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THE NEW IOWA LAND TITLE EXAMINATION STANDARDS*

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* The appendix to this article sets forth the fifth edition of the Iowa Land Title Examination Standards, which contains the old standards, adopted in 1974, as well as the sixth edition of the Iowa Land Title Examination Standards, which contains the new standards adopted in 1984. The standards were promulgated by the Iowa Title Standards Committee of the Iowa State Bar Association.

I. INTRODUCTION

This is the fortieth anniversary of the initial adoption of the Iowa Land Title Examination Standards. At its 1944 meeting, the Iowa State Bar Association adopted fifty-seven standards,[1] that were published in booklet form the same year.[2] The study by a special committee of the Iowa State Bar Association was prompted because some of the County Bar Associations had adopted different standards for title examination for their particular county and there was a growing problem with overly technical title examiners.[3] The title "fly-specker" was causing problems for the more experienced and better informed examiner.[4]

The second edition to the Iowa Land Title Examinations Standards was adopted in 1950;[5] the third edition in 1955;[6] the fourth edition in 1963;[7] the fifth edition in 1974;[8] and in 1984 the Committee on Title Standards proposed the sixth edition.[9]

Title standards are one of the constructive developments in reform that have been adopted in several states by the organized bar. By 1950, sixteen states, including Iowa, had adopted title standards.[10]About one-half of the states have title standards at the present time.[11]

As pointed out by Simes and Taylor, "perhaps there is no greater delusion current among inexperienced [title examiners] than that titles are ei-

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Members of the Iowa Title Standards Committee authored this article. The authors are as follows: LeRoy H. Redfern (Introduction); Randal B. Caldwell (Chapter One: Abstracts); Dennis J. McMenimen (Chapter Two: Political Subdivisions; Chapter Thirteen: Bankruptcy); A.J. Greffenius (Chapter Three: Private Corporations); Theodore L. Kubicek (Chapter Four: Deeds and Contracts; Chapter Seven: Mortgages); Jerry D. Van Scoy (Chapter Five: Husband and Wife); John L. Duffy (Chapter Six: Judicial Proceedings); Richard W. Lozier, Jr. (Chapter Eight: Names; Chapter Fourteen: Condominiums); Dan A. Moore (Chapter Nine: Probate); Arthur R. Gaudio (Chapter Ten: Statutes of Limitations and Marketable Title Acts; Chapter Eleven: Forty Year Marketable Title Act); John L. Hintermeister (Chapter Twelve: Partnerships).

1. IOWA LAND TITLE EXAMINATION STANDARDS (1st ed. 1944) [regardless of edition, the IOWA LAND TITLE EXAMINATION STANDARDS are hereinafter cited as IOWA STANDARDS].

2. Marshall, *Development of Title Examination Standards in Iowa*, 38 IOWA L. REV. 534, 538 (1953).

3. *Id.* at 537-38.

4. *See id.*

5. IOWA STANDARDS (2d ed. 1950).

6. *Id.* (3d ed. 1955).

7. *Id.* (4th ed. 1963).

8. *Id.* (5th ed. 1974).

9. *Id.* (6th ed. 1984).

10. Payne, *Increasing Land Marketability Through Uniform Title Standards*, 39 VA. L. REV. 1, 48 app. B (1953).

11. The following states had Title Standards in place as of 1981: Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Washington, Wisconsin, and Wyoming.

ther wholly good or wholly bad, and that the determination of the person who has the title is merely a mathematical process of applying unambiguous rules of law to the abstract of the record."[12] A determination of marketability is not as easy as applying a precise formula to the facts shown on the face of the record.[13] This is because all of the facts that may affect the marketability determination may not appear in the abstract of the record.[14] In addition, it is often impossible for a title examiner to investigate all of these facts that can affect marketability.[15] For example, items such as forgery, delivery of the deed, or the soundness of the grantor's mind may not be evident upon the face of the record.[16] Thus, the examiner "must decide not whether it is absolutely certain that a given person has title, but whether it is reasonable to conclude from the facts which he can be expected to investigate, that this person has title."[17]

Some fact situations affecting marketability of title arise frequently.[18] Title examiners have established uniform practices to deal with such situations.[19] There are other fact situations, however, for which examiners have not developed uniform practices.[20] There may be distinct variations in the manner with which examiners deal with these situations.[21] For example, examiners uniformly presume "that a recorded deed has been delivered, that it was not a forgery, and that the grantor had the capacity to execute it."[22] On the other hand, title examiners may differ on the issue of whether it is necessary to make spouses or heirs parties to proceedings to sell real estate in probate and to serve notice upon them. Additionally, uncertainty in the determination of marketability is not limited to factual matters, but extends to matters of law as well.[23] An illustration of uncertainty as to a matter of law is that examiners may disagree upon the constitutionality of the Stale Uses and Reversion Act[24] adopted by the legislature.

The differing opinions of title examiners on the proper way to deal with certain matters of fact and law has led to the development of uniform title standards.[25] Such uniformity is necessary if examiners are to avoid adopting the standards of the overly meticulous title examiner.[26] In the absence of

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12. L. Simes & C. Taylor, Model Title Standards 1 (1960).
13. *Id.*
14. *Id.*
15. *Id.* at 2.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. Iowa Code §§ 614.24-.28 (1983).
25. L. Simes & C. Taylor, *supra* note 12, at 3.
26. *Id.* at 2.

uniform standards, the threat that the overly meticulous examiner will object to the marketability of title in the future will cause all title examiners to adopt overly meticulous standards as well.[27] If, however, the particular subject is dealt with by uniform title standards, a title examiner need not apply more restrictive standards.[28] The support of the state bar association and the majority of lawyers will allow the examiner to follow the uniform standards with some degree of certainty that title will not be challenged later.[29]

It is not a simple matter to identify the subject matter that is appropriately addressed by title standards. Jesse E. Marshall offered some guidance in this area. He noted that "[t]he common problems about which agreement can and should be reached include: (1) satisfactory abstracts and abstract certificates; (2) the effect of Statutes of Limitations; (3) presumptions of fact which should be indulged in ordinary situations; (4) general principles of law; (5) the duration of search in many situations; and others."[30]

The subject matter can include almost anything of interest to examiners. Chapters on Condominiums and Bankruptcy have been added to the sixth edition.[31] These new standards should be helpful to title examiners. Some standards have been omitted from the sixth edition either because they are outdated or the matter covered is so well accepted that a title standard on the subject is no longer necessary.[32]

We believe that the new title standards that are in the sixth edition to the Iowa Land Title Examination Standards will be well received by Iowa lawyers. These standards represent the substantially unanimous opinion of a number of lawyers who are experienced title examiners. These new standards are not controversial among experienced title examiners. They are accepted as spelling out the law.

We are fortunate that during the first forty years, the Iowa Land Title Examination Standards are batting a perfect one thousand with the Supreme Court of Iowa. The first Iowa case referring to an Iowa title standard was the 1950 case of *Siedel v. Snider*,[33] wherein the Iowa Supreme Court cited failure to comply with what is now Iowa Land Title Examination Standard 9.8[34] in support of finding that the title was not merchantable. Paul Basye cites the *Siedel* case as an indication that courts may be guided by local standards.[35]

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27. *Id.* at 2-3.
28. *Id.* at 3.
29. *Id.*
30. Marshall, *supra* note 2, at 536.
31. IOWA STANDARDS chs. 13, 14 (6th ed. 1984).
32. For example, standard 1.11 of the fifth edition was omitted.
33. 241 Iowa 1227, 44 N.W.2d 687 (1950).
34. Section 9.8 deals with the necessary showing to be made where there has been no administration of the estate and where title is derived through the heirs of an intestate decedent. IOWA STANDARDS § 9.8 (6th ed. 1984).
35. P. BASYE, CLEARING LAND TITLES 55 n.30 (2d ed. 1970).

In *In Re Baker's Estate*,[36] the Iowa Supreme Court referred to what is now Iowa Land Title Examination Standard 4.10[37] in support of a finding that a sale contract effects an equitable conversion and destruction of a joint tenancy where the contract contains no provision preserving the joint tenancy with right of survivorship. The next year, in *Tesdell v. Hanes*,[38] the court construed Iowa Code Section 614.17, in accordance with what is now Iowa Land Title Examination Standard 10.1.[39] In the case *In Re Estate of Oppelt*,[40] the Iowa Supreme Court quoted Iowa Land Title Examination Standard 1.1[41] in defining marketable title.

The constitutionality of the Stale Uses and Reversion Act[42] as it applied to possibility of reverters was sustained by the Iowa Supreme Court in *Presbytery of Southeast Iowa v. Harris*.[43] During that same session of the supreme court, the court upheld the Stale Uses and Reversion Act[44] as it applies to use restrictions in *Compiano v. Kuntz*.[45]

One should never lose sight of the basic function of the standards, which is to declare and establish officially the practice of title examiners. Drafters of title standards do not make law, they just reach a consensus on what competent, experienced examiners would agree. The practice of title examiners (that is, the custom of title examiners) is the most potent element in the process of title examination. Essentially, it is nothing less than the recognized practices of title lawyers in determining what risks of fact or of law, actual or theoretical, are to be assumed by the title examiners on behalf of a client in approving a title.[46]

II. Chapter One: Abstracts

Chapter one of the Iowa Land Title Examination Standards is entitled "Abstracts."[47] All of the chapters of the Title Standards are primarily addressed to attorneys who examine abstracts of title. Most of chapter one, however, also has special significance for those who prepare abstracts. Although formulated to answer the question, "What kind of abstract should

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36. 247 Iowa 1380, 78 N.W.2d 863 (1956).
37. Section 4.10 deals with contracts severing joint tenancies. Iowa Standards § 4.10 (6th ed. 1984).
38. 248 Iowa 742, 82 N.W.2d 119 (1957).
39. Section 10.1 deals with affidavits of possession under the Iowa Code. Iowa Standards § 10.1 (6th ed. 1984).
40. 203 N.W.2d 213 (Iowa 1972).
41. Section 1.1 deals with the attitude of the attorney in examining abstracts. Iowa Standards § 1.1 (6th ed. 1984).
42. Iowa Code §§ 614.24-.28 (1983).
43. 226 N.W.2d 232 (Iowa 1975). *See also* Iowa Standards § 10.6 (6th ed. 1984).
44. Iowa Code §§ 614.24-.28 (1983).
45. 226 N.W.2d 245 (Iowa 1975). *See also* Iowa Standards § 10.6 (6th ed. 1984).
46. L. Simes & C. Taylor, *supra* note 12, at 5.
47. Iowa Standards ch. 1 (6th ed. 1984).

the examiner accept?" implied in most of these standards is the answer to the question, "What kind of abstract should the abstracter prepare?" For example, some of the standards in chapter one address the relatively mundane questions of the form and method of publication of the abstract.[48] Others deal with whether or not an abstracter can exclude certain items from an abstract.[49] One of the standards answers the question, "What kind of abstracter's certificate is acceptable?"[50] Standard 1.1, however, is the exception. Rather than dealing with the duties of the abstracter, it is concerned with the philosophy and attitude of the examining attorney.[51]

The preface to the sixth edition states: "Title Standard 1.1 continues to be the most important title standard. We encourage all title examiners and abstracters to adhere to both the word and spirit of the number one title standard."[52] No substantive change in the word or spirit of this standard appears in the sixth edition.[53]

There are, however, several cosmetic changes to standard 1.1 that deserve comment. First, the awkward snytax in the problem has been corrected.[54] Second, the example has been removed from the comment.[55] This was done because the principle of standard 1.1 is of such broad impact that any example included in the standard would imply a significance that it does not deserve.[56] Finally, this standard now includes citations to two Iowa Supreme Court cases referring to this standard with approval that were decided since the publication of the fifth edition.[57]

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48. *See id.* §§ 1.2, 1.3.
49. *See id.* §§ 1.5-.10.
50. *Id.* § 1.4.
51. *Id.* § 1.1.
52. *Id., Preface.*
53. *Compare id.* § 1.1 (6th ed. 1984) *with id.* (5th ed. 1974).
54. *Compare id.* § 1.1 (6th ed. 1984) *with id.* (5th ed. 1974).
55. *See infra* note 56.
56. There was some concern by members of the committee as to whether the principle expressed in the example was, in fact, correct. The words stricken were, "Example: It is not reasonable for an examining attorney to require the showing of the patent where, under the Marketable Title Act, the root of title is formed by some instrument other than the patent." IOWA STANDARDS § 1.1 comment (5th ed. 1974). Those members of the committee who practiced in areas where claims by Native Americans have occurred expressed concern about titles where a patent was not available.
57. Wilson v. Fenton, 312 N.W.2d 524, 527 (Iowa 1981); DeLong v. Scott, 217 N.W.2d 635, 637 (Iowa 1974).

In the case of *DeLong v. Scott*, the Iowa Supreme Court ruled that title was marketable by sale during administration of a decedent's estate. DeLong v. Scott, 217 N.W.2d at 637. The will in *DeLong* authorized the executor to convey real estate without prior court order. *Id.* at 636. The purchaser objected to the marketability of title on the ground that since the title to real property passes to devisees under a will immediately upon death, the executor could not give good title without first securing the property from the devisees by warranty deed. *Id.* The basis for the court's decision that such a deed was not necessary was that devisees are owners subject to possession by decedent's personal representative during probate proceedings for the pur-

Historically, the importance of standard 1.1 is that it embodies the purpose of the original Iowa Land Title Examinations Committee.[58] That purpose was "to afford relief to attorneys of our state against the hypercritical attitude of some attorneys toward real estate titles, especially as to defects that experience has demonstrated are technically unimportant insofar as merchantability of titles is concerned."[59] This standard demonstrates that the Bar Association will continue to support title examiners who refuse to adopt the technical objections maintained by a few unreasonably critical examiners.[60] In this respect, the current standard 1.1 is similar to the "General Standard" published in the first edition of Iowa Land Title Examination Standards, which stated:

> Objections and requirements should be made only when the irregularities or defects actually impair the title or reasonably can be expected to expose the purchaser or lender to the hazard of adverse claims or litigation. Many attorneys are over-critical in examining titles and appear to have in mind the making of every possible objection and requirement.[61] The Committee recommends a more realistic attitude with respect to title defects.[62]

Grappling with the practical application of this standard presents more problems than does stating its historical development. The purpose of the standard is "to eliminate technical objections which do not impair marketability and to eliminate common objections which are based upon misunderstanding of the law."[63] Implied in this comment is that if the objection is substantial enough to impair marketability, that is, it presents a reasonable probability of litigation, and if it is based upon an understanding of current law, this standard will not require an examiner to waive such an objection.[64]

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poses of administration, sale, or other disposition under Iowa Code section 633.350. *Id.* at 637.

In *Wilson v. Fenton*, the court found that title was not marketable where litigation had actually been commenced. Wilson v. Fenton, 312 N.W.2d at 526-27.

58. Marshall, *supra* note 2, § 1.5. *See also* Payne, *supra* note 10, at 2-10.

59. IOWA STANDARDS § 1.1 (1st ed. 1944).

60. As Jesse E. Marshall noted:

> There is no doubt but what more and more Title Examiners are using and relying on the Standards. Title men generally, including Abstractors, have been keenly aware of the growing dissatisfaction among businessmen with the delays, redtape and expense of real estate transfers. One of the chief irritants has been the technical and often immaterial objections raised by Title Examiners.

Marshall, *supra* note 2, at 539.

61. *Cf.* G. MADSEN, MARSHALL'S IOWA TITLE OPINIONS AND STANDARDS § 1.5 (2d ed. 1978). "There is constantly hanging over the examiner a kind of Gresham's law which tends to reduce all examiners to the standards of the most timid." *Id.* at 28-29.

62. IOWA STANDARDS, *General Standard* (1st ed. 1944).

63. *Id.* § 1.1 comment (6th ed. 1984).

64. *See* R. PATTON, IOWA LAND TITLE EXAMINATIONS 52 (1929).

> To make a title to real estate unmarketable, so that specific performance of a contract to convey will not be enforced against the vendee, there must be a reasona-

For example, under standard 1.1 a title is not marketable when it is subject to an encumbrance not "expressly provided for by the client's contract."[65]

Although it is nearly impossible to define precisely what standard 1.1 does mean, a summary of what it does not mean will increase our understanding of it.[66] The first standard does not mean that title is rendered unmarketable by the mere possibility of litigation.[67] It does not mean that all marketable titles are good titles, nor does it mean that all good titles are marketable.[68] The standard does not mean that the litigator must be assured of prevailing in order for the examiner's belief in the probability of litigation to be reasonable.[69] That is, if an unreasonable suit has already been filed, standard 1.1 does not force a title examiner to accept title merely because the suit is groundless.[70] Standard 1.1 does not relieve the seller's

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ble doubt as to its validity. If the doubt raises a question of law, it must be a fairly debatable one—one upon which the judicial mind would hesitate before deciding it. If the doubt depend on a matter of fact, and there is no doubt as to how the fact is, and if it may be readily and easily shown at any time, it does not make the title unmarketable.

65. IOWA STANDARDS § 1.1 (6th ed. 1984). *See also* Wilson v. Fenton, 312 N.W.2d 524, 527 (Iowa 1981).

66. The statement has been made that title is merchantable "if a person of reasonable prudence would accept the title in the ordinary course of business." DeLong v. Scott, 217 N.W.2d 635, 637 (Iowa 1974). This statement in itself is of little practical use unless it is determined what the person of reasonable prudence would avoid. Presumably, such a person would avoid the reasonable probability of litigation.

67. *See* G. MADSEN, *supra* note 61, at 120. "An examining attorney should repeat over and over to himself, 'I am not concerned with possibilities, but only with probabilities.' " *Id.*

68. *Id.* at 28.

A title which is not marketable may be good, and vice versa. Titles may be good or valid, but are not shown to be so of record. Likewise, a title may be marketable but subject to hidden defects which may not be discernible from the records. The examiner must remember that he is passing on the record as disclosed by the abstract. He cannot know that certain instruments may be tainted with fraud or forgery. Instruments may be signed by married grantors who sign as single persons. The property may be actually occupied by persons holding under unrecorded instruments.

Id.

69. Holliday v. Arthur, 241 Iowa 1193, 1196-97, 44 N.W.2d 717, 719 (1950).

When called upon to determine whether an abstract of title shows a merchantable title, unless the specific objections urged to the title have been definitely determined by the courts, or are so clear as to not generate a doubt, the court need not pass upon the merits thereof. It is sufficient if the court finds the objections urged, present a doubtful question which may submit the objector to good faith litigation regarding same. If so found, then under our acceptable standard of title, the same is not merchantable.

Id.

70. *See, e.g.*, Wilson v. Fenton, 312 N.W.2d at 527.

Wilson desired to dispute the validity of the lien and did so in collateral litigation. However, rather than show the title was marketable, the existence of the dispute illustrates the wisdom and validity of Youngblut's objection to title. Youngblut had no obligation to participate in the dispute. He bargained for the farm, not for a law-

attorney of the burden of going forward with evidence that is not of record; since that attorney presumably has more background information available, he must go forward with the facts to enlighten the examining attorney.[71] Finally, standard 1.1 does not require the examining attorney to guess whether or not a potential objector would actually file suit as long as it would be reasonable for the objector to do so.[72]

If, however, a potential objector is foreclosed from litigation, or limited in his or her remedies, standard 1.1 requires the examining attorney to take note of these facts.[73] As clearly stated in the comment to standard 1.1, "[t]he examining attorney, by way of a test, may ask after examining the title, what defects and irregularities have been discovered by the examination; and as to each such irregularity or defect, who, if anyone, can take advantage of its as against the purported owner, and to what end."[74] This test has two parts that must be passed, in order to render the title unmarketable. First, potential litigants must exist;[75] second, there must be a remedy available to the litigants that will affect marketability.[76]

The first part of the test will often provide the most powerful weapon in the examiner's title clearing arsenal. When there is no one who objects, it can often eliminate a supposed objection. A reasonable probability of litigation does not exist when every one who has an interest in the property and who has a right to make an objection will waive a technical irregularity.[77] This is possible when all interested parties are clearly identifiable, healthy adults.[78] Conversely, when minors, disabled persons, or persons yet to be born are involved, waiver may be impossible.[79]

> suit. So long as the encumbrance existed and the litigation continued, title was not merchantable within the meaning of the decree.

Id.

71. "Titles may be good or valid, but are not shown to be so of record." G. MADSEN, *supra* note 61, § 1.5, at 28.

72. *See* Holliday v. Arthur, 241 Iowa 1193, 1197, 44 N.W.2d 717, 719 (1950).

73. IOWA STANDARDS § 1.1 comment (6th ed. 1984).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. Even when open classes are involved, the doctrine of virtual representation may provide a mechanism by which notice can be given and title cleared. IOWA R. CIV. P. 43.

79. *Cf.* In re Estate of Oppelt, 203 N.W.2d 213 (Iowa 1972). Oppelt died, leaving his property to "the heirs of the body of Howard Knupp." *Id.* at 213. Knupp survived Oppelt and as a general rule in Iowa, a living person has no heirs. *Id.* at 214. While not deciding who the "heirs" were, the Iowa Supreme Court stated no decision as to merchantability could be made until Oppelt's heirs were joined. *Id.* at 215-16. As the court stated:

> The difficulty at this point is that testator's heirs are not parties to the present proceeding or appeal. We could now decide the question among the Wheelers, the executor, and Howard Knupp's heirs, but we could not adjudicate as to testator's heirs, we therefore leave open the meaning of "heirs" under the present facts."

Id. at 215.

The second part of the test provides that even if there are potential litigants, if the remedy available to those litigants will not affect the title, the mere existence of potential litigants will not be sufficient to render the title unmarketable.[80] One such case occurs when a potential litigant has received fair notice of the sale of real estate in a decedent's estate, or has consented to it, and the only action available to the potential litigant is against the executor for the proceeds.

Dealing with the practical application of standard 1.1 is one of the intuitive aspects of title examination for which precise instruction is impossible.[81] In spite of the standardizing effect the Title Standards were intended to promote for Iowa titles, it is quite probable that this standard in particular is subject to local and even individual interpretation.[82] The extent to which this standard can be applied liberally without compromising the safety of a client's title is the test of the success of the Iowa Land Title Examination Standards.

The remaining standards in chapter one explain in part what an examining attorney can expect from an abstracter and what an abstracter can be called upon to provide. These standards provide the authority under which the Iowa Land Title Association has promulgated, with Bar Association approval, the Iowa Abstracting Standards.[83] These abstracting standards provide flesh for the skeleton of chapter one of the Title Standards by showing at least to a considerable degree, what specific items can be deleted and what items must be included in a complete abstract.[84]

No substantive change has been made to standard 1.2.[85] This standard

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80. IOWA STANDARDS § 1.1 comment (6th ed. 1984).

81. *But see* Wilson v. Fenton, 312 N.W.2d 524, 527 (Iowa 1981). "The marketable title concept and title standards provide an objective basis" for measuring compliance with an order for specific performance. *Id.*

82. "To expect that all examiners would invariably be of the same opinion with respect to a given title is to expect a perfection that does not obtain among human beings." P. BASYE, *supra* note 35, at 20.

83. IOWA ABSTRACTING STANDARDS (Iowa Land Title Association 1976). For a history of these standards, see G. MADSEN, *supra* note 61, § 1.1(A), at 2.

84. *See* G. MADSEN, *supra* note 61, § 1.1(A), at 2.

> A current edition of the abstracting standards is an indispensable tool for any Iowa abstracter, and is an invaluable aid to counsel examining Iowa abstracts. The Land Title Association, as a courtesy to attorneys, has permitted them to purchase a copy of the Standards through any abstracter who is a member of the Association.
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> In those instances where an abstract is incomplete or improperly prepared, examining counsel's task of explaining the deficiency is usually resolved by simply citing the abstracter to the applicable abstracting standard.

Id.

85. *Compare* IOWA STANDARDS § 1.2 (6th ed. 1984) *with id.* (5th ed. 1974). The only change of any kind made to this standard was that the two authorities cited in the fifth edition were deleted. The case cited in the fifth edition, Dickerson v. Morse, 203 Iowa 480, 212 N.W. 933 (1927), does not deal specifically with longhand abstracts, but held that where the vendor delivered to the purchaser a dilapidated abstract of title, the purchaser had the legal right to

addresses the question of whether an abstract written in longhand is acceptable.[86] This kind of abstract is commonly referred to as an "old form" abstract and is often a single sheet of entries handwritten in ink. Fewer of these forms are used since the advent of forty year marketable title abstracts.[87] Standard 1.2 permits an abstracter to continue to use an old form as the beginning of an abstract so long as it is properly certified and not dilapidated.[88] It also permits an abstracter to make substantive additions and corrections to an abstract in longhand, and to prepare pencil notes for preliminary examination prior to putting the abstract in more permanent form.[89]

Standard 1.3 is identical to the fifth edition version.[90] This standard allows abstracters to mimeograph, print or photocopy abstracts.[91] As long as such abstracts have an honest face, that is, as long as they do not appear to be missing entries, they may be prepared and certified by the abstracter and should be accepted by the examiner.[92] "If certified as a copy only, the certificate must show such copy has been compared with the public records and is correct."[93]

Whether the abstract is handwritten, typed, printed or photocopied, it is essential that its certificate complies with standard 1.4.[94] This standard, which has not been changed in substance in the sixth edition, states that the "abstracter's certificate should not be addressed or restricted to any specific person, firm or corporation."[95] It should cover all conveyances, liens, encumbrances, and proceedings and should be general in character.[96] According to standard 1.4, the certificate should also refer to everything in the public records of the county in question that in any way affects the title of the land

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demand and receive a new abstract. *Id.* at 483, 212 N.W. at 934.

Iowa Code section 614 (1983) as cited in the fifth edition is the Marketable Title Act referred to in the present standard. It was thought that this Act was not specific authority supporting the validity of longhand abstracts, and that standard 1.2 was so well accepted that no authority was necessary.

86. IOWA STANDARDS § 1.2 (6th ed. 1984).

87. *See* IOWA CODE §§ 614.29-.38 (1983).

88. IOWA STANDARDS § 1.2 (6th ed. 1984).

89. *Id.* One implication of this standard may be that it is not reasonable for the examiner to require that every legible old abstract be certified under the forty year marketable title act or that old longhand or typewritten portions be deleted. Similarly, Marshall takes the position that the inclusion of irrelevant entries alone is not the basis for a reasonable objection and that "so long as the abstract reflects marketable title, the purchaser is not in a position to complain." G. MADSEN, *supra* note 61, § 1.1(E), at 10.

90. *Compare* IOWA STANDARDS § 1.3 (6th ed. 1984) *with id.* (5th ed. 1974).

91. *Id.* (6th ed. 1984).

92. *Id.*

93. *Id.*

94. *Id.* § 1.4.

95. *Id.*

96. *Id. See also* G. MADSEN, *supra* note 61, § 1.2(A).

abstracted.[97] The comment to this standard states that the certificate copyrighted by the Iowa Land Title Association is acceptable.[98]

The requirement imposed by standard 1.4, that the abstract should not be restricted to specific persons, insures that the abstract continuation will remain valid even after the current holder transfers the title.[99] Future examiners can rely on a past continuation that contains a proper certificate.[100] The requirement of generality in standard 1.4 is to prevent the abstracter from limiting the scope of a search in such a way that information that might affect the title is excluded.[101] Because of the requirement of generality, the title examiner can be assured that the abstract is complete if it contains a valid certificate.[102] Marshall, in his treatise on Iowa titles, said that "an abstract without a valid certificate is no abstract at all".[103] Using that definition, an abstract with a certificate that does not comply with standard 1.4 is not an abstract, but merely a collection of entries of record.

Standard 1.5 states that an abstract covering a lot included in a proprietor's plat under chapter 409 of the Iowa Code is not incomplete merely because it commences with the date of the filing of the plat so long as the plat was recorded prior to 1970.[104] The reasoning behind this standard is that section 592.3 of the Iowa Code provides that the recording of the plat is conclusive evidence of the following facts: that the person owned the land; that the tract was free and clear of all encumbrances unless an affidavit to

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97. IOWA STANDARDS, § 1.4 (6th ed. 1984). *See also* G. MADSEN, *supra* note 61, § 1.2(B).

98. IOWA STANDARDS § 1.4 comment (6th ed. 1984). The acceptable Iowa Land Title Association certificate referred to in the comment states in part: "The undersigned hereby certifies that the foregoing abstract is a correct abstract of title of everything in the public records of said county affecting the title to the real estate described in the caption." Abstracter's Certificate (Iowa Land Title Association 1974).

99. *See* G. MADSEN, *supra* note 61, § 1.2(C) (dealing with defective but ancient abstracter's certificates); *id.* § 1.2(D) (dealing with certificates of deceased abstracters).

100. *See id.* § 1.2(D).

> In view of the very wide practice by examining attorneys of accepting abstracters' certificates regardless of the present status of the abstracter, there does not appear to be any need for a standard [concerning certificates of deceased abstracters]. It is true, of course, that in Iowa there are no requirements that an abstracter have a license or furnish bond, as is true in some states. There are still a good many individuals, usually attorneys, who prepare abstracts. It is a curious fact that examining attorneys usually accept without question certificates of abstracters in previous continuations. On the other hand, they do not accept the previous opinions of attorneys who have examined the abstract, but examine back to the source of title in each case. As was noted in a report by the committee on "The Improvement of Conveyancing by Legislation": "Certificates of other abstract companies with respect to earlier parts of the abstract are regularly accepted. Why not certificates of lawyers?"

Id. at 13.

101. *See id.* § 1.2(B).

102. *See id.* § 1.2(A).

103. *See id.* § 1.2(C).

104. IOWA STANDARDS § 1.5 (6th ed. 1984).

the contrary was filed at the time of recording of the plat; and that any defects in the platting procedure under chapter 409 or defects in acknowledgment are corrected.[105]

The first substantive changes in chapter one are found in standard 1.5. The date referred to in the standard was changed from January 1, 1950 to January 1, 1970 because of a similar change in section 592.3.[106] Also, the words "unless an affidavit to the contrary was filed at the time of recording the plat" were added to this standard to specify the one exception to the general rule of section 592.3.[107] Finally, the second paragraph of standard 1.5 as found in the fifth edition has been deleted.[108]

At the time of the adoption of the fifth edition to the Title Standards, the operative date for section 592.3 was January 1, 1950 and the operative date for section 614.17 was January 1, 1960.[109] As a result, some platting procedures that were not cured by Iowa Code section 592.3 might have been cured by Iowa Code section 614.17 if the requirements listed in the second paragraph of standard 1.5 were met.[110] Since sections 592.3 and 614.17 now refer to the same dates, the circumstance to which paragraph two of standard 1.5 was applicable will no longer arise; thus, the paragraph was deleted.[111]

Standard 1.6 states that ancient proceedings, that is, those filed prior to January 1, 1970, "may be abstracted in a brief manner sufficient only to show their effect on the title."[112] The authority for this standard resides in the statute of limitation contained in Iowa Code section 614.17.[113] The implications of this statute for the title examiner are fully set out in standard 10.1.[114] Since ancient proceedings can be restricted in their effect upon title by this and other statutes of limitation, the abstracter can show less than would be necessary in contemporary proceedings.[115]

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105. IOWA CODE § 592.3 (1983). *See* G. MADSEN, *supra* note 61, § 2.1(A) (dealing with what is an "official plat"); *id.* § 1.2(C) (dealing with the legal authority for shortened abstracts); *id.* § 14.1(E) (platting ordinance not required).

106. IOWA STANDARDS § 1.5 (6th ed. 1984). *See* IOWA CODE § 592.3 (1983).

107. IOWA STANDARDS § 1.5 (6th ed. 1984).

108. *Compare id.* (6th ed. 1984) *with id.* (5th ed. 1974).

109. IOWA CODE §§ 614.17, 592.3 (1973).

110. IOWA STANDARDS § 1.5 (5th ed. 1974).

111. *See id.* (6th ed. 1984).

112. *Id.* § 1.6.

113. IOWA CODE § 614.17 (1983).

114. IOWA STANDARDS § 10.1 (6th ed. 1984).

115. *See* G. MADSEN, *supra* note 61, § 1.1(B).

> The abstracter is not supposed to be a lawyer. He does, however, hold himself out as possessing special skills relative to records and court proceedings. He would fail in his duty if he filled an abstract with matters generally understood, by men of such skill, not to be material to a title. If he *fails* to set out a material matter, however, the risk of damage to the person for whom he prepares the abstract lies on the abstracter and not the examining attorney.

The practical effect of this standard is enormous in that attorneys must accept, and abstracters can provide, much shorter, clearer, and more easily readable abstracts.[116] In its Abstracting Standards, The Iowa Land Title Association has promulgated abbreviated showings for the following proceedings; foreclosures; partitions; quiet title actions; guardianship proceedings; testate estates and intestate estates.[117] By following these abstracting guidelines, the abstracter provides an important service to the examining attorney by reducing the amount of irrelevant material found in the abstract and by standardizing the entries in an abstract.[118] This saves the examining attorney a great deal of time and makes the abstracter an important professional who abstracts the records of the county rather than one who merely copies documents.[119]

This standard is the second in chapter one which contains a substantive change. The date referred to in the standard which defines what an "ancient proceeding" is, has been changed from January 1, 1960 to January 1, 1970.[120] This is because Iowa Code section 614.17 has been updated to limit actions prior to January 1, 1970.[121]

Standard 1.7 has not been changed in substance. This standard deals with the following specific problem: If a landowner sells a portion of real estate and attempts to restrict the activities on this parcel, the restrictive covenants may impose similar restrictions on the remaining real estate which was not sold.[122] Such constraint occurs because of the doctrine of reciprocal negative easements or covenants.[123] An example would be the establishment of a building set back line.[124]

Standard 1.7 merely states that if an abstracter finds such a restriction in a deed to the new neighbor, the abstracter should show these in the abstract of the landowner's remaining real estate.[125] This could be done by

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Id. at 4.

116. *Id.*

117. *See generally* IOWA ABSTRACTING STANDARDS (Iowa Land Title Association 1976).

118. G. MADSEN, *supra* note 61, § 1.1(B), at 2-3.

119. *Id.* § 1.1(B-1).

> The abstracter, of course, has to work with local attorneys and must try to satisfy their requirements even though they may at times seem unreasonable. We should keep constantly in mind, however, than [sic] an abstracter is more than a mere copyist, and he should never "pad" an abstract by setting out records which are not material to the showing of marketable title. My advice to abstracters has, however, always been, "If there is a reasonable doubt, set out the record, and let the examining attorney take the responsibility."

Id. at 7.

120. IOWA STANDARDS § 1.6 (6th ed. 1984).

121. IOWA CODE § 614.17 (1983).

122. IOWA STANDARDS § 1.7 (6th ed. 1984).

123. *Id.*

124. *Id.*

125. *Id.*

showing the conveyance to the new neighbor for reference purposes.[126] The title examiner will then need to determine if the original landowner was bound by his own restrictive covenants.[127]

The title examiner, confronted with such potential restrictions, will probably want to refer to them in the title opinion.[128] The answer to the substantive question of whether the seller's real estate is subject to the restrictions can turn on such facts and circumstances as the existence of a general plan or scheme, the existence of estoppel, or the applicability of the Stale Uses and Reversions Act.[129]

Standard 1.8 presents the following problem: "When the abstract discloses a conveyance of the fee by the former owner to the holder of a tax deed, or discloses a legally sufficient decree quieting title based upon the tax deed, or shows an affidavit conforming to Iowa Code [section] 448.15, should the requirement be made that the abstract show the details preliminary to the execution of the tax deed, including notice of expiration of right of redemption and returns of service thereon?"[130]

The fifth edition of this title standard answered this question with a simple "No."[131] This answer is still retained, with qualification, in the sixth edition.[132] The authority for this standard is found in Iowa Code sections 448.15 and 448.16.[133] The full title implications of these statutes are more fully set out in standards 10.2 and 10.3.[134] To the extent that standard 1.8 deals with the effect and validity of these statutes, it is somewhat repetitive of standard 10.2.[135] But while standard 10.2 deals with all possible imperfections in a tax deed,[136] standard 1.8 deals only with imperfections prelimi-

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126. *Id.*

127. *Id.*

128. *Id.* comment.

129. IOWA CODE §§ 614.24-.28 (1983). *See* Amana Soc'y v. Colony Inn, Inc., 315 N.W.2d 101 (Iowa 1982); Grange v. Korff, 248 Iowa 118, 79 N.W.2d 743 (1956); Schuler v. Independent Sand & Gravel Co., 203 Iowa 134, 209 N.W. 731 (1926); Hegna v. Peters, 199 Iowa 259, 201 N.W. 803 (1925).

The only changes in standard 1.7 were the updating of the A.L.R. citation and the addition of the citation to Amana Soc'y v. Colony Inn, Inc., 315 N.W.2d 101 (Iowa 1982). IOWA STANDARDS § 1.7 (6th ed. 1984).

The *Amana Society* case provides a current review of the law in this area. Specifically, it reviews the relationship of the Stales Uses and Reversions Act, IOWA CODE §§ 614.24-.28 (1983), with the theory of the "general scheme" of land use control. Amana Soc'y v. Colony Inn, Inc., 315 N.W.2d at 116-17. The case involved a unique set of facts that are beyond the scope of this article. Nevertheless, notation of the case is of importance here because it limited the time during which such restrictions are valid. *Id.* at 110-11.

130. IOWA STANDARDS § 1.8 (6th ed. 1984).

131. *Id.* (5th ed. 1974).

132. *Id.* (6th ed. 1984).

133. IOWA CODE §§ 448.15-.16 (1983).

134. IOWA STANDARDS §§ 10.2-.3 (6th ed. 1984).

135. *Id.* § 10.2.

136. *Id.*

nary to the execution of the tax deed.[137] Iowa Code sections 448.15 and 448.16 are used by standard 1.8 to eliminate these preliminary details from the abstract.[138]

The sixth edition of the Title Standards adds a substantive limitation upon the extent to which these statutes can be relied upon to cure defects: "[t]he description in the tax deed must be sufficient to describe the land intended to be conveyed."[139]

Larsen v. Cady[140] prompted the addition of this limitation. The *Larsen* case involved a tax deed containing the following description: "Part of the Northeast Quarter of Section 17, Township 79 North, Range 45, West of the 5th P.M. in Harrison County, Iowa."[141] The Iowa Supreme Court held in *Larsen v Cady* that the use of such an ambiguous description had three effects: first, the tax deed was void because it did not state which part of the northeast quarter was deeded, only that a part of it was deeded; second, the 120 day affidavit that was filed did not cut off adverse claimants because the claimants were not given adequate notice; third, putting an explanation and correction of the legal description in the affidavit did not correct the tax deed and did not cut off possible adverse claimants.[142]

The other substantive addition to standard 1.8 is found in the form of a caveat.[143] This caveat provides in effect that a title examiner should not accept any tax titles until that examiner has studied the United States Supreme Court decision in *Mennonite Board of Missions v. Adams*.[144] In the opinion of the committee, the *Mennonite* case may call into question any tax title based upon Iowa's present constructive notice procedures.

In *Mennonite Board of Missions v. Adams*, Moore executed a mortgage to the Mennonite Board of Missions.[145] Moore always made mortgage payments, but stopped paying taxes.[146] Pursuant to state law, the County Auditor posted notice of a proposed tax sale of the land in the courthouse and published notice once a week for three consecutive weeks.[147] The auditor also notified Moore of the sale by certified mail.[148] The real estate was sold

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137. *Id.* § 1.8.

138. *Id. See also* IOWA CODE §§ 448.15-.16 (1983).

139. IOWA STANDARDS § 1.8 (6th ed. 1984).

140. 274 N.W.2d 907 (Iowa 1979).

141. *Id.* at 909.

142. *Id.* at 909-10. The *Larsen* case did not actually qualify the negative statement that details preliminary to the execution of the tax deed need not be shown. But the importance of this case and its recent vintage prompted the committee to refer to it wherever tax deeds are referred to in the Title Standards.

143. IOWA STANDARDS § 1.8 caveat (6th ed. 1984).

144. *Id.; see* Mennonite Bd. of Missions v. Adams, 103 S. Ct. 2706 (1983).

145. Mennonite Bd. of Missions v. Adams, 103 S. Ct. at 2708.

146. *Id.* at 2709.

147. *Id.* at 2708-09.

148. *Id.*

at tax sale.[149] After the two year redemption period ran, the tax sale purchaser sued to quiet title.[150] The mortgagee then objected to the quieting of title.[151] The Supreme Court ruled that the published and posted notice to the mortgagee did not meet the *Mullane* test of due process under the fourteenth amendment.[152]

The addition of the caveat in the sixth edition version of standard 1.8 is intended to highlight the potential problems that may arise from relying on constructive notice under Iowa's current tax sale procedure. While not expressing an opinion as to the extent to which the *Mennonite* case renders Iowa tax titles unmerchantible, the Committee wanted to warn the title examiner of the existence of this case and its potential effect on titles.[153] It is the Committee's hope that the Iowa legislature will address the uncertainty threatening Iowa tax titles by passing corrective legislation at an early date.

Standard 1.9 states that a mortgage or trust deed more than 20 years old need not be shown on the abstract unless the debt as extended matured within the last 10 years.[154] The authority for this standard is Iowa Code section 614.21, which prohibits foreclosure of ancient mortgages.[155] Standards 10.1, 10.4, and 10.5 deal more fully with this statute of limitations and with its title implications.[156]

The final sentence of standard 1.9 as found in the fifth edition has been deleted from the sixth edition.[157] That sentence indicated that the abstracter's certificate should reveal when ancient mortgages are omitted from an abstract.[158] As an example, the approved certificate of the Iowa Land Title Association states: "Ancient mortgages: Omitted pursuant to Iowa Land Title Examination standards of the Iowa State Bar Association."[159]

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149. *Id.* at 2709.

150. *Id.*

151. *Id.*

152. *Id.* at 2712. *See also* Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950) (requiring, in any final proceeding, notice that is "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

153. *See generally* Mennonite Bd. of Missions v. Adams, 103 S. Ct. 2706. Justice O'Connor disagreed with the *Mennonite* decision, noting that "[d]espite the fact that *Mullane* itself accepted that constructive notice satisfied the dictates of due process in certain circumstances, the Court, citing *Mullane*, now holds that constructive notice can never suffice whenever there is a legally protected property interest at stake." *Id.* at 2713. (O'Connor, J., dissenting).

154. IOWA STANDARDS § 1.9 (6th ed. 1984). *See also* G. MADSEN, *supra* note 61, § 13.7(A).

155. IOWA CODE § 614.21 (1983). Notably the Iowa Abstracting Standards of the Iowa Land Title Association add one other exception where an ancient mortgage should be shown, that is, if the ancient mortgage was foreclosed on and the decree was not the root of title. IOWA ABSTRACTING STANDARDS at 280 comment 1 (Iowa Land Title Association 1976).

156. *See* IOWA STANDARDS §§ 10.1, 10.4, 10.5 (6th ed. 1984).

157. *Compare id.* § 1.9 (6th ed. 1984) *with id.* (5th ed. 1974).

158. *Id.* (5th ed. 1974).

159. Abstracter's Certificate (Iowa Land Title Association 1974).

The fifth edition version of standard 1.9 required this kind of statement in the abstracter's certificate.[160] With the deletion of this sentence in the sixth edition, the title examiner should now assume that if the abstracter certifies that the abstract is complete, then the abstract will include all mortgages that are essential to the title and delete all others.[161]

While standard 1.10 technically does not deal with title matters, it deals with matters which can affect a purchaser's use of the land.[162] The sixth edition has pared down the language of the problem without changing its substance.[163] The standard's question now reads: "When land is located in a municipal or county zoning district, or an airport hazard zone or district, should the abstract show that fact?"[164] The standard has also been reworded, but its substance remains the same.[165] Standard 1.10 requires a brief notation that the property is in such a district or zone.[166] Because these entries will appear on the abstract, they should be referred to in the examiner's title opinion.[167] The examiner's client, particularly in the case of a purchaser of real estate, will then be on notice that restrictions and regulations exist that may affect the purpose for which the property is intended.[168]

The final substantive change in the first chapter is that standard 1.11 has been deleted from the sixth edition.[169] Iowa Code section 230.25 has been amended to eliminate any effect on real title.[170] The question

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160. IOWA STANDARDS § 1.9 (5th ed. 1974).

161. *See* G. MADSEN, *supra* note 61, § 1.1(B). Madsen wrote:

> I am sure that it is the general understanding of title examiners that when an abstractor omits any part of an instrument or record being abstracted, he is certifying that the omitted part is either not essential to the title in question, or that the things omitted, such as acknowledgements, witnesses, etc., are all in *regular* form.

Id. at 3.

162. IOWA STANDARDS § 1.10 (6th ed. 1984).

163. *Id.*

164. *Id.* In the fifth edition the question was:

> When an abstract pertains to land that is within a restricted residence district established by a city or town, or within a municipal or county zoning district, or within an airport hazard zone, area, or district, should the abstract make mention of that fact, and if it should, then to what extent?

Id. (5th ed. 1974).

165. *Compare id.* (6th ed. 1984) *with id.* (5th ed. 1974). The citations in the sixth edition have been updated to refer to the current statutes concerning such regulations. *Id.* (6th ed. 1984).

166. *Id.* (6th ed. 1984).

167. *See* G. MADSEN, *supra* note 61, § 14.2.

168. *Id.*

169. *Compare* IOWA STANDARDS ch. 1 (6th ed. 1984) *with id.* (5th ed. 1974).

170. *See* G. MADSEN, *supra* note 61, § 1.1(B-1).

> A lien for support of the mentally ill was provided by former Iowa Code, §§ 230.25 to 230.27. The lien was effective as notice from the time of indexing in the office of the county auditor. Such lien was effective only upon real estate then *owned* by the debtor. Iowa Code, §§ 230.25, 230.26 were amended by the fifty-eighth General

presented by standard 1.11 in the fifth edition was: "How can an examiner determine whether there exists a lien for support of the owner's mentally ill spouse?"[171] The answer to this question given in the fifth edition was that "[t]he abstracter's showing of a search against the owner is sufficient."[172] The comment explained that this was sufficient because "Iowa Code Section 230.25 now requires indexing against both the owner and spouse."[173]

With the abolition of all such liens as of January 1, 1977, this title standard has been rendered unnecessary.[174] Any pre-existing liens under the old law could have been preserved only by the filing of an action to enforce the lien.[175] In that event, the lien would appear on the abstract as a lawsuit or judgment.[176] If no lawsuit or judgment appears, then support of an owner's mentally ill spouse can no longer affect the marketability of the owner's title.

III. Chapter Two: Political Subdivisions

Chapter two of the Iowa Land Title Examination Standards embodies only one standard—standard 2.1.[177] This standard is deceptively brief. As with a number of the Title Standards, it is important to recognize the limitations of standard 2.1, as well as the issues that the standard is not intended to address. Originally, standard 2.1 was aimed at a very specific question—whether the resolution authorizing the execution of a deed by a governmental unit must be filed for record.[178] A brief review of the history

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Assembly to provide that no assistance is a lien against the husband or wife of a committed person for aid furnished prior to July 4, 1959, unless the lien was indexed against such husband or wife by the county auditor prior to July 4, 1960. The 1960 amendments required the county auditor to index both under the name of the person admitted or committed and under the name of such person's husband or wife to create a lien. Iowa Code, § 230.25(2) abolishes all liens created under the former Iowa Code, § 230.25 save for those liens preserved by the county instituting an action prior to January 1, 1977, to enforce the lien. Iowa Acts, 67 G.A. 1st Sess., S.F. 35, §§ 1-3 (1977) eliminated the lien for care of alcoholics unless preserved by an action to enforce the lien commenced prior to January 1, 1978.

Id. at 5-6.

171. Iowa Standards § 1.11 (5th ed. 1974).
172. *Id.*
173. *Id.* comment.
174. Iowa Code § 230.25(2) (1983).
175. *Id.*
176. *See* Iowa Standards ch. 6 (6th ed. 1984) (dealing with judicial proceedings).
177. *Id.* § 2.1.
178. *Id.* (3d ed. 1955). The text of the third edition standard is as follows:

2.1 PROBLEM:

Where a deed is made by a municipal corporation of the state of Iowa, is it necessary to require that a copy of the resolution authorizing the execution of said deed by the governing body of said corporation be filed for record?

STANDARD:

of standard 2.1 reveals the original limited scope of this standard and the subtle changes that have occurred with each revision.

The first version of standard 2.1 appears in the third edition of the Iowa Land Title Examination Standards.[179] In the third edition, standard 2.1 posed the following question: "Where a deed is made by a municipal corporation of the state of Iowa, is it necessary to require that a copy of the resolution authorizing the execution of said deed by the governing body of said corporation be filed for record?"[180] The standard answered this question in the affirmative.[181] Explaining this answer, the comment noted that the powers of a municipal corporation did not extend beyond those powers granted in state statutes or the state constitution.[182] The powers of such bodies were noted to be limited because municipal corporations were official bodies.[183] The comment also noted that the powers extended by state laws and the state constitution were to be strictly construed.[184]

This first version of the standard 2.1 was consistent with Iowa law that governed municipal conveyances prior to July 4, 1951.[185] Prior to that date, a municipal corporation was empowered to dispose of and convey property in accordance with terms set by the city council.[186] This was construed to require only a resolution.[187] Hence, the original standard addressed only the question of whether the resolution authorizing the conveyance should be recorded. The second version of standard 2.1 is found in the fifth edition of the Iowa Land Title Examination Standards.[188] The fifth edition expanded

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Yes.

COMMENT:

Municipal corporations are official bodies and have only such powers as are granted by the Constitution or laws of the state. In general, powers are strictly construed.

Id.

179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. IOWA CODE §§ 403.11-.12 (1950) (repealed 1951).
186. *Id.* § 403.12. Section 403.12 of the 1950 Iowa Code states:

Disposal of lands and streets. They shall have power also to dispose of the title or interest of such corporation in any real estate, or any lien thereon, or sheriff's certificate therefor, owned or held by it, including any street or portion thereof vacated or discontinued, however acquired or held, in such manner and upon such terms as the council shall direct.

Id.

187. *See id.*
188. IOWA STANDARDS § 2.1 (5th ed. 1974) The text of the fifth edition standard is as follows:

2.1 PROBLEM:

Where a deed is made by a municipal corporation, a county or a school district of

the scope of standard 2.1 to include counties and school districts, as well as municipal corporations.[189] In addition, the fifth edition incorporated the statutory requirement that, after July 4, 1951, published notice be given and a hearing be held on a proposed disposition of real property by a city.[190] The second version, as set out in the fifth edition, not only required the recording of a resolution approving the execution of the deed, but also required the recording of a proof of publication.[191]

The fifth edition version of standard 2.1 referred to the resolution "approving the execution" of the deed,[192] rather than referring to the resolution "authorizing the execution" of the deed, as in the third edition.[193] The resolution "approving the execution" of the deed referred to the resolution required by section 569.7 of the Iowa Code,[194] whereas the resolution "authorizing the execution" of the deed referred to the resolution required by

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the state of Iowa, is it necessary to require that a copy of the resolution approving the execution of said deed by the governing body of said corporation and proof of publication of notice to dispose of said real property, where required, be filed for record?

STANDARD:
Yes.

COMMENT:
Municipal corporations are official bodies and have only such powers as are granted by the Constitution or laws of the state. In general, powers are strictly construed. Publication of notice of proposal to dispose of real property by municipal corporations has been required since July 4, 1951. Prior to that date notice and hearing were not required. (See Iowa Code§403.11 and §403.12 (1950) which was repealed by Iowa Acts, 54 G.A., ch. 151 (1951)).

Authority: Iowa Code §368.39.
Iowa Code §569.7.
Iowa Code §297.22 et seq.
Iowa Code §332.3 & 4.

Id..

189. *Id.*

190. *Id. See also* IOWA CODE § 368.39 (1954), which reads:

Disposal of lands and streets. They shall have power to dispose of the title or interest of such corporation in any real estate, or any lien thereon, or sheriff's certificate therefor, owned or held by it, including any street or portion thereof vacated or discontinued, however acquired or held, in such manner and upon such terms as the council shall direct. However, where exercise of said power deprives or restricts the abutting property owners from free access to their property, so as to decrease the value thereof, the corporation shall be liable in damages therefor. Notice of any proposal to dispose of real property under the provisions of this section shall be given by publication, once each week for two consecutive weeks in the manner provided by section 618.14. The last of said publications shall appear not less than ten days before the meeting of the council at which said proposal is to be acted on.

Id.

191. IOWA STANDARDS § 2.1 (5th ed. 1974).

192. *Id.*

193. *Id.* (3d ed. 1955).

194. IOWA CODE § 569.7 (1946).

section 368.39.[195] Even though the statutory requirements that a resolution "authorizing the execution" of a deed[196] and a resolution "approving the execution" of a deed[197] were not changed between the third and fifth editions of the Title Standards, the fifth edition focused on a different resolution than the third edition.[198]

In reviewing standard 2.1 for the sixth edition, the Title Standards Committee recognized that the fifth edition's version of the standard had been premised upon several statutes that had undergone change since the fifth edition.[199] These statutory changes almost entirely were the result of granting home rule to cities and counties.[200] The statutory changes were not substantive. In some cases the statute was restated and, in many cases, the chapter and section were renumbered.[201] Because no substantive change occurred in the applicable law, the Title Standards Committee did not consider similar changes in standard 2.1 to be necessary.

The Title Standards Committee approved several changes to be made to standard 2.1 in the sixth edition. First, the title of the chapter was changed from "Municipal Corporations" to "Political Subdivisions."[202] This change is consistent with the expansion of the standard, which began in the fifth edition, to include counties and school districts in addition to municipal corporations.[203] Second, the comment was shortened. The sixth edition deletes the language of the fifth edition which noted that municipal corporations had only such powers as were granted by the laws and constitution and that such powers were to be strictly construed.[204] This language was considered unnecessary and perhaps inaccurate in light of the home-rule statutes.[205] Another sentence was deleted because it became redundant in light of other language added to the comment.[206] Finally, the authorities were up-

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195. *Id.* § 368.39 (1973) (current version at *id.* § 364.7 (1983)).

196. *Id.; see also id.* § 403.12 (1950) (repealed 1951).

197. *Id.* § 569.7 (1946).

198. *Compare* IOWA STANDARDS § 2.1 (6th ed. 1984) *with id.* (5th ed. 1974).

199. For example, section 368.39 of the 1973 Iowa Code was renumbered to become section 364.7 of the 1983 Iowa Code.

200. IOWA CODE chs. 331, 368, 372, 376, 380, 384, 388, 392 (1983) (granting home rule to cities and counties).

201. Section 368.39 of the 1973 Code is restated in revised terminology in section 364.7 of the 1983 Code. There was no change in wording or numeration of sections 297.22-.25 and section 569.7 from the 1973 Code to the 1983 Code. Sections 332.3-.4 of the 1973 Code were restated in revised terminology in section 331.61 of the 1983 Code.

202. *Compare* IOWA STANDARDS § 2.1 (6th ed. 1984) *with id.* (5th ed. 1974).

203. *See id.* (5th ed. 1974).

204. *Compare id.* (6th ed. 1984) *with id.* (5th ed. 1974).

205. *See* IOWA CODE chs. 331, 362, 368, 372, 376, 380, 384, 388, 392 (1983).

206. In the fifth edition, the standard stated: "Prior to [July 4, 1951] notice and hearing were not required." IOWA STANDARDS § 2.1 (5th ed. 1974). The language added in the sixth edition that made the fifth edition language redundant was: "Publication of notice of proposal to dispose of real property by municipal corporations was not required prior to July 4, 1951." *Id.* (6th ed. 1984).

dated from the fifth edition to reflect the renumbering of code sections[207] and to add section 363.3 of the Iowa Code, which governs publication of notices.[208]

In order to understand standard 2.1, it is important to consider what the standard is *not* intended to cover. Standard 2.1 is *not* intended to be a conclusive statement of *all* that is to be required for acceptance of a deed from a political subdivision. To set out all such requirements would involve several standards. The code sections cited as authority for standard 2.1, however, do contain the basic requirements for conveyances by the various political subdivisions.[209]

For example, sections 364.7 and 362.3 refer to conveyances by a city,[210] sections 297.22 through 297.25 pertain to conveyances by school districts,[211] and section 331.361 deals with conveyances by counties.[212] Section 569.7 applies to the state, counties, and municipal corporations, but not to school districts.[213] These are the basic provisions applicable to conveyances by political subdivisions, although other more specialized provisions do exist. In reviewing a conveyance from a political subdivision it is essential that the applicable code provisions be identified and satisfied.

Although not set forth in standard 2.1, the basic requirements for sale of property by a city or county are essentially identical. These requirements are: (1) a resolution of the proposed disposition;[214] (2) a single publication of notice of the proposed disposition and hearing thereon, not less than four nor more than twenty days before the hearing;[215] (3) the hearing;[216] (4) a resolution containing the final determination on the proposed disposition, including the approval of any deed;[217] and (5) transcript of the minutes of the hearing, showing the votes casts, certified by the Secretary of the governing body.[218]

These basic requirements may be subject to separate statutory provisions. In addition, the procedure for school districts is somewhat different and may require an election approving any disposition.[219]

In conclusion, the revision of standard 2.1 for the sixth edition has not been substantive. It should be emphasized that standard 2.1 is not a com-

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207. *See supra* note 201.
208. *See* IOWA CODE § 362.3 (1983).
209. *See id.* §§ 297.22-.25, 331.361, 362.3, 364.7, 569.7.
210. *Id.* §§ 364.7, 362.3.
211. *Id.* §§ 297.22-.25.
212. *Id.* § 331.361.
213. *Id.* § 569.7.
214. *Id.* §§ 331.361(2)(a), 364.7(1).
215. *Id.* §§ 331.361(2)(a), 331.305, 364.7(1), 362.3(1).
216. *Id.* §§ 331.361(2)(a), 364.7(1).
217. *Id.* §§ 331.361(2)(b), 364.7(2), 569.7.
218. *Id.* § 569.7.
219. *Id.* § 297.22.

plete statement of all that must be shown for acceptance of a conveyance from a political subdivision. Those requirements depend on the type of governmental unit involved and the applicable statutory provisions.

IV. Chapter Three: Private Corporations

Chapter three of the Iowa Land Title Examination Standards deals with conveyances and releases by private corporations and resolves questions raised by the imprecise use of corporate names.[220] No substantive changes were required. The sixth edition has made minor revisions for clarification.[221]

Standard 3.1 states that it is not necessary for the abstract to set forth articles of incorporation in order to show that a grantor corporation was authorized to acquire and sell real estate.[222] "If the articles . . . are not shown in the abstract, the examiner may assume that they are not of record" and that there are no corporate power limitations affecting the transaction.[223] This assumption is justified because subsections 496A.4(4) and (5) of the Iowa Code[224] and their source, subsections 4(d) and (e) of the Model Business Corporation Act,[225] specifically authorize a corporation to acquire, sell, and otherwise deal with real estate. It is so unlikely that articles not shown in the abstract would contain any pertinent limitations that they are not worthy of the examiner's concern. If, however, the articles do appear in the abstract, they "give notice of any limitation on the powers of the corporation," and in such case the applicable limitations would have to be observed by the examiner.[226]

A similar analysis applies to standard 3.3 which advises that a corporate deed or release of mortgage need not be supported by proof, through its articles, bylaws or board resolution, that the officers who executed the instrument were authorized to do so.[227] This authorization is recited in the acknowledgment on the instrument. Nevertheless, if the abstract does contain the articles, then the examiner must take notice of any recited limitations on the power of officers to execute releases and deeds.[228]

The purpose of requesting curative documents should not be to create a model abstract that is an exemplar of mechanical perfection and consistency.[229] Rather, the purpose should be to foreclose the assertion of a claim

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220. Iowa Standards ch. 3 (6th ed. 1984).
221. *Compare id.* (6th ed. 1984) *with id.* (5th ed. 1974).
222. *Id.* § 3.1 (6th ed. 1984).
223. *Id.*
224. Iowa Code § 496A.4(4)-(5) (1983).
225. Model Business Corp. Act § 4(d)-(e) (1982).
226. Iowa Standards § 3.1 (6th ed. 1984).
227. *Id.* § 3.3.
228. *Id.*
229. *See generally supra* notes 12-29 and accompanying text.

that could reasonably be expected to embroil a purchaser in a dispute or proceeding that would delay or prevent enjoyment of the benefits to which the purchaser is entitled.[230] Clients already believe that much of what lawyers do is unnecessary; neither real estate law nor the profession is served by requiring apparent nullification of problems that do not exist.

Standard 3.2 makes it clear that a foreign corporation doing business outside of Iowa is not required to obtain authority to do business in the State of Iowa in order to make a valid grant of Iowa real estate.[231] Suppose the foreign corporation is doing business in Iowa without a certificate of authority. The deed is still valid.[232] Suppose the foreign corporation's conveyance of Iowa land was itself part of the business enterprise that required a certificate of authority. Again, the deed would be valid.[233] Section 496A.120 of the Iowa Code provides that the failure of a foreign corporation to obtain a certificate of authority to transact business in Iowa will not impair the validity of any contract or act of the corporation.[234]

Title Standard 3.4 deals with the prevalence of variances in corporate names and recognizes the ease with which spoken and written references to corporate names can transpose or misstate their conjunctive or qualifying parts.[235] If the names used in the instruments and other circumstances that appear on the record allow the examiner to satisfactorily identify the corporation or infer the identify of the corporation with reasonable certainty, then the examiner may ignore the lack of precision in presenting the corporate name from instrument to instrument.[236] The standard itself recites the variances that ordinarily may be ignored.[237] On the other hand, if there are differences "too significant to be ignored," the usual affidavit of identity may be employed.[238] Again, mechanical perfection should not be the goal; rather, reasonable assurance as to the identity of the entity should be the standard.[239]

Standard 3.4 is cross-referenced in standard 8.3, which deals with ab-

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230. *See supra* notes 58-64 and accompanying text.
231. IOWA STANDARDS § 3.2 (6th ed. 1984).
232. *See id.*
233. *Id.*
234. IOWA CODE § 496A.120 (1983).
235. IOWA STANDARDS § 3.4 (6th ed. 1984).
236. *Id.*
237. *Id.* Standard 3.4 states:

> The following variances are among those that ordinarily may be ignored: punctuation marks; use or non-use of the symbol "&" or the word "and" or interchanging them; addition or omission of the word "the" preceding the name; use or non-use of the words "company", "limited", "corporation", "incorporated" or the abbreviations for same, or interchanging them or any such word and the related abbreviation; and inclusion or omission of all or part of a place or location.

Id.
238. *Id.*
239. *See id.*

breviations and derivations of given names.[240] Thus, if the examiner begins with standard 8.3, he will be referred to standard 3.4 on corporate names.[241]

Chapter three is intended to resolve issues that may arise in conveyances and releases by private corporations.[242] It clarifies the premise that minor imperfections in the record normally will not affect title.[243] Perfection is not the standard. The standard requires only so much as is needed to prevent challenges to title. The sixth edition makes no substantive changes.[244] Rather, it carries forward the purposes and goals of the previous edition.

V. Chapter Four: Deeds and Contracts

Chapter four now concerns both deeds and contracts because of the close relationship between the two.[245] Indeed, the Title Standard Committee considered combining this chapter with chapter seven,[246] which deals with mortgages, because of the similarity of the three topics. The Committee, however, decided against it in order to keep the new standards as consistent as possible with the old ones. There are, however, some changes in the numbering of chapter four.

Standard 4.1 has been changed to conform more closely to the wording of the controlling statute.[247] This standard illustrates the difficulty of categorizing these problems into separate and distinct chapters. Not only does it belong in chapter four, but it also could easily be placed in the mortgage chapter[248] or the chapter on the statutes of limitations.[249] When dealing with a particular title problem, it is wise to review all of the related standards in order to determine the solution.

Standard 4.1 poses the following problem: Instrument A was filed for record more than ten years ago and contains a reference to Instrument B (often, but not always, a mortgage) which was not recorded.[250] A does not disclose the due date of B.[251] Does this reference cloud the title? No, it does not.[252] The comment to the standard[253] refers to section 614.21 of the Iowa

240. *Id.* § 8.3.
241. *Id.*
242. *Id.* ch. 3.
243. *See generally id.*
244. *Compare id.* (6th ed. 1984) *with id.* (5th ed. 1974).
245. *Id.* ch. 4 (6th ed. 1984). Chapter four previously was entitled "Deeds." *Id.* (5th ed. 1974).
246. *Id.* ch. 7 (6th ed. 1984).
247. *Id.* § 4.1. *See* Iowa Code § 614.21 (1983).
248. Iowa Standards ch. 7 (6th ed. 1984).
249. *Id.* ch. 10.
250. *Id.* § 4.1.
251. *Id.*
252. *Id.*
253. *Id.* comment.

Code, which became effective July 4, 1946.[254] The statute states that there is a limitation of ten years from the due date of the unrecorded document if the due date is disclosed; otherwise, the ten-year limitation runs from the date of the recording of the instrument.[255] Therefore, in the example, the limitation would run ten years from the recording of Instrument A.

The limitation was enacted to avoid a "troublesome question raised when an instrument, such as a deed, refers to a mortgage not shown of record."[256] Since the statute is so clear on this point, perhaps it is not obvious why the standard is necessary. It is possible that some title examiners wanted a clarification or reaffirmation of the statute. In any case, the standard echoes the statute.[257]

Standard 4.2 presupposes a somewhat different situation. The present titleholder, A, received title by quit claim deed from X.[258] A now intends to grant by warranty deed to B.[259] The problem is this: Should the examiner require an affidavit from X stating that, to the best of his knowledge, there were no outstanding deeds, mortgages, or other claims affecting the title?[260] Both the new and the old standard answer "no" to this question.[261] Both standards state that B takes the property subject to prior equities and thus is not a bona fide purchaser for value without notice.[262] The standards differ, however, in further explaining this problem.

The old standard states that B is presumed to be a bona fide purchaser, and takes title free from outstanding equities of which he has no notice.[263] This reasoning was based upon *Raymond v. Morrison*,[264] which held that the burden of proof was upon the holder of the unrecorded instrument to disprove that the subsequent purchaser was a bona fide purchaser. This case, however, was subsequently overruled by *Young v. Hamilton*,[265] which held that the burden of proof was upon the subsequent grantee (B, in the example) to prove that he was the subsequent purchaser for valuable consideration without notice. The sixth edition omits the issue of presumption and, as a result, also omits all references to both of the cited cases.[266] This shift in the burden of proof does not affect the merchantability of title, however, as

254. IOWA CODE § 614.21 (1983) (originally enacted as 1946 Iowa Acts ch. 223).
255. *Id.*
256. G. MADSEN, *supra* note 61, § 13.7B, at 290.
257. Note, *The Iowa Title Standards I*, 2 DRAKE L. REV. 76, 83 (1953).
258. IOWA STANDARDS § 4.2 (6th ed. 1984).
259. *Id.*
260. *Id.*
261. *Compare id.* (6th ed. 1984) *with id.* (5th ed. 1974).
262. *Compare id.* (6th ed. 1984) *with id.* (5th ed. 1974).
263. *Id.* (5th ed. 1974).
264. 59 Iowa 371, 13 N.W. 332 (1882).
265. 213 Iowa 1163, 240 N.W. 705 (1932). *See also* Note, *supra* note 257, at 83.
266. *Compare* IOWA STANDARDS § 4.2 (6th ed. 1984) *with id.* (5th ed. 1974).

the new standard clearly states.[267]

It is important to note that the new standard has added a significant caveat. If B were buying on contract, he would be protected only to the extent that consideration has been paid.[268] This caveat embodies the principle that a contract purchaser is not considered a bona fide purchaser for value without notice except to the extent that consideration has been paid.[269] The principle produces two distinct results. First, the individual who proposes to buy under contract from a quit claim grantee has a problem not experienced by the purchaser who pays full consideration at the time of purchase.[270] Second, in the event that there was a third party, C, who had received a prior unrecorded instrument, C would prevail over B, who would be entitled only to the amount of consideration actually paid on the contract.[271]

The caveat also raises four important issues. First, what is the situation of the contract purchaser who has placed improvements upon the property without suspecting that a prior unrecorded interest exists? Is he entitled to be reimbursed for his improvements?[272]

Second, there is the problem of an unrecorded interest being placed of record subsequent to the contract. Thus, the purchaser would receive his deed after the recording of this other interest. Should the contract purchaser have the abstract extended and re-examined prior to paying off his contract in order to detect such interests?

Third, what happens if the buyer is in substantial compliance with the contract and then receives notice of the prior equity? This is still a gray area which needs further clarification.

Finally, contract sales have not really been confronted by the courts. The last Iowa case dealing with the matter was decided in 1954.[273] Since that time contract sales have become an accepted method of financing a real estate transaction. Inevitably, the courts will once again deal with this issue.

Although standard 4.3 has been revised, both the problem and the answer are essentially the same as in the fifth edition.[274] The problem itself is

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267. *Id.* (6th ed. 1984). *See also* L. SIMES & C. TAYLOR, *supra* note 12, § 22.3; Note, *supra* note 257, at 83.

268. IOWA STANDARDS § 4.2 comment (6th ed. 1984).

269. Bell v. Pierschbacker, 245 Iowa 436, 448-49, 62 N.W.2d 784, 791-92 (1954); Kitteridge v. Chapman, 36 Iowa 348, 350-51 (1873). *See also* 77 AM. JUR. 2D *Vendor and Purchaser* § 613 (1975); Annot., 109 A.L.R. 156 (1936); 92 C.J.S. *Vendor and Purchaser* § 323(b)(1) (1955).

270. Bell v. Pierschbacker, 245 Iowa at 449, 62 N.W.2d at 792.

271. *See* Kitteridge v. Chapman, 36 Iowa at 351. *See also* 92 C.J.S. *Vendor and Purchaser* § 362 (1955); Annot., 109 A.L.R. 156 (1936).

272. *See* Mack v. Tredway, 244 Iowa 240, 245, 56 N.W.2d 678, 680 (1953) (indicating reimbursement for improvements is possible); *see also* Note, *supra* note 257, at 84 (discussing the possibility of reimbursement for improvements).

273. Bell v. Pierschbacker, 245 Iowa 436, 62 N.W.2d 784 (1954).

274. *Compare* IOWA STANDARDS § 4.3 (6th ed. 1984) *with id.* (5th ed. 1974).

a direct question: "If a deed is given by the mortgagor to the mortgagee, what showing, if any, is required?"[275] The problem assumes that the conveyance from the mortgagor to the mortgagee was intended to be an absolute conveyance and not merely a continuation of the mortgage.[276] Essentially, this standard concerns a transaction that is usually referred to as a deed in lieu of foreclosure.[277]

The primary purpose of the standard is to warn the mortgagee that it is hazardous to accept a deed without more from the mortgagor.[278] A simple statement that the deed is in lieu of foreclosure is not enough to spell out the intention of the parties.[279] The courts have usually construed the cases in such a way that such conveyances, without more, are presumed to be merely a continuation of the security, which means that the grantor-mortgagor retains all rights of redemption.[280] If the parties intended otherwise, the record must so indicate.[281] As a practical matter, the courts' construction of the cases appears to be arbitrary. After all, the mortgagee gains nothing by receiving a deed if it is not what it appears to be.[282] The rule, however, seems to be followed by the majority of states and is derived from the common law.[283] The rationale behind the presumption apparently has been to protect the mortgagor from undue influence, unfair advantage, or fraud.[284]

Because the presumption is against merger, the burden of proof is upon the grantee-mortgagee to prove the transaction is a bona fide conveyance and not a security transaction.[285] This presumption is disproved only if the deed (or other properly executed instrument) clearly rebuts it.[286] Standard 4.3 sets out three statements that, if included in the deed, will at least minimally provide the required proof.[287] Of course, there may be other statements that are equally effective.

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275. *Id.* (6th ed. 1984).

276. *See id.*

277. R. KRATOVIL, MODERN MORTGAGE LAW AND PRACTICE § 29 (1972). For a general discussion of this situation, see Rendleman, *Absolute Conveyance as a Mortgage in Iowa*, 18 DRAKE L. REV. 197 (1969).

278. *See* P. BASYE, *supra* note 35, § 281.

279. *Id.; see also* R. KRATOVIL, *supra* note 277, § 29.

280. *See, e.g.*, Koch v. Wesson, 161 N.W.2d 173, 176 (Iowa 1968); Swartz v. Stone, 243 Iowa 128, 132, 49 N.W.2d 475, 477 (1951). *See also* 55 AM. JUR. 2D *Mortgages* § 1220 (1971).

281. R. KRATOVIL, *supra* note 277, §§ 34-35.

282. 55 AM. JUR. 2D MORTGAGES § 1229 (1971).

283. 2 R. PATTON & C. PATTON, PATTON ON LAND TITLES § 425 (2d ed. 1957) [hereinafter cited as PATTON & PATTON].

284. R. KRATOVIL, *supra* note 277, §§ 31, 33. *See also* 55 AM. JUR. 2D *Mortgages* §§ 1223-24 (1971).

285. IOWA STANDARDS § 4.3 (6th ed. 1984); 2 PATTON & PATTON, *supra* note 283, § 425.

286. *See* IOWA STANDARDS § 4.3 (6th ed. 1984).

287. *Id.* "The deed . . . must show that [it] is given in satisfaction of the mortgage, that it was an absolute conveyance not given as additional security and that the consideration was the release of the grantor from liability under the note." *Id.*

The only drawback to this standard is that it gives no consideration to the effect of our bankruptcy laws.[288] It is possible that a deed given in lieu of foreclosure will be set aside as a voidable preference or a fraudulent transfer.[289]

The sixth edition has transferred what was previously standard 4.4 to chapter nine, which deals with probate, since it deals with acquiring title from a surviving joint tenant.[290] Standard 4.4 is now a completely new standard. It is meant to resolve the frequent question of whether the nontitleholding spouse of a contract purchaser has such an interest in the property that the spouse must be served with a notice of forfeiture in case of default.[291]

Chapter 656 of the Iowa Code clearly requires service of notice upon the vendee or the successor in interest, as well as upon any mortgagee and all parties in possession.[292] Prior to *Eastman v. Defreese*,[293] many lawyers believed that the spouse, although not a vendee, had a dower and/or homestead interest that required that the spouse be served with notice of forfeiture. The cases cited as authority in standard 4.4, however, specifically state that dower does not create an interest that requires notice.[294] The homestead issue has not been raised, but the Title Standards Committee did not believe the homestead interest, if any, would survive a forfeiture.[295] A spouse, by virtue of that fact alone, does not need to be served with notice of forfeiture.[296]

It is important to note, however, that service may be necessary because the spouse has some other interest in the property.[297] For example, if the spouse is a party in possession, then service is required.[298]

Stray deeds, mortgages, and other instruments are always an annoyance to the title examiner. Although they rarely represent real dangers to the title, they cannot be ignored.[299] Standard 4.5 should be applied only when

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288. 11 U.S.C. § 548(a) (1982). *See, e.g.*, First Federal Savings & Loan Ass'n v. Hulm, 738 F.2d 323 (1984) (holding that bankruptcy court must conduct evidentiary hearing on whether price provided reasonably equivalent value in exchange).

289. Jones, *Structuring the Deed in Lieu of Foreclosure Action*, 19 REAL PROP., PROB. & TRUST J. 58, 59-64 (1984).

290. *See* IOWA STANDARDS ch. 9 (6th ed. 1984).

291. *Id.* § 4.4.

292. IOWA CODE § 656.2 (1983).

293. 235 Iowa 488, 17 N.W.2d 104 (1945).

294. Hansen v. Chapin, 232 N.W.2d 506, 510 (Iowa 1975); Eastman v. Defreese, 235 Iowa at 491, 17 N.W.2d at 105.

295. *See* IOWA STANDARDS § 4.4 (6th ed. 1984).

296. *See id.*

297. *See id.* comment.

298. *Id.*; IOWA CODE § 656.2 (1983).

299. *See* Clark v. Holland, 72 Iowa 34, 36, 33 N.W. 350, 351 (1887) (purchaser's knowledge of possible existence of mortgage was sufficient to put him upon inquiry and charge him with knowledge of outstanding mortgage). *See also* P. BASYE, *supra* note 35, § 137; 2 PATTON &

the parties in the stray instruments are truly strangers and are not actually interested parties in the chain of title.[300] The title examiner can determine whether parties are truly strangers by asking for a corrective instrument.[301] Usually, a stranger to the title will not refuse.

The stray instrument merely creates the impression that the stranger has some interest or claim in the property being examined. What is necessary in order to dispel this impression? In the sixth edition, standard 4.5 gives a more detailed answer than was given in the fifth edition.[302] Although the standard still attempts to minimize what must be done to correct this problem, it requires enough to reassure the examining attorney that no real claim exists.

Standard 4.5 requires that an affidavit[303] or disclaimer from the grantee or the mortgagor, as well as a release by the mortgagee, be produced.[304] If it is not possible to obtain these documents, then an affidavit of someone having personal knowledge of the facts is acceptable.[305]

It is important to remember, however, that a showing of this type will only correct problems of the property that is being examined. The standard does nothing to correct the title problems of the other parties involved. If a stray instrument shows up due to a misdescription, the affidavit or disclaimer will do nothing to correct that misdescription.

Wild instruments are generally not found under our indexing system, which follows the transfer of land by titleholder.[306] Only a system that utilizes tract books, which list all matters of record according to the legal description of the land, can regularly pick up wild instruments.[307] Simes and Taylor state that the title is not rendered unmerchantable by means of such stray instruments.[308] They even give examples of judgments existing against the holders of stray instruments and maintain that they are not liens.[309] The Iowa standard indicates that judgments against holders of stray instruments are not liens but only if there is some assurance that a mistake was made and that the mistake has been corrected.[310]

Standard 4.6 deals with a single very narrow problem—whether a mortgage release is acceptable if the only error on it is the date of the original

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PATTON, *supra* note 283, §§ 596, 601.

300. IOWA STANDARDS § 4.5 (6th ed. 1984).

301. *See id.*

302. *Compare id.* (6th ed. 1984) *with id.* (5th ed. 1974).

303. The Code provides for an affidavit explanatory of title. IOWA CODE § 558.8 (1983).

304. IOWA STANDARDS § 4.5 (6th ed. 1984).

305. *Id.*

306. IOWA CODE §§ 558.51-.54 (1983).

307. G. MADSEN, *supra* note 61, § 1.5, at 25-26.

308. L. SIMES & C. TAYLOR, *supra* note 12, § 3.3. This treatise suggests that no corrective action is required under the circumstances described in the problem. *Id.*

309. *Id.*

310. *See* IOWA STANDARDS § 4.5 (6th ed. 1984).

mortgage.[311] The standard clearly states that this error can be disregarded as long as the book and page of record are correct.[312] Therefore, a mortgage release would be unacceptable if it referred to the wrong volume or page or, by extension, the wrong date of recording, or if it included an inaccurate name.

Iowa's standard is much more stringent than that suggested in *Model Title Standards* by Simes and Taylor.[313] Standard 16.4 thereof reads as follows:

> A discharge of a mortgage is sufficient notwithstanding errors in dates, amounts, book and page of record, property descriptions, names and position of parties, and other information, if, considering all circumstances of record, sufficient data are given to identify with reasonable certainty the security interest sought to be discharged. A quit claim deed is sufficient as a discharge if, from circumstances of record, it can be inferred with reasonable certainty that discharge was intended.[314]

In the comment to the proposed standard, Simes and Taylor also state:

> In the usual case, a mortgage discharge or release instrument merely evidences a termination of the security interest which has already occurred by reason of payment. Hence the discharge and its record should not be held to the more exacting standards appropriate for operative instruments. In any case, identification of the mortgage discharged or released, rather than description of the parties, obligation, or property, is the important matter.[315]

The Iowa Title Standards Committee, however, was not willing to extend standard 4.6 to cover other errors.

Standard 4.7 has been modified only in the comment.[316] The problem is this: Is a contract forfeiture valid if notice is served upon one under a legal disability?[317] Do the Iowa Rules of Civil Procedure 13[318] and 14[319] apply? The underlying concern is whether the legal disability of record renders the title unmerchantable.

The notice of forfeiture is valid because, as the standard points out, chapter 656 of the Iowa Code sets out the procedure to be followed in such

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311. *Id.* § 4.6.

312. *Id.*

313. *Compare id. with* L. SIMES & C. TAYLOR, *supra* note 12, § 16.4.

314. L. SIMES & C. TAYLOR, *supra* note 12, § 16.4.

315. *Id.* comment.

316. *Compare* IOWA STANDARDS § 4.7 (6th ed. 1984) *with id.* (5th ed. 1974).

317. *Id.* (6th ed. 1984).

318. Rule 13 makes it unlawful to secure judgment against an incompetent unless a defense has been presented. IOWA R. CIV. P. 13.

319. Rule 14 provides for the appointment of a guardian ad litem on behalf of an incompetent falling within Rule 13. IOWA R. CIV. P. 14.

cases.[320] It is the sole authority for contract forfeitures, and in these cases it supersedes other sections of the Code, unless they are specifically referred to.[321] For example, under the statute, notice must be served in the same way as is provided for the service of original notices.[322]

Former standard 4.8 dealt with whether a description of grantors and mortgagors of joint property should include more than a recitation of their marital status, such as language describing them as "joint tenants."[323] The standard has been omitted since this is no longer considered a problem. Standard 4.8 in the sixth edition is a slightly reworded version of what was standard 4.9 in the fifth edition.[324] It is advisory in nature.

The problem presented by new standard 4.8 is the use of the terms "trustee" or "as trustee" following the name of the grantee in a deed when neither the nature of the trust nor the name of the cestui que trust is given.[325] The standard presupposes that the trust instrument creating the trust is not of record.[326] As the standard explains, such circumstances should prompt the examiner to inquire into the nature of the trust and determine the authority of the trustee.[327] *Zion Church v. Parker*,[328] cited as authority in standard 4.8, clearly states that anyone dealing with such trustee is bound at their peril to determine the extent of the trustee's powers.[329]

Standard 4.9 concerns the termination of a joint tenancy in property held by husband and wife.[330] The problem is this: One spouse conveys his or her interest to a third party, a straw man, who then reconveys to the same spouse.[331] Does this destroy the joint tenancy between the spouses, and transform their title into tenancy in common?[332]

Generally speaking, a severance of joint tenancy can be accomplished in this manner,[333] but because the question addressed in standard 4.9 involves a husband-wife situation, it is controlled by section 561.13 of the Iowa

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320. IOWA STANDARDS § 4.7 (6th ed. 1984). *See* IOWA CODE ch. 656 (1983).
321. IOWA CODE § 656.1 (1983).
322. *Id.* § 656.3. *See also* G. MADSEN, *supra* note 61, § 20.4(D).
323. IOWA STANDARDS § 4.8 (5th ed. 1974).
324. *Compare id.* (6th ed. 1984) *with id.* § 4.9 (5th ed. 1974).
325. *Id.* § 4.8 (6th ed. 1984). It is important to remember that this standard refers to a trust deed and not a deed of trust. A deed of trust refers to a form of mortgage. IOWA CODE § 654.2 (1983).
326. IOWA STANDARDS § 4.8 (6th ed. 1984).
327. *Id. See also* P. BASYE, *supra* note 35, § 21; L. SIMES & C. TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION 107 (1960) [hereinafter cited as THE IMPROVEMENT OF CONVEYANCING].
328. 114 Iowa 1, 86 N.W. 60 (1901).
329. *Id.* at 9, 86 N.W. at 63.
330. IOWA STANDARDS § 4.9 (6th ed. 1984).
331. *Id.*
332. *Id.*
333. G. MADSEN, *supra* note 61, § 3.1(C-4); 1 PATTON & PATTON, *supra* note 283, § 236, at 628.

Code.[334] Under this section, if the property is the homestead, then both spouses must execute the same or like instrument.[335] If they do not, then the conveyance is not valid and the transaction is a nullity.[336]

On the other hand, if such a reconveyance has occurred, and the spouses want to jointly convey the property to another party, the title remains merchantable.[337] This is true whether or not the property was the homestead at the time of the original conveyance because it would not then matter how the parties held title.[338] The void conveyance could create a problem, but only if, subsequent to the conveyance, one of the spouses died and the property was treated as if it had been held in tenancy in common.

Standard 4.10 is a slightly revised version of standard 4.11 of the fifth edition.[339] It is concerned with a contract sale by individuals holding property in joint tenancy.[340] If one of the joint tenants dies before title is conveyed to the purchaser, can the remaining joint tenant(s) convey title, or has the act of entering into the contract caused a severance of the joint tenancy?[341] If the latter has happened, then the legal representative must convey the interest of the deceased joint tenant.[342]

This situation results from the doctrine of equitable conversion.[343] It is not a new concept[344] and is applied in situations other than those involving contracts.[345] In this situation, the doctrine is applied when parties holding title as joint tenants contract to sell to a third party.[346] This causes a severance of the joint tenancy; the end result is an equitable conversion that transforms the interest in realty into personalty.[347]

The doctrine produces both good and bad results. One good result is that judgments obtained against the vendors after a contract is entered into

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334. IOWA CODE § 561.13 (1983).

335. *Id.*

336. *Id. See also* Kubicek & Kubicek, *Selected Topics in Examination of Abstracts of Title*, 26 DRAKE L. REV. 1, 36 (1976).

337. *See* IOWA STANDARDS § 4.9 (6th ed. 1984).

338. *See id.*

339. *Compare id.* § 4.10 (6th ed. 1984) *with id.* § 4.11 (5th ed. 1974).

340. *Id.* § 4.10 (6th ed. 1984).

341. *Id.*

342. *See id.*

343. For an explanation of the doctrine of equitable conversion, see 27 AM. JUR. 2D *Equitable Conversion* §§ 1, 11 (1966) and 18 C.J.S. *Conversion* § 9(a) (1939).

344. For early cases discussing the doctrine of equitable conversion, see In re Estate of Miller, 142 Iowa 563, 565, 119 N.W. 977, 978 (1909); Pierson v. David, 1 Iowa 23, 28 (1855).

345. *See* Ingraham v. Chandler, 179 Iowa 304, 161 N.W. 434 (1917); Beaver v. Ross, 140 Iowa 154, 118 N.W. 287 (1908). *See also* IOWA CODE § 633.384 (1983).

346. *See, e.g*, In re Estate of Baker, 247 Iowa 1380, 1388, 78 N.W.2d 863, 867 (Iowa 1956). *See also* G. MADSEN, *supra* note 61, § 1.1(C).

347. *See, e.g.*, In re Estate of Baker, 247 Iowa at 1388, 78 N.W.2d at 868; In re Estate of Sprague, 244 Iowa 540, 543, 57 N.W.2d 212, 214 (1953); Wood v. Schwartz, 212 Iowa 462, 470, 236 N.W. 491, 494 (1931).

cannot become liens against the property.[348] As stated earlier, the vendors no longer own real property but only personalty, and liens do not automatically attach to personalty.[349]

As the standard indicates, however, the doctrine explains the answer to the problem.[350] The contract destroys the joint tenancy of the vendors.[351] Thus, if one of the joint tenants dies, the successor in interest of the deceased vendor must give title for that interest.[352] There will not be a death tax problem since a lien for those taxes cannot attach to what has become personalty.[353]

It is possible, however, for the contract to contain a clause expressly preserving the joint tenancy of the vendors, and in that case, the surviving joint tenant(s) can give title in fulfillment of the contract.[354] Furthermore, nearly all real estate sales contract forms now in use in Iowa contain this clause.[355] Scriveners who prepare their own contracts, rather than using one of the the printed forms, should insert a clause preserving the joint tenancy provided, of course, that is how the vendors hold the property and wish to maintain it.

Previous standard 4.12,[356] the new 4.11, asks if the title examiner should demand any showing if a deed was not recorded until many years after its execution.[357] The underlying concern is whether a lapse of time makes the delivery of the deed suspect.[358] Without delivery, a deed cannot be considered a valid link in the chain of title.[359]

The standard indicates that a simple lapse of time does not make the title unmerchantable.[360] Once the deed has been filed for record, there is a presumption of delivery no matter when it was executed.[361] The new standard presumes delivery even though the deed was recorded after the gran-

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348. *See, e.g.*, Woodward v. Dean, 46 Iowa 499, 500 (1877). *See also* 2 PATTON & PATTON, *supra* note 283, § 571; 18 C.J.S. *Conversion* § 45 (1939).

349. Beatty v. Cook, 192 Iowa 542, 544, 185 N.W. 360, 361 (1921). *See also* IOWA CODE § 624.23 (1983).

350. *See* IOWA STANDARDS § 4.10 (6th ed. 1984).

351. *See id.*

352. G. MADSEN, *supra* note 61, § 1.1(C).

353. *Id.* §§ 11.1(C)-(E), 11.2(5), 18.2(D); IOWA CODE § 450.7 (1983); I.R.C. § 6324(a) (1984).

354. IOWA STANDARDS, § 4.10 (6th ed. 1984).

355. *See, e.g.*, Iowa State Bar Form 21, Real Estate Contract—Installments, para. 10 (1983).

356. IOWA STANDARDS § 4.12 (5th ed. 1974).

357. *Id.* § 4.11 (6th ed. 1984).

358. *See id.*

359. County of Worth v. Jorgenson, 253 N.W.2d 575, 578 (Iowa 1977); Stow v. Miller, 16 Iowa 460, 462 (1864). *See also* P. BASYE, *supra* note 35, § 13; 23 AM. JUR. 2D *Deeds* § 120 (1983).

360. IOWA STANDARDS § 4.11 (6th ed. 1984).

361. Dyson v. Dyson, 237 Iowa 1285, 1287, 25 N.W.2d 259, 260 (1946). *See also* P. BASYE, *supra* note 35, § 13; THE IMPROVEMENT OF CONVEYANCING, *supra* note 327, at 59, 63; 1 PATTON & PATTON, *supra* note 283, § 20; 23 AM. JUR. 2D *Deeds* § 137 (1983).

tor's death.[362]

The standard suggests, however, that there may be other matters that "warrant inquiry into the question of delivery."[363] There are at least three instances that should prompt the examiner to question the validity of the deed. The first case bringing the validity of the deed into question is the existence of a later instrument such as a deed, mortgage, or contract from the same grantor to a third party. If the instrument was dated after the date of execution of the suspect deed, it would indicate that the first deed was not delivered. The second situation arises when a will is executed after the date of the suspect deed and such will specifically devises the property described in the deed. This again should cause the examiner to seek further information regarding the delivery of the deed. The third instance involves matters outside the record.[364] What if the examiner is aware of certain statements made by the grantor or other parties that do not appear on the record?[365] What if possession has been inconsistent with a questionable deed?[366] Within the current legal climate, a title examiner should not ignore such personal knowledge even though it is not a matter of record. To disregard this type of information could invite a charge of malpractice. Nevertheless, if one of these situations is not present, a title is not generally rendered unmarketable merely because the examiner thinks something is suspect.[367] For example, if a judgment is entered against the grantor, or if the grantor dies, between the date of the instrument and the date of recording, the title examiner should not be concerned with the validity of the transaction.

The Title Standards Committee attempted to design this standard in such a way as to alleviate any fear of trickery. There can be no assumption of collusion between the parties to the instrument unless there are other indications of non-delivery.[368] *Dyson v. Dyson*[369] provides an example. In this case the court stated that the Iowa rule is that when "a deed has been signed, acknowledged and recorded (and here it was recorded after death), it is assumed to have been properly delivered and one who attacks the deed assumes the burden to overcome the presumption of delivery."[370] The widow in this case could not overcome the presumption of delivery; thus, the court held that the delivery was valid.[371]

Chapter four is intended to guide the title examiner in dealing with

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362. IOWA STANDARDS § 4.11 (6th ed. 1984).
363. *Id.*
364. 23 AM. JUR. 2D *Deeds* §§ 168-70 (1983).
365. *Id.* § 168.
366. *Id.* § 162.
367. *Id.* § 171.
368. *See, e.g.*, Dyson v. Dyson, 237 Iowa 1285, 25 N.W.2d 259 (1946).
369. *Id.*
370. *Id.*
371. *Id.*

questions concerning deeds and contracts.[372] The examiner should particularly take note of the changes that have been made in the sixth edition, such as the revision of standard 4.2 dealing with quit-claim deeds[373] and the addition of standard 4.4 concerning contract forfeiture by spouses.[374] Additionally, the close relationship between this chapter and chapter seven on mortgages[375] should prompt the careful examiner to refer to chapter four when dealing with mortgage instruments. Finally, the case law and statutes upon which these standards are premised should provide additional guidance in carrying out the title examination.

VI. Chapter Five: Husband and Wife

Chapter five of the Iowa Land Title Examination Standards, entitled "Husband and Wife," deals with title considerations occurring because marital status is not properly stated in deeds, other instruments of conveyance and encumbrance, or because spouses have not relinquished homestead or dower interests.[376] The six standards contained in chapter five were generated by inquiries presented to the Title Standards Committee of the Iowa State Bar Association over the years. The standards have evolved from live issues between title practitioners. The chapter five standards are the Committee's practical solutions to title irregularities in this area. Chapter five in the sixth edition has not changed significantly from prior editions.[377] Accordingly, this section of the article will be principally a review of and reintroduction to the standards. It will discuss the circumstances generating the issues addressed by the various standards.

Standard 5.1 contains no substantive change from the fifth edition.[378] This standard deals with title objections that arise when the granting clause or acknowledgment in a deed, encumbrance, or other instrument names a spouse of the grantor different than a spouse named earlier in the chain of title.[379] The question is whether a grantor's newly designated spouse may be deemed to have properly joined in the instrument by the simple act of reciting his or her name.[380]

The situation is illustrated by the following series of hypothetical abstract entries:

> Entry No. 10: Deed to John Smith and Mary Smith, husband and wife.
> Entry No. 30: Deed from John Smith and Elizabeth Smith, his wife, to

372. Iowa Standards ch. 4 (6th ed. 1984).
373. *Id.* § 4.2.
374. *Id.* § 4.4.
375. *Id.* ch. 7.
376. *Id.* ch. 5.
377. *Compare id.* (6th ed. 1984) *with id.* (5th ed. 1974).
378. *Compare id.* § 5.1 (6th ed. 1984) *with id.* (5th ed. 1974).
379. *Id.* (6th ed. 1984).
380. *Id.*

third-party buyer.

The question presented in this situation is whether the recitation in the deed at Entry No. 30 may be relied upon to convey the spousal interests of John Smith's wife at the time the property is conveyed to a third-party buyer.[381] According to standard 5.1, the recitation that Elizabeth is the wife of the grantor is sufficient.[382]

In considering what standard 5.1 accomplishes, it is instructive to consider what it is not intended to accomplish as well. The standard does not assist the title examiner in charting the interest of the grantor's former wife, Mary Smith, shown in the abstract at an earlier entry. This pattern should alert the title examiner to the need of determining where the interest that Mary Smith acquired as grantee at Entry No. 10 rests. This factual pattern could have resulted from several types of situations. Perhaps the grantor was divorced from his first wife. Other entries of the abstract must be reviewed to show disposition of the property. Possibly, the former spouse died and the title passed to John Smith by will, intestate succession, or survivorship under a joint tenancy arrangement. Additional entries must be scrutinized to make this determination.

Standard 5.2 contains no substantive change from the fifth edition.[383] This standard deals with the question of determining whether the marital status of the grantor shown for the transfer under consideration can be relied upon when it is different than that shown at earlier entries in the chain of title.[384] This standard may be illustrated by the following hypothetical abstract entries:

> Entry No. 49: Deed to John Jones and Mary Jones, husband and wife.
> Entry No. 59: Deed from John Jones, a single person, to a third-party buyer.

The issue presented is whether the deed reciting John Jones to be a single person is sufficient to show John Jones' marital status.[385] According to standard 5.2, the examiner need not look behind the recitation in the deed at the time John Jones conveys as a single person.[386]

It should be noted that this standard will be of no assistance to the title examiner in determining the disposition of Mary Jones' interest in the property. Additional abstract entries must be scrutinized to determine the status of her claim of title. She may have died, passing her interest by will, intestate succession, or survivorship. She may have been divorced from John, and through dissolution proceedings, she may have passed her title to John. It is

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381. *Id.*
382. *Id. See also* L. Simes & C. Taylor, *supra* note 12, §§ 9.1-.3, at 53.
383. *Compare* Iowa Standards § 5.2 (6th ed. 1984) *with id.* (5th ed. 1974).
384. *Id.* (6th ed. 1984).
385. *Id.*
386. *Id. See also* Keefe v. Cropper, 196 Iowa 1179, 194 N.W. 305 (1923).

necessary for the title examiner to go further than the standard in scrutinizing the situation that generated the title standard.

Standard 5.3 was drafted by the Committee to provide guidance when the marital status of the grantor does not appear in the deed and no spouse is joined in the deed.[387] The root of the problem under these circumstances is that the examiner is unable to determine whether there is a spousal interest that must be conveyed or released, or whether a non-signing spouse has failed to release his or her dower or homestead rights in the property being conveyed.[388]

When this factual pattern is encountered, the title examiner must determine whether the grantor was married or unmarried at the time of execution and delivery.[389] This determination presents three factual situations: (1) the grantor was unmarried at the time of execution and delivery; (2) the grantor was married at the time of execution and delivery, but the property was not homestead property; and (3) the grantor was married at the time of execution and delivery, and the property was homestead property.[390]

The first two fact patterns set out above present no complications. If the grantor was unmarried at the time of execution and delivery, and if there was no recitation of marital status in the deed, standard 5.3 requires the recording of an affadavit establishing that fact.[391] If the property involved is not homestead property and the grantor was married at the time of execution and delivery, but the spouse predeceased the grantor, the standard requires the recording of an affadavit establishing that the spouse predeceased the grantor and that the property was not the homestead.[392] If, however, the grantor's spouse is alive at the time of the title objection, a further conveyance from the non-signing spouse should be obtained and recorded.[393]

In the third factual setting presented above, that is, where the spouse was alive at the time of execution and delivery and the property was the homestead,[394] section 561.13 of the Iowa Code governs the situation.[395] This section provides: "A conveyance or encumbrance of, or contract to convey or encumber the homestead, if the owner is married, is not valid, *unless and until* the spouse of the owner executes the same or a like instrument. . . ."[396] In order to protect the homestead interest of both spouses, the homestead cannot be conveyed or encumbered unless both spouses sign the instru-

387. IOWA STANDARDS § 5.3 (6th ed. 1984).
388. *See id.*
389. *Id.*
390. *Id.*
391. *Id.*
392. *Id.*
393. *Id.*
394. *Id.*
395. IOWA CODE § 561.13 (1983).
396. *Id.* (emphasis added).

ment.[397] Consequently, a conveyance of the homestead where one spouse has not signed the instrument is not valid.[398] The situation may be cured by both spouses signing a new document properly prepared.[399] Alternatively, an instrument of conveyance or encumbrance signed by the non-signed spouse will remedy the situation.[400] This alternative resulted from a legislative change to Iowa Code section 561.13 occurring in 1981.[401]

Formerly, section 561.13 provided: "No conveyance or encumbrance of, or contract to convey or encumber the homestead if the owner is married, is valid, unless the husband and wife *join in execution of the same joint instrument. . . .*"[402] Under the former statute, an attempted conveyance of homestead property by one spouse alone was a nullity.[403] The only way to cure the situation was for both spouses to sign the same or a replacement instrument.[404] Under the amendment, the invalid conveyance may be corrected by obtaining a subsequent conveyance from the non-signing spouse *or* from his or her attorney in fact through power of attorney.[405] This legislative change was enacted to facilitate transfer of title where difficulties were encountered in obtaining both signatures on the same joint instrument.[406]

A question still exists among Title Standards Committee members as to whether the amendment to section 561.13 is prospective or retroactive.[407] The statute is unclear on whether a further conveyance from the non-signing spouse or by his or her attorney in fact in a separate instrument will cure the problem if the transaction occurred after January 1, 1970, but prior to the effective date of the amendment to the statute.[408] The Title Standards Committee, therefore, does not consider the effect of the amendment to section 561.13 on conveyances of encumbrances of homesteads prior to the effective date of the amendment in 1981.[409] Further legislation or court interpretation is necessary before the Committee will take a position on this issue.

A final note concerning standard 5.3 is of some importance. The problem addressed by the standard raises valid title issues only if the transaction occurred after January 1, 1970.[410] Prior to this date, failure to join the

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397. *Id.*
398. *Id.*
399. *Id. See also* IOWA STANDARDS § 5.3 (6th ed. 1984).
400. IOWA CODE § 561.13 (1983). *See also* IOWA STANDARDS § 5.3 (6th ed. 1984).
401. Section 561.13 was amended by 1981 Iowa Acts ch. 181, § 1.
402. IOWA CODE § 561.13 (1981) (emphasis added).
403. *Id.*
404. *Id.*
405. *Id.* (1983) (as amended).
406. *See id.*
407. *See* IOWA STANDARDS § 5.3 comment (6th ed. 1984).
408. *See* IOWA CODE § 561.13 (1983) (as amended).
409. IOWA STANDARDS § 5.3 comment (6th ed. 1984).
410. *Id.* See IOWA CODE § 614.15 (1983), which provides:
In all cases where the holder of legal or equitable title or estate to real estate

spouse in the deed or to recite the grantor's marital status is not objectionable unless suit for recovery was brought to recover the interest within one year after July 1, 1980.[411] Section 614.15 of the Iowa Code[412] is the governing law that dictates this result.

Standard 5.4 contains no substantive change from the fifth edition.[413] The essence of standard 5.4 may be illustrated by examining a simple hypothetical abstract scenario as follows:

> Entry No. 10: Deed to John Doe and Mrs. John Doe.
> Entry No. 29: Deed from John Doe and Mary Doe, husband and wife, to a third-party buyer.

The question presented is whether further identity of Mrs. John Doe, grantee at the earlier abstract entry, is necessary.[414] Standard 5.4 answers the question in the affirmative.[415] A showing by affidavit that Mary Doe was wife of John Doe at the date of execution and delivery of the earlier deed must be obtained and recorded.[416] If this was not in fact the case, Mrs. John Doe would have to be otherwise identified and proceedings undertaken to show whether her interest in the property, received at the earlier conveyance, was vested at the time of abstract examination.

Standard 5.5 involves circumstances where the form of the deed in making a conveyance does not contain a relinquishment of homestead by the spouse who has signed it but who is not named in the granting clause.[417] In other words, a spouse has signed the deed without relinquishing his or her homestead interests.[418] The situation probably occurs because the parties chose not to use a printed deed form. Virtually all Iowa State Bar Association forms contain a relinquishment of homestead and dower interests.[419]

If the property was not homestead property, an affidavit of this fact should be obtained and recorded.[420] If the property was a homestead, the examiner should look to standard 5.3 and obtain a new deed from both the grantor and the grantor's spouse or an additional conveyance from the omit-

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> situated within this state, prior to January 1, 1970, conveyed the real estate or any interest in the real estate by deed, mortgage, or other instrument, and the spouse failed to join in the conveyance, the spouse or the heirs at law, personal representatives, devisees, grantees, or assignees of the spouse are barred from recovery unless suit is brought for recovery within one year after July 1, 1980. . . .

Id.

411. IOWA CODE § 614.15 (1983).
412. *Id.*
413. *Compare* IOWA STANDARDS § 5.4 (6th ed. 1984) *with id.* (5th ed. 1974).
414. *Id.* (6th ed. 1984).
415. *Id.*
416. *Id. See also* L. SIMES & C. TAYLOR, *supra* note 12, § 5.8, at 39.
417. IOWA STANDARDS § 5.5 (6th ed. 1984).
418. *See id.*
419. *See, e.g.*, Iowa State Bar Form 1.2, Warranty Deed (January 1981).
420. IOWA STANDARDS § 5.5 (6th ed. 1984).

ted spouse or his or her attorney in fact.[421] The failure to relinquish a dower or homestead interest is objectionable only if the examiner is confronted with the omission in a transaction occurring after January 1, 1970.[422] Failure to release dower or homestead prior to that time is not objectionable by virtue of Iowa Code section 614.15.[423] Homestead and dower claims based on transactions prior to that date are barred unless suit for recovery of this interest was brought within one year after July 1, 1980.[424]

Standard 5.6 contains no substantive change from the fifth edition.[425] This standard addresses the question of whether one spouse may grant the other spouse authority to release a dower interest via a power of attorney.[426] Standard 5.6 recognizes the long standing principle that one spouse may not act as attorney in fact for the other in releasing dower.[427] In addition, the examiner must remain aware of Iowa Code section 614.15.[428] Dower claims are unenforceable if the conveyance occurred prior to January 1, 1970, unless suit for recovery of the interest was brought one year after July 1, 1980.[429] Thus, this fact pattern should serve as the basis for a title objection only if Iowa Code section 614.15 does not bar a potential claim.[430]

There have been few substantive changes made to chapter five of the new Title Standards. The examiner, however, should review this chapter to determine what interests can and what interests cannot be resolved by looking to these standards. The examiner should be aware of the possibility of homestead interests affecting marketability of title.[431] The chapter five standards, as well as relevant Iowa Code sections, should guide the examiner when homestead interests present a problem.[432] As a final caveat, the examiner should take note of the yet unresolved issue of whether Iowa Code section 561.13 is prospective or retroactive.[433]

VII. Chapter Six: Judicial Proceedings

Six substantive amendments were made to chapter six, including the elimination of two standards, the reversal of the answers in two standards,

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421. *Id.* § 5.3. *See also* Iowa Code § 561.13 (1983).
422. *See* Iowa Code § 614.15 (1983).
423. *Id.*
424. *Id.*
425. *Compare* Iowa Standards § 5.6 (6th ed. 1984) *with id.* (5th ed. 1974).
426. *Id.* (6th ed. 1984).
427. *See id.* This principle is discussed in *Swartz v. Andrews*, 137 Iowa 261, 114 N.W. 888 (1908), which standard 5.5 cites as authority.
428. Iowa Code § 614.15 (1983).
429. *Id. See also* Iowa Standards § 5.5 (6th ed. 1984).
430. Iowa Standards § 5.6 (6th ed. 1984).
431. *See supra* notes 387-407 and accompanying text.
432. *See supra* notes 387-407 and accompanying text.
433. *See supra* notes 407-09 and accompanying text.

and the addition of two new standards.[434] The first deletion was standard 6.1 of the fifth edition.[435] It dealt with the jurisdictional problem presented by misdescription of the real estate and mortgage recording information in an original notice of a foreclosure proceeding.[436] Basing its authority on two old cases,[437] the standard provided that the original notice was sufficient even if it gave an incorrect description of the land and gave the wrong book and page of record of the mortgage, so long as it otherwise correctly described the mortgage.[438]

Standard 6.1 was eliminated because Iowa Rule of Civil Procedure 49 does not require the original notice to contain any information described in former problem 6.1.[439] Likewise, published original notice need not contain the information described in former problem 6.1.[440] Iowa Rule of Civil Procedure 50 provides that when service of original notice is by publication, the original notice shall "contain a general statement of the claim or claims and the relief demanded, and, if for money, the amount thereof" in addition to the information required by Rule of Civil Procedure 49.[441] The form of original notice for publication refers to Rule of Civil Procedure 50.[442] Therefore, Iowa lawyers have generally not encountered former problem 6.1.

The second deletion made by the Title Standards Committee was of standard 6.6 of the fifth edition.[443] This standard indicated the necessity of obtaining a discharge of a bail bond by the court even after a defendant had appeared and been sentenced because the Iowa Code did not provide for the automatic discharge of the bond upon sentence.[444] A separate order of court was required to release the bond.[445] The separate court order requirement was eliminated by recent legislation.[446] New Iowa Code section 811.10 pro-

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434. *Compare* IOWA STANDARDS ch. 6 (6th ed. 1984) *with id.* (5th ed. 1974).
435. *Id.* § 6.1 (5th ed. 1974).
436. *Id.*
437. *See* Fleming v. Hager, 121 Iowa 205, 96 N.W. 752 (1903); Lindsey v. Delano, 78 Iowa 350, 43 N.W. 218 (1889).
438. IOWA STANDARDS § 6.1 (5th ed. 1974).
439. Iowa Rule of Civil Procedure 49(a) provides:

> The original notice shall contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to serve, and within a reasonable time thereafter file, a written special appearance, motion or answer, and shall notify defendant that in case of defendant's failure to do so judgment by default will be rendered against the defendant for the relief demanded in the petition.

IOWA R. CIV. P. 49a.
440. *See* IOWA R. CIV. P. 50.
441. *Id.*
442. IOWA R. OF CT., app. of forms, Form 4, Form of Original Notice for Publication.
443. *See* IOWA STANDARDS § 6.6 (5th ed. 1974).
444. *Id.*
445. *Id.*
446. 1984 Iowa Legis. Serv. No. 4, at 11 (West) (to be codified at IOWA CODE § 811.10).

vides for automatic discharge of a surety bail bond when one of the following occurs: "dismissal of the charges against the defendant"; "judgment of acquittal"; "judgment of conviction"; or "entry of an order . . . which, by its terms, continues the case against the defendant for a period exceeding six months."[447] Since a separate court order discharging the surety is not required under the new statute, a title standard dealing with the subject was no longer necessary.

Standard 6.1 of the sixth edition addresses virtually the same problem as was addressed in standard 6.2 of the fifth edition.[448] The committee, however, reversed its answer.[449] In the fifth edition, standard 6.2 provided that it was not necessary to name the spouse of the owner as a party defendant in a foreclosure proceeding.[450] The prior standard, however, dealt only with the problem of dower.[451] If the spouse was not named, a showing by affidavit that the owner was unmarried or still living at the time of the sheriff's sale was required.[452] Such an affidavit would show that the problem of dower either did not exist or that the inchoate right of dower had not vested at the time of the sheriff's sale. The standard provided that the same rule applied to forfeiture of real estate contracts under chapter 656 of the Iowa Code.[453]

The prior standard ignored the homestead rights of the owner's spouse addressed by the Iowa Supreme Court in *Francksen v. Miller*.[454] In that case, following a mechanic's lien foreclosure decree, the purchaser at the sheriff's sale brought an action in forcible entry and detainer for possession of the 100 acres purchased.[455] The defendant, the former owner, argued that the foreclosure decree was void since his wife had not been joined as a party defendant in the foreclosure litigation and her homestead rights had not been adjudicated.[456] The supreme court held that the foreclosure decree against the defendant was not void.[457] Nevertheless, the supreme court held that the wife's rights with respect to the forty acres designated as the homestead had not been adjudicated.[458] The plaintiff was granted possession of the sixty acres that were not the homestead, but the judgment was reversed and the case remanded for determination of the wife's homestead rights to the forty acres.[459]

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447. *Id.*
448. *Compare* IOWA STANDARDS § 6.1 (6th ed. 1984) *with id.* § 6.2 (5th ed. 1974).
449. *Compare id.*] 6.1] (6th ed. 1984) *with id.* § 6.2 (5th ed. 1974).
450. *Id.* § 6.2 (5th ed. 1974).
451. *Id.*
452. *Id.*
453. *Id. See* IOWA CODE ch. 656 (1983).
454. 297 N.W.2d 375 (Iowa 1980).
455. *Id.* at 376.
456. *Id.*
457. *Id.* at 377.
458. *Id.*
459. *Id.* at 379.

In the sixth edition, standard 6.1 provides that it is necessary to name the owner's spouse in order to adjudicate the homestead and dower rights of the spouse.[460] The answer is qualified with respect to dower.[461] As in the old standard, it provides that if the spouse is not named, a showing must be made by affidavit that the owner was unmarried or still living at the time of the sheriff's sale.[462]

The provision in the old standard 6.2 dealing with naming the spouse in the notice of forfeiture of a real estate contract has been made a separate problem in chapter four.[463] The committee felt this subject was more appropriate in the chapter of the title standards dealing with contracts.

In standard 6.4 of the sixth edition, the committee changed the answer to problem 6.5 of the fifth edition.[464] Former standard 6.5 provided that the failure to appoint a guardian ad litem for a minor or incompetent defendant was not a jurisdictional defect if the time for direct attack upon the judgment had expired.[465] The committee reversed its answer based upon a re-evaluation of the holdings of the cases cited to support the old standard[466] and based upon the mandate of Rule of Civil Procedure 56 regarding appointment of a guardian ad litem.[467]

In *Rice v. Bolton*,[468] the court held that an order approving the sale of land by an administrator was not void. The plaintiff was an adult for whom, as a minor heir of the estate, a guardian ad litem had been appointed.[469] There were, however, irregularities in the representation by the guardian ad litem.[470] The guardian ad litem filed his answer on the same day that he was appointed and the order of sale entered.[471] The order of sale was entered one day prior to the day fixed for hearing.[472] In *Gibbons v. Belt*,[473] the plaintiff moved to set aside a default judgment entered against him as a minor for the negligent operation of an automobile.[474] An attorney had appeared for the plaintiff and had been given time to plead.[475] A default judgment,

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460. IOWA STANDARDS § 6.1 (6th ed. 1984).
461. *Id.*
462. *Id.*
463. IOWA STANDARDS § 4.4 (6th ed. 1984).
464. *Compare id.* § 6.4 (6th ed. 1984) *with id.* § 6.5 (5th ed. 1974).
465. *Id.* § 6.5 (5th ed. 1974).
466. Standard 6.5 of the fifth edition cited the following cases as authority: Gibbons v. Belt, 239 Iowa 961, 33 N.W.2d 374 (1948); Irwin v. Keokuk Bank, 218 Iowa 477, 250 N.W. 671 (1934); Rice v. Bolton, 126 Iowa 654, 100 N.W. 634 (1904). *Id.*
467. IOWA R. CIV. P. 56.1.
468. 126 Iowa 654 (1905), 100 N.W. 634 (1904).
469. *Id.* at 656-57, 100 N.W. at 635.
470. *Id.*
471. *Id.* at 657, 100 N.W. at 635.
472. *Id.*
473. 239 Iowa 961, 33 N.W.2d 374 (1948).
474. *Id.* at 963, 33 N.W.2d at 375.
475. *Id.*

however, was entered against the plaintiff on the same day that the attorney withdrew his appearance.[476] The court held that the judgment was not void.[477]

In *Irwin v. Keokuk Savings Bank & Trust Co.*,[478] an executor of an estate obtained an order substituting a trust deed and mortgage for a $5,000 specific bequest to a minor. Service of the final report of the executor was accepted by the minor's mother, and notice was posted on the courthouse bulletin board to all interested parties.[479] No guardian ad litem was appointed for the minor.[480] When the minor reached majority, he commenced an action to force compliance with the $5,000 specific bequest.[481] The court held that the order substituting the trust deed and mortgage for the specific bequest was void and ordered the executor to pay the minor the $5,000 specific bequest with interest.[482]

To summarize, in *Rice* and *Gibbons*, the supreme court held that the judgments against the minors were not void.[483] In both of these cases, the minors had in fact been represented by a guardian ad litem or an attorney in the proceedings in question.[484] In *Irwin*, however, the minor had not been represented, and the supreme court held that the judgment was void.[485] These cases supported a conclusion different from the answer contained in the old title standard.

Standard 6.4 of the sixth edition follows Iowa Rule of Civil Procedure 56.[486] The language in this rule dealing with appointment of a guardian ad litem is mandatory.[487] The rule provides that a guardian ad litem need not be appointed for a minor or incompetent if there is some other person described in the rule who may be served on behalf of the minor or incompetent.[488] If there is no such person, a guardian ad litem must be appointed to be served on behalf of the minor and to defend for the minor or incompetent.[489] The new standard also follows Rule of Civil Procedure 43 dealing with appointment of a guardian ad litem for others later born to a class that

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476. *Id.*
477. *Id.* at 965, 33 N.W.2d at 376.
478. 218 Iowa 477, 255 N.W. 671 (1934).
479. *Id.* at 478, 255 N.W. at 672.
480. *Id.* at 479, 255 N.W. at 672.
481. *Id.*
482. *Id.* at 481, 255 N.W. at 674.
483. Gibbons v. Belt, 239 Iowa at 965, 33 N.W.2d at 376; Rice v. Bolton, 126 Iowa at 657-58, 100 N.W. at 637.
484. Gibbons v. Belt, 239 Iowa at 963, 33 N.W.2d at 375; Rice v. Bolton, 126 Iowa at 656-57, 100 N.W. at 635.
485. Irwin v. Keokuk Savings Bank & Trust Co., 218 Iowa at 481, 255 N.W. at 674.
486. *Compare* IOWA STANDARDS § 6.4 (6th ed. 1984) *with* IOWA R. CIV. P. 56.1.
487. *See* IOWA R. CIV. P. 56.1.
488. *Id.*
489. *Id.*

makes a claim to the property.[490] The standard provides that if the doctrine of virtual representation does not apply, a guardian ad litem must be appointed to be served and to defend for others later born.[491]

The comment to the new standard summarizes Civil Procedure Rules 56.1(b), 56.1(c), and 43.[492] Following the summary in the comment, a note answers the question presented by the problem.[493] It states that a judgment entered against a minor or incompetent person without appointment of a guardian ad litem is merely voidable if the minor or incompetent was actually represented by an attorney or court-appointed guardian.[494] The judgment is void only if the minor or incompetent person receives no such representation.[495] The note also refers to *In re Marriage of Payne*,[496] which held that Rule of Civil Procedure 13 also applies to prisoners.

The problem presented to the Iowa Supreme Court in *Edge v. Harsha*[497] prompted the addition of 6.6 to the sixth edition of the Title Standards. Following a jury trial, a sizable judgment was entered against Edge.[498] The judgment was recorded in the Jasper County clerk's judgment lien index.[499] Edge appealed the judgment and filed a corporate supersedeas bond to prevent execution of the judgment pending appeal.[500] Legal title to certain real estate in Jasper County was in the name of the judgment debtor, Edge.[501] Relatives of the judgment debtor who claimed to be the equitable owners of the property applied to the district court to discharge the Jasper County real estate from the judgment lien.[502] The district court entered an order releasing the judgment lien based upon the reasoning that the judgment creditors were fully secured by the supersedeas bond.[503]

In *Edge*, the supreme court held that the district court lacked authority to discharge the judgment lien.[504] The supreme court stated that a superse-

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490. *Compare* IOWA STANDARDS § 6.4 (6th ed. 1984) *with* IOWA R. CIV. P. 43.
491. IOWA STANDARDS § 6.4 (6th ed. 1984).
492. *Id.* comment (6th ed. 1984).
493. *Id.* § 6.4 note.
494. *Id.*
495. *Id.*
496. 341 N.W.2d 772 (Iowa 1983).
497. 334 N.W.2d 741 (Iowa 1983). *See* IOWA STANDARDS § 6.4 (6th ed. 1984).
498. Edge v. Harsha, 334 N.W.2d at 741.
499. *Id.* A judgment is a lien against the real estate owned by the defendant at the time of judgment. IOWA CODE § 624.23(1) (1983). The judgment lien attaches against real estate in the county where the judgment is entered or in a county where an attested copy of the judgment is filed with the office of the clerk of court. *Id.* § 624.24.
500. Edge v. Harsha, 334 N.W.2d at 741. Rule seven of the Iowa Rules of Appellate Procedure provides that no appeal from a judgment shall stay proceedings unless the appellant executes a bond with sureties. IOWA R. APP. P. 7. The condition of the bond is that the appellant will satisfy the judgment, if affirmed, plus costs and damages. *Id.*
501. Edge v. Harsha, 334 N.W.2d at 741.
502. *Id.*
503. *Id.*
504. *Id.* at 742.

deas bond is merely a writ to suspend the execution of a judgment pending appeal.[505] The supersedeas bond does not deprive a judgment of its force.[506] The new standard 6.6 is a recitation of the holding in *Edge v. Harsha*.[507]

Standard 6.7 was added to the sixth edition of the title standards to summarize what is required by section 624.23(2) of the Iowa Code[508] to prove that a parcel of real estate is a homestead, and thus, not subject to attachment of a judgment lien under section 624.23(1).[509] A person seeking relief under section 624.23(2) must record a homestead plat in compliance with section 561.4, which requires a statement designating a legal description of property as a homestead.[510] Next, the person must serve written demand on the judgment creditor in any manner authorized for service of original notice under the Iowa Rules of Civil Procedure.[511] The written demand must state that the judgment lien and all benefits deriving therefrom will be forfeited against the real estate platted as a homestead unless the judgment creditor executes against the real estate within 30 days from date of service.[512] If there is no levy of execution within 30 days, the person need only file a copy of the written demand and proof of service of notice in the county where the real estate platted as a homestead is located.[513] This procedure avoids the expensive and time-consuming procedure of a quiet title action or declaratory judgment action to prove that a parcel of real estate is a homestead, and thus, not subject to a judgment lien.[514]

The new standard 6.7 does not change existing Iowa law.[515] Judgment liens have never attached against a homestead.[516] Title examiners have objected to judgment liens only because the abstract did not indicate whether the parcel of real estate described was, in fact, a homestead.[517] Thus, there was no way to adequately prove the existence of a homestead absent a quiet title action or declaratory judgment action.[518]

Of course, section 561.21 of the Iowa Code does specify four classes of debts for which the homestead is liable.[519] Included are: debts contracted prior to the acquisition of the homestead, but the homestead will be liable

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505. *Id.*
506. *Id.*
507. IOWA STANDARDS § 6.6 (6th ed. 1984).
508. IOWA CODE § 624.23(2) (1983).
509. *See* IOWA STANDARDS § 6.7 (6th ed. 1984); IOWA CODE § 624.23(1)-(2) (1983).
510. IOWA CODE §§ 624.23(2), 561.4 (1983); IOWA STANDARDS § 6.7 (6th ed. 1984).
511. IOWA CODE § 624.23(2); IOWA STANDARDS § 6.7 (6th ed. 1984).
512. IOWA CODE § 624.23(2); IOWA STANDARDS § 6.7 (6th ed. 1984).
513. IOWA CODE § 624.23(2); IOWA STANDARDS § 6.7 (6th ed. 1984).
514. *See* IOWA STANDARDS § 6.7 comment (6th ed. 1984).
515. *Id. See also* IOWA CODE § 624.23(2) (1983).
516. In re Keane, 7 Bankr. 844, 848 (Bankr. Iowa 1980); Mitchell v. West, 93 N.W. 380, 381 (1903); Cummings v. Long, 16 Iowa 41, 42 (1864); Lamb v. Shays, 14 Iowa 567, 569 (1863).
517. *See* IOWA STANDARDS § 6.7 (6th ed. 1984).
518. *Id.*
519. IOWA CODE § 561.21(1)-(3) (1983).

only to satisfy a deficiency remaining after exhausting the other property of the debtor subject to execution; debts created by written contract by persons having the power to convey, expressly stipulating that the homestead shall be liable, but the homestead will be liable only for a deficiency remaining after exhausting all other property pledged by the same contract for the payment of the debt; and debts incurred for work done or material furnished exclusively for the improvement of the homestead.[520] In the event of death of the owner of the homestead, if there is no survivor or issue, the homestead exemption is disregarded.[521]

Chapter six has undergone substantial change in the sixth edition. Deletions were made in two standards to bring them in line with the controlling legal authority.[522] The answers to two other standards were changed to reflect the case law dealing with the same subjects.[523] The title examiner should be aware of these changes and conduct his examination accordingly. Of special interest to the examiner is the addition of two new standards to chapter six.[524] Although the addition of standard 6.7 merely restates existing law,[525] standard 6.6 was added to reflect a recent ruling of the Iowa Supreme Court.[526] Thus, the examiner should familiarize himself with standard 6.6 and the authority from which it is derived.

VIII. Chapter Seven: Mortgages

Basically, standard 7.1 has not changed.[527] The problem is simple enough: A mortgage is held by two mortgagees as joint tenants with full rights of survivorship.[528] The issue is whether the death of the first mortgagee creates a problem.[529] Is a mortgage release by the surviving joint tenant sufficient, or must the estate of the deceased provide a release as well?[530] Title is not rendered unmerchantable by this situation.[531] There is no reason why the release of the surviving mortgagee should not be accepted.[532]

A comment has been added to standard 7.1 that specifies that no death tax lien arises by reason of the death of the mortgagee.[533] This is because

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520. *Id.*
521. *Id.* § 561.21(4).
522. *See supra* notes 435-43 and accompanying text.
523. *See supra* notes 448-85 and accompanying text.
524. *See supra* notes 497-521 and accompanying text.
525. *See supra* notes 515-21 and accompanying text.
526. *See supra* notes 497-514 and accompanying text.
527. *Compare* Iowa Standards § 7.1 (6th ed. 1984) *with id.* (5th ed. 1974).
528. *Id.* (6th ed. 1984).
529. *See id.*
530. *Id.*
531. G. Madsen, *supra* note 61, § 13.11(A).
532. Iowa Standards § 7.1 (6th ed. 1984).
533. *Id.* comment.

Iowa follows the lien theory, rather than the title theory of a mortgage.[534] Under Iowa law, a mortgage does not transfer title, but instead imposes a lien on the property.[535] A lien arising by or through a mortgagee cannot attach to the mortgaged property.[536] Therefore, a lien for Iowa inheritance tax or federal estate tax, accruing due to the death of the mortgagee, cannot affect the title to the mortgaged premises.[537]

Interestingly, this comment completely reverses the comment in the third edition of the Iowa Title Standards.[538] In that edition, the comment to the standard insisted upon a showing of non-liability for death taxes just as if the decedent died owning the property rather than merely the mortgage.[539] Standard 7.1 in the fifth edition omitted any comment at all.[540]

Is the result similar when the mortgagees hold as tenants in common and not as joint tenants? The standard does not address this situation, possibly because there are no Iowa cases on this question. The authorities cited in standard 7.1 agree that any one of several mortgagees who hold as tenants in common, whether before or after the death of any one of them, can alone fully release the mortgage.[541] A release given improperly, for example, where a full payment had not been made, would not affect the merchantability of the title.[542] Rather, the problem would remain between the mortgagees or their successors in interest.[543] Since the release would be valid, there would be no problem between the mortgagor and a third party.[544]

In the sixth edition, several changes have been made to standard 7.2.[545] The Committee believed that the wording of the old standard may have misled many examiners; therefore, the Committee attempted to clarify it. Both the problem and the standard have been reworded, and a comment and much more authority have been added.[546]

The standard refers to a purchase money mortgage.[547] The standard addresses a situation where B is buying property from A, but needs to secure a

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534. G. MADSEN, *supra* note 61, § 3.1(C-1).
535. IOWA CODE § 557.14 (1983).
536. G. MADSEN, *supra* note 61, §§ 3.1(C-1), 13.10(B).
537. *Id.* § 13.11(A).
538. *Compare* IOWA STANDARDS § 7.1 (6th ed. 1984) *with id.* (3d ed. 1955).
539. *Id.* (3d ed. 1955).
540. *See id.* (5th ed. 1974).
541. P. BASYE, *supra* note 35, § 353; 2 PATTON & PATTON, *supra* note 283, § 567 nn.20-22; 55 AM. JUR. 2D *Mortgages* § 409 (1971). *See also* R. KRATOVIL, *supra* note 277, § 437. *But see* G. MADSEN, *supra* note 61, § 13.11(B).
542. P. BASYE, *supra* note 35, § 353; 2 PATTON & PATTON, *supra* note 283, § 567 nn.20-22; 55 AM. JUR. 2D *Mortgages* § 409 (1971).
543. P. BASYE, *supra* note 35, § 353; 2 PATTON & PATTON, *supra* note 283, § 567 nn.20-22; 55 AM. JUR. 2D *Mortgages* § 409 (1971).
544. P. BASYE, *supra* note 35, § 353.
545. *Compare* IOWA STANDARDS § 7.2 (6th ed. 1984) *with id.* (5th ed. 1974).
546. *Compare id.* (6th ed. 1984) *with id.* (5th ed. 1974).
547. *See id.* (6th ed. 1984).

loan from C in order to pay the purchase price.[548] C is concerned about the priority of liens arising from and through ownership of the property by B.[549] Thus, C records the B-C mortgage prior to the recording of the A-B deed.[550] Does C now have a mortgage valid and binding as to third parties?[551] According to the standard, the answer is yes.[552] Nevertheless, it is important to understand the qualifying conditions. The mortgage is valid only if it is recorded subsequent to the date of the deed.[553] If, however, the deed is dated after the recording date of the mortgage, then that mortgage is invalid as to subsequent third parties in interest who do not have actual notice of such mortgage.[554]

This standard must be read in conjunction with Iowa's recording statute.[555] It provides that the act of recording constitutes constructive notice.[556] If an instrument is recorded outside of the chain of title, that is, prior to the date of the recorded instrument conveying ownership, then there is no constructive notice.[557] There is no constructive notice because of Iowa's system for indexing instruments affecting real estate.[558] There are separate indices for mortgages, deeds, and all other instruments that affect title.[559] All are maintained in chronological order.[560] When a deed is filed for record, the date is noted and anyone searching the record as to the new grantee will begin the search only from the date the deed is filed.[561] Therefore, if a mortgage is recorded prior to the date of the filing of the deed, that mortgage will probably not be found since the search goes forward, not backward, chronologically. Standard 7.2 attempts to alert the examiner to this problem.[562]

One must not, however, read the standard too literally. "[S]ubsequent to the date of the instrument" does not mean "at least the next day."[563] *Higgins v. Dennis*,[564] cited as authority for standard 7.2, involved a mortgage recorded prior to, but on the same day as the recording of the deed.[565]

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548. *Id.*
549. *Id.*
550. *Id.*
551. *Id.*
552. *Id.*
553. *Id. See also* G. MADSEN, *supra* note 61, § 13.8(A).
554. IOWA STANDARDS § 7.2 comment (6th ed. 1984). *See* Higgins v. Dennis, 104 Iowa 605, 610, 74 N.W. 9, 11 (1898).
555. IOWA CODE § 558.55 (1983).
556. *Id.*
557. *See* R. KRATOVIL, *supra* note 277, § 229; P. BASYE, *supra* note 35, § 3.
558. IOWA CODE §§ 558.51-.54 (1983).
559. *Id.* § 558.53.
560. *Id.* § 558.52.
561. *Id.* § 558.49.
562. *See* IOWA STANDARDS § 7.2 (6th ed. 1984).
563. *See* IOWA CODE § 558.51 (1983).
564. 104 Iowa 605, 74 N.W. 9 (1898).
565. *Id.* at 607, 74 N.W. at 10.

The Iowa Supreme Court held that the search of the record should extend to the entire day upon which the instrument was recorded.[566]

In actual practice this problem of a pre-recorded mortgage does not occur very frequently in Iowa. Many abstracters have their own tract books and do not rely upon the indices. Previously-filed mortgages are found by the abstracters and noted on their records; thus they appear in the abstract of title. The examining attorney can then note them in his opinion. Nevertheless, the problem should not be taken lightly. Judge Richard J. Vipond,[567] formerly a member of the Title Standards Committee of the Iowa State Bar Association, warned of the dangers of this situation in a seminar presentation on mortgages at which he stated:

> A mortgage should not be recorded prior to the date of the instrument which conveys title to the mortgagor. Title Standard 7.2 states that a mortgage recorded prior to the *recording* of the instrument by which ownership is acquired is valid, except to the extent that rights of third parties may have intervened. However, a mortgage recorded prior to the date of the deed is outside the chain of title and does not constitute constructive notice.[568]

Standard 7.3 has not been changed except to include *Patton on Land Titles* as additional authority.[569] The concern of this standard is whether a foreclosed mortgage, or any other junior lien created by written instrument, must be specifically released in order to obtain merchantable title.[570] Although the standard is not particularly clear on this point, it can be assumed that the release referred to is one obtained from the lienholder rather than the statutory release provided for in the Iowa Code.[571] The statutory release only applies to the foreclosed mortgage, and then only if the judgment has been paid in full.[572] Thus, the standard necessarily refers to other junior security interests.

Standard 7.3 makes other assumptions as well.[573] For example, it assumes that proper notice was given to all lienholders and all other necessary parties, and that the court had jurisdiction over them. Given all these assumptions, the real question asked by the standard is this: Does a properly conducted foreclosure, culminating in a sheriff's deed, sufficiently preclude any claims arising from a holder of a security interest against the property?

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566. *Id.* at 610, 74 N.W. at 11.

567. Judge of Iowa's Third Judicial District, Division 3B.

568. Address by Judge Vipond, College of Law, University of Iowa at Iowa City, Iowa (Oct. 17, 1980).

569. *Compare* IOWA STANDARDS § 7.3 (6th ed. 1984) *with id.* (5th ed. 1974).

570. *Id.* (6th ed. 1984).

571. IOWA CODE § 655.5 (1983).

572. *Id.*

573. These assumptions are implied from the question and solution contained in standard 7.3. *See generally* IOWA STANDARDS § 7.3 (6th ed. 1984).

If such a claim somehow survives a foreclosure, would it adversely affect the merchantability of the title? The standard clearly states that such claims are extinguished by proper foreclosure of the primary mortgage.[574] There is no need to obtain releases from mortgage holders or holders of security interests after a foreclosure.[575] In fact, it is not clear why any title examiner would believe that a proper foreclosure proceeding does not eliminate all such claims.

Standard 7.4 remains essentially unchanged except that an explanatory comment has been added.[576] The standard itself deals with the situation whereby a defective mortgage is followed by a corrective one.[577] Upon payment, is it preferable to have one rather than the other released, or should both be released?[578] For example, assume the record shows two mortgages from A to B but there are changes in the second mortgage.[579] Although the second mortgage may not expressly state that it corrects the first mortgage, the standard assumes that the title examiner can somehow determine this.[580] The standard states that if only one of the mortgages is released, marketability is not impaired.[581]

The comment, however, attempts to alert the examiner to one significant problem. If the original mortgage, and not the corrective mortgage, is the one released, then there is the possibility that the parties were simply trying to clear the record of the original mortgage, leaving the second, corrective mortgage still in force.[582] Simes and Taylor, the authority cited by the standard, believe that the record will give some indication of the intention of the parties.[583] The title examiner, however, must also be alert to other circumstances that might reveal the parties' intent.[584] If the second mortgage fails to clearly show the reason for its execution, such as a mistake in the first mortgage, then it is preferable that the release include both mortgages. A second alternative would be a release of the second mortgage in order to avoid the construction that the release of the first mortgage was merely to correct the record caused by the defective first mortgage.

Chapter seven should lend the examiner some assistance in determining how a given mortgage may affect marketability of title. The examiner should keep in mind the close relationship between this chapter and chapter four, which deals with deeds and contracts, when a question involving mortgages

574. *Id.*
575. *Id.*
576. *Compare id.* § 7.4 (6th ed. 1984) *with id.* (5th ed. 1974).
577. *Id.* (6th ed. 1984).
578. *See id.*
579. *Id.*
580. *Id.*
581. *Id.*
582. *Id.* comment.
583. L. Simes & C. Taylor, *supra* note 12, § 16.7.
584. *See* Iowa Standards § 7.4 (6th ed. 1984).

arises.[585] Chapter seven sets forth the steps to be taken to assure marketability of title: (1) a release may be executed by a surviving joint tenant to a mortgage when the other joint tenant dies;[586] (2) a purchase-money mortgage should not be recorded prior to the recording of the deed.[587] In addition, a proper foreclosure of the primary mortgage extinguishes junior liens.[588] Finally, the standard states that where a defective mortgage is followed by a corrective mortgage, it is sufficient if only one of the mortgages is released.[589]

IX. Chapter Eight: Names

While it does not appear that there are any major substantive legal issues pertaining to names in real estate titles, variations in names appearing in chains of title occur so frequently that the conscientious title examiner cannot ignore this problem. Fortunately for the title examiner, Iowa law and these Title Standards provide considerable guidance in resolving these issues without imposing an undue burden on the parties involved.[590] Prior to addressing the standards themselves, it is useful to re-examine standard 1.1 to determine the proper attitude of the examining attorney with respect to variations in names.[591] The title examiner should keep in mind that "objections and requirements should be made only when the irregularities or defects can reasonably be expected to expose the purchaser or lender to the hazard of adverse claims or litigation."[592] As evidenced by an examination of the standards, technical perfection is not required when addressing name variations.[593]

Standard 8.1 deals with the situation where a name is spelled in two or more ways that are pronounced alike or substantially alike.[594] The standard finds such differences in spelling to be immaterial, and even a slight difference in pronunciation may not be important.[595] Iowa common law recognizes the doctrine of *idem sonans*.[596] This doctrine was last addressed by the Iowa Supreme Court in *Webb v. Ferkins*,[597] which is cited in the authority for the standard. That case did not involve a land title question, but dealt with a

585. *See generally* Iowa Standards chs. 4, 7 (6th ed. 1984).
586. *Id.* § 7.1.
587. *Id.* § 7.2.
588. *Id.* § 7.3.
589. *Id.* § 7.4.
590. *See id.* ch. 5. *See also* Iowa Code §§ 558.6, 558.8, 614.17 (1983).
591. *See* Iowa Standards § 1.1 (6th ed. 1984).
592. *Id.*
593. *See supra* notes 25-29 and accompanying text.
594. Iowa Standards § 8.1 (6th ed. 1984).
595. *Id.*
596. *See* Webb v. Ferkins, 227 Iowa 1157, 290 N.W. 112 (1940).
597. *Id.*

jurisdictional question.[598] A man named Firkins was served with original notice addressed to Firkins.[599] The supreme court found the variance in spelling to be immaterial.[600] Additionally, the difference in pronunciation, if any, was found not to be important since the attentive ear would find difficulty in distinguishing between the two names when pronounced.[601] In that case, it does not appear that there was ever any serious question as to whether the defendant knew that he was being sued.[602] Thus, it is important to note the exception set out in standard 8.1 suggesting that the result may be different where a question of constructive service of notice is involved.[603] In such a situation, there may in fact be a question as to whether the defendant had actual knowledge. There is no Iowa law on this particular point.

Additional guidance for the problem raised in standard 8.1 is provided by Iowa Code section 558.6, which seems to go even further than the *Webb* case.[604] This section states that the given name of a person appearing in a land title may be different when that name appears as grantee of a title and subsequently appears as grantor of a title, provided that the surnames in both instances are written the same or sound the same.[605] In such circumstances, the conveyances or record thereof are only presumptive evidence that the surnames in the conveyance refer to the same person.[606] It may be appropriate to require an additional showing of identity when it appears that the presumption could be rebutted.[607]

Standard 8.2 deals with a situation where in one conveyance a person is identified, for example, as "John Doe", and in a subsequent conveyance that same person is identified, for example, as "John *R.* Doe".[608] Previously, section 8.2 of the Title Standards cited statutory law and case decisions stating that under these circumstances there is a presumption of identity, but the standard went on to say that the Iowa practice has been to require affidavits of identity.[609] The Committee now takes the position that if the law presumes identity, no affidavit of explanation is required, and that the practice should conform to the law.[610] The Committee believes that the better practice is simply to recognize that the law is what the courts say it is, and

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598. *See id.* at 1158-59, 290 N.W. at 113.
599. *Id.* at 1159, 290 N.W. at 113.
600. *Id.* at 1162, 290 N.W. at 115.
601. *Id.*
602. *See id.* at 1164, 290 N.W. at 116 (variation so slight that defendant must have known that action was against him).
603. IOWA STANDARDS § 8.1 (6th ed. 1984).
604. IOWA CODE § 558.6 (1983).
605. *Id.*
606. *See id.*
607. *Id.*
608. *See* IOWA STANDARDS § 8.2 (6th ed. 1984).
609. *Id.* (5th ed. 1974).
610. *Id.* (6th ed. 1984).

that land titles need not be cluttered with unnecessary affidavits.

Standard 8.3 addresses the issues that may arise where one instrument appearing in a chain of title shows the given name of a party in full and another instrument shows the given name as an abbreviation.[611] The standard states that the examiner may "rely on all customary and usually recognized abbreviations and derivations of given names."[612] The question then becomes: What is a "customary and usually recognized abbreviation" of any particular name? While the title examiner may have no difficulty accepting Wm. as an abbreviation for William, and Bill as a derivation of William, can the examiner accept Martha as a derivation of Mary as was done in *Nelson v. Trigg*,[613] or Mollie for Mary as was done in *State v. Watson*?[614] Courts are not necessarily unanimous in construing what is a "customary and usually recognized abbreviation." The North Dakota Supreme Court has recognized Harry as a derivation of Henry,[615] but the Illinois Supreme Court has held that Harry is not a recognized derivation of Henry.[616] In this respect the experience and the judgment of the title examiner must simply be brought to bear on the resolution of such issues. Fortunately, the questions usually will be easily resolved by obtaining an appropriate affidavit.

Section 8.4 concerns the change of a woman's name through marriage as it may impact on a real estate chain of title.[617] The standard simply recognizes that a woman's name can, and generally does, change through marriage; thus, a recital in the deed as to the former name is sufficient.[618] The standard impliedly takes note of the solemnity of the recital by citing *Keefe v. Cropper*.[619] In that case, the court stated that such a recital "must be accepted as true and upon which a subsequent purchaser may with safety rely."[620]

Standard 8.5 carries forward the lesson of standard 8.4 by stating that a recital in a subsequent instrument can be used to correct or clarify an error in the name of a person appearing in a prior instrument.[621] This seems to be a particularly useful method to resolve whatever question there may be in name variations. Where title is taken, for example, in the name of "Jon Doe" and in fact the correct name of the person is "John R. Doe", that variation in name can be corrected by a recitation in the granting clause of a

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611. *Id.* § 8.3.
612. *Id.*
613. 3 Tenn. (Cooke) 733 (18__).
614. 30 Kan. 281, 1 P. 770 (1883).
615. Woodward v. McCollum, 16 N.D. 42, 111 N.W. 623 (1907).
616. Garrison v. People, 21 Ill. 535 (1858).
617. IOWA STANDARDS § 8.4 (6th ed. 1984).
618. *Id.*
619. 196 Iowa 1179, 194 N.W. 305 (1923).
620. *Id.* at 1185, 194 N.W. at 308.
621. IOWA STANDARDS § 8.5 (6th ed. 1984).

subsequent deed stating "Jon Doe a/k/a John R. Doe".[622] The same sort of recitation can also be made in an affidavit of possession, a mortgage, or other instrument.[623]

Standard 8.6 deals with a situation where the grantor's signature on a deed may vary from the name as it appears in the body of the deed.[624] As an example, the grantor appears as "John R. Doe" and the signature appears as "John Doe".[625] The standard states that no additional proof of identity is necessary, provided that the acknowledgement agrees with either the signature or the name as it appears in the body of the deed.[626] Thus, if the acknowledgement states either "John R. Doe" or "John Doe," that is sufficient.[627]

Standard 8.7 deals with "*discriptio personae*" words, that is, words describing a person named in the instrument and title prefixes and suffixes.[628] The standard states that such words are not part of the name, and may be disregarded except to the extent that the use of such words may raise a question of identity.[629] For example, the name "Mr. John Doe" would presumably never refer to the same person as "Mrs. John Doe." Likewise, "John Doe, Sr." would presumably not be the same person as "John Doe, Jr."

The case cited as authority for standard 8.7, *State v. Dankwardt*,[630] dealt with a question of the identity of one "Mary Mahoney" and Mary Mahoney, Jr." In that context, it was evident that "Mary Mahoney" and "Mary Mahoney, Jr." were in fact the same person.[631] The Iowa Supreme Court held that "[i]t is well settled that the terms 'Junior' and 'Senior' are no part of a name[,] . . . and should be regarded as surplusage."[632] While that may be true in a technical sense, common usage suggests that "John Doe, Sr." and "John Doe, Jr." are two different people, and that "John Doe" and "John Doe, Jr." are also two different people. In any event, if the use of such terms of "*discriptio personae*" does in fact create a question of identity, that question can be resolved with an appropriate affidavit.

One of the most troublesome aspects of resolving variances in names is the question addressed by standard 8.8 as to whose affidavits or recitals are acceptable.[633] In actual practice, there is frequently considerable pressure on

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622. *See id.*
623. *Id.*
624. *Id.* § 8.4.
625. *See id.*
626. *Id.*
627. *Id.*
628. *Id.* § 8.5.
629. *Id.*
630. 107 Iowa 704, 77 N.W. 495 (1898).
631. *See id.* at 710, 77 N.W. at 496.
632. *Id.*
633. IOWA STANDARDS § 8.8 (6th ed. 1984).

the title examiner from persons who have an interest in the chain of title and persons who have an interest in a pending real estate transaction. The prior standard stated that "the value of an affidavit or recital is not *substantially* diminished by the fact that the maker is interested in the title or the subject matter of the affidavit or recital."[634] In examining this issue, the Committee felt that use of the term "substantially" was not appropriate, and that the maker's interest in the title or the subject matter of the affidavit may in fact greatly diminish the value of the affidavit. There are circumstances, however, where the maker's interest does not diminish the value of the affidavit. That matter is left to the good judgment of the title examiner.[635] The Committee felt it appropriate to substitute the word "necessarily" for the word "substantially".[636] Standard 8.8 adds the new sentence: "However, the examiner should consider the maker's knowledge and interest in the transaction."[637] It may be appropriate to consider the degree of interest in determining whether the affidavit of an interested party is acceptable.[638] Some practitioners will accept a "self-serving" affidavit from a person appearing in the chain of title if the matter in controversy appears to be relatively nominal.

Standard 8.8 also indicates three general requirements relating to affidavits and recitals: (1) the person making the affidavit or recital should be competent to testify in court; (2) the affidavit or recital should "state facts rather than conclusions"; and (3) the basis of the knowledge of the maker should be disclosed in the affidavit or recital.[639] An acceptable sample affidavit would state as follows:

> I, Richard Roe, being first duly sworn on oath depose and state that I am a licensed practicing attorney in the City of Des Moines, Iowa. I further state that I am well and personally acquainted with John R. Doe who has resided at 100 Main Street, Des Moines, Iowa, for the past ten years, and who has been employed by ABC Manufacturing Company for the past ten years. I further state that his wife's name is Mary Doe, and that his Social Security number is 123-45-6789. I further state that the said John R. Doe appears as the record titleholder of the following described property:
>
> Lot 1 in Blackacre, an Official Plat, now included in and forming a part of the City of Des Moines, Iowa.
>
> Through investigation of the records of the Polk County Court House, I have determined that the John Doe against whom a Notice of Tax Lien was filed by the Internal Revenue Service on January 1, 1980, recorded in Book 1234, Page 567 of the Polk County, Iowa records, has resided at

634. *Id.* (5th ed. 1974).
635. *See generally id.* (6th ed. 1984).
636. *Id.*
637. *Id.*
638. *Id.*
639. *Id.*

> 100 First Street, Des Moines, Iowa, for the past five years, is employed by XYZ Manufacturing Company, is married to Jane Doe, and has Social Security number 987-65-4321.
> Based on the foregoing, I further depose and state that I have determined that the John R. Doe who appears in the chain of title to the above described real estate is a different person than the John Doe against whom the Notice of Tax Lien appears, and that the Tax Lien is not a lien against the real estate described above.

The issue under consideration in standard 8.9 is whether there must be a showing that affidavits explanatory of title are filed by, or under the direction of the owner of the real estate.[640] Section 558.8 of the Iowa Code provides that only the owner in possession has the right to file an affidavit explanatory of title.[641] That section, however, requires consideration of section 614.17 of the Iowa Code, which deals with affidavits of possession.[642] Section 614.17 explicitly details the form of the power of attorney whereby the owner of land appoints the County Recorder as attorney in fact for the purpose of filing the affidavit.[643] Section 558.8, however, is not so explicit,[644] and it is the position of the Committee that an affidavit executed by a disinterested party may be presumed to be filed by the owner or under his authority.[645] It is somewhat troubling to the Committee that there is no case authority to support this proposition. It should be noted, however, that this practice appears to be used throughout the state, and there are thousands of such affidavits appearing in land titles. Additionally, no court decision has held that such an affidavit may *not* be filed and relied upon.

Standard 8.10 deals with the power of the affidavit of possession to cure name discrepancies occurring prior to January 1, 1970.[646] If no claims are of record under the provisions of section 614.17 of the Iowa Code, the standard advises that a section 614.17 affidavit of possession may be utilized to rectify these name discrepancies.[647] *Tesdall v. Hanes*[648] and *Lane v. Travelers Insurance Co.*[649] are well known to Iowa land title examiners. Although they do not deal directly with issues relating to names, they both deal with the strength of an affidavit of possession when correctly used.[650] It should be borne in mind that the use of an affidavit of possession to correct name

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640. *Id.* § 8.9.
641. IOWA CODE § 558.8 (1983).
642. *Id.* § 614.17.
643. *Id.*
644. *See id.* § 558.8.
645. IOWA STANDARDS § 8.9 (6th ed. 1984).
646. *Id.* § 8.10.
647. *Id. See* IOWA CODE § 614.17 (1983).
648. 248 Iowa 742, 82 N.W.2d 119 (1957).
649. 230 Iowa 974, 299 N.W. 553 (1941).
650. *See* Tesdall v. Hanes, 248 Iowa at 747-48, 82 N.W.2d at 122; Lane v. Travelers Ins. Co., 230 Iowa at 967-68, 299 N.W. at 554-55.

variations is in addition to all other curative procedures. It applies, however, only to those name variations appearing in a chain of title prior to January 1, 1970.[651]

Recurring marketability issues that arise from variations in names appearing in the chain of title are dealt with in chapter eight in accordance with the general premise set out in standard 1.1—the examiner may follow the standards free from the threat of objection by the "fly-specker."[652] As a general rule, minute variations in a name will not affect marketability.[653] Additionally, in some cases, variations may be cured by a proper recitation in a subsequent deed or by affidavit.[654] The standard, however, requires the examiner to exercise due care in determining whose recitals and affidavits should be accepted.[655] As a final note, the examiner should be cognizant of the interrelationship between chapter eight and statutory and case law.

X. Chapter Nine: Probate

There were twenty-three standards in chapter nine of the third edition.[656] The fourth edition was a reprint of the third edition, but a twenty-fourth standard was inserted in 1969.[657] Since the fourth edition in 1963, the Iowa Probate Code[658] and the amendment to the inheritance tax[659] laws have been adopted by the legislature. These laws necessitated the elimination of some standards and changes in a number of other standards.[660] The chapter now relies heavily on statutory authority.[661] The fifth edition, adopted in 1974, contained thirteen standards in chapter nine.[662] The sixth edition also contains thirteen standards in the chapter on probate.[663] One standard, however, was added,[664] and one was eliminated.[665] Otherwise, no substantive changes were made to this chapter.[666]

Standard 9.1 provides that an order of court relating to the sale or execution of an executor's deed is not required if, by virtue of the will, the

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651. Iowa Standards § 8.10 (6th ed. 1984).
652. *See id.* § 1.1.
653. *See supra* notes 594-616 and accompanying text.
654. *See supra* notes 617-23 and accompanying text.
655. *See supra* notes 633-45 and accompanying text.
656. Iowa Standards ch. 9 (3d ed. 1955).
657. *Id.* (4th ed. 1963).
658. Iowa Code ch. 633 (1983).
659. *Id.* § 450.22.
660. *Compare* Iowa Standards ch. 9 (5th ed. 1974) *with id.* (4th ed. 1963).
661. *See generally id.* (6th ed. 1984).
662. *Id.* (5th ed. 1974).
663. *Id.* (6th ed. 1984).
664. *Id.* § 9.9. This standard was previously promulgated in chapter four. *See id.* § 4.4 (5th ed. 1974).
665. Standard 9.11 of the previous edition was omitted. *See* Iowa Standards § 9.11 (5th ed. 1974).
666. *See generally id.* ch. 9 (6th ed. 1984).

executor has the unrestricted power to sell real estate.[667] The Title Standards Committee added the comment that this is the case regardless of whether the power to sell is mandatory or merely discretionary.[668] The standard follows the long-recognized rule that when power to sell is conferred upon the executor by the will, statutory sale procedure need not be followed.[669] The executor acts under the power given by the will, and not under the authority of the court.[670] Additionally, standard 9.1 closely tracks the language of the statutory authority upon which it is based.[671] Iowa Code section 633.383 states: "When power to sell, mortgage, lease, pledge or exchange property of the estate has been given to any personal representative under the terms of any will, the statutory requirements with reference to procedure for such purposes shall not apply."[672]

Although the standard is clear, there are three areas that should be approached with caution. First, the provisions of the will must be closely reviewed to determine if in fact the will vests the executor with the power to sell. The following are examples of clauses that will vest the executor with such power:

> (1) My executor shall have the power to sell, transfer, and convey any property, real or personal, without order of court.
>
> (2) It is my will that my estate shall be sold by my executors or executor.
>
> (3) I authorize the executor in his discretion to sell the real estate without application to, or order from, any court.

Second, caution must be exercised in reviewing the terms of the will for *specific* real estate being devised to *specific* beneficiaries. Finally, the Probate Code requires that where "there are two or more fiduciaries, they shall all concur in the exercise of the powers conferred upon them, unless the instrument creating the estate provides to the contrary."[673]

Standard 9.2 provides that spouses of heirs and claimants are not necessary parties in proceedings to sell real estate.[674] Therefore, notice need not be served upon them unless, in accordance with the Iowa Code, notice has been requested.[675] The Probate Code specifically defines "all persons interested" as including only "distributees in the estate and persons who have requested notice as provided by this Code."[676] The Probate Code provides:

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667. *Id.* § 9.1.
668. *Id.* comment.
669. Feaster v. Fagan, 135 Iowa 633, 633-35, 113 N.W. 479, 480 (1907).
670. *Id.* at 635, 113 N.W. at 480.
671. *Compare* IOWA STANDARDS § 9.1 (6th ed. 1984) *with* IOWA CODE § 633.383 (1983).
672. IOWA CODE § 633.383 (1983).
673. *Id.* § 633.76.
674. IOWA STANDARDS § 9.2 (6th ed. 1984).
675. *Id. See also* IOWA CODE § 633.42 (1983).
676. IOWA CODE § 633.389 (1983).

> [A]t any time after the issuance of letters testamentary or of administration upon a decedent's estate, any person interested in the estate may file with the clerk a written request, in duplicate, for notice of the time and place of all hearings in such estate for which notice is required by law, by rule of court, or by an order in such estate.[677]

Standard 9.3 provides that a court order is required when real estate, which is acquired by a legal representative through foreclosure of a mortgage (in satisfaction of a debt), is to be sold by the representative and the will does not authorize the representative to sell.[678] According to the standard, it is for the court to determine whether its order will be with or without notice.[679]

Standard 9.4 states that an order of court is not required to authorize the release of a mortgage, judgment, or other lien by a fiduciary.[680] It is necessary, however, to make a showing of record that the executor who executed the release was qualified to act and had been appointed at the time of the execution of the release.[681] It should be noted that previously this standard addressed assignments, as well as releases.[682] In 1975, the Iowa legislature deleted the word "assign" from the relevant Code section.[683] Thus, the Committee has eliminated the reference to assignment from this standard.[684]

Standard 9.5 deals with whether a showing of all the owner's heirs at law should be made where the owner of real estate dies testate.[685] George F. Madsen, in *Iowa Title Opinions and Standards*, notes that a list of such heirs may be invaluable at a later date for the following reasons:

> 1. The will may be refused probate or set aside, in which case it is necessary to know both heirs and beneficiaries.
> 2. A widow may elect to take against the will.
> 3. Children may be born after the execution of the will, who are not provided for. If the intestate heirs are listed together with their ages, this can be determined.
> 4. There may be partial intestacy where the will fails to distribute all of the testator's property.
> 5. There may be some imperfection in the probate proceedings making necessary an action to quiet title against the heirs. It is very important in such a case to have an authoritative list of the heirs.[686]

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677. *Id.* § 633.42.
678. IOWA STANDARDS § 9.3 (6th ed. 1984).
679. *Id.*
680. *Id.* § 9.4.
681. *See* IOWA CODE §§ 633.95, .98 (1983).
682. *See* IOWA STANDARDS § 9.4 (5th ed. 1974).
683. 1975 Iowa Acts ch. 208, § 5.
684. *See* IOWA STANDARDS § 9.4 (6th ed. 1984).
685. *Id.* § 9.5.
686. G. MADSEN, *supra* note 61, § 16.3(B), at 340-41.

Nevertheless, as a general matter, the standard does not require a showing of the testator's heirs at law.[687]

The standard, however, recognizes the problem noted by Madsen that a child may have been born after the testator executed his will.[688] The standard requires that unless the will either provides for or intentionally omits a child born to, or adopted by, the decedent after execution of his will, a determination of whether any such child exists must be made.[689] "Such child, whether born before or after the testator's death, shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate."[690]

Note should be made that House File 2474 amended Iowa Code section 633.361.[691] The filing deadline for the probate inventory has been extended from 60 to 90 days after qualification by the personal representative.[692] These changes apply to inventories filed on or after July 1, 1984.[693]

Standard 9.6 states that "Iowa Code [section] 633.93 [may] be relied upon to bar action for recovery of real estate by persons claiming under the deceased, ward or beneficiary when the property has been sold by the fiduciary and when the deed from the fiduciary has been recorded for more than five years."[694] The Committee did not discover any Iowa cases concerning Iowa Code section 633.93. Constitutional issues may be raised if a claimant to real estate passing through probate administration attacks the title: Is five years a reasonable amount of time?

Standard 9.7 sets out the showing required in the probate records if the interest of the heirs or devisees entitled to the real estate have been conveyed.[695] Closing of the estate need not be shown.[696] The standard, however, does require "that all death taxes have been paid or the liens released, that the time for filing claims has elapsed and all timely filed claims, if any, have been resolved, and that no other reasonable grounds appear for the personal representative to sell or mortgage the real estate."[697]

Recent amendments to the Probate Code have some effect on Standard 9.7.[698] The published notice of administration or admission of a will to probate must now include the date of death.[699] The time for taking the follow-

687. IOWA STANDARDS § 9.5 (6th ed. 1984).
688. *See id.*
689. *Id.*
690. IOWA CODE § 633.267 (1983).
691. 1984 Iowa Legis. Serv. No. 3, at 64 (West).
692. *Id.*
693. *Id.*
694. IOWA STANDARDS § 9.6 (6th ed. 1984). *See* IOWA CODE § 633.93 (1983).
695. IOWA STANDARDS § 9.7 (6th ed. 1984).
696. *Id.*
697. *Id.*
698. *See* 1984 Iowa Legis. Serv. No. 3, at 64-65 (West).
699. *Id.*

ing actions has been changed from six months to four months from the date of the second publication of the notice of probate:

> 1. Filing claims against the estate;
> 2. Filing an action to set aside probate;
> 3. Election by a surviving spouse, serving as executor, to take against the will;
> 4. Election by a surviving spouse to occupy the homestead;
> 5. Filing an application to set off the share of a surviving spouse electing against the will; and
> 6. Bringing an action for recovery from the distributees (where the entire estate has been distributed) by the holder of a claim which was accepted as a contingent claim. [Four months from the date the claim becomes absolute].[700]

These changes are applicable to estates which are granted administration, and wills admitted to probate, on or after July 1, 1984.[701]

The Probate, Property and Trust Law Committee of the Iowa State Bar Association is studying the situation created by *Continental Insurance Co. v. Moseley*.[702] In that case, the decedent died testate in August of 1980.[703] The executor petitioned for probate of the will and for summary administration.[704] On September 26, 1980, the district court entered an order admitting the will to probate, directing the issuance of letters testamentary, and ordering summary administration.[705] On September 30, 1980, letters were issued and the notice to creditors was filed.[706] The notice to creditors was published in the newspaper on October 4, 9, and 14, 1980, and the proof of publication was filed on October 20, 1980.[707]

Under Nevada law, creditors of the estate are required to file their claims "within 60 days after the first publication of the notice to creditors."[708] If their claims are not filed within the 60 days, the claims are "barred forever."[709] At the time of the decedent's death, there was a civil action pending against her that had been filed by Continental.[710] Continental received notice of the decedent's death on December 3, 1980—the last day for filing claims against her estate.[711] Continental filed its claim on De-

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700. *Id.*
701. *Id.*
702. 98 Nev. 476, 653 P.2d 158 (1982).
703. *Id.* at _, 653 P.2d at 159.
704. *Id.* at _, 653 P.2d at 159.
705. *Id.* at _, 653 P.2d at 159. Under Nevada law, if the gross value of the estate does not exceed $60,000, the court may order summary administration. NEV. REV. STAT. § 145.040 (1983).
706. Continental Ins. Co. v. Moseley, 98 Nev. at _, 653 P.2d at 159.
707. *Id.* at _, 653 P.2d at 159.
708. NEV. REV. STAT. § 145.060 (1983).
709. *Id.*
710. Continental Ins. Co. v. Moseley, 98 Nev. at _, 653 P.2d at 159.
711. *Id.* at _, 653 P.2d at 159.

cember 5, 1980—two days later.[712]

Continental then filed a motion to compel republication in the probate proceeding.[713] Continental's primary contention was "that the publication of notice to creditors [was] insufficient under constitutional standards of procedural due process."[714] Nevertheless, the district court denied Continental's motion and declared that its claim was forever barred.[715] Affirming the lower court's decision, the Supreme Court of Nevada held that the requirement of due process for giving notice of a pending legal proceeding under *Mullane v. Central Hanover Bank & Trust Co.*[716] had been met.[717]

On June 27, 1983, however, the United States Supreme Court granted the petition for writ of certiorari.[718] The judgment was vacated and the case was remanded to the Supreme Court of Nevada for further consideration in light of *Mennonite Board of Missions v. Adams.*[719] On remand, in *Continental Insurance Co. v . Moseley,*[720] the Nevada Supreme Court concluded that more than service by publication was required in order to afford due process to Continental. Therefore, the lower court's order was reversed and the matter remanded for further proceedings.[721]

The Probate, Property and Trust Law Committee of the Iowa State Bar Association is currently analyzing the effect of this case on Iowa's probate statute.

Standard 9.8 sets out the required showings where title is derived through the heirs of an intestate decedent and where there has been no administration of the estate.[722] The standard requires an affidavit showing that:

> (1) the decedent died intestate at least five years prior;
> (2) the estate of said decedent had not been administered upon;
> (3) the decedent was survived by the persons named in the affidavit, specifying their relationship to [the] decedent; and
> (4) such statement of the assets of the decedent's estate to enable the title examiner to determine what further showing, if any, to require as to inheritance and estate taxes.[723]

These requirements are premised upon section 633.413 of the Iowa Code,

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712. *Id.* at _, 653 P.2d at 159.
713. *Id.* at _, 653 P.2d at 159.
714. *Id.* at _, 653 P.2d at 159.
715. *Id.* at _, 653 P.2d at 160.
716. 339 U.S. 306, 314 (1950).
717. Continental Ins. Co. v. Mosely, 98 Nev. at _, 653 P.2d at 160.
718. Continental Ins. Co. v. Moseley, 103 S. Ct. 3530, 3530 (1983).
719. *Id.* For a discussion of *Mennonite Bd. of Missions v. Adams,* 103 S. Ct. 2706 (1983), see *supra* text accompanying notes 145-52.
720. 683 P.2d 20 (1984).
721. *Id.* at 21.
722. IOWA STANDARDS § 9.8 (6th ed. 1984).
723. *Id.*

which disallows claims after five years from the date of death.[724] An additional requirement is that unless the death took place more than twenty years prior, a clearance of inheritance tax is necessary under section 450.22.[725]

This standard had limited use between July 1, 1981 and July 1, 1982. At that time, Iowa Code section 633.331 provided that the will of a decedent could be admitted *after* the expiration of the five-year period as documentary evidence of title only.[726] In 1982, the Iowa State Bar Association proposed an amendment to remedy the situation. The amendment was enacted by the legislature.[727]

Standard 9.9, formerly standard 4.4,[728] deals with the acquisition of title from a surviving joint tenant who holds title under a deed creating a valid joint tenancy.[729] The standard does not require "a showing of nonliability for federal estate and gift taxes,"[730] but nonliability for Iowa inheritance taxes must be shown.[731] If, however, the inheritance tax lien has expired, only a showing of the date of death is required.[732]

The inheritance tax lien expires twenty years from the date of death when there has been no regular probate proceedings, except to the extent that taxes are attributable to remainder or deferred interests that have not been finally vested in possession for at least ten years.[733] When there has been a probate proceeding, the inheritance tax lien expires ten years from the date of death, except to the extent taxes are attributable to remainder or deferred interests that have not been finally vested in possession for at least ten years.[734] The ten-year statute of limitation does not apply to a clearance of inheritance tax or short form probate proceeding which is not an administration of an estate.[735]

Standard 9.10, formerly standard 9.9,[736] addresses the situation where the surviving joint tenant conveys title pursuant to a contract, and the contract preserves the sellers' joint tenancy as well as the surviving joint tenant's right to receive the proceeds.[737] In this situation, the standard does not require a regular probate or clearance of inheritance tax.[738] Standard 9.11,

724. Iowa Code § 633.413 (1983).
725. Iowa Standards § 9.8 (6th ed. 1984). *See* Iowa Code § 450.22 (1983).
726. Iowa Code § 633.331 (1981).
727. 1982 Iowa Acts ch. 1076, § 1.
728. *See* Iowa Standards § 4.4 (5th ed. 1974).
729. *Id.* § 9.9 (6th ed. 1984).
730. *Id.* comment.
731. *Id.* § 9.9.
732. *Id.*
733. Iowa Code § 450.7(1)(a) (1983).
734. *Id.* § 450.7(1)(b).
735. *Id.*
736. *See* Iowa Standards § 9.9 (5th ed. 1974).
737. *Id.* § 9.10 (6th ed. 1984).
738. *Id.*

formerly standard 9.10,[739] provides that it is not necessary to require the payment of claims, the payment of inheritance or federal estate taxes, or the closing of the estate when title is conveyed by the fiduciary pursuant to a contract made by the decedent.[740] In the situations presented by standards 9.10 and 9.11, the equitable title passes to the purchaser when the contract of sale is executed.[741] Additionally, no death tax lien on the real estate exists in these situations.[742] One word of caution should be noted concerning the situation presented by standard 9.10. Under those circumstances, the abstracter should show the provision in the contract preserving the joint tenancy of the sellers.

Standard 9.12 provides that when real estate is transferred during the administration of an estate by the personal representative under Iowa Code Section 633.386, or *under small estate administration Section 635.12*, or under power of sale in the will, an adequate showing must be made with regard to the payment of, or non-liability of the estate for federal estate taxes.[743] Alternatively, a specific release of the federal estate tax lien must be obtained.[744] The standard requires no showing with respect to payment of the costs of administering the estate; the existence or payment of claims filed in the estate; personal liens, taxes, and judgments against heirs or beneficiaries; federal or Iowa income taxes, unless notice of a lien has been filed; and Iowa inheritance taxes.[745] It should be noted that although Iowa inheritance taxes are liens, the lien is divested by the executor's sale.[746]

The showing required with regard to federal estate taxes deserves a more extended discussion. Most examiners rely on the probate inventory to establish that no federal estate tax return will be filed. Where it appears that a proper return has been filed and the tax paid, the examiner should require a showing of the estate tax closing letter *and* copies of checks showing payment of any tax due *or* a receipt from the Internal Revenue Service showing payment of the tax. The Closing Letter alone is not sufficient proof of payment of the tax. Prior to January 1, 1977, title examiners required a showing of non-liability if the probate inventory showed a gross estate in excess of $60,000.[747] After January 1, 1977, such showing is required only if the gross estate exceeds the following schedule.[748]

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739. *See id.* § 9.10 (5th ed. 1974).
740. *Id.* § 9.11 (6th ed. 1984).
741. *Id.* §§ 9.10-.11.
742. *Id.*
743. *Id.* § 9.12.
744. *Id.*
745. *Id.*
746. IOWA CODE § 450.7(3) (1983).
747. I.R.C. § 2052 (1976), *repealed by* Tax Reform Act of 1976, Pub. L. No. 94-0455, § 2001(a)(4), 90 Stat. 1520, 1848.
748. I.R.C. § 2010 (1981).

Year of Death	Unified Credit	Exemption Equivalent
1977	$ 30,000	$120,667
1978	$ 34,000	$134,000
1979	$ 38,000	$147,333
1980	$ 42,500	$161,563
1981	$ 47,000	$175,625
1982	$ 52,800	$225,000
1983	$ 79,300	$275,000
1984	$ 96,300	$325,000
1985	$121,800	$400,000
1986	$155,800	$500,000
1987 and thereafter	$192,800	$600,000

The Title Standards Committee made few changes in the sixth edition of chapter nine. This lack of change, however, is in no way an indication that the chapter nine standards are not of importance. Because land title transfer often occurs upon death, many issues affecting marketability of title derive from probate proceedings. The numerosity of the chapter nine standards is illustrative of the many issues that may arise. Although all of these issues are significant, it would be instructive to note two of the most significant issues in closing. First, the recent amendments to the Probate Code should be noted and followed by the examiner.[749] Finally, the examiner should anticipate the possible constitutional issues raised by *Continental Insurance Co. v. Moseley*.[750]

XI. Chapter Ten: Statutes of Limitations and Marketable Title Acts

A general comment was added to Chapter ten to remind title examiners that several of the statutes that are discussed in this chapter are revised periodically.[751] In order to avoid the need for a wholesale revision of this chapter when one or more of these statutes is updated, the general comment advises the reader to adjust the dates used in the chapter to comply with any amendments.[752]

While there was a change in the context of standard 10.1,[753] no change of purpose or result was intended. The intention was to spell out more carefully the operation of Iowa Code section 614.17,[754] as well as the showings

749. *See supra* notes 691-93, 698-701 and accompanying text.
750. *See supra* notes 702-21 and accompanying text.
751. Iowa Standards ch. 10 (6th ed. 1984).
752. *Id.*
753. *Compare id.* § 10.1 (6th ed. 1984) *with id.* (5th ed. 1974).
754. Iowa Code § 614.17 (1983).

required in the abstract. In effect, the old standard only mentioned two out of the five basic requirements that must be fulfilled to invoke the protection of the statute.[755] There are five elements that must be demonstrated to cut off stale claims under section 614.17.[756] If these elements are not shown in the abstract, the examiner is not justified in rendering an opinion that the stale claim is unenforceable.[757]

The first requirement of section 614.17 is that the person who is claiming the benefit of the statute must be the holder of record title.[758] In order to be benefitted by the statute, the person must have color of title.[759] In other words, there must be a document, whether it be a deed or some other instrument, that purports to transfer title to the person claiming the advantage of the statute.[760] Furthermore, this document must be recorded.[761] Usually this document will be recorded in the county recorder's office.[762] Not all documents in a chain of title, however, are recorded there.[763] For example, a person's color of title may depend upon a decree of the court found in the Clerk of Court's office.[764] That decree is sufficient to make the claimant the holder of record title.[765]

The second element of section 614.17 is that the person asserting the benefit of this statute must be in possession.[766] This requirement involves several noteworthy issues. First, unlike the other four requirements, possession is a factual event, not a record event. Thus, it is not, of itself, ascertainable from the record. The object of this statute, however, is to make the marketability of the title determinable from the record.[767] Therefore, the statute provides for the recording of an affidavit of possession.[768] The filing of that affidavit puts the party's possession on the record and enables an examiner to rely on the recorded affidavit as a demonstration of the party's possession.[769]

Another issue relating to the possession requirement that has caused

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755. *See* IOWA STANDARDS § 10.1 (5th ed. 1974).
756. IOWA CODE § 614.17 (1983).
757. *See* IOWA STANDARDS § 10.1 (6th ed. 1984).
758. IOWA CODE § 614.17 (1983).
759. *See id.*
760. *Id.*
761. *Id. See also* IOWA STANDARDS § 10.1 (6th ed. 1984).
762. *See* G. MADSEN, *supra* note 61, ch. 4.
763. *See, e.g.*, Lane v. Travelers Ins. Co., 230 Iowa 913, 299 N.W. 533 (1941) (recognizing interests arising in contingent remaindermen under a will). *See also* PATTON & PATTON, *supra* note 283, § 6, at 16-24.
764. IOWA CODE § 614.17 (1983).
765. *See id.*
766. *Id. See also* P. BASYE, *supra* note 35, § 176.
767. *See* Tesdall v. Hanes, 248 Iowa 742, 745, 82 N.W.2d 119, 121 (1957).
768. IOWA CODE § 614.17 (1983).
769. *See id.* § 558.8 (dealing with the presumption of validity of affidavits filed on the record by the owner in possession).

some dispute revolves around the quality of the possession necessary in order to comply with the statute's requirements. The question concerns whether the possession must, in effect, be adverse possession.[770] The comment to standard 10.1 clearly states that there is no need for adverse possession.[771] The standard is in accord with the statute which, on its face, does not require the possession to rise to the level of adverse possession.[772] Thus, there is no need to assert in the affidavit that the possession was continuous for any period of time.[773]

A final issue of note arises as a corollary to the requirement that the person using the statute must be in possession. A person who has title to a nonpossessory interest may not claim the benefit of the statute.[774] Thus, the holder of an easement or other incorporeal interest cannot assert this statute.

The third requirement of section 614.17 is that the person using the statute must have an unbroken chain of record title that predates January 1, 1970.[775] The various recorded instruments constituting links in the record titleholder's chain of title must go back to a date prior to January 1, 1970.[776] A break in the chain of record title prior to that date does not prevent the use of the statute.[777] A break in the chain after that date, however, would render the statute unavailable.[778]

It appears that there are two types of breaks that may create problems. The first is merely a gap in the record.[779] For example, suppose A conveyed to B of record in 1965, and C conveyed to D of record in 1975. Since the link between B and C is missing from the record, D does not have an unbroken chain of record title.

The other type of break involves a concept similar to the concept of "root of title" as used in the forty year Marketable Title Act.[780] An example of this type of break is given in the comment to standard 10.1.[781] If A conveys of record to B in 1968 subject to an interest in X, and B conveys of record to C in 1975, C does not have an unbroken chain of record title.[782] The record title, in order to be unbroken, must appear without reference to

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770. *See* IOWA STANDARDS § 10.1 comment (6th ed. 1984).
771. *Id.*
772. *See* IOWA CODE § 614.17 (1983).
773. *See* IOWA STANDARDS § 10.1 comment (6th ed. 1984). *See also* G. MADSEN, *supra* note 61, § 12.1(A).
774. *See* IOWA CODE § 614.17 (1983).
775. IOWA CODE § 614.17 (1983).
776. *Id.*
777. *Id.*
778. *Id.*
779. *See* G. MADSEN, *supra* note 61, § 12.1(H-2), at 259-60.
780. IOWA CODE §614.29(5) (1983).
781. IOWA STANDARDS § 10.1 comment (6th ed. 1984).
782. *Id.*

the adverse interest (that is, the one sought to be cut off) from the first recorded title transaction prior to 1970. In effect C's "root of title"[783] is the A to B deed in 1968, and that very deed demonstrates an outstanding interest in X. If, however, the B to C conveyance had been in 1969, C would have had an unbroken chain of title. This is because the first transaction prior to 1970 would have been the B to C conveyance, and since that date the record contains no reference to the interest of X.[784]

The fourth requirement of section 614.17 is that the claim which is cut off by the statute must arise prior to January 1, 1970.[785] This statute declares that any adverse claim that arose prior to that date is "ancient" and no longer enforceable if the other requirements of the statute are met.[786] Thus, if an adverse claim arose in 1973, it is not affected by this statute.

It must be remembered that the adverse claim is determined when it *first* arises.[787] Thus, if the adverse claim was created in a conveyance from A to B in 1965 and transferred to C in 1973, it is subject to being cut off by section 614.17. The important date is not when it arose in C, but when it first arose.

The final section 614.17 requirement is that there must be no preservation of the adverse claim between July 1, 1980 and June 30, 1981.[788] If a preservation is made of record during that period of time, the interest is not cut off by the statute, no matter how old the claim might be.[789] A preservation at an earlier date, or under an earlier version of this same statute is not adequate.[790] A preservation must be filed during the specified preservation period each time the statute is revised.[791] Also, when a person fails to file under the statute during a specific preservation period, the adverse claim is not revived by a filing during the preservation period under a subsequent revision of the statute.[792]

Standard 10.2 remains substantially unchanged from the 1974 edition.[793] In effect, the inquiry concerns what is necessary in order to rely on sections 448.15 and 448.16 to cure imperfections arising in a tax sale.[794] Sec-

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783. The author realizes that section 614.17 of the Iowa Code does not employ the term "root of title." The concept, however, is so parallel that the term is used here to aid in the explanation of the concept.

784. *See* Lytle v. Guilliams, 241 Iowa 523, 41 N.W.2d 668 (1950).

785. IOWA CODE § 614.17 (1983).

786. *Id.*

787. Note, *supra* note 257, at 79-80. *See also* IOWA STANDARDS § 10.1 comment (6th ed. 1984); G. MADSEN, *supra* note 61, § 12.1(H).

788. IOWA CODE § 614.17 (1983).

789. *Id.*

790. *Id.*

791. *Id.* §§ 614.17, .20. Taken together, these two sections reflect the legislative intent to cut off ancient claims and to prevent too-easy preservation of the same. *Id.*

792. 1970 Iowa Acts ch. 1271, § 7.

793. *Compare* IOWA STANDARDS § 10.2 (6th ed. 1984) *with id.* (5th ed. 1974).

794. *Id. See* IOWA CODE §§ 448.15-.16 (1983).

tion 448.15 provides that when two years have transpired since the issuance and recording of a tax deed, the holder of title may file a specified affidavit with the county recorder.[795] Section 448.16 provides that anyone who has any right, title, or interest adverse to the title derived from the tax deed must file a claim with the county recorder within 120 days after the filing of the affidavit.[796] If the claim is not filed within that period, then it may not be asserted against the holder of title through the tax deed.[797]

What must the examiner require the abstract to show? Standard 10.2 states that the abstract must show that an affidavit has been filed in proper form and that 120 days have expired thereafter without the filing of a claim.[798] Of course, the examiner should also determine that two years have transpired since the issuance and recording of the tax deed.[799] Since the abstract will, of necessity, show the recording of the tax deed, the calculation of the two year period should present no difficulty.

Two observations or concerns were added to standard 10.2 by way of a comment and a caveat. The comment deals with the adverse effect that an incorrect legal discription in the tax deed will have upon the operation of sections 448.15 and 448.16.[800] In *Larsen v. Cady*,[801] the Iowa Supreme Court held that if a tax deed is issued with an erroneous description, these sections will not apply to cut off the adverse claim. This is true even if the affidavit under section 448.15 contains a correct description.[802] Since one of the more common defects in a tax deed is an incorrect description, some difficulties may arise in the use of these sections. Therefore, the examiner should review the description in the tax deed with the purposes of ascertaining, to the extent it is within his power, that the description therein is correct and describes the land being conveyed to the examiner's client.

An even more significant and pervasive problem arises under the case of *Mennonite Board of Missions v. Adams*,[803] which is mentioned in the caveat.[804] In that case, the United States Supreme Court considered an Indiana tax sale statute.[805] The statute required only that notice of the tax sale be served upon the owner of the real estate.[806] As a result, the mortgagee was never sent notice of the pending tax sale.[807] Notice was, however, pub-

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795. Iowa Code § 448.15 (1983).
796. *Id.* § 448.16.
797. *Id.*
798. Iowa Standards § 10.2 (6th ed. 1984).
799. *See* Iowa Code § 448.15 (1983).
800. Iowa Standards § 10.2 comment (6th ed. 1984).
801. 274 N.W.2d 907 (Iowa 1979).
802. *Id.* at 909.
803. 103 S. Ct. 2706 (1983).
804. Iowa Standards § 10.2 caveat (6th ed. 1984).
805. Mennonite Bd. of Missions v. Adams, 103 S. Ct. at 2708-09.
806. *Id.*
807. *Id.* at 2709.

lished and posted.[808] The Supreme Court held that the failure to use some more appropriate method to notify the mortgagee of the tax sale was a violation of the mortagee's right of due process[809] and the notices that were published and posted were not adequately designed to warn the mortgagee of the existence of the tax sale proceedings.[810] Consequently, the tax sale was ineffective as against the mortgagee.[811]

The Iowa tax sale statute requires only publication;[812] it does not even require that direct notice be given to the owner of the premises. Under the rationale of *Mennonite Board of Missions v. Adams*, the Iowa statute would appear to suffer a constitutional due process defect. It would be invalid as to both a mortgagee and the owner. Based on other decisions, there may also be problems with its validity as against an installment contract vendee[813] and the holder of a judgment lien.[814] Obviously, this would be an area in which proper remedial legislation is needed.

Standard 10.3 also remains unchanged from the 1974 edition.[815] The issue raised concerns who may make and file a tax title affidavit.[816] The relevant statute[817] is not entirely clear. The standard recites that the affidavit may be made by either the record titleholder or anyone having knowledge of the facts, as long as it is filed by, or at the request of, the record titleholder.[818] Again a caveat was added to express the Committee's concern that *Mennonite Board of Missions v. Adams* may have some effect on this standard.[819]

Standard 10.4 is unchanged in purport and effect although the text has been substantially shortened to avoid restating the facts of the problem in the standard itself.[820] The issue there is whether a mortgage is enforceable when it is more than twenty years old, does not show a date of maturity, and has not been extended of record so as to show a maturity date within the last ten years.[821] These facts fit within the first fact pattern of the Ancient Mortgage Act.[822] Under that Act, if the mortgage is recorded and discloses no maturity date, then an action may not be brought to foreclose that mortgage more than twenty years beyond its date, which is not necessarily

808. *Id.*
809. *Id.* at 2712.
810. *Id.* at 2711-12.
811. *Id.* at 2712.
812. IOWA CODE § 446.9 (1983).
813. *See, e.g.*, Harris v. Gaul, 572 F. Supp. 1554 (N.D. Ohio 1983).
814. *See, e.g.*, Nolf v. Estate of Schumo, 479 A.2d 940 (Pa. 1984).
815. *Compare* IOWA STANDARDS § 10.3 (6th ed. 1984) *with id.* (5th ed. 1974).
816. *Id.* (6th ed. 1984). *See also* G. MADSEN, *supra* note 61, § 18.6(B).
817. IOWA CODE § 448.15 (1983).
818. IOWA STANDARDS § 10.3 (6th ed. 1984).
819. *Id.* caveat. *See* Mennonite Bd. of Missions v. Adams, 103 S. Ct. 2706 (1983).
820. *Compare* IOWA STANDARDS § 10.4 (6th ed. 1984) *with id.* (5th ed. 1974).
821. *Id.* (6th ed. 1984).
822. IOWA CODES § 614.21 (1983).

the date of the recording.[823] If, however, prior to the expiration of the twenty year period, an extension setting forth a maturity date is filed, then an action may be brought to foreclose the mortgage up to, but not beyond, ten years after the stated maturity date.[824]

Standard 10.5 also is unchanged in purport and effect, but has been substantially shortened to avoid restating the facts of the problem in the standard itself.[825] The facts of the problem fit within the second fact pattern of the Ancient Mortgage Act.[826] Under the Act, if a mortgage is recorded and discloses a maturity date, an action may not be brought to foreclose the mortgage after the greater of: (a) twenty years from the date of the mortgage, or (b) ten years from the maturity date revealed therein.[827] If, however, prior to the expiration of the twenty or ten year period, an extension setting forth a new maturity date is recorded, than an action may be brought to foreclose the mortgage up to, but not beyond, ten years after the stated maturity date.[828]

The issue in standard 10.5 is whether a mortgage is enforceable if it is more than twenty years old, secures a principal indebtedness and future advances, sets forth a maturity date for the principal indebtedness, but states no maturity for the future advances and no extension agreement is recorded.[829] The real issue is whether failure to state a maturity date for the future advances affects the result. First, an interpretation of the note and mortgage would probably yield a conclusion that the maturity date of the future advances is the same as the principal indebtedness. That seems to be the normal meaning of a mortgage with a single maturity date. In any event, even without such an interpretation, the mortgage has but one stated maturity date. The position of the standard is that the mortgage may not be enforced beyond the ten year period after the stated maturity date unless an extension agreement setting forth a new maturity date has been recorded.[830]

Standard 10.6 is unchanged from the prior edition.[831] The comment, however, has been expanded to be more descriptive of the operation of the Stale Uses and Reversions Act.[832] The authority has also been expanded to set forth several cases decided since the prior edition.[833]

Although not directly involved in the standard, a short review of the operation of the Stale Uses and Reversions Act is useful. In order to make

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823. *Id.*
824. *Id.*
825. *Compare* IOWA STANDARDS § 10.5 (6th ed. 1984) *with id.* (5th ed. 1974).
826. IOWA CODE § 614.21 (1983).
827. *Id.*
828. *Id.*
829. IOWA STANDARDS § 10.5 (6th ed. 1984).
830. *Id.*
831. *Compare id.* § 10.6 (6th ed. 1984) *with id.* (5th ed. 1974).
832. *Id.* comment (6th ed. 1984). *See* IOWA CODE §§ 614.24-.28 (1983).
833. *See* IOWA STANDARDS § 10.6 (6th ed. 1984).

use of the Act, the person claiming its benefit must be the holder of record title.[834] This brings into consideration the same issues raised under standard 10.1.[835] Of prime importance, this requires a document on the record that purports to transfer title to the person claiming the advantage of the statute.[836]

The person taking advantage of the Stale Uses and Reversions Act must be in possession.[837] The same observations raised above under Standard 10.1 are also relevant here.[838] It should be noted that, unlike section 614.17, there is no direct authority for filing an affidavit of possession for the purpose of placing the fact of possession on the record. Perhaps, an affidavit filed under section 614.17 would be adequate for purposes of this Act also.

The interests which are cut off by the operation of this Act are reversions, reverted interests, and use restrictions.[839] As explained in the new expanded comment, the terms "reversions" and "reverted interests" mean possibilities of reverter and rights of re-entry (powers of termination) whether or not a right to possession has accrued to that claimant.[840] For example, if O conveys certain premises to A in 1966 "so long as they are used for school purposes," and O or his successors do not preserve their interest, it may not be enforced against the holder of record title (A) in possession after 1987. This is true regardless of whether or not the limitation has been breached by 1987. This Act also cuts off use restrictions if they are not properly preserved.[841] The term "use restriction" is used to indicate a restrictive convenant or negative easement.[842] It does not include an affirmative easement.[843]

In order for the Stale Uses and Reversions Act to cut off a stale claim, the record must show that the claim has not been preserved within twenty-one years after the recording of the instrument creating it.[844] If it has been preserved within that period of time, it may be enforced for another twenty-one years.[845] In order to be enforced thereafter, it must be preserved again within the prior twenty-one year period.[846]

In several recent cases the Iowa courts have held that the interest

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834. IOWA CODE § 614.24 (1983).
835. *Compare* IOWA STANDARDS § 10.6 (6th ed. 1984) *with* IOWA CODE § 614.24 (1983).
836. IOWA CODE § 614.24 (1983).
837. *Id.*
838. *Compare* IOWA STANDARDS § 10.6 (6th ed. 1984) *with* IOWA CODE § 614.24 (1983).
839. IOWA CODE § 614.24 (1983).
840. IOWA STANDARDS § 10.6 comment (6th ed. 1984).
841. IOWA CODE § 614.24 (1983).
842. G. MADSEN, *supra* note 61, § 12.3(A), at 274. *See generally* P. BASYE, *supra* note 35, §§ 55-60 (discussing statutes of limitation barring nonpossessory interests).
843. *See* THE IMPROVEMENT OF CONVEYANCING, *supra* note 327, at 203-29.
844. IOWA CODE § 614.24 (1983).
845. *Id.* § 614.25.
846. *Id.*

owned by a railroad is an easement, rather than a fee simple determinable or fee simple on condition subsequent. Since the interest is not a possessory one, the Act does not prevent the owner of the fee simple from asserting his ownership after the easement was abandoned.[847] In addition, section 614.24 was recently amended to exclude its application to reversionary interests in railroad property.[848] The amendment's effective date was July 1, 1980.[849] It does not appear that this amendment has retroactive effect. If rights of reentry or possibilities of reverter were cut off prior to July 1, 1980, the owner of the fee simple has a vested interest. It would be a denial of that owner's due process to create subsequently an interest in the land in favor of another person and without the agreement of the landowner.

It is clear that chapter ten of the Title Standards cannot be reviewed without reviewing the Iowa Code sections upon which it is based. Statutes available to cut off claims contribute to the clearing of title in order that marketability may be established. The examiner must, however, be assured that the proper statutory requirements have been fulfilled.[850] These requirements are reflected in the Chapter Ten standards.[851] The examiner should also be aware of the possible implications of the *Mennonite* case.[852] The Iowa tax sale statute may be constitutionally defective under the rationale of that case.[853] Thus, legislative change in that area is possible.

XII. Chapter Eleven: Forty Year Marketable Title Act

Standard 11.1 is substantially unchanged from the prior edition.[854] The impact of the change is minor. This standard deals with the extent to which the forty year Marketable Title Act may be relied upon to cure or remedy imperfections in the chain of title.[855] A person who has an unbroken chain of record title extending back to the root of the title[856] has a title free and clear of all interests that arose prior to the root of title unless the interest is one of the matters excepted from the operation of the Act by section 614.32.[857] The prior version of this standard did not refer to section 614.32.[858] Rather it stated that the title was marketable if there were no matters in the chain

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847. *See, e.g.*, Hawk v. Rice, 325 N.W.2d 97 (Iowa 1982); Johnson v. Burlington Northern, Inc., 294 N.W.2d 63 (Iowa Ct. App. 1980).

848. *See* Iowa Code § 614.24 (1983) (as amended by 1980 Iowa Acts ch. 1115, § 6.

849. 1980 Iowa Acts ch. 1115, § 6.

850. *See supra* notes 756-92, 795-97, 822-24, 826-28, 834-38 and accompanying text.

851. *See generally* Iowa Standards ch. 10 (6th ed. 1984).

852. *See supra* notes 803-14 and accompanying text.

853. *See supra* notes 803-14 and accompanying text.

854. *Compare* Iowa Standards § 11.1 (6th ed. 1984) *with id.* (5th ed. 1974).

855. *Id.* (6th ed. 1984). *See* Iowa Code §§ 614.29-.38 (1983).

856. For a discussion of the root of title and a definition of an unbroken chain of record title, see Iowa Standards § 11.2 (6th ed. 1984).

857. *Id.* § 11.1. *See* Iowa Code § 614.32 (1983).

858. Iowa Standards § 11.1 (5th ed. 1974).

of title purporting to divest the interest.[859] In reality, that limitation was incomplete. A person's title under the forty year Marketable Title Act is subject to all the matters excepted in section 614.32.[860]

Although standard 11.1 does not enumerate the matters listed in section 614.32, it is worthwhile to review them here. Under that section the marketable title is subject to five exceptions.[861] The first exception subjects marketable title to all interests that are inherent in the muniments that form the record chain of title from the root of title and thereafter.[862]

The second exception under section 614.32 is any interest preserved by the filing of a proper notice or by forty years of continuous possession in accordance with section 614.34.[863] Any person who claims an interest in the real estate may preserve his claim by filing a notice to that effect in the county recorder's office.[864] That notice, in order to be effective, must be filed within the forty year period immediately following the root of title.[865] For example, assume that A conveyed to B in 1940 and that is the root of title. If A also previously conveyed an interest to X in 1935, X may preserve that interest by filing a notice in the recorder's office by 1980. The period for filing the notice is not extended by any legal disability or minority of X.[866]

If the same record owner has been in possession for forty continuous years, during which period no title transaction appears of record in his chain of title, then the possession is deemed to be the equivalent of filing a notice of claim immediately preceding the termination of the forty year period.[867] The purpose of this provision is to deal with one limited circumstance. As in the prior example, assume that A conveyed to B in 1940, and that A had previously conveyed to X in 1935. Assume further that X has been in continuous possession since 1935 with no title transaction appearing in his chain of title, and that X has not filed any notice preserving the interest with the county recorder. Under the principle of the previous paragraph, B would prevail over X despite the fact that X possessed and improved the property since 1935.[868] Under the principle of this paragraph, if X has been in possession as required, X is given special consideration. A notice is deemed to have been filed on the fortieth anniversary of X's acquisition of

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859. *Id.*

860. IOWA CODE § 614.32 (1983).

861. *Id.*

862. IOWA CODE § 614.32(1) (1983). For a discussion of this exception, see *infra* notes 892-95 and accompanying text.

863. IOWA CODE § 614.32(2) (1983).

864. *Id.* § 614.35.

865. *Id.* § 614.34(1).

866. *Id.*

867. *Id.* § 614.34(2).

868. It is possible, however, that X might prevail as a person who has established adverse possession subsequent to the root of title. *See id.* § 614.32(3).

the premises.[869] But for this provision, X, the archetypical American landowner, would lose to B.

The third exception of section 614.32 subjects marketable title to the rights of any person who establishes adverse possession or prescriptive user, in whole or in part, subsequent to the root of title.[870] Thus, if A conveyed to B in 1940, and X entered into adverse possession in 1965 and remained in possession thereafter, B's title is subject to X's adverse possession. Furthermore, the adverse possession need not continue to the date of the title search in order to be valid.[871] The statute merely requires that there be a period of adverse possession subsequent to root of title.[872] Thus, in the above example, if X entered adverse possession in 1965 and remained until 1976, adverse possession would be established. If X then left possession and B conveyed to C in 1980, the title by adverse possession in X would be valid against C even though X was not in possession at the date of the conveyance to C.

The fourth limitation on marketable title under section 614.32 is any interest arising out of a title transaction recorded after the root of title.[873] To be valid, however, such a title transaction must be recorded within the forty year period immediately following the root of title.[874] Thus, assume that A conveyed to B in 1940 and that conveyance is the root of title. If A also previously conveyed an interest to X in 1935, and X conveyed of record to Y in 1945, that interest is preserved and may be enforced against B. If, however, X conveyed of record to Y in 1983, the recorded title transaction would not have occurred within the forty year period after the root of title and Y could not enforce the interest.

Finally, marketable title is subject to the exceptions set forth in section 614.36.[875] That section contains three exceptions. First, the title is subject to the effect of any easement that is apparent from, or can be proved by, physical evidence of its use.[876] For example, assume that A conveyed of record to B in 1940 and that is the root of title. Further, assume that A conveyed an easement to X in 1935. If, at the date of determination, this easement is apparent, the easement is not cut off despite the fact that it predated the root of title.[877] For another example, assume that X is a utility company that has an easement for a buried pipeline or wires that are not apparent. Nevertheless, the easement is not cut off if it can be proved by physical evidence of its use. Presumably, excavation will demonstrate the physical

869. *Id.* § 614.31.
870. *Id.* § 614.32(3).
871. *Id.*
872. *Id.*
873. *Id.* § 614.32(4).
874. *Id.* §§ 614.32(4), .33.
875. *Id.* § 614.32(5).
876. *Id.* § 614.35.
877. *Id.*

evidence of its use. Apparently this exception was adopted for the specific purpose of protecting holders of easements like utility lines.

Second, the title is subject to any right, title or interest of the United States, even if the notice described above has not been filed.[878] The interests of all other governmental entities, however, whether state or municipal, are subject to the barring effect of the Act.[879]

Third, the Act does not bar any lessor from enforcing his or her right to possession after the expiration of a lease.[880] Suppose A executes a fifty year, long-term, prepaid lease to B in 1935. Assume that B purports to convey the premises to C in fee simple in 1940. That conveyance becomes C's root of title and, but for this exception, C would prevail over A when the lease expires. This provision, however, precludes that effect.

Standard 11.2 is essentially unchanged from the prior edition.[881] Its objective is to define the term "unbroken chain of record title."[882] In addition, the standard also explains the concept of a root of title.[883] The root of title is the most recent conveyance or other transaction in a person's chain of title that purports to create or transfer the interest that the present owner claims, and that was recorded at least forty years prior to the present date (or such other date for which marketability is being determined).[884] Assume A conveyed of record to B in 1900, B conveyed of record to C in 1940, and C conveyed of record to D in 1950. The root of title determined as of 1985 would be the B to C conveyance in 1940. However, if the decision is made after 1990, then the root of title becomes the C to D conveyance in 1950. The root of title need not be a conveyance or other transfer by deed.[885] It might also be, inter alia, a will admitted to probate, an intestate administration, or a decree of a court.[886]

In order to use the Marketable Title Act, a person must have an unbroken chain of title of record going back to, and including, the root of title.[887] Therefore, it is also important to define the unbroken chain concept. In order that a chain of record title be unbroken, there must be no record gaps.[888] The record must disclose all the links that comprise the chain from the root of title up to the current date.[889] According to standard 11.2:

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878. *Id.*
879. *Id.* § 614.33.
880. *Id.* § 614.36.
881. *Compare* IOWA STANDARDS § 11.2 (6th ed. 1984) *with id.* (5th ed. 1974).
882. *See id.* (6th ed. 1984).
883. *Id.*
884. IOWA CODE § 614.29(5) (1983).
885. *See id.* § 614.29(5)-(6). *See also* IOWA STANDARDS § 11.2 comment (6th ed. 1984).
886. IOWA CODE § 614.29(6) (1983). *See also* IOWA STANDARDS § 11.2 comment (6th ed. 1984).
887. IOWA CODE § 614.29(6) (1983).
888. *See* IOWA STANDARDS § 11.2 (6th ed. 1984).
889. *See id.*

> 'An unbroken chain of title of record' . . . may consist of (1) a single conveyance or other title transaction which purports to create an interest and which has been a matter of public record for at least forty years; or (2) a connected series of conveyances or other title transactions of public record in which the root of title has been a matter of public record for at least forty years.[890]

Thus, if A conveyed of record to B in 1940 and nothing further has been recorded in the chain of title, B has an unbroken chain of title. This chain of title consists of a single link—the root of title. Instead, assume that A conveyed of record to B in 1940, B conveyed of record to C in 1960, and C conveyed of record to D in 1980. D's unbroken chain of record title consists of three conveyances commencing with the root of title in 1940. If, in the last example, the B to C conveyance in 1960 was not recorded, there would then be a break in the chain of record title. D would not, at this time, be entitled to invoke the protection of the Act, even if the unrecorded conveyance could later be proved. In the alternative, assume that the A to B conveyance was made in 1940, but was not recorded until 1950 and no prior recorded conveyance could be found in the chain of title. In that case, the chain of title would not continue back at least forty years, and D could not invoke the aid of the act until 1990.

Standard 11.3 also remains essentially unchanged from the prior edition.[891] It inquires as to the effect that is given interests that encumber the root of title.[892] According to the Marketable Title Act, the title is subject to all interests and defects that are inherent in the muniments that form the chain of title.[893] Since the root of title is one of the muniments that forms the chain of record title, the title is subject to all interests and defects revealed by it.[894] The Act, however, further provides that a general reference in the muniment to an easement, use restriction, or other interest predating the root of title is not sufficient to preserve it, unless specific identification is made in the muniment to a recorded title transaction that creates the interest.[895] For example, suppose that A conveyed of record to B in 1940 and this document is the root of title. If it states that the conveyance to B is subject to easements and convenants recorded at a specific book and page of the records, the title is subject to those interest. If, however, it merely states that the conveyance is subject to all easements and covenants of record, the prior interests are no longer enforceable.

Standard 11.4 of the fifth edition was considered by the Committee on Title Standards to be unnecessary and partially duplicated by standard 11.5

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890. *Id.*
891. *Compare id.* § 11.3 (6th ed. 1984) *with id.* (5th ed. 1974).
892. *Id.* (6th ed. 1984).
893. IOWA CODE § 614.32(1) (1983).
894. *See generally* IOWA STANDARDS § 11.3 (6th ed. 1984).
895. *Id.*

of the fifth edition.[896] As a result, old standard 11.4 was omitted.[897] Old standard 11.5 now appears as standard 11.4.[898] It is substantially unchanged, except for the deletion of repeated examples in the comment.[899]

Standard 11.4 considers the meaning and effect of "matters purporting to divest an interest."[900] The term is defined in the standard as "those matters appearing of record which, it taken at face value, warrant the inference that the interest has been divested."[901] Under the Marketable Title Act, this term has importance because a person has an unbroken chain of record title only if nothing appears in the record purporting to divest the person of his purported interest.[902] An obvious example of the application of this concept is as follows. Suppose A conveys of record to B in 1940, and B conveys of record to C in 1960. Further, assume that C conveyed of record to D in 1984. Although C had a forty year chain of record title in 1980, the deed to D purports to divest it and C obviously does not have title.

Standard 11.5 continues to be in substantially the same form as was standard 11.6 in the prior edition.[903] It addresses the relationship between the forty year Marketable Title Act and other marketable title legislation, especially section 614.17.[904] The standard states that the forty year Act and other marketable title legislation are supportive of each other and not in conflict.[905] They are *in pari materia* and each should be used when appropriate.[906] For example, if A conveyed of record to B in 1940 and that document formed the root of title, the forty year Act should be applied to cut off stale claims that predate 1940. Suppose, however, that B executed a mortgage in 1945 that matured in 1970. If no extension was recorded, the Ancient Mortgages Act should be applied.[907] If B conveyed of record to C in 1950 and reserved right of re-entry or possibility of reverter, the Stale Uses and Reversions Act should be applied to cut off B's interest, if it has not been preserved.[908] If B conveyed of record to C in 1950 and later conveyed of record to D in 1965, and the requirements of section 614.17 have been met, then that section should be applied to cut off C's interest.[909]

Standard 11.6 is the same in effect as standard 11.7 in the prior edi-

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896. *Compare* IOWA STANDARDS § 11.4 (5th ed. 1974) *with id.* § 11.5.
897. *See id.* § 11.4.
898. *Id.* (6th ed. 1984).
899. *Compare id.* (6th ed. 1984) *with id.* § 11.5 (5th ed. 1974).
900. *Id.* § 11.4 (6th ed. 1984).
901. *Id.*
902. IOWA CODE § 614.31(2) (1983).
903. *Compare* IOWA STANDARDS § 11.5 (6th ed. 1984) *with id.* § 11.6 (5th ed. 1974).
904. *Id.* § 11.5 (6th ed. 1984).
905. *Id.*
906. *See id.*
907. IOWA CODE § 614.21 (1983).
908. *Id.* §§ 614.24-.28.
909. *Id.* § 614.17.

tion.[910] The only change was to simplify the standard by omitting the repetition of the problem in the body of the standard.[911] The standard inquires as to the necessity of showing present possession by the record titleholder in order to rely on the Marketable Title Act.[912] The standard states that no such possession is necessary; thus, it need not be shown.[913] The Act states that "any person" who has an unbroken chain of record title back to the root of title may make use of the act.[914] The person who may use the Act need not be in possession.[915] In fact, that person need not even claim a possessory interest.[916] Thus, a person may use this Act to clear his or her title to an easement.

The examiner should be aware, as the comment to standard 11.6 mentions, that there are two instances under the Act when possession is important. The Marketable Title Act does not cut off the claim of a person who has established adverse possession, in whole or in part, subsequent to the root of title.[917] Nor does it cut off the rights of a record owner who has been in continuous possession for forty years.[918] In order to deal with these situations, an inquiry should be made as to parties in possession to ascertain if anyone claims these possessory rights.[919] Further, the Act does not cut off an easement that predates the root of title if it is apparent from, or can be proved by, physical evidence of its use.[920] An inspection or other inquiry should be made as to the existence of such an easement.[921]

Standard 11.7 remains substantially unchanged from standard 11.8 in the prior edition.[922] It inquires as to whether the Marketable Title Act affects the length of the chain of title that must be shown in the abstract.[923] The drafters had several purposes in mind when the Marketable Title Act was formulated. Two objective are obvious. The first of these is to cut off stale claims that are older than the root of title; the second is to make the record, to the extent possible, be the place for ascertaining the status of the title.[924] As a corollary to these more obvious objectives, an examiner need

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910. *Compare* IOWA STANDARDS § 11.6 (6th ed. 1984) *with id.* § 11.7 (5th ed. 1974).
911. *Compare id.* § 11.6 (6th ed. 1984) *with id.* § 11.7 (5th ed. 1974).
912. *Id.* § 11.6 (6th ed. 1984).
913. *Id.*
914. IOWA CODE § 614.31 (1983). *See also id.* § 614.29(4).
915. *See* IOWA CODE § 614.31 (1983). *See also id.* § 614.29(4).
916. *See* IOWA STANDARDS § 11.6 comment (6th ed. 1984).
917. IOWA CODE § 614.32(3) (1983). *See also* IOWA STANDARDS § 11.6 comment (6th ed. 1984).
918. IOWA CODE § 614.32(2) (1983). *See also* IOWA STANDARDS § 11.6 comment (6th ed. 1984).
919. IOWA STANDARDS § 11.6 comment (6th ed. 1984).
920. IOWA CODE § 614.35 (1983). *See also* IOWA STANDARDS § 11.6 comment (6th ed. 1984).
921. IOWA STANDARDS § 11.6 (6th ed. 1984) *with id.* § 11.8 (5th ed. 1974).
922. *Compare id.* § 11.7 (6th ed. 1984) *with id.* § 11.8 (5th ed. 1974).
923. *Id.* § 11.7 (6th ed. 1984).
924. *See id.*

not be concerned with interests that predate the root and need not examine the chain of title prior to that date.[925] Thus, the abstract need not carry the chain of title back beyond the root of title.[926] This has not only the benefit of cutting off stale claims predating the root, but also that of reducing the expenses of the search. Nevertheless, the abstract should disclose claims of the United States, rights of reversioners under leases, and easement that are apparent from, or can be proved by, physical evidence of their use, even if they predate the root of title.[927] These interests are not cut off by the operation of the Marketable Title Act.[928]

Standard 11.8 is new and was added because of a question posed to the Title Standards Committee several years ago. The question is whether a mortgage that has been released of record, and not foreclosed, may be treated as the root of title.[929] The position of the standard is that it may not.[930] The problem arises because, in checking the record, an abstracter may find such a mortgage to be the first transaction that is more than forty years old. In the comment an example is given.[931] Assume A conveyed of record to B in 1930, B mortgaged to C in 1940, and B conveyed to D in 1960.[932] Further, the mortgage was later released of record.[933] Under the Act, in order to be the root of title the transaction must purport to create the interest claimed by D.[934] In the example, D claims a fee simple and not merely a lien on the real estate.[935] In other words D's chain of title is A to B to D and not A to B to C to D.[936]

An example of an analogous situation may help to clarify the problem. Suppose, in the above example, that B conveyed an easement to C in 1940 (instead of a mortgage lien). That too would be a title transaction.[937] The B to C transaction, however, certainly cannot be the root of title. B conveyed only an easement to C in 1940, and D now claims a fee simple. Therefore, the first transaction more than forty years old that purports to create the interest claimed by D is the A to B conveyance in 1930.

Finally, suppose A conveyed of record to B in 1930, and B mortgaged to C in 1940. No subsequent transactions occurred of record. If the B to C transaction were the root of title, then there would be a chain of title that

925. *See id.*
926. *Id.*
927. *Id.*
928. IOWA CODE §§ 614.33(5), .36 (1983).
929. IOWA STANDARDS § 11.8 (6th ed. 1984).
930. *Id.*
931. *Id.* comment.
932. *Id.*
933. *Id.*
934. *Id.*; IOWA CODE § 614.31 (1983).
935. IOWA STANDARDS § 11.8 comment (6th ed. 1984).
936. *Id.*
937. IOWA CODE § 614.29(1) (1983).

never discloses any transaction purporting to convey any title at all to B. That is not in accord with the purposes of the act. The root of title must be the A to B conveyance in 1930.

The comment also notes that if the B to C mortgage had been foreclosed upon less than forty years ago and D claimed through the foreclosure, the mortgage could be root of title if it were the first transaction more than forty years old.[938] In other words, as a result of the foreclosure the mortgage lien ripened into a fee simple, and D now claims through the B to C to D chain of title.

The foregoing text, as well as the title of chapter eleven itself, indicates that the chapter eleven standards are controlled by the forty year Marketable Title Act. The chapter should be of assistance to the examiner in defining the concepts of "root of title" and "unbroken chain of record title."[939] The significance of the Act lies in its ability to cure or remedy imperfections in title thereby rendering the title marketable.[940] The title examiner should be wary of the exceptions to the forty year Marketable Title Act.[941] The exceptions are not set out in chapter eleven. Therefore, the examiner should become familiar not only with chapter eleven and the Act itself, but also with the statutory exceptions to the Act.

XIII. Chapter Twelve: Partnerships

Chapter twelve of the sixth edition is substantially unchanged from the fifth edition.[942] In light of the similarity with the fifth edition and the substantial clarity of the chapter twelve standards on their face, this section of the article will not address the chapter twelve standards on a standard-by-standard basis. Rather, this section will deal with the following topics: (1) the development of the law of partnerships; (2) the general considerations a title examiner should be familiar with in dealing with partnership issues affecting marketability of title; (3) the underlying concern that runs throughout chapter twelve as to what constitutes the "usual course of partnership business"; and (4) the status of joint ventures.

The partnership concept existed prior to the earliest codification of laws.[943] Modern partnership law is based partly in common law, which in the middle of the 18th century began to develop into today's commercial law.[944] During the 19th century, the use of the partnership form of business became widespread,[945] but the English Partnership Act of 1890 was apparently the

938. Iowa Standards § 11.8 comment (6th ed. 1984).
939. *See supra* notes 881-90 and accompanying text.
940. *See generally* Iowa Code §§ 614.20-.38 (1983).
941. *See supra* notes 861-77 and accompanying text.
942. *Compare* Iowa Standards ch. 12 (6th ed. 1984) *with id.* (5th ed. 1974).
943. 59 Am. Jur. 2d *Partnerships* § 2 (1971).
944. *Id.*
945. *Id.*

first attempt to codify partnership principals.[946] At the same time, attempts at codification were made in the United States.[947] In 1914, the Uniform Partnership Act was approved by the National Conference of Commissioners of Uniform State Laws, and adoption by state legislatures commenced.[948]

Prior to the enactment of the Uniform Partnership Act in Iowa,[949] a partnership, not being a person, was incapable of taking and holding title to land.[950] Title to partnership real estate was vested in the partners as tenants in common, subject only to equitable charge for payment of partnership debts when other partnership assets were exhausted.[951] This was true even though the courts regularly held that a partnership was a legal entity distinct from its partners.[952] Often, title to partnership real estate was held by only one of the partners. If, however, the real estate was partnership property, then the partner in whose name the property was titled was deemed to be a trustee for the other partners.[953]

Prior to the adoption of the Uniform Partnership Act in Iowa, there was a question as to the existence of spousal rights in partnership property. The cases held that such rights existed only as to that portion of reality that was not needed to pay the legitimate, enforceable debts or charges of the partnership.[954] Spousal interests in partnership property do not exist for real estate owned pursuant to the terms of the Act.[955]

Upon adoption of the Uniform Partnership Act,[956] ownership of real estate by the partnership entity and in the name of the partnership became possible.[957] The Iowa land title examiner will thus encounter three separate types of partnership titles, and each may be treated very differently from a marketable title standpoint. First, conveyances of real estate owned by a partnership prior to July 4, 1971 must be treated as though the real estate was owned by the individual partners.[958] All of the partners, as well as their spouses, must join in the conveyance.[959] A second possible type of partnership title arises where real estate was acquired by a partnership *after* July 4, 1971, and the acquiring partnership was formed *before* July 4, 1971. This

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946. *Id.*
947. *Id.*
948. *Id.* n.9. By 1939, fewer than 20 states had adopted the Act; but by 1971, 40 states had adopted the Uniform Partnership Act. *Id.*
949. IOWA CODE ch. 633 (1983) (effective July 4, 1971).
950. Curtis v. Reilly, 188 Iowa 1217, 1221, 177 N.W. 535, 537 (1920).
951. Bankers Trust Co. v. Knee, 222 Iowa 988, 994-95, 270 N.W. 438, 441 (1937).
952. Cody v. J.A. Dodds & Sons, 252 Iowa 1394, 1396, 110 N.W.2d 255, 256 (1961); Soursos v. Mason City, 230 Iowa 157, 158, 296 N.W. 807, 808 (1941).
953. Lutz v. Billick, 172 Iowa 543, 547-48, 154 N.W. 884, 885 (1915).
954. Paige v. Paige, 71 Iowa 318, 326, 32 N.W. 360, 364 (1887).
955. IOWA CODE § 544.25(2)(e) (1983); IOWA STANDARDS § 12.3 (6th ed. 1984).
956. IOWA CODE ch. 544 (1983).
957. *Id.* § 544.83.
958. *See* PATTON & PATTON, *supra* note 283, § 222, at 731-32.
959. Bankers Trust Co. v. Knee, 222 Iowa at 993, 270 N.W. at 441.

sequence of events creates a problem because the pre-Act partnership's real estate title was vested in all of the individual partners and may have been subject to certain spousal interests.[960] The Uniform Partnership Act divests the spousal interests and the interests of the individual partners.[961] Because the divesture of those rights is a creature of the Act, the question presented is whether or not the Act can divest spousal and individual interests in real estate owned by an entity *not* formed pursuant to the Act. The Committee has declined to take a position on the status of the title to such real estate.[962] This writer believes that it would be prudent to treat such real estate as though it had been purchased prior to July 4, 1971, and require conveyance by all partners and their spouses. The third type of partnership title is derived pursuant to the Act, is vested in the partnership entity, and does not give rise to spousal interests.[963]

Before the title examiner can determine if a partnership title problem exists, he must determine what a partnership is and when such an entity exists. A partnership may exist between individuals, partnerships, corporations, associations, trusts, trustees, and other fiduciaries.[964] A partnership may exist if there is an association of any of these entities, or any combination of these entities, to carry on as co-owners a business for profit.[965] At common law, a partnership was a contract of two or more competent persons or entities to place their money, effects, labor, and skill in commerce and to bear the loss or divide the profit in certain proportions.[966] The current rules for determining the existence of a partnership are set forth in the Uniform Partnership Act.[967] The Act, however, does not resolve the question as to the true nature of the partnership entity. The partnership is not such an entity as is a natural person or a corporation.[968] Its status as an independent entity is limited, and it is an entity only for certain purposes, such as dividing ownership, facilitating transfers of property, and acquiring and managing assets.[969]

At common law, the partners held partnership property as tenants in common.[970] Partnership property, however, may also be held in the name of only one of the partners. The Act and the case law provide that unless the contrary is shown, property acquired with partnership funds is partnership

960. Iowa Code § 544.4(5) (1983).
961. *Id.* § 544.25(2)(e).
962. Iowa Standards ch. 12 general comment (6th ed. 1984).
963. Iowa Code § 544.25(2)(e) (1983); Iowa Standards § 12.3 (6th ed. 1984).
964. Iowa Code § 544.2(3) (1983).
965. *Id.* § 544.6(1).
966. 59 Am. Jur. 2d *Partnerships* § 7 (1971).
967. Iowa Code § 544.7 (1983).
968. 59 Am. Jur. 2d *Partnerships* § 7 (1971).
969. *Id.*
970. Curtis v. Reilly, 188 Iowa at 1220, 177 N.W. at 537.

property.[971] As between partners, the issue of what is partnership property will be determined by the intent of the parties.[972]

Although partnership land title problems are often raised by the questions presented in this section, those problems are usually addressed in courts of law rather than in opinions prepared by Iowa land title examiners. Land purchasers and creditors must rely on the record and their actual knowledge of facts involving the title to the land in which they are interested.[973] It is at this juncture that the role of the Iowa land title examiner becomes important. Although the Uniform Partnership Act sets forth the rules for determining what is partnership property,[974] it is imperative that in passing on the marketability of Iowa land titles, the title examiner be able to interpret the record. It is equally important for the examiner to consider any actual knowledge that he or his purchaser-client may have that would indicate the possibility of the existence of a partnership interest in the real estate.[975] It is the intent of the drafters of the Iowa Land Title Examination Standards to assist the title examiner in his interpretation of the record in determining the marketability of Iowa land titles.

In the sixth edition of the Title Standards, no substantive changes were made in chapter 12.[976] Among the criteria for deciding to amend or not to amend the existing standards is the very real possibility that changes in the standards could render titles unmarketable that, based upon existing standards, have been determined to be marketable. Such a situation would very likely lead to a multiplicity of title litigation that, in turn, would create enormous difficulties for those examiners whose title opinions had been overturned. It could even require corrective legislation. Such was the problem faced by the drafters of chapter twelve of the sixth edition in attempting to interpret the term "usual course of partnership business."[977]

The Iowa Uniform Partnership Act provides:

> [E]very partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, *for apparently carrying on in the usual way the business of the partnership of which he is a member* binds the partnership. . . .[978]

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971. IOWA CODE § 544.8(2) (1983). *See* In re Allen's Estate, 239 N.W.2d 163, 167 (Iowa 1976).

972. In re Allen's Estate, 239 N.W.2d at 167.

973. *See* IOWA STANDARDS § 12.1 (6th ed. 1984).

974. IOWA CODE § 544.8 (1983).

975. *See* IOWA STANDARDS § 12.1 (6th ed. 1984).

976. *Compare id.* ch. 12 (6th ed. 1984) *with id.* (5th ed. 1974).

977. The term "usual course of the partnership business" is employed in section 544.9(1) of the Iowa Code and sections 12.1 and 12.2 of the Iowa Title Standards. *See* IOWA CODE § 544.9(1) (1983); IOWA STANDARDS §§ 12.1-.2 (6th ed. 1984).

978. IOWA CODE § 544.9(1) (1983).

The Act further provides that where title to real property is in the partnership name, any partner may convey title if that conveyance is pursuant to the provisions of the previously quoted section.[979] Sections 12.1 and 12.2 of the standards remain substantially unchanged since their original adoption by the Title Standards Committee in 1974.[980] Both sections refer to conveyances made "in the usual course of the partnership business."[981]

There are many interpretations of the term "in the usual course of the partnership business." If the partnership business is buying and selling real estate, and the land being conveyed is part of the "stock" being held by the business for sale, then conveyance of that land is in the usual course of the partnership business.[982] Assume, however, that the partnership is engaged in the grocery business; that it expands into a new facility; and that it sells the old store and land. Is that conveyance in the usual course of the partnership business? After long, laborious, and sometimes heated debate, the Committee decided that it was.[983] The primary basis for the Committee's decision was that Iowa practitioners have approved as marketable many land titles where conveyances were executed by less than all of the members of a partnership that was engaged in a business other than the buying and selling of real estate. Also, the Committee feared that many such conveyances had been made with the assumption that no spousal interest existed.

There are no Iowa cases on point. Thus, it is very likely that, at least until the issue is addressed by the courts, the opinion of the Committee will be the "Iowa Law" of partnership titles. Two cases are cited in the standards.[984] *Lawer v. Kline*[985] involved a partnership which conducted a clothing business in the town of Riverton, Wyoming. The lease for the business premises was signed by Lawer, as landlord, and by Kline, *one* of the partners, as tenant.[986] The dispute arose over the amount of rent provided for in the lease.[987] The main question was whether the lease, having been signed by only one of the partners, was binding on the partnership and the other partners.[988] The court found that in order to be binding, the lease must have been found to be necessary and appropriate to carry on the partnership business.[989] Because the partnership needed *some* lease to carry on its business,

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979. *Id.* §§ 544.9(1), .10(1).

980. *Compare* IOWA STANDARDS §§ 12.1-.2 (6th ed. 1984) *with id.* (5th ed. 1974).

981. *Compare id.* (6th ed. 1984) *with id.* (5th ed. 1974).

982. *Id.* § 12.2 (6th ed. 1984).

983. *See generally* IOWA STANDARDS ch. 12 (6th ed. 1984).

984. The cases cited are Ellis v. Mihelis, 60 Cal. 2d 206, 384 P.2d 7, 32 Cal. Rptr. 415 (1963) and Lawer v. Kline, 39 Wyo. 285, 270 P. 1077 (1928). *See* IOWA STANDARDS § 12.1 (6th ed. 1984).

985. 39 Wyo. 285, 270 P. 1077 (1928).

986. *Id.* at _, 270 P. at 1077.

987. *Id.* at _, 270 P. at 1077.

988. *Id.* at _, 270 P. at 1077.

989. *Id.* at _, 270 P. at 1079.

the court found that the execution of that lease was in the usual course of the partnership business.[990] Thus, it was binding even though executed by only *one* of the partners.[991]

Ellis v. Mihelis[992] is a particularly pursuasive rebuttal of the Committee's position. The Uniform Partnership Act had been enacted by California at the time the case was handed down.[993] The action was to compel specific performance of a contract to sell ranchland.[994] Defendants contended that the agreement was not binding on the non-signing partner.[995]

The defendants, who were brothers, owned two ranches.[996] Both ranches were operated in the usual manner as ranch or farming property, one by Pericles in Stanislaus County and the other by Elias in Santa Cruz County, California.[997] All income and expenses of the two ranches were lumped together for income tax purposes, and partnership tax returns were filed with respect to income from the ranches.[998] In addition, the income derived from the two operations was divided equally between the personal income tax returns of the two brothers.[999] The brothers decided to sell the Stanislaus County ranch.[1000] They agreed that Pericles should handle negotiations for the sale and submit any prospective deals to Elias.[1001] The ranch was listed with a real estate broker and a buyer was found.[1002] A contract was signed and earnest money was deposited with the broker.[1003] The buyer performed some agricultural activities on the ranch, after which the parties all met at the ranch.[1004] Until that meeting, neither the broker nor the buyer knew that Elias had an interest in the ranch.[1005] At that meeting, Pericles stated that he had changed his mind and did not want to sell; that he was not "going through with the deal"; that as a result of a frost that occurred a few days earlier, damaging some vineyards in the area, but leaving his grapes unharmed, his crop had become too valuable for him to sell the ranch; and that he could get the same price after the harvest.[1006]

The trial court found that Pericles and Elias operated the ranch as

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990. *Id.* at _, 270 P. at 1079.
991. *Id.* at _, 270 P. at 1079.
992. 60 Cal. 2d 206, 384 P.2d 7, 32 Cal. Rptr. 415 (1963).
993. *Id.* at _, 384 P.2d at 13, 32 Cal. Rptr. at 421.
994. *Id.* at _, 384 P.2d at 9, 32 Cal. Rptr. at 417.
995. *Id.* at _, 384 P.2d at 9, Cal. Rptr. at 417.
996. *Id.* at _, 384 P.2d at 9, Cal. Rptr. at 417.
997. *Id.* at _, 384 P.2d at 9, Cal. Rptr. at 417.
998. *Id.* at _, 384 P.2d at 10, 32 Cal. Rptr. at 417.
999. *Id.* at _, 384 P.2d at 10, 32 Cal. Rptr. at 417.
1000. *Id.* at _, 384 P.2d at 10, 32 Cal. Rptr. at 417.
1001. *Id.* at _, 384 P.2d at 10, 32 Cal. Rptr. at 417.
1002. *Id.* at _, 384 P.2d at 10, 32 Cal. Rptr. at 417-18.
1003. *Id.* at _, 384 P.2d at 10, 32 Cal. Rptr. at 418.
1004. *Id.* at _, 384 P.2d at 10, 32 Cal. Rptr. at 418.
1005. *Id.* at _, 384 P.2d at 10, 32 Cal. Rptr. at 418.
1006. *Id.* at _, 384 P.2d at 10-11, 32 Cal. Rptr. at 418.

partners, and that the ranch was an asset of the partnership.[1007] It further found that the contract was fair and reasonable.[1008] Since the plaintiff offered to perform all of the conditions of the contract, and the defendants without just cause had refused to perform, the Court decreed that the contract was enforceable.[1009]

The California Supreme Court reversed the trial court, stating in part:

> [K]eep in mind that there is no evidence that defendants were in the business of buying and selling real estate or that the sale of the ranch was in the usual course of the partnership business. . . . [The act provides that] all acts of a partner which are apparently within the usual course of the particular business bind the partnership. . . . [A] contract executed by one partner alone to sell partnership real estate is binding on the other partners provided the partnership is in the business of buying or selling real estate and the property covered by the contract is part of the stock held for sale.[1010]

The foregoing language of the *Ellis* court specifically conflicts with the position of the Committee. If the "usual course of the partnership business" issue is presented to the Iowa court, and that court follows *Ellis*, it is likely that remedial legislation will be necessary to unsnarl the partnership title problems that would be created thereby.

A joint venture is an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business venture for joint profit, for which purpose they combine their efforts, property, money, skill, and knowledge without creating a partnership or a corporation.[1011] The Iowa Supreme Court has held that joint ventures will be treated essentially the same as partnerships;[1012] therefore, chapter twelve of the standards can usually be applied to Iowa land titles that involve joint ventures. A joint venture agreement, will often specifically provide that it is *not* a partnership. Thus, if the agreement is of record, it should be closely reviewed by the title examiner. Title to real estate held by a joint venture that is *not* a partnership is held by the joint ventureres as tenants in common, and unless written authority is otherwise given, conveyances thereof must be made by all of the joint venturers and their spouses.[1013]

Iowa land titles involving partnerships are fraught with problems, particularly involving the question of who must join in conveying those titles. This writer urges Iowa land titles examiners to approach those problems with caution and with conservatism. This writer also predicts that eventu-

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1007. *Id.* at _, 384 P.2d at 11, 32 Cal. Rptr. at 419.
1008. *Id.* at _, 384 P.2d at 11, 32 Cal. Rptr. at 419.
1009. *Id.* at _, 384 P.2d at 11, 32 Cal. Rptr. at 419.
1010. *Id.* at _, 384 P.2d at 13, 32 Cal. Rptr. at 421.
1011. 66 Am. Jur. 2d *Joint Ventures* § 1 (1969).
1012. Brewer v. Central Constr. Co., 241 Iowa 799, 806-07, 43 N.W.2d 131, 136 (1950).
1013. 66 Am. Jur. 2d *Joint Ventures* § 17 (1969).

ally the Iowa courts will interpret the "regular course of the partnership business" to support the position of the Committee. Such an interpretation will remove many of the current difficulties facing Iowa title examiners who consider the problems of partnerships in titles. If Iowa should follow the California court, partnership questions in Iowa titles will become much more difficult for the examiner.

XIV. Chapter Thirteen: Bankruptcy

The Title Standards Committee of the Iowa State Bar Association, in drafting the new title standards for bankruptcy contained in the sixth edition of the Iowa Land Title Standards intended to provide basic guidance to title examiners for the most common bankruptcy situations.[1014] This section of the article will review the three standards contained in chapter thirteen, but will not address all the title issues that may be raised by a bankruptcy proceeding.

For the title examiner, a showing of a filing of a petition in bankruptcy by a party with an interest in real estate is significant for two basic reasons. First, the filing of a petition in bankruptcy, whether voluntary or involuntary, creates a bankruptcy estate.[1015] In most instances, an interest in real estate will be property of the estate.[1016] As long as property remains part of the bankruptcy estate, it is subject to the jurisdiction of the bankruptcy court and cannot be conveyed except in accordance with the Bankruptcy Code.[1017] Generally, a debtor's interest in real estate ceases to be property of the bankruptcy estate when one of the following events occur: (1) a sale or lease of the interest by the trustee, not in the ordinary course of business;[1018] (2) an abandonment of the interest by the trustee;[1019] (3) a determination that the interest is exempt property;[1020] (4) a sale or lease of the interest in the ordinary course of business (if the business is authorized to be operated);[1021] (5) the confirmation of a plan of reorganization in a Chapter 11 proceeding;[1022] or (6) termination of the debtor's interest in some fashion.[1023] Second, upon filing a petition in bankruptcy, whether voluntary or involuntary, the automatic stay of bankruptcy becomes effective.[1024] Generally, the

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1014. Iowa Standards ch. 13 (6th ed. 1984).
1015. 11 U.S.C. § 541 (1981).
1016. *Id.* For property not included in the bankruptcy estate, see *id.* § 541(b).
1017. *Id.* prec. § 101.
1018. *Id.* § 363(b).
1019. *Id.* § 554.
1020. *Id.* § 522(c)(1)-(2).
1021. *Id.* § 363(c)(1).
1022. *Id.* § 1141(b).
1023. For example, a debtor's interest in property could be terminated by a state law foreclosure and judgment sale. This assumes that the automatic stay was lifted or no longer applicable.
1024. 11 U.S.C. § 362(a) (1981).

automatic stay protects the debtor from any action against the debtor, property of the estate, or property of the debtor.[1025]

It is against the background of these basic bankruptcy concerns that the title standards on bankruptcy were written. Standard 13.1 addresses the showing required for the transfer of an interest in property not in the ordinary course of business.[1026] Standard 13.2 considers the showing necessary to demonstrate that the automatic stay is in force.[1027] Standard 13.3 focuses on the showing necessary in the event that property that has been set aside as exempt is to be transferred or lien rights against it are to be enforced.[1028]

Standard 13.1 applies to the "use, sale or lease of property [of the estate] other than in the ordinary course of business,"[1029] the creation of a lien on property of the estate,[1030] and any other disposition of an interest in real property not otherwise specifically authorized by statute.[1031] Under standard 13.1, the abstract should show the filing of a petition for relief under the Bankruptcy Code,[1032] which will include the date of such filing, the name of the debtor or debtors, and the chapter under which relief is sought.[1033] The filing of a voluntary petition constitutes an order for relief.[1034]

A debtor is required to file a list of creditors, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of financial affairs.[1035] The statement of financial affairs and the schedules are to be filed with the petition in a voluntary proceeding or within fifteen days of filing the petition.[1036] The "Schedule of Assets" form requires the debtor to list in "Schedule B-1" all real property in which the debtor has an interest.[1037]

Standard 13.1 also requires a showing of the appointment of and acceptance by a trustee.[1038] This showing, however, will only be made in Chapter 7 or Chapter 13 proceedings,[1039] unless a trustee has been appointed

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1025. *Id.* § 362(a)(1)-(8).

1026. IOWA STANDARDS § 13.1 (6th ed. 1984).

1027. *Id.* § 13.2.

1028. *Id.* § 13.3.

1029. 11 U.S.C. § 363(b) (1981).

1030. *Id.* § 364(c)-(d).

1031. *See* IOWA STANDARDS § 13.1 (6th ed. 1984).

1032. *Id. See also* 11 U.S.C. §§ 301-303 (1981).

1033. 11 U.S.C. § 303 (1981).

1034. *Id.* § 301.

1035. *Id.* § 521; FED. BANKR. R. 1007(a)-(b). *See also* IOWA STANDARDS § 13.1 (6th ed. 1984).

1036. FED. BANKR. R. 1007(c). In an involuntary proceeding, the schedules and statements are to be filed within 15 days of the entry of an order for relief. *Id.*

1037. Official Bankruptcy Form No. 6. This form requires the description and location of all real property in which the debtor has an interest. *See id.*

1038. IOWA STANDARDS § 13.1 (6th ed. 1984).

1039. 11 U.S.C. §§ 701, 702, 1302 (1981). The debtor in possession in a Chapter 11 proceeding has the rights and duties of a trustee. *Id.* § 1107(a). The debtor is the "debtor in

upon motion in a Chapter 11 proceeding.[1040] In a proceeding pursuant to Chapter 7 of the Bankruptcy Code, an interim trustee is appointed "promptly after the order for relief."[1041] The Chapter 7 interim trustee serves as the trustee if no other trustee is elected by the creditors.[1042] In a Chapter 13 proceeding, a trustee is appointed by the court.[1043] Upon appointment by the court, the clerk is to notify the trustee of the appointment and the trustee is to notify the court in writing of the acceptance or rejection of such appointment within five days after the receipt of the notice.[1044] The trustee is required to file a bond within five days after selection.[1045] The trustee is the "representative of the estate"[1046] and has the right to convey, subject to the various bankruptcy provisions.

Standard 13.1 also requires the abstract to show the fulfillment of procedural requirements necessary to obtain approval of the bankruptcy court, after notice and hearing, for a "disposition" of an interest in real property.[1047] That is, such items as motions and notices relating to the approval of disposition must be shown in the abstract.[1048] Paragraph four of standard 13.1 refers to Bankruptcy Rule 9014 requiring "contested case proceedings" to be commenced by motion.[1049] Paragraph four also refers to those "adversary proceedings" described in Bankruptcy Rule 7001 that must be commenced by complaint.[1050] Thus, under the standard, a showing of the abovementioned motion and complaint must appear in the abstract.[1051]

The majority of proceedings to which standard 13.1 will apply will be motions to sell property free and clear of liens, which are made pursuant to 11 U.S.C. sections 363(b)(1) and 363(f) and require "notice and a hearing."[1052] Other types of proceedings that may fall within the scope of standard 13.1 also require "notice and a hearing."[1053] Paragraph five and com-

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possession," except when a trustee has been appointed in a Chapter 11 proceeding. *Id.* § 1101(1).

1040. *Id.* § 1104.

1041. *Id.* § 701(a).

1042. *Id.* § 702(d). This is the usual procedure in Iowa. It is uncommon for creditors to elect a trustee.

1043. *Id.* § 1302. The court may appoint a standing Chapter 13 trustee, who is the trustee upon qualification. *Id.*

1044. FED. BANKR. R. 2008.

1045. 11 U.S.C. § 322(a) (1981).

1046. *Id.* § 323(a).

1047. *See* IOWA STANDARDS § 13.1 (6th ed. 1984).

1048. *Id.*

1049. FED. BANKR. R. 9014.

1050. *Id.* 7001, 7003.

1051. *See* IOWA STANDARDS § 13.1 (6th ed. 1984).

1052. 11 U.S.C. §§ 363(b)(1), 363(f) (1981). For a definition of "notice and hearing," see *id.* § 102(a) which allows for notice and hearing as is appropriate in the particular circumstances.

1053. *Id.* § 364(d)(1).

ment (a) of standard 13.1 address the notice and hearing requirement.[1054] As stated in comment (a), Bankruptcy Rule 2002(a)(2) requires not less than twenty days notice of the proposed use, sale or lease or property not in the ordinary course of business, unless the court orders otherwise.[1055] A notice of a proposed use, sale or lease of property other than in the ordinary course of business must include the "time and place of any public sale, the terms and conditions of any private sale and the time fixed for filing objections."[1056] The notice is sufficient if the subject property is generally described.[1057] Standard 13.1 requires that a showing of such notice be included in the abstract.[1058]

Comment (e) of standard 13.1 refers to Local Bankruptcy Rule 2001 and the mailing of notice by counsel.[1059] This is a proposed rule that has not yet been adopted.[1060] The practice described in comment (e) appears on occasion in the United States Bankruptcy Court for the Southern District of Iowa but not in the United States Bankruptcy Court for the Northern District of Iowa. Comment (e) should not be relied upon to justify the procedure for giving notice described therein until such time as Local Rule 2001 has been adopted.[1061]

Paragraph six of standard 13.1 requires a showing of any objections to the proposed disposition.[1062] Pursuant to Bankruptcy Rule 6004(b), such an objection must be "filed and served not less than five days before the date set for the proposed action or within the time fixed by the court."[1063] If an objection is filed, a hearing will be held on the proposed disposition at the time set in the notice of the proposed disposition or by separate notice.[1064] If no objection is filed and served, no actual hearing may be held.[1065] If the proposed disposition is not objected to or is approved by the court over objection, the court will issue an order authorizing the use, sale or lease not in the ordinary course, or other disposition.[1066] Paragraph seven of standard 13.1 requires a showing of such order.[1067]

The document of conveyance must also be shown, as required by paragraph eight of standard 13.1.[1068] The debtor, the trustee, or the debtor in

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1054. IOWA STANDARDS § 13.1 comment (6th ed. 1984).
1055. *Id.* comment. *See* FED. BANKR. R. 2002(a)(2).
1056. FED. BANKR. R. 2002(c)(1).
1057. *Id.*
1058. IOWA STANDARDS § 13.1 (6th ed. 1984).
1059. *Id.* comment.
1060. *Id.* ch. 13 *Preface.*
1061. *Id.*
1062. *Id.* § 13.1.
1063. FED. BANKR. R. 6004(b).
1064. *Id.* 6004(c)-(d).
1065. *Id.*
1066. *Id.*
1067. IOWA STANDARDS § 13.1 (6th ed. 1984).
1068. *Id.*

possession shall execute the document of conveyance.[1069] Additionally, in order to verify that the required notices have been given and that no notice of appeal, application to extend time for appeal, or motion to stay has been filed, paragraph nine of standard 13.1 requires a clerk's certificate on these matters to be shown in the abstract.[1070] A notice of appeal must be filed within ten days of the date of entry of the judgment, order, or decree from which appeal is taken.[1071]

In a Chapter 11 proceeding, if a plan of reorganization has been confirmed, the additional showings set out in paragraph ten of standard 13.1 are required.[1072] Prior to confirmation of a plan in a Chapter 11 proceeding, the showings in paragraphs one through nine of standard 13.1 are all that are required.[1073] Upon confirmation of a plan, the property of the estate vests in the debtor.[1074] Subject to the limitations or restrictions contained in the plan, after confirmation of the plan, the debtor may convey or otherwise dispose of an interest in real property without giving notice or seeking court approval.[1075] Consequently, showings must be made of the notice of the hearing on confirmation of the plan,[1076] the order confirming the plan,[1077] and the relevant portions of the plan.[1078]

Standard 13.2 focuses on the automatic stay provided for under section 362 of the Bankruptcy Code.[1079] Generally, the automatic stay commences upon the filing of a petition[1080] and prohibits any action against the debtor, the property of the estate, or the property of the debtor.[1081] The automatic stay remains in effect to prevent action against property of the estate until the property is no longer property of the estate,[1082] or until the stay is terminated or modified by order of the court.[1083] As to acts against the debtor, property of the debtor, or property of the estate, the stay continues until the

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1069. FED. BANKR. R. 6004(e)(2); IOWA LOCAL BANKR. R. 6002.

1070. IOWA STANDARDS § 13.1(9) (6th ed. 1984).

1071. FED. BANKR. R. 8002(a).

1072. IOWA STANDARDS § 13.1 (6th ed. 1984).

1073. *See id.*

1074. 11 U.S.C. § 1141(b) (1981).

1075. *Id.* § 1141(c).

1076. A hearing on confirmation, after notice, is required by the Bankruptcy Code. *Id.* § 1128(a). The notice is to be given in accordance with Federal Bankruptcy Rules 2002(b) and 3020(b).

1077. FED. BANKR. R. 3020(c). *See also* 11 U.S.C. § 1129 (1981).

1078. IOWA STANDARDS § 13.1 (6th ed. 1984).

1079. *Id.* § 13.2.

1080. 11 U.S.C. § 362(a) (1981).

1081. *Id.* § 362(a)(1)-(8). Certain actions are not stayed by section 362(a). *See id.* § 362(b)(1)-(10).

1082. *Id.* § 362(c)(1). Property ceases to be property of the estate upon abandonment, *id.*, § 554, a determination of exemption, *id.* § 522(6), or otherwise. An action against such property, however, may still be protected by the stay as property of the debtor. *See id.* § 362(a)(5).

1083. *Id.* § 362(d)-(f).

earliest of the following occurs: (a) the case is closed;[1084] (b) the case is dismissed;[1085] (c) a discharge is granted;[1086] (d) a court order is issued terminating or modifying the stay;[1087] or (e) operation of law otherwise causes the termination of the stay.[1088]

The concern of standard 13.2 is the need to determine whether the automatic stay is in effect.[1089] If the stay is in force, a foreclosure or forfeiture cannot be commenced or continued.[1090] Thus, standard 13.2 deals with the showing required in the event a motion for relief from the stay is filed pursuant to 11 U.S.C. § 362(d).[1091] In the event a case is closed or dismissed, or a discharge is granted or denied, the relevant court orders closing or dismissing the case or granting or denying a discharge should be shown.[1092] The relevant notices, hearings and certificates should also be shown.[1093]

Additionally, standard 13.2 addresses the showings required in the event a motion for relief from the stay is filed.[1094] The standard requires the motion for relief,[1095] as well as the notice and hearing of the motion for relief,[1096] to be shown in the abstract.[1097] As stated in comment (a) to standard 13.2, "reasonable" notice and opportunity for hearing is required.[1098] Standard 13.2 requires a showing of the notice given.[1099]

Hearings on motions for relief from the stay are subject to expedited scheduling.[1100] The stay will terminate thirty days after the filing of the motion for relief, unless the court, after notice and a hearing, orders the stay continued pending the conclusion of, or as a result of a final hearing and determination.[1101] The hearing required to be held within thirty days of the date of filing the motion may be a preliminary hearing.[1102] If the initial hearing is a preliminary hearing, the final hearing must be commenced not later

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1084. *Id.* § 362(c)(2)(A).
1085. *Id.* § 362(c)(2)(B).
1086. *Id.* § 362(c)(2)(C). A discharge is not granted to a corporation in a Chapter 7 case. *Id.*
1087. *Id.* § 362(d).
1088. *Id.* § 362(e).
1089. IOWA STANDARDS § 13.2 (6th ed. 1984).
1090. 11 U.S.C. § 362(a)(1) (1981).
1091. IOWA STANDARDS § 13.2 (6th ed. 1984).
1092. *Id.*
1093. *Id.*
1094. *Id.*
1095. 11 U.S.C. § 362(d) (1981). An action for relief from the stay may be commenced by a party in interest upon "request." *Id.* The request is to be in the form of a motion. FED. BANKR. R. 4001(a), 9014. Such an action is a contested case proceeding. *Id.* 9014.
1096. 11 U.S.C. § 362(d) (1981).
1097. IOWA STANDARDS § 13.2 (6th ed. 1984).
1098. *Id.* comment. *See* FED. BANKR. R. 9014.
1099. IOWA STANDARDS § 13.2 (6th ed. 1984).
1100. 11 U.S.C. § 362(e) (1981).
1101. *Id.*
1102. *Id.*

than thirty days after the conclusion of the preliminary hearing.[1103] Finally, the stay will terminate thirty days after the final hearing is commenced, unless within that time the court denies the motion.[1104] The order terminating the stay and the Clerk's certificates are required to be shown under standard 13.2.[1105]

Standard 13.3 sets forth the basic showings required before property set aside as exempt may be transferred or lien rights against it enforced.[1106] This scenario is common with homestead property. The basic showings that are required in the abstract in the event that a bankruptcy proceeding is commenced by a party with an interest in the real estate are: (1) the filing of the petition for relief; and (2) appointment and acceptance of the trustee.[1107]

Standard 13.3 also sets out the essential showing required to determine whether property has been set aside or determined to be exempt.[1108] In Iowa, property that may be claimed as exempt is determined by Iowa law.[1109] The debtor must list property claimed as exempt on Schedule B-4.[1110] The abstract should include a showing of the listing of the property on Schedule B-4.[1111] A party in interest must object to the claimed exemption within thirty days after the section 341 hearing (first meeting of creditors), or within any extension granted by the court.[1112] If no objection is made, the property claimed exempt will be deemed exempt.[1113] While standard 13.3 does not expressly require a showing of the minutes of the section 341 hearing (meeting of creditors), such a showing should be made. The thirty day time limit for filing objections to a claimed exemption will run from the date of any amendments to Schedule B-4.[1114] Standard 13.3 requires a showing that the time for filing objections has expired.[1115] It also required a clerk's certificate that no objections were filed.[1116]

Once property is deemed to be exempt, it ceases to be property of the estate.[1117] Even though exempt property is no longer part of the bankruptcy

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1103. *Id.*

1104. FED. BANKR. R. 4001(b). It is a common practice for bankruptcy counsel to waive these various deadlines, as a courtesy to the court, due to the volume of these types of proceedings. In such event, the waiver should be shown.

1105. IOWA STANDARDS § 13.2 (6th ed. 1984).

1106. *Id.* § 13.3.

1107. *Id.*

1108. *Id.*

1109. 11 U.S.C. § 522(b)(1) (1981); IOWA CODE § 627.10 (1983). Iowa opted out of the federal exemptions contained in title 11, section 522(d) of the United States Code.

1110. 11 U.S.C. § 522(1) (1981).

1111. IOWA STANDARDS § 13.3 (6th ed. 1984).

1112. 11 U.S.C. § 522(1) (1981); FED. BANKR. R. 4003(b).

1113. 11 U.S.C. § 522(1) (1981); FED. BANKR. R. 4003(b).

1114. FED. BANKR. R. 4003(b).

1115. IOWA STANDARDS § 13.3 (6th ed. 1984).

1116. *Id.*

1117. 11 U.S.C. § 522(b) (1981).

estate, generally, the automatic stay will still be applicable, either as to actions against the debtor or property of the debtor.[1118] Standard 13.3 requires a showing of the extinguishment of the stay as to both the debtor and the property.[1119]

The Committee discussed other possible bankruptcy standards, but limited the standards to the three set out above. The uncertainty, dynamic nature, and complexity of the bankruptcy laws at the present time makes the task of drafting title standards difficult. Many titles subject to bankruptcy proceedings will present title problems beyond the scope of standards 13.1, 13.2 and 13.3. It is the committee's intent, however, that these basic standards will assist examiners with some of the more routine bankruptcy situations.

XV. Chapter Fourteen: Condominiums

Since the adoption in 1966 of chapter 499B of the Iowa Code,[1120] there is no question that in metropolitan areas and resort communities the condominium form of ownership has become an important force in Iowa real estate transactions. After a slow beginning when market acceptance was not well established, it now appears that condominium ownership is a strong, viable alternative form of life style and real property ownership. The members of the Title Standards Committee felt that it would be useful to address issues pertaining to condominium land titles as a part of the Title Standards. Surprisingly, however, there has been no litigation in Iowa regarding condominium land titles although there appear to be unresolved issues and interpretations of Iowa's condominium statute. Given the lack of judicial guidance, the threshold issue in this new chapter of the Title Standards has been to determine what the standards can appropriately cover. The Committee felt that it would be useful at least to begin the process of developing standards for use by Iowa land title examiners. What has been published in Chapter Fourteen of the Sixth Edition of the Title Standards[1121] should be viewed as only the beginning of the process. This process is undertaken with the idea that further comment and participation of the practicing Bar will be vital to the ultimate success of this undertaking.

One of the areas of concern is the wide variance of practice among attorneys in preparing and recording a Declaration of Condominium. Hence, standard 14.1 refers the examiners to Iowa Code section 499B.4, which specifies the contents of the "Declaration."[1122] Also noted by the standard is the statutory requirement that a copy of the floor plan be filed with the

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1118. *Id.* § 362(a)(1), (a)(5).
1119. Iowa Standards § 13.3 (6th ed. 1984).
1120. Iowa Code ch. 499B (1983).
1121. Iowa Standards ch. 14 (6th ed. 1984).
1122. *Id.* § 14.1. *See* Iowa Code § 499B.4 (1983).

Declaration.[1123]

Already, the need for continuing comment from the practicing bar has been demonstrated. It has been suggested that the requirement in standard 14.1 that the plans be certified by an engineer, architect, or land surveyor[1124] goes beyond what is required by the statute. While the statute states that a copy of the plans must be filed of record, and that they must show the dimensions, area, and location of the common elements affording access to each apartment, it goes on to provide that other common elements shall be shown graphically insofar as possible and shall be certified.[1125] It thus appears from a careful reading of the statute that only the "other common elements" need to be certified by an engineer, architect or land surveyor.[1126] The "other common elements" referred to are presumably the common elements that would be disclosed in a site plan. It has been suggested that this is a necessary result of interpretation since an engineer, architect or land surveyor could not certify to a full and exact copy of the plans of the building if the building has not yet been built. Thus, it appears that one of the purposes of publishing the new Iowa Land Title Standards in loose leaf form will soon be realized in that same clarification and revision of standard 14.1 appear to be necessary.

In reviewing condominium issues, the Committee found that there were wide variations in practice with respect to the contents of a deed for a condominium unit. Standard 14.2 reiterates the requirements specified in section 499B.5.[1127] One of these is that the deed must contain the description of the land.[1128] The Committee took note of the practice of some attorneys of incorporating a long metes and bounds legal description of real estate into the deed by reference.[1129] The Committee took the position that such a procedure is desirable so as to avoid unnecessary confusion or the potential for error in preparing a deed with a long metes and bounds legal description.[1130]

The Committee also noted the practice of omitting the date of the Declaration of Condominium.[1131] While such a practice may be technically inconsistent with section 499B.5,[1132] it does not appear to the Committee that such an omission would make the conveyance defective.[1133] "If the correct book and page of recording are given, the recording date of the Declaration

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1123. Iowa Standards § 14.1 (6th ed. 1984). *See* Iowa Code § 499B.6 (1983).
1124. Iowa Standards § 14.1 (6th ed. 1984).
1125. Iowa Code § 499B.6 (1983).
1126. *See id.*
1127. Iowa Standards § 14.2 (6th ed. 1984). *See* Iowa Code § 499B.5 (1983).
1128. Iowa Standards § 14.2 (6th ed. 1984). *See* Iowa Code § 499B.5 (1983).
1129. *See* Iowa Standards § 14.2 comment (6th ed. 1984).
1130. *Id.*
1131. *See id.*
1132. *See* Iowa Code § 499B.5 (1983).
1133. Iowa Standards § 14.2 comment (6th ed. 1984).

of Condominium can be determined from the records."[1134] This position was adopted in part on the basis of the standard 1.1 statement that "objections and requirements should be made only when the irregularities or defects reasonably can be expected to expose the purchaser or lender to the hazard of adverse claims or litigation."[1135] The omission of the date of the Declaration of Condominium from the deed, when the date can be determined from the record, does not render title to the property unmarketable.[1136]

It should be noted that section 499B.5(4) provides that the deed may contain any further details which the parties deem desirable.[1137] This provision is typically used to effectuate a conveyance of certain limited common elements, such as a particular garage or parking space or a storage unit within the condominium. Other information may also be included as appropriate.

This new chapter of the Title Standards embodies the purpose for which such standards are composed—to create uniformity in title matters.[1138] Since the condominium form of real estate ownership is a newly developing area, the Committee recognized the need for delineation of acceptable title practices. The absence of case law in this area made the task of the Committee difficult. Thus, the Committee sought to recognize the prevailing practices in Iowa.[1139] In some cases, however, there has been a wide variance in practice.[1140] In resolving these variations, the Committee has endeavored to fulfill the general purpose of title standards by creating uniformity of practice in order to avoid the threat of objection from the overly-meticulous title examiner.[1141] Because this is the Committee's first attempt at addressing condominium issues, the comments and suggestions of Iowa practitioners are invited.

XVI. Conclusion

The Title Standards promulgated by the Land Title Examination Committee will not reduce title examination to the application of a precise formula to the facts shown on the record of title. Title examination is, and perhaps always will be, a process plagued by technicality. Such technicalities, however, are necessary to protect outstanding claims against real estate. The objective of title examination standards is to preserve the purpose of these technicalities without imposing unrealistic burdens upon the process of establishing marketability of title. Thus, in composing the Title Stan-

1134. *Id.*
1135. *Id.* § 1.1.
1136. *Id.* § 14.2 comment.
1137. Iowa Code § 499B.5(4) (1983).
1138. *See supra* notes 25-29 and accompanying text.
1139. *See supra* notes 1129-31 and accompanying text.
1140. *See supra* notes 1122, 1127 and accompanying text.
1141. *See supra* notes 1131-36 and accompanying text.

dards, the Committee was guided by the principle set out in the first edition of the Iowa Land Title Examination Standards. That principle is to ensure that "[o]bjections and requirements [will] be made only when the irregularities or defects actually impair the title or reasonably can be expected to expose the purchaser or lender to the hazard of adverse claims or litigation."[1142] The Committee sought to fulfill this objective by conducting a thorough study of the statutory and case law, as well as of the prevailing title examination practices. The Title Standards do not resolve all of the issues that may arise in land title examination. The Committee believes, however, that the standards will provide guidance in those areas that are established and warning of unsettled areas of title examination that may present problems in the future. Above all, it is hoped that the Title Standards will continue to establish uniformity in Iowa land title examination.

1142. IOWA STANDARDS *General Standard* (1st ed. 1944).

APPENDIX

This appendix contains the fifth edition of the Land Title Examination Standards on the left pages and the sixth edition on the right pages. From standard 13.2 through Chapter 14, however, the standards in the sixth edition are printed on both left and right pages because there are no corresponding standards in the fifth edition. The standards are reprinted here, in their official form, with the permission of the Iowa Land Title Examination Committee.

CHAPTER 1

ABSTRACTS

1.1 PROBLEM:

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

STANDARD:

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

COMMENT:

Title Standards are primarily intended to eliminate technical objections which do not impair marketability and some common objections which are based upon misunderstanding of the law. The examining attorney, by way of a test, may ask himself after examining the title what defects and irregularities he has discovered by his examination; and as to each such irregularity or defect, who, if anyone, can take advantage of it as against the purported owner, and to what end. Example: It is not reasonable for an examining attorney to require the showing of the patent where, under the Marketable Title Act, the root of title is formed by some instrument other than the patent.

Authority: In Re Estate of Oppelt, 203 N.W.2d 213 (1972). Standard quoted at page 215.
55 AmJur, Vendor and Purchaser §206 at 667.
92 C.J.S., Vendor and Purchaser, §191c at 30.
Simes & Taylor, Model Title Standards, 2.1.

1.2 PROBLEM:

Is an abstract written in longhand acceptable?

STANDARD:

Yes, if it is legible and not mutilated so that some of the entries cannot be read. If the abstract meets these requirements, there is no justification for requiring the owner to undergo the additional expense of a new typewritten abstract. However, where such entries are prior to the "Root of Title", an illegible or mutilated longhand portion of an abstract may be omitted or disregarded if the abstracter certifies under the 40 year Marketable Title Act.

Authority: Dickerson v. Morse, 203 Iowa 480; 212 N.W. 933 (1927).
Iowa Code §614.29 et seq.

1.3 PROBLEM:

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

CHAPTER 1

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

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

COMMENT:

Title standards are primarily intended to eliminate technical objections which do not impair marketability and some common objections which are based upon misunderstanding of the law. The examining attorney, by way of a test, may ask after examining the title what defects and irregularities have been discovered by the examination; and as to each such irregularity or defect, who, if anyone, can take advantage of it as against the purported owner, and to what end.

Authority: In Re Estate of Oppelt, 203 N.W.2d 213 (Iowa 1972). Standard quoted at page 215.
DeLong v. Scott, 217 N.W.2d 635 (Iowa 1974).
Wilson v. Fenton, 312 N.W.2d 524 (Iowa 1981). Standard quoted at page 527.
77 Am. Jur. 2d Vendor and Purchaser § 131 at 312 (1975).
92 C.J.S. Vendor and Purchaser § 191(c) at 30 (1955).
L.M. Simes & C.B. Taylor, Model Title Standards 2.1 (1960).

1.2 PROBLEM:

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STANDARD:

Yes, if it is legible and not mutilated so that some of the entries cannot be read. If the abstract meets these requirements, there is no justification for requiring the owner to undergo the additional expenses of a new typewritten abstract. However, where such entries are prior to the "Root of Title", an illegible or mutilated longhand portion of an abstract may be omitted or disregarded if the abstracter certifies under the Forty Year Marketable Title Act.

1.3 PROBLEM:

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

STANDARD:

All types of reproduction of abstracts are acceptable if properly certified by separate certificates to be correct and complete abstracts.

If certified as a copy only, the certificate must show such copy has been compared with the public records and is correct.

1.4 PROBLEM:

What kind of abstracter's certificate is acceptable?

STANDARD:

The abstracter's certificate should not be limited to any specific person, firm or corporation, and should cover all conveyances, liens, encumbrances and proceedings in the offices of the Recorder, Clerk of the District Court, Auditor, and Treasurer.

COMMENT:

It is recommended that the certificate, instead of attempting to refer to the various county offices, should be general in character and refer to everything in the public records of the county in question in any way affecting the title of the land abstracted.

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

1.5 PROBLEM:

Is an abstract covering a lot which is included in a proprietor's plat under Chapter 409 of the Iowa Code satisfactory if it commences with the date of the filing of the plat?

STANDARD:

Yes, if such plat has been recorded prior to January 1, 1950, it is conclusive evidence that the proprietors had title thereto at that time under Iowa Code §592.3.

If the plat has been recorded after January 1, 1950, then an abstract covering a lot therein, commencing with the plat, and in which the entire platting procedure is shown, is acceptable provided that the addition was platted prior to January 1, 1960, and shows: (1) a record title owner prior to that date, (2) full compliance with all statutory requirements with reference to the platting, and (3) an affidavit of possession is furnished under Iowa Code §614.17.

1.6 PROBLEM:

How fully should ancient proceedings be abstracted?

STANDARD:

Probate and other proceedings prior to January 1, 1960, may be abstracted in a brief manner sufficient only to show their effect on the title.

STANDARD:

All types of reproduction of abstracts are acceptable if properly certified by separate certificates to be correct and complete abstracts.

If certified as a copy only, the certificate must show such copy has been compared with the public records and is correct.

1.4 PROBLEM:

What kind of abstracter's certificate is acceptable?

STANDARD:

The abstracter's certificate should not be addressed or restricted to any specific person, firm or corporation. It should cover all conveyances, liens, encumbrances and proceedings in the offices of the Recorder, Clerk of the District Court, Auditor, and Treasurer. The certificate should be general in character and refer to everything in the public records of the county in question in any way affecting the title of the land abstracted.

COMMENT:

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

1.5 PROBLEM:

Is an abstract covering a lot which is included in a proprietor's plat under Chapter 409 of the Iowa Code satisfactory if it commences with the date of the filing of the plat?

STANDARD:

Yes, if such plat has been recorded prior to January 1, 1970, it is conclusive evidence that the proprietors had title thereto at that time unless an affidavit to the contrary was filed at the time of recording the plat under Iowa Code § 592.3.

1.6 PROBLEM:

How fully should ancient judicial proceedings be abstracted?

STANDARD:

Proceedings prior to January 1, 1970 may be abstracted in a brief manner sufficient only to show their effect on the title.

Authority: Iowa Code § 614.17.

1.7 PROBLEM:

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

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

STANDARD:

The abstracter should, under such circumstances, show the conveyance of tract B. The doctrine of reciprocal, negative easements or covenants does, or may, apply. If there is doubt as to applicability of the doctrine, the doubt should be resolved in favor of showing the conveyance. The question of applicability should be resolved by the title examiner and not by the abstracter, who should act on the principle that matter which reasonably may be considered to be material to title should be shown in an abstract. As to the nature and extent of the doctrine referred to, see the authority cited below.

Authority: Hegna v. Peters, 199 Iowa 259; 201 N.W. 803 (1925),
Restatement, Property, §527.
Shuler v. Ind. Sand & Gravel Co., 203 Iowa 134; 209 N.W. 731 (1926).
Grange v. Korff, 248 Iowa 118; 79 N.W. 2d 743 (1956).
McSweyn v. Inter-Urban Ry. Co., 256 Iowa 1140; 130 N.W. 2d 445 (1964).
Annotations: 4 A.L.R. 2d 1371.19 A.L.R. 2d 1274.23 A.L.R. 2d 520.
20 AmJur, 2d Covenants §§9 and 173.

1.8 PROBLEM:

Where the abstract discloses a conveyance of the fee by the former owner to the holder of a tax deed, or discloses a legally sufficient decree quieting title based upon the tax deed, or shows an affidavit conforming to Iowa Code §448.15, should the requirement be made that the abstract show the details preliminary to the execution of the tax deed, including notice of expiration of right of redemption and returns of service thereon?

STANDARD:

No.

Authority: Iowa Code §557.3.
Iowa Code §448.16.
Iowa Code Annotated §558.18, Note 241 et seq.
Marshall, Iowa Title Opinions, §18.6.

1.7 PROBLEM:

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

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

STANDARD:

Yes.

COMMENT:

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

Authority: Amana Soc. v. Colony Inn, Inc., 315 N.W.2d 101 (Iowa 1982).
Grange v. Korff, 248 Iowa 118, 79 N.W.2d 743 (1956).
Shuler v. Independent Sand & Gravel Co., 203 Iowa 134, 209 N.W. 731 (1926).
Hegna v. Peters, 199 Iowa 259, 201 N.W. 803 (1925).
Restatement of Property § 527 (1936).
Annot. 40 A.L.R. 3d 864 (1971).
23 A.L.R. 2d 520 (1952).
4 A.L.R. 2d 1364 (1949).
20 Am. Jur. 2d Covenants §§ 9 and 173 (1963).

1.8 PROBLEM:

When the abstract discloses a conveyance of the fee by the former owner to the holder of a tax deed, or discloses a legally sufficient decree quieting title based upon the tax deed, or shows an affidavit conforming to Iowa Code § 448.15, should the requirement be made that the abstract show the details preliminary to the execution of the tax deed, including notice of expiration of right of redemption and returns of service thereon?

STANDARD:

No. However, the description in the tax deed must be sufficient to describe the land intended to be conveyed.

Authority: Larsen v. Cady, 274 N.W.2d 907 (Iowa 1979).
Iowa Code § 557.3.
Iowa Code §§ 448.15-.16.
Iowa Code Ann. § 558.19 (West 1950), note 241 et seq.
G.F. Madsen, Marshall's Iowa Title Opinions and Standards § 18.6 (2d ed. 1978).
See Iowa Land Title Examination Standards 10.2 and 10.3.

1.9 PROBLEM:

Is it necessary for an abstract to show mortgage or trust deeds, either satisfied or not satisfied, of more than twenty years old?

STANDARD:

No, unless the record shows that the original debt, or said debt extended by an extension agreement of record, matured within the last ten years. A statement to the effect that such mortgages are omitted should be made by the abstracter.

Authority: Iowa Code §614.21.

1.10 PROBLEM:

When an abstract pertains to land that is within a restricted residence district established by a city or town, or within a municipal or county zoning district, or within an airport hazard zone, area, or district, should the abstract make mention of that fact, and, if it should, then to what extent?

STANDARD:

The abstract should call attention to every ordinance, resolution and regulation which is a part of the public records of the county that in anywise regulates or restricts the free use of the land. Because of the nature of such restrictions and regulations, it is not necessary to abstract them extensively, and a brief notation is ordinarily sufficient.

Authority: Iowa Code Chapters 329, 358A, 413, 414 and 415.
Iowa Code §§366.14, 332.3(22), and 420.41.

1.11 PROBLEM:

How can an examiner determine whether there exists a lien for support of the owner's mentally ill spouse?

STANDARD:

The abstracter's showing of a search against the owner is sufficient.

COMMENT:

Iowa Code §230.25 now requires indexing against both the owner and spouse.

CHAPTER 2

MUNICIPAL CORPORATIONS

2.1 PROBLEM:

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

CAVEAT:

This Standard does not consider the effect which Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed. 2d 180 (1983) may have upon Iowa Code §§ 448.15-.16.

1.9 PROBLEM:

Is it necessary for an abstract to show a mortgage or a deed of trust, either satisfied or not satisfied, if more than twenty years old?

STANDARD:

No. However, if the record shows that the original debt, or said debt extended by an extension agreement of record, matured within the last ten years, it must be shown.

Authority: Iowa Code § 614.21.

1.10 PROBLEM:

When land is located in a municipal or county zoning district, or an airport hazard zone or district, should the abstract show that fact?

STANDARD:

Yes. The abstract should call attention to every ordinance, resolution and regulation of record which in any way regulates or restricts the free use of the land. Because of the nature of such restrictions and regulations, it is not necessary to abstract them extensively. A brief notation is sufficient.

Authority: Iowa Code Chapters 329, 358A, 414.
Iowa Code § 331.304.

*The text of former standard 1.11 has been deleted.

CHAPTER 2

POLITICAL SUBDIVISIONS

2.1 PROBLEM:

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

STANDARD:

Yes.

COMMENT:

Municipal corporations are official bodies and have only such powers as are granted by the Constitution or laws of the state. In general, powers are strictly construed. Publication of notice of proposal to dispose of real property by municipal corporations has been required since July 4, 1951. Prior to that date notice and hearing were not required. (See Iowa Code §403.11 and §403.12 (1950) which was repealed by Iowa Acts, 54 G.A., ch. 151 (1951)).

Authority: Iowa Code §368.39.
Iowa Code §569.7.
Iowa Code §297.22 et seq.
Iowa Code §332.3 & 4.

CHAPTER 3

PRIVATE CORPORATIONS

3.1 PROBLEM:

Where a deed is executed by a corporation, is it necessary to require a showing from the articles of incorporation that the corporation was authorized to acquire and sell real estate?

STANDARD:

No, unless the articles of incorporation are recorded in the County where the land is located, in which case said articles would give constructive notice to any person dealing with the land of any limitations on the power of the corporation.

3.2 PROBLEM:

If a deed is made by a corporation organized and doing business under the laws of some State other than Iowa, is it necessary to require a showing that said corporation has obtained authority to do business in the State of Iowa?

STANDARD:

No.

3.3 PROBLEM:

If a deed or release of mortgage is executed by a corporation, is it necessary to obtain a showing from its articles of incorporation, bylaws or by a duly adopted resolution of its board of directors that the officers who executed the instrument were authorized to do so?

STANDARD:

No. However, if the articles of incorporation are recorded in the county in which the land

STANDARD:

Yes.

COMMENT:

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

Authority: Iowa Code § 297.22 et seq.
Iowa Code § 331.361.
Iowa Code § 362.3.
Iowa Code § 364.7.
Iowa Code § 569.7.

CHAPTER 3

PRIVATE CORPORATIONS

3.1 PROBLEM:

When a deed is executed by a corporation, is it necessary to require a showing from the articles of incorporation that the corporation was authorized to acquire and sell real estate?

STANDARD:

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

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

3.2 PROBLEM:

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

STANDARD:

No. Such authority is not necessary to convey real estate.

Authority: L.M. Simes & C.B. Taylor, Model Title Standards 12.6 (1960).
Iowa Code § 496A.120.

3.3 PROBLEM:

If a deed or release of mortgage is executed by a corporation, is it necessary to obtain a showing from its articles of incorporation, bylaws or by a duly adopted resolution of its board of directors that the officers who executed the instrument were authorized to do so?

STANDARD:

No. However, if the articles of incorporation are shown in the abstract, the examiner is

is situated, the examiner is bound to take notice of any limitations contained in said articles with respect to the powers of the officers to execute deeds. Articles of incorporation need not be shown for releases of mortgages.

3.4 PROBLEM:

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

STANDARD:

Corporations are satisfactorily identified, although their exact names are not used and variations exist from instrument to instrument, if, from the names used and other circumstances of record, identity of the corporation can be inferred with reasonable certainty. Among other variances: punctuation marks; addition or omission of the word "the" preceding the name; use or non-use of the symbol "&" for the word "and"; use or non-use of abbreviations for "company", "limited", "corporation" or "incorporated"; and inclusion or omission of all or part of a place or location ordinarily may be ignored. Affidavits and recitals of identity may be used and relied upon to obviate variances too substantial or too significant to be ignored.

COMMENT:

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

Authority: Simes & Taylor, Model Title Standards, 12.1.

CHAPTER 4

DEEDS

4.1 PROBLEM:

When a deed or other instrument filed for record more than ten years ago refers to a mortgage which cannot be found in the abstract, is it necessary to require any further explanation concerning said mortgage?

STANDARD:

Code Section 614.21 applies to a mortgage which is not of record but which is described or referred to in any other instrument which is filed of record. The limitation is ten years from the due date of the mortgage if disclosed in the record and if not so disclosed then ten years from the date of the record of the instrument containing such reference.

4.2 PROBLEM:

Where title was conveyed to the present owner by a quit claim deed but said owner proposes to convey by warranty deed or to execute a mortgage containing covenants of warranty, is

bound to take notice of any limitations contained in said articles with respect to the powers of the officers to execute deeds or releases. Articles of incorporation need not be shown for releases of mortgages.

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

3.4 PROBLEM:

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

STANDARD:

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

COMMENT:

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

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

CHAPTER 4

DEEDS AND CONTRACTS

4.1 PROBLEM:

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

STANDARD:

No.

COMMENT:

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

4.2 PROBLEM:

When the present owner holds title by quit claim deed and proposes to convey by warranty deed or to execute a mortgage containing covenants of warranty, is it proper for the examiner

it proper for the examiner for the purchaser or lender to require an affidavit from the grantor in the quit claim deed stating that at the time of the execution of the quit claim deed there were no unrecorded contracts, mortgages or other outstanding claims affecting the title within the knowledge of said grantor?

STANDARD:

No. It is true that the grantee in a quit claim deed takes the property subject to prior equities and is not a bona fide purchaser for value without notice. However, when the quit claim grantee conveys by warranty deed, his grantee will, presumptively, be a bona fide purchaser and will take the title free from outstanding equities of which he has no notice.

Authority: Winkler v. Miller, 54 Iowa 476, 6 N.W. 698 (1880).
Raymond v. Morrison, 59 Iowa 371, 13 N.W. 332 (1882).
Huber v. Bossart, 70 Iowa 718, 29 N.W. 608 (1886).
Hannan v. Seidentopf, 113 Iowa 658, 86 N.W. 44 (1901).

4.3 PROBLEM

If the grantee in a deed holds a mortgage on the real estate and there is no recitation in the deed to the effect that it was given in satisfaction of the mortgage, is it necessary to require an affidavit from the grantor in the deed stating that the deed was given in satisfaction of the mortgage, that it was an absolute conveyance not given as additional security, and that the consideration was the release of the grantor from liability under the note?

STANDARD:

A deed can be shown to be a mortgage. If the purchaser or lender is dealing with the grantee in such deed, the showing called for should be required. If the grantee in such deed has already conveyed the property, such showing is not necessary. It would be the duty of the mortgagor-grantor to take some action after the initial conveyance by the mortgagee-grantee and before further conveyances of the property.

Authority: Holman v. Mason City Auto Co., 186 Iowa 704, 171 N.W. 12 (1919).
2 Patton, Land Titles 2d Ed. §425.

4.4 PROBLEM:

When title is acquired through the survivorship of a joint tenant under a deed creating a valid joint tenancy, what showing is necessary before accepting a deed or mortgage from the survivor?

to require an affidavit from the grantor in the quit claim deed stating that at the time of the execution of the quit claim deed there were no unrecorded deeds, contracts, mortgages or other outstanding claims affecting the title within the knowledge of said grantor?

STANDARD:

No.

COMMENT:

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

Authority: Bell v. Pierschbacher, 245 Iowa 436, 62 N.W.2d 784 (1954).
Hannan v. Seidentopf, 113 Iowa 658, 86 N.W. 44 (1901).
Steele v. Sioux Valley Bank, 79 Iowa 339, 44 N.W. 564 (1890).
Winkler v. Miller, 54 Iowa 476, 6 N.W. 698 (1880).
Kitteridge v. Chapman, 36 Iowa 348 (1873).
Iowa Code § 558.41.
1 R. Patton & C. Patton, Patton on Land Titles § 16 (2d ed. 1957).
L.M. Simes & C. B. Taylor, Model Title Standards 22.3 (1960).

4.3 PROBLEM:

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

STANDARD:

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

Authority: Koch v. Wasson, 161 N.W.2d 173 (Iowa 1968).
Blum v. Keene, 245 Iowa 867, 63 N.W.2d 197 (1954).
Swartz v. Stone, 243 Iowa 128, 49 N.W.2d 475 (1951).
Lutz v. Cunningham, 240 Iowa 1037, 38 N.W.2d 638 (1949).
Holman v. Mason City Auto Co., 186 Iowa 704, 171 N.W. 12 (1919).
2 R. Patton & C. Patton, Patton on Land Titles § 425 (2d ed. 1957).

*Former standard 4.4 corresponds with new standard 9.9.

4.4 PROBLEM: [This standard is new—there is no corresponding standard in the fifth edition.]

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

STANDARD:

A showing of non-liability for Iowa inheritance taxes. In all cases where there have been no regular probate proceedings a clearance of inheritance tax (CIT) pursuant to Iowa Code §450.22 is necessary, unless the inheritance tax lien has expired as provided by Iowa Code §450.7. If inheritance tax lien has expired, a showing of the date of death of deceased joint tenant should be made.

COMMENT:

With respect to Iowa inheritance taxes the 4th Edition of Iowa Land Title Examination Standards stated that "if it can be shown by the affidavit of a responsible person that the inheritance tax exemption is substantially in excess of the gross value of the estate for inheritance tax purposes, such an affidavit will be sufficient." Such an affidavit is no longer sufficient unless it was placed of record prior to July 1, 1971. As of July 1, 1971, Iowa Code §450.22 was amended to require a clearance of inheritance tax in all instances where real estate is involved and no regular probate proceedings are had.

A showing of non-liability for federal estate and gift taxes is no longer necessary when title is acquired through the survivorship of a joint tenant.

Authority: Internal Revenue Ruling 56-144.

4.5 PROBLEM:

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

STANDARD:

If any claim thereunder has not been barred by Iowa Code §614.17, an affidavit should be obtained from the grantee in the deed or from the mortgagor or mortgagee, as the case may be, stating that the description was in error and that the grantee, or the mortgagor or mortgagee, claims no interest in the real estate in question. If such affidavit cannot be obtained, an affidavit of a person having personal knowledge of the facts should be accepted.

4.6 PROBLEM:

If the release of a mortgage correctly states the book and page of record, the parties and the description of the real estate, is it fatally defective if it gives the wrong date of the mortgage?

STANDARD:

No. The book and page of record is the most important part of the description and a mistake in the date can be disregarded.

4.7 PROBLEM:

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

STANDARD:

Yes. Chapter 656 provides a special method for forfeiture of a real estate contract without an action in court and contains no exceptions relating to persons under disability.

STANDARD:

No.

COMMENT:

This is true only if the spouse is not a party in possession.

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

4.5 PROBLEM:

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

STANDARD:

If Iowa Code § 614.17 is not applicable, (1) in the case of a deed, an affidavit or disclaimer showing no interest in the property should be obtained from the grantee and (2) in the case of a mortgage, the same showing should be obtained from the mortgagor and a release of the mortgage obtained from the mortgagee. In lieu of either (1) or (2) above, a corrected deed or mortgage setting out the true facts and stating that the description in the prior deed or mortgage was in error is acceptable. If the affidavit or disclaimer cannot be obtained from the grantee or mortgagor, then an affidavit of a person having personal knowledge of the facts is acceptable.

4.6 PROBLEM:

If the release of a mortgage correctly states the book and page of record and the parties, is it fatally defective if it gives the wrong date of the mortgage?

STANDARD:

No. The book and page of record is the most important part of the description and a mistake in the date can be disregarded.

4.7 PROBLEM:

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

STANDARD:

Yes. Chapter 656 provides a special method for forfeiture of a real estate contract without an action in court and contains no exceptions relating to persons under disability.

COMMENT:

In the case of a minor, service must be made in accordance with R.C.P. 56(b).

Authority: Iowa Code §656.3.
46 Iowa Law Review 786 (1961).

4.8 PROBLEM:

If A and B, who have acquired title as joint tenants, make a subsequent conveyance or mortgage, is it necessary to include anything in the granting clause relating to the grantors except the names of the parties and their marital status?

STANDARD:

No. Every outright conveyance of real estate passes all interest of the grantor therein.

COMMENT:

This standard was adopted because some conveyancers seem to think it necessary in a deed or mortgage by joint tenants to refer to them as such or to use some phrase such as "each in his or her own right." This is mere surplusage and unnecessary.

Authority: Iowa Code §557.3.

4.9 PROBLEM:

Where a deed describes the grantee as trustee without disclosing on its face either the nature of the trust or the name of the cestui que trust, what showing, if any, is necessary before accepting a conveyance from the grantee?

STANDARD:

Even though designation of the grantee as trustee does not necessarily create a trust (see Hodgson v. Dorsey, 230 Iowa 730, 298 N.W. 895, 137 A.L.R. 456 (1941)), it is the general rule that the use of the bare word "trustee" or "as trustee" following the name of the grantee in a deed is sufficient to charge with notice all persons dealing with the grantee concerning the land and to place them on reasonable inquiry as to the existence and nature of the trust. An examiner should require that there be recorded and shown on the abstract a satisfactory disclosure of the facts. Depending upon the circumstances, such showing can be made by the contract relating to the matter, by a declaration of trust or by affidavit. If there is a trust, there should be a recorded authorization for the trustee's conveyance or the cestui que trust should join in the trustee's conveyance.

Authority: See comprehensive note in 137 A.L.R. 460.

4.10 PROBLEM:

Where title to real estate is held by a husband and wife as joint tenants with right of survivorship, would a deed to a third party, executed by one of them without joinder of the

COMMENT:

Notice must be served on the same conditions and in the same manner as is provided for the service of original notices.

Authority: Iowa Code § 656.3.

*The text of former standard 4.8 has been deleted.

4.8 PROBLEM: [formerly standard 4.9]

When a deed describes the grantee as trustee without disclosing on its face either the nature of the trust or the name of the cestui que trust, what showing, if any, is necessary before accepting a conveyance from the grantee?

STANDARD:

Even though designation of the grantee as trustee does not necessarily create a trust (see *Hodgson v. Dorsey*, 230 Iowa 730, 298 N.W. 895, 137 A.L.R. 456 (1941)), it is the general rule that the use of the bare word "trustee" or "as trustee" following the name of the grantee in a deed is sufficient to charge with notice all persons dealing with the grantee concerning the land and to place them on reasonable inquiry as to the existence and nature of the trust. If Iowa Code § 614.14 is not applicable, an examiner should require a satisfactory disclosure of the facts. Depending upon the circumstances, such showing can be made by the contract relating to the matter, by a declaration of trust or by affidavit. If there is a trust, there should be a recorded authorization for the trustee's conveyance or the cestui que trust should join in the trustee's conveyance.

Authority: Zion Church v. Parker, 114 Iowa 1, 86 N.W. 60 (1901).
Boardman v. Willard, 73 Iowa 20, 34 N.W. 487 (1887).
Sleeper v. Iselin, 62 Iowa 583, 17 N.W. 922 (1883).
1 R. Patton & C. Patton, Patton on Land Titles § 228 (2d ed. 1957).
Annot. 137 A.L.R. 460 (1941).

4.9 PROBLEM: [formerly standard 4.10]

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

STANDARD:

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

Authority: Iowa Code § 561.13.
1 R. Patton & C. Patton, Patton on Land Titles § 236 (2d ed. 1957).

4.10 PROBLEM: [formerly standard 4.11]

When real estate is owned by joint tenants who enter into a contract for the sale of it, and one of them dies before title is conveyed to the purchaser, is a conveyance by the survivor or

other and followed by a reconveyance to the one executing the deed, be sufficient to terminate the joint tenancy and to create a tenancy in common?

STANDARD:

If the property did not constitute a homestead, such conveyance would be sufficient. If the property was a homestead, a conveyance by one spouse alone would be ineffective to terminate the joint tenancy.

Authority: Iowa Code §561.13.
Thayer v. Sherman, 218 Iowa 451, 255 N.W. 506 (1934).

4.11 PROBLEM:

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

STANDARD:

The sale contract effects an equitable conversion and a destruction of the joint tenancy. The conveyance should, therefore, be made by the survivor or survivors and by the personal representatives of the decedent or their successors in interest.

COMMENT:

The foregoing problem and standard are based on the assumption that the sale contract contains no provision that the sale proceeds shall be paid to the vendors as joint tenants with right of survivorship. If the contract contains a provision preserving the joint tenancy with right of survivorship, a deed from the survivor or survivors is sufficient.

Authority: In Re Baker's Estate, 247 Iowa 1380, 78 N.W. 2d 863, 868 (1956)—(approved this standard).

4.12 PROBLEM:

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

STANDARD:

Mere lapse of time between the date of execution and the date of filing of a deed for record does not make a title unmarketable. No objection should be based on it unless other matter contained in the abstract or other information warrants inquiry into the question of delivery.

Authority: Jones v. Betz, 203 Iowa 767, 210 N.W. 609, 213 N.W. 282 (1927).
Hodgson v. Dorsey, 230 Iowa 730, 298 N.W. 895, 137 A.L.R. 456 (1941).
Ferrell v. Stinson, 233 Iowa 1331, 11 N.W. 2d 701 (1943).
Crawford v. Couch, 234 Iowa 1246, 15 N.W. 2d 633 (1944).
Dyson v. Dyson, 237 Iowa 1285, 25 N.W. 2d 259 (1946).

survivors sufficient to vest the entire title in the purchaser, or does the act of entering into the sale contract cause such a severance of the joint tenancy that the interest of the deceased joint tenant will need to be conveyed by the executor, administrator, devisees or heirs?

STANDARD:

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

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

4.11 PROBLEM: [formerly standard 4.12]

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

STANDARD:

Mere lapse of time between the date of execution and the date of filing of a deed for record does not make a title unmarketable. No objection should be based on it unless other matters warrant inquiry into the question of delivery. The presumption of delivery exists even though the recording is after grantor's death.

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

CHAPTER 5

HUSBAND AND WIFE

5.1 PROBLEM:

Where a deed recites either in the body thereof or in the acknowledgment that the grantors are husband and wife, is it necessary to determine whether such recitation is correct, even where it appears from preceding instruments in the chain of title that the name of the spouse of the owner was different?

STANDARD:

The examiner may rely upon the recitation in the deed or acknowledgment.

Authority: Iowa Code §558.14.
Bisby v. Walker, 185 Iowa 743, 169 N.W. 467 (1919).
Modified, 185 Iowa 743, 171 N.W. 152 (1919).
Keefe v. Cropper, 196 Iowa 1179, 194 N.W. 305 (1923).
In the latter case the Iowa Supreme Court states:
"The verity of public records is not subject to impeachment for slight or transient reasons, and a solemn recital in a deed must be accepted as true, and as one upon which a subsequent purchaser may with safety rely."

5.2 PROBLEM:

If a deed recites in the body of a deed or in the acknowledgment that the grantor is single, a widower, a widow or unmarried, is it safe to rely upon said recitation, even though other instruments in the chain of title indicate that prior to the date of the deed the grantor was married?

STANDARD:

The examiner may rely upon the recitation in the deed or acknowledgment.

Authority: Keefe v. Cropper, 196 Iowa 1179, 194 N.W. 305 (1923).

5.3 PROBLEM:

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

STANDARD:

If the deed was recorded prior to January 1, 1960, no further showing is necessary, except when a claim has been filed in accordance with Iowa Code §614.15. If the deed is recorded after January 1, 1960, it is necessary to obtain either (1) an affidavit that the grantor was unmarried at the time of the execution and delivery of the deed; or (2) if he was married at the time of the execution of the deed, an affidavit that his spouse predeceased him, and that the real estate was not a homestead; or (3) a further conveyance from the grantor and wife. If the grantor was married at the time of the execution of the deed and the property was a homestead, it would be necessary to obtain a new deed as the previous deed would be a nullity.

Authority: Iowa Code §561.13 and §614.15.

CHAPTER 5

HUSBAND AND WIFE

5.1 PROBLEM:

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

STANDARD:

Yes.

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

5.2 PROBLEM:

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

STANDARD:

Yes.

Authority: Keefe v. Cropper, 196 Iowa 1179, 194 N.W. 305 (1923).

5.3 PROBLEM:

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

STANDARD:

If the deed was recorded prior to January 1, 1970, no further showing is necessary, except when a claim has been filed in accordance with Iowa Code § 614.15. If the deed is recorded after such date, it is necessary to obtain either (1) an affidavit that the grantor was unmarried at the time of the execution and delivery of the deed, or (2) if the grantor were married at the time of the execution and delivery of the deed, either an affidavit that the spouse predeceased the grantor and that the real estate was not a homestead, or a further conveyance from the spouse. If the grantor were married at the time of the execution of the deed and the property were a homestead, it would be necessary to obtain either (1) a new deed from grantor and spouse, or (2) a deed from the spouse.

Authority: Iowa Code §§ 561.13, 614.15.

COMMENT:

This Standard does not consider the effect of the 1981 amendment to § 561.13 on deeds of the homestead executed and delivered prior thereto.

5.4 PROBLEM:

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

STANDARD:

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

Authority: Simes & Taylor, Model Title Standards, 5.8.

5.5 PROBLEM:

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

STANDARD:

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

Authority: Iowa Code §561.13.

5.6 PROBLEM:

Is a release of dower sufficient if made by one spouse acting as an attorney in fact for the other under a duly executed power of attorney?

STANDARD:

Not unless validated by Iowa Code §614.15 or §614.17, relating to conveyances prior to January 1, 1960.

Authority: Swartz v. Andrews, 137 Iowa 261, 114 N.W. 888 (1908).

CHAPTER 6

JUDICIAL PROCEEDINGS

6.1 PROBLEM:

Where an original notice in a foreclosure proceeding describes the land incorrectly and gives the wrong book and page of record of the mortgage, but otherwise correctly describes the mortgage, is it sufficient to confer jurisdiction to enter a judgment by default?

STANDARD:

The notice is sufficient.

Authority: Fleming v. Hager, 121 Iowa 205; 96 N.W. 752 (1903), (wrong range number and wrong page of record).
Lindsey v. Delano, 78 Iowa 350; 43 N.W. 218 (1889), (wrong township number).

5.4 PROBLEM:

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

STANDARD:

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

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

5.5 PROBLEM:

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

STANDARD:

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

Authority: Iowa Code § 561.13.

5.6 PROBLEM:

Is a release of dower sufficient if made by one spouse acting as an attorney-in-fact for the other under a duly executed power of attorney?

STANDARD:

No. However, the dower claim is unenforceable if the conveyance was made prior to January 1, 1970, unless a claim has been filed in accordance with Iowa Code § 614.15.

Authority: Swartz v. Andrews, 137 Iowa 261, 114 N.W. 888 (1908).

CHAPTER 6

JUDICIAL PROCEEDINGS

*The text of former standard 6.1 has been deleted.

6.1 PROBLEM: [formerly standard 6.2]

Is it necessary to name the owner's spouse in the foreclosure of a real estate mortgage?

STANDARD:

Yes. It is necessary to name the owner's spouse in order to adjudicate the homestead and dower rights of the spouse. With respect to dower, if the spouse is not named, it must be shown by affidavit that the owner was unmarried or still living at the time of the sheriff's sale. If the owner was married and died before the sale, the spouse's right of dower would not be adjudicated.

Authority: Francksen v. Miller, 297 N.W.2d 375 (Iowa 1980).
Eastman v. DeFrees, 235 Iowa 488, 17 N.W.2d 104 (1945).
Bowden v. Hadley, 138 Iowa 711, 116 N.W. 689 (1908).
Iowa Code §§ 633.211, .212, .238.

6.2 PROBLEM:

Is it necessary to name the spouse of the owner as a party defendant in the foreclosure of a real estate mortgage?

STANDARD:

No. If said spouse is not made a party, it must be shown by affidavit that the owner was unmarried or still living at the time of the sheriff's sale, because if he was married and died before the sale, the spouse's right of dower would not be cut off. The same is true as to the forfeiture of a real estate contract under Chapter 656 of the Iowa Code.

Authority: Bowden v. Hadley, 138 Iowa 711, 116 N.W. 689 (1908).
Eastman v. Defrees, 235 Iowa 488, 17 N.W. 2d 104 (1945).
Iowa Code §§633.211, 633.212, and 633.238.

6.3 PROBLEM:

When the holder of a judgment for costs against a title holder is named as defendant in a proceeding to foreclose a mortgage, is it necessary to name as additional defendants the parties in whose favor such costs are based on the appearance docket, as, for instance, the county, the official shorthand reporter, witnesses, and attorneys entitled to statutory attorney fees and copy fees?

STANDARD:

No. A judgment is a lien only by operation of some statute, and there is no statute creating a lien in favor of a person who may become ultimately entitled to the costs if the same are paid to the clerk. The judgment creditor has a right to receive the money and use it in any way he sees fit, and therefore he is the only necessary party to the foreclosure as a lienholder.

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

6.4 PROBLEM:

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

STANDARD:

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

Authority: Gibbons v. Belt, 239 Iowa 961, 23 N.W. 2d 374 (1948).

6.2 PROBLEM: [formerly standard 6.3]

When the holder of a judgment for costs against a title holder is named as defendant in a proceeding to foreclose a mortgage, is it necessary to name as additional defendants the parties in whose favor such costs are based on the appearance docket, as, for instance, the county, the official shorthand reporter, witnesses, and attorneys entitled to attorney fees?

STANDARD:

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

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

6.3 PROBLEM: [formerly standard 6.4]

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

STANDARD:

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

Authority: Gibbons v. Belt, 239 Iowa 961, 33 N.W.2d 374 (1948).
Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A. App. §§ 511, 520.

6.4 PROBLEM: [formerly standard 6.5]

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

STANDARD:

A guardian ad litem need not be appointed for a minor or incompetent if there is some other person described in Iowa R.C.P. 56 who may be served on behalf of the minor or incompetent. If there is no such person, a guardian ad litem must be appointed to be served and to defend for the minor or incompetent.

A guardian ad litem need not be appointed for others later born if the doctrine of virtual representation applies under Iowa R.C.P. 43. If the doctrine of virtual representation does not apply, a guardian ad litem must be appointed to be served and to defend for others later born.

Authority: Iowa R.C.P. 13.
Iowa R.C.P. 43.
Iowa R.C.P. 56.1(b)—.1(d).
Irwin v. Keokuk Sav. Bank & Trust Co., 218 Iowa 477, 255 N.W. 671 (1934).

6.5 PROBLEM:

Is the failure to appoint a guardian ad litem for a minor or incompetent defendant a jurisdictional defect?

STANDARD:

No, if the time for direct attack upon the judgment has expired. The judgment is not void and cannot be collaterally attacked.

Authority: Rice v. Bolton, 126 Iowa 654; 100 N.W. 634 (1904).
Irwin v. Keokuk Bank, 218 Iowa 477; 255 N.W. 671 (1934).
Not jurisdictional—Gibbons v. Belt, 239 Iowa 961, 33 N.W. 2d 374 (1948).
44 C.J.S., Insane Persons, §141 and §151(b).

6.6 PROBLEM:

Is it necessary to obtain a discharge of a bail bond by the Court when the principal defendant has appeared and been sentenced?

COMMENT:

If original notice on the minor or incompetent is served on behalf of one who is the guardian or other fiduciary and the guardian or fiduciary is the only person who would be available upon whom service could be made, Iowa R.C.P. 56.1(b) and 56.1(c) provide the court or a judge shall appoint, without prior notice on the ward, a guardian ad litem upon whom service shall be made and who shall defend for the minor or incompetent. Iowa R.C.P. 13 provides that no judgment without a defense shall be entered against a minor or incompetent.

Unless service can be made on the guardian, parent or person aged 18 years or more who has care and custody in accordance with Iowa R.C.P. 56.1(b) in the case of a minor, a guardian ad litem must be appointed to be served and to defend for the minor in accordance with Iowa R.C.P. 13.

Unless service can be made on the guardian, spouse or person aged 18 years or more who has care and custody in accordance with Iowa R.C.P. 56.1(c) in the case of an incompetent, a guardian ad litem must be appointed to be served and to defend for the incompetent in accordance with Iowa R.C.P. 13.

Where persons composing a class which may be increased by others later born, do or may make a claim affecting specific property involved in an action, a guardian ad litem must be appointed to be served and to defend for others later born in accordance with Iowa R.C.P. 43, unless all living members of the class are parties to the action.

NOTE:

A judgment entered against a minor or incompetent person without appointment of a guardian ad litem is merely voidable under Iowa R.C.P. 13, if the minor or incompetent was actually represented by an attorney or court-appointed guardian. The judgment is void only if the minor or incompetent person received no such representation. The same rules apply to prisoners. In Re Marriage of Payne, 341 N.W.2d 772 (Iowa 1983).

*The text of former standard 6.6 has been deleted.

6.5 PROBLEM: [formerly standard 6.7]

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

STANDARD:

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

Authority: Collinson v. City of Dubuque, 242 Iowa 986, 47 N.W.2d 839 (1951).
McCartney v. City of Washington, 124 Iowa 382, 100 N.W. 80 (1904).
26 Iowa L. Rev. 96 (1940).
G.F. Madsen, Marshall's Iowa Title Opinions and Standards § 9.3(B) (2d ed. 1978).
Cook, Rules of Civil Procedure 344, 350 (3d ed.).
6 Loth, Iowa R.C.P. Forms §§ 3.24, .29, .31 (2d ed. West 1971).

6.6 PROBLEM: [This standard is new—there is no corresponding standard in the fifth edition].

STANDARD:

Yes. There is no provision in the Code for the automatic discharge of the bond upon sentence, and an order of the Court should be entered releasing the bond.

6.7 PROBLEM:

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

STANDARD:

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

Authority: Cummings v. Landes, 140 Iowa 80, 85; 117 N.W. 22 (1908).
McCartney v. City of Washington, 124 Iowa 382, 100 N.W. 80 (1904).
26 Iowa Law Review 96 (Nov. 1940).
Marshall, Iowa Title Opinions, §9.3(b) pp. 55-56 (1970 Pocket Part).
Cook, Rules of Civil Procedure, pp. 344, 350.
Collinson v. City of Dubuque, 242 Iowa 986, 47 N.W. 2d 839 (1951).

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

STANDARD:

No. The judgment constitutes a lien on the real estate even though appeal was taken and bond filed. Judgments are liens upon real estate owned by judgment debtor at the time judgment is rendered, and also upon real estate subsequently acquired, for a period of 10 years from date of judgment. An appeal does not vacate or affect the judgment appealed from, but when the appeal bond is filed and approved, further proceedings are stayed. The purpose of the appeal bond is to maintain the status quo. The bond is not superior protection or substitution for that of the lien. A court is not entitled to discharge the lien because an appeal bond has been filed. A bond's customary terms provide merely that it will pay what is due the judgment creditor in the event the judgment debtor does not pay. Thus, if payment is not made, the judgment creditor would be required to levy under the judgment lien before making demand upon the surety.

COMMENT:

Instead of satisfying the judgment or obtaining release of the property from its lien, there can be employed a variety of procedures, the choice depending on the circumstances in each case, which as a practical matter could render the property immune to that lien.

Authority: Edge v. Harsha, 334 N.W.2d 741 (Iowa 1983).
Iowa Code §§ 624.23(1), .24.
Iowa R. App. P. 7.

6.7 PROBLEM: [This standard is new—there is no corresponding standard in the fifth edition].

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

STANDARD:

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

(1) A homestead plat has been filed pursuant to Iowa Code §561.4;
(2) Proper written demand has been served on the owner of any judgment;
(3) No levy of execution has been made against the real estate within 30 days from the date of service of the demand;
(4) A copy of the written demand and proof of service has been filed in the office of the county recorder of the county where the real estate platted as a homestead is located.

COMMENT:

Although under Iowa Code §§ 561.21 and 624.23 only a very limited class of judgments are liens against the homestead, judgment debtors were unable to convey marketable title to otherwise exempt homestead real estate without a declaratory judgment or quiet title action to establish that a judgment of record was not a lien. Iowa Code § 624.23(2) now provides an inexpensive and simple procedure for identifying an exempt homestead of record and establishing that judgments upon which execution has not been levied within 30 days from the date of service of proper written demand do not constitute liens upon such exempt homestead.

It should be noted that the 1982 amendments to Iowa Code § 624.23 do not change existing case law as to what judgments may in fact be liens under Iowa Code § 561.21. Unless a judgment arises out of a claim as described in Iowa Code § 561.21, the judgment is not a lien on the

CHAPTER 7

MORTGAGES

7.1 PROBLEM:

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

STANDARD:

Yes.

Authority: 55 AmJur 2d, Mortgages, §409.
2 Patton, Land Titles, 2d Ed. §567, n. 20-22.

7.2 PROBLEM:

Is a mortgage valid which is recorded prior to recording of the instrument by which ownership is acquired?

STANDARD:

Yes, except to the extent that rights of third parties may have intervened.

Authority: Simes & Taylor, Model Title Standards, 16.1.

homestead. Presumably judgment creditors whose interest is not described in Iowa Code § 561.21 will not levy execution when notice is served under Iowa Code § 624.23 because a wrongful levy would arguably subject the creditor to a claim by the judgment debtor.

Authority: In Re Keane, 7 B.R. 844 (Bkrtcy. Iowa 1980).
Mitchell v. West, 93 N.W. 380 (Iowa 1903).
Cummings v. Long, 16 Iowa 41 (1864).
Lamb v. Shays, 14 Iowa 567 (1863).
Iowa Code §§ 561.21, 624.23.
Redfern, Iowa Land Title News, Sept./Oct. 1980 at 7.

CHAPTER 7

MORTGAGES

7.1 PROBLEM:

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

STANDARD:

Yes.

COMMENT:

Furthermore, upon the death of the mortgagee there is no requirement that the mortgaged property be cleared from any possible inheritance tax lien or federal estate tax lien.

Authority: Courtney v. Carr, 6 Iowa 238 (1858).
Iowa Code § 557.14.
P.E. Basye, Clearing Land Titles § 353 (2d ed. 1970).
2 R. Patton & C. Patton, Patton on Land Titles § 567, n. 20-22 (2d ed. 1957).
55 Am. Jur. 2d Mortgages § 409 (1971).

7.2 PROBLEM:

Is a mortgage valid as to third parties if recorded prior to recording of the instrument by which ownership is acquired?

STANDARD:

Yes, if the mortgage is recorded subsequent to the date of the instrument of conveyance.

COMMENT:

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

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

7.3 PROBLEM:

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

STANDARD:

No.

Authority: Simes & Taylor, Model Title Standards, 16.5.

7.4 PROBLEM:

Where a mortgage is followed by another which can be determined by the record to have been given to correct or modify the former, or to be a re-recording of the former, or to secure the same obligation, is marketability impaired by a failure to discharge one of the mortgages if the other is discharged of record?

STANDARD:

No.

Authority: Simes & Taylor, Model Title Standards, 16.7.

CHAPTER 8

NAMES

8.1 PROBLEM:

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

STANDARD:

The doctrine of Idem Sonans (namely, that if two names, as commonly pronounced in the English language, are sounded alike, a variance in their spelling is immaterial; and even a slight difference in their pronunciation is unimportant if the attentive ear finds difficulty in distinguishing between the two names when pronounced, and although spelled differently, they are to be regarded as the same) should be liberally applied, and the fact of identity of the party presumed in spite of variations in the spelling of the same, excepting where a question of constructive service of notice of proceedings is involved.

COMMENT:

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

7.3 PROBLEM:

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

STANDARD:

No.

Authority: 2 R. Patton & C. Patton, Patton on Land Titles §§ 564-66 (2d ed. 1957).
L.M. Simes & C.B. Taylor, Model Title Standards 16.5 (1960).

7.4 PROBLEM:

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

STANDARD:

No.

COMMENT:

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

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

CHAPTER 8

NAMES

8.1 PROBLEM:

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

STANDARD:

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

COMMENT:

The doctrine of Idem Sonans also applies where a given name of an individual, as it appears in the record title, is spelled in two or more ways that are usually pronounced alike or

Authority: Webb v. Ferkins, 227 Iowa 1157; 290 N.W. 112 (1940).
Simes & Taylor, Model Title Standards, 5.1.
Iowa Code §558.6.

8.2 PROBLEM:

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

STANDARD:

Under the Iowa Code and decisions, there is a presumption of identity. However, the Iowa practice has been to require affidavits of identity or recitals of identity in conveyances. Where all of the instruments involved became a matter of record prior to January 1, 1960, then, in view of Iowa Code §614.17 as amended, no proof of identity should be required; moreover, in the absence of special circumstances raising doubt about identity, the examiner should not require an affidavit of possession.

Authority: Vanderwilt v. Broerman, 201 Iowa 1107; 206 N.W. 959 (1926).
Iowa Code §558.6.
Simes & Taylor, Model Title Standards, 5.2.

8.3 PROBLEM:

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

STANDARD:

The examiner should rely on all customary and usually recognized abbreviations and derivations of given names.

Authority: State v. Moffitt, 155 Iowa 702; 136 N.W. 908 (1912).
Brown v. Piper, 91 U.S. 37, 23 L. Ed. 200 (1875).
1 Patton, Land Titles, 2d Ed., §74.
Simes & Taylor, Model Title Standards, 5.3.

8.4 PROBLEM:

When the name of a woman is changed through marriage subsequent to her acquisition of title, and then she conveys by an instrument executed in her married name, is she sufficiently identified if the instrument contains a recital as to her former name, e.g., "Mary Brown, formerly Mary Smith"?

STANDARD:

Such a recital is sufficient.

Authority: 1 Patton, Land Titles, 2d Ed., §72.
Keefe v. Cropper, 196 Iowa 1179, 194 N.W. 305 (1923).

substantially alike, and the surname and initials are the same in all cases.

Authority: Webb v. Ferkins, 277 Iowa 1157, 290 N.W. 112 (1940).
Iowa Code § 558.6.
L.M. Simes & C.B. Taylor, Model Title Standards 5.1 (1960).
57 Am. Jur. 2d Names § 19 (1971).

8.2 PROBLEM:

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

STANDARD:

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

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

8.3 PROBLEM:

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

STANDARD:

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

COMMENT:

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

Authority: State v. Moffit, 155 Iowa 702, 136 N.W. 908 (1912).
Brown v. Piper, 91 U.S. 37, 23 L.Ed 200 (1875).
1 R. Patton & C. Patton, Patton on Land Titles § 74 (2d ed. 1957).
L.M. Simes & C.B. Taylor, Model Title Standards 5.3 (1960).

8.4 PROBLEM:

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

STANDARD:

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

Authority: Keefe v. Cropper, 196 Iowa 1179, 194 N.W. 305 (1923).
1 R. Patton & C. Patton, Patton on Land Titles § 72 (2d ed. 1957).

8.5 PROBLEM:

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

STANDARD:

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

Authority: Keefe v. Cropper, 196 Iowa 1179, 194 N.W. 305 (1923).
Simes & Taylor, Model Title Standard, 5.4.
1 Patton, Land Titles, 2d Ed., §78.

8.6 PROBLEM:

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

STANDARD:

The certificate of acknowledgment should be accepted as providing adequate identification.

Authority: Paxton v. Ross, 89 Iowa 661, 57 N.W. 428 (1894).
1 Patton, Land Titles, 2d Ed., §78.
Simes & Taylor, Model Title Standards, 5.6.

8.7 PROBLEM:

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

STANDARD:

They form no part of the name, and may be disregarded, excepting that the words Senior and Junior, and the abbreviations therefore, do have significance and must be observed when both appear in connection with the same name in the chain of title. Likewise, the word "Junior" has come into frequent use as a given name and when used as such must be treated the same as any other given name.

Authority: 1 Patton, Land Titles, 2d Ed., §75.
State v. Dankwardt, 107 Iowa 704, 77 N.W. 495 (1898),
Simes & Taylor, Model Title Standards, 5.5.
55 C.J.S., Names, §§3, 4, 5, 6, 7, and 8.

8.8 PROBLEM:

Is the use of recorded affidavits a proper means of correcting discrepancies and variances in names?

STANDARD:

Yes. Affidavits or recitals should be made by persons competent to testify in court, state facts, rather than conclusions, and disclose the basis of the maker's knowledge. The value of an

8.5 PROBLEM:

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

STANDARD:

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

Authority: Keefe v. Cropper, 196 Iowa 1179, 194 N.W. 305 (1923).
L.M. Simes & C.B. Taylor, Model Title Standards 5.4 (1960).
1 R. Patton & C. Patton, Patton on Land Titles § 78 (2d ed. 1957).

8.6 PROBLEM:

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

STANDARD:

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

Authority: Paxton v. Ross, 89 Iowa 661, 57 N.W. 428 (1894).
1 R. Patton & C. Patton, Patton on Land Titles § 78 (2d ed. 1957).
L.M. Simes & C.B. Taylor, Model Title Standards 5.6 (1960).

8.7 PROBLEM:

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

STANDARD:

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

Authority: State v. Dankwardt, 107 Iowa 704, 77 N.W. 495 (1898).
1 R. Patton & C. Patton, Patton on Land Titles § 75 (2d ed. 1957).
L.M. Simes & C.B. Taylor, Model Title Standards 5.5 (1960).
65 C.J.S. Names §§ 3-8 (1966).

8.8 PROBLEM:

Whose affidavits or recitals are acceptable?

STANDARD:

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

affidavit or recital is not substantially diminished by the fact that the maker is interested in the title or the subject matter of the affidavit or recital.

Authority: Iowa Code §558.8.
Simes & Taylor, Model Title Standards, 8.2.

8.9 PROBLEM:

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

STANDARD:

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

8.10 PROBLEM:

Where a discrepancy in a name occurred prior to January 1, 1960, thus bringing it within the provisions of Iowa Code §614.17, and is of too serious a nature to be ignored, may an examiner rely on affidavits of possession under Iowa Code §614.17 to overcome this irregularity, provided that the abstract does not show that there are any claims on record under the provisions of said section, or should affidavits of identity be required?

STANDARD:

An affidavit of possession is sufficient if the record does not disclose any claims filed as provided by Iowa Code §614.17.

Authority: Lane v. Travelers Ins. Co., 230 Iowa 973; 299 N.W. 553 (1941).
Tesdell v. Hanes, 248 Iowa 742, 82 N.W. 2d 119 (1957).
Marshall, Iowa Title Opinions, §12.1.

CHAPTER 9

PROBATE

9.1 PROBLEM:

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

STANDARD:

No.

Authority: Iowa Code §633.383.

9.2 PROBLEM:

In proceedings to sell real estate is it necessary to make spouses of the heirs or persons having claims on file, parties thereto or serve notice upon them?

or the subject matter of the affidavit or recital. However, the examiner should consider the maker's knowledge and interest in the transaction.

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

8.9 PROBLEM:

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

STANDARD:

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

8.10 PROBLEM:

When a discrepancy in a name occurred prior to January 1, 1970, thus bringing it within the provisions of Iowa Code § 614.17, and is of too serious a nature to be ignored, may an examiner rely on an affidavit of possession under Iowa Code § 614.17 to overcome this irregularity, provided that the abstract does not show that there are any claims of record under the provision of said section?

STANDARD:

Yes.

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

CHAPTER 9

PROBATE

9.1 PROBLEM:

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

STANDARD:

No.

COMMENT:

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

Authority: Iowa Code § 633.383.

9.2 PROBLEM:

In proceedings to sell real estate is it necessary to make spouses of the heirs or persons having claims on file, parties thereto or serve notice upon them?

STANDARD:

Spouses of heirs and claimants are not necessary parties and it is not necessary to serve notice upon them unless they have requested notice in accordance with Iowa Code §633.42.

COMMENT:

Sale by fiduciary is governed by Iowa Code §633.396-401. Notice of hearing is required to be served upon "all persons interested" which Iowa Code §633.389 defines as including only "distributees in the estate and persons who have requested notice as provided by this Code."

9.3 PROBLEM:

Where real estate is acquired by a legal representative in the course of the administration of an estate through foreclosure of a mortgage, in satisfaction of a debt due the estate, does the legal representative have authority to sell such real estate in the absence of the authority in a will to sell?

STANDARD:

The legal representative has authority to sell but a court order is required. The court order may be with or without notice as the Court may determine.

Authority: Iowa Code §633.385, §633.387, and §633.389.

9.4 PROBLEM:

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

STANDARD:

No such order is required.

Authority: Iowa Code §633.95, see also §633.78.

9.5 PROBLEM:

If the owner of real estate dies testate, is there any need to show his heirs at law?

STANDARD:

No. However, in view of Iowa Code §633.267 and §633.361, it might be necessary to determine from the probate proceedings or from an affidavit whether or not any child was born to or adopted by the decedent after the execution of his will.

9.6 PROBLEM:

May Iowa Code §633.93 be relied upon as a cure or remedy for imperfections where the deed from the fiduciary has been recorded for more than five years?

STANDARD:

Yes. Iowa Code §633.93 is a valid statute of limitations which bars recovery of real estate sold by any fiduciary unless brought within five years after the date of the recording of the conveyance.

STANDARD:

No. Spouses of heirs and claimants are not necessary parties and it is not necessary to serve notice upon them unless they have requested notice in accordance with Iowa Code § 633.42.

COMMENT:

Sale by fiduciary is governed by Iowa Code §§ 633.386 through 633.401. Notice of hearing is required to be served upon "all persons interested" which Iowa Code § 633.389 defines as including only "distributees in the estate and persons who have requested notice as provided by this Code."

9.3 PROBLEM:

When real estate is acquired by a legal representative in the course of the administration of an estate through foreclosure of a mortgage, in satisfaction of a debt due the estate, does the legal representative have authority to sell such real estate in the absence of the authority in a will to sell?

STANDARD:

Yes. The legal representative has authority to sell but a court order is required. The court order may be with or without notice as the court may determine.

Authority: Iowa Code §§ 633.385, .387, .389.

9.4 PROBLEM:

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

STANDARD:

No.

Authority: Iowa Code § 633.95.

9.5 PROBLEM:

If the owner of real estate dies testate, is there any reason to show all of the owner's heirs at law in the estate proceedings?

STANDARD:

No. Nevertheless, it is necessary to determine from the probate proceedings or from an affidavit whether any child was born to or adopted by the decedent after the execution of the decedent's will unless the will provides for the child or it appears from the will that the omission of the child was intentional.

Authority: Iowa Code §§ 633.267, .361(7).

9.6 PROBLEM:

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

STANDARD:

Yes.

9.7 PROBLEM:

Is it necessary that the probate records show the closing of the estate if it appears that the interests of all persons entitled thereto have been transferred by deed?

STANDARD:

No. When the estate has no been closed it is necessary that the time for filing claims has elapsed, that all death taxes have been paid or the liens released, and that no reasonable grounds appear for the personal representative to sell or mortgage the real estate.

COMMENT:

If the personal representative is in possession pursuant to Iowa Code §633.351, a court order may be required by Iowa Code §633.353 or §633.354.

9.8 PROBLEM:

What showing is necessary where title is derived through heirs of an intestate decedent where there has been no administration on the estate?

STANDARD:

Iowa Code §633.413 bars claims after five years from the date of death. In the absence of special circumstances putting the examiner on notice, marketable title should be accepted as being established in such cases where it is shown by affidavit that (1) the decedent died intestate at least five years prior, (2) that the estate of said decedent had not been administered upon, (3) that the decedent was survived by the persons named in the affidavit, specifying their relationship to said decedent, and (4) such statement of the assets of the decedent's estate to enable the title examiner to determine what further showing, if any, to require as to inheritance and estate taxes.

Where such affidavit is filed after July 1, 1971, a clearance of inheritance tax (CIT) pursuant to Iowa Code §450.22 is necessary unless the death occurred more than 20 years prior.

Authority: Iowa Code §450.22, §450.7.
Sidel v. Snider, 241 Iowa 1227, 44 N.W. 2d 687 (1950).

*New standard 9.9 corresponds with former standard 4.4.

9.9 PROBLEM:

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

STANDARD:

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

9.7 PROBLEM:

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

STANDARD:

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

COMMENT:

If the personal representative is in possession pursuant to Iowa Code § 633.351, a court order may be required by Iowa Code § 633.353 or § 633.354.

9.8 PROBLEM:

What showing is necessary where title is derived through heirs of an intestate decedent where there has been no administration on the estate?

STANDARD:

Iowa Code § 633.413 bars claims after five years from the date of death. In the absence of special circumstances putting the examiner on notice, marketable title should be accepted as being established in such cases where it is shown by affidavit that: (1) the decedent died intestate at least five years prior; (2) the estate of said decedent had not been administered upon; (3) the decedent was survived by the persons named in the affidavit, specifying their relationship to said decedent; and (4) such statement of the assets of the decedent's estate to enable the title examiner to determine what further showing, if any, to require as to inheritance and estate taxes.

When such affidavit is filed after July 1, 1971, a clearance of inheritance tax (CIT) pursuant to Iowa Code § 450.22 is necessary unless the death occurred more than 20 years prior.

Authority: Siedel v. Snider, 241 Iowa 1227, 44 N.W.2d 687 (1950).
See Sorenson v. Wright, 268 N.W.2d 203 (Iowa 1978).
Iowa Code §§ 450.7, .22.

9.9 PROBLEM:

When title is acquired from a surviving joint tenant who holds title under a deed creating a valid joint tenancy, what showing is necessary before accepting a deed or mortgage from such survivor?

STANDARD:

A showing of nonliability for Iowa inheritance taxes is necessary. When there has been no regular probate proceedings, a clearance of inheritance tax (CIT) pursuant to Iowa Code § 450.22 is necessary, unless the inheritance tax lien has expired as provided by Iowa Code § 450.7(1)(a) (twenty years from date of death). If the inheritance tax lien has expired, a showing of the date of death of deceased joint tenant is all that is required.

COMMENT:

If it can be shown by the affidavit of a responsible person that the inheritance tax exemption is substantially in excess of the gross value of the estate for inheritance tax purposes, such an affidavit will be sufficient if recorded prior to July 1, 1971. As of July 1, 1971, Iowa Code §

9.10 PROBLEM:

Where title to real estate is conveyed by the fiduciary pursuant to a contract of sale made by the decedent in his lifetime, is it necessary to require the payment of claims against the estate of the decedent, the payment or showing of non-liability for state inheritance taxes and federal estate taxes, and the closing of the estate?

STANDARD:

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

9.11 PROBLEM:

Where the court in a probate sale or mortgage proceeding has made an order fixing time and place for hearing on the petition and prescribed the notice to be given to the ward, is it permissible for the attorney for the petitioner to serve the notice, or does Rule of Civil Procedure No. 52 apply? (Note: Rule 52 provides, "Original Notices may be served by any person who is neither a party nor the attorney for a party to the action.")

STANDARD:

Rule 52 does not apply and service of the notice by the attorney for the petitioner is permissible.

Authority: McCarty, Iowa Probate Practice, §109 et seq.
Schroeder v. District Court of Iowa, 213 Iowa 814, 239 N.W. 806 (1931).
Compare In Re Feldner, 167 Iowa 150, 149 N.W. 38 (1914).
Iowa Code §633.40 and §633.389.

9.12 PROBLEM:

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

STANDARD:

1. An adequate showing must be made with regard to the payment of or non-liability of the estate for federal estate taxes, or a specific release of the federal estate tax lien must be obtained.
2. No showing is required with regard to Iowa inheritance taxes.
3. Unless notice of tax lien has been filed, no showing is required with regard to federal income taxes, Iowa income taxes, or Iowa personal property taxes.
4. No showing is required with regard to the payment of costs of administration of the estate.
5. No showing is required with regard to the existence or payment of claims filed in the estate.

450.22 was amended to require a CIT "in all instances where real estate is involved and no regular probate proceedings are had." Iowa Code § 450.7(1)(b), which refers to a ten-year statute of limitation, does not apply to a CIT proceeding which is not an administration of an estate. A showing of nonliability for federal estate and gift taxes is no longer necessary when title is acquired through the survivorship of a joint tenant.

Authority: Rev. Rul. 56-144.
Plumb, Federal Tax Liens §§ 30 & 344 (3d ed. 1972).

9.10 PROBLEM: [Formerly standard 9.9]

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

STANDARD:

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

9.11 PROBLEM: [Formerly standard 9.10]

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

STANDARD:

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

*The text of former standard 9.11 has been deleted.

9.12 PROBLEM:

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

STANDARD:

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

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

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

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

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

Authority: 1. Int. Rev. Code §2204, 6325.
2. Iowa Code §450.7.
3. Int. Rev. Code §6323(a); Marshall, Iowa Title Opinions, §18.1(c); Iowa Code §422.26; Marshall, Iowa Title Opinions, §18.2(H); Iowa Code §445.29; Marshall, Iowa Title Opinions, §16.9(c).
4 & 5. Iowa Code §633.78, §633.395, §633.430. Neither expenses of administration nor claims constitute liens on real property in the estate, therefore a good faith purchaser should take the property free of any interests arising from these sources. The proceeds of sale are available to satisfy these interests in the order of their priority under Iowa Code §633.425. See Marshall, §16.8(o).
6. It was the intention of the draftsmen that judgment creditors of heirs and devisees would not be necessary parties. 34 C.J.S., Ex. & Adms., §640, 68 A.L.R. 1479, Iowa Code §633.389 provides "for purposes of this section, the term 'all persons interested' shall include only distributees in the estate and persons who requested notice as provided by this Code."

9.13 PROBLEM:

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

STANDARD:

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

Authority: Iowa Code §633.389.

CHAPTER 10

STATUTES OF LIMITATION

10.1 PROBLEM:

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

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

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

Authority:
1. U.S. v. Vohland, 675 F.2d 1071 (9th Cir. 1982).
I.R.C. §§ 2204, 6325.
2. Iowa Code § 450.7(3).
3. I.R.C. § 6323(a).
Iowa Code § 422.26.
G.F. Madsen, Marshall's Iowa Title Opinions and Standards §§ 16.9(A), 18.1(B) (2d ed. 1978).
4. & 5. Iowa Code §§ 633.78, .395, .430. Expenses of administration and claims do not constitute liens on real property in the estate.
See G.F. Madsen, Marshall's Iowa Title Opinions and Standards § 16.8(D) (2d ed. 1978).
6. Judgment creditors of heirs and devisees are not necessary parties.
Iowa Code § 633.389 provides "for purposes of this section, the term 'all persons interested' shall include only distributees in the estate and persons who requested notice as provided by this Code."
See generally 34 C.J.S. Ex. & Adms. § 640 (1942); Annot., 68 A.L.R. 1479 (1930).

9.13 PROBLEM:

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

STANDARD:

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

Authority: Iowa Code § 633.389.

CHAPTER 10

STATUTES OF LIMITATIONS

&

MARKETABLE TITLE ACTS

GENERAL COMMENT:

ALL DATES HEREIN ARE IN ACCORDANCE WITH THE CODE OF IOWA 1983. ADJUSTMENTS SHOULD BE MADE, AS APPROPRIATE, TO COMPLY WITH ANY AMENDMENTS ENACTED AFTER THAT DATE.

10.1 PROBLEM:

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

STANDARD:

Iowa Code §614.17 is a valid statute of limitation, and is a bar against all claims of every description arising prior to January 1, 1960, excepting claims owned by the State or the United States. As a prerequisite to reliance upon this statute, for the purpose of title examination, it is necessary only to require that the abstract show the recording of an affidavit of possession as provided by said section, and that there is no claim on record under the provisions of the statute.

Authority: Lane v. Travelers Ins. Co., 230 Iowa 973; 299 N.W. 553 (1941).
Collier v. Smaltz, 149 Iowa 230, 128 N.W. 396 (1910).
Hutchinson v. Olberding, 150 Iowa 604, 130 N.W. 139 (1911).
Newgirg v. Black, 174 Iowa 636, 156 N.W. 708 (1916).
Marshall, Iowa Title Opinions, §12.1.

COMMENT:

In principle, §614.17 is exactly the same as §614.15 and §614.21, the validity and constitutionality of which sections were established by the three cases last cited above. Much of the confusion and uncertainty in the minds of some title examiners in connection with §614.17 and the related §614.18, §614.19 and §614.20 appears to be due to an impression to the effect that this law provides for the use of an affidavit of adverse possession to cure the title defect and to make the title marketable. This is a misconception. All claims that come within the purview of this group of sections are, unless preserved in the method provided by §614.17, barred by that section as "against the holder of the record title to such real estate in possession when such holder of the record title and his grantors immediate or remote are shown by the record to have held chain of title to said real estate, since January 1, 1960", and the function of the affidavit is merely to establish of record the fact of possession under claim of ownership, upon which fact the operative effect of the statute of limitation is dependent.

One must exercise care, of course, to make certain that the facts of the particular case in which it is proposed to apply the section are such as to bring the case within its scope. For instance, assume the following state of facts: Prior to January 1, 1960, a conveyance of record is made to Smith, expressly subject to a contract of sale to Brown; Smith then conveys of record to White subsequent to January 1, 1960; his conveyance is not made subject to such contract, nor is it otherwise qualified; a good record chain of title from Smith is thereafter made; but no conveyance or forfeiture of the contract interest of Brown appears of record. Under this set of facts, §614.17 does not apply. This is true because it is not the fact that (in the language of the statute) the "holder of the record title and his grantors *** are shown by the record to have held chain of title *** since January 1, 1960." The case would be otherwise if the assumed facts should be altered only in the particular that the conveyance by Smith was recorded prior to (instead of subsequent to) January 1, 1960.

Authority: Tesdell v. Hanes, 248 Iowa 742, 82 N.W. 2d 119 (1957).
Burgess v. Leverett, 252 Iowa 31, 105 N.W. 2d 703 (1960).
Iowa Act discussed Wichelman v. Messner, (Minn. 1959), 250 Minn. 88, 83 N.W. 2d 800, 71 A.L.R. 2d 816, 846.
Iowa Law Review, Vol. 43, page 446.
Simeon v. City of Sioux City, 252 Iowa 779, 108 N.W. 2d 506, 510 (1961).

10.2 PROBLEM:

To what extent may Iowa Code §448.15 and §448.16 be relied upon as a cure or remedy for imperfections in a tax deed?

STANDARD:

Iowa Code § 614.17 is a valid marketable title act, and is a bar against claims arising prior to January 1, 1970, excepting claims owned by the State or the United States. As a prerequisite to reliance upon this statute, it is necessary only to require that the abstract show that the grantor or other person desiring to use the statute: (1) is the holder of record title, (2) is in possession and (3) has an unbroken chain of record title predating January 1, 1970, and that the adverse claim, (4) arose prior to January 1, 1970 and (5) has not been preserved of record between July 1, 1980 and June 30, 1981. Possession may be shown by the recording of an affidavit of possession as provided in said section.

COMMENT:

In principle, § 614.17 is the same as § 614.15, § 614.21 and § 614.24, the validity and constitutionality of which sections were accepted or established in the three cases last cited below. Much of the confusion and uncertainty in the minds of some title examiners in connection with § 614.17 and the related § 614.18, § 614.19 and § 614.20 appears to be due to an impression to the effect that this law provides for the use of an affidavit of adverse possession to cure the title defect and to make the title marketable. This is a misconception. All claims that come within the purview of this group of sections are, unless preserved in the method provided by § 614.17, barred by that section as "against the holder of the record title to the real estate in possession, when the holder of the record title and the holder's immediate or remote grantors are shown by the record to have held chain of title to the real estate, since January 1, 1970," and the function of the affidavit is merely to establish of record the fact of possession upon which fact the operative effect of the statute is dependent.

One must exercise care, of course, to make certain that the facts of the particular case in which it is proposed to apply the section are such as to bring the case within its scope. For instance, assume the following state of facts: Prior to January 1, 1970, a conveyance of record is made to Smith, expressly subject to a contract of sale to Brown; Smith then conveys of record to White subsequent to January 1, 1970; his conveyance is not made subject to such contract, nor is it otherwise qualified; a good record chain of title from Smith is thereafter made, but no conveyance or forfeiture of the contract interest of Brown appears of record. Under this set of facts, § 614.17 does not apply. This is true because it is not the fact that (in the language of the statute) the "holder of the record title and the holder's immediate and remote grantors are shown by the record to have held chain of title . . . since January 1, 1970. . . ." The case would be otherwise if the assumed facts should be altered only in the particular that the conveyance by Smith was recorded prior to (instead of subsequent to) January 1, 1970.

Authority: Tesdell v. Hanes, 248 Iowa 742, 82 N.W.2d 119 (1957).
Lane v. Travelers Ins. Co., 230 Iowa 973, 299 N.W. 553 (1941).
Comment, 43 Iowa L. Rev. 446 (1958).
Iowa Act discussed in Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800, 71 A.L.R.2d 816 (1957).
G.F. Madsen, Marshall's Iowa Title Opinions and Standards § 12.1 (2d ed. 1978).
See also:
Texaco, Inc. v. Short, 454 U.S. 516, 102 S.Ct. 781, 70 L. Ed.2d 738 (1982).
Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232 (Iowa 1975).
Newgirg v. Black, 174 Iowa 636, 156 N.W. 708 (1916).
Hutchinson v. Olberding, 150 Iowa 604, 130 N.W. 139 (1911).

10.2 PROBLEM:

To what extent may Iowa Code § 448.15 and § 448.16 be relied upon as a cure or remedy for imperfections in a tax deed?

STANDARD:

These sections constitute a valid statute of limitation, and, when complied with, bar all claims based upon defects in a tax deed, excepting claims owned by the State or the United States. As a prerequisite to reliance upon these statutes, for the purpose of title examination, it is necessary only to require that the abstract show the recording of an affidavit as provided in §448.15 and that no claims have been filed thereunder within one hundred twenty (120) days after the filing of such affidavit.

Authority: Swanson v. Pontralo, 238 Iowa 693, 27 N.W. 2d 21 (1947).
Patterson v. May, 239 Iowa 602, 29 N.W. 2d 547 (1948).
Simeon v. City of Sioux City, 252 Iowa 779, 108 N.W. 2d 506, 510 (1961).

10.3 PROBLEM:

Who may make and file the tax title affidavit under Iowa Code §448.15 and §448.16?

STANDARD:

Such affidavit may be made and filed by the record title holder at the time of filing, or may be made by anyone having knowledge of the facts, but filed at the request of the record title holder.

Authority: Marshall, Iowa Title Opinions, §18.6(B).

10.4 PROBLEM:

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

STANDARD:

Yes, because it does not affirmatively appear from the record as required by said statute that less than ten years have elapsed since the date of maturity of the indebtedness.

STANDARD:

These sections constitute valid marketable title legislation and bar all claims based upon defects in a tax deed, excepting claims owned by the State or the United States. As a prerequisite to reliance upon these statutes it is necessary only to require that the abstract show the recording of an affidavit as provided in §448.15 and that no claims have been filed thereunder within 120 days after the filing of such affidavit.

Authority: Simeon v. City of Sioux City, 252 Iowa 779, 108 N.W.2d 506 (1961).
Patterson v. May, 239 Iowa 602, 29 N.W.2d 547 (1947).
Swanson v. Pontralo, 238 Iowa 693, 27 N.W.2d 21 (1947).

COMMENT:

If the tax deed, as issued, contains an erroneous description, even if the above affidavit is recorded with a correct description, adequate notice is not given to holders of adverse claims and these sections do not operate.

Authority: Larsen v. Cady, 274 N.W.2d 907 (Iowa 1979).

CAVEAT:

This Standard does not consider the effect which Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) may have upon § 448.15 and § 448.16.

10.3 PROBLEM:

Who may make and file the tax title affidavit under Iowa Code §448.15 and § 448.16?

STANDARD:

Such affidavit may be made and filed by the record titleholder at the time of filing, or may be made by anyone having knowledge of the facts, but filed at the request of the record titleholder.

Authority: Patterson v. May, 239 Iowa 602, 29 N.W.2d 547 (1947).
G.F. Madsen, Marshall's Iowa Title Opinions and Standards § 18.6(B) (2d ed. 1978).

CAVEAT:

This Standard does not consider the effect which Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) may have upon § 448.15 and § 448.16.

10.4 PROBLEM:

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

STANDARD:

Yes.

Authority: Ramiller v. Ramiller, 236 Iowa 323, 18 N.W.2d 622 (1945).

10.5 PROBLEM:

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

STANDARD:

Yes, because it does not affirmatively appear from the record that less than ten years have elapsed since the date of maturity of any part of the indebtedness secured thereby.

10.6 PROBLEM:

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

STANDARD:

Yes. The Stale Uses and Reversions Act is a valid statute of limitation.

Authority: Chicago & Northwestern Ry. Co. v. City of Osage, 176 N.W. 2d 788 (1970).
Marshall, Iowa Title Opinions, §12.3 (E-1)(1970 Pocket Part).

COMMENT:

The limitation on use restrictions, including restrictive covenants, and reversions applies whether the restrictions have been breached or not and whether or not the purpose is obsolete or still beneficial. The limitation applies against municipal corporations. The limitation applies to minors, the mentally ill and persons entitled to relief under the Soldiers and Sailors Civil Relief Act. (See Comment at Standard 11.1).

10.5 PROBLEM:

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

STANDARD:

Yes.

Authority: Ramiller v. Ramiller, 236 Iowa 323, 18 N.W.2d 622 (1945).

10.6 PROBLEM:

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

STANDARD:

Yes. The Stale Uses and Reversions Act is a valid marketable title act.

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

COMMENT:

The limitation on "reversion, reverted interests or use restrictions" applies to possibilities of reverter, rights of re-entry (powers of termination), and restrictive covenants whether the limitation, condition or restriction has been breached and whether the purpose is obsolete, or still beneficial. The limitation applies against municipal corporations. The limitation applies to minors, the mentally ill and persons entitled to relief under the Soldiers' and Sailors' Civil Relief Act. However, § 614.24 now provides that it does not apply to a reversionary interest in railroad property if the reversion is caused by the abandonment of the property for railroad purposes after July 1, 1980. (This section would not appear to affect reversionary interests which were cut off by operation of Iowa Code § 614.24 prior to July 1, 1980.) Nor do these sections apply if the interest owned is an easement rather than a possessory estate subject to a reversion or use restriction.

Authority: Hawk v. Rice, 325 N.W.2d 97 (Iowa 1982).
Haack v. Burlington Northern, Inc., 309 N.W.2d 147 (Iowa Ct. App. 1981).
Johnson v. Burlington Northern, Inc., 294 N.W.2d 63 (Iowa Ct. App. 1980).
See also:
Texaco, Inc. v. Short, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982).

CHAPTER 11

MARKETABLE TITLE ACT

11.1 PROBLEM:

To what extent may the Marketable Title Act (Iowa Code §§614.29-614.38) be relied upon to cure or remedy imperfections in the chain of title and support a determination that a title is marketable?

STANDARD:

The Marketable Title Act is remedial legislation embodying a valid statute of limitation and should be relied upon as a cure or remedy for such imperfections of title as fall within its scope. An interest in land shall be deemed marketable where any person can show an unbroken chain of record title extending back at least forty years and where no matter appears of record within such chain of title purporting to divest the interest.

Authority: Simes & Taylor, Improvement of Conveyancing by Legislation, pp. 253-273 (1960).
Lane v. Travelers Ins. Co., 230 Iowa 973, 299 N.W. 553 (1941).
Tesdell v. Hanes, 248 Iowa 742, 82 N.W.2d 119 (1957).

COMMENTS:

(a) Constitutional validity. The Marketable Title Act is both prospective and retroactive in its operation. The validity of its prospective operation is beyond question. Its retroactive operation appears similarly free from doubt. The Act is clearly within the principle, well established in Iowa, that the legislature can require a periodic recording or a re-recording to provide notice of existing interest, and can extinguish the interests of those who fail to comply with the requirement. The only qualification to this principle is that a reasonable time be provided, after the legislation is enacted, to permit all persons a fair opportunity to record the necessary notices; the Marketable Title Act provides a one-year period for this purpose, which seems clearly within the accepted standards of reasonableness.

11.2 PROBLEM:

What is an unbroken chain of record title?

STANDARD:

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

COMMENT:

(1) Suppose A is the grantee in a deed of a tract of land which was recorded in 1930. Assume also, that nothing affecting the chain of title to this land has been recorded since then. In 1970 A has an "unbroken chain of title of record". This is true without regard to whether deed forming the root of title contained any covenants of title or was a quit claim. Instead of the recorded instrument, which constitutes the root of title, being a deed of conveyance, it may be a will admitted to probate or a decree of the Federal or State District Court of record in 1930.

CHAPTER 11

40 YEAR MARKETABLE TITLE ACT

11.1 PROBLEM:

To what extent may the 40 Year Marketable Title Act (Iowa Code §§ 614.29-.38) be relied upon to cure or remedy imperfections in the chain of title and support a determination that a title is marketable?

STANDARD:

The 40 Year Marketable Title Act is remedial legislation and should be relied upon as a cure or remedy for such imperfections of title as fall within its scope. Any interest in land shall be deemed marketable where the holder has such interest of record and can show an unbroken chain of record title to such interest extending back at least forty years to the root of title, and where none of the matters excepted in Iowa Code § 614.32 appears.

Authority: L.M. Simes & C.B. Taylor, Improvement of Conveyancing by Legislation 253-73 (1960).
See also:
Texaco, Inc. v. Short, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982).
Presbytery of Southeast Iowa v. Harris, 226 N.W.2d 232 (Iowa 1975).
Tesdell v. Hanes, 248 Iowa 742, 82 N.W.2d 119 (1957).

COMMENT:

The 40 Year Marketable Title Act is both prospective and retroactive in its operation. Its retroactive application is only limited by the grace period specified in Iowa Code § 614.38, *i.e.*, if the 40 year period would have expired prior to July 1, 1969, it is extended until one year after July 1, 1969.

11.2 PROBLEM:

What is an unbroken chain of record title?

STANDARD:

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

COMMENT:

(1) Suppose A is the grantee in a deed of a tract of land which was recorded in 1940 and that nothing affecting the chain of title to this land has been recorded since then. In 1980 A has an "unbroken chain of title of record." This is true without regard to whether the deed forming the root of title contained any covenants of title or was a quit claim. The instrument or proceedings which constitutes the root of title may, inter alia, be a deed, a will admitted to probate, an intestate administration, or a decree of the Federal or State District Court of record in 1940.

(2) Instead of having only a single link, A's chain of title may contain two or more links. Thus, suppose X is the grantee in a deed of a tract of land which was recorded in 1930; and X conveyed the same tract to Y, by deed, which was recorded in 1935; Y conveyed the same tract to A by deed, which was recorded in 1950. In 1970 A has an "unbroken chain of title of record". Any or all of these links may consist of a will admitted to probate or a decree of the Federal or State District Courts, instead of deeds of conveyance.

The significant time from which the forty-year record title begins is not the delivery of the instrument, but the date of its recording. Suppose A is the grantee in a deed, executed and delivered in 1935, but recorded in 1940. A does not have an "unbroken chain of title of record", since forty years have not elapsed subsequent to the recording of his deed in 1940. He will not have the "unbroken chain" required by the statute until 1980.

11.3 PROBLEM

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

STANDARD:

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

COMMENT:

Suppose a deed from O to A in 1930 forms the root of title. This deed specifically identifies by book and page of recording, and excepts mineral rights created earlier in favor of X. The exception of the mineral rights is a matter purporting to divest within the meaning of the Act and the title is subject to that interest.

11.4 PROBLEM

Of what effect is the recording subsequent to the root of title of an instrument purporting to divest some interest of the record title holder?

STANDARD:

An instrument recorded subsequent to the root of title which purports to divest the marketable title is accorded the same effect as the recording of the notice provided for in Iowa Code §614.34. An interest conveyed or created by the recorded instrument is preserved. (See Standard 11.5 concerning what instruments purport to divest.)

11.5 PROBLÆM:

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

(2) Instead of having only a single link, A's chain of title may contain two or more links. Thus, suppose X is the grantee in a deed of a tract of land which was recorded in 1940, and X conveyed the same tract to Y by deed which was recorded in 1960. Y conveyed the same tract to A by deed which was recorded in 1970. In 1980 A has an "unbroken chain of title of record." Any or all of these links may consist, inter alia, of a deed, a will admitted to probate, an intestate administration, or a decree of the Federal or State District Court.

The significant time from which the forty-year record title begins is not the delivery of the instrument, but the date of its recording. Suppose A is the grantee in a deed executed and delivered in 1940, but recorded in 1945. A does not have an "unbroken chain of title of record" in 1980, since forty years have not elapsed subsequent to the recording of the deed in 1945. A will not have the "unbroken chain" required by the statute until 1985.

11.3 PROBLEM:

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

STANDARD:

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

COMMENT:

Suppose a deed from O to A in 1940 forms the root of title. This deed specifically identifies by book and page of record an exception for mineral rights created earlier in favor of X. The exception of the mineral rights is an interest or defect which is inherent in the muniments of the chain of title as provided in Iowa Code § 614.32(1), and the title is subject to that interest.

*The text of former standard 11.4 has been deleted.

11.4 PROBLEM: [formerly standard 11.5]

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

STANDARD:

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

COMMENT:

The obvious case in which a recorded instrument purports to divest the forty-year chain of title is that of a conveyance to another person. A is the grantee of a tract of land in a deed of conveyance recorded in 1935. The record shows a conveyance of the same tract from A to B, recorded in 1955. There is also a deed of conveyance of the same tract from B to X, recorded in 1977. Although B, in 1975, had a forty-year chain of title, the deed to X purports to divest it, and B, of course, does not have title.

11.5 PROBLEM: [formerly standard 11.6]

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

STANDARD:

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

COMMENT:

The obvious case in which a recorded instrument purports to divest the forty-year chain of title is that of a conveyance to another person. A is the grantee of a tract of land in a deed of conveyance recorded in 1925. The record shows a conveyance of the same tract from A to B, recorded in 1935. There is also a deed of conveyance of the same tract from B to X, recorded in 1967. Although B, in 1965, had a forty-year record chain of title, the deed to X purports to divest it, and B, of course, does not have a title.

A recorded instrument may also purport to divest even though there is not a complete chain of record title connecting the grantee in the divesting instrument with the forty-year chain. Suppose A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1925. A deed of the same land was recorded in 1935, from X to Y, which recites that A died intestate in 1931 and that X is his only heir. There is nothing else on record indicating that X is A's heir. The deed recorded in 1935 is one "purporting to divest" within the terms of the Act. This is the conclusion to be reached whether the recital of heirship is true or not.

Or suppose, again, that A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1925. A deed of the same land from X to Y was recorded in 1935, which contains the following recital: "being the same land heretofore conveyed to me by A". There is no instrument on record from A to X. This instrument is nevertheless one "purporting to divest" within the terms of the Act.

Suppose that in 1925, A was the last grantee in a recorded chain of title, the deed to him being recorded in that year. A deed of the same land was recorded in 1935, signed: "A by B, attorney-in-fact." Even though there is no power of attorney on record, and even though the recital is untrue, the instrument is one "purporting to divest" within the terms of the Act.

On the other hand, an inconsistent deed on record is not one "purporting to divest" within the terms of the Act, if nothing on the record purports to connect it with the forty-year chain of title. The following fact situations illustrate this.

A is the last grantee in a recorded chain of title, the last deed of which was recorded in 1925. A mortgage from X to Y of the same land, containing covenants of warranty, is recorded in 1935. The mortgage is not an instrument "purporting to divest" within the terms of the Act.

It should be observed that although the recorded instruments in the last two illustrations are not instruments "purporting to divest" the forty-year title, they are not necessarily nullities. Under Iowa Code §614.32(4) the marketable record title can be subject to interests arising from such instruments.

11.6 PROBLEM:

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

STANDARD:

The Marketable Title Act is designed to be supportive of existing title clearing legislation and should not be construed to be in conflict with such other acts. The Act specifically states that it is not intended to affect the operation of other curative acts or statutes of limitation. Section 614.17 continues in full force and effect and should be frequently used to eliminate title defects occurring within the forty-year chain of title, but prior to January 1, 1960.

STANDARD:

The Marketable Title Act is designed to be supportive of existing title clearing legislation and should not be construed to be in conflict with such other acts. The Act specifically states that it is not intended to affect the operation of other curative acts or statutes of limitation. Iowa Code § 614.17 continues in full force and effect and should be used to eliminate title defects occurring within the forty-year chain of title, but prior to January 1, 1970.

COMMENT:

Generally, because it is broader in scope, the Marketable Title Act should be expected to replace Iowa Code § 614.17 and other remedial acts as the primary mechanism for eliminating title defects occurring beyond the forty-year chain of title. However, within the forty-year chain of title, the other title clearing acts will continue to be the exclusive basis for removing title defects. For example, suppose A conveyed a fee to B in 1955. In 1962 a deed is recorded showing a conveyance of the premises from B to C. In 1965 a warranty deed from B to D is recorded. D's title is in issue in 1984. The Marketable Title Act is of no relevance because the alleged defect lies within the forty-year chain. However, D may file an affidavit of possession under Iowa Code § 614.17, and since C's claim arose prior to 1970, and no timely notice has been filed to preserve it, D's title is marketable.

11.6 PROBLEM: [formerly standard 11.7]

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

STANDARD:

No.

COMMENT:

Generally, because it is broader in scope, the Marketable Title Act should be expected to replace Iowa Code §614.17 and other remedial acts as the primary mechanism for eliminating title defects occurring beyond the forty-year chain of title. However, within the forty-year chain of title, the other title clearing acts will continue to be the exclusive basis for removing title defects. For example, suppose A conveyed a fee to B in 1945. In 1952 a contract is recorded showing a sale of the premises from B to C, but no deed is ever recorded. In 1955 a warranty deed from B to D is recorded. D's title is in issue in 1974. The Marketable Title Act is of no relevance because the alleged defect lies within the forty-year chain, but an affidavit of possession may be filed under Iowa Code §614.17 to clear the title, the contract claim having arisen prior to 1960 and no subsequent notice having been filed to preserve it.

11.7 PROBLEM:

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

STANDARD:

No record showing of possession is required to rely on the Marketable Title Act to remedy title imperfections beyond the forty-year chain of title.

COMMENT:

The Marketable Title Act is generally designed to extinguish ancient title defects without regard to present possession. The Act specifically excepts any title by adverse possession which accrues at any time subsequent to the effective date of the root of title and also makes special provision for record owners of possessory interests who have been in continuous possession for forty years or more and whose possession continues down to the time at which the marketability of the title is being determined. Except for these two situations, the present possession of the land is not considered in determining the operation of the Act on ancient title imperfections. Of course, because these two possessory situations are excepted from the Act's bar, it is necessary in each case to ascertain the present possession to assure that all ancient interests have effectively been extinguished; but this is no different from the usual inquiry that must be made to protect against interests evidenced by possession that arose within the forty-year title chain. Ancient easements which are apparent or can be proved by physical evidence of their use, such as water, sewer lines, electric, telephone and pipelines are excepted from the operation of the act and purchasers should inspect the property and check for the existence of such easements.

11.8 PROBLEM:

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

STANDARD:

Except as to matters which are exempted from the operation of the Act under Iowa Code §614.36, the abstract need extend no further beyond forty years from the present time than is

COMMENT:

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11.7 PROBLEM: [formerly standard 11.8]

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

STANDARD:

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

COMMENT:

A major purpose of the Marketable Title Act is to limit the examination of the record title to a relatively modern period, as reflected in the forty-year chain requirement. Consistent with this shortening of the period of title examinations is the intent to reduce the record search and shorten abstracts. In all cases, the abstract must go back to the conveyance or other title transaction which is the "root of title". It will rarely occur that this instrument was recorded precisely forty years prior to the present time. In nearly every case the period from the recording of the "root of title" to the present will be somewhat more than forty years. For example, C wishes to have an abstract of title showing the forty-year title required to make title marketable under the Act. The only instruments of record are the following: (1) A patent from the United States to A, recorded in 1900; (2) a deed from A to B, recorded in 1942; (3) a deed from B to C, recorded in 1960. In 1984 the deed from A to B is the root of title, since it is in the last instrument recorded forty years or more prior to the present time. Thus, the abstract will start with the deed from A to B.

11.8 PROBLEM: [This standard is new—there is no corresponding standard in the fifth edition.]

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

STANDARD:

No.

necessary to show the "root of title." Beyond this point search should be confined to those interests excepted from coverage by the Act, i.e., rights of reversions under leases, and claims of the United States. It is the purpose of the Marketable Title Act to make the use of "forty-year abstracts" standard throughout the state.

COMMENT:

A major purpose of the Marketable Title Act is to limit the examination of the record title to a relatively modern period, as reflected in the forty-year chain requirement. Consistent with this shortening of the period of title examination is the intent to reduce the record search and shorten abstracts. In all cases, the abstract must go back to the conveyance or other title transaction which is the "root of title;" and it will rarely occur that this instrument was recorded precisely forty years prior to the present time. In nearly every case, the period from the recording of the "root of title" to the present, will be somewhat more than forty years. For example, C wishes to have an abstract of title showing the forty-year title required to make his title marketable under the Act. The only instruments of record are the following: (1) A patent from the United States to A, recorded in 1900, (b) a deed from A to B, recorded in 1932; (c) a deed from B to C, recorded in 1950. In 1974 the deed from A to B is the root of title, since it is the last instrument recorded forty years or more prior to the present time. Thus, the abstract will start with the deed from A to B. Where the root of title is formed by some instrument other than the patent, it is not necessary for the abstract to show the patent.

CHAPTER 12

PARTNERSHIP

12.1 PROBLEM:

Where real property is held in partnership's name how should it be conveyed?

STANDARD:

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

COMMENT:

Elmer Jones and Robert Smith are partners, doing a real estate business in the name of Enterprise Associates. Real Estate is purchased for the partnership and title is taken in the name of Enterprise Associates, a partnership. The partnership wishes to sell the land to Henry Green. The deed should be executed in the name of Enterprise Associates, a partnership. It may be signed by one or both of the partners. Thus the signature can read: "Enterprise Associates, a partnership, consisting of Elmer Jones and Robert Smith, by Elmer Jones and Robert Smith," or "Enterprise Associates, a partnership, by Elmer Jones." If the latter form of execution is used, the deed should show, by its recitals, or evidence should be secured to show, that Elmer Jones is one of the partners. The purchaser should have no knowledge negativing the

COMMENT:

Assume the following facts: A conveyed to B in 1930, B mortgaged to C in 1940 (which mortgage was later released) and B conveyed to D in 1960. In order for a person to have a 40 year chain of title under Iowa Code § 614.31, there must exist in the land records "a conveyance or other title transaction, of record not less than forty years . . ., which said conveyance or other title transaction purports to create such interest. . . ." This section requires that the root of title must purport to create the interest claimed by the present owner. The 1940 transaction only purported to create a mortgage lien. Since this lien was never foreclosed it never became a fee. The present owner is certainly claiming a far greater interest than a lien. The owner is claiming a fee through the A to B to D chain and not through the mortgage to C. (The result would be different if D claimed through a foreclosure of the B to C mortgage and in that case the mortgage would be the root of title.)

The policy of the Act is to require the root of title to create color of title in the claimant. The Act does not create a marketable title if there is no document creating color of title in the claimant. For example, suppose A should convey to B in 1930 and B should mortgage to C in 1940. There are no subsequent title transactions. The mortgage to C in 1940 is not the root of title.

CHAPTER 12

PARTNERSHIPS

GENERAL COMMENT:

THIS CHAPTER APPLIES TO REAL PROPERTY ACQUIRED UNDER THE UNIFORM PARTNERSHIP ACT, IOWA CODE CHAPTER 544. NO POSITION IS TAKEN AS TO THE STATUS OF REAL PROPERTY ACQUIRED BY A PARTNERSHIP AFTER JULY 4, 1971, WHEN THE PARTNERSHIP WAS FORMED PRIOR TO THAT DATE.

12.1 PROBLEM:

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

STANDARD:

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

COMMENT:

Elmer Jones and Robert Smith are partners, doing business in the name of Enterprise Associates. Real estate is purchased for the partnership and title is taken in the name of "Enterprise Associates, a Partnership". The partnership wishes to sell the land to Henry Green. The deed should be executed in the name of "Enterprise Associates, a Partnership". It may be signed by one or both of the partners. Thus, the signature can read: "Enterprise Associates, a Partnership consisting of Elmer Jones and Robert Smith, by Elmer Jones and Robert Smith", or "Enterprise Associates, a partnership by Elmer Jones." If the latter form of execution is used, the deed should show, by its recitals, or evidence should be secured to show that Elmer Jones is one of the partners. The purchaser should have no knowledge negating the presumption that Elmer Jones was acting with authority of the partnership. If the deed should read

presumption that Elmer Jones was acting with authority of the partnership. If the deed should read "Enterprise Associates, a partnership, by Elmer Jones, one of the partners," it should be passed by the title examiner in the absence of any knowledge of lack of authority on the part of Jones. Suppose, title to partnership real estate has been taken in the name of Enterprise Associates, a partnership, and the partnership consists of Elmer Jones and Robert Smith. Suppose Elmer Jones and Robert Smith and their wives execute a conveyance of the property to Henry Green, the deed making no reference to a partnership. Green would have only an equitable title to the land. See Iowa Code §544.10(2).

Authority: Iowa Code §544.9 and §544.10.
Simes and Taylor, Model Title Standards, 13.1.

12.2 PROBLEM:

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

STANDARD:

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

Authority: Iowa Code §544.9.
Simes and Taylor, Model Title Standards, 13.2.

12.3 PROBLEM:

Are there marital rights in partnership real property?

STANDARD:

Neither rights of a spouse or homestead rights attach to the interest of a married partner in specific partnership real property. If by recitals in instruments in the chain of title, or otherwise, it appears that partnership real property was conveyed, the title examiner should not require any evidence of release or non-existence of such marital rights.

COMMENT:

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

Suppose real property has been conveyed to Elmer Jones and Robert Smith, a co-partnership. A conveyance is then made of the same property to Henry Green, executed by "Elmer

"Enterprise Associates, a Partnership, by Elmer Jones, one of the partners", it should be passed by the title examiner in the absence of any knowledge of lack of authority on the part of Jones. Suppose title to partnership real estate has been taken in the name of "Enterprise Associates, a Partnership", and the partnership consists of Elmer Jones and Robert Smith. Suppose Elmer Jones and Robert Smith and their wives execute a conveyance of the property to Henry Green, the deed making no reference to a partnership. Green would have only an equitable title to the land. See Iowa Code § 544.10(2) and Chapter 12 General Comment.

Authority: Iowa Code §§ 544.9-.10.
L.M. Simes & C.B. Taylor, Model Title Standards 13.1 (1960).

CAVEAT:

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

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

12.2 PROBLEM:

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

STANDARD:

Yes. When real property is held by a partnership, and a conveyance is made on behalf of the partnership by one or more, but less than all, of the partners and the conveyance appears to be executed in the usual course of partnership business, it is presumed, in the absence of evidence to the contrary, that the conveyance was made by the partner or partners executing it for the purpose of carrying on in the usual way the business of the partnership. No further evidence of authority of such partner or partners to execute the instrument should be required by the title examiner. See Chapter 12 General Comment and Caveat to Iowa Land Title Examination Standard 12.1.

Authority: Iowa Code § 544.9.
L.M. Simes & C.B. Taylor, Model Title Standards 13.2 (1960).

12.3 PROBLEM:

Are there marital rights in partnership real property?

STANDARD:

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

COMMENT:

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

Suppose real property has been conveyed to "Elmer Jones and Robert Smith, a Partnership". A conveyance is then made of the same property to Henry Green, executed by "Elmer

Jones and Robert Smith, a co-partnership." The wives of Jones and Smith do not join in the conveyance. Green gets a marketable title and nothing further is required.

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

Authority: Iowa Code §544.25(2)(e).
Simes and Taylor, Model Title Standards, 13.3.

12.4 PROBLEM:

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

STANDARD:

After the death of a partner, real property owned by the partnership may be conveyed by the surviving partner or partners. After the death of the last surviving partner, the partnership property may be conveyed by his legal representative, in which case the title examiner should require a showing of the deaths of the partners.

Authority: Iowa Code §544.25(2)(d).
Simes and Taylor, Model Title Standard, 13.4.

CHAPTER 13

BANKRUPTCY

*Former Chapter 13 contained no preface.

Jones and Robert Smith, a Partnership". The wives of Jones and Smith do not join in the conveyance. Green gets a marketable title and nothing further should be required.

Suppose a conveyance to the partnership, as in the preceding hypothetical case. In this case, the partnership does not sell the real property and Elmer Jones dies leaving a widow. The widow cannot claim rights in the land. See Chapter 12 General Comment.

Authority: Iowa Code § 544.25(2)(e).
L.M. Simes & C.B. Taylor, Model Title Standards 13.3 (1960).

12.4 PROBLEM:

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

STANDARD:

After the death of a partner, real property owned by the partnership may be conveyed by the surviving partner, the partnership property may be conveyed by that partner's legal representative or partners. After the death of the last surviving partner, in which case the title examiner should require a showing of the deaths of all of the partners. See Chapter 12 General Comment.

Authority: Iowa Code § 544.25(2)(d).
L.M. Simes & C.B. Taylor, Model Title Standards 13.4 (1960).

CHAPTER 13

BANKRUPTCY

PREFACE

Chapter 13 was written on the assumption proposed local Bankruptcy Rules 2001 and 6002 would be adopted. The Proposed Rules are set out below:

MAILING BY COUNSEL

Any twenty-day notice required to be given under Bkcy. R. 2002(a) may be given by counsel for the debtor or counsel for any interested party who shall file with the Clerk a certificate of mailing containing a list of the names and addresses of all parties to whom notice was mailed.

Proposed Local Bkcy. R. 2001

THE REAL ESTATE

The disposition of interests in real property of the estate shall be over the signature of the trustee of the debtor. Except as to dispositions of interests in real property of the estate in the ordinary course of business, a written order of the court authorizing the disposition shall be obtained in all cases. Any motion or application affecting an interest in real property must contain an accurate legal description of the real estate.

Proposed Local Bkcy. R. 6002

NOTE

These proposed local Bankruptcy Rules had not been adopted as of the date the Iowa Land Title Examination Standards 6th Edition was published.

13.1 PROBLEM:

When real estate is sold in bankruptcy, what showings must be made on the abstract of the proceedings to clear the real estate from all mortgages, liens, and encumbrances?

STANDARD:

The abstract should show:

1. That a bankruptcy case was commenced by the filing of a petition with the Clerk of the Federal District Court.

2. An adjudication of the bankrupt. The filing of a voluntary petition is an automatic adjudication of bankruptcy as of the date of filing. When an involuntary petition has been filed an order of adjudication must be entered.

3. The election or appointment and the qualification of a trustee.

4. The real estate under examination is listed as an asset in the bankruptcy schedules.

5. The petition for the sale of real estate, free and clear of all liens and encumbrances.

6. The order fixing the time and place for hearing on the petition for sale.

7. Proof that summons and notice of trial of adversary proceedings has been served on all lienholders.

8. Proof that a notice of the time and place of the proposed sale has been sent to all creditors, unless such notice has been waived by the Court.

9. A report of sale by the Trustee. This can be incorporated with No. 5.

10. The order of the court approving the sale.

11. A Court Officer's Deed from the trustee conveying the real estate to the buyer.

The above showing should be made by obtaining a certified copy of the above requirement from the Bankruptcy Court and having them filed in the county where the real estate is located, unless the Bankruptcy Court is located in such county.

Authority: Collier, Bankruptcy Manual, §58.03; 70.54.
Collier, Bankruptcy, Vol. 4A §70.99, page 1214.
Collier, Bankruptcy, Vol. 3 §58.05, page 486.

13.1 PROBLEM:

When an interest in real property is transferred in a bankruptcy proceeding not in the ordinary course of business, what showing must be made in the abstract?

STANDARD:

The abstract should show:

1. Filing of petition for relief under the Bankruptcy Code.
2. Appointment of trustee and acceptance if trustee has been appointed.
3. Description of the real property on the appropriate bankruptcy schedule of the debtor.
4. Motion, complaint or application for disposition of an interest in real property. (See Comment ¶¶c, d, f).
5. Notice of the proposed disposition under 11 U.S.C. § 102 and Fed. Bkcy. R. 2002(a). (See Comment ¶¶a, b).
6. Objections, if any, to the disposition.
7. Order authorizing disposition.
8. Document of conveyance. (See Comment ¶b).
9. Clerk's certificate as to mailing of notice and that no notice of appeal, application to extend time for appeal or motion to stay has been filed. (See Comment ¶e).
10. If the transfer is from a debtor-in-possession or a trustee in a Chapter 11 proceeding, the abstract should also show:
    - A. Notice for hearing on confirmation of the plan.
    - B. Order confirming plan (Official Form No. 31).
    - C. Plan of reorganization (See Comment ¶g).
    - D. If transfer is made before confirmation of a plan of reorganization, there need be shown only those items described in paragraphs 1 through 9, above.

COMMENT:

a. Fed. Bkcy. R. 2002(a)(2) requires not less than 20 days notice by mail of ". . . a proposed use, sale, or lease of property other than in the ordinary course of business unless the court for cause shown shortens the time or directs another method of giving notice; . . . ." Fed. Bkcy. R. 2002(c) sets forth the required contents of the notice. 11 U.S.C. § 102(1) defines the phrase "after notice and a hearing". Under some circumstances a hearing need not be held if not requested. See Advisory Committee Note to Fed. Bkcy. R. 2002(a).

b. Fed. Bkcy. R. 6004 describes the procedure to be followed when interests in real property are to be transferred other than in the ordinary course of business and the manner of execution of the instrument of conveyance.

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

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

e. Pursuant to Local Bkcy. R. 2001, counsel may mail the requisite notice and file an affidavit of mailing listing the names and addresses of the parties to whom notice was mailed. The Clerk's certificate may be based on such mailing. The Clerk's certificate must include a certified copy of the attorney's affidavit showing names and addresses of parties to whom notice was mailed.

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

g. In some instances the plan will be lengthy, with but a small portion pertaining to the transfer of an interest in real property. Only those portions which affect title to real property shall be shown in the abstract. The "Order Confirming Plan" will in almost every case constitute an "Order Authorizing Disposition" unless language of the plan suggests a contrary intent. Reference to the official forms will aid the examiner. *See* No. 29—Order Approving Disclosure Statement and Fixing Time For Filing Acceptance or Rejection of Plan, Combined with Notice Thereof; No. 30—Ballot for Accepting or Rejecting Plan; No. 31—Order Confirming Plan.

11 U.S.C. 1141 generally permits the debtor to dispose of interest in real property after confirmation of a plan without further motion, complaint, or application and hearing; however, the plan may impose restrictions of the debtor's power to dispose of interest in real property.

Authority: 11 U.S.C. §§ 363(b), (f); 1126 (acceptance of plan); 1128 (confirmation hearing); 1129 (confirmation of plan); 1141 (effect of confirmation).
Fed. Bkcy. R. 2002(a)2, (b), (c), (i); 3018; 3020; 6004; 9007; 9014.
Local Bkcy. R. 2001, 6002.
2 Collier, Bankruptcy ¶ 363.03 (15th ed. 1983).
5 Collier, Bankruptcy ¶¶ 1126.01[3], 1128.01[2], 1129.02, 1141.01 (15th ed. 1983).

13.2 PROBLEM: [This standard is new—there is no corresponding standard in the fifth edition.]

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

STANDARD:

If the bankruptcy proceeding is pending, the abstract should show:

1. Filing of petition for relief under the Bankruptcy Code.
2. Appointment of trustee and acceptance. (Chapters 7 and 13 cases.)
3. Description of the real property on the appropriate bankruptcy schedule of the debtor.
4. Motion for relief from the stay.
5. Notice of motion for relief from the stay.
6. Order terminating or modifying the stay, or expiration by operation of law.
7. Clerk's certificate of mailing notice and that no notice of appeal, application to extend time for appeal, or motion to stay has been filed.

COMMENT:

a. Rule 9014 requires ". . . reasonable notice and opportunity for hearing. . . ." Because of the time limitations imposed by Fed. Bkcy. R. 4001, it is not practical to give a twenty-day notice.

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

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

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

Authority: 11 U.S.C. §362.
Fed. Bkcy. R. 4001, 9014.
2 Collier, Bankruptcy ¶ 362.08 (15th ed. 1983).

13.3 PROBLEM: [This standard is new—there is no corresponding standard in the fifth edition.]

If an interest in real property of the estate has been set aside as exempt, what showing must be made in the abstract before it may be transferred by the debtor or lien rights against it can be enforced?

STANDARD:

The abstract should show:

1. Filing of petition for relief under the Bankruptcy Code.
2. Appointment of trustee and acceptance. (Chapters 7 and 13 cases.)
3. Description of the real property on the appropriate bankruptcy schedule of the debtor reflecting that exempt status is claimed.
4. Extinguishment of automatic stay under 11 U.S.C. § 362.
5. Expiration of time to file objections to exemptions and Clerk's certificate that no objections to exemption have been filed.

COMMENT:

a. Objections to a claimed exemption must be filed ". . . within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a). . . ." Fed. Bkcy. R. 4003(b).

b. Schedule B-4 of Official Form No. 6—Property Claimed as Exempt—must include the interest in real property claimed as exempt. Unless the interest is reasonably described, the examiner may not rely on the fact that no objection has been filed.

c. Property set aside as exempt remains property of the debtor subject to the automatic stay under 11 U.S.C. § 362(a)(5) until expiration under 11 U.S.C. § 362(c)(2). 2 Collier, *Bankruptcy* ¶ 362.06 (15th ed. 1983).

d. If the conveyance is to be made by the debtor, the examiner need not be concerned with the existence of the automatic stay under 11 U.S.C. § 362. However, the examiner must be mindful that lien rights may exist. See Iowa Land Title Examination Standard 13.4.

Authority: 11 U.S.C. § 522.
Fed. Bkcy. R. 1007, 4003.
3 Collier, Bankruptcy ¶ 522.10, .23, .27 (15th ed. 1983).

13.4 PROBLEM: [This standard is new—there is no corresponding standard in the fifth edition.]

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

STANDARD:

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

COMMENT:

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

b. By utilizing the procedure set out in Iowa Code § 624.23, a debtor may identify of record what judgments, if any, are liens against real property platted as a homestead. (See Iowa Land Title Examination Standard 6.8.)

Authority: H.R. Rep. No. 595, 95th Cong., 1st Ses. 361; S. Rep. No. 989, 95th Cong., 2 Ses. 76.
3 Collier, Bankruptcy ¶ 524.01 (15th ed. 1983).
Polk County Fed. Sav. & Loan Ass'n v. Weathers, 234 Kans. 410, 672 P.2d 596 (1983).
United Presidential Life Ins. Co. v. Barker, 31 B.R. 145 (Bkcy. N.D. Tex. 1983).

CHAPTER 14

CONDOMINIUMS

14.1 PROBLEM: [This standard is new—there is no corresponding standard in the fifth edition.]

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

STANDARD:

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

14.2 PROBLEM:

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

STANDARD:

1. Description of the land including the book, page and date of recording of the declaration.
2. Unit or apartment number.
3. Percentage of undivided interest in the common areas and facilities.

COMMENT:

The description of the land may be incorporated by reference. This may be particularly desirable when there is a long metes and bounds legal description. If the correct book and page are given, the date of recording the declaration can be determined from the records, and the omission of the date of recording the declaration does not make the deed defective.

Authority: Iowa Code §499B.5.