

Editor's Preface – September, 2018

The first version of Vermont's Standards of Title was adopted by the Vermont Bar Association Board of Bar Managers on March 18, 1999. The Title Standards Committee is a subcommittee of the VBA's Real Property committee.

- Title Standards adopted March 18, 1999.
- Changes were made and approved in 2003.
- Changes were made and approved in 2008.
- Changes were made and approved in September, 2010. Changes included:
 1. Standard 6.4 was amended.
 2. Standard 9.1 was re-formatted.
 3. Standard 15.1 was adopted.
 4. Standard 19.1 was adopted.
- Changes were made and approved in September, 2012. Changes included:
 1. Standard 2.2 was amended to add a Comment.
 2. Standard 6.4 was amended to revise a Comment.
 3. Standard 9.1 was amended to add a Comment.
 4. Standard 13.4 was amended to revise a Comment.
 5. Standard 16.1 was adopted.
 6. Standard 16.2 was adopted.
 7. Standard 17.2 was adopted.
 8. Standard 19.1 was amended (standard revised, comment added).
 9. Standard 21.1 was adopted.
 10. Standard 21.2 was adopted.
- Changes were made and approved in September, 2014. Changes included:
 1. Standard 6.5 was amended to add Comment 8
 2. Standard 10.1 was adopted.
 3. Standard 14.1 was amended and Comments revised.
 4. Standard 16.2 was amended to correct a citation.
 5. Standard 18.1 was amended and a Comment added.
 6. Standard 19.1 Comments were amended.
 7. Standard 27.1 Comment was amended.
- Changes were made and approved in September, 2016
 1. Standard 1.1 – new text added to the standard
 2. Standard 2.2 – new text added to the standard
 3. Standard 2.2 - new text added to Comment 1

4. Standard 2.2 – new text added to Comment 4
5. Standard 2.2 – new text added to Comment 5
6. Standard 2.3 – new Comment added
7. Standard 6.4 – Comment 5 revised
8. Standard 6.5 – new Comment added
9. Standard 7.1 – new Comment added
10. Standard 12.1 – new Standard added
11. Standard 13. 1 – Comment 4 – material revision
12. Standard 14.1 – Comment 2 – minor revision
13. Standard 16.2 – Comment 8 – minor revision
14. Standard 16.2 – new Comment added
15. Standard 19.1 – new Comment added

Changes were made and approved <<TBD>>

1. Standard 2.2 – new text added to Comment 8
2. Standard 3.1 – new Standard added
3. Standard 6.4 – Comment 6 added
4. Standard 14.1 – Comment 8 removed, new Comments added, Comments renumbered
5. Standard 16.2 – Comment 14 added
6. Standard 17.3 – new Standard added
7. Standard 17.4 – new Standard added
8. Standard 17.5 – new Standard added
9. Standard 18.1 – Comment 9 added
10. Standard 18.6 – new Standard added
11. Standard 18.7 – new Standard added
12. Standard 19.1 – Comment 8 revised, Comment 9 added
13. Standard 23.1 – Comment 6 added

2014 Editor: Andy Mikell, Chair – Title Standards Subcommittee (2007-2014)

2016, 2018 Editor: Jim Knapp, Recorder of Title Standards – (1990-2013 and 2015-current)

Committee Members (2018)

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**CHAPTER I
TITLE EXAMINATION**

STANDARD 1.1

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THE ROLE OF THE EXAMINING ATTORNEY

The role of the attorney is to secure for the attorney's client a title which is in fact marketable, subject to the terms of the client's contract specifying permitted encumbrances, if any. An attorney must (i) examine the land records to determine marketable record title; (ii) take into consideration other matters outside the land records which may affect the marketability of title; and (iii) disclose and report to the client those matters affecting marketability of title which would lead a reasonably prudent buyer to refuse to take a conveyance of the property, when paying full value for it.

An attorney has an obligation to identify those factual circumstances which constitute clouds on the title that are disclosed in the public records and report those matters to the recipient of the results of the search. An attorney has a duty to inform and explain to the client the implications of any clouds on title that would influence a reasonably prudent purchaser not to purchase the property. *Fleming v. Nicholson*, 168 Vt. 495 (1998) citing *North Bay Council, Inc., v. Bruckner*, 563, A.2d. 428, 431 (N.H. 1989)

Comment 1. See Standard 1.3 for a definition of marketable title.

Comment 2. A contract for the sale of real estate includes an implied condition that, except for the encumbrances referred to therein, marketable title is to be transferred unencumbered with any defects.

Comment 3. The role of the attorney in a real estate transaction is broader than the role of the title examiner. The determination of marketable title is one element among several. The attorney's obligation is to counsel the client on all elements of the transaction, subject to the terms of the attorney's engagement. Refer to Ethical Consideration 7-8 of the Code of Professional Responsibility.

Comment 4. An attorney must consider information outside the land records that comes to the attorney's attention during the course of representing the attorney's client.

Comment 5. The attorney must disclose to the attorney's client information which may affect marketability of the title of which the attorney has actual knowledge or which is properly filed and indexed in the land records. The disclosure should be made in a manner such that it is understandable to the client and in reasonable detail to permit the client to make an informed decision regarding title to the property.

September, 2016 - Added second paragraph added.

STANDARD 1.2

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THE EXAMINING ATTORNEY'S ATTITUDE

It is almost impossible to find a title free from defects, irregularities or objections. Objections should be made or title-clearing requirements imposed only when the irregularities or defects present a real and substantial basis for litigation or probability of loss.

Comment 1. The built-in uncertainty of title should not drive an attorney to extreme caution far in excess of the real and substantial possibility of litigation or probability of loss. An attorney should not construe picayune irregularities or defects as substantial defects in title which might result in their client's loss of bargain of their contract. In dealing with the uncertainty of title, the attorney should be a positive and constructive force to resolve the material defects in title, but also willing, with the client's informed consent, to accept the inevitable technical defects.

Comment 2. Title Standards are primarily intended to eliminate technical objections which do not impair marketability and some common objections which are based upon misapprehension of the law.

Comment 3. When an attorney finds a situation which the attorney believes creates a question as to marketability of the title and the attorney has knowledge that this same title has been examined and passed as marketable by another attorney, the attorney should communicate with the other attorney, explain the title situation and afford the opportunity for discussion, explanation and correction, when necessary.

STANDARD 1.3

DEFINITION OF MARKETABLE TITLE

A marketable title is one that may be freely made the subject of resale. *Krulee v. Huyck & Sons*, 121 VT 304 (1959) A marketable title is one that allows an owner to hold the land free from the probable claim of another. It is a title which would allow the holder of the land if he or she wanted to sell, to transfer a title which is reasonably free from doubt. A title is marketable when its validity cannot be said to involve a question of fact and is good as a matter of law. *First National Bank v. Laperle*, 117 VT 144, 157 (1952).

STANDARD 1.4

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REFERENCE TO TITLE STANDARDS IN THE REAL ESTATE SALES CONTRACT

An attorney drafting a real estate sales contract should include a provision that any and all questions of marketability are to be determined in accordance with the Title Standards of the Vermont Bar Association then in force and that the effect of the existence of any encumbrances and title defects shall be determined in accordance with such standards.

Comment 1. The following language or its equivalent is recommended for inclusion in all real estate contracts:

It is understood and agreed that the title herein required to be furnished by the seller shall be marketable and the marketability thereof shall be determined in accordance with the Vermont Marketable Title Act (27 V.S.A. § 601 et seq.) and Standards of Title of the Vermont Bar Association now in force to the extent applicable standards exist. It is also agreed that any and all defects in or encumbrances against the title which come within the scope of said Title Standards shall not constitute a valid objection on the part of the buyer, if such Standards do not so provide; provided, the seller furnishes any affidavits or other instruments which may be required by the applicable Standards.

Comment 2. This Standard is to be liberally construed and applied. All objections to title should be considered in the light of these standards to the extent there is a relevant standard in force at the time.

History

March 29, 2000 - Technical Correction - Replaced the word “obligations” with objections in Comment 2.

**CHAPTER II
USE AND OPERATION OF THE LAND RECORDS**

STANDARD 2.1

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PERIOD OF SEARCH

A Title Search covering a period to an instrument recorded at least 40 years is sufficient for a title purview of the Marketable Record Title Act (27 V.S.A., Ch 5), provided that the basis thereof is a deed, a deed under some governmental authority, a probate proceeding in which the property is reasonably identified or described, a mortgage deed subsequently foreclosed, or any other instrument which shows of record reasonable probability of title and possession thereunder, provided further, that none of the title instruments within that period actually searched discloses any title defects or outstanding interests in third parties, in which case, the search should be extended beyond the 40-year period in order to determine the existence and validity of such defects or interests at the time of the search.

Comment 1. Quit Claim deeds have been commonly used as an instrument of conveyance throughout the history of conveyancing in Vermont, and therefore may serve as the root deed of a search. Nevertheless, the title examiner should be aware that a Quit Claim deed is also used as an instrument of release and does not therefore necessarily purport to convey any interest whatsoever. The examiner should be conscious of the circumstances surrounding the Quit Claim deed apparent from the records and must understand that it may be appropriate to continue the search to an earlier deed if the circumstances warrant.

STANDARD 2.2

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THE CONCEPT OF THE CHAIN OF TITLE AND ITS RELATIONSHIP TO THE RULE OF RECORD NOTICE AND THE SCOPE OF THE TITLE SEARCHER'S OBLIGATION

The "Chain of Title" concept is a principle of common law, developed to protect subsequent parties from being charged with constructive notice of the contents of those recorded instruments which a title searcher would not be expected to discover by the customary search of the general grantor-grantee indices and other appropriate indices and diligent inquiry of the Town Clerk as to matters left for recording, but not indexed. Notwithstanding the holding of *Haner v. Bruce* (146 Vt. 262), it is not reasonable or customary to examine the indices of the individual record books, where a general index is maintained.

An attorney has an obligation to identify those factual circumstances which constitute clouds on the title that are disclosed in the public records and report those matters to the recipient of the results of the search. An attorney has a duty to inform and explain to the client the implications of any clouds on title that would influence a reasonably prudent purchaser not to purchase the property. *Fleming v. Nicholson*, 168 Vt. 495 (1998) citing *North Bay Council, Inc., v. Bruckner*, 563, A.2d. 428, 431 (N.H. 1989)

Comment 1. The term "recorded instruments" includes, but is not limited to, deeds, leases, decrees, liens, judgments, maps, documents imposing covenants, restrictions or easements on property, agreements adjusting boundaries and all other documents by which an interest in real property may be transferred or claimed. The absence of a required state or municipal land use permit, the failure to discover a certificate of occupancy or the absence of available evidence in the form of written instruments confirming compliance with the terms of an issued land use permit, when required, may call into question the marketability of the title. *Fleming v. Nicholson*, 168 Vt. 495 (1998) citing *North Bay Council, Inc., v. Bruckner*, 563, A.2d. 428, 431 (N.H. 1989).

Comment 2. The "chain of title" concept makes it clear that neither contractual duty nor the duty to use reasonable care encompasses the duty of examining the land records at large, but only those which appear in the particular chain of title. This concept, at one and the same time, serves as a guide- line to determine the extent of the burden which will be imposed upon a title examiner as well as the extent of the examiner's responsibility to the client. The examiner is required to search for, and thus be responsible for, those recorded instruments which are within the chain of title to a particular parcel. As regards those recorded instruments which are considered outside of this chain of title, the title examiner need not search for, nor is the title examiner accountable to the client for their existence on the land records.

Comment 3. Generally speaking, the period of constructive notice from the land records, and therefore the period of the title search, extends to a particular owner from the date such owner acquires title (not the date on which the transfer is recorded) to the date of the recording of a conveyance divesting the owner of the interest being examined. In this respect, such record notice and period of title search are corollary terms, the period of both being synonymous. If, after the recording of a deed from an owner, another deed is subsequently recorded from that same person to a different grantee (whether the date thereof is earlier or later is immaterial), a purchaser from the first grantee is not charged with constructive record notice of the second grantee's conveyance, though it is on record when the title is searched. This principle has general application in the case of two successive deeds from the same grantor, both deeds recorded in the order of their execution. A party thereafter purchasing from the first grantee is not charged with notice by reason of the record then existing of the second deed. This principle will also control the required period of search when the first of two deeds has been the last to be recorded.

Comment 4. Any instrument which does not provide notice of the interest claimed because the instrument is outside the chain of title is effective against subsequent parties in the chain of title who have actual notice or are put on inquiry notice of the existence of such instrument. *Richart v. Jackson*, 171 VT 94 (2000).

Comment 5. "Springing liens" are an exception to the general rule. Federal liens, Vermont tax liens (and those liens which purport to have the same effect as such liens) and judgment liens recorded against a person who does not own an interest in real estate at the time of the recording of such lien will attach by operation of law to any interest acquired subsequent to the recording of the lien for the effective term of the lien. The title examiner must search outside the traditional chain of title to find these liens. The recommended period of search for these liens is back twenty years plus 30 days from the date of the search. The twenty year period is dictated by the longest known period of an effective judgment lien, which is for Federal Civil Judgment liens. See, 28 U.S.C. §3201. The title examiner must check for liens filed against each person who had title to the property being searched back for the full twenty year period. The title examiner should also check the name of the client, if the client is acquiring the property being examined. As to judgment liens, See Powell, Law of Real Property §38.05(5).

After acquired title: Judgment liens recorded against a person who does not own an interest in real estate at the time of the recording of such lien will attach by operation of law to any interest acquired subsequent to the recording of the lien for the effective term of the lien. The title examiner must search outside the traditional chain of title to find these liens. The period of search for these liens is back twenty years plus thirty days from the date of the search. The title examiner must check for liens filed against each person who had title to the property being searched back for the full twenty year period. The title examiner should also check the name of the client, if the client is acquiring the property being examined. . As to judgment liens, See Powell, Law of Real Property §38.05(5).

Comment 6. Where an owner divides a tract of land, and, in conveying one portion of it, creates in favor of that grantee an easement or other right or interest over the portion retained, subsequent purchasers of such retained portion are charged with constructive notice of the existence of such easement or other right or interest, because the first recorded deed, even though conveying other land, is in the chain of title to the common grantor's remaining land. Therefore, the lack of actual notice or knowledge on the part of the subsequent purchaser to the existence of the easement or the fact that the deed stated that remaining property was free and clear of all encumbrances, are all immaterial.

Comment 7. Because of these rules, the concept of chain of title and the corresponding duty of a title examiner, are not limited to transactions which involve the same land in which an interest is then being acquired but can and do extend to those transactions of the same grantor but involving other land.

Comment 8. There is an additional circumstance which the title examiner must consider. It is derived from the rule of law announced in the line of cases that includes *Clearwater Realty Company v. Bouchard*, 146 Vt. 359 (1985), *Crabbe & Sweeney v. Veve Associates*, 150 Vt. 53 (1988), and *Lalonde v. Renaud*, 157 Vt. 281 (1989) and the applicable provisions of the Vermont Marketable Title Act. The rule of law in the *Clearwater* line of cases may be stated concisely as -- rights of way, easements, and the designation of areas as common space on a recorded plan used as the basis of the description in connection with the conveyance of one or more of the lots shown on the plan vests rights in the grantee and the grantee's successors in title rights in those areas designated on the plan as rights of way, easements, and common space. In deciding the *Clearwater* line of cases, the issue of the provisions of the Marketable Title Act has not arisen. The provisions of 27 V.S.A. 604 exempt easements granted, reserved or retained in a deed from the provisions of the Marketable Title Act that would otherwise extinguish such rights, and therefore the rights of way shown on very old plans that are outside the chain of title may still be encumbrances on the title. *Regan v. Pomerleau et al*, 107 A.3d 327, 2014 VT 99 (2014) held that: "the intentions and reasonable expectations of the parties - - as evidenced by the recorded plat and written deeds - - therefore fully support the conclusion that applicant has an implied easement" Id. at 335.

Comment 9. The term "other appropriate indices" as used in this title standard includes the general grantor-grantee index (but does not include the indices of the individual record books), lien index, road record books, index of discharged instruments if kept separately, and the uniform commercial code financing statement index.

Comment 10. PACER, an on-line data base maintained by the Federal Courts (<http://pacer.psc.uscourts.gov/>), provides for a search tool to determine if there has been a Bankruptcy filing in any of the Federal Bankruptcy Courts.

History

March 29, 2000 - Comment 4 -- Removed the word “constructive” before “notice” in the first line.

Comment 5 -- Removed the reference to “Department of Tax” and replaced with tax lien; changed capitalization of phrase “Judgment Lien” to lower case.

Comment 8 – Changed capitalization of word “Rights” in right of way.

Comment 9 – Revised beginning of parenthetical to read “but does not include”

September 20, 2012 Comment 10 was added.

September 2016 New second paragraph was added to the Standard.

The second sentence in Comment 1 was added.

Comment 5 was revised to add reference to Powell

September 2018 Comment 8 was amended by adding the last sentence.

STANDARD 2.3

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EFFECT OF THE RECORDING OF INSTRUMENTS CLAIMING AN INTEREST IN REAL ESTATE

When an instrument is recorded which claims an interest in real estate and the claim is one which is authorized by law, then the examiner is on inquiry notice to determine the basis of the claim and the impact of the claim on the title to the interest being searched. If, however, the claim is one not authorized by law, then the recorded notice of the claim is not effective to encumber title to the property in which the interest is claimed.

Comment 1. Certain claims by strangers to the chain of title are authorized by law such as a notice of claim under 27 V.S.A. 605, mechanics liens (9 V.S.A. Chap. 51); judgment liens (12 V.S.A. Chap. 113); pre-judgment attachments (12 V.S.A. Chap. 123 and V.R. Civ. P. 4.1); and, a claim of adverse possession documented in the land records.

Comment 2. Claims not authorized by law such as a non-judicial attachment or lis pendens, a real estate listing agreement, or a lien for fuel oil filed by the supplier to the owner not otherwise authorized by 9 V.S.A. Chap. 51 (mechanics liens) are not sufficient to put the title examiner on inquiry notice of the matters stated therein.

Comment 3. If the record discloses a recorded Purchase and Sale Agreement or Deposit Receipt and Sales Agreement and there does not appear of record an instrument conveying the title to the property interest subject to such Agreement to the purchaser/buyer named in the Agreement, the title examiner should not assume that such Agreement is unenforceable. Such an agreement may result in an encumbrance on the title. *Hemingway v. Shatney*, 152 Vt. 600 (1989). See *Colony Park Associates v. Gall et al.*, 154 Vt. 1 (1990).

Comment 4. For a discussion of when a recorded instrument operates to slander title, see *Wharton v. Tri-State Drilling & Boring*, 2003 VT 19, 824 A2d. 531 (2003)

History

March 29, 2000 Comment 4. -- Removed.

September, 2016 New Comment 4 - Added

STANDARD 2.4

WILD INSTRUMENTS INSTRUMENTS BY STRANGERS TO THE RECORD CHAIN OF TITLE

A wild instrument is an instrument executed by a person who is a stranger to the record chain of title at the time such instrument is recorded. A wild instrument is of no effect subject to the application of the common law principle of “after acquired title.”

Comment 1. For example assume that in a chain of title that runs from A to B, from B to C, C to D, an instrument recorded during C’s possession of the property from E to Z purporting to convey the land owned of record is a wild instrument and does not render D’s title unmarketable.

STANDARD 2.4A

AFTER-ACQUIRED TITLE

If a warranty deed or another instrument containing covenants of warranty similar to a warranty deed is a wild instrument and the grantor of such wild instrument subsequently acquires title to the property purported to be conveyed by the wild instrument, then the wild instrument shall be effective to convey the title described in the wild instrument to the grantee named in the wild instrument.

Comment 1. Under the doctrine of “After Acquired Title” (also known as the “Doctrine of Estoppel by Deed”), if “A” who has no title to Blackacre conveys Blackacre to “B” by a deed such conveyance would be a “wild deed”, but if A thereafter acquires title to Blackacre, this after acquired title will automatically enure to the benefit of B , and its successors in interest. Under this rule, the title would inure to the benefit of the parties by application of the Doctrine of Estoppel -- preventing A from denying that A owned the interest A purported to convey to B. This doctrine applies regardless of how or when the subsequent title is acquired by A, and regardless of whether or not there is a mere ignorance or fraud on A’s part. For example, assume a chain of title that runs from A to B, B to C, C to D, an instrument recorded during C’s possession of the property from E to Z purporting to convey the land owned of record by C is a wild instrument and does not render C’s title unmarketable. If, however, after the date of the deed from E to Z, D conveys to E the property described in the deed of E to Z the deed from E to Z is effective to convey the property to Z.

Comment 2. For Vermont cases related to after acquired title, see *Cross v. Martin*, 46 Vt, 14 (1873) and *President and Fellows of Middlebury College v. Cheney*, 1 Vt. 336 (1828). The cases on “after acquired title” hold as well settled law that a deed with warranty covenants passes a title later acquired by the grantor, as long as the grantor acquires the title before the party holding the land by the wild deed is ousted or removed from the property. The legal principle on which the cases are based is the absurdity of having the grantor of the wild instrument recover the lands from the grantee after the grantor actually acquires the property, and the recovery by the grantee of the wild instrument of damages from the grantor. The vesting of the title in the grantee of the formerly wild instrument is in discharge of the covenants of warranty in the wild instrument.

History

March 29, 2000 - Comment 1 – Replaced the word “ensure” with inure.

STANDARD 2.5

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PRIORITY OF CONVEYANCES

Vermont is a "notice" state. Delivery of a deed, a mortgage or other conveyance of land in fee simple or for term of life, or a lease for more than one year to a grantee who has no notice of a prior conveyance to another, establishes priority in the grantee without notice. The instrument constitutes constructive notice as of the time it is recorded.

Comment 1. Vermont is a pure “notice” state, not a “race-notice” state, because a claimant does not have to record to perfect a claim, nor win a race to the land records in addition to giving notice nor even record at all, to have good title. *Hemingway v. Shatney*, 152 Vt. 600, 603-4 (1989). Under *Hemingway*, Vermont’s core recording provision 27 V.S.A. §342 is merely a means, albeit a powerful one, of giving constructive notice, and so establishing priority, of one’s claim against the world.

Comment 2. Refer to Standard 2.2 for the obligation of the title examiner with respect to instruments outside the chain of title.

STANDARD 2.6

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TIME WHEN A CONVEYANCE IS CONSIDERED AS PROPERLY "RECORDED"

An instrument is considered to be recorded and effective against subsequent parties from the time it is *delivered to* the town clerk, even though there is (1) a delay in the transcribing or indexing; (2) a complete failure to transcribe or index; or (3) an error by the town clerk in the transcribing or indexing of the same.

Comment 1. The duties of a town clerk in reference to the recording of instruments affecting the title to real estate are set forth in Title 24 § 1154, § 1159, and § 1161. However, the proper recording of such an instrument by the town clerk is constructive notice notwithstanding clerical errors attributable by the town clerk in indexing the instrument in the town land records. *Haner v. Bruce*, 146 Vt. 262, 264. The indices which the town clerk is required to maintain are not part of the record, and thus the complete failure to index a recorded instrument does not invalidate the recording.

Comment 2. As a matter of good practice, a title examiner should conduct a follow-up search to verify recording of instruments previously delivered for recording.

STANDARD 2.7

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RECORD OF EXPIRED LEASES OR EXPIRED INTERESTS

In the absence of notice of renewal arising from possession, record, or otherwise, a recorded lease or other instrument evidencing a right or interest in real property with a specified term does not constitute an encumbrance on title when the term expressed in such leases or other instrument has expired.

Comment 1. The title examiner should disclose the existence of the instrument identifying the interest and an explanation of the reasons why the interest no longer constitutes an encumbrance on title.

Comment 2. The word “term” as used in this title standard means the specified term of the interest and any possible renewals or extensions.

Comment 3. Certain interests in land are created for a specified term such as conveyances of standing timber, oil and gas leases and conveyances of mining rights. Those interests in which the time of termination is ambiguous in the instrument may be terminated by curative statutes. Reference may be had to 27 V.S.A. §609 regarding limitations on standing timber and 29 V.S.A. §561 *et seq.* regarding oil and gas leases.

CHAPTER 3 STANDARD 3.1

Perpetual Lease Land

A conveyance of a durable or perpetual lease creates a leasehold interest and not a fee interest. The relationship between parties to a durable lease is that of lessor and lessee. The character of land governed by a perpetual lease may not be treated as irrelevant by a title examiner if such character is discovered in the search.

Unless the governing instrument provides otherwise, the lessor retains title to mineral rights in the leasehold property. A lessee is not entitled to extract minerals from the leasehold property; to do so constitutes voluntary waste for which the tenant is answerable. *Galkin v. Town of Chester*, 716 A.2d 25, 168 Vt. 82 (Vt. 1998).

Comment 1: Reference is made to Act 152 of the Adjourned Legislative Session of 2017-2018 concerning only those lease lands owned by municipal corporations. Inter alia, the Act provides that unless municipalities affirmatively vote to retain owned lease lands prior to January 1, 2020, fee ownership of such lands becomes vested in the current lessees of record as of that date.

Comment 2: Lease land is a form of real property interest that originates from certain lands being set aside in the original town charters, to be held in trust for the benefit of various public institutions. In charters issued by provincial New Hampshire Governor Benning Wentworth, the beneficiaries were typically a town school, the Church of England, and the Society for the Preservation (Propagation) of the Gospel in Foreign Parts (SPG), an Anglican missionary society. Post-Revolutionary Vermont charter beneficiaries were typically a town school, a county grammar school, seminary or college (UVM, Dartmouth, Middlebury) and the social worship of God – local churches.

Not all town charters provided lease lands for all of these purposes, but all charters set aside land as sources of income for the various public or pious uses.

The lease term typically ran “as long as water runs and grass grows” and provided a fixed annual rent. The proprietors leased the land by perpetual lease to encourage use of the property that could not be purchased in fee.

Such lease lands, other than those dedicated to the Ministry of the Church of England, remain as leaseholds, unless the lessor has conveyed the fee to a present leaseholder, and should be conveyed exclusively by quitclaim deed or portion thereof.

Comment 3: In order to determine who owns the fee interest in a parcel identified as lease land, a title examiner may be required to extend the search well beyond the statutory 40 year period.

Comment 4: The definitive treatise on Vermont lease land is *The Vermont Leaselands*, Walter Thompson Bogart (1950).

Comment 5: Lease lands, other than those dedicated to the Ministry of the Church of England, remain as leaseholds, unless the holder of the fee (lessor) has conveyed the fee to a present leaseholder. For a grant to the Ministry of the Church of England see the U.S. Supreme Court holding in *Town of Pawlet v. D. Clark & Others*, 9 Cranch 292 (1815).

Comment 6: Towns rarely collect rents, as perpetual leaseholds are now taxed as land owned in fee. 32 V.S.A. § 3610.

Comment 7. Educational, ecclesiastical or municipal corporations may convey by deed the fee simple in lands the title to or use of which is held by such corporations under state or colonial grant for purposes defined in such grants. Such conveyance may be made to the owner and holder of leasehold rights in such land if such lands are then held under lease, but shall not be made to other than such holders of leasehold interests except subject to such leasehold interest, if any, or simultaneously with the extinguishment thereof. 24 V.S.A. § 2406.

Before 1937, town selectmen were precluded from conveying public lands in fee. See, *Trustees of Caledonia County Grammar Sch. v. Kent*, 86 Vt. 151, 156, 84 A. 26, 28 (1912). In 1935 the Legislature enacted a statute permitting the Town of Belvidere to convey certain public lands. See 1935, No. 239, § 1; see also *Jones v. Vermont Asbestos Corp.*, 108 Vt. 79, 102, 182 A. 291, 302 (1936) (upholding statute). In 1937 the statute was amended to remove the prohibition altogether. See 1937, No. 56, § 1. *Galkin v. Town of Chester*, 716 A.2d 25, 168 Vt. 82 (Vt. 1998)

Comment 8. The successor in interest to the Incorporated Society for the Propagation of the Gospel in Foreign Parts is the Trustees of the Episcopal Diocese of Vermont. *Mikell v. Town of Williston*, 129 Vt. at 588. In 1927, the SPG conveyed, through a quit claim deed the right to collect the annual lease payments to the Trustees of the Diocese. The Trustee initiated a procedure through which a lease obligation could be set aside through a quit claim deed. Contact information for the Diocese is Five Rock Point Road, Burlington, Vermont. www.diovermont.org. For UVM, contact the General Counsel's office at UVM.

Comment 9. Under the current statutory framework, lease lands are fully taxable subject to a credit for the annual rent 32 V.S.A. §3610. For rents supervised by towns, the rents are collected as part of the property taxes and, in theory, turned over by the town to the beneficiaries from time to time.

In 1971, the Vermont Supreme Court declared the statute requiring ratable distribution of fees generated by school lease lands to the existing religious organizations in town a violation of Article 3 of the Vermont Constitution and the First and Fourteenth Amendments of the U.S. Constitution in *Mikell v. Town of Williston*, 129 Vt. 586 (1971). The fees are not paid to the town.

When collected, rents payable to non-municipal lessors are collected directly from the lessees.

Comment 10. In connection with mortgages to financial institutions, 8 VSA §14302 provides in part: “a mortgage upon lands impressed with a public use, sometimes known as lease, society or glebe lands, but held under a durable lease, shall not be deemed to be subordinate to such lease or public use.” A similar provision for mortgages to Credit Unions is found at 8 VSA §32302.

History

September, 2018: This standard was added.

CHAPTER IV
STANDARD 4.1

LIMITATIONS ON THE USE BY GRANTOR OF CORRECTIVE DEEDS

A grantor who has conveyed by an effective, unambiguous deed cannot, by executing a subsequent deed, make a substantial change in the name of the grantee, decrease the size of the premises or the extent of the estate granted, impose a condition or limitation upon the interest granted, or otherwise diminish the grant of the prior deed, even though the corrective deed purports to correct or modify the prior deed. Recording of a deed that violates this standard will not impair the marketability of the title established by the prior deed.

Comment 1. A grantor may not undo or qualify an otherwise valid conveyance in order to correct or modify the prior valid conveyance unilaterally. To effect any change of the type described in this standard, the original grantee or his or her successor should convey back to the grantor of the prior deed and the grantor of the prior deed should then execute a corrective deed effecting the change which should then be recorded.

CHAPTER VI

STANDARD 6.1

* * * * *

GRANTORS

An instrument will only operate as a conveyance of the legal title to an interest in land if it designates an individual or entity authorized by statute as grantor who is (a) in existence and (b) has the capacity to hold and transfer the legal title to land at the time of the conveyance.

Comment 1. Pursuant to 1 V.S.A. §118, a grantor “may include every person by or from whom an estate or interest in land is passed in or by a deed” and a grantee “may include every person to whom such estate or interest passes.” A “person” is defined as “any natural person, corporation, municipality, the State of Vermont or any department, agency or subdivision of the State and any partnership, unincorporated association or other legal entity”. 1 V.S.A. §128.

History

March 29, 2000 Comment 1 revised by incorporating the statutory definition of grantee and grantor.

Second paragraph and third paragraph of Comment 1 were deleted.

STANDARD 6.2

* * * * *

MAJORITY

In the absence of actual knowledge or constructive notice derived from properly indexed instruments in the chain of title to the contrary, a title examiner may presume that an individual grantor identified in a recorded deed was of full legal age at the time of the conveyance.

Comment 1. An attorney representing the purchaser or mortgagee from a minor must require and record a guardian's license to sell or convey issued by a court of competent jurisdiction.

Comment 2. Since March 29, 1972, a “minor” is defined as a person under the age of eighteen (18) years. Title 1 V.S.A. §173. An adult person is one who is “a resident or nonresident person of eighteen years or older”. Id.

History

March 29, 2000 Restated the language defining “knowledge” as being actual knowledge or constructive notice derived from properly indexed instruments in the chain of title. This concept is used in the first clause of Standards 6.2, 6.3, 6.4 and 6.5

Deleted Comment 3 because the internal reference to Comment 2 in Standard 6.3 no longer applied.

STANDARD 6.3

* * * * *

MENTAL CAPACITY

In the absence of actual knowledge or constructive notice derived from properly indexed instruments in the chain of title to the contrary, a title examiner may presume that an individual grantor identified in a recorded deed was mentally competent at the time of the conveyance. A deed properly executed by a guardian of the lands of the ward under an order of sale of the probate court having jurisdiction is presumed valid and shall convey the interest of the ward.

Comment 1. An attorney representing the purchaser or mortgagee in a current transaction from an incompetent individual must require and record (a) a guardian's license to sell or convey issued by a court of competent jurisdiction; or (b) a properly executed valid durable power of attorney.

History

March 29, 2000 Restated the language defining “knowledge” as being actual knowledge or constructive notice derived from properly indexed instruments in the chain of title. This concept is used in the first clause of Standards 6.2, 6.3, 6.4 and 6.5.

Comment 1 - Inserted the words in a current transaction in the first line of the Comment. Inserted the words properly executed valid before “durable power of attorney”. The words “executed in proper form” were omitted from the end of the sentence.

Comment 2 - Text formerly in Comment 2 was incorporated in the body of the Standard.

STANDARD 6.4

* * * * *

MARITAL INTERESTS

In the absence of actual knowledge or constructive notice derived from properly indexed instruments in the chain of title to the contrary, a title examiner may presume that an individual grantor identified in a recorded deed was unmarried and not a partner to a civil union at the time of the conveyance.

If the grantor took title with a spouse or a partner to a civil union, a title examiner may presume the spouse or partner to a civil union to be deceased if (a) the deed contains a recitation to that effect and has been recorded for not less than fifteen (15) years with the clerk of the town where the real property is located; or (b) a death or burial certificate or decree issued by a court having competent jurisdiction, or other proof of death establishing the grantor's status as widowed, has been recorded or is available for filing with the clerk of the town where the real property is located.

Comment 1. If the grantor is married or is a partner to a civil union, the property may be subject to a claim of the spouse or other partner to the civil union. See Title 27 V.S.A. §101 *et seq.*, as to homestead rights. Section 141(a) renders a conveyance of a homestead property without execution by both spouses “inoperative”. The former rule that a deed to a homestead property, executed by only one spouse, is void was abandoned. Such a conveyance is inoperative with respect to the spouse who did not join in the conveyance and may be set aside by that spouse unless the homestead interest is otherwise extinguished. See, *Estate of Girard v. Laird*, 159 Vt. 508 (1993), overruling the holding in *Martin v. Harrington*, 73 Vt. 193 (1901). See Title 14 V.S.A. §461 *et seq.*, as to “dower” and “curtesy” rights of a surviving spouse.

Comment 2. Notwithstanding the limitation discussed in Comment 1, a transfer of the homestead interest between spouses is permitted; with previous transfers being ratified. 27 V.S.A. 141(d).

Comment 3. The statutory presumption of the creation of a tenancy in common does not apply to conveyances to a husband and wife or to partners to a civil union where the presumption exists that a tenancy by the entirety is created. See 27 V.S.A. §2.

Comment 4. See Title 27 V.S.A. §349 and Act 91 of the Vermont Legislature, 1999 Adjourned Session (Civil Union Bill), for the rules governing conveyances between (1) Husband and wife; (2) Partners to a civil union; and (3) Spouses/partners to a civil union and

one or more other persons. See, Act 003 2009-2010 Session, Vermont Legislature; “*An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage.*”

Comment 5. The failure to identify or state the marital relationship of plural grantees in a conveyance does not impair marketability if such identity or relationship is otherwise established by, or can be readily inferred from, other recorded instruments, acknowledgments or affidavits, it is good practice, however, to recite the marital or civil union relationship in the deed; ie:

"A & B, spouses [or a married couple] as tenants by the
entirety" "A& B, parties to a civil union as tenants by the
entirety”

Moynihan’s Introduction to the Law of Real Property, 229-235 , (West, 1962), traces and discusses the common law roots of the tenancy by the entirety. Moynihan writes that :

At common law a conveyance to grantees who were husband and wife created in them an estate by the entireties. It was not necessary that they be described as husband and wife or that the conveyance manifest an intention that they take as tenants by the entirety. (230).

The failure to identify or state the marital or civil union relationship of plural grantees in a conveyance does not impair marketability if such identity or relationship is otherwise established by, or can be readily inferred from, other recorded instruments, acknowledgments or affidavits. For some Vermont cases addressing the nature of interest held by plural grantees, see: *Brownson v. Hull*, 16, Vt. 309 (1844); *Davis v. Davis*, 30 Vt. 440, 441 (1875); *Town of Corinth V. Emery*, 63 Vt. 505 (1891).

Comment 6. A creditor cannot attach property owned jointly by a debtor and a nondebtor when they hold title as tenants by the entirety. *RBS Citizens, N.A. v. Ouhrabka*, 30 A.3d 1266, 190 Vt. 251, 2011 VT 86 (2011). However, upon termination of a tenancy by the entirety, by death or dissolution of the marriage, the attachment or judgment lien may spring onto the interest of the spouse subject to the encumbrance. See Standard 2.2, Comment 5.

History

March 29, 2000 Restated the language defining “knowledge” as being actual knowledge or constructive notice derived from properly indexed instruments in the chain of title. This concept is used in the first clause of Standards 6.2, 6.3, 6.4 and 6.5 Insert clause re leading phrase.

August 1, 2000 Added references to the existence of Civil Unions under Act 91 of the Vermont Legislature, 1999 Adjourned Session.

September 24, 2010 Added Comments 2 and 5 (see also Standard 14.1, Comment 2).

September 20, 2012 Revised Comment 4.

September, 2016 Comment 5 – revised.

September 2018 Comment 6 was added.

STANDARD 6.5

POWERS OF ATTORNEY

In the absence of actual knowledge or constructive notice derived from properly indexed instruments in the chain of title to the contrary, a title examiner may presume that an individual grantor who has conveyed property pursuant to a properly executed and recorded power of attorney, whether or not durable, was (a) competent to execute the power of attorney, (b) competent and alive at the time the deed was delivered, and (c) the power of attorney had not been revoked at the time the deed was delivered.

Comment 1. A deed or other conveyance of lands or of an estate or interest in land, made under a power of attorney, shall not be of any effect unless such power of attorney, is signed, witnessed by one or more witnesses, acknowledged and recorded in the office where such deed is required to be recorded. Title 27 V.S.A. §305. For acknowledgment out of state, including a foreign country, see 27 V.S.A. §379(a).

Comment 2. In the case of a deed or other instrument executed pursuant to a durable power of attorney, there is no requirement of competency at the time of the conveyance.

Comment 3. An attorney representing a purchaser or mortgagee from a grantor acting through an attorney in fact in a current transaction must establish: (a) that the power of attorney authorizes and empowers the attorney in fact to take the action required to convey title; (b) that the power is properly executed; and, (c) whether the instrument is a "durable power of attorney". As to requirements for and effect of a durable power of attorney, see Title 14 V.S.A. §3508.

If the power of attorney is not "durable", and is being used in a current transaction, an affidavit should be provided if requested and may be recorded. See 14 V.S.A. §3507(d).

Comment 4. The age of the power of attorney is not relevant to its validity unless the power of attorney expired by its own terms. See 14 V.S.A. 3502(d)(1).

Comment 5. An executor, administrator or guardian may not appoint an attorney in fact for the purpose of executing an instrument affecting an interest in real property. See *Watkins' Estate v. Howard National Bank & Trust Company*, 113 Vt. 126 (1943), at page 133.

Absent evidence of authority to the contrary, a trustee, corporate officer, designated partner, or anyone else acting in an elected or appointive capacity may not appoint an attorney in fact for the purpose of executing a document affecting title to real property. A designated partner is one appointed under a written resolution or authorization to act on behalf of the partnership. A general partner may appoint an attorney in fact as to matters affecting only the interest of that general partner.

Comment 6. A person may accept a deed or other instrument signed by a substitute attorney in fact, provided that (a) the power of attorney document includes language allowing the attorney in fact to appoint a substitute attorney in fact; (b) the appointment of the substitute attorney in fact is exercised pursuant to a document executed with the formalities of a deed, which makes reference to the original power of attorney; and (c) the document exercising the power of substitution and the power of attorney document are recorded in the same land records.

Comment 7. A photocopy or electronically transmitted facsimile of the POA may be relied upon to the same extent as an original. 14 VSA §3513.

Comment 8. Unless a trust instrument prohibits delegation of authority, a trustee may delegate the trustee's duties and powers to an agent as provided in 14A VSA §807.

Comment 9. As to the validity of powers of attorney executed outside the State of Vermont, see 14 V.S.A. §3514 and 27 V.S.A. §305(b).

History

March 29, 2000 Restated the language defining “knowledge” as being actual knowledge or constructive notice derived from properly indexed instruments in the chain of title. This concept is used in the first clause of Standards 6.2, 6.3, 6.4 and 6.5 Insert clause re leading phrase.

Obligations of an attorney accepting documents signed using a power of attorney were clarified in Comment 3.

Former Comment 4 was incorporated in Comment 1.

Former Comment 5 was renumbered to Comment 4.

New Text was added to Comment 5 to explain the limitations on appointment of an attorney in fact by a fiduciary.

Comment 6 was added to describe when the designation of a substitute attorney in fact is effective.

September 26, 2008 Comment 3 was amended as follows: change to statutory citation from 14 V.S.A. §3051 to §3508; last paragraph amended and statutory citation added.

Amended comment 4 to add the words “unless the power of attorney expired by its own terms. See 14 V.S.A. 3502(d)(1).”

Comment 7 was added.

September 18, 2014 Comment 8 was added.

September 2016 Comment 9 was added.

CHAPTER VII

STANDARD 7.1

* * * * *

GRANTEES

An instrument will not operate as a conveyance of the legal title to an interest in land unless it designates an individual or entity authorized by statute as grantee who is (a) in existence and (b) has the capacity to take and hold the legal title to land at the time of the conveyance. A deed will not pass the legal title if the grantee is: (1) designated in the alternate, (2) unborn, (3) a deceased person or (4) any other entity not in existence.

Comment 1. A deed to an incompetent or minor is good, since the same restrictions which apply to incompetent or minor grantors do not apply to grantees.

Comment 2. If a deed does not pass legal title to the purported grantee or grantees, the legal title remains in the grantor.

Comment 3. A corporation is not in existence for purposes of taking legal title unless a current certificate of good standing is recorded or is otherwise available or obtainable. See 11A V.S.A. §§ 2.03, 3.02(4).

Comment 4. Where a *de facto* partnership exists as evidenced by a Tradename Registration with the Vermont Secretary of State (11 V.S.A. §1621), a deed to the tradename shall be a conveyance to the partnership.

Comment 5. Pursuant to 1 V.S.A. §118, a grantor “may include every person by or from whom an estate or interest in land is passed in or by a deed” and a grantee “may include every person to whom such estate or interest passes.” A “person” is defined as “any natural person, corporation, municipality, the State of Vermont or any department, agency or subdivision of the State and any partnership, unincorporated association or other legal entity.” 1 V.S.A. §128.

Comment 6. A conveyance that names an estate, guardian, or trust as the grantee of an interest is a valid and effective conveyance to the personal representative, the ward, or the trustee of the trust. See, 27 V.S.A. §351

History

March 29, 2000 Comment 5 revised by incorporating the statutory definition of grantee and grantor.

September 26, 2008 Standard was revised to omit the prohibition against conveyances to “an estate” or to “a trust” in light of the enactment of 27 V.S.A. 351 validating such conveyances. See 2003, Act 150 (Adj. Sess.) §3.

September, 2016 New Comment 6 - Added

CHAPTER VIII
STANDARD 8.1

NAME VARIANCES

It should be manifest from the face of the document that the grantor is the same as the grantee in the instrument conveying title to the grantor. Generally, this means that the name of the grantor will be the same as the prior grantee; or, a subsequent deed contains a recital that the grantor in such deed and the grantee in a prior deed are the same person. Notwithstanding, a greater degree of liberality should be indulged with the greater lapse of time and in the absence of circumstances appearing in the land records which raise reasonable doubt as to the identity of the parties.

Comment 1. Identity of parties should be accepted as sufficiently established where: (a) common abbreviations, derivatives or nicknames are used for first names; (b) differently spelled names sound alike, or their sounds cannot be distinguished easily, or common usage by corruption or abbreviation has made their pronunciation identical; or (c) in one instance a first name or names of a person is or are used, and in another instance the initial letter or letters only of any such first name or names is or are used but the surnames are the same or *idem sonans*; (d) in one instance a first name or initial letter is used, and in another instance is omitted, but in both instances the other first names or initial letters correspond and the surnames are the same or *idem sonans*.

Comment 2. In the event of a change in the name or status of an owner of an interest in real estate, including a merger or consolidation, the examining attorney should assure himself/herself that the requirements of 27 V.S.A. §350 have been met.

Comment 3. This Standard shall not expand the scope of the examining attorney's duty to include the search of every variation of a name.

History

March 29, 2000 The second and third sentence of the Standard were combined for clarity.

Comment 1 and original Comment 2 and Comment 3 were combined into a single Comment identified as Comment 1. Comment 4 was renumbered to Comment 2 and Comment 5 was renumbered to Comment 3.

CHAPTER IX

STANDARD 9.1

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EXECUTION AND ACKNOWLEDGMENT

Deeds and other conveyances of an interest in lands must be signed by the party or parties granting the interest, acknowledged by the grantor, as provided by statute, and recorded in the clerk's office of the town in which such lands are located.

Comment 1. The requirements for execution and acknowledgment are set forth in 27 V.S.A § 341 and 342.

Comment 2. Omission of the date of execution and/or acknowledgment from a conveyance or other instrument affecting title does not impair marketability. Even if the date of execution/acknowledgment is of particular significance, an undated instrument should be presumed to have been timely executed/acknowledged if the date of execution/ acknowledgment or of recordation supports that presumption.

Inconsistencies in the recitals or indication of dates, as between dates of execution and acknowledgment or recordation, do not impair marketability. Absent a particular significance of one of the dates, a proper sequence of formalities will be presumed, notwithstanding such inconsistencies. See *Spero v. Bove*, 116 VT 76 (1950).

Comment 3. An executor, administrator or guardian may not appoint an attorney in fact for the purpose of executing a document affecting title to real property. See *Watkins' Estate v. Howard National Bank & Trust Company*, 113 Vt. 126 (1943), at page 133; See also, 14 V.S.A. 3504.

Comment 4. Absent evidence of authority to the contrary, a trustee, corporate officer, designated partner, or anyone else acting in an elected or appointive capacity may not appoint an attorney in fact for the purpose of executing a document affecting title to real property. A designated partner is one appointed under a written resolution or authorization to act on behalf of the partnership. A general partner may appoint an attorney in fact as to matters affecting only the interest of that general partner.

Comment 5. See 27 V.S.A. Section 348 for the exceptions to the rule for defective instruments which have been on record for a period of years.

Comment 6. See 27 V.S.A. 379 for the requirements for acknowledgment of deeds and other conveyances of interests in land, or powers of attorney affecting such lands, in another state, province or kingdom.

Comment 7. The requirement of a witness was omitted as of July 1, 2004. The change applies retroactively.

Comment 8. Unless a trust instrument prohibits delegation of authority, a trustee may delegate the trustee's duties and powers to an agent as provided in 14A VSA 807. An alternate source of authority to delegate a trustee's powers by powers of attorney appears in 14 VSA 3504(b)(7).

History

March 29, 2000 The first sentence of the standard was revised to reflect the statutory change so that “one or more” witnesses are sufficient.

Comment 1(c) was rewritten generally for clarification of the circumstances in which a fiduciary may grant a power of attorney.

Comment 1(d) – The case of the letters was changed from all caps to mixed case to match the context of the remaining standards.

February 5, 2008 Original Comment 1(e) and 1(f) omitted; Comment 1(g) and 1(h) renumbered and a new Comment 1(g) added.

September 24, 2010 Comment 1 was reformatted

September 20, 2012 Comment 8 was added.

CHAPTER X

STANDARD 10.1

* * * * *

PROPERTY DESCRIPTIONS

A deed or other instrument affecting an interest in real property must contain, directly or by reference, a description of the property that is not so vague and uncertain as to render it impossible to identify the property.

Errors, irregularities and deficiencies in property descriptions in the chain of title do not impair marketability of title unless, after all circumstances of record are taken into account, the description does not identify a distinct property.

Land surveys, related conveyances, accepted rules of construction, and other considerations including the passage of time without objection, should be relied upon to resolve ambiguous descriptions.

Comment 1. Ambiguities and problems may be resolved by recognized rules of construction. In addition, all matters of record, such as descriptions of adjoining properties, maps and surveys, are useful in resolving an ambiguous description. Unrecorded maps and surveys may also be of value in interpreting an ambiguous description.

Comment 2. One may reasonably rely upon corrections or improved descriptions appearing in later conveyances in interpreting an ambiguous description. One may recreate the correct property description by correcting what appear to be obvious typographical mistakes or scrivener's errors.

Comment 3. Extrinsic evidence is generally acceptable to explain an uncertainty or ambiguity existing in a description in order to make the description apply to the parcel intended to be conveyed, and give effect to the instrument.

For example, a deed description such as "my residence" or "my property on Elm Street" may be clarified by extrinsic evidence to establish the fact that the grantor owned at the time only one parcel of land on the designated street, thereby saving the description from being declared void for uncertainty. However, extrinsic evidence cannot be considered if there is no ambiguity in the instrument. *Main St. Landing, LLC v. Lake St. Ass'n*, 179 Vt. 583, 892 A.2d 931 (2006, mem.).

Comment 4. The use of a street address, E-911 address or designation, tax parcel identification number or a SPAN number alone is not recommended as the sole means of describing a parcel of land. The identification of property that relies upon such forms of data depends on information that is not reliably kept for long periods of time and is subject to alteration by the custodian from time to time. A reference to a revised street address created by an official change in the address does not create an ambiguity in the description. An incorrect street address, E-911 address or designation, tax parcel identification number or a SPAN number will not render title unmarketable if the remainder of the description is sufficient to identify the property.

Comment 5. A description may take the form of a reference to prior recorded instruments.

Example: Being all and the same lands and premises as were conveyed to the Grantor by warranty deed of George Washington dated July 4, 1776 and recorded in Book 2 at Page 21 of the Land Records of the Town of Washington.

A description by reference is interpreted as though the document being referenced is incorporated into the document being reviewed. *Lamoge v. People's Trust Co.*, 168 VT 265 (1998). However, the absence of a reference to a prior deed does not invalidate an otherwise valid description.

Comment 6. By Reference to a Lot Number and Map. A description may take the form of a reference to a recorded map and identifying information on the map that indicates which parcel of land is being described. For example:

Example: Being Lot No. 4 on a Plan of lands identified as Happy Acres, Phase III, prepared by XYZ Land Surveys, dated 10/8/1948 and recorded in Plan Book 3 at Page 67 of the Town of Washington Land Records.

Or,

Being Lot 5 in the Third division of Lots in the Town of Washington, drawn to the right of George Washington.

A deed or other conveyance of land which includes a reference to a survey prepared or revised after July 1, 1988 may be recorded only if it is accompanied by the survey to which it refers, or cites the volume and page in the land records showing where the survey has previously been recorded. 27 V.S.A. 341(b).

A description of a parcel of land by a lot number, referring either to a lot depicted on a plan referred to in the deed or one of the original division lots of the town, will control when the description also has general language seeking to enlarge or diminish the scope of the grant. *Spiller v. Scribner*, 36 Vt. 245, 246 (1863). The rule was extended to provide that a map referred to in a description of property is

incorporated in the description and where there is an ambiguity in the description, the map will control. *Withington v. Derrick*, 153 Vt. 598, 604 (1990).

Comment 7. Description by Reference to Monuments. A description may use monuments or physical items such as trees, streams, bridges, iron pins, the boundaries of adjacent parcels, and the distances between them to describe property. For example, a parcel of land may be described as:

Example: A parcel of land bounded on the north by Old County Road; on the East by the lands now or formerly of A. Hamilton; on the south by the stone wall between the within described parcel and the lands now or formerly of T. Jefferson, and on the west by the water's edge of Lake Champlain.

Monuments which are natural things are designated natural monuments. Monuments made by a person are referred to as artificial monuments. Boundaries of adjacent land owners, sometimes called "abutters" are also artificial monuments. In interpreting an ambiguous description, a call to a natural monument prevails over an artificial monument, a call to a monument prevails over a call for a specific distance; and a call to acreage is deemed the least reliable of the elements of a description. A monument used in a description must exist at the time the description is incorporated in an instrument and the monument must be sufficiently identified in the document. If the monument does not exist (such as a reference to an "iron pin to be set") or if the monument is not sufficiently described to be identifiable, then the monument cannot be used in court to prove the location of the boundaries in a later case.

Various types of descriptions have been found to better indicate the intent of the parties. A reference to a monument in a description is given controlling weight over distance descriptions and acreage descriptions. *Phillips v. Savage*, 151 Vt. 118, 119 (1989).

There are two general classifications of monuments, a natural monument such as a river, tree or similar thing and an artificial monument such as an iron pin, a concrete post or a blazed line. Natural monuments prevail over artificial monuments and artificial monuments over courses and distances in deeds. *Marshall v. Bruce*, 149 Vt. 351, 353 (1988). A reference to a neighboring property's boundary is a reference to a monument. *Phillips v. Savage*, 151 Vt. 118, 119 (1989); *Monet v. Merritt*, 136 Vt. 261, 264 (1978).

After a description by monuments, the next most reliable description is a description by courses and distances. *Haddock v. Poutre*, 139 Vt. 124, 127 (1980). The least reliable form of description is the statement of quantity of acreage. *State Highway Board v. Jamac Corp.*, 131 Vt. 510, 514 (1973).

Comment 8. With respect to bodies of water forming boundaries of property, one should consider whether the body of water is navigable or non-navigable by definition, whether the public trust doctrine is applicable, and the effect of the common law principles of riparian rights, erosion, accretion (gradual and imperceptible accumulation of land by natural causes along the banks of a body of water), avulsion (sudden removal of soil from the land of one owner and its deposit on the land of another owner), inundation and reliction (increase in the land area due to the gradual shifting of the river course causing it to withdraw from its banks). (Public Trust Doctrine – *State of Vermont and City of Burlington v. Central Vermont Railway, Inc.*, 153 Vt. 337 (1989). For a definition of navigable waters, see 10 V.S.A. §1422 (4) and 33 CFR Part 329.

Comment 9. The intention of the parties set out in the words of the instrument must be given effect. *Withington v. Derrick*, 153 Vt. 598, 603 (1990); *Spooner v. Menard*, 124 Vt. 61, 62 (1963). If the deeds or other instruments under consideration are clear then the precise language of the instruments will be enforced.

Comment 10. Where an ambiguity arises because a single instrument contains inconsistencies, the generally recognized rule is that a specific description will always control a general description. A reference to a prior deed is considered a general description. *Pine Haven North Shore Association v. Nesti*, 138 Vt. 381, 387 (1980).

Comment 11. Certain cases can be useful in reconciling ambiguous or indefinite descriptions. See the following cases: *Withington v. Derrick*, 153 Vt. 598, 603 (1990); *Spooner v. Menard*, 124 Vt. 61, 62 (1963); *deNeergaard, et al v. Dillingham*, 123 Vt. 327, 332 (1963); *Sheldon Slate Products Company, Inc. v. Kurjiaka*, 124 Vt. 261, 267 (1964); *Kennedy v. Rutter*, 110 Vt. 332 (1939).

History

September 18, 2014 This standard was added.

CHAPTER XI

STANDARD 11.1

* * * * *

DELIVERY

Delivery of instruments which are witnessed, acknowledged and recorded in accordance with Vermont law, is presumed in all cases. Specifically, delay in recording, with or without record evidence of the intervening death of the grantor, does not of itself rebut the presumption.

Comment 1. A transfer of title to real estate, by deed, requires a delivery of the deed. The fact of execution of the deed does not suffice to transfer title; and recording of the deed is not necessary to transfer title, only to give notice of the transfer to third parties. A potential problem arises in that, unlike execution, which requires the presence of a witness and notary, or recording, which requires the Town Clerk, delivery may take place in private, with only the parties present. Furthermore, the delivery of the deed must be with the intent to make a present transfer, rather than in any sort of escrow, loan, fraud on creditors or spouses, etc. Delivery is, therefore, far more difficult of proof than either execution or recording, even though it is the fact crucial to the transfer. In an attempt to avoid that difficulty of proof especially in the absence of the original parties, Vermont law provides that a presumption of delivery of the deed arises when a deed is properly executed and recorded. This presumption may fly in the face of facts; for instance, a seller might execute his deed and hold it pending receipt of payment, and the "buyer" might steal the executed deed and record it without the consent of the seller. The presumption is not, therefore, conclusive. Nonetheless, a prudent title examiner may rely upon such presumption in the absence of any definite rebutting evidence.

Comment 2. In most cases, a deed will be delivered at the time of execution, and recorded as soon as practicable after execution and delivery. In those cases in which there is a substantial time interval between execution and recording, there is no certain means of determining the time of delivery. This uncertainty does not, however, negate the presumption of delivery.

Comment 3. A particular problem is presented when there is a substantial interval between the execution of the deed and the recording thereof and the grantor is known to have died or to have become incompetent in the interval. In the absence of any significant evidence to the contrary, the presumption still applies - the grantor is presumed to have delivered the deed prior to death or other disability.

Comment 4. The issue of status of title in the situation in which a grantor executes a deed, and places it in the hands of a third party for safekeeping, or it is found in the "grantor's" effects following death, and then recorded, is beyond the scope of these standards, as it would require determination - presumably by a court of competent jurisdiction - of the grantor's intent. A prudent attorney or title examiner, having actual knowledge of such a state of facts would normally decline to certify title under the deed in question pending a court ruling or corrective action.

CHAPTER XII

Standard 12.1

CONVEYANCE BY GUARDIAN APPOINTED BY VERMONT COURT

A conveyance of an interest in Vermont real property by a Guardian appointed by a Vermont Court is valid if the Guardian has been duly appointed and a License has been issued by the Vermont Superior Court - Probate Division with jurisdiction over the property.

Comment 1: The Probate Division of a Vermont Superior Court may authorize the sale of real property. 14 VSA §2881. A deed executed by a guardian under order of sale shall be valid. 14 VSA §2884.

Comment 2. The License (order of sale) must be recorded in the land records before the sale occurs.

Comment 3: A Guardian may discharge a mortgage without a specific license. 14 VSA §2801.

Comment 4: For law applying to the status of licenses or orders to sell real estate by foreign courts; see, 14 V.S.A. §2654 and §2886, and see also, §§3181-3183.

September 2016 – This standard was added.

CHAPTER XIII

STANDARD 13.1

* * * * *

CONVEYANCE BY HEIRS' DEED

A deed by heirs, whether in warranty or quitclaim form, shall be effective to pass title to real estate where the same has been of record for a period of at least fifteen years and it is established by corroborative evidence that the signatories of said deed are all of the decedent's heirs-at-law.

Comment 1. Title to real estate of an intestate passes immediately to the intestate's heirs upon death, subject to the lien of the administrator for the payment of debts, expenses of administration., and other expenses legally chargeable against the estate. *In Re Estate of Bettis*, 133 Vt. 310 (1975). The heir upon the death of the ancestor has a vested interest in the estate which the heir may immediately convey by deed. The grantee by the deed gets the title of the heir holding the land subject to the lien of the administrator. *Austin v. Bailey*, 37 Vt. 219, 222 (1864).

Comment 2. Evidence of heirship may be established through probate or other public records in this or other states or by affidavit based upon personal knowledge from one closely acquainted with decedent's family history. *Jones v. Jones Estate*, 121 Vt. 111, 114 (1959). When reasonably possible, the collateral evidence thus established shall be placed of record and cross-indexed to the instrument of conveyance it purports to corroborate.

Comment 3. The fifteen year time period for this standard has no specific Vermont statutory basis, but is adopted because: (a) it extends beyond any applicable statute of limitations for defeasance by the administrator's or any tax lien, and (b) the likelihood of a successful adverse claim to title arising after fifteen years is remote, reduced *inter alia* by the number of instances in which the record owner also takes possession establishing an additional independent claim to title by long user.

Comment 4. Comment deleted.

Comment 5. With respect to an heirs deed which is of record less than 15 years, the title examiner must be able to establish that all heirs executed the heirs deed. For an heirs deed which has been of record more than 15 years, a title examiner may assume that the execution was by all of the heirs unless there is contrary evidence in the record.

STANDARD 13.2

* * * * *

CONVEYANCE BY DEVISEES IN LIEU OF PROBATE ADMINISTRATION

A deed by the devisees named in a will that has been proved and allowed in a Vermont probate court, whether in warranty or quitclaim form, shall be effective to pass title to real estate where the same has been of record for a period of at least fifteen years.

Comment 1. 14 V.S.A. §101 provides that a will shall not pass title to real estate unless the will is proved and allowed in a Vermont probate court. See also 14 V.S.A. §113 *et seq.* However, there is no additional requirement of a decree of distribution or administrator's deed. Title to real estate of a testate passes immediately to the testate's devisee's upon death, subject to the lien of the administrator for the payment of debts, expenses of administration, and other expenses legally chargeable against the estate. *In Re Margaret E. Callahan's Estate*, 115 Vt. 128, 134 (1947). This is consistent with the rule as to heirs' deeds in Standard 13.1, with the additional requirement of probate and allowance of the will necessary to define the class of heirs.

Comment 2. Recording of the will and the probate and allowance thereof in the land records is recommended for convenience, but not a requirement of law or of this Standard.

Comment 3. The fifteen year time period for this Standard has no specific Vermont statutory basis, but is adopted because: (a) it extends beyond any applicable statute of limitations for defeasance by the administrator's or any tax lien, and (b) the likelihood of a successful adverse claim to title arising after fifteen years is remote, reduced inter alia by the number of instances in which the record owner also takes possession establishing an additional independent claim to title by long user. Any conveyance of less than fifteen years duration of record should be confirmed by confirmatory, *nunc pro tunc*, or ordinary decree of distribution.

History

March 29, 2000 Inserted "a Vermont" before probate court in the body of the standard and in Comment 1. Added the citation to 14 V.S.A. §113 *et seq.*

STANDARD 13.3

* * * * *

OMITTED REAL ESTATE OR FAULTY DESCRIPTION OF CLOSED ESTATE

When an estate has been administered in a Vermont probate court and a final decree of distribution recorded in the land records, no reopening of the estate shall be required to convey an interest of the decedent merely because: (1) all of the real estate of the decedent or interest therein was not included in the inventory or in the decree of distribution, or (2) the description of such estate or interest in the inventory or decree was inaccurate, or (3) any other error or omission has occurred to cause such estate or interest to be misdescribed in the probate record. A deed by heirs or devisees, whether in warranty or quitclaim form, shall be effective to pass title to real estate if the existing probate record enables a clear and unambiguous determination that the grantors would be the persons entitled to decree of such estate or interest if the estate were reopened to correct the error or include the omitted property.

Comment 1. No provision is made in this standard for reduction of risk upon passage of time, because the nature of the risks are not time-related. If additional federal or state succession or inheritance taxes are due based on the additional value of the omitted interest, this can generally be determined from the probate record, a determination of probable date of death value made, and amended returns as necessary and clearances secured without the necessity of additional probate administration. The status of claims against the decedent and expenses of administration are likewise a matter of probate record.

Comment 2. Adequate references to the probate record and recital of the erroneous or omitted information is recommended for convenience, but not a requirement of this standard.

History

March 29, 2000 - Added the word warranty, in the phrase which begins “whether in” and before the words “quit claim.”

STANDARD 13.4

* * * * *

CONVEYANCE BY TRUSTEE OF A NON-PROBATE TRUST

A title examiner may presume that the trustee of a non-probate trust, named as grantor in an instrument in the chain of title, had authority to convey, with or without a certificate of trust or other recorded evidence of authority.

A conveyance by the current trustee of a non-probate trust shall be effective to transfer title to real estate even if the record title is held in the name of the trust or a former trustee.

Comment 1: See 14A V.S.A. §§ 1012 and 1013 for the presumptions available and the required elements of the certificate of trust for current transfers in which the grantor is a trustee.

Comment 2. If the Settlor of a Trust is deceased at the time of the transfer by a Trustee, an unrecorded tax lien under Federal (Estate or Gift Tax) or Vermont (Land Gains) laws may encumber the property.

History

March 29, 2000

Title - Replaced the words “INTER VIVOS” with A NON-PROBATE.

Body of Standard - replaced the words “an inter vivos” with the words a non probate in the first sentence. Added the words receipt and recording before the colon. Added the words commonly referred to as a “Trustee Certificate” in the second sentence. Omitted the last two sentences of the Standard.

Comment 2 - Added new Comment 2 to address the material removed from the last two sentences of the Standard.

Comment 3 – Added new Comment 3 as guidance for practitioners involved intratransfers where there is a possibility of the Special Estate Tax Lien or Special Gift Tax Lien arising.

September 26, 2008:

Body of Standard: Revised the standard as a result of the adoption of 27 V.S.A. §351 & § 352. (See 2003, Act 150 (Adj. Sess.) §3.)

Comments were revised as follows: Comment 1 was deleted and new comment 1 inserted in its stead. Former comment 2 was deleted. Former comment 3 was amended and renumbered as Comment 2.

September 20, 2012. Comment 1 revised to reference statutory change.

CHAPTER XIV

STANDARD 14.1

* * * * *

CONVEYANCE TO TWO OR MORE PERSONS

Conveyances and devises of lands, whether for years, for life or in fee, made to two or more persons, shall be construed to create estates in common and not in joint tenancy, unless it is consistently and unambiguously expressed therein that the grantees or devisees shall take the lands jointly or as joint tenants or in joint tenancy or to them and the survivors of them. This provision shall not apply to (a) devises or conveyances made (i) in trust; (ii) to a married couple; (iii) to parties who are parties to a civil union where the civil union and the conveyance were both made after June 30, 2000; or (b) a conveyance in which it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy.

Conveyances or devises of an interest in land to two persons whose marriage or civil union is recognized by the State of Vermont creates a tenancy by the entirety, unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in common or a joint tenancy.

If a grantor took title with a spouse, a partner to a civil union or a joint tenant, a title examiner may presume the spouse, partner to a civil union or joint tenant to be deceased if: (a) the deed contains a recitation to that effect and has been recorded for not less than fifteen (15) years with the clerk of the town where the real property is located; or (b) a death or burial certificate or decree issued by a court having competent jurisdiction, or other proof of death establishing the grantor's status as widowed, has been recorded or is available for filing with the clerk of the town where the real property is located.

Comment 1. The common law incident of survivorship prevails for tenancies by the entirety in Vermont. See *Town of Corinth v. Emery*, 63 Vt. 505, 22 A 618 (1891).

Comment 2. The failure to identify or state the marital relationship of plural grantees in a conveyance does not impair marketability if such identity or relationship is otherwise established by, or can be readily inferred from, other recorded instruments, acknowledgments or affidavits, it is good practice, however, to recite the marital or civil union relationship in the deed; ie:

"A & B, husband and wife as tenants by the entirety"

"A & B, spouses [married couple] as tenants by the
entirety"

"A& B, parties to a civil union as tenants by the entirety"

Moynihan's Introduction to the Law of Real Property, 229-235 , (West, 1962), traces and discusses the common law roots of the tenancy by the entirety. Moynihan writes that:

At common law a conveyance to grantees who were husband and wife created in them an estate by the entireties. It was not necessary that they be described as husband and wife or that the conveyance manifest an intention that they take as tenants by the entirety. (230).

The failure to identify or state the marital or civil union relationship of plural grantees in a conveyance does not impair marketability if such identity or relationship is otherwise established by, or can be readily inferred from, other recorded instruments, acknowledgments or affidavits. For some Vermont cases addressing the nature of interest held by plural grantees, see: *Brownson v. Hull*, 16, Vt. 309 (1844); *Davis v. Davis*, 30 Vt. 440, 441 (1875); *Town of Corinth V. Emery*, 63 Vt. 505 (1891).

Comment 3. To make a consistent and unambiguous expression of the intent to create an estate other than an estate in common, the conveyancer should explain precisely the nature of the interest intended, and specific language to that effect should be inserted in any deed, either in the Granting Clause (which passes title to the interest) or in the Habendum Clause (which sets forth the estate to be held), or both, but if it appears in both clauses the expression of the intended estate must be the same. The fact that the expression of the intent to create an estate other than an estate in common appears in only one of the two clauses does not create an ambiguity or negate the effect of specifying the intended estate.

Comment 4. In the event that the Grant clause and the Habendum clause in a particular deed specify different tenancies, it is likely that the presumption would be that the deed creates a tenancy in common. *Kipp v. Chips Estate* 169 Vt.102, (1999)

Comment 5. Where property is deeded to married persons or persons joined by a civil union and a tenancy by the entirety is not intended, specific language to that effect should be used; ie:

"A & B, {husband and wife; a married couple; or parties to a civil union}, as tenants in common and not as tenants by the entirety".

Comment 6. Where property is deeded to other than married persons or parties to a civil union, unless a tenancy in common is intended, specific language explaining the interest intended should be used; ie:

"A & B, as joint tenants with rights of survivorship"

Comment 7. Where mixed entities are involved, specific language should be used to insure that the intended result is clearly understood; ie:

"A as to an undivided 72% interest and B as to an undivided 28% interest, as tenants in common"

"A & B, husband and wife, as tenants by the entirety as to an undivided one-half interest; and C & D, husband and wife as tenants by the entirety as to an undivided one-half interest, the marital unities to take as tenants in common"

–OR– "A&B, parties to a civil union, as tenants by the entirety as to an undivided one-half interest; and C& D, parties to a civil union as tenants by the entirety as to an undivided one-half interest, the civil union unities to take as tenants in common"

"A & B, husband and wife or "A& B, parties to a civil union as tenants by the entirety; and C, the tenants by the entirety and the individual to take as joint tenants with rights of survivorship"

Comment 8. Removed

Comment 9. Subject to 27 VSA §2(b) which provides that an instrument may create a joint tenancy in which the interests of joint tenants may be equal or unequal, common law provides that formation of a joint tenancy must satisfy the four unities, being the unity of time, title, interest and possession. The unity of time requires that the estate of the tenants is vested for one and the same period (e.g.: joint tenants for a term of years, joint tenants in fee simple; the estates are running at the same time and for the same length of time; joint estates cannot run for different or successive time periods). The unity of title requires that the joint estate of all of the tenants be acquired in a single transfer. In contrast, tenants in common may take property by several titles. The unity of interest (now amended by 27 VSA §2(b)) required that all tenants acquire and hold the same size or percentage share; and that joint tenants may not have joint interests in a property of different character, scope or size. The unity of possession requires that the tenants hold the same undivided possession of the whole and enjoy the same rights until the death of one.

Comment 10. A creditor cannot attach property owned jointly by a debtor and a nondebtor when they hold title as tenants by the entirety. *RBS Citizens, N.A. v. Ouhרבka*, 30 A.3d 1266, 190 Vt. 251, 2011 VT 86 (2011). However, upon termination of a tenancy by the entirety, by death or dissolution of the marriage, the attachment or judgment lien may spring onto the interest of the spouse subject to the encumbrance. See Standard 2.2, Comment 5.

History

This standard was added in 2003.

September 18, 2014: The standard was amended as follows:

Second sentence of the first paragraph: Change “husband and wife” to “a married couple”.

First sentence of second paragraph: Delete the following phrase after the words ‘civil union’ (“as to a civil union made after June 30, 2000”);

Add the third paragraph.

Comments were amended as follows:

Comment 2 to add the example: “A & B, a married couple as tenants by the entirety”.

Comment 5 to: (1) delete the following parenthetical phrase after the words ‘civil union’ (“provided both the civil union and the conveyance to the partners in the civil union occur after June 30, 2000”); (2) to amend the example by adding “a married couple”.

September 2018: The standard was amended as follows:

Comment 8 removed and replaced with Comment 9

Comment 10 was added.

CHAPTER XV
STANDARD 15.1

DEEDS RETAINING LIFE ESTATES WITH RESERVED POWERS

A life estate with reserved powers is created when the record title holder (the “Grantor”) conveys title to one or more persons (the “Remainderman”), and reserves a life estate together with an additional right to sell, mortgage, lease, gift, or otherwise convey with or without consideration fee title or any lesser interest. A title examiner may presume a subsequent conveyance (including a conveyance of the fee, a mortgage, a lease, or the conveyance of some interest less than the entire fee) by the Grantor, without joinder by the Remainderman, is a valid transfer of the specified interest as long as the right to convey such interest was granted to or retained by the Grantor.

NOTE: This Standard is *not* intended to address the efficacy of these deeds for Medicaid Planning purposes, or their compliance with Medicaid regulations.

Comment 1. Without reserved powers, creation of a life estate results in two vested estates, an interest for life and a remainder interest. The holder of a life estate without reserved powers cannot convey, alter, revoke or otherwise affect the remainder interest nor convey a greater estate.

Deeds creating an enhanced life estate with reserved powers have been variously known as – “Ladybird Johnson” deeds, “Granai” deeds, “Medicaid” deeds or “Barre” deeds. See, *Aiken v. Clark*, 117 Vt. 391 (1952), for a general discussion of the principles applicable to life estate. See, *Weed v. Weed*, 2008 VT 121, 185 Vt. 83, 968 A.2d 210 (2008) for a general discussion of the principles related to exercising power to convey under a reserved power where the transfer is a gift and not a sale.

Comment 2. No statutory language or universally accepted language exists to create a life estate with reserved powers.

Comment 3. The use of the word “title” in this standard is not intended to define the extent of the holder's interest.

Comment 4. Title examiners should be aware of the consequences of the holding in *Brousseau v. Brousseau*, 182 Vt. 533, 927 A.2d 773 (2007)), and in particular the Court's adoption of the principle that an off record intention, expressed after the date of the conveyance that the conveyance was not intended to create a present vesting of an interest in the property conveyed is sufficient to overcome any presumption of donative intent. Thus, during the lifetime of the grantor of the deed, it is possible for the grantor to assert that there was no intent to make a present gift of an interest in the property conveyed and thus any transfer of interest apparent in the deed was ineffective.

History

September 24, 2010 This standard was added.

CHAPTER XVI

STANDARD 16.1

ATTACHMENTS

A recorded attachment creates an encumbrance on the title to property, dependent on the status of the suit in which the attachment was granted. The priority of the Writ of Attachment is established at the date and time it is recorded in the land records. Any judgment lien filed on real property which has been attached in the suit in which the judgment is rendered shall relate back to the date of attachment if the judgment is recorded within 60 days after it becomes final. An attachment expires immediately upon dismissal of the suit or a judgment adverse to the attaching party, or 60 days after final judgment in favor of the attaching party.

Comment 1. See 12 V.S.A. §2902 for requirements for recording of judgments. See VRCP 4.1 for the procedure for acquiring an attachment. See VRCP 62(e) regarding continuation of Attachments after judgment is entered.

Comment 2. A discharge of an attachment can be obtained and recorded pursuant to 12 V.S.A. §3293(b).

History

September 20, 2012 This standard was added.

STANDARD 16.2

JUDGMENT LIENS

A final judgment issued in a civil action, or a restitution order entered under 13 VSA Section 7043, shall constitute a lien on real property owned by a judgment debtor if a copy of the judgment, certified by the court clerk, which contains the date it became final is filed in the land records.

A judgment lien shall be effective for eight years from the issuance of the final judgment except that a petition for foreclosure filed during the eight-year period, if filed in the land records, shall extend the period until the termination of the foreclosure suit.

A judgment which is renewed pursuant to 12 VSA Section 506 shall constitute a lien for eight years from the issuance of the renewed or revived judgment, and if the renewed or revived judgment is recorded, 12 VSA 2903(b), it shall relate back to the date on which the original lien was first recorded.

A judgment lien shall be discharged in the same manner as a mortgage pursuant to 27 VSA Chapter 5.

Comment 1. For judgment liens see Title 12, Chapter 113.

Comment 2. Validity: Where judgment creditor failed to comply with requirement of the section that recorded copy of judgment order contain date judgment became final, certified by court clerk, no valid lien was created. Purcell v. FDIC, 141 BR 480 (Bankr. D. Vt. 1992), aff'd 150 B.R. 111 (D.Vt. 1993).

NB: Notwithstanding the foregoing, several decisions issued subsequent to Purcell caution that a Vermont court may not rule so narrowly and that a judgment lien which does not strictly comply with the statute may, nevertheless, constitute actual, constructive and/or inquiry notice that a lien has been asserted.

Comment 3. Writ of Attachment: When a judgment has become final by expiration of the time for appeal by dismissal of an appeal, or on certificate of decision from the Supreme Court, or by the expiration of any applicable stay of execution or the issuance of an order for immediate execution, an attachment shall continue for 60 days if the

judgment is for the plaintiff but shall be dissolved forthwith if the judgment is for the defendant. VRCP 62(e).

Comment 4. Foreclosure: If not satisfied within 30 days of recording, a judgment lien may be foreclosed and redeemed as provided in 12 VSA 2903(d) and VRCP 80.1.

Comment 5. Domestication of foreign judgment order: The local law of the forum determines the methods by which a judgment of another state is enforced. Vermont law governs all procedural issues in actions to enforce foreign judgments in Vermont courts... When a cause of action is brought in Vermont, Vermont law determines the accrual date and the limitations period. A cause of action accrued in a foreign jurisdiction cannot be maintained after the time limit imposed by the Vermont statute for the same kind of action has expired. Conversely, an action timely brought in Vermont can be maintained here even if time-barred in the jurisdiction where the action arose. The only exception to this rule occurs when a foreign statute creates a new right of action and prescribes a specific limitation period. Since the right to enforce the judgment is not a creature of a foreign statute, but rather a common law action, we cannot import a foreign statute to determine its accrual date. Under Vermont law, "[a] judgment creditor generally has a right to bring an action upon a judgment at any time after its rendition, until it is barred by the statute of limitation." An action on a foreign judgment not commenced within eight years is prima facie barred by the statute. *Marine Midland Bank v. Bicknell*, 176 Vt. 389 (2004); see also Restatement (2d) Conflict of Laws § 99 (1971)

Comment 6. Divorce Decree with financial obligations: The filing of a final divorce decree issued pursuant to 15 V.S.A. § 754 is a judgment lien. A final decree which provides that one party owes a financial obligation to another does not automatically create an encumbrance on title since an encumbrance is created only in accordance with the terms of the judgment. Additionally, the filing of a final divorce decree does not create a security interest under 12 V.S.A. § 2901. Absent specific language creating an equitable lien, a divorce decree that orders the payment of money at some future time is not conclusive enough to support a general lien. No lien is created in a divorce decree unless the court specifically creates one. See *Sumner v. Sumner*, 176 Vt. 452 (2004).

See also 15 VSA § 711 re: sale of property to satisfy a lien.

Comment 7. IRS: For liens involving Federal General Tax liens, Federal Special Estate Tax, Federal Special Gift Tax see Standards 23.1, 24.1 and 25.1, respectively.

Comment 8. After acquired title: Judgment liens recorded against a person who does not own an interest in real estate at the time of the recording of such lien will attach by operation of law to any interest acquired subsequent to the recording of the lien for the effective term of the lien. The title examiner must search outside the traditional chain of title to find these liens. The recommended period of search for these liens is back twenty years plus 30 days from the date of the search. The title examiner must check for liens filed against each person who had title to the property being searched back for the full

twenty-year period. The title examiner should also check the name of the client, if the client is acquiring the property being examined. As to judgment liens; See Powell, Law of Real Property §38.05(5).

Comment 9. Bankruptcy: Judgment liens recorded in the land records do not become unenforceable merely because a debtor listed the debt on a bankruptcy petition and obtained a discharge in bankruptcy. The liens remain effective unless the Bankruptcy Court issues an order expressly stating that the property may be sold “Free and Clear” of liens.

Comment 10. Federal judgment liens: A judgment in a civil action creates a 20 year lien on all real property of a judgment debtor upon the filing of a certified copy of the abstract of the judgment in the land records. If approved by the court, the lien may be renewed for one additional period of 20 years upon filing a notice of renewal before the expiration of the 20-year lien period. Any renewal relates back to the date that judgment was filed. 28 U.S. Code Sect. 3201

Comment 11. Hospital Liens: A hospital lien, unless reduced to judgment, is not an encumbrance on real property. Town clerks are required to provide a book to be called the hospital lien docket which indexes the name of the injured person and the hospital. A hospital in Vermont which furnishes medical or other service, to a patient injured by reason of an accident not covered by the workers' compensation act, shall have a lien upon any recovery for damages to be received by the patient, or by his heirs or personal representatives in the case of his death, whether by judgment or by settlement or compromise after date of the services. This lien shall not attach to one-third of said recovery or \$500.00 whichever shall be the lesser and in addition said lien shall be subordinate to an attorney's lien. 18 VSA § 2251 The lien shall not be effective, however, unless a written notice containing the name and address of the injured person, the date of the accident, the name and location of the hospital, and the name of the person alleged to be liable is filed in the office of the clerk of the town in which the hospital is located, before the payment of any moneys to the injured person, his attorneys or legal representatives as compensation for the injuries; nor unless the hospital also mails, postage prepaid, a copy of the notice with a statement of the date of filing thereof to the injured person, and to the person alleged to be liable before payment to the injured person, his attorneys or legal representative of compensation for the injuries. The hospital shall mail a copy of the notice to any insurance carrier which has insured the person against liability for the accident.

Comment 12. Child Support Order: A judgment issued for support arrearages in excess of one-twelfth of the annualized amount of support shall constitute an arrearage judgment lien, if properly recorded in accordance with 12 VSA Section 2904. The judgment shall become a lien for the amount of support arrearages at the time the judgment is issued and any arrearages which accrue after that time and until the lien is released. The judgment shall not become a lien for any sum or sums prior to the date they severally became due and payable. 15 VSA Section 791. The lien shall be effective for eight years from the date of judgment or eight years after termination of the obligation to pay support, whichever is later.

This state shall accord full faith and credit to arrearage liens that arise in another state if the other state accords reciprocity to this state's arrearage liens. 15 VSA Section 791(h).

Comment 13. Homeowner Association Liens: Vermont law is unsettled on the term of the priority of HOA liens in Common Interest Communities (27A VSA §3-116). See *Wells Fargo Bank v. Schunk et al.*, Windham Unit, Civil Division, Docket No 193-4-10 Wmcv (April 28, 2011) and *Chase Home Finance LLC v. McLean et al.* Rutland Unit, Civil Division, Docket 424-6-10 Rdev (July 22, 2011) holding that claim to priority of HOA lien is based on a six month period of delinquencies accruing immediately prior to initiation of foreclosure AND all unpaid assessments that continue to accrue during the pendency of the foreclosure. Cf. *EverHome Mortgage Company v. Murphy et al.*, Bennington Unit, Civil Division, Docket No. 115-3-10 Bncv and *VHFA v. Coffey et al.* No. S0367-11 Cnc, slip op. (Vt. Super. Ct. August 11, 2001) holding that priority of HOA lien is only for the six month period prior to the filing of the complaint for foreclosure.

Comment 14. A creditor cannot attach property owned jointly by a debtor and a nondebtor when they hold title as tenants by the entirety. *RBS Citizens, N.A. v. Ouhrabka*, 30 A.3d 1266, 190 Vt. 251, 2011 VT 86 (2011). However, upon termination of a tenancy by the entirety, by death or dissolution of the marriage, the attachment or judgment lien may spring onto the interest of the spouse subject to the encumbrance. See Standard 2.2, Comment 5.

History

September 20, 2012	This standard was added.
September 18, 2014	Corrected the citation in the last sentence of the standard from 12 VSA Chapter 5 to 27 VSA Chapter 5.
September, 2016	Comment 8 was revised. Comment 13 was added.
September, 2018	Comment 14 was added.

CHAPTER XVII
STANDARD 17.1

RESERVED

CHAPTER XVII

STANDARD 17.2

DEEDS IN LIEU OF FORECLOSURE

A deed in lieu of foreclosure given by a mortgagor to the then current holder of that mortgage is effective to transfer all the mortgagor's title to such holder and shall create a merger of title discharging the mortgage unless, from all the circumstances, it is apparent that the best interests of the mortgagee require the legal and equitable estates be kept separate.

- Comment 1.** See, *Howard v. Clark*, 71 Vt. 424, 427, 45 Atl. 1042, 76 A. S. R. 782 as cited in *Island Pond National Bank v. Alfred Lacroix et al.* 158 A. 684, 104 Vt. 282 (Vt. 1932)
- Comment 2.** A Deed in Lieu of Foreclosure is a deed of the mortgaged property by the mortgagor/borrower to the then current holder of the mortgage. It may be conveyed with or without warranty covenants and may be given by a fiduciary.
- Comment 3.** An effective conveyance of the fee title occurs when all the interests have merged or, if the deed in lieu includes non-merger language: (i) when the conveyance by the grantee of the deed in lieu includes the interest acquired in the deed in lieu and the original mortgage interest; or, (ii) the holder of the mortgage discharges the mortgage.
- Comment 4.** If the mortgagor/borrower's right of redemption is granted to any person other than to the then current holder of the mortgage, fee title is not conveyed until both the mortgage interest and the equitable interest are vested in the same person or entity.
- Comment 5.** A deed in lieu of foreclosure given contemporaneously with the mortgage or an amendment of the mortgage is not effective to terminate the rights of the mortgagor, under the doctrine of clogging the equity of redemption. See generally, Powell on Real Property (4:Section 37.44).

Comment 6. In order to avoid the possibility of a claim of fraudulent transfer of title under the applicable federal bankruptcy or state law, a grantee in a deed in lieu should be satisfied that there is no substantial value in the property in excess of the mortgage debt due to the mortgagee plus assessed but unpaid property taxes. In re: Lauren Jo Chase, Chapter 13 Case #02-10582, Adversary Proceeding #03-1058 United States Bankruptcy Court, District of Vermont. See also 12 V.S.A.4941(c) for court finding required in a strict foreclosure action.

Comment 7. A deed in lieu given during the pendency of a foreclosure does not operate to extinguish the rights of any person with a valid lien of record in the land records.

History

September 20, 2012 This standard was added.

CHAPTER XVII

STANDARD 17.3

TITLE DERIVED FROM A FORECLOSURE

A party acquires title through foreclosure if the foreclosure was completed in conformance with the foreclosure statutes in effect on the date the foreclosure complaint was filed.

Judicial Sale

Title transfers upon the recording of a certified copy of the court order confirming the sale. 12 VSA §4954.

Strict Foreclosure

Title vests in the foreclosing mortgagee upon the issuance of the foreclosure judgment, subject only to the equity of redemption.¹ Record title is perfected:

- a. For foreclosure actions filed prior to July 1, 2012, by the recording of a certified copy of the judgment order; and,
- b. For foreclosure actions filed on or after July 1, 2012, a certified copy of the judgment order and a certified copy of the certificate of non-redemption. The judgment order must contain the finding of no substantial value required by 12 VSA §4941(c).

Non-Judicial Sale

Title vests in the grantee named in the deed issued by the foreclosing lender to the high bidder at auction.

¹ From In re: John R. Canney, III, U.S. Court of Appeals for the Second Circuit
March 7, 2002
http://www.vtb.uscourts.gov/sites/vtb/files/opinions/9811881_316.pdf

A foreclosure judgment vests full legal and equitable title to the property with the mortgagee, subject only to the mortgagor's "equity of redemption," which is a contingent equitable interest in the property ... See *Stowe Ctr., Inc v. Burlington Sav. Bank*, 451 A.2d 1114, 1115 (Vt. 1982) ("Under Vermont law if no one redeems foreclosed property within the prescribed period, the foreclosing mortgagee, pursuant to Vermont strict foreclosure procedure, 12 V.S.A. chapter 163, subchapter 6, obtains full and complete title and has the right to sell the property and retain the surplus, if any.") additional citations omitted.

"Footnote 11: We disagree with the district court's suggestion that title does not pass until a certificate of non—redemption is recorded. *Merchants Bank*, 253 B. R. at 517-18 (relying on 12 Vt. Stat. Ann. Section 4530). This procedural requirement allows the mortgagee to perfect title with respect to "subsequent purchasers, mortgagee's or attaching creditors" but has no effect whatsoever on the mortgagor. Citations omitted."

Comment 1. Effective July 1, 2012 Vermont's foreclosure statutes were amended creating, among other things, new requirements for actions commenced on and after that date.

Comment 2. A mortgage on farmland and a dwelling house owned by a natural person cannot be foreclosed by the non-judicial sale process. 12 VSA §4961

Comment 3. Title to a foreclosed property acquired pursuant to a non-judicial sale or strict foreclosure may be subject to possible fraudulent conveyance issues as discussed in Comment No. 6, Standard 17.2. During the period May 5, 2006 to July 1, 2012, a judgment in a strict foreclosure action must include the findings that there is no substantial value in the property in excess of the mortgage as specified in 12 VSA 4528(b). After July 1, 2012, the requirement for findings regarding findings that there is no substantial value in the property in excess of the mortgage is specified in 12 VSA §4941.

Comment 4. For foreclosures filed prior to July 1, 2012, the recording of the certificate of non-redemption was not required but was customary.

Comment 5. The final judgment in a foreclosure action may be captioned Order or Judgment Order and Decree of Foreclosure or any other variant of the same.

Comment 6. See VRCP 80.1 (k) for contents of an Order of Confirmation and 12 VSA §4954 for the effect of the confirmation order.

Comment 7. The procedure and limitations on application of the non-judicial sale foreclosure are set out in 12 VSA §4961.

History

September 2018: This standard was added.

STANDARD 17.4

THE EFFECT OF RECORDING A COMPLAINT ON SUBSEQUENTLY RECORDED INTERESTS

Upon the recording of a copy of a Complaint for Foreclosure in the land records, any party who thereafter acquires a record interest in the property is foreclosed provided that:

- a) in an action commenced prior to July 1, 2012, a certified copy of the Judgment Order and Decree of Foreclosure was recorded in the land records within 30 days after the expiration of the last day for redemption set forth in the Judgment Order;
- b) in an action commenced on or after July 1, 2012, certified copies of the Judgment Order and Decree of Foreclosure and Certificate of Non-Redemption are recorded in the land records, regardless of when the recording occurs.

Comment 1: Notwithstanding the foregoing, the Vermont Department of Taxes claims that, even when subordinated, a Current Use Lien survives a foreclosure, citing *Merchants Bank v. Darling, J et. al.* Chittenden Superior Court, Docket No. S 00277-95 CnC Entry Order (Leavitt, July 24, 1995).

Comment 2: Compare 12 V. S.A §4530 (repealed effective 7/1/2012) against 12 VSA §4947.

September 2018: This standard was added.

STANDARD 17.5

DISCHARGE OF MORTGAGE OR OTHER INTERESTS FOLLOWING A FORECLOSURE ACTION

Marketability of a title derived through foreclosure of a mortgage is not impaired by failure to record a release of the instrument which created the interest foreclosed, or any instrument which created a subsequent lien or interest which was extinguished by the foreclosure.

Comment 1: Upon the execution and delivery of a mortgage deed, all the mortgagor retains is the equity of redemption. Any subordinate interest attached only to the equity of redemption. When the equity of redemption is terminated by foreclosure, all the subordinate interests are terminated.

- a) Requiring a release of the mortgage foreclosed, or of liens and other interests which were extinguished by the foreclosure judgment, is unnecessary because the foreclosure judgment extinguishes the equity of redemption in the interest foreclosed and in any subordinate interests attached to such equity of redemption.
- b) If a foreclosed mortgage is discharged after the title has transferred, title is not adversely affected because the foreclosure merged the legal and equitable title and the mortgage was no longer in effect.

Comment 2: Any mortgage or lien filed after the issuance of a final judgment order and decree of foreclosure is of no force or effect.

History

September 2018: This standard was added.

CHAPTER XVIII

STANDARD 18.1

* * * * *

DISCHARGES OF MORTGAGES

Mortgages may be discharged by any of the following methods:

1. By entry on the margin of the record of the mortgage executed by the mortgagee and witnessed by the town clerk;
2. By acknowledgement of payment by the mortgagee of record by entry on the mortgage deed and witnessed;
3. By separate instrument executed and acknowledged by the mortgagee of record;
4. By licensed attorney pursuant to affidavit per 27 VSA §464a;
5. By deed of (re)conveyance by the mortgagee to the current record title holder; or
6. By deed executed or joined in by the mortgagee, provided the joinder is for the express purpose of discharging the mortgage.
7. By discharge by an authorized person or entity acting on behalf of the Holder of the mortgage.

Comment 1: Vermont is a title theory state. The granting of a mortgage is a conveyance of legal title by the mortgagor to the mortgagee subject to the mortgagor's right to redeem.

Comment 2: Normally, a discharge executed by a mortgagee merely evidences a record termination of the security interest, which has already occurred by operation of law as a result of the payment of the debt. Whatever extinguishes the debt, discharges the mortgage. *Island Pond Natl Bank v. Lacroix*, 104 Vt. 282 (1932). Once the debt has been satisfied, there is no longer any outstanding mortgage which could be enforced, whether or not it has been formally discharged. *Nash v. Kelley*, 50 Vt. 425, 430. However, payment of the mortgage debt is a factual issue, and, absent a discharge of mortgage executed and delivered by the holder of the mortgage, the mortgage must be judicially terminated if the mortgage is to be discharged of record. In order to make the title marketable, a discharge of the mortgage should be secured and recorded.

Comment 3. See 12 VSA §502 for the 15 year statute of limitations for the re-entry of land. See also *Huntington v. McCarty*, 174 Vt. 69 (2000).

Comment 4. Where a Certificate of Redemption is filed in a foreclosure action, no discharge is required. The Certificate of Redemption is conclusive evidence of satisfaction of the conditions of the mortgage.

Comment 5. Where there is a Deed in Lieu of Foreclosure in the chain of title, there is no need to obtain a discharge of any mortgage(s) in which (1) the grantor of the deed in lieu of foreclosure is the then current owner of record title and (2) the grantee of the deed in lieu is the record holder of the mortgage at the time of the deed in lieu; and the deed in lieu of foreclosure does not preserve the separation of legal and equitable title.

Comment 6. See title standard 18.2 regarding errors in the form of the discharge.

Comment 7. See 27 V.S.A. §470 for curative provisions for defective discharges.

Comment 8. Where a non-resident mortgagee dies out of state, the mortgagee's fiduciary can discharge the mortgage without the need for ancillary administration in Vermont.

Comment 9. **As to discharging a mortgage following a foreclosure action see Standard 17.5**

History

September 26, 2008 This standard was added.

September 18, 2014 The standard was amended to add paragraph 7 and Comment 8.

September 2018 Comment 9 was added

STANDARD 18.2

* * * * *

IRREGULARITIES AND DISCREPANCIES IN DISCHARGES OF MORTGAGES AND OTHER DOCUMENTS

A discharge of a mortgage is sufficient, notwithstanding error in dates, amounts, volume and page or record, property descriptions, names of parties and other information, if, considering all circumstances of record, sufficient data are given to identify, with reasonable certainty, the mortgage sought to be discharged.

Comment 1. Regardless of the number or type of errors in a discharge, if the searcher can determine from the instrument that a particular mortgage was intended to be discharged, the discharge should be deemed sufficient.

Comment 2. This standard presumes that the person executing the discharge of mortgage is the holder of that mortgage at the time that the discharge is given. It often occurs, however, that the discharging party is not the mortgagee of record. The usual reason for this situation is the absence of a recorded assignment, or assignments, of the mortgage. This Standard does not eliminate the necessity for a good chain of title to the mortgage. While it is true that Standard 28.1 relaxes this requirement in the very special circumstances surrounding discharges of mortgages held by assignees of a receiver of a failed financial institution, the rule of that Standard cannot properly be expanded to eliminate the need for a proper recorded assignment of mortgage vesting title in the releasor.

Comment 3. The inadvertent reference in a discharge of mortgage to a mortgage modification agreement, rather than to the mortgage itself, falls within the purview of this standard, provided that the record discloses an adequate chain to permit the searcher to connect the modification to the mortgage sought to be discharged.

Comment 4. See 27 V.S.A. §470 for curative provisions for defective discharges.

Comment 5. Searchers may occasionally encounter a document purporting to be a “discharge of assignment of mortgage.” The significance to be ascribed to such an instrument is a function of its true nature; the searcher must examine the underlying assignment to determine whether it is an *absolute* assignment of the mortgage, or merely a *collateral* assignment of that mortgage, i.e., an assignment given by the mortgagee to secure his own debt to a third person.

An *absolute* assignment of a mortgage is in reality a deed, transferring to the assignee the legal title to the mortgaged premises, subject to the mortgagor's equity of redemption. The assignee's purported discharge of such an assignment is no more effective than would be a grantee's discharge of a deed; in both instances, the "releasor" is ineffectively attempting to accomplish by a discharge a transfer that can only occur by means of a present conveyance. Similarly, an attempted discharge of an *absolute* assignment by the assignor is void. The occasionally encountered scenario involves an assignment of a mortgage by A to B. A then discovers that the mortgage should have been assigned to C, not B, and attempts to correct the problem by executing and recording a discharge of the assignment to B, followed by an assignment from A to C. Clearly, both the discharge and the subsequent assignment to C are of no effect, and title to the mortgage remains in B, who is the only party properly able to discharge the underlying mortgage.

A discharge of a *collateral* assignment of mortgage, although appropriate in most instances, presents an entirely different set of concerns. A collateral assignment of a mortgage is, in essence, a mortgage of a mortgage. For example, if A has given a mortgage to B to secure A's debt, B may assign A's mortgage to C to secure B's indebtedness to C. If B satisfies its debt to C, then C should reassign A's mortgage back to B, who again may foreclose if A defaults. If C, rather than reassigning A's mortgage to B, purports to discharge B's assignment to C, this will be deemed to be a reassignment. The searcher must take care to recognize, however, that such a discharge has no effect on the underlying mortgage, which still remains in effect. If, instead, the underlying mortgage is the instrument sought to be discharged, a discharge executed only by the mortgagee is inadequate; the collateral assignee must join in the discharge if the mortgage is to be fully discharged unless the collateral assignee has reassigned the mortgage to the mortgagee.

History

September 26, 2008

This standard was added

STANDARD 18.3

* * * * *

DISCHARGES OF CORRECTED, RE-RECORDED, OR MODIFIED MORTGAGES

- A. Where a mortgage is recorded and it either states on its face, or it is otherwise obvious from a reading of the mortgage, that its purpose is to correct or modify a previously recorded mortgage and both mortgage deeds purport to secure the same indebtedness, a subsequently recorded discharge of the later recorded mortgage is deemed to be a sufficient discharge of both mortgages, even though the discharge does not make specific reference to the first recorded mortgage. A recorded discharge which makes reference only to the first recorded mortgage shall not, however, be deemed a sufficient discharge of the later re-recorded mortgage.
- B. Where a mortgage deed is re-recorded for the purpose of correcting a deficiency in the execution, attestation or acknowledgment of a previously recorded mortgage, a subsequently recorded discharge which makes reference to the re-recorded mortgage shall be deemed a sufficient discharge of both instruments. A recorded discharge which makes reference only to the original mortgage may or may not constitute a sufficient discharge of the re-recorded mortgage depending on the mortgagee's intent.
- C. Where a Mortgage Modification Agreement has been recorded which makes reference to a previously recorded mortgage and purports to modify that mortgage in one or more particulars, a recorded discharge which makes reference to the original mortgage deed but not to any subsequent Modification(s) shall be deemed sufficient to discharge the mortgage as modified. A recorded discharge which makes reference only to a modification agreement without making reference to the original mortgage shall also be deemed a sufficient discharge of the mortgage which was modified, absent affirmative evidence of record that the mortgagee did not intend to discharge the original mortgage.

Comment 1. It is not uncommon for a title search to disclose a recorded mortgage which is then followed by another recorded mortgage which makes reference to the earlier mortgage and states that its purpose is to correct some error or omission in the first document or it is otherwise obvious that such was the purpose of the re-recording of the mortgage. If this later recorded mortgage has been duly executed, attested and acknowledged, it is a substitute mortgage for the earlier mortgage. Thus, a subsequent discharge which makes reference only to the first recorded mortgage is not sufficient to evidence a discharge of the substituted mortgage. It may be that the intention of the releasor was to clear the record of the original mortgage and to leave in force the substituted mortgage. This is essentially a question of fact which cannot be determined from the records. In order to clear title the substituted mortgage should be expressly discharged of record.

Comment 2. There is a significant difference between a corrected mortgage that changes the original mortgage in a substantive aspect and one that is merely re-recorded to correct an error in execution, attestation or acknowledgment. In the former case, the corrected mortgage is indeed a substitute mortgage, and the rule set out in section A of this Standard is logical and appropriate.

Comment 3. Section C of this Standard intends to make its provisions consistent with those of Standard 18.2, entitled to Irregularities and Discrepancies in Discharges of Mortgages and Other Documents regarding the inadvertent reference in a mortgage discharge to a mortgage modification rather than to the mortgage itself. Under both that Standard and this one, such a discharge is given full recognition as a discharge of the entire mortgage. Indeed, it is difficult to conclude otherwise, since the concept of releasing a mortgage modification is virtually unknown in our practice. Universally, a mortgagee seeking to reverse the effect of a modification would do so by means of a new modification, and not by a discharge of only the modification sought to be rendered ineffective. Thus, a reference in a mortgage discharge to a modification, rather than to the mortgage itself, reasonably can only be seen as an inadvertent error, and the instrument is entitled to be given effect as a discharge of the mortgage in its entirety.

History

September 26, 2008 This standard was added.

STANDARD 18.4

EFFECT OF FAILURE TO DISCHARGE ASSIGNMENTS OF LEASES AND/OR RENT, RIDERS OR FINANCING STATEMENTS

Failure to separately discharge an assignment of leases and/or rents, a financing statement or a rider to a mortgage does not impair marketability if, from the record, it can be determined or inferred with reasonable certainty that the assignment, financing statement or rider was given as additional security for an obligation secured by a mortgage which has been discharged of record.

Comment 1. Notwithstanding the foregoing standard, it is good practice to insert in an assignment of leases and/or rents a provision that the discharge of the mortgage securing the obligation for which the assignment is also security shall operate as a discharge of that assignment.

Comment 2. 9A VSA §9-515 provides that, except as otherwise provided in subsections (b), (e), (f), and (g), a filed financing statement is effective for a period of five years after the date of filing. Thus, the provisions of this Standard relating to financing statements become inapplicable if the financing statement at issue has been terminated as a matter of law.. The exception described in (g) states: “A record of a mortgage that is effective as a financing statement filed as a fixture filing under section 9 - 502(c) remains effective as a financing statement filed as a fixture filing until the mortgage is discharged or satisfied of record or its effectiveness otherwise terminates as to the real property.”

Comment 3. On occasion, a mortgage may have been assigned to a subsequent holder, but a collateral assignment of leases and/or rents regarding the loan was not similarly assigned. Despite the different ownership of the mortgage and the assignment, this standard still applies; a discharge of only the mortgage will discharge the assignment.

History

September 26, 2008 This standard was added.

STANDARD 18.5

DISCHARGES INVOLVING MORTGAGE ELECTRONIC REGISTRATION SYSTEM (MERS)

When MERS is the record holder of a mortgage, the mortgage shall be discharged only by MERS. A valid discharge may be issued by (1) MERS, or (2) a member of MERS acting through a certifying officer of MERS.

Comment 1. MERS was created for the purpose of streamlining the mortgage process by eliminating the need to record assignments. When MERS is the mortgagee of record, a discharge is executed by an officer of MERS. MERS may also act as nominee for the lender and servicer and, if named as nominee, MERS remains as nominee regardless of how often the mortgage is sold.

Comment 2: MERS serves as mortgagee of record or as nominee for the beneficial owner of the mortgage loan. MERS becomes the mortgagee of record by assignment or in the original security instrument (MERS as Original Mortgagee or "MOM"). Once MERS is the mortgagee of record, subsequent assignments of the mortgage are not necessary upon a transfer of servicing to another MERS member or the sale of the beneficial interest in the note because MERS remains the mortgagee on behalf of the current owner and servicer. The servicer of a MERS-registered loan has the legal authority to discharge the mortgage on behalf of MERS because, as a member of MERS, authority was granted to their officers through a corporate resolution. The person authorized to sign discharges is sometimes referred to as a "certifying officer" by MERS.

Comment 3: A title examiner who finds a discharge signed by a member of MERS may presume that the signer was a duly appointed certifying officer.

Example: A Mortgage from "John and Mary Doe to MERS as nominee for ABC Bank" may be discharged by either: (a) a MERS certifying officer from ABC Bank or (b) by a MERS member other than ABC Bank acting through a certifying officer.

Comment 4: For assistance in obtaining a discharge or getting help from MERS, determining whether a particular lender is a member of MERS, information may be obtained from:

MERS website: www.mersinc.org

MERS Help Desk: 1.888.680.6377

MERS Voice Response Unit: 1.888.679.6377

- provide the Borrower's SSN or the Mortgage Identification Number (MIN) on the mortgage and the automated system will provide the name of the current servicer.

Comment 5. A title examiner may consider information within the discharge to determine that the discharge was executed on behalf of MERS and is, therefore, a valid discharge of a MERS mortgage. Such information may include the existence of a MIN (MERS Mortgage Identification Number), a reference in the body or signature line to MERS, or a reference to an assignment to MERS.

History

September 26, 2008

This standard was added.

STANDARD 18.6

EFFECT OF FAILURE TO RELEASE A MULTI-TOWN MORTGAGE IN ALL TOWNS WHERE IT WAS RECORDED

Absent an expressed intent to the contrary, a mortgage recorded in more than one town against (a) a single parcel of land lying in more than one town, or (b) a condominium unit located in a development which is located in more than one town, but which was discharged in fewer than all such towns shall be deemed to discharge the mortgage in all towns.

- Comment 1.** A title examiner need not inquire regarding an undischarged mortgage unless the record affirmatively discloses an intention that the mortgage continue to remain of force or effect. It is recommended that a copy of the recorded discharge be obtained and recorded in the town where no discharge is recorded but failure to do so does not impair marketability.
- Comment 2.** If the undischarged mortgage is a “blanket” mortgage affecting multiple parcels of land, whether contiguous or noncontiguous, then it must be discharged of record in every town in which a parcel is located.
- Comment 3.** When a unit in a condominium is located in one town, but the common elements allocated to the unit are located in an adjacent town, a discharge of a mortgage recorded only in the town in which the unit itself is located does not impair marketability. If the discharge is only recorded in the town where the common elements are located and not in the town where the unit is located, then it is recommended that a copy of the discharge so recorded be obtained and recorded in the town in which the unit is located but failure to do so does not impair marketability.
- Comment 4.** Provided the discharge is recorded in one town where the mortgage is recorded, the situs of the substantial part of the land does not alter the effect of the discharge of the mortgage.

History

September 2018: This standard was added.

STANDARD 18.7

HOME EQUITY CONVERSION (REVERSE) MORTGAGE LOANS UNRELEASED HUD SECOND MORTGAGE

The Home Equity Conversion Mortgage (HECM) loan program is administered by the U.S. Department of Housing and Urban Development (HUD). Typical HECM loan closing documentation includes a first mortgage in favor of the HUD–approved first mortgage lender and a second mortgage in favor of HUD. The HUD Mortgage (second mortgage) cannot be considered satisfied by the release of the first mortgage. Title remains unmarketable until the second mortgage on the subject property is released of record.

Comment 1. HECM loans are one form of reverse mortgages. This Standard addresses only HECM mortgages.

Comment 2. The two mortgages may secure separate notes, one to the primary lender and one to HUD. Therefore, it is necessary to obtain a discharge of both mortgages. It is rare that HUD advances any funds under its second note. However, under the HECM program HUD may advance funds to the borrower under its note if the first mortgage lender fails to perform its obligations under its loan documents and fully advance funds due to the borrower. It is this possibility that leaves title unmarketable until the second mortgage is released.

Comment 3. The second mortgage in favor of HUD recites that it is given to secure payments which the Secretary may make to, or on behalf of, the Borrower pursuant to Section 255 of the National Housing Act (42 USC 1715z–20) and the underlying loan agreements between the parties. That Section provides that these advances, as made by HUD, shall not be included in the debt due under the first note unless either (a) the first note has been assigned to HUD or (b) HUD accepts reimbursement from the first lender. Thus, where HUD has advanced funds to the Borrower under the terms of the HECM program those funds are secured by the second mortgage unless there has been either: (i) and assignment of the first mortgage to HUD or (ii) reimbursement for those advances by the first mortgage holder to HUD.

Comment 4. Pursuant to its agreement with HUD, the institutional first mortgage lender is obligated to notify HUD’S national servicer when the first note and mortgage have been satisfied. The servicer then normally processes the cancellation of the second note and issues a release for the HUD mortgage. Unfortunately, as with mortgage releases in general, the system breaks down if the release of the HUD mortgage is not recorded. A title examiner may seek assistance in obtaining the necessary release of the HUD mortgage by contacting either the first mortgage lender or HUD through its national program servicer at the HUD website. So long as HUD can verify that: (a) the first mortgage note and mortgage have been paid in full, and (b) HUD has not expended any funds under its second note, as described in comment 1 above, HUD will issue a satisfaction of the HUD note and release the HUD mortgage.

Comment 5. Practitioners should also be aware that in the context of a foreclosure of the first institutional mortgage, or any other senior lien, the existence of the HUD second mortgage, as a lien in favor of the United States, will require that the United States be made a defendant and mandate a foreclosure by sale pursuant to 28 U.S.C. 2410(c). However, there will be no statutory redemption in favor of HUD as 12 U.S.C. 1701k provides that there shall be no right of redemption in favor of the United States where its interest derives from the issuance of insurance under the National Housing Act, as amended, 12 U.S.C. 1701 et seq.

History

September 2018 : This standard was added.

CHAPTER XIX

STANDARD 19.1

TAX COLLECTOR'S DEED

A tax collector's deed supported by a report of sale meeting the requirements of 32 V.S.A. §5255 operates as a conveyance of legal title to the interest in the land sold at tax sale when the tax collector's deed has been properly executed and recorded after the time for redemption has passed. Marketable title will require that: (i) the title examiner make additional inquiry to determine that notice of the tax sale was given consistent with the requirements of 32 V.S.A. §5252 and §5253 and constitutional due process; and, (ii) the one year statute of limitations has passed (32 V.S.A. §5263). In the case of a potential or actual defect in the tax sale, a title examiner may also rely upon a final court order confirming title.

Comment 1. Adequate statutory notice may nonetheless violate constitutional due process, in that Vermont Statutes do not require proof of actual receipt of notice. See, *Jones v. Flowers*, 547 U.S. 220 (2006); See also *Turner v. Spera*, 140 Vt. 19 (1980). See also *Hogaboom v. Jenkins v. Town of Milton*, 2014 VT 11.

Comment 2. The tax collector's deed conveys title against the taxpayer and anyone claiming under the taxpayer. 32 V.S.A. §5261. However, the State of Vermont Tax Department has expressed a position that tax sales do not extinguish State Tax liens recorded against the property. The Committee takes no position on the State's asserted rights. The United States may take the same position with respect to Federal Tax liens.

Comment 3. The statutes of limitations applicable to the tax sale titles include:

- (a) 32 V.S.A. §5294(4) and §5295(3).
- (b) 32 V.S.A. §5263.
- (c) 12 V.S.A. §501.

Comment 4. Another area of judicial inquiry, also with a constitutional due process element, has been the disparity between tax sale price and property value, *Bogie v. Town of Barnet*, 129 Vt. 46 (1970); *Price v. Leland*, 149 Vt. 518 (1988). However, in

response to *Bogie* and its progeny, current best tax sale practices incorporate a method for determining whether the premises are divisible (so that less than the whole can satisfy the obligation), and for protecting the excess proceeds for the taxpayer. The 1995 amendment to 32 V.S.A. §5254 adding subsection (b) is also clearly directed towards the “divisibility” issue. The Vermont Supreme Court has not had this issue before it since the amendment was enacted.

- Comment 5.** A notice of tax sale should inform the taxpayers that they may seek an abatement of the taxes. *Windsor v. Blanchard*, Windsor Superior Court, April 4, 2000. S528-11-99 Wrcv.
- Comment 6.** Marketable title may be established when the grantee named in the tax collector’s deed and such grantee’s successors in title have held continuous, open, and notorious possession of the property described in the tax collector’s deed for a period of at least fifteen years.
- Comment 7.** The issue of distribution of excess proceeds from a tax sale is unsettled. See *In Re Estate of Mary Lee Settle-Tazewell*, District of Orange Probate Court, Docket No. OeP 025-09 ET.
- Comment 8.** An examiner may wish to consider whether the tax sale could be a fraudulent transfer. See *In Re: Lauren Jo Chase*, United States Bankruptcy Court, District of Vermont, Case #02-10582, Adversary Proceeding #03-1058. 9 VSA 2293(2) Act 117 amended 9 VSA §2293 by reducing the statute of limitations relating to fraudulent transfers from four years (prior to 7/1/18) to two years (on and after 7/1/18).
- Comment 9.** Subsection (ii) of the Standard was amended to change the statute of limitations from three years to one year per Act 117 of the 2017-2018 Legislative Session.

History

- September 24, 2010** This Standard was added.
- September 20, 2012** Standard revised by adding last sentence; original last sentence moved to Comment 6. Citation was added to the *Flowers* decision in Comment 1.
- September 18, 2014** Standard revised to add the *Hogaboom* case citation to Comment 1 and to add Comment 7.
- September 2016** Comment 8 was added.
- September 2018** Standard was revised as follows:
- Comment 8 was revised to reflect the statutory changes in Act No.117 of the 2017 – 2018 Legislative Session.
- Comment 9 was added to reflect the statutory changes in Act 117 of the 2017-2018 Legislative Session.

CHAPTER XX
STANDARD 20.1

PRESUMPTIONS APPLICABLE TO CORPORATE CONVEYANCES

When a conveyance or other instrument of a corporation executed in the name of the corporation appears in the chain of title and it is in proper form, it shall be presumed (1) that the person executing the instrument was the officer or agent they purported to be and was duly authorized to execute the instrument for and on behalf of the corporation; and (2) that the corporation was legally in existence at the time the instrument took effect.

Comment 1. An attorney representing a grantee from a corporation in a current transaction must establish that the conveyance or instrument was authorized, the particular officer or agent who acts on behalf of the corporation is, in fact, the officer or agent the person purports to be, and that such officer has the authority to execute the instrument in question. A certificate by the secretary of the corporation that shows both agency and authority suffices, but this certificate need not be recorded. However, it is recommended that the attorney be satisfied, to the extent it is practical, that the corporation is in existence at the time of conveyance by obtaining a Certificate of Good Standing from the Secretary of State.

Comment 2. See, *Miller v. Rutland & Washington Railroad*, 36 Vt. 452-502 (1863)

Comment 3. If the conveyance or instrument otherwise meets the requirements of this standard, the absence of the printed name of the corporation above the signature does not defeat the presumption of this Standard.

Comment 4. If the deed identifies a corporation as the Grantor and the signature is by an individual without the name of the corporation, and there appears in the instrument a recital of authority such as the word or words “agent”, “duly authorized” or “by” or “for” or similar terms or by official position, the presumption of this Standard shall apply.

History

This standard added 2003.

CHAPTER XXI
STANDARD 21.1

* * * * *

**THE EFFECT OF A DISCHARGE OF DEBTOR IN BANKRUPTCY
COURT UPON EXISTING SECURED LIENS**

A Discharge of a Debtor in Bankruptcy does not discharge a mortgage or lien against the Debtor's property, unless such mortgage or lien was expressly avoided, eliminated or discharged by a bankruptcy court order.

Comment 1. PACER, an on-line data base maintained by the Federal Courts (<http://pacer.psc.uscourts.gov/>), provides for a search tool to determine if there has been a Bankruptcy filing in any of the Federal Bankruptcy Courts. If the examiner finds undischarged liens, the examiner should review the bankruptcy court file to determine the status of the liens.

Comment 2. Reference is made to Standard 21.2 for Sales Free and Clear of Liens and Interests.

History

September 20, 2012 This Standard was added.

CHAPTER XXI
STANDARD 21.2

SALES FREE AND CLEAR OF LIENS AND INTERESTS

When a deed from a trustee in bankruptcy or debtor in possession is recorded together with a §363(f) Order to Sell Free and Clear, a title examiner may presume that the conveyance was properly authorized if the deed is consistent with the terms and conditions of the Order.

Comment 1. The recorded Order acts as a release of the liens and other interests included in the bankruptcy proceedings. If the Order does not specify the liens released, a title examiner should review the bankruptcy court file to determine which creditors were parties in the bankruptcy proceedings.

Comment 2. An Order to Sell Free and Clear may include the lien of municipal real estate taxes in the list of liens and interests to be removed from the property or it may require that they be paid from the proceeds along with the closing costs. Many taxing authorities refuse to recognize the right of the bankruptcy court to remove the tax lien from the property. It is important that the municipal taxes be paid in full and any liens associated therewith be released to avoid additional problems, expense, and potential litigation.

Comment 3. PACER, an on-line data base maintained by the Federal Courts (<http://pacer.psc.uscourts.gov/>), provides for a search tool to determine if there has been a Bankruptcy filing in any of the Federal Bankruptcy Courts.

History

September 20, 2012

This Standard was added.

CHAPTER XXII
STANDARD 22.1

**CONVEYANCES TO AND FROM LIMITED LIABILITY
COMPANIES IN THE CHAIN OF TITLE**

- A. When a deed or other instrument of a limited liability company (“LLC”), whether foreign or domestic, appears in the chain of title, and with respect to a domestic LLC, such instrument is dated and recorded on or after 1 July 1996, and is executed by a person or persons described therein as managers or members of the limited liability company, it may be presumed that such person or persons was or were authorized to execute such deed or other instrument for and on behalf of the limited liability company named therein, and that the limited liability company was legally in existence at the time the instrument took effect.
- B. Where a limited liability company is designated as the grantee or releasee in a deed or other instrument and with respect to a domestic LLC, such instrument is dated and recorded on or after 1 July 1996, it shall be presumed that such limited liability company was legally in existence at the time of delivery of such deed or other instrument.

Comment 1. On 1 July 1996, 11 V.S.A. Chapter 21 became effective creating a new type of statutory business entity in Vermont known as the limited liability company (“LLC”). The LLC has characteristics of both partnerships and corporations, but unlike either of these, the LLC does not have any significant history of judicial interpretation. For example, there is presently no judicially recognized concept of a *de facto* limited liability company as there is with respect to corporations. Nevertheless, it would be unreasonably burdensome to require that the title searcher examine the Secretary of State’s records for each limited liability company in a chain of title to determine its legal existence at the time of the conveyance. It is probable that the concept of a *de facto* LLC would be applied by Vermont courts to deal with the problem of acquisition of title to real property by an LLC which initial articles of organization had not been filed with or accepted by the Secretary of State at the time of a conveyance into a purported LLC. Similarly, a conveyance by an LLC of property in its name where the LLC had not been properly formed, or which having been properly formed, had been dissolved, raises the same question as in the corporate

context. It would seem reasonable and practical to assume that courts would apply a *de facto* LLC doctrine to recognize the validity of such conveyances.

For these reasons the title examiner may presume that a grantee named in a deed in the chain of title which is described as a limited liability company was in fact legally in existence at the time the instrument took effect, provided the deed was dated and recorded on or after 1 July 1996.

The title examiner may also presume that, where a deed or other instrument of conveyance has purportedly been executed on behalf of an LLC, the LLC was in existence at the time of the execution and delivery of such deed or other instrument.

Comment 2. Any member of a member-managed LLC or any manager of a manager-managed LLC may execute an instrument affecting the interest of the LLC in real property unless the articles of organization limit their authority. The instrument is conclusive in favor of a person who gives value without knowledge of the lack of the authority of the person executing the instrument. 11 V.S.A. §3041(c).

Based on this statute, an attorney representing a grantee from an LLC in a current transaction must establish 1) that the LLC is member-managed or manager-managed, 2) that the person executing the LLC instrument is a member/manager at the time of execution, 3) that the articles of organization do not limit the authority of the member/manager to execute the instrument. However, it is recommended that the attorney be satisfied, to the extent it is practical, that 1) the LLC is in existence at the time of conveyance (NOTE: pursuant to 11 V.S.A. §3028(a), the Secretary of State will furnish a Certificate of Existence which may be relied upon as conclusive evidence that the LLC is in existence), 2) the person executing the deed or other instrument is authorized to do so under the provisions of the operating agreement or by statute, and 3) the specific conveyance is approved and authorized by appropriate vote of the members or managers of the LLC. The attorney may rely on an affidavit from the seller's attorney to establish these facts or personally examine the articles of organization, operating agreement, membership list, and other available LLC documents.

Comment 3. When an attorney is merely examining a recorded deed or other instrument in the chain of title which names an LLC as the grantor and has been executed by a person on behalf of the LLC, in the absence of actual knowledge to the contrary, the following presumptions may be made by the title examiner: a) if the instrument was executed by a person described as a member of the LLC, it may be presumed that the management of the LLC is in its members and that the person who executed the instrument was, at the time of such execution, a member of the LLC; b) if the instrument was executed by a person described as a manager of the LLC, it may be

presumed that the management of the LLC was vested in one or more managers under its articles of organization and that the person executing the instrument was, at the time of such execution, a manager of the LLC; and c) it may be presumed that the person who executed the instrument on behalf of the LLC was duly authorized to execute and deliver the deed or other instrument on behalf of the LLC and that the conveyance had been approved by the necessary vote of the members or managers of the LLC as required by statute or by the operating agreement of the LLC.

CHAPTER XXIII

STANDARD NO. 23.1 FEDERAL GENERAL TAX LIEN

* * * * *

A title examiner may presume that real estate, including after acquired land, is free of a Federal General Tax Lien, notice of which has been filed in the town clerk's office where the land is located when:

- A. There is recorded in the town clerk's office a certificate of release, certificate of discharge or certificate of non-attachment pursuant to IRC §6325; or
- B. Ten years and thirty days after the date of the tax assessment, provided no extension and no notice of lien has been refiled in the town clerk's office.

Comment 1 The Federal General Tax Lien arises after assessment, demand for payment and the taxpayer's failure to pay. See IRC §6321. Such liens are valid even if they are not filed, except against certain specified protected classes, including purchasers, holders of security interests, mechanic's lienors and judgment creditors under IRC §6323(a). Even where a tax lien is properly filed, holders of security interests can be free of tax liens for security interests which arise after the filing of the tax lien under certain specified circumstances.

Comment 2 The notice of lien prepared by the IRS includes a date which operates as a certificate of release if a re-filing is not made as of that date.

Comment 3 The ten (10) year lien period may be extended in several ways. See IRC §6502. However, for certain protected classes of third parties (purchasers, security interest holders, mechanics lienor, judgment lien creditors) the extensions are not effective as to those persons, unless the Lien has been refiled within the one (1) year period ending ten (10) years and thirty (30) days after the assessment, or within the last year of every subsequent ten (10) year period. See IRC §6323(g).

Comment 4 Title 9 V.S.A. §2051 requires that notices of liens upon real or personal property for taxes or other obligations payable to the United States of America, certificates and notices affecting the liens when required to be filed, be filed in the office of the town clerk of the town where the property is situated.

Comment 5 Title 9 V.S.A. §2052 requires the town clerk to record all notices of federal liens

in a book kept for that purpose, the date and hour of filing the lien, and to index those notices or liens. When a certificate of discharge of a federal lien is filed, the town clerk shall enter the same upon the same page of the record where the notice of lien is filed, and permanently attach the original certificate of discharge to the original notice of lien. See §2053. The practitioner should be aware that the failure to index a notice of lien in the general index of land records as required by 9 V.S.A. §2052 and 24 V.S.A. §116, may not render a lien unenforceable as a result of the ruling in Haner v. Bruce, 146 Vt. 262 (1985).

Comment 6: In *United States v. Craft*, 535 U.S. 274 (2002), the Court held that a federal tax lien arising under §6321 of the IRC on “all property and rights to property” of a delinquent taxpayer attaches to the rights of the taxpayer in property held as a tenancy by the entirety (entireties property), even when state law insulates entireties property from the claims of creditors of only one spouse. The Court stated that while state law determines what rights a taxpayer has in property, federal law determines whether the state-defined rights are “property” or “rights to property” for purposes of §6321.

See **IRS Bulletin: 2003-39** for a discussion of, and FAQ related to, “Collection Issues Related to Entireties Property”.

History

September 26, 2008 This standard was added.

September 2018: Comment 6 was added.

CHAPTER XXIV
STANDARD 24.1

* * * * *

FEDERAL SPECIAL ESTATE TAX LIEN

IRC §6324(a) imposes a special lien for Federal Estate Taxes (Federal Special Estate Tax Lien), which arises automatically at death if there is estate tax liability. It is a lien upon the gross estate of the decedent for ten (10) years from the date of death. The lien is a secret lien since there is no statutory authority providing for recording notice thereof; no prior assessment, demand or notice of any kind is required. Death alone is the factor which triggers its creation.

There is no Federal Special Estate Tax Lien if the decedent's gross estate, as defined in IRC §2031 is less than the exempt amount.

The title examiner may presume that real property is free of the Federal Special Estate Tax Lien:

1. Ten years after death; or
2. Where there is proof of payment of the amount shown due by the Internal Revenue Service Tax Closing Letter; or
3. When the IRS issues, pursuant to IRC §6325 (b), a certificate of discharge of the property or a certificate of release or non-attachment of the lien; or
4. When, in the case of non-probate property, there is a transfer to a purchaser or a holder of a security interest as defined in IRC §6323(h). In practice, an arms-length transaction for full value is a transfer meeting this test; or
5. Final Decree of Distribution is issued by a Vermont Probate Court; or
6. To the extent that the sale proceeds are used to pay expenses of the Estate. See IRC §6321.

Comment 1 The Federal Special Estate Tax Lien is different from the Federal General Tax Lien under IRC §6321 in both the notice requirements and in the enforcement. Enforcement of the Federal Special Estate Tax Lien may be by way of levy and sale or other process.

Comment 2 The lien attaches to all property included in the gross estate, whether or not the property comes into the possession of the Executor/Administrator; it includes non-probate property such as survivorship property, transfers in contemplation of death, transfers to take effect in possession and enjoyment at death and revocable transfers.

Comment 3 To protect mortgagees and purchasers from the secret Federal Special Estate Tax Lien, IRC §6324(a)(2) provides that this lien will be automatically divested when the so-called non-probate property included in a decedent's gross estate is transferred to a purchaser or mortgagee. Generally speaking, "non-probate" property is that property which had not come into the possession of a decedent's fiduciary because of transfers or transaction involving it during decedent's life, though this same property is deemed part of the gross estate for purposes of computing the amount of the Estate Tax. The definition of "purchaser" in IRC §6323 (h)(1)(6) is expressly made applicable to this Federal Special Estate Tax Lien thereby including executory contract purchasers, optionees and lessees within the term "purchaser". In addition, it is provided that a "purchaser" means one who for "an adequate and full consideration in money or money's worth" acquires an interest which is valid against subsequent purchasers without actual notice. The elimination of the requirement that a purchaser be "bona fide" means that actual knowledge of a Federal Special Estate Tax Lien will not prevent an otherwise qualified purchaser from acquiring the property free from such lien.

Comment 4 While IRC §6324(a)(1) provides that "such part of the gross estate as is used for the charges of administration expenses allowed by the Probate Court shall be divested of the Federal Special Estate Tax Lien", this has been interpreted not to mean that the property itself must be so used, but that such property may be mortgaged or sold and the proceeds therefrom so used. Hence, if the fiduciary sells or mortgages land included in the gross estate, and uses these proceeds to pay the expenses and charges approved by the probate court, then the land so sold or mortgaged will be divested of the Federal Special Estate Tax Lien. *U.S. v. Security-First Nat'l Bank*, 30 F. Supp. 113 (So. D. Cal.). It is only because of this interpretation that bona fide purchasers and mortgagees from the fiduciary acquire any protection at all against this secret Federal Estate Tax Lien.

It is not sufficient that the fiduciary merely sell or mortgage the estate property to a bona fide purchaser or mortgagee. This alone will not prevent the Federal Special Estate Tax Lien from continuing to attach to the transferred property in the hands of such bona fide purchaser or mortgagee. This is so whether or not the property is sold or mortgaged pursuant to authority contained in the will or to the authority of a probate court order. *Detroit Bank v. U.S.*, 317 U.S. 329, 63 S. Ct. 297; *Smythe v. U.S.*, 169 F.2d 49 (1st Cir). The bona fides of the particular transfer or mortgage will not divest the property of the Federal Special Estate Tax Lien. What is required is that the proceeds of the particular sale or mortgage be used as aforesaid.

Even though expenses for such items as funeral expenses and doctor bills incurred during the decedent's last illness were proper and necessary expenses, if the payment of these were not approved by the Probate Court, then this payment does not come within the exception.

Comment 5 Mere issuance of a License to Sell is not sufficient to assure that the Federal Special Estate Tax Lien is extinguished because the License, by itself, does not guarantee the proceeds will, in fact, be used to pay expenses of the estate in the manner required under Federal Law. However, it may be helpful but not dispositive to obtain a License to Sell which provides that the License to Sell is issued for the purpose of raising funds for the portion of taxes and administration costs and that no interim distribution of funds be made without satisfaction of the Federal Special Estate Tax Lien.

History

September 26, 2008 This standard was added.

CHAPTER XXV

STANDARD NO. 25.1

* * * * *

THE FEDERAL SPECIAL GIFT TAX LIEN

Lands transferred by gift become subject, immediately and without notice, to a lien for such Gift Tax as may be found due from the donor in respect to all gifts made by him during the calendar year in which such gift was made.

Real Property of a donor, is free of the Federal Special Gift Tax Lien:

1. Ten (10) years after the gift in any case, and sooner;
2. If (a) the gift tax return is filed, (b) the unified credit is sufficient to cover the non-exempt portion of the gift, and (c) the credit is claimed for the property, or the gift tax is paid; or
3. When the IRS issues, pursuant to IRC §6325, a certificate of discharge of the real property, or a certificate of release or non-attachment of the lien; or
4. If there is a transfer to a purchaser or holder of a security interest where the lien is divested under IRC §6324(b). See IRC §6323(h).

Comment 1. The Federal Special Gift Tax Lien, like the Federal Special Estate Tax Lien is a secret lien. The making of the gift alone triggers the creation of the lien, and there is no statutory requirement for filing of notice of lien.

In addition to the Federal Special Estate Tax Lien and the Federal Special Gift Tax Lien, there may also arise a general federal tax lien against the same property for the same tax; these liens can exist simultaneously. However, the general federal tax lien can arise only after the gift tax becomes due, and then only following assessment, demand, and refusal or neglect to pay, and finally, by filing the notice of lien.

Comment 2. Any particular gift in a calendar year becomes liable for the tax on all gifts made during that particular year. The donee of a gift shall be personally liable for such tax to the extent of the value of such gift.

Property received by way of a gift and transferred by the donee (or by transferee of the donee) to a purchaser or holder of a security interest is automatically divested of the gift tax lien. (See IRC §6324[b]). The lien then shifts to all other property of the donee, even including after acquired property.

Comment 3. Under IRC §6324(c)(1) mechanics' liens, real property tax liens, special assessment liens and liens for charges for utilities or public services furnished by a governmental entity have priority over the Federal Special Gift Tax Lien.

History

September 26, 2008 This standard was added.

CHAPTER XXVII
STANDARD NO. 27.1

* * * * *

VERMONT ESTATE TAX LIEN

A title examiner may presume the real estate is free of a Vermont Estate Tax Lien unless a notice of lien has been filed in the town clerk's office where the land is located. A lien arises upon assessment and notice. 32 V.S.A. §7497.

Comment 1. There is no clear law on the issue of whether there is a statute of limitations affecting Vermont Tax Liens. At the time of adoption of this Standard, the Vermont Department of Taxes takes the position that there is no statute of limitations for any such Estate Tax Lien.

Comment 2. There is no secret lien provided. A lien arises upon assessment and notice under 32 V.S.A. §7497.

Comment 3. Vermont Tax Liens attach to after-acquired property. See Title Standard 2.2, Comment 5.

History

September 26, 2008 This standard was added.

September 18, 2014 Amended to correct a scrivener error in the statutory citation in the standard and in Comment 2.

CHAPTER XXVIII

STANDARD 28.1

* * * * *

ESTABLISHING MARKETABLE TITLE TO INTERESTS IN REAL PROPERTY OWNED BY FAILED FINANCIAL INSTITUTIONS

When an interest in real property was owned of record by a bank, savings and loan association, credit union or other financial institution at the time such institution was declared or adjudicated to be insolvent (a "failed institution"), a chain of title for that interest must be established from the failed institution to the purported owner as of the time of a subsequent title search. A sufficient chain of title shall be deemed to exist and title to such real property interest which is otherwise marketable shall be deemed marketable if such chain of title is evidenced by one or more recorded instruments described in this chapter.

History

This standard was added in 2003.

STANDARD 28.2

* * * * *

TITLE OF THE RECEIVER OF A FAILED FINANCIAL INSTITUTION TO THE ASSETS OF THAT INSTITUTION

All assets of an insolvent financial institution are transferred to and vest by operation of law, state or federal, in the receiver or conservator duly appointed for that institution. Record notice of said transfer may be established either by: (a) recording of a photocopy of the order of insolvency and appointment of receiver as entered by the applicable federal or state regulator; or (b) recording of a subsequent assignment, discharge, or other instrument of conveyance of property interest by or on behalf of the receiver which recites the particulars of the insolvency and appointment of receiver.

Comment 1. Any instrument purporting to satisfy the notice requirements of this title standard should be indexed in the grantor index in the name of the failed financial institution as Grantor and in the name of the receiver as Grantee. If the instrument is a conveyance or assignment by the receiver to a third party, the instrument should also be indexed in the name of the receiver in the grantor index and in the name of the transferee in the grantee index.

History

This standard was added in 2003.

STANDARD 28.3

* * * * *

TITLE OF THE IMMEDIATE TRANSFEREE OF THE RECEIVER OF A FAILED FINANCIAL INSTITUTION

Title to an interest in real property owned by the Federal Deposit Insurance Corporation (“FDIC”) or Resolution Trust Corporation (“RTC”) as receiver of a failed financial institution must be conveyed, transferred or assigned by a deed or other instrument in writing of the FDIC or RTC as such receiver, executed by its authorized agent, representative, or attorney-in-fact. An instrument executed by an attorney-in-fact on behalf of the receiver is valid even though the governing power of attorney from the receiver to the attorney-in-fact is not locally recorded, provided the instrument recites at least the following particulars of the power of attorney: (a) its date of execution; (b) land records location where originally recorded; and (c) statement that said power of attorney has not been revoked or terminated as of date of execution of the instrument.

History

This standard was added in 2003.

STANDARD 28.4

* * * * *

MARKETABILITY OF TITLE IN A REAL ESTATE INTEREST OF A FAILED FINANCIAL INSTITUTION FOR WHICH NO CONVEYANCE, TRANSFER OR ASSIGNMENT APPEARS OF RECORD PRIOR TO THE DISSOLUTION OF THE BRIDGE INSTITUTION WHICH HAD CONTINUED THE BUSINESS OF THE FAILED INSTITUTION

Where an interest in real property was owned of record by a financial institution at the time of the declaration or adjudication of insolvency of that institution, and where the FDIC or RTC as receiver of that failed institution entered into a Purchase and Assumption agreement with a bridge institution, and where no conveyance, transfer or assignment of the title of that real property interest appears of record prior to the dissolution of the bridge institution, a subsequent conveyance, transfer or assignment of that real property interest executed by the FDIC or RTC in its capacity either as the receiver of the failed institution or as receiver of the dissolved bridge institution transfers good and marketable title to the transferee.

History

This standard was added in 2003.

STANDARD 28.5

* * * * *

DISCHARGES, PARTIAL RELEASES, ASSIGNMENTS, AND FORECLOSURE OF MORTGAGES OF A FAILED INSTITUTION BY A TRANSFEREE OF THE RECEIVER FOR SUCH FAILED INSTITUTION

(a) Title to real property described in a mortgage held by a financial institution at the time it was declared or adjudicated to be insolvent, which mortgage was foreclosed by a party claiming to be the owner of that mortgage through or under the receiver of the failed institution, shall not be deemed to be marketable unless such mortgage was assigned of record by the receiver and by every subsequent assignee of the mortgage down to the foreclosing party. As an alternative to an assignment by the receiver to a foreclosing party, a finding by the court in the foreclosure action that the plaintiff has good title to the mortgage will suffice to establish such title, providing the receiver was named a defendant in that action.

(b) A discharge or partial release of a mortgage owned by a financial institution at the time it was declared or adjudicated to be insolvent, which discharge or partial release is given by a party claiming to be the owner of that mortgage by assignment or transfer from the receiver of the failed institution, shall be considered sufficient to discharge or partially release the mortgage referred to therein even though there is no assignment or transfer of record from the receiver to the releasor provided the recorded discharge or partial release contains a recital of the manner in which the releasor acquired ownership of such mortgage.

Comment 1. The recital set forth in a discharge or partial release executed by a party purporting to be the owner of said mortgage by an assignment or transfer from the receiver of a failed institution shall include at least the following particulars: (a) dated of execution of assignment or transfer from the receiver; (b) statement that the mortgage was not subsequently re-assigned or retransferred prior to date of execution of discharge or partial release.

Comment 2. Any discharge or partial release purporting to satisfy the requirements of section (b) of this title standard must should be indexed in the grantor index in the names of the failed institution, the receiver, and the releasor, respectively, and in the grantee index in the names of the releasor and the releasee (mortgagor).

History

This standard was added in 2003.