v Pagel & Frey, LLC*, 2007 WL 1228629 (Mich App), unpublished.

STANDARD 17.4

RIGHT TO CONSTRUCTION LIEN FOR IMPROVEMENT TO CONDOMINIUM

STANDARD: A CONTRACTOR, SUBCONTRACTOR, SUPPLIER OR LABORER WHO PROVIDES AN IMPROVEMENT TO A CONDOMINIUM HAS A RIGHT TO A CONSTRUCTION LIEN AS FOLLOWS:

(A) EXCEPT AS PROVIDED IN SUBPARAGRAPH (B), (C) OR (D), THE CONSTRUCTION LIEN FOR AN IMPROVEMENT FURNISHED TO A CONDOMINIUM UNIT OR ITS LIMITED COMMON ELEMENTS ATTACHES ONLY TO THE CONDOMINIUM UNIT AND ITS LIMITED COMMON ELEMENTS.

(B) THE CONSTRUCTION LIEN FOR AN IMPROVEMENT FURNISHED TO A COMMON ELEMENT AND AUTHORIZED BY THE CONDOMINIUM DEVELOPER ATTACHES ONLY TO THE CONDOMINIUM UNITS OWNED BY THE DEVELOPER AT THE TIME OF RECORDING OF THE CLAIM OF LIEN.

(C) THE CONSTRUCTION LIEN FOR AN IMPROVEMENT AUTHORIZED BY THE ASSOCIATION OF CO-OWNERS OF CONDOMINIUM UNITS ATTACHES TO EACH CONDOMINIUM UNIT ONLY TO THE PROPORTIONAL EXTENT THE CO-OWNER OF THE UNIT IS REQUIRED TO CONTRIBUTE TO THE EXPENSES OF ADMINISTRATION AS PROVIDED BY THE CONDOMINIUM DOCUMENTS.

(D) THE CONSTRUCTION LIEN FOR AN IMPROVEMENT FURNISHED TO A COMMON ELEMENT DOES NOT ATTACH TO A CONDOMINIUM UNIT IF THE DEVELOPER OR THE ASSOCIATION OF CO-OWNERS OF CONDOMINIUM UNITS DID NOT CONTRACT FOR THE IMPROVEMENT.

Problem A: Whiteacre Development, LLC, the developer of Blackacre Condominium, owns Units 3, 6, 7 and 8 of the Condominium.

Whiteacre contracted with Acme Cabinet Company to install cabinets in Unit 7. Does Acme have a right to a construction lien on any units in the Condominium?

Answer: Yes, but only on Unit 7.

Problem B: Same facts as in Problem A, except that the cabinets were installed in a community room, a common element of the Condominium. Does Acme have a right to a construction lien on any units in the Condominium?

Answer: Yes, but only on Units 3, 6, 7 and 8.

Problem C: The association of co-owners of condominium units in Sunny Dale Condominium contracted with Tiptop Roofing to re-roof some of the condominium units. The roofs are common elements. Does Tiptop have a right to a construction lien against all the units in the Condominium?

Answer: Yes. However, the lien amount on each unit in the Condominium is limited to the proportional extent that the unit owner is required to contribute to the expenses of administering the Condominium as provided by the condominium documents.

Problem D: Jack Jones, the owner of Unit 6 of Rush Ridge Condominium, contracted with Elegant Fence Co. to construct a privacy fence in a general common element of the Condominium. The condominium association did not authorize Jones to enter into the contract. Does Elegant have a right to a construction lien on any units in the Condominium?

Answer: No.

Authority: MCL 570.1126.

Note: A construction lien attaching to a condominium unit also attaches to the limited common elements appurtenant to the unit.

STANDARD 17.5

TIME TO RECORD CLAIM OF LIEN

STANDARD: THE RIGHT TO A CONSTRUCTION LIEN CEASES TO EXIST UNLESS A CLAIM OF LIEN IS RECORDED WITH THE REGISTER OF DEEDS FOR THE COUNTY IN WHICH THE REAL PROPERTY IS LOCATED WITHIN 90 DAYS AFTER THE LAST DAY ON WHICH THE LIEN CLAIMANT FURNISHED LABOR OR MATERIAL FOR AN IMPROVEMENT TO THE REAL PROPERTY.

Problem A: Smyth Drywall contracted to provide drywall for the construction of a building on Whiteacre. On May 29, 2007, Smyth Drywall completed its work at the building. On August 28, 2007, Smyth Drywall recorded a claim of lien against Whiteacre. Was the lien timely recorded?

Answer: No. The last day for recording the lien was August 27, 2007.

Problem B: Same facts as in Problem A, except that on July 1, 2007, Smyth Drywall performed warranty work on the drywall at the building. Was the lien timely recorded?

Answer: No. The performance of warranty work does not extend the time for recording a lien.

Problem C: Same facts as in Problem A, except that when Smyth Drywall presented its lien for recording on August 2, 2007, the register of deeds accepted the lien for recording and date-stamped the lien, but did not assign a liber and page number to the lien until August 28, 2007. Was the lien timely recorded?

Answer: Yes.

Authorities: Problem A: MCL 570.1111(1).

Problem B: *Woodman v Walter*, 204 Mich App 68, 514 NW2d 190 (1994); *Stock Building Supply v Parsley Homes*, 291 Mich App 403, 804 NW2d 898 (2011).

Problem C: MCL 570.1111(1). *Central Ceiling & Partition v Department of Commerce*, 470 Mich 877, 683 NW2d 142 (2004).

Comment A: A lien claimant must strictly comply with the 90-day requirement of MCL 570.1111(1). *Northern Concrete Pipe v Sinacola Companies-Midwest*, 461 Mich 316, 603 NW2d 257 (1999). If the 90th day falls on a Saturday, Sunday or legal holiday, a lien recorded on the next day that is not a Saturday, Sunday or legal holiday is timely. *Superior Products Co v Merucci Bros*, 107 Mich App 153, 309 NW2d 188 (1981).

Comment B: Last minute clean-up or the picking up of tools after the completion of actual work may be considered part of the work for the purpose of determining the last day of furnishing labor or material for an improvement. See, *Blackwell v Bornstein*, 100 Mich App 550, 299 NW2d 397 (1980). Compare, *Superior Steel Systems v Nature's Nuggets*, 174 Mich App 368, 435 NW2d 492 (1989).

STANDARD 17.6

RELATIVE PRIORITY OF CONSTRUCTION LIENS

STANDARD: CONSTRUCTION LIENS ON AN IMPROVEMENT GENERALLY HAVE EQUAL PRIORITY BASED ON THE DATE OF THE FIRST ACTUAL PHYSICAL IMPROVEMENT.

Problem: Nick Paige, the owner of Whiteacre, contracted with Vivian Construction Co. to construct a building on Whiteacre. On May 5, 2006, Myers Landscape Co. commenced grubbing and clearing work on Whiteacre, which constituted the first actual physical improvement. In June, 2007, Allen Excavating, Inc. excavated the basement of the building. Allen recorded a claim of lien against Whiteacre in August, 2007. In April, 2008, Hagen Carpentry performed finish carpentry work in the building. Hagen recorded a claim of lien against Whiteacre in June, 2008. Does the Allen lien have priority over the Hagen lien?

Answer: No. The Allen and Hagen liens have equal priority based on the May 5, 2006 date of the first actual physical improvement.

Authority: MCL 570.1119(1). *Michigan Pipe & Valve-Lansing v Hebler Enterprises*, 292 Mich App 479, 808 NW2d 323 (2011), *lv den* 490 Mich 874, 803 NW2d 688 (2011).

Comment A: The term “actual physical improvement” means an “actual physical change in, or alteration of, real property as a result of labor provided, pursuant to a contract, by a contractor, subcontractor, or laborer which is readily visible and of a kind that would alert a person upon reasonable inspection of the existence of an improvement.” MCL 570.1103(1).

Comment B: “A construction lien under this act shall take priority over all garnishments for the contract debt made after commencement of the first actual physical improvement, without regard to the date of recording of the claim of lien.” MCL 570.1119(2).

Note: See Standard 17.8 regarding circumstances under which lien claimants may not have equal priority.

STANDARD 17.7

PRIORITY OF CONSTRUCTION LIEN OVER LIENS, ENCUMBRANCES AND OTHER INTERESTS

STANDARD: A CONSTRUCTION LIEN HAS PRIORITY OVER ALL LIENS, ENCUMBRANCES AND OTHER INTERESTS IN REAL PROPERTY THAT ARE RECORDED AFTER THE FIRST ACTUAL PHYSICAL IMPROVEMENT TO THE REAL PROPERTY.

Problem A: Hogan Construction Company provided labor and materials for the construction of a building on Whiteacre. The first actual physical improvement for the building construction occurred on October 24, 2007. First Bank recorded a mortgage against the building on December 1, 2007. Hogan recorded a claim of lien against Whiteacre on January 15, 2008. Does the Hogan lien have priority over the mortgage?

Answer: Yes.

Problem B: Same facts as in Problem A, except that a judgment lien was recorded against the owner of Whiteacre on October 25, 2007. Does the Hogan lien have priority over the judgment lien?

Answer: Yes.

Problem C: Same facts as in Problem A, except that Taylor Land Development Company recorded an easement for access across Whiteacre on October 31, 2007. Does the Hogan lien have priority over the easement?

Answer: Yes.

Authority: MCL 570.1119(3).

STANDARD 17.8

PRIORITY OF MORTGAGE, LIEN, ENCUMBRANCE OR OTHER INTEREST OVER CONSTRUCTION LIEN

STANDARD: A MORTGAGE, LIEN, ENCUMBRANCE OR OTHER INTEREST IN REAL PROPERTY RECORDED BEFORE THE FIRST ACTUAL PHYSICAL IMPROVEMENT HAS PRIORITY OVER A CONSTRUCTION LIEN, EXCEPT THAT A MORTGAGE ADVANCE AFTER THE FIRST ACTUAL PHYSICAL IMPROVEMENT DOES NOT HAVE PRIORITY OVER:

(A) A CONSTRUCTION LIEN UNLESS THE MORTGAGEE HAS FOR SUCH ADVANCE:

(1) RECEIVED A CONTRACTOR'S SWORN STATEMENT PURSUANT TO MCL 570.1110;

(2) MADE THE ADVANCE PURSUANT TO THE SWORN STATEMENT; AND

(3) RECEIVED A WAIVER OF LIEN FROM THE CONTRACTOR AND EACH SUBCONTRACTOR, LABORER AND SUPPLIER WHO PROVIDED A NOTICE OF FURNISHING; OR

(B) THE CONSTRUCTION LIEN OF A LIEN CLAIMANT NOT SET FORTH ON A CONTRACTOR'S SWORN STATEMENT IF THE LIEN CLAIMANT HAS:

(1) PROVIDED A NOTICE OF FURNISHING BEFORE THE ADVANCE OR IS EXCUSED FROM PROVIDING A NOTICE OF FURNISHING PURSUANT TO MCL 570.1108, 570.1108a OR 570.1109; OR

(2) RECORDED A CLAIM OF LIEN BEFORE THE ADVANCE,

UNLESS THE MORTGAGEE HAS RECEIVED FROM THE LIEN CLAIMANT EITHER:

(1) A FULL CONDITIONAL WAIVER OF LIEN; OR

(2) A PARTIAL UNCONDITIONAL WAIVER OF LIEN FOR THE FULL AMOUNT DUE THE LIEN CLAIMANT AS OF THE DATE THROUGH WHICH THE LIEN IS WAIVED AS SHOWN ON THE WAIVER OF LIEN, WHICH DATE IS WITHIN 30 DAYS BEFORE THE DATE OF THE ADVANCE.

Problem A: Charland Enterprises, Inc., the owner of Whiteacre, entered into a contract with Morris Construction, Inc. to build an office building on Whiteacre. On October 15, 2006, Main Bank recorded a mortgage given by Charland to secure a loan for construction of the building. On October 16, 2006, Charland recorded a notice of commencement against Whiteacre. The first actual physical improvement for the building construction occurred on October 24, 2006. Weadon Concrete Co., a subcontractor of Morris, provided materials for the building on November 1, 2006. On November 15, 2006, Main Bank made an advance under the mortgage for costs of construction of the building pursuant to a contractor's sworn statement. Main Bank did not obtain a waiver of lien from Weadon, which was listed on the sworn statement. On December 18, 2006, Weadon recorded a claim of lien against Whiteacre. Does the Weadon lien have priority over the advance?

Answer: Yes, because Main Bank did not obtain a waiver of lien from Weadon.

Problem B: Same facts as in Problem A, except that Weadon was not listed on the sworn statement but provided a notice of furnishing on November 1, 2006. Does the Weadon lien have priority over the advance?

Answer: Yes, because Main Bank did not obtain a waiver of lien from Weadon.

Problem C: Same facts as in Problem A, except that Weadon was not listed on the sworn statement, did not provide a notice of furnishing and was not excused from providing a notice of furnishing. Does the Weadon lien have priority over the advance?

Answer: No.

Problem D: Same facts as in Problem C, except that Weadon recorded a claim of lien before the date of the advance. Does the Weadon lien have priority over the advance?

Answer: Yes.

Problem E: Same facts as in Problem B, except that Charland did not record a notice of commencement and Weadon did not provide a notice of furnishing. Does the Weadon lien have priority over the advance?

Answer: Yes, because the failure to record the notice of commencement extends the time to provide the notice of furnishing.

Problem F: Same facts as in Problem E, except that Charland recorded a notice of commencement and Weadon contracted directly with Charland. Does the Weadon lien have priority over the advance?

Answer: Yes.

Authorities: Generally: MCL 570.1119(2), (3) and (4).

Problem E: MCL 570.1108(10).

Problem F: MCL 570.1109(1).

Comment A: The Committee expresses no opinion concerning whether “disbursement pursuant to a contractor’s sworn statement” in the third sentence of MCL 570.1119(4) requires the mortgagee (1) to obtain a waiver of lien from each contractor, subcontractor, laborer and supplier listed on the sworn statement which has not provided a notice of furnishing or is excused from providing a notice of furnishing, or (2) to make direct payments to each contractor, subcontractor, laborer and supplier pursuant to MCL 570.1110(7).

Comment B: The requirement that a notice of furnishing be provided may be excused under MCL 570.1108(10)-(13) (the failure of an owner, lessee or designee to record or, upon the request of the lien claimant, to provide a notice of commencement with a blank notice of furnishing attached with respect to an improvement to real property operates to extend the time within which the contractor, supplier or laborer may provide the notice of furnishing), MCL

570.1108a(9) and (10) (the failure of an owner, lessee or designee, upon request of the lien claimant, to provide a notice of commencement with blank notice of furnishing attached with respect to an improvement to a residential structure operates to extend the time within which a contractor, supplier or laborer may provide a notice of furnishing) and MCL 570.1109(1) (if the contractor contracts directly with an owner or lessee).

Comment C: Generally, the construction liens of all lien claimants have equal priority based upon the date of first actual physical improvement. However, the amount of a construction lien entitled to priority vis-à-vis one or more advances under a mortgage is based upon separate determinations as to whether the construction lien has priority over or is subordinate to each advance under MCL 570.1119(4). These separate determinations can result in differing priorities among construction liens as to one or more mortgage advances.

Note: See Comment A to Standard 17.6 regarding the definition of “first actual physical improvement” and the priority of construction liens generally. See Standard 17.7 regarding the priority of construction liens if the first actual physical improvement occurs before a mortgage is recorded.

CHAPTER XVIII

ATTACHMENTS

STANDARD 18.1

NATURE AND DURATION OF ATTACHMENT

STANDARD: AN ATTACHMENT CONSTITUTES A LIEN UPON AN INTEREST IN REAL PROPERTY WHEN A CERTIFIED COPY OF THE ATTACHMENT, INCLUDING A DESCRIPTION OF THE REAL PROPERTY, IS RECORDED IN THE OFFICE OF THE REGISTER OF DEEDS OF THE COUNTY IN WHICH THE REAL PROPERTY IS LOCATED.

THE LIEN OF THE ATTACHMENT CONTINUES UNTIL:

- (A) EXECUTION IS ISSUED AND LEVY MADE AGAINST THE REAL PROPERTY;**
- (B) A REASONABLE PERIOD OF TIME TO REDUCE THE CLAIM TO JUDGMENT HAS ELAPSED AND NO JUDGMENT IS OBTAINED; OR**
- (C) A JUDGMENT IS ENTERED AND NO LEVY IS MADE AGAINST THE REAL PROPERTY WITHIN A REASONABLE PERIOD OF TIME.**

Problem A: An attachment against Blackacre was recorded in 1993. In 2004, a reasonable period of time to obtain a judgment had elapsed, there had been no release of the attachment and no judgment had been obtained by the attaching creditor. Does the attachment constitute a lien on Blackacre?

Answer: No.

Problem B: An attachment against Blackacre was recorded in 1993. On October 24, 1996, a judgment was obtained by the attaching creditor. As of December 24, 1996, there was no execution levy against Blackacre. On December 24, 1996, did the attachment constitute a lien on Blackacre?

Answer: Yes. The Michigan Supreme Court has held that a delay of two months in levying execution after the entry of a judgment is not an unreasonable delay.

Authorities: Problem A: MCL 600.4035. *Avery v Stephens*, 48 Mich 246, 12 NW 211 (1882); *Trowbridge v Bullard*, 81 Mich 451, 45 NW 1012 (1890); *Levy v Gittleson*, 324 Mich 242, 37 NW2d 105 (1949).

Problem B: *Geiges v Greiner*, 68 Mich 153, 36 NW 48 (1888).

Comment A: Dismissal of the suit operates as a release of the attachment. *Orr v Keyes*, 37 Mich 385 (1877); *Roehl Storage Co v Wilson*, 268 Mich 691, 256 NW 598 (1934).

Comment B: An attachment may be discharged of record in accordance with MCL 600.4041.

STANDARD 18.2

PRIORITY AS BETWEEN ATTACHMENT AND UNRECORDED PRIOR CONVEYANCE

STANDARD: AN ATTACHMENT IS A LIEN UPON THE INTEREST IN THE ATTACHED REAL PROPERTY OWNED BY THE DEBTOR AT THE TIME A CERTIFIED COPY OF THE ATTACHMENT IS RECORDED WITH THE REGISTER OF DEEDS. THE INTEREST OF A GRANTEE OR MORTGAGEE OF THE DEBTOR UNDER AN UNRECORDED CONVEYANCE MADE BEFORE THE RECORDING OF THE ATTACHMENT HAS PRIORITY OVER THE ATTACHMENT.

Problem: Oscar Roy, mortgaged Blackacre to Edward Lane. Before the mortgage was recorded, an attachment was recorded against Blackacre in an action brought against Roy. Does the attachment have priority over the mortgage?

Answer: No.

Authorities: MCL 600.4035. *Columbia Bank v Jacobs*, 10 Mich 349 (1862); *French v DeBow*, 38 Mich 708 (1878); *Campbell v Keys*, 130 Mich 127, 89 NW 720 (1902).

Comment: See Standard 19.4 regarding the priority of an execution levy as against a prior unrecorded conveyance.

CHAPTER XIX

EXECUTION LEVIES AND SALES

STANDARD 19.1

DURATION OF EXECUTION LEVY

STANDARD: AN EXECUTION LEVY AGAINST REAL PROPERTY CEASES TO BE VALID UPON THE EXPIRATION OF FIVE YEARS AFTER THE DATE OF RECORDING OF THE EXECUTION LEVY.

Problem: An execution levy was recorded against Blackacre in 1997. There was no sale of Blackacre pursuant to the levy. In 2004, is the levy a lien against Blackacre?

Answer: No.

Authorities: MCL 600.6051. *Dobby v Heath*, 327 Mich 29, 41 NW2d 325 (1950).

Comment: A sale may be made under an execution levy within five years after the date of recording of the execution levy, even though the judgment on which the levy is based expired before the sale. *Mosher v Borden*, 201 Mich 106, 166 NW 972 (1918). After the five-year period has expired, a sale made under an execution levy is void. *Bliss v Slater*, 144 Mich 648, 108 NW 86 (1906).

STANDARD 19.2

EFFECT OF FAILURE TO GIVE PROPER NOTICE OF EXECUTION SALE

STANDARD: THE VALIDITY OF A SALE ON EXECUTION LEVY TO A BONA FIDE PURCHASER IS NOT AFFECTED BY FAILURE TO COMPLY WITH THE STATUTORY PROVISIONS REGARDING NOTICE OF THE SALE.

Problem: Blackacre was sold to Ira Pierce pursuant to a sale on execution levy. The sheriff did not post a notice of the sale. Pierce purchased Blackacre at the sale in good faith without notice of the failure to post. The redemption period expired and the sheriff's deed to Pierce was recorded. Does Pierce hold title to Blackacre?

Answer: Yes.

Authorities: MCL 600.6052 and 600.6054. *Grand Rapids National Bank v Kritzer*, 116 Mich 688, 75 NW 90 (1898); *Kelso v Coburn*, 334 Mich 43, 53 NW2d 686 (1952).

STANDARD 19.3

RECORDING OF SHERIFF'S DEED ON EXECUTION SALE

STANDARD: IF A SHERIFF'S DEED UNDER AN EXECUTION SALE IS NOT RECORDED WITHIN 10 YEARS AFTER THE REDEMPTION PERIOD HAS EXPIRED, ANY INTEREST IN REAL PROPERTY ACQUIRED UNDER THE SHERIFF'S DEED IS NULL AND VOID.

Problem: Blackacre was sold to Ira Pierce in 1994 at an execution sale. A sheriff's certificate of sale was recorded. No sheriff's deed was recorded. In 2006, does Pierce hold title to Blackacre?

Answer: No.

Authorities: MCL 600.6055, 600.6062 and 600.6067. *Pike v Halpin*, 188 Mich 447, 154 NW 148 (1915).

Comment: The time periods for redemption from an execution sale are set forth in MCL 600.6062 and 600.6063.

STANDARD 19.4

PRIORITY OF EXECUTION LEVY OVER UNRECORDED CONVEYANCE

STANDARD: THE LIEN OF AN EXECUTION LEVY HAS PRIORITY OVER A PRIOR UNRECORDED CONVEYANCE OF WHICH THE EXECUTION CREDITOR HAD NO ACTUAL OR CONSTRUCTIVE NOTICE.

Problem A: Oscar Roy deeded Blackacre to Simon Grant in 2004. In 2005, Earl Carr obtained a judgment against Roy and recorded an execution levy against Blackacre. Grant's deed was not recorded. Carr had no actual or constructive notice of Grant's interest. Does Carr's levy have priority over Grant's title?

Answer: Yes.

Problem B: Same facts as in Problem A, except that Grant is in open possession of Blackacre as of the date of the levy. Does Carr's levy have priority over Grant's title?

Answer: No. Carr has constructive notice of Grant's interest.

Authorities: Problem A: MCL 600.6051. *Lachelt v McInerney*, 185 Mich 413, 152 NW 86 (1915).

Problem B: *Coleman v Hoge*, 313 Mich 181, 20 NW2d 857 (1945).

Note: See Standard 18.2 regarding the rights of an attachment creditor with respect to an unrecorded conveyance.

CHAPTER XX

FEDERAL TAX LIENS

STANDARD 20.1

GENERAL TAX LIEN

STANDARD: IF ANY PERSON LIABLE TO PAY ANY FEDERAL TAX FAILS TO PAY THE TAX AFTER DEMAND IS MADE, THE AMOUNT OF THE TAX, TOGETHER WITH INTEREST, PENALTIES, AND COSTS, IS A LIEN IN FAVOR OF THE UNITED STATES UPON ALL PROPERTY AND RIGHTS TO PROPERTY BELONGING TO THE PERSON. THE LIEN:

- (A) ARISES WITHOUT NOTICE AS OF THE TIME THE TAX ASSESSMENT IS MADE (UNLESS ANOTHER DATE IS SPECIFIED BY LAW);
- (B) CONTINUES UNTIL THE AMOUNT DUE IS SATISFIED OR BECOMES UNENFORCEABLE BECAUSE OF LAPSE OF TIME; AND
- (C) IS VALID AGAINST ALL PERSONS EXCEPT THOSE PROTECTED UNDER 26 USC 6323.

Authorities: 26 USC 6321, 6322 and 6323.

Comment: The Internal Revenue Service prepares a certificate of assessment after it determines a tax is delinquent and sends the taxpayer a notice of delinquency, demanding payment within 10 days.

The lien attaches to all property and rights to property of the taxpayer. The lien is valid not only as against the taxpayer, but also against any person who later acquires an interest in the taxpayer's property, except a party protected by 26 USC 6323. See, Standards 20.4 and 20.5.

STANDARD 20.2

SCOPE OF GENERAL TAX LIEN

STANDARD: A GENERAL TAX LIEN FOR ANY FEDERAL TAX ATTACHES TO ALL THE PROPERTY AND RIGHTS TO PROPERTY, INCLUDING AFTER-ACQUIRED PROPERTY, OF ANY PERSON LIABLE FOR PAYMENT OF THE TAX. THE SCOPE OF THE TAX LIEN IS NOT LIMITED BY EXEMPTIONS IN A STATE'S CONSTITUTION OR STATUTES.

Problem A: On January 3, 2004, a federal tax was assessed against Donald Brown. On that date title to Blackacre was vested in Donald Brown and Mary Brown, husband and wife, as tenants by the entireties. Did the Browns then hold Blackacre free of the federal tax lien which arose at the time of the assessment?

Answer: No.

Problem B: Same facts as in Problem A, except that on June 1, 2005 Donald Brown died. Did Mary Brown then hold Blackacre free of the tax lien?

Answer: Yes.

Problem C: Donald Brown and Thomas Palmer were the owners of Blackacre "as joint tenants and not as tenants in common" on January 3, 1999 on which date a federal tax was assessed against Brown. On January 17, 1999 a notice of federal tax lien was recorded and indexed in the office of the register of deeds for the county in which Blackacre was located. Did Brown then hold his interest in Blackacre free of the federal tax lien?

Answer: No. Because the delinquent taxpayer's interest in Blackacre can be reached by his creditors, the tax lien attached thereto. Because notice of the lien had been recorded and indexed, a grantee of Brown would take subject to the lien. Upon foreclosure of the lien, the purchaser at the foreclosure sale would acquire an undivided one-half interest in Blackacre.

If Brown and Palmer had held Blackacre as “joint tenants with right of survivorship,” as “joint tenants and to the survivor,” “and to the survivor,” or “or to the survivor,” or some variant, as described in Standard 6.3, the federal tax lien would have attached to Brown’s interest in Blackacre and upon Palmer’s death, Brown surviving, would have attached to the full fee title to Blackacre. If Brown had died, Palmer surviving, Palmer would take the full fee title, unaffected by the lien. It should be noted, however, that it is possible that a federal estate tax lien arising with respect to the estate of Brown might then attach to Blackacre. See, Standards 20.8, 20.12 and 20.13.

Problem D: Donald Brown and Thomas Palmer were the owners of Blackacre “as joint tenants and not as tenants in common.” On January 3, 1999, Brown died. On January 17, 1999, a delinquent federal income tax was assessed against Brown. Did Palmer then hold title to Blackacre free of the federal tax lien which arose at the time of the assessment?

Answer: Yes. When the tax was assessed, the tax lien did not attach to Blackacre because the delinquent taxpayer no longer held any property right in Blackacre. His interest had been extinguished and the surviving joint tenant had become the sole owner. It should be noted, however, that it is possible that a federal estate tax lien arising against the estate of Brown might then have attached to Blackacre. See, Standards 20.8, 20.12 and 20.13.

Problem E: On January 3, 1999, a federal tax was assessed against Donald Brown. On January 17, 1999, Brown acquired title to Blackacre. Did Brown then hold Blackacre free of the federal tax lien which arose at the time of assessment?

Answer: No. The tax lien attached to Blackacre immediately upon acquisition by Brown. See, Comment A.

Problem F: On January 3, 1999, a notice of federal tax lien against Donald Brown was recorded and indexed in the office of the register of deeds for the county in which Blackacre was located. On January 17, 1999, Brown acquired title to Blackacre by purchase and simultaneously with the purchase executed a purchase money mortgage secured by Blackacre. The mortgage was recorded. Did the mortgage have priority over the tax lien?

Answer: Yes. Although notice of the tax lien was recorded and indexed before Brown acquired title to Blackacre and before the mortgage was given, the tax lien is subordinate to the recorded purchase money mortgage. Because the deed to Brown and his purchase money mortgage were simultaneous, Brown is regarded as having acquired Blackacre subject to his mortgage.

A contrary result might be reached had the purchase money mortgage not been recorded. In *Allan v Diamond T Motor Car Co*, 291 F2d 115 (CA 10, 1961), an unrecorded purchase money mortgage was held to be subordinate to a later filed notice of federal tax lien.

A mortgage is a purchase money mortgage if the proceeds of the mortgage are applied on the purchase price regardless of whether the vendor is the mortgagee.

Problem G: The United States sought to enforce a federal tax lien against Donald Brown by levy on Blackacre. Brown established that Blackacre was his homestead and claimed that, therefore, he was entitled to the homestead exemption provided for in the Michigan Constitution of 1963, Art X, Sec. 3 and in MCL 600.6023. May the United States sell Blackacre without regard to the homestead exemption?

Answer: Yes. The right to enforce a federal tax lien is not limited or impaired by exemptions in a state's constitution or statutes.

Authorities: Generally: 26 USC 6321, 6323(f)(4), 6634(a) and (c).

Problem A: *United States v Craft*, 535 US 274 (2002); *Hatchett v United States*, 330 F3d 875 (CA 6, 2003).

Problems B and D: *Irvine v Helvering*, 99 F2d 265 (CA 8, 1938), reversing 36 BTA 653 (1937); *Tooley v Commissioner*, 121 F2d 350 (CA 9, 1941).

Problem C: *Midgley v Walker*, 101 Mich 583, 60 NW 296 (1894); *Finch v Haynes*, 144 Mich 352, 107 NW 910 (1906); *Murphy v Mich Trust Co*, 221 Mich 243, 190 NW 698 (1922); *Smith v Smith*, 290 Mich 143, 287 NW 411 (1939); *Benson v Burke*, 42-2 USTC 9621 (Kan, 1942); *United States v Beggerly*, 51-1 USTC 9304 (SD Cal, 1951); *United States v Brandenburg*, 106 F Supp 82 (SD Cal, 1952); *Edward v United States*, 215 F Supp 382 (Kan, 1963).

Problem E: *Glass City Bank v United States*, 326 US 265, 66 S Ct 108, 90 L Ed 56 (1945); *United States v Caldwell*, 74 F Supp 114 (MC Tenn, 1947); *Bensinger v Davidson*, 147 F Supp 240 (SD Cal, 1956).

Problem F: Rev Rul 68-57, 1968-1 Cum Bul 553. *United States v New Orleans & Ohio R Co*, 12 Wall 362, 20 L Ed 434 (1871); *Fec-teau v Fries*, 253 Mich 51, 234 NW 113 (1931); *Troyer v Mundy*, 60 F2d 818 (CA 8, 1932).

Problem G: *Shambuagh v Scofield*, 132 F 2d 345 (CA 5, 1942); *United States v Heffron*, 158 F 2d 657 (CA 9, 1947); *United States v Mitchell*, 403 US 190, 91 S Ct 1963; 29 L Ed 2d 406 (1971).

Comment A: “All property and rights to property” includes property acquired in any manner after a tax lien arose. A federal tax lien against only one spouse will attach to the interest of that spouse in after-acquired property held as a tenancy by the entireties.

Comment B: Effective November 6, 1978, 26 USC 6323(f)(4) provides that the filing requirements for a notice of a general tax lien are not satisfied, “unless the fact of filing of such deed has been entered and recorded in a public index at the place of filing in such a manner that a reasonable inspection of the index will reveal the existence of the deed, and there is maintained [at the applicable office...] an adequate system for the public indexing of federal tax liens...” Hence, all references in this chapter to “filing for record and indexing” mean the filing and indexing of the tax lien at the appropriate State, county or local office, which with respect to real property will be the office of the register of deeds for the county in which the real property is located.

Note: See, Standard 20.6.

STANDARD 20.3

DURATION OF GENERAL TAX LIEN

STANDARD: A GENERAL TAX LIEN CONTINUES UNTIL LIABILITY FOR THE AMOUNT DUE IS SATISFIED OR BECOMES UNENFORCEABLE BECAUSE OF LAPSE OF TIME. ENFORCEMENT OF THE LIEN IS ORDINARILY BARRED 10 YEARS AFTER THE DATE OF ASSESSMENT. A JUDGMENT FOR THE AMOUNT DUE EXTENDS THE LIEN FOR THE LIFE OF THE JUDGMENT.

Authorities: 26 USC 6322 and 6502(a).

Comment A: This Standard is limited to the duration of a lien for taxes created by 26 USC 6321 and does not address the validity or priority of the lien against other interests described in 26 USC 6323. See, Standard 20.4.

Comment B: Failure to assess the tax within three years after the last day prescribed for filing a tax return, or the day actually filed if filed later, generally bars assessment and enforcement. 26 USC 6501(a). The period within which an assessment may be made may differ under various circumstances. See, for example, 26 USC 6501(c)(4); 6501(e)(1); 6501(c)(1), (2) and (3); 7508(a)(1)(A), (G) and (H); 6503(a)(1); and 6872.

Comment C: Any proceedings for collection of taxes must commence within 10 years after assessment or within any period specified in a written agreement with the taxpayer. 26 USC 6502(a). The 10-year limitation period is suspended during various periods (and certain specified intervals thereafter). Some of these periods are:

- (A) while assets are in the custody of any court, 26 USC 6503(b);
- (B) while a taxpayer is outside of the United States for a continuous period of at least six months, 26 USC 6503(c);
- (C) during a period of wrongful seizure, 26 USC 6503(g);

- (D) during a period in which the Secretary is prohibited from collecting by reason of a case under Title 11 of the U. S. Code and for six months after such period, 26 USC 6503(h);
- (E) when necessary to prevent undue hardship while a taxpayer is in military service, 50 USC App 573; and
- (F) in some cases, while a taxpayer is serving in the armed forces of the United States or in support of the United States, 26 USC 7508(a)(1).

STANDARD 20.4

VALIDITY OF GENERAL TAX LIEN AGAINST PROTECTED PERSON

STANDARD: A GENERAL TAX LIEN IS NOT VALID AGAINST ANY PERSON WHO BECOMES A PURCHASER, HOLDER OF A SECURITY INTEREST OR A MECHANIC'S LIENOR AS THOSE TERMS ARE DEFINED IN 26 USC 6323(h), OR A JUDGMENT LIEN CREDITOR UNLESS THE NOTICE OF TAX LIEN HAS BEEN RECORDED AND INDEXED AS PROVIDED IN 26 USC 6323.

Problem A: On January 10, 1997, Donald Brown mortgaged Blackacre to Alfred Leonard and received the full amount of the mortgage loan. The mortgage was recorded the same day. On March 21, 1997, a notice of a federal tax lien against Brown was recorded and indexed in the office of the register of deeds for the county in which Blackacre is located. Does the mortgage lien have priority over the tax lien?

Answer: Yes.

Problem B: Same facts as in Problem A, except that before the mortgage was executed, Leonard knew that a tax had been assessed against Brown. Does the mortgage lien have priority over the tax lien?

Answer: Yes. A mortgagee qualifies for the protection of 26 USC 6323(a), (h) and (i) if the mortgage is executed and recorded before the notice of tax lien is recorded and indexed, even though the mortgagee has actual knowledge of the assessment. It is not necessary that the mortgagee be without notice in the sense required to obtain priority over an earlier unrecorded mortgage.

If, however, the mortgage was made pursuant to a scheme of the mortgagor and mortgagee to evade collection of the tax, the mortgage would not have priority over the tax lien.

Problem C: On January 10, 1997, Donald Brown mortgaged Blackacre to Alfred Leonard. The mortgage was not recorded until March 28, 1997. On March 21, 1997, a notice of federal tax lien against Brown was re-

corded and indexed in the office of the register of deeds for the county in which Blackacre is located. Does the mortgage lien have priority over the tax lien?

Answer: No. To have priority over the tax lien, the mortgage must be “protected under local law against a subsequent judgment lien arising out of an unsecured obligation.” 26 USC 6323(h). As to recorded purchase money mortgages, see Standard 20.2, Problem F.

Problem D: On January 10, 1997, Donald Brown mortgaged Blackacre to Alfred Leonard. The mortgage was recorded the same day and secured all amounts up to \$25,000 for which the mortgagor was or might become liable to the mortgagee. The mortgagee was not obligated to advance any specific amount. The mortgagee did advance \$15,000 on January 10, 1997, and an additional \$5,000 on March 28, 1997. On March 21, 1997, a notice of federal tax lien against Brown was recorded and indexed in the office of the register of deeds for the county in which Blackacre is located. Does the mortgage’s priority as to the initial advance extend to the \$5,000 advanced after the notice of federal tax lien was recorded and indexed?

Answer: No. The relative priority of the mortgage lien is fixed as to each advance made, as of the time it is made. The principle of relation back to the date of the original mortgage is inapplicable for the purpose of establishing priority of later advances over an intervening tax lien of which notice has been recorded and indexed. The principle does not apply, however, to a situation where the mortgagee is obligated by contract to make additional advances to be secured by the mortgage. See, Standard 20.5.

Problem E: On July 1, 1992, Thomas Drew sold Blackacre to Paul Ingram on a land contract which called for a total payment of \$10,000. Ingram entered into actual possession of Blackacre, made the required monthly payments to Drew, but did not record the land contract. On January 10, 1997, a notice of federal tax lien against Drew was recorded and indexed in the office of the register of deeds for the county in which Blackacre is located. Ingram continued to make the monthly payments directly to Drew until October 5, 1997, at which time he paid Drew the balance owing on the contract and received a deed from Drew. Did Ingram acquire title to Blackacre free of the tax lien?

Answer: Yes. Possession by a land contract vendee constitutes notice to a subsequent purchaser, brings the vendee within the definition of a purchaser under 26 USC 6323(h)(6), and protects the vendee as to all monies paid on the land contract. If Ingram had not been in possession, recording of the land contract before the recording and indexing of the notice of tax lien would have had the same effect.

Problem F: On July 1, 1996, Thomas Drew sold Blackacre to Donald Brown on a land contract which called for a total payment of \$10,000. Brown recorded the contract on the same day. On January 10, 1997, when \$9,500 remained due on the contract, a federal tax was assessed against Brown. On January 19, 1997, a notice of federal tax lien against Brown was recorded and indexed in the office of the register of deeds for the county in which Blackacre is located. On February 5, 1997, Brown surrendered the contract and quit-claimed Blackacre to Drew, who released Brown from liability on the contract. Did Drew then hold Blackacre free of the federal tax lien against Brown?

Answer: No. The lien against Brown attached to his vendee's interest. Brown's later conveyance to the vendor did not affect the rights of the United States.

Authorities: Generally: 26 USC 6323.

Problem A: *United States v Beaver Run Coal Co*, 99 F2d 610 (CA 3, 1938); *Potter v United States*, 111 F Supp 585 (RI, 1953); *Runyan Machine & Boiler Works, Inc v Oil Screw "Captain Pete,"* 56-1 USTC 9179 (ND Fla, 1955).

Problem B: *United States v Beaver Run Coal Co*, 99 F2d 610 (CA 3, 1938); *Smith v United States*, 113 F Supp 702 (HI, 1953); *Hart v United States*, 207 F2d 813 (CA 8m 1953); *Runyan Machine & Boiler Works, Inc v Oil Screw "Captain Pete,"* 56-1 USTC 9179 (ND Fla, 1955); *United States v Leary*, 58-1 USTC 9263 (Conn, 1958).

Problem C: *In re F MacKinnon Mfg Co*, 24 F2d 156 (CA 7, 1928); *Underwood v United States*, 118 F2d 760 (CA 5, 1941), affirming 37 F Supp 824 (ED Tex, 1939); *Edmundson v Scofield*, 92 F Supp 91 (SD Tex, 1950); *Plains Motors, Inc v Clark*, 52-2 USTC 9441 (WY, 1952); *Mason City & Clear Lake R Co v Imperial Seed Co*, 152 F Supp 145 (ND Iowa, 1957); *Leipert v RC Williams & Co*, 161 F Supp 355 (SD NY, 1957); *Allan v Diamond T Motor Car Co*, 291 F2d 115 (CA 10, 1961); *Gauvey v United States*, 291 F2d 42 (CA 8, 1961).

Problem D: Rev Rul 56-41, 1956-1 Cum Bul 562. *United States v Security Trust & Savings Bank*, 340 US 47, 71 S Ct 111, 95 L Ed 53 (1950); *United States v Ringler*, 166 F Supp 544 (ND Ohio, 1958); *United States v Christensen*, 269 F2d 624 (CA 9, 1959); *Ladue v Detroit & Milwaukee R Co*, 13 Mich 380 (1865).

Problem E: 26 USC 6323(h). *Engle v Tinker National Bank*, 269 F Supp 199 (ED NY, 1967).

Problem F: *Bensinger v Davidson*, 147 F Supp 240 (SD Cal, 1956); *United States v Morrison*, 247 F2d 285 (CA 5, 1957).

Comment A: If a mortgagee or other lienor has priority over a federal tax lien under the rule stated in this Standard, 26 USC 6323(e) extends the priority to the extent permitted by local law as to the following: interest or carrying charges; reasonable expenses incurred in collecting or enforcing the obligation; reasonable attorney fees; reasonable insurance and repair costs; and other charges permitted thereunder.

Comment B: The term “mechanic’s lienor,” as defined in 26 USC 6323(h)(2) means any person who under local law has a lien on real property and includes a “lien claimant” under MCL 570.1105(2).

Comment C: The term “judgment lien creditor” is defined in Treasury Regulation §301.6323(h)-1 as a person who has: (i) obtained a valid judgment, in a court of record of competent jurisdiction, for the recovery of specifically designated property or for a certain sum of money, and (ii) perfected a lien under the judgment on the property involved. Under the regulation, a judgment lien is not perfected until the requirements of local law are complied with, including recording. Also, the term “judgment” does not include the determination of a quasi-judicial body or of a person acting in a quasi-judicial capacity, such as the action of State-taxing authorities.

Note: As to the validity of a general tax lien against “super priorities,” see Standard 20.5. As to the continued effectiveness of a notice of tax lien, see Standard 20.7.

STANDARD 20.5

INTEREST SUPERIOR TO FEDERAL TAX LIEN PREVIOUSLY RECORDED AND INDEXED – “SUPERPRIORITY”

STANDARD: A GENERAL TAX LIEN, EVEN THOUGH NOTICE OF THE LIEN HAS BEEN RECORDED AND INDEXED, IS NOT VALID WITH RESPECT TO CERTAIN QUALIFIED REAL PROPERTY INTERESTS SPECIFIED IN 26 USC 6323 (b) AND (c), INCLUDING REAL PROPERTY TAXES AND SPECIAL ASSESSMENTS, COMMERCIAL TRANSACTIONS, FINANCING AGREEMENTS, OBLIGATORY DISBURSEMENT AGREEMENTS, REAL PROPERTY CONSTRUCTION OR IMPROVEMENT FINANCING AGREEMENTS AND MECHANICS' LIENS.

Problem A: Donald Brown owned Blackacre on November 15, 1989 when a notice of federal tax lien against him was recorded and indexed in the office of the register of deeds for the county in which Blackacre was located. Brown failed to pay the real property taxes levied on Blackacre in 1990. John Doe purchased Blackacre at the 1993 tax sale for the delinquent 1990 taxes, obtained a tax deed to Blackacre in 1994, and then perfected his tax title. Did Doe acquire title free of the federal tax lien?

Answer: Yes. The 1990 real property tax, being a tax of general application levied by a taxing authority based upon the value of real property, is superior to the federal tax lien, because the real property tax is entitled under local law to priority over security interests in property which are prior in time.

Problem B: Donald Brown owned and occupied a residence on Blackacre. On January 3, 1999, a notice of a federal tax lien against Brown was recorded and indexed in the office of the register of deeds for the county in which Blackacre was located. On May 11, 1999, Brown hired John Doe to make repairs to the residence at a contract price of \$4,500. Doe made the repairs and Brown failed to pay him. Doe then recorded a construction lien against Blackacre. Was Doe's construction lien superior to the federal tax lien?

Answer: Yes. A construction lien is superior to a federal tax lien previously recorded and indexed if (1) the mechanic's lien is for repairs or improvements of a personal residence (containing not more than four dwelling units), (2) the owner occupies the residence or a unit of the residence, and (3) the contract price with the owner does not exceed \$5,000.

Authorities: Generally: 26 USC 6323(b), (c) and (d).

Problem A: 26 USC 6323(b)(6)(A). MCL 211.72. *Robbins v Barron*, 32 Mich 36 (1875).

Problem B: 26 USC 6323(b)(7).

STANDARD 20.6

RECORDING AND INDEXING NOTICE OF GENERAL TAX LIEN

STANDARD: A NOTICE OF GENERAL TAX LIEN IS VALID AGAINST A PERSON ENTITLED TO THE PROTECTION OF 26 USC 6323(a):

- (A) AS TO REAL PROPERTY, IF RECORDED AND ENTERED IN A PUBLIC INDEX IN THE OFFICE OF THE REGISTER OF DEEDS FOR THE COUNTY IN WHICH THE REAL PROPERTY IS LOCATED;
- (B) AS TO PERSONAL PROPERTY OF AN INDIVIDUAL RESIDENT OF MICHIGAN, IF FILED WITH THE OFFICE OF THE REGISTER OF DEEDS FOR THE COUNTY IN WHICH THE INDIVIDUAL RESIDES;
- (C) AS TO PERSONAL PROPERTY OF A CORPORATION OR PARTNERSHIP, THE PRINCIPAL EXECUTIVE OFFICE OF WHICH IS IN MICHIGAN, IF FILED WITH THE OFFICE OF THE MICHIGAN SECRETARY OF STATE;
- (D) AS TO PERSONAL PROPERTY OF A CORPORATION OR PARTNERSHIP, THE PRINCIPAL EXECUTIVE OFFICE OF WHICH IS NOT IN MICHIGAN, IF FILED IN ACCORDANCE WITH THE LAW IN EFFECT IN THE STATE IN WHICH THE OFFICE IS LOCATED; AND
- (E) AS TO PERSONAL PROPERTY OF ANY TAXPAYER WHOSE RESIDENCE IS OUTSIDE THE UNITED STATES, IF FILED IN ACCORDANCE WITH THE LAW OF THE DISTRICT OF COLUMBIA.

Problem A: Donald Brown owned Blackacre. On May 25, 1999, a notice of federal tax lien was recorded and indexed against Brown in the office of the register of deeds for the county in which Blackacre was located. On July 13, 1999 Brown deeded Blackacre to Alfred Leonard. Did

Leonard acquire Blackacre free of the federal tax lien?

Answer: No. The lien became valid against any purchaser upon recording and indexing in the office of the register of deeds in the county where the real property was located.

Problem B: Same facts as in Problem A, except that the register of deeds after receiving the tax lien failed to record and index it. Leonard, searched the records of the register of deeds, found no reference to the notice of federal tax lien, and purchased Blackacre. Did Leonard acquire title free of the federal tax lien?

Answer: Yes. 26 USC 6323(f)(4) requires that the notice of lien be recorded and indexed with the office of the register of deeds in the county where the real property is located.

Problem C: Jordan Corporation, incorporated and having its principal executive office in Indiana, owned Blackacre, which is located in Wayne County, Michigan. On February 1, 1999, a notice of a federal tax lien against Jordan Corporation was filed and recorded in Indiana, in accordance with Indiana law. On May 2, 1999, Jordan Corporation deeded Blackacre to Paul Ingram. Did Ingram acquire Blackacre free of the federal tax lien?

Answer: Yes.

Problem D: Donald Brown, a resident of Oakland County, Michigan, held a mortgage on Blackacre, which is located in Wayne County, Michigan. On February 1, 1999, a notice of a federal tax lien against Brown was recorded and indexed in the office of the Oakland County register of deeds. On May 4, 1999, Brown assigned the mortgage to Paul Ingram. Did Ingram acquire the mortgage free of the federal tax lien?

Answer: No. Upon recording and indexing, the federal tax lien attached to Brown's mortgagee's interest. A notice of federal tax lien attaches to a mortgagee's interest and other personal property (including after-acquired property) of an individual resident of Michigan if the notice is recorded and indexed in the county in which the individual resides at the time the notice is recorded.

Problem E: Same facts as in Problem D, except that Brown moved to Kent County, Michigan, on May 2, 1999. Did Ingram acquire the mortgage free of the federal tax lien?

Answer: No. The lien attached before Brown moved from Oakland County. See, Comment.

Problem F: Green Company, a Michigan partnership, having its principal executive office in Macomb County, Michigan held a mortgage on Whiteacre located in Saginaw County, Michigan. On April 10, 1999, a notice of federal tax lien against Green Company was filed in the office of the Michigan Secretary of State. On May 4, 1999, Green Company assigned the mortgage to Paul Ingram. Did Ingram acquire the mortgage free of the federal tax lien?

Answer: No. Filing of a notice of federal tax lien in the office of the Michigan Secretary of State is valid against the personal property (including after-acquired property) of a corporation or partnership having its principal executive office in Michigan.

Problem G: Jordan Corporation, incorporated and having its principal executive office in Indiana, held a mortgage on Whiteacre, which is located in Saginaw County, Michigan. On April 16, 1999, a notice of federal tax lien against Jordan Corporation was filed in Indiana in accordance with Indiana law. On June 4, 1999, Jordan Corporation assigned the mortgage to Paul Ingram, a Michigan resident. Did Ingram acquire the mortgage free of the federal tax lien?

Answer: No. The lien attached before the assignment.

Problem H: Donald Brown, a resident of Windsor, Ontario, held a mortgage on Blackacre, located in Wayne County, Michigan. On April 10, 1999, a notice of a federal tax lien against Brown was recorded with the register of deeds for Wayne County. On June 4, 1999, Brown assigned the mortgage to Paul Ingram, a resident of Wayne County. Did Ingram acquire the mortgage free of the federal tax lien?

Answer: Yes. In order to be valid against personal property, a notice of tax lien must be filed in the place of residence of the individual taxpayer. Because Brown resides outside of the United States, he is deemed to reside in the District of Columbia for federal tax lien purposes.

Authorities: 26 USC 6323(f); MCL 211.661 *et seq.*

Comment: Verification that an assignor's interest in an assigned mortgage is free of a federal tax lien requires: (1) determination of the place of residence or principal executive office of the assignor for the past 10 years and 30 days; and (2) search of the records of each such place for the appropriate period. If the assignor is not the original mortgagee, a similar determination and search would be required as to each intervening holder of the mortgage.

If the residence of any holder of the mortgage was at any time outside the United States, a search for such period in the District of Columbia would be required.

STANDARD 20.7

EFFECT OF FILING AND REFILING NOTICE OF GENERAL TAX LIEN FOR RECORD AND INDEXING

STANDARD: A NOTICE OF A GENERAL TAX LIEN WHEN FILED FOR RECORD AND INDEXED, REMAINS VALID AGAINST PARTIES PROTECTED UNDER 26 USC 6323(a) FOR A PERIOD OF 10 YEARS AND 30 DAYS AFTER THE ASSESSMENT DATE.

IF A NOTICE IS REFILED FOR RECORD AND INDEXED DURING THE “REQUIRED REFILING PERIOD” (THE ONE-YEAR PERIOD ENDING 30 DAYS AFTER THE EXPIRATION OF 10 YEARS AFTER THE DATE OF ASSESSMENT), THE NOTICE REMAINS VALID FOR AN ADDITIONAL PERIOD OF 10 YEARS AFTER THE END OF THE “REQUIRED RE- FILING PERIOD” AND MAY BE EXTENDED BY REFILING FOR RECORD AND INDEXING.

IF A NOTICE IS REFILED FOR RECORD AND INDEXED AFTER THE EXPIRATION OF THE “REQUIRED REFILING PERIOD,” NOTICE IS VALID AS OF THE TIME OF RE- FILING FOR RECORD AND INDEXING, BUT PROSPECTIVELY ONLY, FOR A PERIOD OF 10 YEARS AFTER THE END OF THE PRECEDING “REQUIRED REFILING PERIOD” AND MAY BE EXTENDED BY REFILING FOR RECORD AND IN- DEXING.

Problem A: Donald Brown owned Blackacre. On March 1, 1994 a federal tax was assessed against Brown. On July 1, 1997, a notice of the federal tax lien against Brown was filed for record and indexed in the office of the register of deeds for the county in which Blackacre was located. On April 15, 2004, Brown deeded Blackacre to Paul Ingram. The notice had not been refiled for record or indexed. Did Ingram acquire Blackacre free of the federal tax lien?

Answer: Yes.

Problem B: Donald Brown owned Blackacre. On March 1, 1993, a federal tax was assessed against Brown. On July 1, 1993, a notice of the federal tax lien against Brown was filed for record and indexed in the office of the register of deeds for the county in which Blackacre was located. Notice of the lien was refiled for record and indexed on April 15, 2002. On November 18, 2004 Brown deeded Blackacre to Paul Ingram. Did Ingram acquire Blackacre free of the federal tax lien?

Answer: No. The initial “required refiling period” began April 1, 2002 and continued through March 31, 2003. Thus, April 15, 2002 was within the “required refiling period.” Because refiling for record and indexing continued the validity of the notice for 10 years after the end of the “required refiling period” (not after the date of refiling for record and indexing), the refiling for record and indexing on April 15, 2002 continued the validity of the notice through March 31, 2013.

Problem C: Donald Brown owned Blackacre and Whiteacre. On March 1, 1993 a federal tax lien was assessed against Brown. On July 1, 1993, a notice of federal tax lien against Brown was filed for record and indexed in the office of the register of deeds for the county in which both Blackacre and Whiteacre were located. On April 15, 2003, Brown deeded Blackacre to Paul Ingram. A notice of the lien was refiled for record and indexed on June 2, 2005. On June 15, 2005, Brown deeded Whiteacre to Ingram. Did Ingram acquire either Blackacre or Whiteacre free of the federal tax lien?

Answer: Yes, as to Blackacre. At the time Blackacre was deeded, more than 10 years and 30 days had elapsed after the date of the assessment. Because the notice of the federal tax lien was not refiled for record and indexed during the “required refiling period,” the notice was not valid until refiled for record and indexed on June 2, 2005. The refiling of the notice for record and indexing after expiration of the initial “required refiling period” is valid prospectively only and did not affect the conveyance of Blackacre made after the notice ceased to be valid and before the notice was refiled for record and indexing.

No, as to Whiteacre. The refiling for record and indexing of the notice of the federal tax lien on June 2, 2005, before the conveyance of Whiteacre, revived the validity of the notice of the lien as of that date. The notice is effective through March 31, 2013. The refiling

for record and indexing caused the notice to remain valid until the expiration of 10 years after the end of the preceding “required refiling period.” Because the assessment was March 1, 1993, the end of the first “required refiling period” was March 31, 2003. The refiling for record and indexing continued the validity of the notice for 10 years after March 31, 2003.

Authorities: 26 USC 6323(g) and 6502(a).

Comment A: To be valid as a refiling, a notice of federal tax lien must be refiled for record and indexed in the office in which the prior notice of lien was filed or recorded and, in certain instances in which notice of a change of residence has been given to the United States, must also be refiled for record and indexed in the new state of residence. A notice of lien may be kept valid indefinitely by repeated refilings for record and indexing.

Comment B: Section 11317 of the Revenue Reconciliation Act of 1990, which became effective on November 5, 1990, amended the period for collection of a tax levy or proceeding in court from six years to 10 years, 26 USC 6502(a), and the “required refiling period” to “the one-year period ending 30 days after the expiration of 10 years after the date of assessment of the tax,” 26 USC 6323(g). The Internal Revenue Service takes the position that a notice of federal tax lien recorded before November 5, 1990 which reflects the prior six-year collection period had to be rerecorded by the “required refiling period” stated in the notice. A notice refiled for record and indexed after November 5, 1990 will reflect the 10-year collection period under 26 USC 6502(a), as amended.

STANDARD 20.8

SCOPE AND RELATIVE PRIORITY OF ESTATE TAX LIEN

STANDARD: UPON DEATH AND WITHOUT NOTICE, A FEDERAL ESTATE TAX LIEN IN THE AMOUNT ULTIMATELY DETERMINED TO BE DUE AGAINST THE GROSS ESTATE OF A DECEDENT, ARISES AND ATTACHES TO THE GROSS ESTATE FOR 10 YEARS AND IS SUPERIOR TO ALL LIENS WHICH ARISE LATER, EXCEPT AS PROVIDED IN 26 USC 6324(c). THE LIEN, HOWEVER, IS SUBJECT TO DIVESTMENT IN THE MANNER PROVIDED UNDER 26 USC 6323(h)(1) AND (6) AND DOES NOT APPLY TO ANY PROPERTY OF THE ESTATE SUBJECT TO THE SPECIAL LIENS PROVIDED FOR IN 26 USC 6324A AND 6324B.

Problem A: John Doe owned Blackacre subject to a mortgage. Doe died December 2, 1995, leaving an estate liable for payment of federal estate tax. The mortgage was foreclosed in 1996. The mortgagee paid real property taxes for 1994, 1995 and 1996, current insurance premiums and the statutory attorney fees for the foreclosure. The mortgage provided that the lien secured repayment of the amounts paid by the mortgagee. Does the lien for the mortgage indebtedness, increased by the amounts paid, have priority over the federal estate tax lien?

Answer: Yes. The federal estate tax lien attached to Blackacre upon John Doe's death, but the previously existing mortgage had priority over the tax lien and the priority extends to the expenditures.

Problem B: John Doe owned Blackacre at the time of his death. His will, naming a personal representative with power of sale, was admitted to probate and the personal representative qualified. The inventory and appraisal filed in the estate disclosed a total probate estate in an amount less than the applicable estate tax exemption. The personal representative deeded Blackacre to Richard Roe, pursuant to the power of sale. May it be presumed that Roe acquired title to Blackacre free of a federal estate tax lien?

Answer: No, because the gross estate of a decedent for federal estate tax purposes includes certain property interests in addition to the decedent's probate estate. If Doe owned any such property interests at the time of his death, their value, in addition to the value of Doe's probate estate, could result in a gross federal estate tax estate in excess of the estate tax exemption.

Problem C: John Doe died February 1, 2005. His estate included Blackacre and was subject to federal estate tax. County and city real property taxes accruing after February 1, 2005 were not paid. Do the liens of the unpaid real property taxes have priority over the estate tax lien?

Answer: Yes.

Problem D: John Doe died testate December 1, 1996. His estate included Blackacre and was subject to federal estate tax. Frank Ernest obtained a judgment against Doe's devisees on February 14, 1997. On March 11, 1997, Blackacre was levied on pursuant to the judgment, sold to Ernest at a sale on execution levy and the redemption period expired. Did Ernest acquire title to Blackacre free of the estate tax lien?

Answer: No. Upon Doe's death, the estate tax lien attached to Blackacre without notice and had priority over the interest of the judgment creditor.

Problem E: Tom Swift died November 15, 1996. His estate included Blackacre and was subject to federal estate tax. On December 24, 1996, the personal representative of Swift's estate mortgaged Blackacre to Frank Ernest. None of the mortgage proceeds were used to pay charges against the estate or expenses of administration. The mortgage was foreclosed and the redemption period expired. Did the purchaser at the foreclosure sale acquire title to Blackacre free of the estate tax lien?

Answer: No. Upon Swift's death, the estate tax lien attached to Blackacre without notice and had priority over the interest of the mortgagee.

Authorities: Generally: 26 USC 2031 through 2044, 6323, 6324(a) and (c).

Problem A: 26 USC 6323(e).

Problem C: 26 USC 6323(b) and 6324(c). *Robbins v Barron*, 32 Mich 36 (1875).

Problem D: *United States v McGuire*, 42 F Supp 337 (NJ, 1941).

Problem E: *United States v Security-First National Bank of Los Angeles*, 30 F Supp 113 (SD Cal, 1939).

Comment A: Some types of property interests, as defined by federal law, which may be included in the gross estate of a decedent, but not in the probate estate, are:

- (A) insurance on the life of the decedent with respect to which the decedent possessed any incident of ownership;
- (B) property owned jointly or by the entirety;
- (C) property subject to a power of appointment;
- (D) property which the decedent conveyed during his or her lifetime, but in which certain incidents of ownership were retained;
- (E) property conveyed by the decedent in contemplation of death; and
- (F) transfers taking effect at death.

Comment B: A federal estate tax lien attaches upon death and without notice. A general tax lien for the same estate tax arises at the time the assessment is made. See, Standard 20.1. Each lien has separate characteristics as to scope, relative priority and enforcement, and the United States may enforce either lien. *United States v Cleavenger*, 325 F Supp 871 (ND Ind, 1971), appeal dismissed, 483 F2d 1406 (CA 7, 1973).

Comment C: Real property may be divested of a federal estate tax lien as provided in 26 USC 6324(a)(1) and (2). See, Standards 20.9 and 20.10.

STANDARD 20.9

DIVESTING PROPERTY OF ESTATE TAX LIEN UPON CONVEYANCE BY SURVIVING TENANT

STANDARD: ONE WHO TAKES TITLE AS A PURCHASER FROM OR IS GRANTED A SECURITY INTEREST BY AN OWNER WHO HELD TITLE TO REAL PROPERTY AS A SURVIVING JOINT TENANT OR TENANT BY THE ENTIRETIES, TAKES FREE OF ANY FEDERAL ESTATE TAX LIEN AGAINST THE ESTATE OF THE DECEASED TENANT UNLESS A PRIOR NOTICE OF A GENERAL TAX LIEN HAS BEEN RECORDED AND INDEXED.

Problem A: Samuel Long and Dorothy Long owned Blackacre as tenants by the entireties. Samuel Long died in 1998 leaving an estate subject to federal estate tax. In 1999 and before the recording and indexing of a notice of federal estate tax lien, Dorothy Long, as survivor, deeded Blackacre to Paul Ingram, a purchaser for an adequate and full consideration in money or money's worth. A certified copy of the death certificate of Samuel Long was attached to the deed. Did Ingram acquire title to Blackacre free of the federal estate tax lien against the estate of Samuel Long?

Answer: Yes.

Problem B: Samuel Long and Maurice Dean owned Blackacre as joint tenants. Samuel Long died in 1998 leaving an estate subject to federal estate tax. Dean deeded Blackacre to Sidney Carr for a nominal consideration. Carr deeded Blackacre to Paul Ingram, a purchaser for an adequate and full consideration in money or money's worth. No notice of a federal estate tax lien against Long's estate was recorded or indexed. Did Ingram acquire title to Blackacre free of the federal estate tax lien?

Answer: Yes. Blackacre was not divested of the lien upon conveyance to Carr, who was not a purchaser as defined in 26 USC 6323(h)(6), but Blackacre was divested when the later conveyance was made to Ingram, who was a protected purchaser.

Authorities: 26 USC 6323(h)(1), (6) and 6324(a)(2).

- Comment A:** Before the Federal Tax Lien Act of 1966, property conveyed by a surviving tenant was divested of an estate tax lien only if the purchaser, mortgagee or pledgee was “bona fide.” Internal Revenue Service rulings indicated that the “bona fides” were not affected by a purchaser’s knowledge that the seller became the sole owner upon the death of a tenant by the entireties or joint tenant. Rev Rul 56-144; 56-1 Cum Bul 563. Under the Federal Tax Lien Act of 1966, actual knowledge by a purchaser or holder of a security interest of the existence of an estate tax lien, or of facts which would make the existence of such a lien probable, does not deprive the purchaser or holder of a security interest of protected status if the other requisites of 26 USC 6323(h)(1) or (6) are satisfied.
- Comment B:** 26 USC 6324(a)(2) also provides for divesting property of an estate tax lien upon transfer by various persons other than surviving tenants.
- Comment C:** A purchaser or holder of a security interest, meeting the requirements of 26 USC 6323(h)(1) and (6) and 6324(a)(2), is also be protected against the special estate tax liens described in Standards 20.12 and 20.13, unless a prior notice of a general tax lien has been recorded and indexed.

STANDARD 20.10

DIVESTING REAL PROPERTY OF ESTATE TAX LIEN THROUGH SALE OR MORTGAGE BY DECEDENT'S PERSONAL REPRESENTATIVE

STANDARD: REAL PROPERTY INCLUDED IN A DECEDENT'S PROBATE ESTATE WHICH IS DEEDED OR MORTGAGED BY A PERSONAL REPRESENTATIVE IS DIVESTED OF A FEDERAL ESTATE TAX LIEN IF THE PROCEEDS OF THE SALE OR MORTGAGE ARE USED FOR THE PAYMENT OF THE CHARGES AGAINST THE ESTATE AND EXPENSES OF ITS ADMINISTRATION THAT ARE ALLOWED BY THE PROBATE COURT AND IF NO NOTICE OF THE FEDERAL ESTATE TAX LIEN HAS BEEN RECORDED OR INDEXED.

Problem A: John Doe owned various parcels of real property, including Blackacre. Doe died January 10, 1999. The probate court ordered the sale of Blackacre for the purpose of paying allowed charges and expenses and the sale was confirmed. The personal representative of Doe's estate deeded Blackacre to Richard Roe. A notice of federal estate tax lien against Doe's estate was recorded and indexed after execution of the deed. All proceeds of the sale were used for the payment of the charges and expenses. Did Roe acquire title to Blackacre free of the federal estate tax lien?

Answer: Yes.

Problem B: The estate of John Doe, deceased, included Blackacre and was subject to federal estate tax. The personal representative of Doe's estate mortgaged Blackacre to Security Trust Bank to secure a loan. The loan proceeds were used to pay funeral expenses and medical bills which were allowed by the probate court, and also charges and expenses which were not allowed. The mortgage was foreclosed and the redemption period expired. Did the purchaser at the foreclosure sale acquire title to Blackacre free of the federal estate tax lien?

Answer: No. Because the loan proceeds were used, in part, to pay charges and expenses which were not allowed by the probate court, Blackacre was not fully divested of the federal estate tax lien.

Authorities: 26 USC 6324(a)(1). *United States v Security First National Bank of Los Angeles*, 30 F Supp 113 (SD Cal 1939); *United States v McGuire*, 42 F Supp 337 (NJ 1941); *Northington v United States*, 475 F2d 720 (CA 5, 1973); *Kleine v United States*, 539 F2d 427 (CA 5, 1976).

STANDARD 20.11

DURATION OF ESTATE TAX LIEN

STANDARD: A FEDERAL ESTATE TAX LIEN ON THE GROSS ESTATE OF A DECEDENT CONTINUES IN FORCE FOR A PERIOD OF 10 YEARS AFTER THE DATE OF DEATH UNLESS THE ESTATE TAX IS SOONER PAID IN FULL OR BECOMES UN-ENFORCEABLE BY REASON OF LAPSE OF TIME.

Problem: John Doe, owner of Blackacre, died on January 10, 1984. His estate was subject to federal estate tax. The estate was closed in 1985 and Blackacre was assigned to Richard Poe. On January 20, 1994, was Poe's title to Blackacre free of the federal estate tax lien?

Answer: Yes. The estate tax lien had expired, but see comment B below.

Authority: 26 USC 6324(a)(1).

Comment A: The periods of limitation within which a tax may be assessed (26 USC 6501) and enforced (26 USC 6502) apply to an estate tax. See, Standard 20.3, Comments B and C.

Comment B: Upon the expiration of 10 years after the date of death, the estate tax lien ceases to exist. If a right to assess or enforce the tax continues, a general tax lien may attach. *United States v Cleavenger*, 325 F Supp 871 (ND Ind. 1971), appeal dismissed, 483 F2d 1406 (CA 7, 1973). See, Standards 20.1 through 20.10.

STANDARD 20.12

SPECIAL LIEN FOR ESTATE TAX DEFERRED UNDER 26 USC 6166

STANDARD: A SPECIAL TAX LIEN (“SECTION 6166 LIEN”) ATTACHES TO ALL PROPERTY DESIGNATED IN AN AGREEMENT EXECUTED AND FILED IN COMPLIANCE WITH 26 USC 6324A PURSUANT TO AN ELECTION TO EXTEND THE TIME FOR PAYMENT OF THE ESTATE TAX UNDER 26 USC 6166. THE LIEN:

- (A) IS IN LIEU OF THE FEDERAL ESTATE TAX LIEN UNDER 26 USC 6324 (SEE 26 USC 6324A(d)(4));**
- (B) ARISES AT THE EARLIER OF THE DATE THE PERSONAL REPRESENTATIVE IS DISCHARGED FROM LIABILITY UNDER 26 USC 2204 OR NOTICE OF THE LIEN IS RECORDED IN ACCORDANCE WITH 26 USC 6323(f);**
- (C) CONTINUES UNTIL THE LIABILITY FOR THE DEFERRED AMOUNT IS SATISFIED OR BECOMES UNENFORCEABLE BY REASON OF LAPSE OF TIME;**
- (D) IS NOT VALID AGAINST ANY PARTIES PROTECTED BY 26 USC 6323(a) UNTIL NOTICE HAS BEEN RECORDED AND INDEXED; AND**
- (E) IS NOT VALID WITH RESPECT TO CERTAIN REAL PROPERTY INTERESTS SPECIFIED IN 26 USC 6324(d)(3) EVEN IF NOTICE OF THE LIEN HAS BEEN RECORDED AND INDEXED. IF THE INTERNAL REVENUE SERVICE FILES A NOTICE (AS PROVIDED FOR IN 26 USC 6323(f)) THAT PAYMENT OF THE DEFERRED AMOUNT OF ESTATE TAX HAS BEEN ACCELERATED UNDER 26 USC 6166(g), THEN THE SECTION 6166 LIEN TAKES PRIORITY OVER LATER RECORDED MECHANIC’S LIENS AND REAL PROPERTY CONSTRUCTION OR IMPROVEMENT FINANCING STATEMENTS,**

BUT NOT OVER REAL PROPERTY TAXES AND SPECIAL ASSESSMENTS.

Authorities: 26 USC 6166 and 6324A.

Comment: An estate tax return is due nine months after the decedent's death. 26 USC 2204(a). Except in certain situations, payment of the estate tax is required to be made with the return. The Secretary of the Treasury may extend the time for payment for a reasonable period not to exceed 10 years. 26 USC 6161.

The fiduciary may elect to extend the installment payment privilege to 15 years for that portion of the estate tax attributable to an interest in a farm or other closely held business, if the value of the business interest is more than 35% of the adjusted gross estate. If the fiduciary has elected to defer payments of estate tax attributable to a farm or other closely held business, under the 15-year payout rule, the special lien described in this Standard applies. 26 USC 6166.

Note: See, Standards 20.5, 20.6 and 20.8.

STANDARD 20.13

SCOPE AND PRIORITY OF SPECIAL LIEN FOR ADDITIONAL ESTATE TAX ATTRIBUTABLE TO VALUE OF REAL PROPERTY USED IN OPERATION OF FARM OR OTHER QUALIFYING BUSINESS

STANDARD: A SPECIAL ESTATE TAX LIEN ATTACHES TO AN INTEREST IN REAL PROPERTY WITHIN THE MEANING OF 26 USC 2032A(b) IF AN ELECTION IS FILED UNDER 26 USC 2032A TO VALUE THE INTEREST FOR FEDERAL ESTATE TAX PURPOSES BASED ON ITS ACTUAL USE. THE LIEN:

- (A) IS IN LIEU OF THE FEDERAL ESTATE TAX LIEN UNDER 26 USC 6324;
- (B) ARISES AT THE TIME AN ELECTION IS FILED UNDER 26 USC 2032A;
- (C) CONTINUES UNTIL THE LIABILITY FOR TAX UNDER 26 USC 2032A(c) IS SATISFIED OR HAS BECOME UNENFORCEABLE BY REASON OF LAPSE OF TIME, OR UNTIL IT IS ESTABLISHED TO THE SATISFACTION OF THE SECRETARY OF THE TREASURY THAT NO FURTHER TAX LIABILITY MAY ARISE UNDER THIS SECTION;
- (D) IS NOT VALID AGAINST ANY PARTIES PROTECTED BY 26 USC 6323(a) UNTIL NOTICE HAS BEEN RECORDED AND INDEXED; AND
- (E) TAKES PRIORITY OVER A LIEN WHICH IS LATER RECORDED IN THE SAME MANNER AS A LIEN UNDER SECTION 26 USC 6166.

Authorities: 26 USC 6166, 6324, 6324A, 6324B and 2032A.

Comment: 26 USC 6324B permits the application of the special lien described in this Standard to all qualified farm or other qualified real property with respect to which a special use valuation election has been made.

The lien arises as a result of an election under 26 USC 2032(A)(d) to value real property based on its actual use which must be made not later than the due date (including extensions) for filing the estate tax return. In addition, the fiduciary must file a written agreement signed by each person who has an interest (whether or not in possession) in any real property for which actual use valuation is elected. Each such person must also consent to the recapture of the estate tax benefit if the real property is conveyed for, or converted, to non-qualifying uses. The agreement must be filed with the estate tax return.

Note: See, Standards 20.6, 20.8 and 20.12.

STANDARD 20.14

SCOPE AND PRIORITY OF GIFT TAX LIEN

STANDARD: REAL PROPERTY CONVEYED BY GIFT BECOMES IMMEDIATELY SUBJECT TO A LIEN FOR THE GIFT TAX DUE FROM THE DONOR IN RESPECT TO ALL GIFTS MADE BY THE DONOR DURING THE CALENDAR YEAR IN WHICH THE GIFT WAS MADE. THE LIEN HAS PRIORITY OVER ALL LIENS WHICH ARISE LATER, EXCEPT AS PROVIDED IN 26 USC 6324(c).

Problem A: Mary Doe received Swampacre by gift in March, 1990. The value of Swampacre was such that no gift tax was due. In November of 1990 the same donor made a gift of Blackacre to Richard Roe. The combined value of the gifts was such that a gift tax was due. No gift tax return was filed by the donor and no gift tax was paid. On January 1, 1999 did Doe own Swampacre free of the gift tax lien?

Answer: No.

Problem B: Mary Doe received Blackacre by gift in 1990. The value of Blackacre was sufficient to create a federal gift tax liability. The gift tax was never paid. In 1993, Doe conveyed Blackacre as a gift to Richard Roe. In 1994 did Roe hold Blackacre free of the gift tax lien?

Answer: No. The gift tax lien on Blackacre which arose from the 1990 gift continued to be effective even after Blackacre was later conveyed by gift.

Note: See Standard 20.16 regarding the duration of a gift tax lien.

Authorities: 26 USC 2501, 2502, 2503, 2504 and 6324(b). Treas Reg §301.6324-1 (1972). *Baur v Commissioner*, 145 F2d 338 (CA 3, 1944); *Winton v Reynolds*, 57 F Supp 565 (Minn, 1944).

Comment: In addition to a federal gift tax lien, a general tax lien for the same gift arises at the time the assessment is made. See, Standard 20.1. Each lien has separate characteristics as to scope, priority and en-

forcement, and the United States may enforce either lien.

Note: See Standard 20.15 regarding conveyances and encumbrances that may divest a gift tax lien.

STANDARD 20.15

VALIDITY OF GIFT TAX LIEN AGAINST PROTECTED PERSON

STANDARD: A GIFT TAX LIEN IS NOT VALID AGAINST ANY PERSON WHO BECOMES A PURCHASER, HOLDER OF A SECURITY INTEREST, A MECHANIC'S LIENOR AS THOSE TERMS ARE DEFINED IN 26 USC 6323(h) OR A JUDGMENT LIEN CREDITOR, UNLESS THE NOTICE OF THE TAX LIEN HAS BEEN RECORDED AND INDEXED AS PROVIDED IN 26 USC 6323.

Problem A: Mary Doe acquired Blackacre in 2005 for a consideration of "love and affection." The value of Blackacre was sufficient to create a federal gift tax liability which was not discharged. In 2006, Doe deeded Blackacre to Paul Ingram and the deed was recorded. Ingram paid an adequate and full consideration in money or money's worth. No notice of the federal gift tax lien against Doe or Ingram was recorded. Did Ingram take free of the gift tax lien?

Answer: Yes. Ingram was a purchaser who took free of the gift tax lien. 26 USC 6324(b) provides for a gift tax lien and its divestment upon transfer to a purchaser or holder of a security interest, as those terms are defined in 26 USC 6323(h). Upon divestment, the lien attaches to all real property, including after-acquired property of Doe to the extent of the value of Blackacre.

Problem B: Same facts as in Problem A, except that in 2006 Doe mortgaged Blackacre to Ingram to secure payment of a loan from Ingram. The mortgage was recorded. Does Ingram's mortgage have priority over the gift tax lien?

Answer: Yes.

Authorities: 26 USC 6323(h) and 6324(b).

Comment: In addition to a federal gift tax lien, a general tax lien for the same gift arises at the time the assessment is made. See, Standard 20.1. Each lien has separate characteristics as to scope, relative priority and enforcement, and the United States may enforce either lien.

STANDARD 20.16

DURATION OF GIFT TAX LIEN

STANDARD: A GIFT TAX LIEN CONTINUES UNTIL THE TAX IS SATISFIED, OR BECOMES UNENFORCEABLE BY REASON OF LAPSE OF TIME. THE LIEN EXPIRES 10 YEARS AFTER THE DATE THE LAST GIFT WAS MADE DURING THE CALENDAR YEAR FOR WHICH A GIFT TAX RETURN WAS REQUIRED.

Problem: On November 23, 1995, John Smith gave Blackacre to Mary Doe. The value of Blackacre, plus that of other gifts made by Smith, the last of which was made on December 15, 1995, in the period covered by the same gift tax return created a gift tax liability. The tax was not paid nor had it become unenforceable by reason of lapse of time. On December 16, 2005, does Doe hold Blackacre free of the gift tax lien?

Answer: Yes. More than 10 years elapsed since the date of the last gift made in 1995.

Authorities: 26 USC 6324(b). *Baur v Commissioner*, 145 F2d 338 (CA 3, 1944).

Comment: A gift tax lien ceases to exist before the expiration of 10 years after the date the gift or gifts were made if the lien “becomes unenforceable by reason of lapse of time.” 26 USC 6324(b). Although the limitations on the time within which a tax may be assessed (26 USC 6501) and enforced (26 USC 6502) apply to a gift tax, it is difficult to establish in any particular case that a statutory period of time has run because the period of limitations may be tolled under various circumstances. See, Standard 20.3, Comments B and C. The specific gift tax lien ceases to exist upon the expiration of 10 years after the date the gift or gifts were made. If a right to assess or enforce the tax remains, there is a general tax lien against the affected real property. See, Standards 20.1 through 20.7.

STANDARD 20.17

RELEASE, DISCHARGE, SUBORDINATION AND NONATTACHMENT OF FEDERAL TAX LIEN

STANDARD: A CERTIFICATE ISSUED BY THE UNITED STATES WHICH PURPORTS TO:

- (A) RELEASE A FEDERAL TAX LIEN;
- (B) DISCHARGE ANY SPECIFIC PROPERTY FROM A FEDERAL TAX LIEN;
- (C) SUBORDINATE A FEDERAL TAX LIEN TO ANOTHER INTEREST; OR
- (D) STATE THAT A SPECIFIC FEDERAL TAX LIEN DOES NOT ATTACH TO THE PROPERTY OF A SPECIFIED PERSON IS CONCLUSIVE, SUBJECT TO THE FOLLOWING:
 - (1) THE CERTIFICATE MUST BE RECORDED IN THE SAME OFFICE AS THE NOTICE OF FEDERAL TAX LIEN TO WHICH IT RELATES;
 - (2) A CERTIFICATE OF RELEASE OR NON-ATTACHMENT IS SUBJECT TO REVOCATION ON CONDITIONS SPECIFIED IN 26 USC 6325(f)(2), BUT THE REVOCATION IS EFFECTIVE ONLY AFTER NOTICE OF THE REVOCATION HAS BEEN RECORDED IN THE SAME OFFICE IN WHICH THE RELATED NOTICE OF LIEN WAS RECORDED; AND
 - (3) A DISCHARGE OF SPECIFIC PROPERTY FROM A LIEN IS NOT VALID IF THE PERSON LIABLE FOR THE TAX REACQUIRES THE PROPERTY AFTER THE CERTIFICATE HAS BEEN ISSUED.

Problem: Donald Brown was the owner of Blackacre. On January 17, 2006, a federal tax was assessed against Brown. On February 15, 2006, a notice of the federal tax lien against Brown was recorded in the office

of the register of deeds for the county in which Blackacre is located. On March 15, 2006, a certificate of release of the lien against Brown was recorded in the same register of deeds office. No revocation of the certificate was recorded. On March 31, 2006, Brown conveyed Blackacre to Paul Ingram, who was a purchaser entitled to the protection of 26 USC 6323(a). Did Ingram acquire Blackacre free of the federal tax lien?

Answer: Yes. Ingram was entitled to rely on the conclusiveness of the certificate recorded on March 15, 2000, because no revocation had been recorded before the conveyance of title. Had a revocation been recorded at any time, the lien would have been reinstated immediately but would have been effective prospectively only. Consequently, the recording of a release does not relieve a purchaser from the necessity of examining the title for a recorded revocation.

Authorities: 26 USC 6325(a), (b), (d), (e) and (f). Treas Reg §400.2-1(b), as to discharges based on substitution of proceeds of sale.

Comment: 26 USC 6323(f) requires the indexing of recorded notices of liens, but this section does not refer to indexing of certificates of release. In practice, however, releases and revocations of liens are recorded and indexed at the place of recording of the original lien. The Committee expresses no opinion as to whether there is a federal statutory requirement for the indexing of recorded releases and revocations. The Michigan Uniform Federal Lien Registration Act, MCL 211.661 *et seq.*, requires the indexing of revocations, releases and reattachments. MCL 211.665.

STANDARD 20.18

LEVY AND DISTRAINT

STANDARD: REAL PROPERTY TO WHICH A FEDERAL TAX LIEN ATTACHES IS SUBJECT TO LEVY, DISTRAINT AND SALE BY THE UNITED STATES. THE SALE PURCHASER ACQUIRES THE TITLE OF THE TAXPAYER AT THE TIME THE LIEN ATTACHED, PROVIDED:

- (A) THERE WAS NO REDEMPTION FROM THE SALE;**
- (B) A PROPER DEED WAS ISSUED BY THE UNITED STATES; AND**
- (C) THERE WAS SUBSTANTIAL COMPLIANCE WITH THE APPLICABLE STATUTORY PROCEDURE.**

Problem: Donald Brown owned Blackacre, subject to a recorded mortgage. On January 3, 2006, a federal tax was assessed against Brown. On February 1, 2006, a notice of federal tax lien against Brown was recorded in the county in which Blackacre was located. Later the United States levied upon, seized and on March 22, 2006, sold Blackacre to Kevin Smith and recorded a certificate of sale. On April 13, 2006, Brown granted a second mortgage on Blackacre. On October 1, 2006, no redemption having been made within 180 days from the sale, the United States deeded Blackacre to Smith, who recorded the deed. There had been substantial compliance with all of the applicable statutory procedures. Did Smith acquire title to Blackacre subject only to the first mortgage?

Answer: Yes. The first mortgage was recorded before the recording of the general tax lien. Smith acquired the title Brown held at the time the tax lien attached. Accordingly, Smith's title was free of the second mortgage. If the second mortgage had been recorded after the assessment but before the recording of the notice of the

federal tax lien, Smith's title would be subject to the second mortgage.

Authorities: 26 USC 6331 to 6344, inclusive.

Comment A: This Standard applies to all federal tax liens, including general, estate and gift tax liens.

Comment B: In *United States v Craft*, 535 US 274, 122 S Ct 1414, 152 L Ed 2d 437 (2002), the Supreme Court held that a federal tax lien against one spouse attaches to real property owned by husband and wife as tenants by the entirety. In *United States v Barr*, 617 F3d 370 (CA 6, 2010), the Court of Appeals held that the Internal Revenue Service could foreclose a lien for unpaid federal taxes owed by Mr. Barr against property held by Mr. and Mrs. Barr as tenants by the entirety, and distribute one-half of the proceeds to the Internal Revenue Service and one-half to Mrs. Barr. The court held that "Title 26 USC § 7403 authorizes federal courts to decree a sale of property to enforce a federal tax lien. When such a foreclosure sale takes place, the proceeds are to be distributed "according to the findings of the court in respect to the interests of the parties and of the United States," thus providing fair compensation both to the government and to any third parties. *Id.* § 7403(c)." The court further held that "[b]ecause Mr. and Mrs. Barr have equal interests in their home, division according to their interests results in an equal distribution of the proceeds of the sale of that home."

Note: See Standard 20.2 regarding the scope of a general tax lien for unpaid federal taxes.

CHAPTER XXI

STATE TAX LIENS



STANDARD 21.1

STATE TAX LIEN FOR TAXES ADMINISTERED BY MICHIGAN DEPARTMENT OF TREASURY

STANDARD: A LIEN FOR A TAX ADMINISTERED BY THE MICHIGAN DEPARTMENT OF TREASURY UNDER 1941 P.A. 122, BEING MCL 205.1 THROUGH 205.31, TOGETHER WITH INTEREST AND PENALTIES:

- (A) ATTACHES TO REAL PROPERTY AND RIGHTS TO REAL PROPERTY, INCLUDING AFTER-ACQUIRED PROPERTY, OF ANY PERSON LIABLE FOR THE TAX FROM THE DATE THAT A REPORT OR RETURN ON WHICH THE TAX IS LEVIED WAS REQUIRED TO BE FILED WITH THE DEPARTMENT OF TREASURY;**

- (B) IS A FIRST LIEN UPON THE REAL PROPERTY AND RIGHTS TO REAL PROPERTY OF THE DELINQUENT TAXPAYER, EXCEPT FOR BONA FIDE LIENS RECORDED BEFORE THE DATE OF RECORDING OF THE NOTICE OF TAX LIEN; HOWEVER, BONA FIDE LIENS RECORDED BEFORE THE NOTICE OF TAX LIEN IS RECORDED TAKE PRECEDENCE ONLY TO THE EXTENT OF DISBURSEMENTS MADE UNDER A FINANCING ARRANGEMENT BEFORE THE 46TH DAY AFTER THE DATE OF THE TAX LIEN RECORDING, OR BEFORE THE PERSON MAKING THE DISBURSEMENTS HAD ACTUAL KNOWLEDGE OF A TAX LIEN RECORDING UNDER THE ACT, WHICHEVER IS EARLIER;**

- (C) IS NOT VALID AGAINST A PERSON WHO BECOMES A MORTGAGEE, PLEDGEE, PURCHASER, INCLUDING A CONTRACT PURCHASER, OR JUDGMENT CREDITOR BEFORE THE RECORDING OF NOTICE OF THE TAX LIEN IN THE OFFICE OF THE REGISTER OF DEEDS FOR THE COUNTY IN WHICH THE REAL PROPERTY IS LOCATED; AND

- (D) CONTINUES FOR SEVEN YEARS AFTER THE DATE OF ATTACHMENT; THE LIEN MAY BE EXTENDED ANOTHER SEVEN YEARS BY REFILEING PURSUANT TO THE ACT.

Authorities: MCL 205.29, 211.682, 211.686 and 16.183.

Comment: The State Tax Lien Registration Act provides that a person who becomes a “mortgagee, pledgee, purchaser, including contract purchaser, or judgment creditor” has priority over a state tax lien for which no notice of lien has been recorded. MCL 211.686. The Act does not define these terms, but it has been held that “the statutory definition of purchaser in 26 USC 6323(h)(6) reflects the intent of our Legislature in enacting MCL 211.686” *Department of Treasury v Campbell*, 107 Mich App 561, 309 NW2d 668 (1981), *lv den*, 413 Mich 935 (1982).

Note: With respect to state tax liens arising under the Michigan Employment Security Act, see Standard 21.2.

STANDARD 21.2

STATE TAX LIEN UNDER MICHIGAN EMPLOYMENT SECURITY ACT

STANDARD: THE LIEN FOR TAXES UNDER THE MICHIGAN EMPLOYMENT SECURITY ACT:

- (A) ATTACHES TO REAL PROPERTY AND RIGHTS TO REAL PROPERTY OF A DELINQUENT EMPLOYING UNIT FROM THE DATE THAT A REPORT UPON WHICH THE SPECIFIC TAX IS COMPUTED WAS REQUIRED TO BE FILED WITH THE MICHIGAN UNEMPLOYMENT INSURANCE AGENCY;**
- (B) IS A FIRST LIEN UPON THE REAL PROPERTY AND RIGHTS TO REAL PROPERTY OF THE DELINQUENT EMPLOYING UNIT, BUT IS NOT VALID AGAINST LIENS AND ENCUMBRANCES RECORDED BEFORE THE RECORDING OF NOTICE OF THE TAX LIEN IN THE OFFICE OF THE REGISTER OF DEEDS FOR THE COUNTY IN WHICH THE REAL PROPERTY IS LOCATED; AND**
- (C) CONTINUES UNTIL THE LIABILITY, OR A JUDGMENT FOR THE TAX, IS SATISFIED, OR UNTIL THE LIEN BECOMES UNENFORCEABLE BECAUSE OF LAPSE OF TIME.**

Authority: MCL 421.15(e).

Note: With respect to state tax liens for taxes administered by the Michigan Department of Treasury, see Standard 21.1.

CHAPTER XXII

TAX TITLES



STANDARD 22.1

FAILURE TO SERVE NOTICE OF RIGHT TO RECONVEYANCE

STANDARD: UNLESS THE GRANTEE IN A STATE TREASURER'S TAX DEED SERVES A NOTICE OF RIGHT TO A RECONVEYANCE ON ALL PERSONS ENTITLED TO THE NOTICE WITHIN FIVE YEARS AFTER THE DATE THE GRANTEE BECOMES ENTITLED TO THE TAX DEED, THE GRANTEE AND THE GRANTEE'S HEIRS AND ASSIGNS ARE BARRED FROM ASSERTING ANY INTEREST DERIVED FROM THE TAX DEED.

Problem: Tom Bryan purchased the tax lien on Blackacre at the county treasurer's sale of land for delinquent taxes held on the first Tuesday in May, 1992. Bryan became entitled to a tax deed on the first Tuesday of May in 1993. Bryan did not surrender his tax purchaser's certificate until 1994, at which time he received a tax deed from the state treasurer. Bryan did not serve a notice of right to a reconveyance of Blackacre. Bryan conveyed Blackacre to Albert Brown in June 1998. Did Brown acquire marketable title to Blackacre?

Answer: No. Failure to serve the required notice within five years after the date when a tax purchaser, or the purchaser's heirs or assigns, became entitled to a state treasurer's tax deed, bars those claiming title under the deed or the certificate of purchase from asserting any interest derived from the tax deed.

Authorities: MCL 211.73a (repealed by 1999 P.A. 123, effective December, 31, 2003), 211.72 (repealed by 1999 P.A. 123, effective December, 31, 2003), 211.140 (repealed by 2001 P.A. 94, effective December 31, 2003). *McClure v Knight*, 284 Mich 649, 280 NW 76 (1938);

Brousseau v Conklin, 301 Mich 241, 3 NW2d 260 (1942); *Bentley v Cam*, 362 Mich 78, 106 NW2d 528 (1960).

Comment A: The required notice must be served within five years on all persons entitled thereto as of the date the notice was delivered to the sheriff for service. Such persons are:

- (a) the last grantee in the regular chain of title of the land, or of an interest in the land, according to the records of the county register of deeds;
- (b) the person in actual and open possession of the land;
- (c) the grantee under the tax deed issued by the state treasurer for the most recent year's taxes according to the records of the county register of deeds;
- (d) the mortgagee named in each undischarged recorded mortgage, or an assignee of each mortgage of record;
- (e) the holder of record of any undischarged recorded lien.

If a person entitled to a notice of right to a reconveyance is deceased or under legal disability, the notice must be served on the personal representative, trustee, conservator or guardian.

See MCL 211.73a and 211.92 (both repealed by 1999 P.A. 123, effective December, 31, 2003), 211.140 (repealed by 2001 P.A. 94, being MCL 250.1001, effective December 31, 2003) and 211.140a (repealed by 2005 P.A. 183 effective December 31, 2006).

Comment B: The Committee expresses no opinion as to whether this Standard applies to a tax sale after 1997 because MCL 211.73a was repealed effective December 31, 2003, before expiration of the five-year period permitted for service of notice of right to a reconveyance.

Comment C: Before 2002, delinquent real property tax liens were offered at annual sales held in each county pursuant to MCL 211.60 through 211.70. Liens not purchased at sale were automatically bid to the state for foreclosure. Following enactment of 1999 P.A. 123, beginning in 2001, liens for delinquent taxes for 1999 and later may be forfeited to

the county treasurer on March 1 of the first year of delinquency and may then be subject to foreclosure at a circuit court hearing held at the end of the second year of delinquency, under MCL 211.78 through 211.78o. Delinquent tax liens for 1997 and earlier were sold under the former procedure. A phase-in period was created for delinquent 1998 and 1999 taxes, which were permitted to be sold under the former procedure or forfeited and foreclosed under the new procedure, in the county treasurer's discretion.

Comment D: After December 27, 1993, if real property has been identified as certified special residential property under MCL 211.55a (repealed by 1999 P.A. 123, effective July 23, 1999), the date that a purchaser becomes entitled to a tax deed is the second Tuesday in July of the year of the sale.

STANDARD 22.2

EFFECT OF DEED FROM STATE GIVEN TO EVIDENCE REDEMPTION

STANDARD: A DEED FROM THE DEPARTMENT OF NATURAL RESOURCES GIVEN TO EVIDENCE REDEMPTION OF REAL PROPERTY THROUGH PAYMENT OF DELINQUENT TAXES, CONVEYS TO THE GRANTEE ONLY THE INTEREST THE GRANTEE HELD BEFORE TITLE VESTED IN THE STATE AND REVIVES ALL INTERESTS WITH THEIR RESPECTIVE PRIORITIES AS EXISTED BEFORE TITLE VESTED IN THE STATE.

Problem A: Albert Thomas was the owner of Blackacre, subject to a mortgage executed by a prior owner, which Thomas had not assumed or agreed to pay. Blackacre was sold to the State at the 1991 county treasurer's sale of land for delinquent taxes. There was no redemption of Blackacre in the year following the sale. The state treasurer recorded a deed to the State in 1992. Thomas timely redeemed Blackacre and received a deed from the Department of Natural Resources. Is Blackacre subject to the mortgage?

Answer: Yes.

Problem B: Albert Thomas, Bernard Bell and James Leyland owned Blackacre as tenants in common. Blackacre was sold to the State at the 1991 county treasurer's sale of land for delinquent taxes. There was no redemption of Blackacre in the year following the sale. The state treasurer recorded a deed to the State in 1992. Thomas timely redeemed Blackacre and received a deed from the Department of Natural Resources. Are the interests of Bell and Leyland revived, subject to a lien in favor of Thomas?

Answer: Yes.

Authorities: MCL 211.67a (repealed by 1999 P.A. 123, effective December 31, 1999), 211.131a(2), 211.131c(4) and 211.131e(5) (repealed by 2005 P.A. 183, effective December 31, 2006).

- Comment A:** A lien in favor of the redeeming interest holder attaches to all interests in the real property held by other parties, if any, to an extent proportionate to the amount paid by the redeeming interest holder.
- Comment B:** This Standard also applies to a deed given to evidence redemption from a tax sale to the State by a municipality under the provisions of 1948 CL 211.355 (repealed by 1951 P.A. 167, being MCL 247.651) on or after June 19, 1941. See, *Oakland County Treasurer v Auditor General*, 292 Mich 58, 290 NW 327 (1940); and *Zirkaloso v Parsons*, 351 Mich 131, 88 NW2d 293 (1958).
- Comment C:** This Standard also applies to a deed of release and quitclaim executed by a holder of a tax deed from the state treasurer or auditor general in connection with a redemption from a tax sale under MCL 211.141 (repealed by 2005 P.A. 183, effective December 31, 2006).
- Comment D:** MCL 211.131a(1) (repealed by 2005 P.A. 183, effective December 31, 2006) authorizes the issuance of a deed to correct an error or to cancel a deed to the State for a reason other than redemption. Such a deed has the same effect as a deed from the State given to evidence redemption. See, Standard 22.3-1.
- Comment E:** Before 2002, delinquent real property tax liens were offered at annual sales held in each county pursuant to MCL 211.60 through 211.70. Liens not purchased at sale were automatically bid to the state for foreclosure. Following enactment of 1999 P.A. 123, beginning in 2001, liens for delinquent taxes for 1999 and later may be forfeited to the county treasurer on March 1 of the first year of delinquency and may then be subject to foreclosure at a circuit court hearing held at the end of the second year of delinquency, under MCL 211.78 through 211.78o. Delinquent tax liens for 1997 and earlier were sold under the former procedure. A phase-in period was created for delinquent 1998 and 1999 taxes, which were permitted to be sold under the former procedure or forfeited and foreclosed under the new procedure, in the county treasurer's discretion.

STANDARD 22.3-1

EFFECT OF CERTIFICATE OF ERROR FROM STATE ON TAX SALE

STANDARD: A CERTIFICATE OF ERROR ISSUED BY THE DEPARTMENT OF TREASURY TO DIVEST THE STATE OF TITLE TO REAL PROPERTY ERRONEOUSLY DEEDED TO IT IN CONNECTION WITH A COUNTY TREASURER'S SALE OF TAX DELINQUENT REAL PROPERTY REVIVES ALL INTERESTS WITH THEIR RESPECTIVE PRIORITIES THAT WOULD HAVE EXISTED HAD THE REAL PROPERTY NOT BEEN OFFERED AT THE SALE.

Problem: Albert Thomas was the owner of Blackacre, subject to a mortgage executed by a prior owner. Thomas had not assumed and agreed to pay the mortgage. Blackacre was erroneously sold at the 1991 county treasurer's sale of real property for delinquent taxes. It was later discovered that Blackacre should not have been offered at the sale. The Department of Treasury recorded a certificate of error relating to Blackacre setting forth the facts as to the erroneous sale. Is Blackacre subject to the mortgage?

Answer: Yes.

Authorities: MCL 211.98, 211.98b and 211.131a (repealed by 2005 P.A. 183, effective December 31, 2006). *Wood v Bigelow*, 115 Mich 123, 73 NW 129 (1897).

Comment A: This Standard applies regardless of whether the state treasurer's deed names as grantee a private party or the State of Michigan. It also applies in those instances in which the State, after its acquisition of title, conveys the land by deed.

Comment B: Before 2002, delinquent real property tax liens were offered at annual sales held in each county pursuant to MCL 211.60 through 211.70. Liens not purchased at sale were automatically bid to the state for foreclosure. After 2000, under 1999 P.A. 123, liens for delinquent taxes for 1999 and later may be forfeited to the county treasurer on

March 1 of the first year of delinquency and may then be subject to foreclosure at a circuit court hearing held at the end of the second year of delinquency, under MCL 211.78 through 211.78o. Delinquent tax liens for 1997 and earlier were sold under the former procedure. A phase-in period was created for delinquent 1998 and 1999 taxes, which were permitted to be sold under the former procedure or forfeited and foreclosed under the new procedure, at the county treasurer's discretion.

Note: No tax sale may be held after May, 2001 under MCL 211.60 *et seq.* See Standard 22.3-2 regarding certificates of error relating to tax foreclosures under MCL 211.78k.

STANDARD 22.3-2

EFFECT OF CERTIFICATE OF ERROR RECORDED BY FORECLOSING GOVERNMENTAL UNIT ON TAX FORECLOSURE PURSUANT TO MCL 211.78k(9)

STANDARD: A CERTIFICATE OF ERROR RECORDED BY A FORECLOSING GOVERNMENTAL UNIT PURSUANT TO MCL 211.78k(9) CANCELS THE FORECLOSURE OF REAL PROPERTY FOR DELINQUENT TAXES UNLESS THE REAL PROPERTY HAS BEEN PREVIOUSLY CONVEYED UNDER MCL 211.78m.

Problem: Albert Thomas owned Blackacre, subject to a mortgage given by a prior owner. Thomas did not assume the mortgage. Blackacre was erroneously foreclosed by a judgment entered in 2005. It was later discovered that taxes on Blackacre had been paid at the time of foreclosure. The foreclosing governmental unit did not sell Blackacre, but recorded a certificate of error describing Blackacre and stating that the foreclosure of Blackacre was in error. Is Blackacre subject to the mortgage?

Answer: Yes.

Authority: MCL 211.78k (9).

Comment: Before 2002, delinquent real property tax liens were offered at annual sales held in each county pursuant to MCL 211.60 through 211.70. Liens not purchased at sale were automatically bid to the state for foreclosure. After 2000, under 1999 P.A. 123, liens for delinquent taxes for 1999 and later may be forfeited to the county treasurer on March 1 of the first year of delinquency and may then be subject to foreclosure at a circuit court hearing held at the end of the second year of delinquency, under MCL 211.78 through 211.78o. Delinquent tax liens for 1997 and earlier were sold under the former procedure. A phase-in period was created for delinquent 1998 and 1999 taxes which were permitted to be sold under the former procedure or forfeited and foreclosed under the new procedure, at the county treasurer's discretion.

- Note 1:** No tax sale may be held after May, 2001 under MCL 211.60 *et seq.* See Standard 22.3-1 regarding certificates of error relating to tax sales before 2002.
- Note 2:** MCL 211.78m provides that foreclosed real property may be conveyed to the state, city, village, township or county, or to a purchaser at auction or, if the real property is a facility under the Natural Resources and Environmental Protection Act and certain other criteria apply, to the State Land Bank Fast Track Authority.

STANDARD 22.4

SCAVENGER DEEDS

STANDARD: A DEED, EXECUTED PURSUANT TO A SALE BY THE STATE LAND OFFICE BOARD OR THE DEPARTMENT OF CONSERVATION UNDER THE PROVISIONS OF 1937 P.A. 155, AS AMENDED (COMMONLY KNOWN AS THE SCAVENGER ACT), OF REAL PROPERTY ACQUIRED BY THE STATE IN TAX FORECLOSURE PROCEEDINGS VESTS MARKETABLE TITLE IN THE GRANTEE, SUBJECT TO ANY LIMITATIONS CONTAINED IN THE DEED OR THE SCAVENGER ACT. THE TITLE SO ACQUIRED IS ALSO SUBJECT TO ANY INTERESTS WHICH MAY BE REVIVED IN EQUITY.

Problem A: In 1943, the State acquired title to Blackacre as the result of proceedings for the sale of land for delinquent property taxes. In 1944, the State deeded Blackacre to Max Fry, who had no previous interest in Blackacre. Did Fry acquire marketable title to Blackacre?

Answer: Yes, subject to the limitations, if any, contained in the deed or provided by the Scavenger Act. See, Problems E and F and Comment C.

Problem B: Albert Thomas and Boswell Thomas held title to Blackacre as tenants in common. In 1943, the State acquired title to Blackacre as the result of proceedings for the sale of land for delinquent property taxes. In 1944, the State deeded Blackacre to Albert Thomas. Albert Thomas later conveyed Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre free of any rights of Boswell Thomas?

Answer: Yes, subject to the limitations, if any, contained in the deed to Albert Thomas or provided by the Scavenger Act. See, Problems E and F and Comment C.

Problem C: In 1938, Max Fry acquired title to Blackacre subject to several mortgages and liens which Fry did not assume or agree to pay. In 1942, the State acquired title to Blackacre as a result of proceedings for the sale of land for delinquent property taxes. In 1943, the State deeded

Blackacre to Fry. Did Fry acquire marketable title to Blackacre free of mortgages and liens?

Answer: Yes.

Problem D: Blackacre was subject to an easement by prescription in favor of the owners of adjoining land. In 1945, the State acquired title to Blackacre as a result of proceedings for the sale of land for delinquent property taxes. In 1946, the State deeded Blackacre to Max Fry. Did Fry acquire marketable title to Blackacre free of the easement?

Answer: Yes. See, however, Comment C regarding preservation of utility easements. See also, Standard 22.7.

Problem E: Blackacre was subject to recorded restrictions limiting its use to residential purposes only and imposing a minimum building setback line. In 1942, the State acquired title to Blackacre as a result of proceedings for the sale of land for delinquent property taxes. In 1943, the State deeded Blackacre to Max Fry, who had no previous interest in Blackacre. Did Fry acquire marketable title to Blackacre free of the restrictions?

Answer: No.

Problem F: In 1944, the State acquired title to Blackacre as a result of proceedings for the sale of land for delinquent property taxes. In 1946, the Department of Conservation which had jurisdiction over the area within which Blackacre was located, deeded Blackacre to Max Fry, who had no previous interest in Blackacre. Did the deed to Fry include the coal, oil, gas and other mineral rights in Blackacre?

Answer: No. Sales of land under the control and jurisdiction of the Department of Conservation (lands in the counties north of and including the counties of Oceana, Newaygo, Mecosta, Isabella, Midland and Arenac) to any person who was not a prior owner were subject to a reservation in favor of the State of all coal, oil, gas and other mineral rights.

Problem G: Robert Brown mortgaged Blackacre to Edward Lane. The mortgage contained a covenant to pay property taxes. Brown failed to pay the taxes. In 1947, the State acquired title to Blackacre as the result of proceedings for the sale of land for delinquent property taxes. In

1948, the State deeded Blackacre to Brown. In 1950, Brown deeded Blackacre to Simon Grant and the deed was recorded. In 1997, does Grant hold marketable title to Blackacre free of the mortgage lien?

Answer: Yes. In general, a court of equity will not permit a mortgagor or vendee, obligated by contract to pay taxes on mortgaged or purchased land, to default in doing so and then obtain an advantage over his mortgagee or vendor by acquiring title to the land under the provisions of the Scavenger Act. However, in this problem, title was conveyed by the purchasing mortgagor to a subsequent grantee who had no contractual duty to pay taxes; there was no timely action to enforce the mortgagee's rights; and more than 40 years have elapsed since the deed to Grant was recorded, i.e., the first muniment of title in the "40-year chain of title," is subsequent to the deed from the State Land Office Board to Brown.

Authorities: Generally: MCL 211.351 *et seq.* (repealed by 1964 P.A. 256, 1967 P.A. 196 and 1994 P.A. 451).

Problem A: *Pavlovic v Kastner*, 302 Mich 120, 4 NW2d 491 (1942); *Sharpe v State Land Office Board*, 306 Mich 189, 10 NW2d 822 (1943); *Langford v Auditor General*, 325 Mich 585, 39 NW2d 82 (1949).

Problem B: *Meltzer v State Land Office Board*, 301 Mich 541, 3 NW2d 875 (1942); *Koenig v Koenig*, 311 Mich 12, 18 NW2d 259 (1945); *Rolland v Rolland*, 314 Mich 619, 23 NW2d 104 (1946).

Problem C: *Darby v Freeman*, 304 Mich 459, 8 NW2d 137 (1943); *Lowrie & Webb Lumber Co v Ferguson*, 312 Mich 331, 20 NW2d 209 (1945).

Problem D: *Young v Thendara, Inc*, 328 Mich 42, 43 NW2d 58 (1950); *Grand Rapids Township Highway Commissioner v Walkotten*, 335 Mich 612, 56 NW2d 399 (1953); *Kern v Schaar*, 338 Mich 637, 62 NW2d 614 (1954); *Moceri v St. Clair Shores*, 366 Mich 380, 115 NW2d 103 (1962).

Problem E: MCL 211.359. *Grand Rapids Township Highway Commissioner v Walkotten*, 335 Mich 612, 56 NW2d 399 (1953); *Cooper v Kovan*, 349 Mich 520, 84 NW2d 859 (1957).

Problem F: MCL 211.353 (repealed by 1964 P.A. 256, effective August 28, 1964); MCL 211.356 (repealed by 1967 P.A. 196, effective November 2, 1967).

Problem G: MCL 565.101, 565.101a, 565.103 and 600.5803. *Jacobsen v Nieboer*, 299 Mich 116, 299 NW 830 (1941); *Walker v Woods*, 308 Mich 24, 13 NW2d 193 (1944); *McAlpine v Meehan*, 312 Mich 107, 19 NW2d 765 (1945). See also, Standard 16.10. –

- Comment A:** The validity of any deed executed pursuant to the Scavenger Act, and the sale pursuant to which it was executed, cannot be attacked by reason of any defect in the procedure after six months after the issuance of the deed. MCL 211.358e. See, *Caplan v Jerome*, 314 Mich 198, 22 NW2d 270 (1946).
- Comment B:** The Scavenger Act became effective on July 3, 1937, and governed in part the disposition by the Department of Conservation or the State Land Office Board of all land acquired by the State of Michigan on or before May 1, 1949, as a result of tax sale proceedings. By amendment of the Act, the State Land Office Board was abolished as of May 1, 1949; later, the disposition of land subject to provisions of the Scavenger Act was administered by the Department of Conservation under section 6 of the Act until that section was repealed by 1967 P.A. 196, effective November 2, 1967.
- Comment C:** Deeds by the State Land Office Board or the Department of Conservation do not affect interests assessed as personal property under the provisions of Section 8 of the General Property Tax Act, MCL 211.8 (e.g., easements held by public utilities for gas or electric transmission lines).

STANDARD 22.5

DEED OF REAL PROPERTY REVERTED BEFORE APRIL 1, 1976 PURSUANT TO GENERAL PROPERTY TAX ACT

STANDARD: A DEED BY THE DEPARTMENT OF NATURAL RESOURCES OR THE DEPARTMENT OF CONSERVATION OF REAL PROPERTY ACQUIRED BY THE STATE FOR DELINQUENT TAXES BEFORE APRIL 1, 1976, UNDER AUTHORITY OF THE GENERAL PROPERTY TAX ACT, VESTS MARKETABLE TITLE IN THE GRANTEE.

Problem: In 1972, by proceedings under the General Property Tax Act for the sale of lands for delinquent taxes, title to Blackacre was acquired by the State. Blackacre was deeded by the Department of Natural Resources to Harold Fowler in 1974. The deed contained a recital that it was executed pursuant to Section 131 of the General Property Tax Act. The deed was recorded. Is Fowler's title marketable?

Answer: Yes.

Authorities: MCL 211.131 (repealed by 2005 P.A. 183, effective December 31, 2006). MCL 211.67b (repealed by 1999 P.A. 123, effective December 31, 2003).

Comment A: A deed executed pursuant to the General Property Tax Act may reserve mineral, coal, oil and gas rights. MCL 322.212 (now MCL 324.503). *Matthews v Dep't of Conservation*, 355 Mich 589, 96 NW2d 160 (1959), held that a reservation of mineral rights included sand, gravel, clay and other non-metallic minerals. 1964 PA 125 amended MCL 322.212 (now MCL 324.503) to provide that the term "mineral rights" does not include sand, gravel, clay or other non-metallic minerals for deeds executed after May 15, 1964. A deed of tax reverted land may reserve to the State aboriginal antiquities and the right to explore and excavate for them. MCL 299.52 (now MCL 324.76104). It may also reserve a right of ingress to and egress from a watercourse. MCL 322.212 (now MCL 324.503).

Comment B: The title to land conveyed by the State pursuant to the General Property Tax Act may be subject to certain visible or recorded easements that were not extinguished when the land reverted to the State. See, Standards 22.7 and 22.8.

Comment C: The General Property Tax Act provides that, after six months from the recording of a deed to the State pursuant to MCL 211.67(a), the State's title is deemed to be absolute, and no suit or proceeding "shall thereafter be instituted by any person claiming through the original or government title to set aside, vacate or annul the said deed or the title derived thereunder." MCL 211.431.

In *Dow v State of Michigan*, 396 Mich 192, 240 NW2d 450 (1976), an action brought by owners against the State challenging the tax sale proceedings for lack of due process, it was held that the State as titleholder could not rely on the statute "to insulate itself from redress if the statutory procedure does not meet constitutional requirements." The court stated, however, that a different question would be presented if rights of a third party had intervened. The Court of Appeals held in *Buckley Land Corp v Dep't of Natural Resources*, 178 Mich App 249, 443 NW2d 390, *lv den*, 433 Mich 876 (1989), that *Dow* does not apply retroactively. See, Standard 22.6.

Comment D: With respect to the adequacy of notice under 1976 PA 292, MCL 211.131e, see *Smith v Cliffs of the Bay Condominium Ass'n* 465 Mich 876, 634 NW2d 362 (2001) and *Jones v Flowers* 547 US 220, 126 S Ct 1708, 164 L Ed2d 415 (2006). In *Jones*, the U.S. Supreme Court held that when a certified-mail notice of a tax sale is returned unclaimed, the foreclosing entity must take additional reasonable measures to attempt to provide notice to the property owner before selling the property, if it is practicable to do so. In such event, the Court suggested that notice by first class mail, sent to the owner at the property address or sent to "occupant" at the property address, or notice by posting the property, would be reasonable notice.

Comment E: The name of the Department of Conservation was changed to the Department of Natural Resources by 1968 PA 353, which amended MCL 16.104, effective November 15, 1968. The Department of Natural Resources was replaced by the Department of Natural Resources and Environment by Executive Order No.

2009-45, effective as of January 17, 2010. The Department of Natural Resources and Environment was abolished and its powers and duties for the management of the natural resources of the State, including authority to convey real property pursuant to the General Property Tax Act, were transferred to the re-created Department of Natural Resources, by Executive Order No. 2011-1, effective as of March 13, 2011.

STANDARD 22.5A

DEED OF REAL PROPERTY REVERTED AFTER MARCH 31, 1976 PURSUANT TO MCL 211.60 – 211.70

STANDARD: A DEED BY THE DEPARTMENT OF NATURAL RESOURCES OF REAL PROPERTY ACQUIRED BY THE STATE FOR DELINQUENT TAXES AFTER MARCH 31, 1976 PURSUANT TO MCL 211.60 – 211.70, VESTS MARKETABLE TITLE IN THE GRANTEE IF THE STATE COMPLIED WITH THE NOTICE PROVISIONS OF THE GENERAL PROPERTY TAX ACT.

Problem: In 1995, by proceedings under MCL 211.60 – 211.70 for the sale of lands for delinquent taxes, title to Blackacre was acquired by the State. Blackacre was deeded by the Department of Natural Resources to Harold Fowler in 2010. The deed contained a recital that it was executed pursuant to Section 131 of the General Property Tax Act. The deed was recorded. Is Fowler’s title marketable?

Answer: Yes, provided that notice was given in accordance with the notice provisions of the General Property Tax Act, but in certain circumstances additional reasonable measures may be required to satisfy due process requirements. See, Caveat.

Authorities: MCL 211.67, 211.67b (both repealed by 1999 P.A. 123, effective December 31, 2003); MCL 211.131 (repealed by 2005 P.A. 183, effective December 31, 2006; MCL 211.131e (repealed by 2006 P.A. 611, effective December 31, 2014).

Comment A: A deed executed pursuant to the General Property Tax Act may reserve mineral, coal, oil and gas rights. MCL 322.212 (now MCL 324.503). *Matthews v Dep’t of Conservation*, 355 Mich 589, 96 NW2d 160 (1959) held that a reservation of mineral rights included sand, gravel, clay and other non-metallic minerals. 1964 PA 125 amended MCL 322.212 (now MCL 324.503) to provide that the term “mineral rights” does not include sand, gravel, clay or other non-metallic minerals for deeds executed after May 15, 1964. A deed of tax reverted land may reserve to the State aboriginal antiquities and the right to explore and excavate for them. MCL 299.52 (now MCL 324.76104). It may also re-

serve a right of ingress to and egress from a watercourse. MCL 322.212 (now MCL 324.503).

Comment B: The title to land conveyed by the State pursuant to the General Property Tax Act may be subject to certain visible or recorded easements that were not extinguished when the land reverted to the State. See, Standards 22.8 and 22.9-1.

Comment C: As to lands reverted to the State after March 31, 1976, MCL 211.131e provides that “[f]or all property the title to which vested in this state under this section after October 25, 1976, the redemption period on property deeded to the state under former section 67a shall be extended until the owners of a recorded property interest in the property have been notified of a hearing before the department of treasury, a local unit of government, or a land bank fast track authority” and that “[p]roof of the notice of a hearing under this section shall be recorded with the register of deeds in the county in which the property is located in a form prescribed by the department of treasury.”

Comment D: The Department of Natural Resources was replaced by the Department of Natural Resources and Environment, by Executive Order No. 2009-45, effective as of January 17, 2010. The Department of Natural Resources and Environment was abolished and its powers and duties for the management of the natural resources of the State, including authority to convey real property pursuant to the General Property Tax Act, were transferred to the re-created Department of Natural Resources, by Executive Order No. 2011-1, effective as of March 13, 2011.

Caveat: With respect to the adequacy of notice under 1976 PA 292, MCL 211.131e, see *Smith v Cliffs of the Bay Condominium Ass’n*, 463 Mich 420, 617 NW2d 536 (2000). See also, *Jones v Flowers*, 547 US 220, 126 S Ct 1708, 164 L Ed2d 415 (2006). In *Jones*, the U.S. Supreme Court held that when a certified-mail notice of a tax sale is returned unclaimed, the foreclosing entity must take additional reasonable measures to attempt to provide notice to the property owner before selling the property, if it is practicable to do so. In such event, the Court suggested that notice by first class mail, sent to the owner at the property address or sent to “occupant” at the property address, or notice by posting the property, would be reasonable notice.

STANDARD 22.5B

DEED OF REAL PROPERTY FORECLOSED PURSU- ANT TO MCL 211.78 – 211.78o

STANDARD: A DEED BY A FORECLOSING GOVERNMENTAL UNIT OF REAL PROPERTY ACQUIRED FOR DELINQUENT TAXES PURSUANT TO MCL 211.78 - 211.78o VESTS FEE SIMPLE TITLE IN THE GRANTEE IF THE FORECLOSING GOVERNMENTAL UNIT COMPLIED WITH THE NOTICE PROVISIONS OF THE GENERAL PROPERTY TAX ACT.

Problem: In 2004, Oakland County acquired title to Blackacre as the foreclosing governmental unit by judgment dated March 1, 2004, in proceedings under MCL 211.78-211.78o for the sale of lands for delinquent taxes. Oakland County deeded Blackacre to John Doe in November, 2004. The deed contained a recital that it was executed pursuant to Section 78m(2) of the General Property Tax Act. The deed was recorded. Did Doe acquire fee simple title to Blackacre?

Answer: Yes, provided that Oakland County complied with the notice provisions of the General Property Tax Act, but in certain circumstances, additional reasonable measures may be required to satisfy due process. See, Caveat 2.

Authorities: MCL 211.78k(6). *Republic Bank v Genesee County Treasurer*, 471 Mich 732, 690 NW2d 917 (2005); *In re Petition by Treasurer of Wayne County for Foreclosure (Wayne County Treasurer v Perfecting Church)*, 478 Mich 1, 732 NW2d 458 (2007).

Comment A: If the State is the foreclosing governmental unit, mineral, coal, oil and gas rights may be reserved in deeds executed pursuant to the General Property Tax Act. MCL 324.503. The term “mineral rights” as used in MCL 324.503 does not include sand, gravel, clay and other non-metallic minerals. MCL 324.503. A deed of tax reverted land may also reserve to the State (1) aboriginal antiquities and the right to explore and excavate for them, MCL 324.76104, and (2) the right of ingress to and egress from a watercourse, MCL 324.503.

Comment B: The title to land conveyed by a foreclosing governmental unit pursuant to the General Property Tax Act may be subject to certain interests therein, including, among others, future installments of special assessments, certain visible or recorded easements and private deed restrictions. See, Standard 22.9-2.

Caveat 1: The General Property Tax Act provides that, if forfeited delinquent taxes, interest, penalties and fees are not paid on or before the March 31 immediately following entry of a judgment of foreclosure or, in a contested case, within 21 days after entry of the judgment, fee simple title will vest absolutely in the foreclosing governmental unit except for interests described in Standard 22.9-2. MCL 211.78k(5) and (6). The Act further provides that the owner of an extinguished interest who claims that he or she did not receive notice as required by the Act, may not bring an action for possession but is limited to an action for damages. MCL 211.78l. The Michigan Supreme Court in *In re Petition by Treasurer of Wayne County for Foreclosure (Wayne County Treasurer v Perfecting Church)*, 478 Mich 1, 732 NW2d 458 (2007) held this provision to be unconstitutional as to property owners who had not been accorded due process.

Caveat 2: In *Jones v Flowers*, 547 US 220, 126 S Ct 1708, 164 L Ed2d 415 (2006), the U.S. Supreme Court held that when a certified-mail notice of a tax sale is returned unclaimed, the foreclosing entity must take additional reasonable measures to attempt to provide notice to the property owner before selling the property, if it is practicable to do. In such event, the Court suggested that notice by first class mail, sent to the owner at the property address or sent to “occupant” at the property address, or notice by posting the property, would be reasonable notice.

STANDARD 22.6

NOTICE REQUIRED BEFORE TAX SALE

STANDARD: NOTICE THAT REAL PROPERTY WILL BE SOLD FOR DELINQUENT TAXES AT THE ANNUAL TAX SALE MUST BE GIVEN:

- (A) BY THE COUNTY TREASURER BY SENDING NOTICE BY FIRST CLASS MAIL TO THE PARTY ASSESSED;
- (B) BY THE STATE TREASURER BY PUBLISHING A COURT ORDER AND PETITION ONCE EACH WEEK FOR THREE CONSECUTIVE WEEKS; AND
- (C) BY THE STATE TREASURER BY PUBLISHING A NOTICE ADVISING THE PUBLIC OF THE TAX SALE ADVERTISING.

Problem: The tax assessment roll listed John Green of 123 Greenacre Lane as the party assessed for taxes for Blackacre, which had an address of 789 Blackacre Road. Green moved from 123 Greenacre Lane but did not provide a change of address for the tax assessment roll. Green stopped paying property taxes on Blackacre. Blackacre was scheduled to be sold at the county treasurer's tax sale. Before the sale, notice of the sale was sent to John Green at 123 Greenacre Lane and to "Occupant" at 789 Blackacre Road. Neither notice was returned as undeliverable. A notice of the sale and copies of the order and petition were published once each week for three consecutive weeks. Were the notices sufficient?

Answer: Yes.

Authorities: MCL 211.61a, 211.61b, 211.63 and 211.66 (all repealed by 1999 P.A. 123, effective December 31, 2003). *Grand Rapids v Green*, 187 Mich App 131, 466 NW2d 388 (1991), *lv den*, 439 Mich 1007, 485 NW2d 491 (1992). See also *Thompson v Auditor General*, 261 Mich 624,

247 NW 360 (1933), regarding constitutional due process requirements for description of land with reasonable certainty.

Comment: Before 2002, delinquent real property tax liens were offered at annual sales held in each county pursuant to MCL 211.60 through 211.70. Liens not purchased at sale were automatically bid to the state for foreclosure. Following enactment of 1999 P.A. 123, beginning in 2001, liens for delinquent taxes for 1999 and later may be forfeited to the county treasurer on March 1 of the first year of delinquency and may then be subject to foreclosure at a circuit court hearing held at the end of the second year of delinquency, under MCL 211.78 through 211.78o. Delinquent tax liens for 1997 and earlier were sold under the former procedure. A phase-in period was created for delinquent 1998 and 1999 taxes, which were permitted to be sold under the former procedure or forfeited and foreclosed under the new procedure, in the county treasurer’s discretion.

Caveat: MCL 211.61a provided in part: “Failure to receive or serve the notice shall not invalidate the proceedings taken under the state treasurer’s petition and decree of the circuit court, in foreclosure and sale of the lands for taxes.” MCL 211.66 provided, in part: “The publication of the order and petition aforesaid shall be equivalent to a personal service of notice on all persons who are interested in the lands specified in such petition, of the filing thereof, of all proceedings thereon and on the sale of the lands under the decree, and shall give the court jurisdiction to hear such petition, determine all questions arising thereon, and to decree a sale of such lands for the payment of all taxes, interest and charges thereon.”

Dow v State of Michigan, 396 Mich 192, 240 NW2d 450 (1976), held that due process requires that an owner of a significant property interest be given proper notice and an opportunity for a hearing at which the owner may contest the State’s claim that it may sell the property for delinquent taxes, and that newspaper publication is not constitutionally adequate notice. The court held that holders of a significant property interest are entitled to notice “reasonably calculated, under all circumstances, to apprise them of [the] opportunity” for a hearing. *Dow* does not apply retroactively. *Buckley Land Corp v Dep’t of Natural Resources*, 178 Mich App 249, 443 NW2d 390 (1989), *lv den*, 433 Mich 876 (1989).

In response to *Dow*, 1976 P.A. 292, effective October 25, 1976, added MCL 211.67b (repealed by 1999 P.A. 123, effective December 31, 2003), requiring the county treasurer to send pre-sale notice to the occupant, and MCL 211.131e (repealed by 2005 P.A. 183, effective December 31, 2006), requiring the State to provide a hearing and notice of the hearing to all holders of significant property interests in parcels deeded to the State after a tax sale. *Smith v Cliffs on the Bay Condominium Ass'n*, 463 Mich 420, 617 NW2d 536 (2000), *cert den*, 532 US 1020, 121 S Ct 1958, 149 L Ed 2d 754 (2001), held that the notice provisions and procedures in 1976 P.A. 292 satisfy the requirements of due process. But cf., *Jones v Flowers*, 547 US 220, 126 S Ct 1708, 164 L Ed 2d 415 (2006), in which the court held that the failure to take additional reasonable steps to provide notice to an owner whose certified mail notice was returned unclaimed did not satisfy due process requirements. The Committee expresses no opinion as to whether *Jones* applies retroactively.

Note: See Standard 22.1 regarding post-sale notice requirements applicable to a tax lien purchaser.

STANDARD 22.7

EFFECT OF TAX SALE PROCEEDING AFTER JULY 2, 1937 AND BEFORE AUGUST 28, 1964, ON LIENS AND ENCUMBRANCES ON REAL PROPERTY ACQUIRED BY STATE AT TAX SALE

STANDARD: TITLE TO REAL PROPERTY ACQUIRED BY THE STATE IN A TAX SALE PROCEEDING AFTER JULY 2, 1937 AND BEFORE AUGUST 28, 1964, IS FREE OF LIENS AND ENCUMBRANCES WHICH EXISTED WHEN THE STATE ACQUIRED TITLE.

Problem A: A plat recorded in 1925 included the grant of an easement over Blackacre. In 1951, the State acquired title to Blackacre in a tax sale proceeding. In 1953, after the redemption period expired, the State conveyed Blackacre to Robert Doe. Is Doe's title to Blackacre subject to the easement?

Answer: No.

Problem B: In 1928, Center City imposed a special assessment against Blackacre for street improvements. The assessment was not paid. In 1939, the State acquired title to Blackacre in a tax sale proceeding. In 1941, after the redemption period expired, the State conveyed Blackacre to Robert Doe. Is Doe's title to Blackacre subject to the special assessment?

Answer: No.

Problem C: Same facts as in Problem B. May Center City impose a special assessment to replace the cancelled assessment?

Answer: No. A special assessment cancelled by tax sale cannot be revived.

Authorities: MCL 211.67 (repealed by 1999 P.A. 123, effective December 31, 2003). *Municipal Investors Association v City of Birmingham*, 298 Mich 314, 299 NW 90 (1941); *Young v Thendara, Inc.*, 328 Mich 42, 43 NW2d 48 (1950); *Moceri v City of St Clair Shores*, 366 Mich 380, 115 NW2d 103 (1962).

STANDARD 22.8

EFFECT OF TAX SALE PROCEEDING AFTER AUGUST 27, 1964 AND BEFORE DECEMBER 14, 1990, ON LIENS AND ENCUMBRANCES ON REAL PROPERTY ACQUIRED BY STATE AT TAX SALE

STANDARD: TITLE TO REAL PROPERTY ACQUIRED BY THE STATE IN A TAX SALE PROCEEDING AFTER AUGUST 27, 1964 AND BEFORE DECEMBER 14, 1990, IS FREE OF LIENS AND ENCUMBRANCES WHICH EXISTED AT THE TIME THE STATE ACQUIRED TITLE, EXCEPT ANY VISIBLE OR RECORDED EASEMENT, RIGHT OF WAY OR PERMIT WHICH IS:

- (A) IN FAVOR OF THE UNITED STATES, THE STATE OR ANY POLITICAL SUBDIVISION OR AGENCY OF THE STATE;
- (B) IN FAVOR OF ANY PUBLIC AUTHORITY OR DRAINAGE DISTRICT; OR
- (C) GRANTED OR DEDICATED FOR PUBLIC USE OR FOR USE BY A PUBLIC UTILITY.

Problem: In 1959, John Doe granted an easement to Center City for a drain across Blackacre. In 1972, the State acquired title to Blackacre in a tax sale proceeding. In 1973, after the redemption period expired, the State conveyed Blackacre to Robert Jones. Is Jones's title to Blackacre subject to the easement?

Answer: Yes.

Authorities: MCL 211.67b(1) (repealed by 1999 P.A. 123, effective December 31, 2003). *City of Boyne City v Crain*, 179 Mich App 738, 446 NW2d 348 (1989); *Frey v Scott*, 224 Mich App 304, 568 NW2d 162 (1997).

Note: See Standard 22.6 with respect to notice required for tax sales.

STANDARD 22.9-1

EFFECT OF TAX SALE PROCEEDING PURSUANT TO MCL 211.60 THROUGH 211.70 AFTER DECEMBER 13, 1990 ON LIENS AND ENCUMBRANCES ON REAL PROPERTY ACQUIRED BY STATE AT TAX SALE

STANDARD: TITLE TO REAL PROPERTY ACQUIRED BY THE STATE THROUGH TAX SALE PROCEEDINGS PURSUANT TO MCL 211.60 THROUGH 211.70 AFTER DECEMBER 13, 1990 IS FREE OF LIENS AND ENCUMBRANCES WHICH EXISTED AT THE TIME THE STATE ACQUIRED TITLE, EXCEPT:

- (A) ANY VISIBLE OR RECORDED EASEMENT; AND
- (B) ANY VISIBLE OR RECORDED RIGHT OF WAY OR PERMIT THAT IS:
 - (1) IN FAVOR OF THE UNITED STATES, THE STATE, OR ANY POLITICAL SUBDIVISION OR AGENCY OF THE STATE;
 - (2) IN FAVOR OF ANY PUBLIC AUTHORITY OR DRAINAGE DISTRICT; OR
 - (3) GRANTED OR DEDICATED FOR PUBLIC USE OR FOR USE BY A PUBLIC UTILITY.

Problem A: Jane Doe, the owner of Blackacre, conveyed the east half of Blackacre to Mary Smith in 1990. Doe later acquired an easement over the north 10 feet of the east half of Blackacre from Smith. The easement was not visible or recorded. In 1997, the State acquired title to the east half of Blackacre through a tax sale proceeding. In 1998, after expiration of the redemption period, the State conveyed the east half of Blackacre to Robert Jones. Is Jones's title to the east half of Blackacre subject to the easement?

Answer: No.

Problem B: Jane Doe, the owner of Blackacre, conveyed the east half of Blackacre to Mary Smith in 1990, reserving in the deed an easement over the north 10 feet. The deed was recorded. In 1997, the State acquired title to the east half of Blackacre through tax sale proceedings. In 1999, after expiration of the redemption period, the State conveyed the east half of Blackacre to Robert Jones. Is Jones's title to the east half of Blackacre subject to the easement?

Answer: Yes.

Problem C: Same facts as in Problem A, except Doe used the easement as a visible access road to the west half of Blackacre. Is Jones's title to the east half of Blackacre subject to the easement?

Answer: Yes.

Authority: MCL 211.67b.

Comment A: Before 2002, delinquent real property tax liens were offered at annual sales held in each county pursuant to MCL 211.60 through 211.70. Liens not purchased at sale were automatically bid to the state for foreclosure. Following enactment of 1999 P.A. 123, beginning in 2001, liens for delinquent taxes for 1999 and later may be forfeited to the county treasurer on March 1 of the first year of delinquency and may then be subject to foreclosure at a circuit court hearing held at the end of the second year of delinquency, under MCL 211.78 through 211.78o. Delinquent tax liens for 1997 and earlier were sold under the former procedure. A phase-in period was created for delinquent 1998 and 1999 taxes, which were permitted to be sold under the former procedure or forfeited and foreclosed under the new procedure, in the county treasurer's discretion.

Comment B: The Committee expresses no opinion as to whether MCL 211.67b is applicable to rights of way or permits of the type described in part B of the Standard which are neither visible nor recorded.

STANDARD 22.9-2

EFFECT OF TAX FORECLOSURE PROCEEDING ON LIENS AND ENCUMBRANCES ON REAL PROPERTY ACQUIRED BY A FORECLOSING GOVERNMENTAL UNIT THROUGH A JUDGMENT OF FORECLOSURE PURSUANT TO MCL 211.78k ENTERED BEFORE JANUARY 3, 2007

STANDARD: TITLE TO REAL PROPERTY ACQUIRED BY A FORECLOSING GOVERNMENTAL UNIT THROUGH A JUDGMENT OF FORECLOSURE PURSUANT TO MCL 211.78k ENTERED BEFORE JANUARY 3, 2007, IS FREE OF LIENS AND ENCUMBRANCES THAT EXISTED AT THE DATE THE JUDGMENT WAS ENTERED, EXCEPT:

(A) FUTURE INSTALLMENTS OF SPECIAL ASSESSMENTS;

(B) RECORDED LIENS, RESTRICTIONS OR OTHER GOVERNMENTAL INTERESTS IMPOSED PURSUANT TO THE NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT, 1994 PA 451, MCL 324.101 ET SEQ.;

(C) VISIBLE OR RECORDED EASEMENTS OR RIGHTS OF WAY; AND

(D) PRIVATE DEED RESTRICTIONS.

Problem A: Jane Doe, the owner of Blackacre, conveyed the east half of Blackacre to Mary Smith in 1995. Smith later conveyed to Doe an easement over the north 10 feet of the east half of Blackacre. The easement was not visible or recorded. In 2003, the State, as the foreclosing governmental unit, acquired title to the east half of Blackacre through a judgment of foreclosure pursuant to MCL 211.78k and expiration of the redemption period. Later, the State conveyed the east half of Blackacre to Robert Jones. Is Jones's title to the east half of Blackacre subject to the easement?

Answer: No.

Problem B: Same facts as in Problem A, except that the easement was recorded. Is Jones's title to the east half of Blackacre subject to the easement?

Answer: Yes.

Problem C: Same facts as in Problem A, except that Doe used the easement as a visible access road to the west half of Blackacre. Is Jones's title to the east half of Blackacre subject to the easement?

Answer: Yes.

Problem D: Beginning in 1997, Blackacre was subject to a special assessment for road improvements payable in installments over 20 years. In 2005, the county treasurer, as the foreclosing governmental unit, acquired title to Blackacre through a judgment of foreclosure pursuant to MCL 211.78k and expiration of the redemption period. Later, the county treasurer conveyed Blackacre to Robert Jones. Is Jones's title to Blackacre subject to the special assessment?

Answer: Jones's title to Blackacre is free of all installments of the special assessment that were due and payable before entry of the judgment of foreclosure, but is subject to all installments due and payable after entry of the judgment.

Authority: MCL 211.78k(5).

Comment A: MCL 211.78(7)(a) defines "foreclosing governmental unit" as used in sections 78 through 157 of the General Property Tax Act, MCL 211.78 – 211.157, as (a) the county treasurer or (b) the State, if a county has opted out of the tax foreclosure process pursuant to MCL 211.78(3).

Comment B: Before 2002, delinquent real property tax liens were offered at annual sales held in each county pursuant to MCL 211.60 – 211.70. Liens not purchased at sale were automatically bid to the State for foreclosure. Following enactment of 1999 PA 123, beginning in 2001, liens for delinquent taxes for 1999 and later may be forfeited to the county treasurer on March 1 of the first year of delinquency and may then be subject to foreclosure at a

circuit court hearing held at the end of the second year of delinquency, under MCL 211.78 – 211.78o. Delinquent tax liens for 1997 and earlier were sold under the former process. A phase-in period was created for delinquent 1998 and 1999 taxes, which were permitted to be sold under the former process or forfeited and foreclosed under the new process, at the county treasurer's discretion.

STANDARD 22.9-3

EFFECT OF TAX FORECLOSURE PROCEEDING ON LIEN AND ENCUMBRANCE ON REAL PROPERTY ACQUIRED BY A FORECLOSING GOVERNMENTAL UNIT THROUGH A JUDGMENT OF FORECLOSURE PURSUANT TO MCL 211.78k ENTERED AFTER JANUARY 2, 2007

STANDARD: TITLE TO REAL PROPERTY ACQUIRED BY A FORECLOSING GOVERNMENTAL UNIT THROUGH A JUDGMENT OF FORECLOSURE PURSUANT TO MCL 211.78k ENTERED AFTER JANUARY 2, 2007, IS FREE OF LIENS AND ENCUMBRANCES THAT EXISTED AT THE DATE THE JUDGMENT WAS ENTERED, EXCEPT:

- (A) FUTURE INSTALLMENTS OF SPECIAL ASSESSMENTS;**
- (B) RECORDED LIENS, RESTRICTIONS OR OTHER GOVERNMENTAL INTERESTS IMPOSED PURSUANT TO THE NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT, 1994 PA 451, MCL 324.101 ET SEQ.;**
- (C) VISIBLE OR RECORDED EASEMENTS OR RIGHTS OF WAY;**
- (D) PRIVATE DEED RESTRICTIONS;**
- (E) INTERESTS OF A LESSEE OR AN ASSIGNEE OF AN INTEREST OF A LESSEE UNDER A RECORDED OIL OR GAS LEASE; AND**
- (F) INTERESTS IN OIL OR GAS THAT WERE OWNED BY A PERSON OTHER THAN THE SURFACE OWNER IF, DURING THE PERIOD OF 20 YEARS IMMEDIATELY BEFORE THE FILING OF THE PETITION FOR FORECLOSURE UNDER MCL 211.78h:**
 - (1) THE INTEREST WAS SOLD, LEASED, MORTGAGED, TRANSFERRED, OR RESERVED BY**

**INSTRUMENT RECORDED IN THE COUNTY
WHERE THE INTEREST IS LOCATED; OR**

**(2) THE OWNER OF THE INTEREST RECORDED A
NOTICE OF INTENT TO PRESERVE THE IN-
TEREST.**

Problem A: Jane Doe, the owner of Blackacre, conveyed the east half of Blackacre to Mary Smith in 1995. Smith later conveyed to Doe an easement over the north 10 feet of the east half of Blackacre. The easement was not visible or recorded. In 2003, the State, as the foreclosing governmental unit, acquired title to the east half of Blackacre through a judgment of foreclosure pursuant to MCL 211.78k(5) and expiration of the redemption period. Later, the State conveyed the east half of Blackacre to Robert Jones. Is Jones's title to the east half of Blackacre subject to the easement?

Answer: No.

Problem B: Same facts as in Problem A, except that the easement was recorded. Is Jones's title to the east half of Blackacre subject to the easement?

Answer: Yes.

Problem C: Same facts as in Problem A, except that Doe used the easement as a visible access road to the west half of Blackacre. Is Jones's title to the east half of Blackacre subject to the easement?

Answer: Yes.

Problem D: Beginning in 1997, Blackacre was subject to a special assessment for road improvements, payable in installments over 20 years. Later, the county treasurer, as the foreclosing governmental unit, acquired title to Blackacre through a judgment of foreclosure pursuant to MCL 211.78k and expiration of the redemption period. Later, the county treasurer conveyed Blackacre to Robert Jones. Is Jones's title to Blackacre subject to the installments of the special assessment due and payable before entry of the judgment of foreclosure?

Answer: No, but Jones's title is subject to all installments of the special assessment due and payable after entry of the judgment.

Problem E: In 1980 Jane Doe conveyed Blackacre, reserving a fee interest in all oil and gas. The deed was recorded in 1980. No further activity occurred affecting the oil and gas. In 2008, the State, as the foreclosing governmental unit, acquired title to Blackacre through a judgment of foreclosure pursuant to MCL 211.78(k) and expiration of the redemption period. Later, the State conveyed Blackacre to Robert Jones. Did Jones acquire the oil and gas?

Answer: Yes.

Problem F: Same facts as in Problem E, except that the conveyance and recording occurred in 1990. Did Jones acquire the oil and gas?

Answer: No.

Problem G: Same facts as in Problem E, except that in 1999 Doe recorded a notice of intent to preserve her interest in the oil and gas. Did Jones acquire the oil and gas?

Answer: No.

Problem H: Same facts as in Problem E, except that in 1990 Doe leased the oil and gas to Gusher Oil, LLC. The lease was recorded in 1990. Did Jones acquire Doe's interest in the oil and gas?

Answer: No. Neither Doe's fee interest nor Gusher's leasehold interest was affected by the tax foreclosure.

Problem I: Same facts as in Problem H, except that the lease was not recorded. Did Jones acquire the oil and gas?

Answer: Yes, Jones acquired both Doe's fee interest and Gusher's leasehold interest.

Problem J: Same facts as in Problem E, except that in 1980 Doe leased the oil and gas rights to Deep Driller, LLC. The lease was recorded in 1980. Oil and gas production began in 1982 and continued in-

to 2008, but no instrument affecting the oil and gas was recorded after 1980. Did Jones acquire all the interest in the oil and gas?

Answer: No. Jones acquired Doe's interest in the oil and gas subject to Deep Drillers' lease, which was not extinguished by the tax foreclosure. Although production is sufficient under MCL 554.291 *et seq.* to prevent Doe's interest from being deemed abandoned and vesting in the surface owner, production alone is insufficient to prevent the severed oil and gas interest from being foreclosed for delinquent real property taxes.

Authority: MCL 211.78k(5).

STANDARD 22.10

EFFECT OF TAX SALE OR TAX FORECLOSURE PROCEEDING ON REAL PROPERTY INTEREST EX- EMPT FROM TAXATION UNDER THE GENERAL PROPERTY TAX ACT

STANDARD: TITLE TO A PROPERTY INTEREST EXEMPT FROM TAXATION UNDER THE GENERAL PROPERTY TAX ACT IS NOT AFFECTED BY TAX SALE OR TAX FORECLOSURE PROCEEDINGS.

Problem A: The State owned the mineral interests in Blackacre. Blackacre was sold at tax sale to Fred Warner. Warner served notices under MCL 211.140 of the right to redeem from the tax lien sale to all interest holders in Blackacre, including the State. There was no redemption during the statutory period. Did Warner acquire the mineral interests?

Answer: No, because the State-owned mineral interests were exempt from taxation, the foreclosure did not affect the interests.

Problem B: Blackacre, subject to a railroad right-of-way, was foreclosed for delinquent taxes and title vested in the foreclosing governmental unit. After the redemption period expired, the foreclosing governmental unit deeded Blackacre to Cy Luce. The tax description by which Blackacre was foreclosed and deeded to Luce did not exclude the railroad right-of-way. Is Luce's title subject to the right-of-way?

Answer: Yes, because the railroad was exempt from taxation under the General Property Tax Act, the foreclosure did not affect the right-of-way.

Authorities: Problem A: *Porter v Auditor Gen*, 255 Mich 526, 238 NW 185 (1931); *Hammond v Auditor Gen*, 70 Mich App 149, 245 NW2d 544 (1976).

Problem B: MCL 211.7v. *Smith v Auditor Gen*, 138 Mich 582, 101 NW 807 (1904).

- Comment A:** Michigan's current and former constitutions provide for specific taxation of certain real and personal property interests in lieu of general ad valorem taxation. Const 1963, art 9, § 3. These interests are therefore exempt from foreclosure under the General Property Tax Act. They include railroad, telegraph, and telephone operating property subject to specific taxation under MCL 207.1 *et seq.*, and oil or gas pipelines and electric utility lines and their rights of way or easements assessed as personal property under MCL 211.8.
- Comment B:** The result is the same whether delinquent taxes are foreclosed through tax sale proceedings under MCL 211.60 *et seq.* (repealed by 1999 PA 123) or tax foreclosure proceedings under MCL 211.78 *et seq.*
- Comment C:** Real property exempt from taxation under the General Property Tax Act may be foreclosed for unpaid special assessments imposed or for delinquent property taxes levied in years in which the property was not tax-exempt. *In re Petition of Auditor Gen*, 300 Mich 80, 1 NW2d 461 (1942) (special assessments); *Triangle Land Co v Detroit*, 204 Mich 442 (1918) (prior years' property taxes).
- Comment D:** An interest in real property owned by the State, even if subject to delinquent taxes, is not subject to foreclosure. *In re Petition of Wayne County Treasurer for Foreclosure (Wayne County Treasurer v Watson)*, 480 Mich 981, 742 NW2d 109 (2007), *mod*, 480 Mich 1139, 745 NW2d 781 (2008); *State Highway Comm'r v Simmons*, 353 Mich 432, 91 NW2d 819 (1958). Real property owned by a public school district is considered State-owned and not subject to tax foreclosure. *King v School Dist No 5*, 261 Mich 605, 247 NW 66 (1933).

The Committee expresses no opinion as to whether real property owned by a municipality is affected by a foreclosure under the tax sale proceedings set forth at MCL 211.60 *et seq.* (repealed by 1999 PA 123). *See, King v School Dist No 5, supra*. However, real property owned by a municipality is not subject to foreclosure under the tax foreclosure proceedings set forth at MCL 211.78 *et seq.* *Detroit Building Auth v Wayne County Treasurer*, 480 Mich 897; 738 NW2d 765 (2008).

STANDARD 22.11

EFFECT OF RECORDING OF CERTIFICATE OF FORFEITURE

STANDARD: THE RECORDING OF A CERTIFICATE OF FORFEITURE OF REAL PROPERTY PURSUANT TO MCL 211.78g(2) DOES NOT DIVEST AN OWNER OF AN INTEREST IN THE REAL PROPERTY. THE OWNER IS DIVESTED OF THE INTEREST ONLY BY A JUDGMENT OF FORECLOSURE AND EXPIRATION OF THE REDEMPTION PERIOD.

Problem: On April 5, 2005, the county treasurer recorded a certificate of forfeiture pursuant to MCL 211.78g(2), stating that Blackacre was forfeited to the county treasurer on March 1, 2005, for delinquent 2003 taxes pursuant to MCL 211.78g(1). On May 27, 2005, Steve Mason, the owner of Blackacre, conveyed Blackacre to Russ Alger. Did Alger acquire marketable title to Blackacre?

Answer: Yes, subject to the lien for 2003 taxes and potential loss of title through the tax foreclosure process if the 2003 taxes are not paid.

Authority: MCL 211.78(g).

Comment: The General Property Tax Act requires a foreclosure hearing to be held within 30 days before March 1 in the year after the forfeiture, and the entry of a judgment of foreclosure, followed by the applicable redemption period. MCL 211.78h(5) and 211.78k(5) and (6).

Caveat: Under MCL 211.78i(6), the recording of an instrument conveying an interest in real property after the recording of a certificate of forfeiture does not entitle the interest holder to additional notice of the foreclosure proceedings. *First Nat'l Bank of Chicago v Dep't of Treasury*, 485 Mich 980; 774 NW2d 912 (2009).

CHAPTER XXIII

DESCRIPTIONS

STANDARD 23.1

STRICT INTERPRETATION OF UNAMBIGUOUS DESCRIPTION

STANDARD: AN INSTRUMENT CONTAINING A DESCRIPTION OF AN IDENTIFIABLE PARCEL OF REAL PROPERTY, WHICH IS PLAIN AND INTELLIGIBLE, AND WITHOUT MATERIAL AMBIGUITY, IS EFFECTIVE TO CONVEY THE REAL PROPERTY SO DESCRIBED, NOTWITHSTANDING A DIFFERENT INTENT OF THE PARTIES.

Problem A: Mary Doe deeded Blackacre to Richard Roe. The legal description in the deed contained non-material ambiguities, but sufficiently identified Blackacre as the real property being conveyed. Did Roe acquire title to Blackacre?

Answer: Yes.

Problem B: Pursuant to a contract for the sale of Blackacre, Mary Doe, owner of Blackacre, deeded Blackacre to Richard Roe. The legal description in the deed was unambiguous but clearly identified Whiteacre, which Doe also owned. Did Roe acquire title to Blackacre?

Answer: No. Roe acquired title to Whiteacre, but the deed may be subject to an action for reformation.

Problem C: Same facts as in Problem B, except that Roe later deeded Whiteacre to Simon Grant, who was a bona fide purchaser. Did Grant acquire title to Whiteacre?

Answer: Yes. Although Roe's title to Whiteacre might be subject to divestment in an action for reformation brought by Doe, the right of reformation is not available against a bona fide purchaser.

Authorities: Problem A: *Farabaugh v Rhode*, 305 Mich 234, 9 NW2d 562 (1943); *Gawrylak v Cowie*, 350 Mich 679, 86 NW2d 809 (1952); *State, ex rel Director of Department of Conservation v Spencer*, 5 Mich App 1, 145 NW2d 812 (1966); *Arnold v Ellis*, 5 Mich App 101, 145 NW2d 822 (1966).

Problem B: *Kowatch v Darnell*, 354 Mich 197, 92 NW2d 342 (1958).

Problem C: *Juif v State Highway Comm'r*, 287 Mich 35, 282 NW 892 (1939).

Comment: If a description is unambiguous, evidence regarding the intent of the grantor is inadmissible against a later bona fide purchaser. *Juif v State Highway Comm'r*, *supra*.

Note: See Standard 3.3 with respect to the attempted correction of a previously executed deed.

STANDARD 23.2

AMBIGUOUS DESCRIPTION: DETERMINING INTENT OF PARTIES

STANDARD: IF A DESCRIPTION CONTAINS EITHER A PATENT OR A LATENT AMBIGUITY, THE AMBIGUITY IS RESOLVED BY DETERMINING THE ACTUAL INTENT OF THE PARTIES OR, IF NECESSARY, BY APPLYING SETTLED RULES OF CONSTRUCTION TO DETERMINE THE PROBABLE INTENT OF THE PARTIES.

Problem: Molly Hagen intended to sell, and Martin Elli intended to purchase, Blackacre. The call for the southern boundary of the true description of Blackacre was “thence due east 100 feet to the east line of Section 1.” In the deed executed by Hagen, the description of Blackacre was accurate, except that the call for the southern boundary was erroneously given as “thence due east 100 feet to the west line of Lake Huron.” Does the rule of construction that monuments, such as shore lines, prevail over courses and distances apply to defeat the intent of the parties to the deed?

Answer: No. The intent of the parties controls over the rules of construction.

Authorities: Generally: *Moran v Lezotte*, 54 Mich 83, 19 NW 757 (1884); *Smith v Smith*, 71 Mich 633, 40 NW 21 (1888); *Plummer v Gould*, 92 Mich 1, 52 NW 146 (1892); *Negaunee Iron Co v Iron Cliffs Co*, 134 Mich 264, 96 NW 468 (1903); *Glidden v Beaverton Power Co*, 223 Mich 383, 193 NW 862 (1923); *Farabaugh v Rhode*, 305 Mich 234, 9 NW2d 562 (1943); *Curran v Maple Island Resort Association*, 308 Mich 672, 14 NW2d 655 (1944); *Purlo Corp v 3925 Woodward Avenue, Inc*, 341 Mich 483, 67 NW2d 684 (1954); *Gawrylak v Cowie*, 350 Mich 679, 86 NW2d 809 (1957); *McHenry v Ford Motor Co*, 146 F Supp 896 (ED Mich 1956), *rev'd on other grounds*, 269 F2d 18 (1959); *Weimer v Gilbert*, 7 Mich App 207, 151 NW2d 348 (1967); *Michaels v Chamberlain*, 26 Mich App 317, 182 NW2d 360 (1970).

Comment A: The intent of the parties controls over all rules of construction. *Holmes v Trout*, 32 US 171, 8 L Ed 647 (1833); *Paddock v Pardee*, 1 Mich 421 (1850); *Purlo Corp v 3925 Woodward Avenue, Inc, supra*; *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 699 NW2d 272 (2005).

If the actual intent of the parties cannot be determined, courts apply the following rules of construction to determine the probable intent of the parties in resolving an ambiguous description:

1. If an instrument contains a general description of the real property followed by a more particular description, the latter controls. *Jones v Pashby*, 62 Mich 614, 29 NW 374 (1886); *Nichols v New England Furniture Co*, 100 Mich 230, 59 NW 155 (1894).

2. Fixed lines and monuments generally control over contradictory or conflicting statements of courses, distances or quantity. *County of St Clair v Lovington*, 90 US 46, 23 L Ed 59 (1874); *Keyser v Sutherland*, 59 Mich 455, 26 NW 865 (1886); *Nordberg v Todd*, 254 Mich 440, 236 NW 826 (1931); *Farabaugh v Rhode, supra*; *Curran v Maple Island Resort Ass'n, supra*; *People, ex rel MacMullan v Babcock*, 38 Mich App 336, 196 NW2d 489 (1972).

3. A point in a description is a monument only if it indicates a permanent object which is either natural or artificial, *Murray v Buikema*, 54 Mich App 382, 221 NW2d 193 (1974), such as a river or spring, *Stolte v Krentlel*, 271 Mich 98, 260 NW 127 (1935), or a lake, pipe or post, *Keyser v Sutherland, supra*. If a monument cannot be located, or is lost or obliterated, evidence may be admitted to prove its location. *Hess v Meyer*, 73 Mich 259, 41 NW 422 (1889).

4. If monuments identified in a description are inconsistent with fixed lines in the description, such as section lines or quarter lines, the monuments control. *Murray v Buikema, supra*.

5. If courses and distances conflict, courses control. *Bird v Stimson*, 197 Mich 582, 164 NW 438 (1917), *reh den*, 166 NW 1043 (1918).

6. A line designated as running along one of the four primary compass points, such as “west,” is presumed to run “due west” according to the true meridian. *Gutha v Roscommon County Road Comm’n*, 296 Mich 600, 296 NW 694 (1941).

7. The word “half” in a description means half in quantity. *Au Gres Boom Co v Whitney*, 26 Mich 42 (1872); *Dart v Barbour*, 32 Mich 267 (1875); *Heyer v Lee*, 40 Mich 353 (1879); *Hartford Iron Mining Co v Cambria Mining Co*, 80 Mich 491, 45 NW 351 (1890). The word “half” as used in a government survey means that part of the section or other parcel being subdivided that is determined with reference to a line which is equidistant from the boundary lines of the parcel. *Edinger v Woodke*, 127 Mich 41, 86 NW 397 (1901).

8. If one part of a description is false or impossible and the omission of that part leaves an adequate and identifiable description, the false or impossible part is rejected and the remaining part of the description is given effect. *Anderson v Baughman*, 7 Mich 69 (1859); *Gilman v Riopelle*, 18 Mich 145 (1869); *Wilt v Cutler*, 38 Mich 189 (1878); *Taber v Shattuck*, 55 Mich 370, 21 NW 371 (1884); *Tuthill v Katz*, 163 Mich 618, 128 NW 757 (1910).

9. A description which contains a customary or generally accepted abbreviation or a numerical figure is not ambiguous. *Harrington v Fish*, 10 Mich 415 (1862).

10. A description which identifies a lot in a recorded plat must identify the plat with particularity. *Warner v Noble*, 286 Mich 654, 282 NW 855 (1938).

11. If a description contains conflicting particulars, the particular as to which there is the least probability of error controls. *Moran v Lezotte*, *supra*; *Curran v Maple Island Resort Ass’n*, *supra*.

12. If, but only if, other rules of construction fail to resolve an ambiguity, a description will be construed strongly against the grantor. *Bolio v Marvin*, 130 Mich 82, 89 NW 563 (1902); *Negaunee Iron Co v Iron Cliffs Co*, *supra*; *Heethuis v Kerr*, 194 Mich 689, 161 NW 910 (1917); *Old Mission Peninsula School District v French*, 362 Mich 546, 107 NW2d 758 (1961).

13. A conveyance is void only if the description is so vague, uncertain or impossible that the real property cannot be identified. *Dwight v Tyler*, 49 Mich 614, 14 NW 567 (1883); *Persinge v Jubb*, 52 Mich 304, 17 NW 851 (1883); *Stampe v Steele*, 209 Mich 205, 176 NW 464 (1920).

Comment B: A patent ambiguity is apparent on the face of the instrument; a latent ambiguity arises from the application of the words of the instrument to the subject described. *Zilwaukee Twp v Saginaw-Bay City Ry Co*, 213 Mich 61, 181 NW 37 (1921).

CHAPTER XXIV

SUBMERGED LAND, NAVIGATIONAL SERVITUDE AND RIPARIAN RIGHTS



STANDARD 24.1

TITLE TO GREAT LAKES BOTTOMLANDS

STANDARD: TITLE TO GREAT LAKES BOTTOMLANDS LYING WITHIN THE BOUNDARIES OF THE STATE OF MICHIGAN IS HELD BY THE STATE IN FEE SIMPLE AND IN TRUST FOR THE PEOPLE OF THE STATE EXCEPT LAND PATENTED OR LAWFULLY CONVEYED OR CONFIRMED BY THE UNITED STATES BEFORE STATEHOOD OR THEREAFTER BY THE STATE OF MICHIGAN.

Problem: Richard Roe owned Blackacre, which had Lake Michigan water frontage. Private title to Blackacre originated with a U.S. patent in 1840. Roe constructed a wharf on Lake Michigan submerged land contiguous to Blackacre. Roe deeded Blackacre together with the wharf and the submerged land to Simon Grant. Did Grant acquire title to the submerged land?

Answer: No.

Authorities: *Illinois Central R Co v Illinois*, 146 US 387, 13 S Ct 110, 36 L Ed 1010 (1892); *People v Silberwood*, 110 Mich 103, 67 NW 1087 (1896); *People v Warner*, 116 Mich 228, 74 NW 705 (1898); *State v Lake St Clair Fishing & Shooting Club*, 127 Mich 580, 87 NW 117 (1901); *Nedtweg v Wallace*, 237 Mich 14, 211 NW 647 (1927); and *Obrecht v National Gypsum Co*, 361 Mich 399, 105 NW2d 143 (1960).

Comment A: The principle stated in the Standard has also been applied to Lake St. Clair. *Nedtweg v Wallace*, *supra*.

- Comment B:** The character of the State's title in trust is discussed in *Nedtweg v Wallace, supra*, which upheld the constitutionality of a Michigan statute that authorized the State to lease lake bottomlands to private parties for private uses.
- Comment C:** The Great Lakes Submerged Lands Act, MCL 322.701 *et seq.*, now codified as Part 325 of the Natural Resources and Environmental Protection Act, MCL 324.32501 *et seq.*, adopted after the decision in *Nedtweg v Wallace, supra*, required the Michigan Department of Environmental Quality to make certain findings in addition to those required under *Nedtweg*, before disposing of any Great Lakes bottomlands or permitting use of the waters of the Great Lakes. Both before and after the adoption of 1955 P.A. 247, the Legislature by public act and joint resolution authorized certain conveyances of State-owned Great Lakes bottomlands. Those conveyances lawfully disposed of the State's title to such land. See, for example, 1907 JR 15, 1913 P.A. 326 (now codified as Part 339 of the Natural Resources and Environmental Protection Act, MCL 324.33901 *et seq.*), 1954 P.A. 41, 1955 (Ex Sess) P.A. 8, 1956 P.A. 36, 1959 P.A. 11, 1959 P.A. 31 and 1962 P.A. 84.
- Comment D:** Certain Great Lakes bottomlands were patented by the United States before the admission of Michigan as a State. Title to such land did not vest in the State upon its admission to the Union. *Klais v Danowski*, 373 Mich 262, 129 NW2d 414 (1964). See also, 43 USC 1301.
- Comment E:** The United States has a navigational servitude over the waters of the Great Lakes which arises under the Commerce Clause of the U. S. Constitution. The servitude is not affected by the State's ownership of the Great Lakes bottomlands. Such ownership was confirmed in *Illinois Central R Co v Illinois, supra*, and by the Submerged Lands Act, 43 USC 1301, *et seq.*
- Comment F:** There is no statute of limitations barring the State from taking legal action regarding possession of unpatented Great Lakes bottomland or made land formerly submerged by the waters of the Great Lakes. MCL 317.294. Title to the land cannot be acquired by adverse possession. *State v Venice of America Land Co*, 160 Mich 680, 125 NW 770 (1910). There are circumstances, however, in which the State may be estopped from asserting title. *Oliphant v Frazho*, 381 Mich 630, 167 NW2d 280 (1969).

Comment G: Part 325 of the Natural Resources and Environmental Protection Act, MCL 324.32501 *et seq.*, governs, *inter alia*, the use and occupancy of lake bottomland and made land in the Great Lakes lying within the boundaries of the State of Michigan. Part 325 permits the sale, lease or other conveyance of Great Lakes bottomlands by the Department of Environmental Quality.

Note: See Standard 24.2 concerning title to land submerged by waters other than those of the Great Lakes.

STANDARD 24.2

TITLE TO LAND SUBMERGED BY WATERS OF NATURAL WATERCOURSES OTHER THAN GREAT LAKES

STANDARD: TITLE TO LAND SUBMERGED BY WATERS OF NATURAL WATERCOURSES OTHER THAN THE GREAT LAKES IS VESTED IN THE ABUTTING LANDOWNERS.

Problem: Brown owned Blackacre, which abutted Muskegon Lake. White took sand and gravel from the submerged land abutting Blackacre without Brown's consent. Is White liable to Brown for damages?

Answer: Yes.

Authorities: *Lorman v Benson*, 8 Mich 18, 77 AD 435 (1860); *McMorran Milling Co v C H Little Co*, 201 Mich 301, 167 NW 990 (1918); *Hall v Wantz*, 336 Mich 112, 57 NW2d 462 (1953).

Comment A: This Standard concerns title to land submerged by waters of naturally-occurring inland watercourses, i.e., inland lakes, rivers, streams and ponds, although the courts have applied the same analysis to land submerged by artificial impoundments on natural streams. *Hartz v Detroit, P & N Ry*, 153 Mich 337, 116 NW 1084 (1908); *Moore v Provost*, 205 Mich 687, 172 NW 410 (1919). Note, however, that Part 301 of the Natural Resources and Environmental Protection Act, MCL 324.30101 *et seq.*, includes both natural and artificial watercourses in the definition of a regulated "inland lake or stream."

Comment B: Watercourses which empty into or connect the Great Lakes are considered inland waters. *Lorman v Benson*, 8 Mich 18 (1860) (Detroit River); *Rice v Ruddiman*, 10 Mich 125 (1862) (Muskegon Lake); *Ryan v Brown*, 18 Mich 196, 100 AD 154 (1869) (St. Mary's River); *Pere Marquette Boom Co v Adams*, 44 Mich 403, 6 NW 857 (1880) (Pere Marquette Lake); *Webber v The Pere Marquette Boom Co*, 62 Mich 626, 30 NW 210 (1886) (Pere Marquette Lake); *Jones v Lee*, 77 Mich 35, 43 NW 855 (1889) (Muskegon Lake); *Hall v Wantz*, 336 Mich 112, 57

NW2d 462 (1953) (White Lake). See Standard 24.1 for the rule regarding Lake St. Clair.

Comment C: Title to land submerged by natural watercourses other than the Great Lakes is subject to the riparian rights of owners of other riparian or littoral property. *Hilt v Weber*, 252 Mich 198, 233 NW 159 (1930); *Thompson v Enz*, 379 Mich 667, 154 NW2d 473 (1967).

In addition, title to land submerged by waters of navigable watercourses is subject to a navigational servitude in favor of the public.

Comment D: For cases addressing the division of submerged land, see *Clark v Campau*, 19 Mich 325 (1869); *Grand Rapids Ice & Coal Co v South Grand Rapids Ice & Coal Co*, 102 Mich 227, 60 NW 681 (1894); *Hanson v Way Estate*, 25 Mich App 469, 181 NW2d 537 (1970). For cases addressing the division of accreted or relicited land, see *Cutliff v Densmore*, 354 Mich 586, 93 NW2d 307 (1958); *Weisenburger v Kirkwood*, 7 Mich App 283, 151 NW2d 889 (1967); *Booker v Wever*, 42 Mich App 368, 202 NW2d 439 (1972); and *Gregory v LaFaive*, 172 Mich App 354, 431 NW2d 511 (1988).

STANDARD 24.3

NAVIGATIONAL SERVITUDE

STANDARD: A NAVIGATIONAL SERVITUDE FOR THE BENEFIT OF THE PUBLIC EXISTS AS TO:

- (A) A RIVER OR STREAM THAT HAS BEEN USED FOR OR IS CAPABLE OF SUPPORTING COMMERCIAL BOATING OR THE FLOTATION OF LOGS FOR COMMERCIAL PURPOSES;**
- (B) AN INLAND LAKE THAT HAS BOTH A NAVIGABLE INLET AND A NAVIGABLE OUTLET; AND**
- (C) THE GREAT LAKES.**

WHEN A BODY OF WATER IS SUBJECT TO A NAVIGATIONAL SERVITUDE, THE PUBLIC, HAVING GAINED LAWFUL ACCESS, HAS THE RIGHT OF REASONABLE USE OF THE WATERS FOR CERTAIN PURPOSES INCIDENT TO NAVIGATION.

Problem A: Wilma White owned all of the real property surrounding Clear Lake. There was no public access to Clear Lake except via the Red River, which flowed both into and out of the lake. The Red River was historically used to float logs both above and below the lake. White sought a court order to prevent the public from using the Red River as access to Clear Lake for fishing. Is White entitled to the order?

Answer: No. The Red River, which serves as both inlet and outlet to Clear Lake, is navigable. Therefore, Clear Lake is subject to a navigational servitude which permits the public to enter the lake from the navigable river and to fish in the lake.

Problem B: Same facts as in Problem A, except that the Red River was historically capable of floating logs only below Clear Lake. Is White entitled to the order?

Answer: Yes. The Red River is navigable only as an outlet to Clear Lake. Therefore, Clear Lake is not subject to a navigational servitude in favor of the public.

Problem C: Same facts as in Problem A, except that White sought a court order to prevent the public from trapping muskrat on Clear Lake. Is White entitled to the order?

Answer: Yes. The rights to hunt, trap and gather ice for commercial purposes are riparian rights vested in the owners of bottomlands under the waters of the State, regardless of whether the waters are subject to a navigational servitude.

Authorities: Problem A: *Collins v Gerhardt*, 237 Mich 38, 211 NW2d 115 (1926); *Attorney General ex rel Director of Conservation v Taggart*, 306 Mich 432, 11 NW2d 193 (1943); *Bott v Natural Resources Comm'n*, 415 Mich 45, 327 NW2d 838 (1982).

Problem B: *Michigan Conference Assoc of Seventh Day Adventists v Natural Resources Comm'n*, 70 Mich App 85, 245 NW2d 412 (1976).

Problem C: *Lorman v Benson*, 8 Mich 18, 77 Am Dec 435 (1860) (harvesting ice); *Sterling v Jackson*, 69 Mich 488, 37 NW 845 (1888) (hunting); *Grand Rapids Ice & Coal Co v South Grand Rapids Ice & Coal Co*, 102 Mich 227, 60 NW 681 (1894) (harvesting ice); *Johnson v Burghorn*, 212 Mich 19, 179 NW 225 (1920) (trapping); *St Helen Shooting Club v Mogle*, 234 Mich 60, 207 NW 915 (1926) (hunting).

Comment A: The right to use navigable waters of the State was reserved to the public by the Ordinance of 1787 for the government of the territory northwest of the Ohio River, and was originally intended to promote commerce and industry, as opposed to recreational uses. *Moore v Sanborne*, 2 Mich 519 (1853). In later cases, the servitude was expanded to include recreational fishing. *Collins v Gerhardt*, *supra*; *Att'y Gen'l v Taggart*, *supra*. In *Bott v Natural Resources Comm'n*, *supra*, the Michigan Supreme Court in *dicta* stated that recreational fishing was the only non-commercial right which had been specifically recognized as an incident of the navigational servitude. The Court was not called upon to decide, and did not decide, whether recreational boating and other recreational uses were included in the

navigational servitude. Later, in *Thies v Howland*, 424 Mich 282, 380 NW2d 463 (1985), the court (also in *dicta*) stated that under the navigational servitude the public has the right to use the surface of the water in a reasonable manner, and gave as examples boating, fishing, swimming and temporary anchorage. *Thies v Howland, supra*, at 288.

Comment B: The Great Lakes are by definition navigable. *Illinois Central R Co v Illinois*, 146 US 387, 13 S Ct 110, 36 L Ed 1018 (1892). Public rights with respect to the Great Lakes include, but are broader than, those under the navigational servitude. These rights include rights under the public trust doctrine, rights resulting from the State's riparian ownership, rights reserved under the federal navigational servitude (see, Standard 24.1), and rights arising out of the State's ownership of the bottomlands.

Caveat: Michigan courts have addressed the issue of navigability of inland lakes in three situations. First, if both the inlet and outlet to the lake are navigable, the lake is subject to a navigational servitude. *Bott v Natural Resources Comm'n, supra*. Second, if there is neither a navigable inlet nor outlet to the lake, the lake is not subject to a navigational servitude. *Winans v Willetts*, 197 Mich 512, 163 NW 993 (1917); *Pigorsh v Fahner*, 386 Mich 508, 194 NW2d 343 (1972); *State of Michigan v The Summer School of Painting of Saugatuck, Inc., on remand*, 126 Mich App 81, 337 NW2d 322 (1983). Third, if there is only a navigable inlet or a navigable outlet (but not both) and the real property surrounding the lake is owned entirely by a single owner, the lake is not subject to a navigational servitude. *Michigan Conference Assoc of Seventh Day Adventists v Natural Resources Comm'n, supra*. Michigan courts have not addressed the question of whether there is a navigational servitude as to a lake which has only a navigable inlet or a navigable outlet (but not both) and which either (a) is surrounded by real property owned by multiple owners or (b) has historically been used for commercial transportation of passengers or goods.

STANDARD 24.4

RIPARIAN RIGHTS

STANDARD: LAND ABUTTING A NATURAL WATERCOURSE IS RIPARIAN WITH RESPECT TO THAT WATERCOURSE, AND THE LANDOWNER HAS THE RIGHT TO ACCRETIONS AND RELICTIONS. THE OWNER OF LAND ABUTTING A NATURAL LAKE OR POND OR A NAVIGABLE STREAM HAS THE RIGHT TO THE REASONABLE USE OF THAT WATERCOURSE, IN COMMON WITH OWNERS OF OTHER RIPARIAN LAND, FOR:

- (A) GENERAL PURPOSES SUCH AS FISHING, BOATING, BATHING, IRRIGATION AND DOMESTIC USES;
- (B) WHARFING OUT TO NAVIGABLE WATERS; AND
- (C) TRANSIT ACROSS INTERVENING SHALLOWS TO OBTAIN ACCESS TO NAVIGABLE WATERS.

Problem A: Wilma White and Brenda Brown each owned a parcel of land abutting Gun Lake. White sought to enjoin Brown from placing a dock on the shoreline of Brown's parcel. Is White entitled to the injunction?

Answer: No. As a riparian owner Brown is entitled to reasonable use of Gun Lake, including the placing of the dock on her land.

Problem B: Lake View Land Holdings, LLC, owned land abutting Gun Lake. Lake View proposed to develop a subdivision of non-waterfront single family homes on its land and to grant access to the lake to all lot owners in the subdivision by vesting ownership of the lakefront land in a homeowners association consisting of all lot owners. Wilma White, who owned riparian land elsewhere on the lake, sought to enjoin Lake View from granting lake access to all lot owners. Is White entitled to the injunction?

Answer: White's right to an injunction depends on whether the court determines the use of Gun Lake by the lot owners is unreasonable.

Authorities: Problem A: *Hilt v Weber*, 252 Mich 198, 233 NW 159 (1930); *Thompson v Enz*, 379 Mich 667, 154 NW2d 473 (1967); *McCardel v Smolen*, 404 Mich 89, 273 NW2d 3 (1978); *Thies v Howland*, 424 Mich 282, 380 NW2d 463 (1985).

Problem B: *Opal Lake Association v Michaywe Limited Partnership*, 47 Mich App 354, 209 NW2d 478 (1973); *on remand* 63 Mich App 161, 234 NW2d 437 (1975); *Pierce v Riley*, 81 Mich App 39 (1978), 264 NW2d 110, *lv den*, 403 Mich 818 (1978); *Three Lakes Association v Kessler*, 91 Mich App 371, 285 NW2d 300 (1979).

Comment A: Although riverfront property is riparian and lakefront property is littoral, the rights associated with ownership of either are commonly referred to as “riparian” rights.

Comment B: An owner’s riparian rights are subject to the correlative rights of other riparian owners, the police power of the state, and, if the land abuts a navigable watercourse, the public’s rights in the watercourse. The same riparian rights attach to ownership of riparian land whether located on the Great Lakes or on inland lakes or streams. *Hilt v Weber*, 252 Mich 198, 233 NW 159 (1930). However, no riparian rights attach to land abutting artificial bodies of water. *Goodrich v McMillan*, 217 Mich 630, 187 NW 368 (1922); *Ruggles v Dandison*, 284 Mich 338, 279 NW 851 (1938); *Thompson v Enz*, *supra*.

Comment C: “Reasonable use” of riparian rights is decided on a case-by-case basis, by applying such factors as the size of the watercourse, the amount of riparian frontage, current uses of the watercourse, and the character of the watercourse. See, Authorities for Problem B.

Comment D: The Committee expresses no opinion as to the extent of the correlative rights of riparian owners on non-navigable watercourses.

STANDARD 24.5

OWNERSHIP OF RIPARIAN RIGHTS

STANDARD: RIPARIAN RIGHTS ATTACH ONLY TO LAND WHICH ADJOINS A NATURAL WATERCOURSE AND MAY NOT BE SEVERED FROM THAT LAND.

Problem: Wilma White was the owner of Blackacre, which adjoined Gun Lake. Brenda Brown was the owner of Greenacre, which was adjacent to Blackacre but had no frontage on the lake. White constructed a channel across Blackacre connecting Gun Lake to Greenacre. Does Brown have riparian rights because of her ownership of Greenacre?

Answer: No. Because Greenacre does not adjoin Gun Lake, its owner has no riparian rights. Greenacre does not acquire riparian rights by virtue of the channel constructed across Blackacre because the channel is not a natural watercourse.

Authorities: *Ruggles v Dandison*, 284 Mich 338, 279 NW 851 (1938); *Thompson v Enz*, 379 Mich 667, 154 NW2d 473 (1967).

Comment A: A riparian owner may grant to one or more non-riparians the right to exercise that owner's riparian rights. The exercise of such granted rights is subject to: (a) any limitations the riparian owner imposes on the non-riparian; and (b) any existing limitations on the rights of the riparian owner, including the restriction that the cumulative exercise of rights relating to the riparian parcel not be unreasonable. Thus, in the Problem, if White permits Brown to use the channel to cross Blackacre to gain access to Gun Lake, Brown may exercise White's riparian rights in the lake, to the extent granted by White. However, Greenacre remains non-riparian land, and the rights Brown may exercise are limited by the reasonableness standard applicable to Blackacre (See, Standard 24.4, Problem B).

Comment B: A parcel of land separated from a natural watercourse by a highway or walkway, where the highway or walkway is contiguous to the watercourse, is riparian, unless a contrary intention appears in the chain of title. *Croucher v Wooster*, 271 Mich 337, 260 NW 739 (1935); *Meridian Twp v Palmer*, 279

Mich 586, 273 NW 277 (1937); *Thies v Howland*, 424 Mich 282, 380 NW2d 463 (1985); 2000 *Baum Family Trust v Babel*, 488 Mich 136, 793 NW2d 633 (2010). If a dedicated highway or walkway parallels and is contiguous to a natural watercourse, the rights (if any) of the public for access to and use of the watercourse from the highway or walkway are determined by the scope of the dedication. *Thies v Howland*, *supra*; *Meridian Twp v Palmer*, *supra*; *McCardle v Smolen*, 404 Mich 89, 273 NW2d 3 (1978). If a highway or walkway (whether public or private) terminates at a natural watercourse, the way is generally deemed to provide access to the water for the use of those persons entitled to use the highway or walkway. *Backus v Detroit*, 49 Mich 110, 13 NW 380 (1882); *Thies v Howland*, *supra*; 2000 *Baum Family Trust v Babel*, *supra*.

Comment C: Part 301 of the Natural Resources and Environmental Protection Act, MCL 324.30101 *et seq.*, concerning inland lakes and streams, does not extend riparian rights to an artificial watercourse. *Holton v Ward*, 303 Mich App 718, 730, 847 NW2d 1 (2014), lv den 497 Mich 980, 861 NW2d 20 (2015).

Comment D: Riparian rights are not alienable, severable, divisible or assignable apart from the land that includes or is bounded by a natural watercourse. *Thompson v Enz*, *supra*. However, riparian rights may be subject to easements, licenses and similar interests. *Little v Kin*, 468 Mich 699, 664 NW2d 746 (2003).

Comment E: Michigan courts have not addressed the question of how far from the water's edge a riparian parcel may extend. It is unclear whether a riparian parcel may extend beyond the watershed or whether non-riparian land becomes riparian when added (by common ownership) to a riparian parcel. For a discussion of these concepts as developed in other jurisdictions, see 1 Beck and Kelley, *Waters and Water Rights*, § 7.02(a)(2), (3d ed, Release 2-12/2010); Tarlock, *Law of Water Rights and Resources*, § 3.47 (2011 ed).

Caveat: In *Newaygo Portland Cement Co v Sheridan Twp*, 137 Mich 475, 100 NW 747 (1904), a property tax case, the court approved separate assessment of bottomlands and riparian rights severed from the upland. The court did not address the propriety of the severance of riparian rights. All later cases follow the holding in *Thompson v Enz*, *supra*, that riparian rights are not severable.

STANDARD 24.6

BOUNDARY OF REAL PROPERTY ABUTTING GREAT LAKES

STANDARD: THE WATERFRONT BOUNDARY LINE OF REAL PROPERTY ABUTTING THE GREAT LAKES IS:

- (A) THE GOVERNMENT LAND OFFICE MEANDER LINE, IF TITLE ORIGINATED WITH A SWAMP LAND PATENT AND THE WATER'S EDGE IS LANDWARD OF THE MEANDER LINE;
- (B) THE GOVERNMENT LAND OFFICE MEANDER LINE OR THE NATURALLY OCCURRING WATER'S EDGE, WHICHEVER IS FURTHER LAKEWARD, IF TITLE ORIGINATED WITH EITHER A BRITISH OR FRENCH LAND GRANT CONFIRMED BY THE UNITED STATES OR A PATENT THAT PREDATES STATEHOOD; OR
- (C) THE NATURALLY OCCURRING WATER'S EDGE, IF TITLE ORIGINATED WITH A PATENT THAT POST DATES STATEHOOD AND IS NOT A SWAMP LAND PATENT.

Problem A: Mike White conveyed a government lot abutting Saginaw Bay to Brenda Brown. Private title to the lot originated with a patent from the State under the Swamp Land Patent Act of 1850. In 1997 the water's edge was 100 feet landward of the meander line shown on the original government land office survey. Does Brown's title to the lot extend to the meander line?

Answer: Yes.

Problem B: Mike White conveyed a parcel of land abutting Lake St. Clair to Brenda Brown. Private title to the land originated with a land grant from the British Crown, confirmed by the United States in 1811. In 1997 the water's edge was 100 feet landward of the meander line shown on the original government land office survey. Did Brown's title extend to the meander line?

Answer: Yes.

Problem C: Mike White conveyed a parcel of land abutting Lake Michigan to Brenda Brown. Private title to the land originated with a patent in 1840. In 2002 the water's edge was approximately 100 feet lakeward of the meander line shown on the original government land office survey. Does Brown's title extend to the water's edge?

Answer: Yes.

Problem D: Same facts as in Problem C, except that in 1997 the water's edge was 100 feet landward of the meander line shown on the original government land office survey. Does Brown hold title to that part of the land lying lakeward of the water's edge?

Answer: No.

Authorities: Problem A: *Sterling v Jackson*, 69 Mich 488, 37 NW 845 (1888); *Brown v Parker*, 127 Mich 390, 86 NW 989 (1901).

Problem B: *Klais v Danowski*, 373 Mich 262, 129 NW2d 414 (1964).

Problems C and D: *Hilt v Weber*, 252 Mich 198, 233 NW 159 (1930).

Comment A: A land patent is an instrument issued by a government to convey public land. Black's Law Dictionary (8th ed) p 1156. A meander line is a survey line that is intended to approximate the location of the water's edge at the time of the survey. *Pere Marquette Boom Co v Adams & Lord*, 44 Mich 403, 6 NW 857 (1880).

Comment B: *Hilt v Weber*, *supra*, holds that the landward boundary of title to land abutting the Great Lakes moves with the naturally-occurring water's edge, if title originated with a post-statehood patent. However, the Court expressly distinguished the analysis of title under a swamp land patent from the analysis of title under a U.S. patent of public land. 252 Mich at 210-212. The courts have not addressed title under a swamp land patent to exposed land lying between the meander line and the water's edge on the Great Lakes.

Comment C: The State and federal governments exercise regulatory authority over the area below the ordinary high water mark and over the area below the level of the Great Lakes. Rivers and Harbors Act, §10, 33 USC 403; Clean Water Act, 23 USC 1251, *et seq.*; Part 325 of the Natural Resources and Environmental Protection Act, MCL 324.32501, *et seq.* (formerly the Great Lakes Submerged Lands Act, 1955 P.A. 247).

Comment D: Littoral land on the Great Lakes is subject to a public trust extending to the ordinary high water mark, a line that lies "where 'the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.'" *Glass v Goeckel*, 473 Mich 667, 674, 703 NW2d 58 (2005), cert den, 546 US 1174, 126 S Ct 1340, 164 L Ed 2d 54 (2006). The public trust includes the right of the public to walk on the beach below the ordinary high water mark. The ordinary high water mark for public trust purposes is different from the regulatory ordinary high water mark under Part 325 of the Natural Resources and Environmental Protection Act, MCL 324.32501 et seq. (formerly the Great Lakes Submerged Lands Act, 1955 P.A. 247). *Burleson v Dep't of Env'l Quality*, 292 Mich App 544, 808 NW2d 792, lv den, 490 Mich 917, 805 NW2d 438 (2011). Part 325 establishes a regulatory boundary at a defined elevation ("ordinary high water mark") for each Great Lake. For regulatory purposes, this artificial boundary avoids uncertainty arising from a boundary line that changes with the water level of the Great Lakes. This regulatory boundary does not, however, determine the lakeward extent of the title to privately-owned land abutting the Great Lakes. *Glass v Goeckel, supra*, at 682.

CHAPTER XXV

PROFIT á PRENDRE



STANDARD 25.1

DEFINITION OF PROFIT Á PRENDRE

STANDARD: A PROFIT á PRENDRE IS A RIGHT TO ACQUIRE, BY SEVERANCE OR REMOVAL FROM LAND OWNED BY ANOTHER, SOME THING OR THINGS CONSTITUTING A PART OF THE LAND SUCH AS SAND, GRAVEL, MINERALS, TIMBER OR GAME. A PROFIT á PRENDRE IS A FLOATING, INDEFINITE, INCORPOREAL HEREDITAMENT WHICH INCLUDES THE RIGHT TO ENTER UPON THE LAND FOR PURPOSES INCIDENTAL TO THE PROFIT á PRENDRE.

Problem: Simon Grant owned Blackacre. Grant contracted with ABC Corporation to sell “all sand, stone and gravel located in and on Blackacre.” The contract term was for three years commencing April 1, 2006. The contract was recorded. On August 1, 2006, Grant deeded Blackacre to John Doe. Is Doe’s title to Blackacre subject to the right of ABC Corporation to remove sand, stone and gravel from Blackacre through March 31, 2009?

Answer: Yes.

Authorities: *St. Helen Shooting Club v Mogle*, 234 Mich 60, 207 NW 915 (1926); *Evans v Holloway Sand & Gravel, Inc.*, 106 Mich App 70, 308 NW2d 440 (1981); *Van Alstine v Swanson*, 164 Mich App 396, 417 NW2d 516 (1987), app den 430 Mich 885 (1988); *Hubscher & Son, Inc. v Storey*, 228 Mich App 478, 578 NW2d 701 (1998).

Comment: The principal difference between a profit á prendre and an easement (whether in gross or appurtenant) is that a profit á prendre allows the grantee to take a profit (e.g., gravel, minerals or game) from the land,

whereas the grant of an easement permits the grantee to “use” the land for the purpose specified in the grant. In other words, an easement is a privilege without a profit which the owner of a parcel of land may grant to another. *Evans v Holloway Sand & Gravel, Inc., supra.*

STANDARD 25.2

CREATION OF PROFIT á PRENDRE

STANDARD: A PROFIT á PRENDRE MAY BE CREATED BY GRANT, RESERVATION OR CONTRACT.

Problem A: ABC Corporation, the owner of Blackacre, granted the exclusive right to hunt game and fowl on Blackacre to Simon Doe. Did Doe acquire a profit á prendre to hunt game and fowl on Blackacre to the exclusion of all other persons, including ABC Corporation?

Answer: Yes.

Problem B: In 2007, ABC Corporation deeded Blackacre to George Davis, reserving to itself the exclusive right to explore for and produce oil and gas for 15 years and so long thereafter as operations to explore for and produce oil and gas were being conducted. In 2020, does Davis have the right to explore for and produce oil and gas from Blackacre?

Answer: No.

Problem C: Same facts as in Problem B. In 2010, Davis sold logging rights on Blackacre by contract to Richard Roe. Did Roe acquire a profit á prendre to remove timber from Blackacre ?

Answer: Yes.

Authorities: Problem A: *St. Helen Shooting Club v Mogle*, 234 Mich 60, 207 NW 915 (1926).

Problem B: *Evans v Holloway Sand & Gravel, Inc.*, 106 Mich App 70, 308 NW2d 440 (1981); *Van Alstine v Swanson*, 164 Mich App 396, 417 NW2d 516 (1987), *lv den*, 430 Mich 885 (1988); *Stevens Mineral Co. v State of Michigan*, 164 Mich App 692, 418 NW2d 130 (1987), *lv den*, 430 Mich 895 (1988).

Problem C: *St. Helen Shooting Club v Mogle*, *supra*; *Stevens Mineral Co. v State of Michigan*, *supra*; *Hubscher & Son, Inc. v Storey*, 228 Mich App 478, 578 NW2d 701 (1998).

Comment: A profit á prendre includes two distinct rights: (1) the right to acquire, by severance or removal from another's land, some thing or things constituting a part of the land; and (2) the right to gain access to the land for purposes incidental to the permitted activity. (See, e.g., *Hubscher & Son, Inc. v Storey, supra*; *Van Alstine v Swanson, supra*; *Evans v Holloway Sand & Gravel, Inc., supra*.)

Ownership of a profit á prendre is not the equivalent of ownership of the materials to be removed. Rather, until the rights are actually exercised and the materials reduced to possession, a profit á prendre is a floating, indefinite, incorporeal right. *Harlow v Lake Superior Iron Co.*, 36 Mich 104 (1877); *Stevens Mineral Co. v State of Michigan, supra*; *Van Alstine v Swanson, supra*.

A profit á prendre vests at the time of its creation, even if the right of entry is not yet exercised. Accordingly, the rule against perpetuities does not apply. *Hubscher & Son, Inc. v Storey, supra*. Because a profit á prendre is an interest in real property, it is subject to the statute of frauds and requires a writing for its creation. *St. Helen Shooting Club v Mogle, supra*.

STANDARD 25.3

EXCLUSIVE OR NON-EXCLUSIVE PROFIT á PRENDRE

STANDARD: A PROFIT á PRENDRE MAY BE EXCLUSIVE OR NON-EXCLUSIVE.

Problem: Joan Doe owned Whiteacre. Doe granted to John Jones and his assigns the exclusive right to hunt on Whiteacre, forever. Doe then deeded part of Whiteacre to Sam Smith subject to the exclusive hunting right of Jones. Does Smith have the right to hunt on the part of Whiteacre conveyed to him?

Answer: No.

Authority: *St. Helen Shooting Club v Mogle*, 234 Mich 60, 207 NW 915 (1926).

STANDARD 25.4

PROFIT á PRENDRE IN GROSS OR APPURTENANT

STANDARD: A PROFIT á PRENDRE MAY BE CREATED IN GROSS OR APPURTENANT TO AN ESTATE.

Problem A: John Jones owned Blackacre. Jones granted to Simon Grant a non-exclusive right to hunt on Blackacre. Grant did not own land adjacent to Blackacre. Did Grant acquire a profit á prendre in gross?

Answer: Yes.

Problem B: Max Miner owned Blackacre. Irving Investor owned Whiteacre, a parcel of land adjacent to Blackacre. Investor granted to Miner the right to remove iron ore from Whiteacre for processing in a furnace on Blackacre. Did Miner acquire a profit á prendre appurtenant?

Answer: Yes.

Authorities: Problem A: *St. Helen Shooting Club v Mogle*, 234 Mich 60, 207 NW 915 (1926).

Problem B: *Negaunee Iron Co. v Iron Cliffs Co.*, 134 Mich 264, 96 NW 468 (1903), *error dis*, 197 US 463, 25 S Ct 474, 49 L Ed 836 (1905).

Comment: The right to hunt game and the right to remove timber, sand, gravel and minerals are profits which are often held in gross, though they may also be held appurtenant to an estate.

STANDARD 25.5

TRANSFERABILITY AND INHERITABILITY OF PROFIT á PRENDRE

STANDARD: A PROFIT á PRENDRE, WHETHER APPURTENANT OR IN GROSS, IS TRANSFERABLE AND INHERITABLE.

Problem A: John Jones owned Blackacre. Jones granted to Simon Grant the right to mine sand and gravel from Blackacre for 25 years. After 10 years Grant assigned the right to Sam Smith. Did Smith acquire the right to mine sand and gravel from Blackacre for the remaining 15 years?

Answer: Yes.

Problem B: John Jones owned Blackacre. Jones granted to Simon Grant the right to mine sand and gravel from Blackacre. Grant died, leaving Junior Grant as his heir. Did Junior Grant inherit the right to mine Blackacre?

Answer: Yes.

Authority: *St. Helen Shooting Club v Mogle*, 234 Mich 60, 207 NW 915 (1926).

STANDARD 25.6

DURATION OF PROFIT á PRENDRE

STANDARD: THE DURATION OF A PROFIT á PRENDRE IS ESTABLISHED BY THE INSTRUMENT CREATING IT AND MAY BE PERPETUAL OR LIMITED.

Problem A: Susan Grant owned Blackacre. On November 20, 1994, Grant deeded Blackacre to John Jones reserving to herself, her successors and assigns the right to produce oil, gas and other minerals for a term of 10 years and so long thereafter as oil, gas and other minerals were produced in paying commercial quantities. After January 1, 2006, oil, gas and other minerals were no longer being produced in paying commercial quantities. Did the reservation terminate?

Answer: Yes.

Problem B: John Jones, the owner of Blackacre, entered into an agreement dated January 1, 2001 with Sandstone Sand & Gravel permitting Sandstone to mine sand, stone and gravel from Blackacre for a term of three years, with a right to extend the agreement for an additional two years. Sandstone exercised its right to extend the agreement. Does Sandstone have the right to mine sand, stone and gravel from Blackacre until December 31, 2005?

Answer: Yes.

Problem C: John Jones owned Blackacre. Jones granted to the St. Clair Hunting Club and its assigns, forever, the right to hunt game and fowl on Blackacre. Did the Hunting Club acquire a perpetual right to hunt game and fowl on Blackacre?

Answer: Yes.

Authorities: Problem A: *Van Alstine v Swanson*, 164 Mich App 396, 417 NW2d 516 (1987), *lv den*, 430 Mich 885 (1988); *Stevens Mineral Co v State of Michigan*, 164 Mich App 692, 418 NW2d 130 (1987), *lv den*, 430 Mich 896 (1988); *Hubscher & Son, Inc. v Storey*, 228 Mich App 478, 578 NW2d 701 (1998).

Problem B: *Evans v Holloway Sand & Gravel, Inc.*, 106 Mich App 70, 308 NW2d 440 (1981); *Van Alstine v Swanson, supra*; *Hubscher & Son, Inc. v Storey, supra*.

Problem C: *St. Helen Shooting Club v Mogle*, 234 Mich 60, 207 NW 915 (1926).

STANDARD 25.7

TERMINATION OF PROFIT á PRENDRE

STANDARD: A PROFIT á PRENDRE MAY BE TERMINATED BY EXPIRATION OF ITS TERM, BY ABANDONMENT OF THE PROFIT, OR BY OPERATION OF LAW.

Problem A: John Jones owned Blackacre. Jones granted to Able Timber Company the right to cut and remove standing timber on Blackacre for a term of three years expiring July 1, 2006. May Able Timber Company continue to cut and remove timber on Blackacre after July 1, 2006?

Answer: No.

Problem B: Lois Lane owned Blackacre. Lane granted to First Rate Mining Co. the right to mine and remove iron ore from Blackacre for the sole purpose of converting the ore to merchantable iron in First Rate's own furnaces. For a period of 10 years, First Rate did not mine or remove iron ore from Blackacre. After 10 years, First Rate dismantled its furnaces. Did First Rate abandon its right to mine and remove iron ore from Blackacre?

Answer: Yes. First Rate's failure to undertake any mining activities on Blackacre coupled with its dismantling of the furnaces evidenced its abandonment of the profit á prendre.

Authorities: Problem A: *Evans v Holloway Sand & Gravel, Inc.*, 106 Mich App 70, 308 NW2d 440 (1981); *Van Alstine v Swanson*, 164 Mich App 396, 417 NW2d 516 (1987), app den 430 Mich 885 (1988); *Hubscher & Son, Inc. v Storey*, 228 Mich App 478, 578 NW2d 701 (1998).

Problem B: *Negaunee Iron Co. v Iron Cliffs Co.*, 134 Mich 264, 96 NW 468 (1903), *error dis* 197 US 463, 25 S Ct 474, 49 L Ed 836 (1905).

Comment A: An oil and gas profit á prendre may be terminated by operation of the Dormant Minerals Act, MCL 554.291, *et seq.* See, Standard 15.4.

Comment B: A profit á prendre in minerals other than oil, gas, sand, gravel, limestone, clay and marl may be terminated by operation of the Marketable Record Title Act if the last recording of the interest precedes at least a 20-year unbroken chain of record title that includes no reference to the interest and if other requirements are satisfied. A profit á prendre in sand, gravel, limestone, clay and marl, or any of them, may be terminated by operation of the Marketable Record Title Act if the last recording of the interest precedes at least a 40-year unbroken chain of record title that includes no reference to the interest and if other requirements are satisfied, MCL 565.101 *et seq.* See, Standard 1.6.

Comment C: The bases for termination of a profit á prendre set forth in this Standard are not exclusive. For example, a profit á prendre may also be terminated by release or by merger of the profit with the servient estate. See generally, 8 Thompson, *The Law of Real Property* (1994), § 65.01 *et seq.* and Bruce and Ely, *The Law of Easements and Licenses in Land* (1995), § 1.04[6].

CHAPTER XXVI

BANKRUPTCY



STANDARD 26.1

EFFECT OF COMMENCEMENT OF BANKRUPTCY CASE ON DEBTOR'S INTEREST IN REAL PROPERTY

STANDARD: UPON THE COMMENCEMENT OF A BANKRUPTCY CASE, ALL LEGAL AND EQUITABLE INTERESTS OF THE DEBTOR IN REAL PROPERTY BECOME PROPERTY OF THE DEBTOR'S BANKRUPTCY ESTATE.

Problem A: Robert Holmes, the owner of Whiteacre, filed a bankruptcy petition. Does Holmes's interest in Whiteacre become property of his bankruptcy estate?

Answer: Yes.

Problem B: Robert Worden and Lynn Worden, husband and wife, owned Whiteacre as tenants by the entireties. Robert Worden filed a bankruptcy petition. Does Robert Worden's interest in Whiteacre become property of his bankruptcy estate?

Answer: Yes.

Problem C: William Jones, a land contract vendee of Whiteacre, filed a bankruptcy petition. Does Jones's interest in Whiteacre become property of his bankruptcy estate?

Answer: Yes.

Problem D: James Smith, a land contract vendor of Whiteacre, filed a bankruptcy petition. Does Smith's interest in Whiteacre become property of his bankruptcy estate?

Answer: Yes.

Authorities: Generally and Problem A: 11 USC 541(a).

Problem B: 11 USC 522(b)(3)(B). *Liberty State Bank and Trust v Grosslight*, 757 F2d 773 (CA 6, 1985); *In re Trickett*, 14 BR 85 (Bankr WD Mich, 1981).

Problem D: 11 USC 541(d).

Comment A: The answer to Problem A would be the same if the bankruptcy debtor were a corporation, general partnership, limited partnership, limited liability company, limited liability partnership or other entity eligible to be a debtor in a bankruptcy case under 11 USC 109.

Comment B: Under 11 USC 522(b)(3)(B), a debtor may elect to exempt from the bankruptcy estate the debtor's interest in real property held as a tenant by the entirety or a joint tenant to the extent the debtor's interest is exempt from process under applicable non-bankruptcy law.

Comment C: This Standard does not address whether and in what circumstances real property owned as tenants by the entirety may be sold in a bankruptcy case. See, authorities cited for Problem B.

STANDARD 26.2

EFFECT OF COMMENCEMENT OF BANKRUPTCY CASE ON FORECLOSURE OF MORTGAGE OR LAND CONTRACT

STANDARD: AFTER COMMENCEMENT OF A BANKRUPTCY CASE OF A MORTGAGOR OR LAND CONTRACT VENDEE, ANY ACT BY THE MORTGAGEE OR LAND CONTRACT VENDOR TO COMMENCE OR CONTINUE A FORECLOSURE OF THE MORTGAGE OR LAND CONTRACT OR PROCEEDINGS TO RECOVER POSSESSION OF THE REAL PROPERTY IS STAYED. ANY SUCH ACT TAKEN AFTER COMMENCEMENT OF A BANKRUPTCY CASE IS VOID.

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

Answer: No.

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

Answer: No.

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

Answer: Yes.

Authorities: 11 USC 362. *In re Glenn*, 760 F2d 1428 (CA 6, 1985).

Comment: The filing of a bankruptcy petition after a foreclosure sale will not toll the statutory redemption period. *In re Glenn, supra*. However, in that

circumstance, the statutory redemption period is extended such that the redemption period will not expire sooner than the 60th day after the filing date. 11 USC 108(b).

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

STANDARD 26.3

EFFECT OF COMMENCEMENT OF BANKRUPTCY CASE ON FORFEITURE OF LAND CONTRACT

STANDARD: AFTER COMMENCEMENT OF A BANKRUPTCY CASE OF A LAND CONTRACT VENDEE, ANY ACT BY THE VENDOR TO COMMENCE OR CONTINUE A FORFEITURE OF THE LAND CONTRACT OR PROCEEDINGS TO RECOVER POSSESSION OF THE REAL PROPERTY IS STAYED. ANY SUCH ACT TAKEN AFTER COMMENCEMENT OF A BANKRUPTCY CASE IS VOID.

Problem: Edward Lane sold Blackacre to Robert Brown by land contract. Lane forfeited the land contract and commenced summary proceedings to recover possession of Blackacre. Brown filed a bankruptcy petition. After the filing, Lane obtained entry of a judgment of possession. Is the judgment of possession void?

Answer: Yes.

Authority: 11 USC 362.

Comment A: The Committee expresses no opinion as to whether the mandatory waiting period under the Summary Proceedings Act, MCL 600.5701, *et seq.*, from the entry of a judgment of possession until the issuance of an order of eviction, is tolled when a bankruptcy petition is filed by the land contract vendee. The Committee also expresses no opinion as to the effect of a bankruptcy case of a land contract vendee on the right of the vendor to retake possession of real property by self-help.

Comment B: If the mandatory waiting period under the Summary Proceedings Act, *supra*, would expire within 60 days after the filing of a bankruptcy case by the land contract vendee, the mandatory waiting period is extended such that the mandatory waiting period will not expire sooner than the 60th day after the bankruptcy filing. 11 USC 108(b).

Caveat: Any act to commence or continue a forfeiture of a land contract or to recover possession of real property of a bankruptcy estate occurring

after the filing of a bankruptcy petition is valid if the vendor obtained relief from the automatic stay before the act or obtained an annulment of the automatic stay after the act. 11 USC 362(d).

STANDARD 26.4

EFFECT ON INTEREST OF LAND CONTRACT VENDEE OF REJECTION OF LAND CONTRACT IN BANKRUPTCY CASE OF LAND CONTRACT VENDOR

STANDARD: IF A LAND CONTRACT IS REJECTED IN THE BANKRUPTCY CASE OF THE VENDOR UNDER 11 USC 365(a), THE LAND CONTRACT VENDEE IN POSSESSION OF THE REAL PROPERTY MAY ELECT TO TREAT THE LAND CONTRACT AS NOT TERMINATED AND REMAIN IN POSSESSION. IF THE VENDEE SO ELECTS, THEN:

- (A) THE VENDEE MUST CONTINUE TO MAKE ALL LAND CONTRACT PAYMENTS, REDUCED BY POST-REJECTION DAMAGES CAUSED BY NON-PERFORMANCE OF THE VENDOR'S LAND CONTRACT OBLIGATIONS; AND
- (B) THE DEBTOR (OR TRUSTEE) MUST CONVEY TITLE TO THE REAL PROPERTY TO THE VENDEE IN ACCORDANCE WITH THE LAND CONTRACT BUT IS RELIEVED OF ALL OTHER LAND CONTRACT OBLIGATIONS.

IF THE VENDEE ELECTS TO TREAT THE REJECTED CONTRACT AS TERMINATED OR IS NOT IN POSSESSION AT THE TIME OF REJECTION, THE VENDEE RETAINS A LIEN ON THE DEBTOR'S INTEREST IN THE REAL PROPERTY IN THE AMOUNT OF THE PURCHASE PRICE PAID.

Problem A: Waldo Smith purchased Whiteacre on land contract. Later, the vendor, Elwood Jones, filed a bankruptcy petition. The land contract was rejected by Jones's bankruptcy trustee while Smith was in possession of Whiteacre. May Smith elect to treat the land contract as not terminated and remain in possession of Whiteacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except that Smith was not in possession of Whiteacre, nor did Smith have any right to possession of Whiteacre. May Smith elect to treat the land contract as not terminated?

Answer: No, but Smith retains a lien on the interest of Jones in Whiteacre in the amount of the purchase price paid.

Authorities: Problem A: 11 USC 365(i).

Problem B: 11 USC 365(j).

Comment A: In bankruptcy, a land contract governed by Michigan law is treated as an executory contract that may be assumed or rejected by a bankruptcy trustee under 11 USC 365(a). *In re Terrell*, 892 F2d 469 (CA 6, 1989).

Comment B: The Committee expresses no opinion as to whether a land contract purchaser who has a right to possession, but does not have actual possession of the real property, may elect to treat the land contract as not terminated and continue making payments under the land contract pursuant to 11 USC 365(i).

STANDARD 26.5-1

SALE OR LEASE OF REAL PROPERTY BY BANKRUPTCY TRUSTEE OR DEBTOR IN POSSESSION IN ORDINARY COURSE OF BUSINESS

STANDARD: A SALE OR LEASE OF REAL PROPERTY BY A BANKRUPTCY TRUSTEE OR DEBTOR IN POSSESSION IN THE ORDINARY COURSE OF THE DEBTOR'S BUSINESS, WITHOUT NOTICE TO CREDITORS OR ORDER OF THE BANKRUPTCY COURT, CONVEYS TITLE TO A PURCHASER OR LESSEE.

Problem A: Keystone Development Company was engaged in the business of purchasing, subdividing and selling real property as residential building lots. Keystone filed a voluntary petition under Chapter 11 of the Bankruptcy Code and was operating its business as a debtor in possession. Keystone sold a residential building lot to Brown. No notice of the sale was given and no order approving the sale was obtained. Did Brown acquire title to the lot?

Answer: Yes.

Problem B: Same facts as in Problem A, except that Keystone owned a shopping center in which it leased retail space. Keystone leased retail space in the shopping center to Green. Did Green acquire a leasehold interest?

Answer: Yes.

Authority: 11 USC 363(c)(1).

Comment: A debtor in possession or a trustee may not sell or lease property in the ordinary course of business unless operation of the business is authorized by the Bankruptcy Code or by an order of the Bankruptcy Court. Unless the Bankruptcy Court orders otherwise, the debtor in possession or the trustee in a Chapter 11, 12 or 13 bankruptcy case is authorized to operate the debtor's business. 11 USC 1108, 11 USC 1203, 1204 and 11 USC 1304(b). However, in a Chapter 7 bankruptcy case, the trustee is not authorized to operate the debtor's business unless authorized by an order of the Bankruptcy Court. 11 USC 721.

STANDARD 26.5-2

SALE OR LEASE OF REAL PROPERTY BY BANKRUPTCY TRUSTEE OR DEBTOR IN POSSESSION NOT IN ORDINARY COURSE OF BUSINESS

STANDARD: A SALE OR LEASE OF REAL PROPERTY BY A BANKRUPTCY TRUSTEE OR DEBTOR IN POSSESSION NOT IN THE ORDINARY COURSE OF THE DEBTOR'S BUSINESS CONVEYS TITLE TO A PURCHASER OR LESSEE IF:

- (A) NOTICE OF THE SALE OR LEASE IS GIVEN;
- (B) AN OPPORTUNITY FOR HEARING IS PROVIDED;
AND
- (C) EITHER:
 - (1) NO OBJECTION TO THE SALE OR LEASE IS FILED; OR
 - (2) THE SALE OR LEASE IS AUTHORIZED BY AN ORDER OF THE BANKRUPTCY COURT AFTER A HEARING.

Problem A: Howard Manufacturing Company owned Whiteacre. Howard, as a debtor in possession under Chapter 11 of the Bankruptcy Code, entered into a contract to sell Whiteacre to Robert Holmes. Howard gave notice of the sale. The notice included the time period for filing objections and a hearing date in the Bankruptcy Court if objections were filed. The notice also stated that if no objections were timely filed Howard would complete the sale to Holmes. No objections were filed and Howard completed the sale to Holmes. Did Holmes acquire title to Whiteacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except that an objection to the sale was filed within the period stated in the notice. A hearing was held, pursu-

ant to which the Bankruptcy Court entered an order authorizing the sale. Did Holmes acquire title to Whiteacre?

Answer: Yes.

Authorities: 11 USC 363(b)(1). Fed. R. Bank. P. 6004.

Comment A: Fed. R. Bank. P. 6004(a) requires that notice of a proposed sale or lease of real property not in the ordinary course of business be given pursuant to Fed. R. Bank. P. 2002(a)(2), (c)(1), (i) and (k) and, if applicable, in accordance with 11 USC 363(b)(2).

Comment B: Fed. R. Bank. P. 6004(f) allows sales not in the ordinary course of business to be by private sale or public auction.

Comment C: The reversal or modification on appeal of an authorization to sell or lease real property not in the ordinary course of business will not affect the validity of the sale or lease to an entity that purchased or leased the property in good faith, whether or not the entity knew of the pending appeal, unless the authorization and the sale or lease were stayed pending appeal. 11 USC 363(m).

Caveat: The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 amended the Bankruptcy Code effective as of April 20, 2005 by adding subsection 363(d)(1) [“(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only (1) in accordance with applicable nonbankruptcy law that governs the transfer of property by a corporation that is not a moneyed, business, or commercial corporation or trust...”]. 11 USC 363(d)(1). Consequently, a non-profit bankruptcy debtor must also comply with applicable non-bankruptcy law regulating a sale its assets.

Note: See Standard 26.5-3 for sales of real property free of liens and other interests.

STANDARD 26.5-3
SALE OF REAL PROPERTY BY BANKRUPTCY
TRUSTEE OR DEBTOR FREE AND CLEAR
OF LIENS AND OTHER INTERESTS

STANDARD: REAL PROPERTY MAY BE SOLD BY A BANKRUPTCY TRUSTEE OR DEBTOR IN POSSESSION FREE AND CLEAR OF LIENS AND OTHER INTERESTS IF THE SALE:

- (A) IS PERMITTED UNDER 11 USC 363(f);**
- (B) COMPLIES WITH THE REQUIREMENTS UNDER 11 USC 363(b)(1) OR 11 USC 363(c), AS APPLICABLE;**
- (C) COMPLIES WITH THE REQUIREMENTS OF BANKRUPTCY RULE 6004(c); AND**
- (D) IS AUTHORIZED BY AN ORDER ENTERED BY THE BANKRUPTCY COURT.**

Problem: Howard Manufacturing Company owned Whiteacre subject only to a mortgage in favor of Star Bank. Howard, as a debtor in possession under Chapter 11 of the Bankruptcy Code, entered into a contract to sell Whiteacre to Robert Holmes. The sale price exceeded the balance due on the mortgage. Howard filed a motion for authority to sell Whiteacre to Holmes free and clear of the mortgage. Howard gave notice of the motion to Star Bank and all other required parties. The notice included the time period for filing objections and the time of the hearing on the motion. Star Bank objected to the motion. At the hearing, the bankruptcy court entered an order authorizing the sale pursuant to the motion and Howard conveyed Whiteacre to Holmes. Did Holmes acquire title to Whiteacre free and clear of the mortgage?

Answer: Yes.

Authorities: 11 USC 363(f)(3). Fed. R. Bankr. P. 6004(c).

Comment A: Under 11 USC 363(f), a debtor in possession or trustee may be authorized to sell real property free and clear of a lien or other interest in the real property only if:

- (1) applicable nonbankruptcy law permits a sale of the real property free and clear of the lien or interest,
- (2) the entity holding the lien or interest consents to the sale,
- (3) as to a lien, if the sale price of the real property exceeds the aggregate value of all liens on the property,
- (4) the lien or interest is subject to a bona fide dispute, or
- (5) the entity holding the lien or interest could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of the lien or interest.

Comment B: A sale of real property under 11 USC 363(f) is subject to the adequate protection requirements of 11 USC 361 and 363(e). Typically, these requirements are satisfied in connection with a sale free and clear of liens and interests by an order approving the sale that provides that the liens and interests attach to the sale proceeds.

Comment C: Fed. R. Bank. P. 6004 sets forth the requirements for (1) filing, serving and objecting to motions to sell real property free and clear of liens and interests and (2) conducting public and private sales of real property.

Comment D: Notwithstanding the requirements of 11 USC 363(f), a trustee or debtor in possession may sell real property free and clear of any vested or contingent right in the nature of dower or curtesy. 11 USC 363(g). In that circumstance, and before consummation of the sale, the debtor's spouse has the right to purchase the real property at the price at which the real property is to be sold. 11 USC 363(i).

Comment E: Notwithstanding the requirements of 11 USC 363(f), a debtor in possession or trustee may sell both the bankruptcy estate's interest and the interest of any co-owner in real property in which the debtor had, at the time the bankruptcy case commenced, an undivided interest as a tenant in common, joint tenant or tenant by the entireties, subject to satisfaction of the requirements of 11 USC 363(h)(1) through (4).

In that circumstance, and before consummation of the sale, the co-owner of the real property has the right to purchase the real property at the price at which the real property is to be sold. 11 USC 363(i).

Comment F: “Other interests” in real property that could be the subject of a sale free and clear under 11 USC 363(f) include a leasehold interest, an easement, a restrictive covenant and a claim of adverse possession. Absent consent, the bankruptcy court will not approve a sale free and clear of such other interests unless:

- (1) applicable nonbankruptcy law permits a sale of the real property free and clear of the interest,
- (2) the interest is subject to a bona fide dispute, or
- (3) the entity holding the interest could be compelled in a legal or equitable proceeding to accept a money satisfaction of the lien or interest. 11 USC 363(f)(1), (4) and (5).

However, a party holding such an interest that is given notice of a sale free and clear of liens and other interests under 11 USC 363(f) and fails to assert the interest, object to the sale or appeal the sale order may be estopped from asserting the interest after the sale. *Gouveia v Tazbir*, 37 F3d 295 (CA 7, 1994); *Precision Industries, Inc v Qualitech Steel SBQ, LLC*, 327 F3d 537 (CA 7, 2003); *In re Mary G. Adamson*, 312 BR 16 (Bankr D Mass 2004); *Canzano v J & B Realty Trust*, 382 F3d 51 (CA 1 2004); *In re Haskell LP*, 321 BR 1 (Bankr D Mass 2005).

STANDARD 26.6

EFFECT OF COMMENCEMENT OF BANKRUPTCY CASE ON PROPERTY TAX FORECLOSURE JUDGMENT

STANDARD: A PROPERTY TAX FORECLOSURE JUDGMENT ENTERED AFTER COMMENCEMENT OF A BANKRUPTCY CASE AGAINST REAL PROPERTY OF THE BANKRUPTCY ESTATE IS VOID.

Problem: Jane Jones, the owner of Greenacre, filed a bankruptcy petition on January 10, 2007. Ad valorem real property taxes assessed against Greenacre for 2004 were unpaid. A judgment of foreclosure for the 2004 taxes was entered on February 28, 2007. Was the foreclosure judgment void?

Answer: Yes.

Authority: 11 USC 362(a).

Comment: Before enactment of 1999 P.A. 123, delinquent real property tax liens were offered at annual sales held in each county pursuant to MCL 211.60 through 211.70. A tax lien sale was void if it occurred after commencement of a bankruptcy case of the owner of the real property subject to the tax lien. See, Standards 22.1 and 22.6. If there was no purchaser at the tax lien sale, the redemption rights of the owner were terminated after notice and a hearing pursuant to MCL 211.131e. The commencement of a bankruptcy case by the owner before termination of the redemption rights operated as a stay of the termination procedure.

Caveat: Any act to commence or continue a real property tax foreclosure after a bankruptcy petition is filed is valid if the foreclosing party obtains relief from the automatic stay before performing the act or obtains an annulment of the automatic stay under 11 USC 362(d).

STANDARD 26.7

EFFECT OF BANKRUPTCY CASE COMMENCED ON OR AFTER OCTOBER 22, 1994 ON ATTACHMENT OF LIEN FOR AD VALOREM TAXES

STANDARD: A LIEN FOR AD VALOREM TAXES ATTACHES TO REAL PROPERTY THAT IS PROPERTY OF THE BANKRUPTCY ESTATE IF THE BANKRUPTCY CASE IS COMMENCED ON OR AFTER OCTOBER 22, 1994, WITHOUT REGARD TO WHETHER THE TAX LIEN DATE WAS BEFORE OR AFTER THE DATE THE BANKRUPTCY CASE WAS COMMENCED.

Problem: Jones Industries, Inc., the owner of Whiteacre, filed a Chapter 11 bankruptcy petition on November 10, 1994. The lien date for ad valorem taxes levied against Whiteacre and first becoming payable in 1994 was December 1, 1994. Did the lien for ad valorem taxes levied in 1994 attach to Whiteacre?

Answer: Yes.

Authority: 11 USC 362(b)(18).

Comment A: In addition to ad valorem property taxes, 11 USC 362(b)(18) is also applicable to a special assessment on real property imposed by a governmental unit.

Comment B: If the bankruptcy case was commenced before October 22, 1994, the lien for ad valorem taxes did not attach to the real property if the bankruptcy case was commenced before the tax lien date. For the lien date for ad valorem taxes levied before 1995, see 1994 P.A. 279 and 1994 P.A. 80.

STANDARD 26.8

EFFECT OF COMMENCEMENT OF BANKRUPTCY CASE ON UNRECORDED INTEREST IN REAL PROPERTY

STANDARD: A BANKRUPTCY TRUSTEE MAY NOT AVOID AN UNRECORDED INTEREST IN REAL PROPERTY IF THERE IS CONSTRUCTIVE NOTICE OF THE INTEREST BEFORE THE COMMENCEMENT OF THE BANKRUPTCY CASE.

Problem: John Smith deeded Whiteacre to Jane Jones. Jones entered into possession of Whiteacre. Jones did not record the deed. Later Smith filed a Chapter 7 bankruptcy petition. May the bankruptcy trustee avoid the interest of Jones in Whiteacre?

Answer: No. Jones's possession of Whiteacre constitutes constructive notice of her interest.

Authorities: 11 USC 544(a)(3). *Robbins v Lenz*, 63 BR 4 (Bankr WD Mich, 1985).

STANDARD 26.9

EFFECT OF COMMENCEMENT OF BANKRUPTCY CASE ON RIGHT TO ENFORCE ASSIGNMENT OF RENTS

STANDARD: AFTER THE COMMENCEMENT OF A BANKRUPTCY CASE, A MORTGAGEE MAY NOT INITIATE ENFORCEMENT OF AN ASSIGNMENT OF RENTS WITH RESPECT TO REAL PROPERTY OF THE BANKRUPTCY ESTATE UNLESS THE BANKRUPTCY COURT GRANTS RELIEF FROM THE AUTOMATIC STAY PROVIDED BY THE BANKRUPTCY CODE.

Problem: On October 24, 1990, Eastview Apartments Limited Partnership mortgaged its residential apartment complex to First Bank. The mortgage contained an assignment of rents. Eastview defaulted under the mortgage. Before First Bank commenced enforcement of the assignment of rents, Eastview filed a voluntary petition under Chapter 11 of the Bankruptcy Code. Was First Bank entitled to initiate enforcement of the assignment of rents without first obtaining relief from the automatic stay?

Answer: No.

Authorities: 11 USC 362(a) and 362(d).

Comment: The Committee expresses no opinion as to whether a mortgagee, who has, following default by the mortgagor, partially or fully completed the steps necessary to enforce an assignment of rents under MCL 554.231 and 554.232, acquires rights in rents and the extent of those rights under the Bankruptcy Code. *See, e.g., In the Matter of P.M.G. Properties*, 55 BR 864 (Bankr ED Mich 1983); *In the Matter of Coventry Commons Associates*, 143 BR 837 (ED Mich 1992); *In re Mount Pleasant Limited Partnership*, 144 BR 727 (Bankr WD Mich 1992); *In re Newberry Square, Inc.*, 175 BR 910 (Bankr ED Mich 1994); *In re Woodmere Investors Limited Partnership*, 178 BR 346 (Bankr SD NY 1995), applying Michigan law.

CHAPTER XXVII

LEASES

STANDARD 27.1

LEASEHOLD ESTATE CREATED BY WRITTEN INSTRUMENT

STANDARD: TO CREATE AN ENFORCEABLE LEASEHOLD ESTATE BY A WRITTEN INSTRUMENT, THE INSTRUMENT MUST:

- (A) IDENTIFY THE PARTIES;**
- (B) CONTAIN AN ADEQUATE DESCRIPTION OF THE PREMISES;**
- (C) STATE THE CONSIDERATION; AND**
- (D) SPECIFY THE LEASE TERM.**

Problem A: John Doe, the owner of Blackacre, entered into a written lease with Richard Roe. The lease described a building located on Blackacre, provided for a term of five years and stated an annual rent. Does Roe have an enforceable leasehold estate in the building on Blackacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except that instead of annual rent, the sole consideration was Roe's performance of specified repairs to the building on the leasehold premises at Roe's expense. Does Roe have an enforceable leasehold estate in Blackacre?

Answer: Yes.

Authorities: Generally and Problem A: *Bushman v Faltis*, 184 Mich 172, 150 NW 848 (1915); *Brodsky v Allen Hayosh Ind., Inc.*, 1 Mich App 591, 137 NW2d 771 (1965).

Problem B: *Shaw v Hill*, 79 Mich 86, 44 NW 422 (1889); *Dept. of Natural Resources v Board of Trustees of Westminster Church of Detroit*, 114 Mich App 99, 318 NW2d 830 (1982).

Comment: A lease for a term of more than one year or a memorandum of the lease must be in writing. MCL 566.106 and 566.108.

STANDARD 27.2

EFFECT OF CONVEYANCE OF FEE TITLE ON LESSOR'S INTEREST IN LEASE

STANDARD: A CONVEYANCE OF FEE TITLE TO REAL PROPERTY INCLUDES THE GRANTOR'S INTEREST AS LESSOR IN ANY LEASE OF THE REAL PROPERTY UNLESS A CONTRARY INTENT APPEARS IN THE INSTRUMENT OF CONVEYANCE.

Problem A: John Doe deeded Blackacre to Simon Grant. At the time of the conveyance, Blackacre was subject to a lease. Does the deed include Doe's interest in the lease?

Answer: Yes.

Authorities: *Perrin v Lepper*, 34 Mich 292 (1876); *Hansen v Prince*, 45 Mich 519, 8 NW 584 (1881); *Plaza Investment Company v Abel*, 8 Mich App 19, 153 NW2d 379 (1967).

Comment: This Standard does not address the nature or extent of the grantee's obligations and liabilities under the lease, or the extent to which rights under the lease may be reserved to the grantor under a deed or other instrument.

STANDARD 27.3

EFFECT OF FORECLOSURE ON LEASE MADE AFTER RECORDED MORTGAGE

STANDARD: FORECLOSURE OF A MORTGAGE AND EXPIRATION OF THE STATUTORY REDEMPTION PERIOD WITHOUT REDEMPTION EXTINGUISHES A LEASE MADE AFTER THE RECORDING OF THE MORTGAGE.

Problem: Marjorie Smith mortgaged Blackacre to First Bank and the mortgage was recorded. Later, Smith leased Blackacre to John Keyes. Smith defaulted on the mortgage during the term of the lease. First Bank foreclosed the mortgage and the statutory redemption period expired without redemption. Is the lease extinguished?

Answer: Yes.

Authorities: MCL 600.3236 (as to foreclosure by advertisement) and 600.3130 (as to judicial foreclosure).

Comment A: In the case of foreclosure by advertisement, a foreclosing mortgagee is not required to give personal notice of the foreclosure to a junior lessee to extinguish the lease. See MCL 600.3208 (requiring only that a foreclosing mortgagee publish a notice of foreclosure in a local newspaper for four consecutive weeks and post the notice on the mortgaged premises) and *Cheff v Edwards*, 203 Mich App 557, 513 NW2d 439 (1994). In the case of judicial foreclosure, a foreclosing mortgagee is not required to name a junior lessee in the foreclosure proceeding to extinguish the lease. *Dolase v Bellow-Claude Neon Co*, 261 Mich 57, 245 NW 596 (1933).

Comment B: This Standard does not address the effect of a non-disturbance agreement between a mortgagee and a tenant of the mortgaged property, nor the effect of a mortgagee's subordination of its mortgage to a lease.

CHAPTER XXVIII

CONDOMINIUMS



STANDARD 28.1

CONDOMINIUM UNIT AS REAL PROPERTY

STANDARD: A CONDOMINIUM UNIT, TOGETHER WITH AND INSEPARABLE FROM ITS APPURTENANT SHARE OF COMMON ELEMENTS, IS REAL PROPERTY AND IS INDEPENDENT OF THE OTHER CONDOMINIUM UNITS.

Problem A: Dennis Jones, owner of Blackacre, recorded a condominium master deed encompassing Blackacre and establishing 30 condominium units. The master deed assigned to each unit a limited common element carport. Kathy Green, owner of a unit in Blackacre, conveyed the unit by deed to Bill White. The legal description in the deed identified the unit, but did not recite that the unit was conveyed together with its appurtenant common elements. Did White acquire title to the unit's appurtenant share of common elements, including the limited common element carport?

Answer: Yes.

Problem B: Same facts as in Problem A, except that Green's deed described only the carport. Did White acquire title to the carport?

Answer: No. A limited common element may not be conveyed separately from the unit to which it is assigned.

Authority: MCL 559.161.

Note: See Standard 28.3 regarding the reassignment of limited common elements.

STANDARD 28.2

RELOCATION OF BOUNDARIES BETWEEN ADJOINING CONDOMINIUM UNITS

STANDARD: THE BOUNDARIES BETWEEN ADJOINING CONDOMINIUM UNITS MAY BE RELOCATED ONLY IF EXPRESSLY PERMITTED BY THE CONDOMINIUM DOCUMENTS. THE RELOCATION IS EFFECTIVE BY RECORDING AN AMENDMENT TO THE MASTER DEED THAT IDENTIFIES THE UNITS INVOLVED IN THE RELOCATION AND CONTAINS CONVEYANCING BETWEEN UNITS WHOSE BOUNDARIES ARE BEING RELOCATED. THE CO-OWNERS OF THE AFFECTED UNITS MAY AGREE ON A REASONABLE REALLOCATION OF THE AGGREGATE UNDIVIDED INTEREST IN COMMON ELEMENTS APPERTAINING TO SUCH UNITS. RELOCATION OF THE BOUNDARIES BETWEEN ADJOINING UNITS REQUIRES APPROVAL OF AN AFFECTED MORTGAGEE.

Problem A: Kathy Green and Bill White own adjoining condominium units in Blackacre. The condominium documents expressly permit relocation of the boundaries between adjoining units at the request of the affected unit owners. May Green and White relocate the boundary between their units by a recorded amendment to the master deed?

Answer: Yes.

Problem B: Same facts as in Problem A, except: that the condominium documents do not contain a provision permitting relocation of unit boundaries. May Green and White relocate the boundary between their units?

Answer: No.

Authority: MCL 559.148.

STANDARD 28.3

REASSIGNMENT OF LIMITED COMMON ELEMENTS

STANDARD: LIMITED COMMON ELEMENTS MAY BE REASSIGNED ONLY BY A RECORDED AMENDMENT TO THE MASTER DEED. LIMITED COMMON ELEMENTS MAY NOT BE REASSIGNED IF REASSIGNMENTS ARE EXPRESSLY PROHIBITED BY THE CONDOMINIUM DOCUMENTS.

Problem A: Kevin Brown and Bob Baker each owns a condominium unit in Blackacre. The recorded master deed assigned to Brown's unit a limited common element boat slip. The condominium documents do not expressly prohibit the reassignment of limited common elements. A recorded amendment to the master deed reassigned Brown's limited common element boat slip to Baker's unit. Is the reassignment valid?

Answer: Yes.

Problem B: Same facts as in Problem A, except that the recorded master deed expressly prohibits reassignment of limited common elements. Is the reassignment valid?

Answer: No.

Authority: MCL 559.139.

STANDARD 28.4

SUBDIVISION OF CONDOMINIUM UNIT

STANDARD: A CONDOMINIUM UNIT MAY BE SUBDIVIDED ONLY IF EXPRESSLY PERMITTED BY THE RECORDED MASTER DEED. IN SUCH CASE, THE SUBDIVISION OF A UNIT IS EFFECTIVE UPON RECORDING AN AMENDMENT TO THE MASTER DEED THAT ASSIGNS NEW IDENTIFYING NUMBERS TO THE UNITS CREATED BY THE SUBDIVISION AND ALLOCATES TO THOSE UNITS ALL OF THE UNDIVIDED INTEREST IN COMMON ELEMENTS APPERTAINING TO THE SUBDIVIDED UNIT.

Problem A: Dennis Jones, owner of Blackacre, recorded a condominium master deed encompassing Blackacre and establishing 30 condominium units. The master deed expressly reserved to Jones, as developer, and to the condominium association, the authority to subdivide units at the request of a unit owner. Kevin Brown owns a unit in Blackacre. May Brown's unit be subdivided by a recorded amendment to the master deed?

Answer: Yes.

Problem B: Same facts as in Problem A, except that the recorded master deed does not expressly permit the subdivision of units. May Brown's unit be subdivided?

Answer: No.

Authority: MCL 559.149.

Comment: If the amendment subdividing a condominium unit does not specifically allocate among the resulting units the limited common elements previously assigned to the subdivided unit, then the resulting units jointly share all rights, and are equally liable, jointly and severally, for all obligations, with regard to the limited common elements previously assigned to the subdivided unit. MCL 559.149(3). The votes in the association and the share of expenses of administration previously allocated to the subdivided unit are proportionately allocated to the resulting units. MCL 559.149(4). Local ordinances may further regulate the division of condominium units. MCL 559.241.

STANDARD 28.5

LIABILITY FOR CONDOMINIUM ASSOCIATION ASSESSMENTS AFTER FORECLOSURE OF A FIRST MORTGAGE

STANDARD: A MORTGAGEE OF A FIRST MORTGAGE OR OTHER PURCHASER OF A CONDOMINIUM UNIT AT A SHERIFF'S SALE PURSUANT TO FORECLOSURE OF THE FIRST MORTGAGE IS LIABLE ONLY FOR CONDOMINIUM ASSESSMENTS THAT BECOME DUE ON OR AFTER THE DATE OF THE SALE.

Problem: Southern Bank held a first mortgage on a condominium unit owned by Richard Jones. The mortgage was foreclosed and Southern Bank purchased the condominium unit at the sheriff's sale held on March 1, 2014. Jones failed to redeem. The condominium association recorded a lien against the unit for assessments that became due both before and after the date of the sheriff's sale. Is Southern Bank liable for all of the assessments?

Answer: No. Southern Bank is liable only for the assessments that became due on or after the date of the sheriff's sale.

Authority: MCL 559.158. *Wells Fargo Bank v Country Place Condominium Ass'n*, 304 Mich App 582, 848 NW2d 425 (2014); *Federal Nat'l Mortgage Ass'n v Lagoons Forest Condominium Ass'n*, 305 Mich App 258, 852 NW2d 217 (2014).

Comment A: MCL 600.3240(4) provides that a purchaser at a foreclosure sale who pays condominium association assessments during the redemption period may include the amount of such payments in the redemption amount.

Comment B: MCL 559.211(2) provides that "Unless the purchaser or grantee requests a written statement from the association of co-owners as provided in this act, at least 5 days before sale, the purchaser or grantee shall be liable for any unpaid assessments against the condominium unit together with interest, costs, fines, late charges, and attorney fees incurred in the collection thereof." *Federal Nat'l Mortgage Ass'n v Lagoons Forest Condominium*

Ass'n, 305 Mich App 258, 852 NW2d 217 (2014) addressed the conflict between MCL 559.158 and MCL 559.211(2), holding that MCL 559.158 governs a foreclosure sale and the foreclosure extinguishes any lien for assessments that became due before the date of the foreclosure sale.

CHAPTER XXIX

LIMITED LIABILITY COMPANY CONVEYANCES



STANDARD 29.1

CONVEYANCE OF LIMITED LIABILITY COMPANY REAL PROPERTY BEFORE DISSOLUTION

STANDARD: A CONVEYANCE OF LIMITED LIABILITY COMPANY REAL PROPERTY EXECUTED IN THE COMPANY NAME BEFORE DISSOLUTION IS BINDING UPON THE COMPANY IF THE CONVEYANCING INSTRUMENT IS:

- (A) EXECUTED BY ALL MEMBERS, IF THE COMPANY IS MEMBER-MANAGED;**
- (B) EXECUTED BY ALL MANAGERS, IF THE COMPANY IS MANAGER-MANAGED (SUBJECT TO ANY CONTRARY PROVISION OF THE COMPANY'S ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT); OR**
- (C) EXECUTED BY ONE OR MORE BUT LESS THAN ALL MEMBERS OR MANAGERS AND:**
 - (1) THE EXECUTING MEMBER(S) OR MANAGER(S) HAVE EXPRESS AUTHORITY TO MAKE THE CONVEYANCE;**
 - (2) THE CONVEYANCE IS AUTHORIZED OR RATIFIED BY ALL MEMBERS, IF THE COMPANY IS MEMBER-MANAGED;**
 - (3) THE CONVEYANCE IS AUTHORIZED OR RATIFIED BY ALL MANAGERS, IF THE COMPANY IS MANAGER-MANAGED (SUBJECT TO ANY CONTRARY PROVISION OF THE COMPANY'S**

ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT); OR

(4) THE EXECUTION OF THE CONVEYANCING INSTRUMENT BY THE MEMBER(S) (IF THE COMPANY IS MEMBER-MANAGED) OR THE MANAGER(S) (IF THE COMPANY IS MANAGER-MANAGED) APPARENTLY CARRIES ON IN THE USUAL WAY THE BUSINESS OF THE COMPANY UNLESS:

(i) THE EXECUTING MEMBER(S) OR MANAGER(S) ARE NOT AUTHORIZED TO MAKE THE CONVEYANCE; AND

(ii) EITHER:

(a) THE GRANTEE HAS ACTUAL KNOWLEDGE THAT THE EXECUTING MEMBER(S) OR MANAGER(S) LACK AUTHORITY TO MAKE THE CONVEYANCE; OR

(b) THE ARTICLES OF ORGANIZATION OR THE MICHIGAN LIMITED LIABILITY COMPANY ACT ESTABLISH THAT THE EXECUTING MEMBER(S) OR MANAGER(S) LACK AUTHORITY TO MAKE THE CONVEYANCE.

Problem A: Blackacre Plat was owned by Acme Land LLC, a Michigan limited liability company managed by its members and engaged in the residential subdivision development business. On February 7, 2003, a deed to Weldon Jobs describing Lot 10 in Blackacre Plat was executed on behalf of the company by Millie Green, a member. Green's execution of the deed on behalf of the company was not expressly authorized, a fact of which Jobs did not have actual knowledge. Also, Green's execution of the deed was not contrary to the operating agreement, nor was her lack of authority established by either the company's articles of organization or the Michigan Limited Liability Company Act. Did Jobs acquire marketable title to Lot 10?

Answer: Yes. The conveyance is binding upon Acme because the execution of the deed apparently carried on in the usual way Acme's land development business and the other statutory requirements were satisfied. The same result would occur if Acme were manager-managed and Green were a manager of the company.

Problem B: Widget LLC, a manager-managed Michigan limited liability company engaged in the manufacturing business, owned Whiteacre, along with other real property. Widget's operating agreement provided that no conveyance of Whiteacre was to be executed without the consent of the members. On July 7, 2003, Clayton Moore, in his capacity as the sole manager, executed a deed describing Whiteacre to George Reeve. The members had not consented to the conveyance. Did Reeve acquire marketable title to Whiteacre?

Answer: No.

Authorities: MCL 450.4401, 450.4402 and 450.4406.

Comment: Operating agreement, as used in this Standard, is defined in MCL 450.4102(2)(q).

CHAPTER XXX
RESTRICTIVE COVENANTS

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STANDARD 30.1

ENFORCEABILITY OF RESTRICTIVE COVENANT

STANDARD: A CLEAR AND UNAMBIGUOUS RESTRICTIVE COVENANT IS ENFORCEABLE.

Problem: John Murphy owned several lots in a subdivision which were subject to a restrictive covenant that prohibited the construction of structures other than a single family dwelling and private garage for not more than two cars. Murphy submitted plans for governmental approval to construct a shopping center on his lots. Several owners with single family dwellings on their lots in the subdivision sought to enforce the restrictive covenant. Is the restrictive covenant enforceable?

Answer: Yes.

Authority: *Cooper v Kovan*, 349 Mich 520, 84 NW2d 859 (1957).

Comment: The interpretation and enforcement of a restrictive covenant is fact-specific.

Note: See Standard 30.2 for equitable exceptions to enforceability of restrictive covenants.

STANDARD 30.2

EQUITABLE EXCEPTIONS TO ENFORCEABILITY OF RESTRICTIVE COVENANT BY INJUNCTION

STANDARD: ENFORCEABILITY OF A VALID RESTRICTIVE COVENANT BY INJUNCTION IS SUBJECT TO THREE EQUITABLE EXCEPTIONS:

- (A) TECHNICAL VIOLATIONS WITH THE ABSENCE OF SUBSTANTIAL INJURY;**
- (B) CHANGED CONDITIONS;**
- (C) LIMITATIONS AND LACHES.**

Problem A: Brian Jones constructed a lakefront house with a porch that violated a restrictive covenant imposing a minimum building setback requirement. The violation did not impair the lake view from either adjacent parcel. A stated purpose of the restrictive covenant was to preserve to each homeowner the full benefit and enjoyment of the owner's home and property with no greater restriction than necessary to ensure the same advantages to other lot owners. The homeowners association sought enforcement of the building setback restriction. Is the restrictive covenant enforceable by injunction?

Answer: No. The violation was only technical and did not violate the purpose of the restrictive covenant because it did not impair the lake view from the adjacent parcels.

Problem B: John Murphy owned 12 lots in a 45-lot subdivision subject to a restrictive covenant limiting use of the lots to single family residential purposes. A house on a lot not owned by Murphy was used for business purposes. Later, the road adjacent to Murphy's lots was widened and the local government rezoned Murphy's lots for office use. Murphy sought to construct an office building on his lots. Is the restrictive covenant enforceable against Murphy by injunction?

Answer: Yes. The changed conditions did not change the character of the subdivision sufficiently to subvert the original purpose of the restrictive covenant.

Problem C: Same facts as in Problem B, except that Mary Jones, a subdivision lot owner, filed a lawsuit against John Murphy with reasonable promptness after it was clear Murphy intended to violate the restrictive covenant. Is the restrictive covenant enforceable by injunction?

Answer: Yes. Jones timely sought to enforce the restrictive covenant.

Problem D: John Smith owned a house on one lot in a 400-lot subdivision subject to a restrictive covenant limiting use of the lots to single-family residential purposes. Forty of the lots, including Smith's, fronted on a major street. Fifteen of these lots had been used for commercial purposes for varying periods of years during the previous 20 years. During that time, there was no successful attempt by other lot owners to enjoin the commercial use. Smith began to convert his house to commercial use. Is the restrictive covenant enforceable against Smith by injunction?

Answer: No. The character of the part of the subdivision fronting on the major street had changed from residential use to commercial use. The other lot owners acquiesced in the change to commercial use by their failure to take action against the many violations of the restrictive covenant over many years. They are therefore barred by laches from obtaining injunctive relief against Smith.

Authorities: Generally: *Cooper v Kovan*, 349 Mich 520, 84 NW2d 859 (1957).

Problem A: *Gamble v Hannigan*, 38 Mich App 500, 196 NW2d 807 (1972).

Problem B: *Rofe v Robinson (after remand)*, 415 Mich 345, 329 NW2d 704 (1982).

Problem C: *Rofe v Robinson (after 2nd remand)*, 126 Mich App 151, 336 NW2d 778 (1983).

Problem D: *Harrigan v Mulcare*, 313 Mich 594, 22 NW2d 103 (1946).

Comment: A technical violation is a slight deviation or a violation that does not add to or take from the objects and purposes of the general

scheme of development. *Webb v Smith*, 224 Mich App 203, 568
NW2d 378 (1997).

STANDARD 30.3

RECIPROCAL NEGATIVE EASEMENT

STANDARD: A GRANTEE WHO ACQUIRES A PARCEL OF REAL PROPERTY BY AN INSTRUMENT THAT DOES NOT INCLUDE AN EXPRESS RESTRICTION ACQUIRES TITLE SUBJECT TO A RESTRICTION ARISING FROM THE DOCTRINE OF RECIPROCAL NEGATIVE EASEMENTS IF THERE IS ACTUAL OR CONSTRUCTIVE NOTICE OF THE FOLLOWING:

- (A) A COMMON GRANTOR,**
- (B) A GENERAL PLAN, AND**
- (C) RESTRICTIVE COVENANTS RUNNING WITH THE LAND IN ACCORDANCE WITH THE PLAN AND WITHIN THE PLAN AREA IN DEEDS PREVIOUSLY GRANTED BY THE COMMON GRANTOR.**

Problem: John Doe owned Blackacre. Doe divided Blackacre into 91 lots and began to sell the lots for residential use. Deeds conveying the first 21 lots included an express restriction that only single family dwellings could be constructed on the lots. Some, but not all, of Doe's later conveyances included the residential restriction. Dwellings were built on all of the lots and all of the lots were used solely for residential purposes for many years. Doe's conveyance of Lot 86 did not include the residential restriction. Martha Roe later acquired Lot 86 and began constructing a gas station on it. Owners of other lots in the subdivision sued to enjoin construction of the gas station, asserting that Lot 86 was restricted to use for residential purposes only. Is Roe's lot subject to the residential restriction?

Answer: Yes. The uniform residential character of the plan area indicated that lots had been developed and used in accordance with a general plan and put Roe on inquiry notice. An inquiry into the title derived from Doe revealed conveyances of lots in the plan area by Doe while he owned Lot 86 that contained restrictions designed to implement the general plan. Roe was therefore bound by constructive notice that Lot 86 was burdened by a

restriction arising from the doctrine of reciprocal negative easements.

Authorities: *Allen v Detroit*, 167 Mich 464, 133 NW 317 (1911); *McQuade v Wilcox*, 215 Mich 302, 183 NW 771 (1921); *Sanborn v McLean*, 233 Mich 227, 206 NW 496 (1925); *Indian Village Ass'n v Barton*, 312 Mich 541, 20 NW2d 304 (1945); *Stark v Robar*, 339 Mich 145, 63 NW2d 606 (1954); *Lanski v Montealegre*, 361 Mich 44, 104 NW2d 772 (1960); *Civic Ass'n of Hammond Lake Estates v Hammond Lake Estates No 3*, 271 Mich App 130, 721 NW2d 801 (2006).

Comment: The doctrine of reciprocal negative easements imposes the same restrictions on a parcel conveyed by a common owner of a larger tract without an express restriction that the common owner imposed on previously conveyed, expressly restricted parcels.

MICHIGAN LAND TITLE STANDARDS

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