CHAPTER 1: THE TITLE EXAMINER

1.01 Purpose of Title Examination

The purpose of an examination of title is to advise an examiner's client whether title to real property is marketable. Based upon the materials examined, the title opinion should advise an examiner's client of any irregularities, defects, and encumbrances appearing within the applicable period of examination that may reasonably be expected to affect the marketability of title, which may be stated as objections, comments or requirements. Additionally, the title opinion may advise the examiner's client of the methods by which the client may secure marketable title.

Comment:

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

Caution:

In Mississippi, it is common for oil, gas and other mineral interest to be severed from the surface estate. If the mineral estate is being examined, then a full search (beginning with the original land patent coming forward to present) is required to determine who has record title to the mineral estate. Mineral estates should be treated as a separate chain of title. Unless expressly stated otherwise herein, these Standards do not generally apply to the examination of a mineral estate.

Source:

Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 2.1 (1960).

History:

Adopted effective as of August 1, 2019.

1.02 Review by Examiner

Based upon the intended scope of the examination, an examiner should review any documents, records, deeds, abstracts, affidavits, or other reliable materials that are necessary to form a legal opinion as to the status of title to the property. The indices that are examined should be set forth in the title opinion or as an exhibit to the opinion, and should include the following records, which should be searched back for at least the indicated time period, unless otherwise limited in the opinion:

Source	Minimum Search Period
General and/or Sectional Index or Subdivision Index	For residential, at least 32 years For non-residential, at least 50 years
State Tax Lien Registry	7 years
Construction Liens	1 year

Source	Minimum Search Period
Lis Pendens	Greater of 10 years or Period of Current Ownership
Federal Tax Liens	10 years
Federal Civil Judgments (if maintained by chancery clerk)	20 years
Circuit Court Judgment Roll	7.5 years
Tax Sale Books (if tax sale is noted in index being searched)	Greater of 10 years or Period of Current Ownership
Ad Valorem Taxes	3 years
Solid Waste or other Municipal Liens (if maintained by chancery clerk)	7.5 years

Comment:

Occasionally, an examiner may limit the examination to instruments in the chain of title that were recorded after the period covered by a prior title opinion that was submitted by the client and prepared by another attorney; in this instance, the examiner is well advised to make certain that the client understands that the client assumes the risk of any deficiencies in the prior opinion.

The documents that are available for examination may vary, but they should be sufficient for an examiner to be legally satisfied as to the status of title to the property. Disclosure of the documents examined is necessary to advise the client of the basis for the opinion and to protect an examiner from documents and matters not considered. The examining attorney is usually not responsible for identifying or gathering the documents to be examined but should assess the acceptability of the methods employed in doing so and should disclose any instance in which the methods employed are not generally considered to be the most reliable. The scope of an examiner's opinion may be limited. In an effort to control cost, it has become common practice for examinations to be limited to a search of the sectional index regardless whether the land is described by lot and block or metes and bounds. Under such circumstances, an examiner should carefully set forth the limited scope of the opinion.

The chancery clerk is required to maintain three general indices: one for deeds, one for deeds of trust and mortgages, and one for general substitutions of trustees. Miss. Code Ann. §§ 89-5-33(1), 89-5-29, 89-5-45. The chancery clerk is also required to maintain a sectional index to instruments describing land which are also entered in a general index. Miss. Code Ann. § 89-5-33(2).

All notices of state tax liens on real property and personal property, tangible and intangible, must be enrolled in the Mississippi Department of Revenue's Tax Lien Registry. Miss. Code Ann. § 85-11-1 et. seq.

All notices of federal liens on real property must be filed in the chancery clerk's office in the county where the real property is located. Miss. Code Ann. § 85-8-5.

The chancery clerk is required to maintain a certified duplicate of each map or plat made of any city, town, or village, or addition thereto. Miss. Code Ann. §§ 19-27-21 to 27.

Each chancery clerk is required to maintain, as a part of the land records of their county, a record entitled "Notice of Liens" wherein notices shall be filed and recorded. Miss. Code Ann. § 85-7-131 (oil and gas well construction); Miss. Code Ann. § 85-7-133; Miss. Code Ann § 85-7-401 (special [construction] liens on real estate); Miss. Code Ann § 85-7-405.

Although financing statements are generally filed in the Office of the Secretary of State, to perfect a security interest or agricultural lien in (i) as-extracted collateral or timber to be cut, or (ii) collateral that is or is to become a fixture, the financing statement must be filed of record in the chancery clerk's office. Miss. Code Ann. § 75-9-301 et seq.

A judgment constitutes a lien upon and binds all of a defendant's property once that judgment is enrolled. Miss. Code Ann. §§ 11-7-191, 11-7-197. The circuit clerk must enroll judgments within 20 days after the end of each term of the circuit court. Miss. Code Ann. § 11-7-189.

Although the tax collector is required to deliver a book of duplicate tax receipts for each prior year—which remains as a permanent record in the chancery clerk's office—the current year's receipts are maintained in the tax collector's office. Miss. Code Ann. § 27-41-43. Therefore, taxes and special assessments for the current year must be examined in the tax collector's office.

Caution:

While an examiner may limit their scope of examination of the official land records to the sectional index, the examiner should be aware that in the event of conflict between the general and the sectional indices, the notice imparted by the general index will prevail except to the extent the land is described by lot number for platted subdivisions, official surveys and unofficial subdivisions and surveys commonly in use, in which case the sectional index will prevail. Alamac LLC v. Travelers Bank & Trust, FSB, 941 So. 2d 219 (Miss. App. 2006). This exemplifies why it is important for examiners to expressly set forth in their title opinion or as an exhibit to the opinion which indices were examined and the periods of examination (e.g., my examination of the official public records was limited to the following indices for the periods shown).

The chancery clerk is required to maintain a general index of all chancery court causes and probate court causes which have been finally disposed of in the courts of the county. Miss. Code Ann. § 19-15-7. While the chancery index is not part of the official land records, a search of the chancery index may reveal matters involving incompetency, probate, minors, divorce, and eminent domain. If a gap in the chain of title occurs (i.e., an apparent missing conveyance or interest), then the chancery index should be searched in an effort to bridge the gap. If an estate proceeding is referenced in the chancery index, but a copy of the will is not included in the estate proceeding, then the will book maintained by the chancery clerk should be searched in an effort to find the will. Miss. Code Ann. § 9-5-137.

The filing of a bankruptcy petition stays the execution of a judgment lien and tolls the running of the seven-year statute of limitations applicable to the judgment lien. Trustmark Nat. Bank v. Pike County Nat. Bank, 716 So.2d 618 (Miss. 1998). The time between the filing of the bankruptcy petition and the end of the bankruptcy proceedings is not to be counted as part of the seven-year period in Miss. Code Ann. § 15-1-47. Id. Therefore, if the chain of title reveals a judgment lien and the examiner becomes aware of a bankruptcy filing since the date the judgment lien was filed but prior to the judgment lien becoming barred of record, then an investigation should be made to determine the whether the seven-year statute of limitations applicable to the judgment lien was tolled.

Source:

Citations in the Comment and Caution; Title Standards Board.

History:

Adopted effective as of August 1, 2019.

1.03 Consultation with Prior Examiner

When an examiner discovers a situation that creates a question regarding the status of title and an examiner has knowledge that another examiner has examined the title or is familiar with the situation in the context of other property, an examiner may, before preparing the opinion, make a reasonable effort to communicate with the other examiner if such communication is in the best interests of an examiner's client and does not violate the Mississippi Rules of Professional Conduct.

Comment:

Communication with the prior attorney is a discretionary matter. A prior examiner may not be readily available for consultation, or communication with the prior examiner may not be economically justified.

Caution:

A prior examiner may represent an adverse or potentially adverse party, possibly making such communication inappropriate.

Source:

Oklahoma Title Examination Standards, Std. 1.2; Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 2.2 (1960).

History:

Adopted effective as of August 1, 2019.

CHAPTER 2: MARKETABLE TITLE; USE OF THE RECORD

2.01 Marketable Title Defined

All title examinations should be based on the marketability of title. A marketable title is a record title that can be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence. To be marketable, a title need not be absolutely free from every possible suspicion. The mere possibility of a defect that has no probable basis does not result in an unmarketable title.

Comment:

Except as otherwise provided in these Standards, if a title examination reveals the need to rely on facts outside of the record, the examiner should record suitable evidence of those facts. An example would be facts that must be proven by parol evidence or by presumptions of fact that would probably, in the event of a suit, become genuine issues of fact. Whether the potential lawsuit would likely be won by the party with apparent record title is immaterial, because threat or probable likelihood of litigation renders the title unmarketable. On the other hand, a title need not be perfect to be marketable. A doubt about title must be a reasonable doubt and be serious enough to affect its value.

Usually, the buyer's attorney examines the title and identifies any title defects. If the examiner prepares a written opinion, any title defects should be listed. The opinion may also contain options to cure each noted defect and comments about the title that are intended to inform the buyer of any concerns about the title that do not affect marketability. Usually in response, the seller's attorney or other agent obtains the curative instruments or takes other necessary action to cure any title defects. Such curative efforts are usually submitted to the buyer's attorney for approval prior to closing. If a title defect cannot be cured prior to closing, the buyer must decide whether to accept the title as is or rescind the transaction.

Affidavits recorded in the official land records related to (a) the identification, marital status, heirship, relation, death, or time of death, of any person who is a party to any instrument affecting the title to real property, (b) the identification of any corporation or other legal entity which is a party to any instrument affecting the title to real property, or (c) typographical or other minor scrivener's errors in an instrument affecting the title to real property, constitute prima facie evidence of the facts stated therein and the marketability of title to real property. Miss. Code Ann. § 89-5-8. See also Standard 14.04 (Affidavit of scrivener's error).

The scope of an examiner's opinion may be limited. Under such circumstances, an examiner should carefully set forth the limited scope of the opinion.

Source:

Marketable title is defined as title "which can be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence." Jones v. Hickson, 37 So. 2d 625 (Miss. 1948); Union & Planters' Bank & Trust Co. v. Corley, 133 So. 232, 237 (Miss. 1931). See also Ferrara v. Walters, 919 So.2d 876, 883 (Miss. 2005)(finding that a break in the chain of title renders the title to the realty unmarketable); In re Will of Wilcher, 994 So.2d 170, 176 (Miss. 2008) (finding that a purchaser may choose to take title subject to any defect, and therefore, title is marketable if the purchaser is willing to accept it without further proof of heirship).

History:

Adopted effective as of August 1, 2019.

2.02 Period of Examination

A title examination covering, in the case of single-family one-to-four residential property, at least 32 years prior to the date of the examination, and in the case of non-residential property, at least 50 years prior to the date of the examination, is sufficient to determine marketability; provided that, the basis thereof is a warranty deed (general or special), one or more quitclaim deeds supported by reasonable proof that they convey full title, a grant from the state, a probate proceeding in which the property is reasonably identifiable, or any other instrument which shows of record reasonable probability of title and possession thereunder; provided further, that the period actually searched does not refer to or indicate prior instruments or defects in title, in which case such prior instruments or defects must also be examined, and that the period actually searched discloses instruments which confirm and carry forward the title to be established.

Comment:

Generally, an examiner's opinion will be based upon the entire chain of title. The chain of title is the successive conveyances, commencing with the severance of title from the sovereign down to and including the conveyance to the present holder. Note that severance from the sovereign occurs on the date of the survey of the property for severance purposes, not on the date of the patent, which always post-dates severance--sometimes by many years. However, over the years it has become customary for examiners in Mississippi to base their opinions upon a chain of title covering much shorter time periods depending on whether the property involved is used or to be used for residential (e.g., at least 32 years) or non-residential purposes (e.g., at least 50 years).

In applying this Standard, it is necessary to trace the record title back to a "root of title," which may be, and generally is, more than the 32 or 50 years back, as applicable. Any defects in the record title subsequent to the date of recording of the "root of title" must be considered by the examiner. Thus, in the case of a non-residential property, suppose the record shows a warranty deed from A to B in fee simple, recorded in 1939. The next instrument in the chain of record title is a conveyance of an easement across the land from B to X, recorded in 1941. The next instrument is a warranty deed from B to C in fee simple, recorded in 1979, in which the easement is not mentioned. In 2018, D who has contracted to purchase the land from C, employs an attorney to examine the title. The title examiner will have to go back to the deed of 1939 and will have to report that the record title is subject to the easement in favor of X created by the deed of 1941. In the case of a residential property, the warranty deed from B to C in fee simple, recorded in 1979, would serve as root of title. Thus, the title examiner would not have to report that the record title is subject to the easement in favor of X created by the deed of 1941, unless another instrument recorded after the root of title includes an express reference to the easement or the examiner otherwise becomes aware of the prior record easement.

If an examination begins with a prior opinion, the prior opinion should be clearly identified in the subsequent opinion and the time period by the subsequent opinion should be clearly set forth therein.

Caution:

If the mineral estate is being examined, then a full search (beginning with the original land patent coming forward to present) is required to determine who has record title to the mineral estate. See Standard 1.01 (Purpose of Title Examination).

As a result of the recording process, the effective date of the various indices examined may not coincide with the date the record examination is conducted. The period between the record effective date and the examination date or document filing date of a subsequent transaction is commonly referred to as the "gap period." This gap period varies by county and by indices within a county and in some instances this interim period may be substantial. When examining title and computing dates referred to in these Standards, the effect of the gap period must be taken into consideration. The oldest effective date of all record indices

examined should be reported as the effective date of the attorney's title certificate unless a report of the effective date of such record index is requested by the client or is of particular significance to the transaction upon which the record search will be relied.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

2.03 Correction Instruments

An examiner may rely on a correction instrument to establish, or as an aid to establishing, marketable title. However, a correction instrument materially altering the effect of a prior conveyance or another instrument that it purports to correct should be considered effective only if joined by all adversely affected parties.

Comment:

Because of the difficulty in determining the materiality of a correction, absent a judicial resolution, the examiner should exercise caution in relying on a correction instrument in which not all adversely affected persons have joined.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

2.04 Access

Every examination should include a determination as to whether the subject property has legal access to a public road, either by virtue of bordering a public street or by virtue of an easement, allowing ingress and egress to the subject property. The examiner's opinion should state whether or not an examination was performed with respect to title to an access easement.

Comment:

There are two "types" of access that must be considered: "legal access" and "actual, physical access". Legal access refers only to the legal right of access to and from the subject property. It does not guarantee any particular level or convenience of access, developable access or access for a particular purpose. Actual physical access, on the other hand, refers to actual vehicular and pedestrian access to and from the subject property based upon a legal right.

Access to a major thoroughfare, such as a state highway or federal interstate highway, controlled by the Department of Transportation, is generally limited to certain designated access points. State Highway Com'n of Mississippi v. McDonald's Corp., 509 So.2d 856, 861 (Miss. 1987)(citing Miss. Code Ann. §§ 65-5-7, -17; finding that there is no right of access to controlled access highway or frontage road to such highway, except that specifically granted by the Highway Department). However, on an ordinary street,

public road or minor highway an abutting landowner has a right of access by law, subject only to some reasonable control. Id.

An examiner is not required to verify actual physical access or access for utility services such as gas, electricity, water, sewer or cable television, unless specifically requested to do so by the client.

Due to the difficulty in determining legal access based solely on matters of record, most examiners will include in their opinion an exception for any and all matters that would be revealed by a complete and accurate survey of the land. Below is an example of such an exception:

> **Rights, interests or claims affecting the property which a complete and accurate survey would disclose, including, but not limited to, boundary line disputes, overlaps or encroachments, roadways, deficiency in quantity of land, changes in boundary lines caused by the location of any water body within or adjacent to the property or lack of access.**

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

2.05 Instruments by Strangers to the Chain of Title

An instrument executed by a person who is a stranger to the record chain of title, at the time such instrument is recorded, does not of itself make title unmarketable; however, such an instrument should give rise to additional investigation.

Comment:

The record shows that in 1950, a tract of land was conveyed by X to Y in fee simple. X is connected with a record chain of title running back to a grant from the state. A deed of the same tract from A to B, neither of whom appeared in the record chain of title, was recorded in 1955. The deed from A to B does not of itself make the title unmarketable. However, an investigation should be made to determine the reason for the stranger's deed.

A purchaser of property is not charged with constructive notice of the existence of a conveyance by a stranger in title. An abstractor is not required to search all of the records, in order to see whether or not some outsider, unknown to the records, has conveyed the property to some other person. He may safely assume the title to be in the party shown by the records. Morgan v. Mars, 43 So.2d 563 (Miss. 1949); See also, Turner v. Bell, 109 So. 794 (Miss. 1926) (any conveyance by the party not shown by the record to have title could not affect the title of the record owner); Hart v. Gardner, 33 So. 442, (Miss. 1903).

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

2.06 Age of Instruments

In determining whether to recommend that a corrective document be filed with respect to an instrument in the chain of title, the examiner should take into consideration, in addition to the other matters treated in these Standards, the period of time the instrument has been of record, applicable statutes of limitation, whether (subsequent to the recordation of the instrument in question) the property has been conveyed without (as far as the record title shows) correction or objection, and the practical feasibility of obtaining required signatures.

Comment:

This Standard conforms to the practice of Mississippi title examiners.

Caution:

Although this Standard conforms to title examination practice, no Mississippi cases are directly on point.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

CHAPTER 3: NAME VARIANCES

3.01 Idem Sonans

An examiner may presume that differently spelled names refer to the same person when the names sound alike or when their sounds cannot be distinguished easily or when common usage by corruption or abbreviation has made their pronunciation identical.

Comment:

This Standard expresses the common law rule of "idem sonans." If a name in a legal document is incorrectly spelled but, when commonly pronounced, conveys to the ear a sound practically identical to the correct name as commonly pronounced, then the name thus given can be accepted as sufficient identification.

Caution:

Special rules apply when the name is the name of a debtor in a document governed in part by the Uniform Commercial Code ("UCC"). The UCC provides that the law governing the perfection of security interests in fixtures, as-extracted collateral, and timber to be cut is the local law of the jurisdiction in which the fixtures or timber are located, and the local law of the jurisdiction in which the wellhead or minehead is located. See Miss. Code Ann. § 75-9-301 (3), (4). The office in which financing statements must be filed to perfect security interests in fixtures, as-extracted collateral, and timber to be cut is the office in which a mortgage on the related real property would be filed. Miss. Code Ann. § 75-9-501(a). In Mississippi, this office is the office of the chancery clerk of the county (and judicial district, when applicable) in which the land, timber or wellhead or minehead is located. Miss. Code Ann. § 89-5-1, 89-5-3. A mortgage can serve as a financing statement filing for fixtures, as-extracted collateral, and timber to be cut provided certain requirements are met. Miss. Code Ann. § 75-9-502 (b), (c). When the debtor in financing statement is an individual, the name of the debtor should be the same as the name on the individual's driver's license. Miss. Code Ann. § 75-9-503(a)(4). When the debtor is a corporation, limited liability company, limited partnership or other business entity, the organization's name is the name as shown on the records of the secretary of state of the state in which the debtor is organized. Miss. Code Ann. § 75-9-503(a)(1). A financing statement substantially satisfying these requirements is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading. Miss. Code Ann. § 75-9-506(a).
Source:

See generally Young v. State, 507 So.2d 48, 49 (Miss. 1987)(finding where names sound substantially alike, minor variances in their form are considered immaterial; "Lewis" and "Louis" are plainly idem sonans. Citing 65 C.J.S. Names § 14; State v. Murrary, 16 N.C.App. 638, 192 S.E.2d 688, 689 (1972)); Johnson v. State, 191 So. 127, 129 (Miss. 1939)(finding that "Mrs. C. C. Hammock" and "Mrs. M. E. Hammock" would appear to be different persons and the names do not come within the doctrine of idem sonans); May v. State, 76 So. 636, 636 (Miss. 1917)(finding that the words "Bowles" and "Bowels" are not idem sonans; noting the different positions of the letter "l" in the two words make two entirely different words); Wanzer v. Barker, 5 Miss. 363, 369 (Miss. App 1840)(finding that whether the name is spelt Wanser or Wanzer makes no difference).

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

3.02 Middle Names Or Initials

Unless otherwise put on inquiry, an examiner may presume that the use of a middle name or initial in one instrument and its nonuse in another instrument does not raise an issue of identity that affects title.

Comment:

Similarity of names is ordinarily sufficient identity in the chain of title. In the absence of evidence casting doubt upon the identity of a party to a conveyance, such similarity is controlling in nearly every instance.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

3.03 Abbreviations

An examiner may presume that any customary and generally accepted abbreviation of a first or middle name is the equivalent of the full name.

Comment:

A commonly known diminutive or abbreviation is sufficient to identify a person in the absence of evidence indicating that a different person was intended.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

3.04 Recitals of Identity

An examiner may rely upon a recital of identity, such as “also known as” (“a/k/a”) or “formerly known as (“f/k/a”) contained in a conveyance executed by the party whose identity is recited, unless the examiner has a reasonable basis for questioning the recital.

If title is held in a name that appears to be a business name, an examiner may rely on a recital of identity that incorporates the words “doing business as” (“dba”) or similar words (e.g., “John Smith, dba Smith Auto Sales), unless the form of name or other facts appearing from the materials examined raise a contrary inference.

Comment:

An examiner often encounters conveyances in which the grantor's name is not the same as that of the record owner, but which recite the identity between the two. Frequent examples include instruments using words such as "also known as" ("aka") ("Robert T. Jones, Jr., aka Bobby Jones"); "formerly" or "formerly known as" ("fka") ("Mary Smith, formerly Mary Jones"); and "nee," which means "born as" ("Mary Lincoln, nee Todd"). Even though these instruments are usually executed only by the person whose identity is recited and might technically be regarded as self-serving, such recitals are, practically universally, accepted as fact to complete the chain of title.

Caution:

On occasion, an examiner may be presented with names which, although recited to be alternative names of the same person, are entirely dissimilar. Under such circumstances, the examiner should bear in mind the presumption that names that are not the same refer to different persons. Unless the instrument recites some further explanation or qualifies as an ancient document (see Comment to Standard 13.40), or supporting facts otherwise appear in the record, an examiner should require further inquiry.

The name of a business entity may raise an inference contrary to a recital of identity. For example, appellations such as "Inc." or "Corporation," ordinarily denoting a particular form of organization, would contradict a recital that the entity is an individual, or a different kind of entity, doing business under the corporate name. If a business entity's name tends to contradict a recital of identity, a requirement of further investigation and proof of identity is warranted. Other examples of words and abbreviations that connote a particular kind of entity are "L.L.C.," "L.C.," or "Ltd. Co." for a limited liability company, "Ltd." or "L.P." for a limited partnership; and "L.L.P." for a limited liability partnership. On the other hand, the word "Company" or "Co." in the name of a business entity is widely used in many different forms of business and should not be regarded as signifying any particular one.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

3.05 Suffixes

Although identity of a name raises a presumption of identity of a person, an examiner should take note of the addition of a suffix, such as "Jr." or "II," to the name of a subsequent grantor because such a suffix may rebut the presumption of identity with the prior grantee.

Comment:

Ordinarily, a suffix is not considered a part of the name. Thus, where the grantee in one instrument is "John Doe, M.D." and the grantor in the next instrument is merely "John Doe," it would be presumed that they are the same person. However, if the grantee in one instrument is "John Doe, Sr." and the grantor in the next instrument is "John Doe, Jr.," the presumption that they are the same person would be rebutted. Or, if the grantee in one instrument is "John Doe," and in another instrument, the grantor is "John Doe, Jr.," the presumption of identity may be rebutted.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

3.06 Variances in Name of Spouse

If a grantee spouse in one instrument of conveyance is identified only by a title and last name (e.g., "John Smith and Mrs. John Smith, grantees") and such spouse is apparently identified in a succeeding instrument in the chain of title by both a given and last name (e.g., "John Smith and Mary Smith, grantors"), an examiner should require further evidence showing that such spouse (e.g., Mrs. John Smith) in the first instrument is the same person as the spouse (e.g., Mary Smith) in the second instrument. The same requirement should be made if these succeeding forms of identification are reversed (e.g., the grantees in the first instrument are "John Smith and Mary Smith" and the grantors in a succeeding instrument in the chain of title are "John Smith and Mrs. John Smith").

Comment:

This Standard conforms to the practice of Mississippi title examiners.

Caution:

Although this Standard conforms to title examination practice, no Mississippi cases are directly on point.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

3.07 Variances in Indication of Sex

If a recorded instrument contains one or more personal pronouns indicating that a person named therein is of a certain sex, and a subsequent instrument in the chain of title contains one or more personal pronouns indicating that such person is of a different sex, such variances do not make the title unmarketable.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

3.08 Variances in the Name of Corporations, Partnerships and Limited Liability Companies

Although their exact names are not used and variations exist from instrument to instrument, an examiner may presume that a corporation, partnership, or limited liability company is satisfactorily identified if, from the name(s) used and other circumstances of record, the identity of the corporation, partnership, or limited liability company can be inferred with reasonable certainty. Variances that an examiner may ordinarily ignore include the addition or omission of the word "the" preceding the name; the use or non-use of the symbol "&" for the word "and"; the use or non-use of abbreviations for "company," "limited," "corporation," "incorporated," "limited liability company," "partnership," and the like; and the inclusion or omission of all or part of a place or a location. An examiner may exercise a greater degree of liberality with a greater lapse of time and in the absence of circumstances appearing of record that raise reasonable doubt as to the identity of the corporation. An examiner may rely on affidavits and recitals of identity to obviate variances too substantial or too significant to be ignored. Good practice dictates that any such affidavit relied upon be recorded to assist future examiners.

Comment:

This Standard has been adopted to assist attorneys in dealing with the problem of name variances as to recorded instruments. It is recommended that greater care be exhibited in the use of the exact and correct name of the corporation or partnership in the preparation of instruments to be recorded so as to eliminate the necessity for this Standard as to such instruments.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

3.09 Name Changes

Where a person's surname is changed, such as through marriage, divorce or other legal proceedings, after the person has acquired title, and the person then conveys in the former name with the new surname added, such a recital is sufficient. A better practice, however, is to set out the new name and recite formerly known as the prior name. If the person's new name does not include the old one, a recitation of the new name formerly known as the old name is sufficient.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

3.10 Correct Name of Grantee

If the given name of a grantee is changed in a subsequent instrument from the original grantor expressly purporting to correct an error in the given name in the original instrument, such a recital may be relied upon unless the corrected name is distinctly dissimilar to the original or where special circumstances put the examiner on inquiry.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

CHAPTER 4: EXECUTION, ACKNOWLEDGMENT, AND RECORDATION

4.01 Omissions and Inconsistencies

The omission of the date of execution from an instrument affecting title does not, in itself, impair marketability. An examiner may presume that an undated instrument has been timely executed if the dates of acknowledgment and recordation, and other circumstances of record, support the presumption.

Inconsistencies in recitals or dates (such as among dates of execution, attestation, acknowledgment, or recordation) do not, in themselves, impair marketability, and an examiner may presume that a proper sequence of formalities occurred.

Comment:

An acknowledgment will not necessarily be deemed fatal for an omission which can be supplied from the body of the instrument itself. White v. Delta Foundation, Inc., 481 So.2d 329, 333–34 (Miss. 1985)(citing 1 Am. Jur. 2d Acknowledgments, § 43, and cases cited thereunder). Notwithstanding the failure to strictly follow form, an acknowledgment that contains all the necessary information should not be held fatal. Estate of Dykes v. Estate of Williams, 864 So.2d 926, 931 (Miss. 2003).

Caution:

In a foreclosure proceeding there must be a strict adherence to the statutory procedures and the legal requirements imposed by the deed of trust. It is not a voluntary act of all parties involved in the transaction. It is not a private transaction, but a public one, in which any person interested is invited to participate. Therefore, with respect to instruments involved in a foreclosure, caution should be taken to ensure that the provisions of a deed of trust as to the manner and form of the execution of the instrument by which the substitution of trustee is made must be strictly complied with. White v. Delta Foundation, Inc., 481 So.2d 329, 334 (Miss. 1985)(citing Federal Land Bank v. Collom, 28 So.2d 126, 127-128 (1946)).

Where there is conflicting language found in the granting clause and the descriptive or recital clause, the granting clause controls. McDonald v. Mississippi Power Co., 732 So.2d 893, 898 (Miss. 1999). For a discussion of the three-tiered process of construction of a deed, see Pursue Energy Corp. v. Perkins, 558 So.2d 349, 352 (Miss. 1990).

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

4.02 Defective Acknowledgments

An examiner should not require corrective action if an otherwise valid instrument of record contains an acknowledgment which is defective or void.

Comment:

Effective July 1, 2011, where an instrument contains a defective or void acknowledgment, but is nevertheless recorded in the official land records, the instrument so acknowledged shall impart constructive notice of the contents thereof to all persons. Miss. Code Ann. § 89-3-1(2).

Under Miss. Code Ann. § 89-5-13 instruments that have been of record for 7 years or more with defective acknowledgments are presumed to have been validly acknowledged without regard to the form of the certificate of acknowledgment. Further, instruments that have been of record for 10 years or more without acknowledgments are presumed to have been validly acknowledged. However, this statute does not create a presumption that the signature on the instrument was authorized. Goodwin v. McMurphy, 435 So. 2d 639 (Miss. 1983).

Caution:

If the relative priorities of conflicting claims to real property were established before July 1, 2011, then the law applicable to those claims at the time those claims were established shall determine their priority. Miss. Code Ann. § 89-3-1(3).

Miss. Code Ann. 89–5–13 is a curative statute for documents containing a defective acknowledgment and "otherwise has no bearing on a deed's validity." Morrow v. Morrow, 129 So.3d 142, 146 (Miss. 2013).

Source:

Citations in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

4.03 Delivery; Effective Date; Delay in Recordation

An examiner may presume the delivery of instruments acknowledged and recorded. Delay in recordation, without evidence of the intervening death of the grantor, does not rebut the presumption or create an unmarketable title; however, delay in recordation with evidence of the intervening death of the grantor does rebut the presumption and does create an unmarketable title, unless the instrument states on its face that the grantor "delivered" the instrument at the time of execution.

Comment:

Delivery and acceptance are essential to a deed's validity. In re Estate of Hardy, 910 So.2d 1052, 1054 (2005). For a deed to be valid in Mississippi, the grantor must deliver it to the grantee. Estate of Dykes v. Estate of Williams, 864 So.2d 926, 930 (Miss. 2003) (citing Martin v. Adams, 216 Miss. 270, 62 So.2d 328, 329 (1953)). To show that the delivery is valid, there must be (1) "a complete and unequivocal delivery of the deed" and (2) "an actual intent by the grantor to deliver the deed," shown by the words and acts of the grantor and the context of the transaction. Id. (citing Benton v. Harkins, 800 So.2d 1186, 1187 (Miss. Ct. App. 2001)). However, the recording of a deed creates the rebuttable presumption that it was delivered. Id. (citing In re Estate of Hardy, 805 So.2d 515, 518 (Miss.2002); McMillan v. Gibson, 222 Miss. 408, 76 So.2d 239, 240 (1954)). This presumption is rebutted once it is shown that there was no delivery. Id. at 930.

An examiner will usually limit the scope of his examination to the record only. However, an examiner may choose to make an inquiry outside of the record if requested by the client. See Standard 1.02.

An effective date other than the execution date or acknowledgment date does not impair marketability. Unless otherwise stated in the instrument, the examiner may presume the effective date of the instrument to be the date of the recording. Regardless of the effective date, execution date, or acknowledgement date – a deed is not effective to transfer title unless and until it is delivered to the grantee. Morrow v. Morrow, 129 So.3d 142, 146 (Miss. 2013)(citing In re Estate of Hardy, 910 So.2d 1052, 1054 (Miss. 2005)). Before delivery, a deed is without force or effect and is merely a "scroll under control of the grantor who is free to withdraw it, destroy it, or complete its execution by delivery." Id. The recording of a deed raises a presumption of its delivery. Id. (citing In re Estate of Hardy, 910 So.2d at 1054).

Miss. Administrative Code 35-VI-3.05 provides that there are two dates that must be considered in determining the eligible ownership for homestead exemption purposes – the date of acknowledgment and the recording date. The date that one becomes the owner of property is the date of acknowledgment of the instrument by which one acquires the title. The acknowledgment date must be no later than January 1 of the year in which he files the application. Unless property is owned by that date there is no legal liability for taxes. The instrument by which title is held must be filed for record with the Chancery Clerk with the county in which the property is located on or before January 7 of the year for which homestead exemption is sought.

An acknowledgment will not necessarily be deemed fatal for an omission which can be supplied from the body of the instrument itself. White v. Delta Foundation, Inc., 481 So.2d 329, 333–34 (Miss. 1985)(citing 1 Am. Jur. 2d Acknowledgments, § 43, and cases cited thereunder).

Caution:

If a grantor retains a deed and keeps it in his possession and control until his death and there is no indication that he intended to deliver the deed, it is void for want of delivery. Id. (citing Grubbs v. Everett, 111 So.2d 923, 924 (1959) (Chancellor did not err in finding that, where grantor did not intend for a deed to be delivered until after her death, the deed never became operative because there was no delivery)). The intent to deliver a deed must be mutual with the intent to accept the deed in order for delivery and acceptance to be complete. Id. Therefore, a deed recorded after the death of the grantor which does not appear to reflect an arm's length sale transaction should not be entitled to the presumption and necessitates inquiry. Morrow v. Morrow, 129 So.3d 142, 146–47 (Miss. 2013) (citing Grubbs v. Everett, 111 So.2d 923, 923–24 (1959) (finding that a deed never became operative where the purported grantor did not intend for the deed to be delivered until after her death).

Source:

Citations in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

4.04 Race-Notice Recording System

Unless otherwise put on inquiry, an examiner may presume that the date and time of filing will determine the priority of all conveyances of the same land as between the several holders of such conveyances.

Comment:

Mississippi is a race-notice jurisdiction. Miss. Code Ann. § 89–5–1 (Conveyances of land; recording); Lott v. Saulters, 133 So.3d 794, 798 (Miss. 2014). See also Miss. Code Ann. § 89-5-5 (Priority of instruments). Under the "race-notice" statute, a grantee has a superior claim to the land when he takes a

deed without notice of a prior competing deed and then records that deed first; however, "a grantee of land takes the land subject to a prior unrecorded deed from his grantor of which he has actual notice." Id. (citing Breeden v. Tucker, 533 So.2d 1108, 1110 (Miss. 1988).

Caution:

Subrogation is an equitable doctrine whereby a court may circumvent the race-notice principles and substitute a later-filed lien into the primary lien holder position on a tract of real property, such that the substitute creditor "succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities." Community Trust Bank of Mississippi v. First Nat. Bank of Clarksdale, 150 So.3d 683, 687 (Miss. 2014) (citing First Nat'l Bank of Jackson v. Huff, 441 So.2d 1317, 1319 (Miss. 1983)).

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

4.05 Constructive Notice

An examiner should examine all instruments within the record chain of title beginning with matters which have been of record for at least the minimum applicable search period and continuing through the date and time of the examination, including, if available for inspection, instruments that have been recently filed for record but not yet indexed.

Comment:

Instruments filed for record within the chain of title impart constructive notice. Constructive notice is notice imputed as a matter of law as a result of an instrument having been filed for record.

A prospective purchaser of real property in Mississippi is charged with constructive notice of every statement of fact contained in the various conveyances constituting the chain of title. Wicker v. Harvey, 937 So.2d 983, 992 (Miss. App. 2006) (citing Bedford v. Kravis, 622 So.2d 291, 295 (Miss. 1993)).

See Standard 2.02. Period of Examination.

Caution:

In certain counties, there may be a delay between the time an instrument is accepted for filing and the time the instrument is actually indexed by the clerk's office. Unfortunately, the recording delay varies from county to county and may be only a day or two or as long as a week or more.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

4.06 Recitals in Instruments in Chain of Title

An examiner should advise the client of outstanding encumbrances and other matters that may affect the title and may be disclosed by recitals in instruments appearing in the chain of title during the applicable search period.

Comment:

A purchaser of land is charged with notice not only of every statement of fact made in the various conveyances constituting his chain of title, but he is also bound to take notice of and to fully explore and investigate all facts to which his attention may be directed by recitals contained in said conveyance. Harrell v. Lamar Co., LLC, 925 So.2d 870, 876 (Miss. App. 2005) (citing Bedford v. Kravis, 622 So. 2d 291, 295 (Miss.1993); Dead River Fishing & Hunting Club v. Stovall, 113 So. 336, 337–38 (1927)); Credit Lyonnais New York Branch v. Koval, 745 So.2d 837, 842 (Miss. 1999). If any such deed or conveyance contains a recital sufficient to put a reasonably prudent man on inquiry as to the sufficiency of the title, then he is charged with notice of all facts that would be disclosed by a diligent and careful investigation. Id.

Caution:

A duty is imposed to examine all deeds and conveyances previously executed and placed of record – either immediate or remote – if such deeds or conveyances in any way affect the title. Harrell v. Lamar Co., LLC, 925 So.2d 870, 876 (Miss. App. 2005). If an examiner limits the scope of examination as provided in Standard 1.02 (Review by Examiner), such limited scope should be expressly stated in the title certificate.
Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

4.07 Duty of Inquiry – Based on Actual Notice

The examiner should advise the client of matters affecting the title that are within the examiner's current actual knowledge even though not revealed by the record, including unfiled instruments and facts known to the examiner that would impart either actual or inquiry notice of matters affecting title.

Comment:

When one has actual knowledge of such facts as would put a man on inquiry, it becomes his duty to make inquiry. Spearman v. Hussey, 50 So.2d 610, 615 (Miss. 1951); Bank of Lexington v. Cooper, 76 So. 659, 661 (Miss. 1917). Any notice sufficient to incite a party to inquiry is equivalent in law to notice of those further relevant facts which such inquiry, if pursued with reasonable diligence, would have disclosed. Buckley v. Garner, 935 So.2d 1030, 1033 (Miss. App. 2005); Stevens v. Hill, 236 So.2d 430, 434 (Miss. 1970).

A purchaser is charged with notice (a) of information appearing of record (constructive notice), (b) of information within the purchaser's knowledge (actual notice), and (c) of information that the purchaser would have learned arising from circumstances that would prompt a good-faith purchaser to make a diligent inquiry (inquiry notice).

While constructive notice serves as notice as a matter of law, actual notice is notice as a matter of fact. Inquiry notice results as a matter of law from facts that would prompt a reasonable person to inquire about the possible existence of an interest in property.

Caution:

The duty to advise of matters not of public record must be tempered by an attorney's ethical duty to preserve confidential information of another current client (Miss. Rule of Prof. Conduct 1.6) or former client (Miss. R. of Prof. Conduct 1.9). Knowledge of such matter may pose a conflict of interest requiring the attorney to withdraw from the title matter.

In Borries v. Goshen Mortgage, LLC, 219 So.3d 593 (Miss. App. 2017), the court held that a recorded instrument failed to impart constructive notice because one of its essential terms was missing (lack of a named beneficiary), but found that the buyer would still be bound by her actual knowledge of the instrument if it appeared in a search of the real property records.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

4.08 Qualification as Bona Fide Purchaser

An examiner cannot determine whether any party in the chain of title is a bona fide purchaser. Accordingly, an examiner should not assume that an interest in the chain of title has been extinguished solely because a person is a bona fide purchaser.

Comment:

A person claiming to be a bona fide purchaser for value without notice must prove (a) that he gave valuable consideration, (b) the presence of good faith, and (c) absence of notice of the adverse interest. In re Estate of Wheeler, 958 So.2d 1266, 1271–72 (Miss. App. 2007).

A quitclaim deed in a chain of title does not deprive the person who claims under it of the character of a bona fide purchaser. There is no distinction between a quitclaim and a warranty deed, as affecting a holder with notice or putting him on inquiry. Chapman v. Sims, 53 Miss. 154 (Miss. 1876); See also Hurst v. J.M. Griffin & Sons, 47 So.2d 811, 812, 209 Miss. 381, 390 (Miss. 1950)(recognizing that a quitclaim deed 'can … be relied on as color of title.'). A conveyance without any warranty shall operate to transfer the title and possession of the grantor as a quitclaim and release. Miss. Code Ann. § 89-1-37.

Source:

Citations in the Comment. See also Miss. Code Ann. § 89-5-1 to -5.

History:

Adopted effective as of August 1, 2019.

4.09 Electronic Filing and Recordation

If an instrument has been filed of record electronically, an examiner may presume that any additional requirements for electronic filing of instruments (beyond those required for recordation of paper instruments) have been met unless the examiner has actual knowledge to the contrary.

Comment:

Electronic filing of instruments in the real property records is governed by (1) the Uniform Electronic Transactions Act (Miss. Code Ann. § 75-12-1 et seq.) (UETA), (2) the Uniform Real Property Electronic Recording Act (Miss. Code Ann. § 89-5-101 et seq.) (URPERA), and (3) standards promulgated by the Mississippi Electronic Recording Commission (Miss. Admin. Code 36-201:1.1 et seq.; Miss. Code Ann. 89-5-109). The federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001 et seq.) (E-SIGN) has been largely modified, limited, and superseded by Mississippi law. Miss. Code Ann. § 89-5-113.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

CHAPTER 5: LAND DESCRIPTIONS

5.01 Land Descriptions Generally

Although an examiner does not determine actual boundaries on the ground, an examiner should determine whether each land description in the chain of title is sufficient to identify the land under examination.

Comment:

An examiner is not responsible for identifying a boundary defect, such as an encroachment or a survey conflict or error, that is not apparent from the instruments examined unless the examiner has other notice of the defect. Moreover, not all boundary defects are apparent from the record.

It is a cardinal rule in the construction of deeds that a deed will not be held void for uncertainty of description if by any reasonable construction it can be upheld. McLendon v. Ravesies, 173 So. 303 (Miss. 1937). In determining the legal sufficiency of a description, an examiner may presume that errors, irregularities, deficiencies, and inconsistencies in a land description in the chain of title are not material unless, under the circumstances, a substantial uncertainty exists as to the identity of the land or the description fails to satisfy the minimal requirements essential to an effective conveyance. When examining a marginally sufficient or questionable land description, the examiner should consider all relevant factors, including the lapse of time, subsequent conveyances, the manifest or typographical nature of an error or omission, and accepted rules of construction.

Where land is described by township, range and section, so that it may be located with absolute certainty, it is of no importance whatsoever to the validity of the conveyance that the lands or a portion thereof are recited as lying in an incorrect county. Holliman v. Charles L. Cherry & Associates, Inc., 569 So. 2d 1139 (Miss. 1990) (citing Morrison v. Casey, 34 So. 145 (Miss. 1903)).

While any title is only as good as the weakest link in the chain of descriptions, practical considerations justify reliance upon corrections or improved land descriptions appearing in later conveyances and upon the passage of time if no apparent difficulties have arisen from a less than perfect land description.

A person buying property is not called upon to investigate the title of lands other than that embraced in his deed or in the transaction which he is making, if that title is clear and free upon the record. Clark v. Dorsett, 128 So. 79 (Miss. 1930). A loss from an incorrect description falls on the party who neglected to see that its description was proper if a third party acquires rights with reference to the property ignorant of the mistake. Id.

Where elements of the description conflict or where the calls do not close, the examiner may utilize rules of construction to construe descriptive calls that are conflicting or ambiguous. When evaluating metes and bounds legal descriptions the “priority of calls” or “rules of dignity of calls” moves in the following priority hierarchy from most to least important:

1. Natural monuments (rivers, lakes, streams, trees, etc.).
2. Artificial monuments (fences, walls, houses, streets, ditches, etc.).
3. Courses (bearings).
4. Distances.

5. Acreage.

Natural monuments include rivers, lakes, streams, or trees; artificial monuments include such landmarks as fences, walls, houses, streets, or ditches. Moran v. Sims, 873 So.2d 1067, 1070 (Miss. App. 2004).

In case of conflict between a monument and a call for courses or distances, courses and distances are controlled by, and must yield to, monuments whether natural or artificial. Ball v. The City of Louisville, 56 So.2d 4, 5 (1952); Holcomb v. McClure, 52 So.2d 922, 924 (1951)(holding that when monuments and distances are both given the monuments control and the distances must be lengthened or shortened if necessary to prevent inconsistency).

In case of conflict between monuments, when a lot is in a platted subdivision, the plat will control over an erroneous monument. O'Herrin v. Brooks, 67 Miss. 266, 6 So. 844 (1889)(holding that the call for the lot itself must prevail over any description, by courses, distances and over any calls for monuments because the lot itself is the prominent object). See however, Duane v. Saltaformaggio, 455 So.2d 753, 758 (Miss.,1984)(holding that in rare instances courses and distances should prevail over monuments if the monuments are incorrectly located and conflict with other primary subdivision markers).

The canons of construction for deeds make specific boundaries control over acreage and fractions of property." Harrison v. Roberts, 989 So.2d 930, 932 (Miss. App. 2008)(citing Estate of DeLoach v. DeLoach, 873 So.2d 146, 153 (¶ 26) (Miss.Ct.App.2004)).

Boundaries may be established by means other than through the calls recited in the instrument, including by express agreement, by the passage of time, or by the action or acquiescence of the parties.

Where a monument is a stream, street or highway, the conveyance extends to and passes the title of grantor to the center thereof. Reynolds v. Refuge Planting Co., 97 So.2d 101, 103 (Miss. 1957).

Caution:

A defective description is one of the most frequent causes of title failure. In general, courts construe land descriptions objectively, i.e., how the land was described in the instrument, and not subjectively, i.e., what the parties intended to describe in the instrument but did not. Thus, ordinarily, if the land description is unambiguous, the parties' subjective intent not expressed in the instrument is of no consequence. Accordingly, the examiner should ascertain that the description in the instruments involved in a chain of title sufficiently describes the land so that it can be identified and located on the ground with reasonable certainty. If extrinsic evidence is necessary to determine the boundaries, then the descriptive words in the deed, or deeds, must furnish a basis or guide for its admission.

An examiner should be aware that it is not always easy to distinguish global or blanket descriptions, which are broadly construed, from Mother Hubbard or cover-all clauses that apply only to small strips of land.

Source:

Citations in the Comment. See also, Jack H. Ewing, "Mississippi Land Descriptions," XVIII Miss. L.J. 381 (1947).

History:

Adopted effective as of August 1, 2019.

5.02 When Defective Descriptions do not Impair Marketability

Errors, irregularities, and deficiencies in property descriptions in the chain of title do not impair marketability unless, after all circumstances of record are taken into account, a substantial uncertainty exists as to the land which was conveyed or intended to be conveyed, or the description falls beneath the minimum requirements of sufficiency and definiteness which is essential to an effective conveyance. Lapse of time, subsequent conveyances, the manifest or typographical nature of errors or omissions, accepted rules of construction, and other considerations should be relied upon to approve marginally sufficient or questionable descriptions.

Comment:

While not required, it is good practice to state the source of title as part of the legal description by using a "derivation clause". A suggested form for this statement would be as follows:

> Being all of the property obtained by Grantor herein under [Warranty] Deed dated _____, and filed for record on _____ in the office of the Chancery Clerk of _____ County, Mississippi, in Book _____, Page _____.

Where an instrument attempts to incorporate both a complete description of the property and a derivation clause referring to another instrument wherein the property is properly described, and the attempted complete description is indefinite, then the attempted complete description will be disregarded and the reference description will pass title to the land described in the instrument referred to. Leake v. Caffey, 19 So. 716 (Miss. 1896)(finding that an imperfect description in a deed is cured by reference to another deed, in which the property is correctly described).

While not required, it is also good practice to record, where possible, all surveys which are used to describe the property so that further inquiry can be made. If this is not possible for whatever reason, it is highly desirable that the description refer to the plat as fully as possible. For example:

> Lot 5, Block A, Blackacre Subdivision, Property of Tom Smith, Blank City, Any County, Mississippi as prepared by John Doe on _____ (date) which is unrecorded.

Discrepancies between a current survey and the record description whereby perimeter distances reflected by the survey are less than the recorded description do not customarily require any curative steps, provided that all lines are within the bounds of the prior legal description. The new description in accordance with the current survey should contain a reference to the source of title, as suggested above, along with a proper reference to the new survey, which should be recorded either as an exhibit to the deed of conveyance or as an independently recorded plat in the plat book.

Discrepancies between a current survey and the record description whereby the survey reflects the lengths of one or more perimeter descriptions to be greater than the recorded counterpart, where the extremities of the boundary are not marked by existing monuments, should be addressed. One option is to obtain a properly executed boundary line agreement(s) with the adjoining neighbor(s) whose property(ies) might be affected by the increased measurement(s). The boundary line agreement should contain the current survey as an exhibit or the survey should be recorded in the plat book and an appropriate reference to it should be made in the boundary line agreement. Alternatively, a corrective deed into the present owner may be sufficient to cure this matter, depending upon the particular facts.

Source:

Citations in the Comment; Title Standards Board.

History:

Adopted effective as of August 1, 2019.

5.03 Water Boundaries

Although an examiner does not determine actual water boundaries on the ground or the character of waters, an examiner should be aware of the following general principles governing riparian and littoral boundaries along tidelands, lakes, and streams.

Riparian and littoral boundaries are governed by both common law and statutory rights.

The boundary of a tract bounded by a non-navigable stream is generally located at the thread or thalweg of the stream.

Title to tidelands and navigable waters, together with the beds and lands underneath the same, is in the State.

Title to the bed of non-navigable streams is determined by the common law.

Comment:

Littoral rights are the rights of landowners whose land is abutting an ocean, sea or lake, while riparian rights are the rights of landowners whose land abuts a river or stream. Bayview Land, Ltd. v. State ex rel. Clark, 950 So.2d 966, 988 (Miss. 2006)(citing Stewart v. Hoover, 815 So.2d 1157, 1163 (Miss. 2002). "Littoral rights are usually concerned with the use and enjoyment of the shore." Id. However, littoral rights are not property rights per se, but are merely revocable licenses or privileges. Id. (citing Columbia Land Dev., LLC v. Sec'y of State, 868 So.2d 1006, 1012 (Miss. 2004); Stewart, 815 So.2d at 1163; Miss. State Highway Comm'n v. Gilich, 609 So.2d 367, 375 (Miss. 1992). "Littoral and riparian property owners have common law and statutory rights under the Coastal Wetlands Protection Law which extend into the waters and beyond the low tide line, and the state's responsibilities as trustee extends to such owners as well as to the other members of the public." Miss. Code Ann. § 29–15–5. These rights are rights to reasonable use, subject to the State's interest in the lands. State ex rel. Rice v. Stewart, 184 So. 44, 50 (Miss. 1938) (citing Money v. Wood, 118 So. 357, 359 (Miss. 1928)).

Before Mississippi entered statehood in 1817, title to the tidelands and navigable waters within its boundaries had been held by the United States. Bayview Land, Ltd. v. State ex rel. Clark, 950 So.2d 966, 970 (Miss. 2006)(citing Secretary of State v. Wiesenberg, 633 So.2d 983, 987 (Miss.1994). Upon Mississippi's entering the Union in 1817, title to those tidelands and navigable waters "was conveyed to Mississippi in trust and became immediately vested, subject to that trust." Id. (citing Phillips Petroleum Co. v. Miss., 484 U.S. 469, 476 (1988)("[W]e reaffirm our longstanding precedents which hold that the States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide.").

The law in Mississippi, as to boundaries on freshwater streams above the ebb and flow of the tides, is that, regardless of the size or navigability, the owners of abutting land own to the thread or thalweg of the stream. Cox v. F-S Prestress, Inc., 797 So.2d 839 (Miss. 2001)(citing Wilson v. St. Regis Pulp & Paper Corp., 240 So.2d 137, 139 (Miss. 1970)). When a stream is a boundary between properties, the boundary shifts with the gradual vagaries and changes in the stream, but if there is a sudden or avulsive change in its course, the boundary remains fixed to the location of the stream prior to the avulsion. Id. (citing Robinson v. Humble Oil & Refining Co., 176 So.2d 307, 316–17 (Miss. 1965)).

Navigable streams are in effect public property, but a non-navigable stream belongs to the owner of lands through which it flows. Ryals v. Pigott, 580 So.2d 1140 (Miss. 1990).

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

5.04 Roads

Although an examiner does not determine actual land boundaries on the ground, an examiner should consider the possible application of the "centerline" doctrine. Where applicable, the doctrine generally provides as follows: Unless the instrument expresses a contrary intent, in a conveyance where a road is a boundary of a tract, the conveyance of the tract presumptively conveys the grantor's title to the center of the road.

Comment:

This Standard applies the centerline doctrine in the context of roads. For purposes of this Standard, "road" includes highways, streets, alleys, railroad rights-of-way, and other types of roads. See Moore v. Kuljis, 207 So.2d 604, 611 (Miss. 1967)("The rule that the description runs to the center of the adjoining street is a rule of conveyance, not a mere presumption rebuttable by parol evidence of grantor's intent. The fee under an adjacent street can easily be excluded by express words so stating."); New Orleans & N. E. R. R. v. Morrison, 203 Miss. 791 (Miss. 1948)(finding generally that conveyances of land bordering on a railroad easement of right of way carry title in fee to the center line of the easement as to subsurface minerals, and reversionary rights to the surface); Jones v. New Orleans & Northeastern R. Co., 59 So.2d 541, 545, 214 Miss. 804, 817-18 (Miss. 1952)(citing 6 Thompson, Real Property, 1940, Sec. 3396, pages 606-607: "intent to convey to the middle line of the highway arises from the presumption that the adjoining owners originally furnished the land for a right of way in equal proportions; and from the further presumption that such owner, in selling land bounded upon the highway, intended to sell to the center line of the street, and not to retain a narrow strip which could hardly be of use or value except to the owner of the adjoining land".); R & S Development, Inc. v. Wilson, 534 So.2d 1008, 1011 (Miss. 1988)(recognizing that upon abandonment of an alley for non-use, title to the alley reverted to the adjoining landowners, who took, consistent with the recognized rule of conveyance, to the center line of the alley).

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

5.05 Easements

An examiner should identify and note as an encumbrance all easements of record that may affect the title under examination.

Comment:

Unrecorded easements may encumber the property under examination. The existence of such easements can only be determined by a physical inspection of the property. An examiner typically does not conduct an on-the-ground inspection of the property. If a physical inspection of the property is conducted to determine the existence or location of easements, the client typically arranges it.

An examiner may be retained to examine easement title. In this circumstance, the examiner should ascertain what information the client needs and conduct the examination accordingly.

Where an easement is negotiated for the purpose of "ingress and egress" to a tract on which a home is to be built, then the easement includes "ingress and egress for other necessities" such as water, sewer, gas, cable, telephone, and other subsurface utility systems absent evidence of intent to the contrary. Bivens v. Mobley, 724 So. 2d 458 (1998). However, limitations may arise if the use inconveniences the servient estate in a significant way. Id.

Caution:

Certain title examinations may require the examiner to determine additional information about easements.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

5.06 Effect of Prior Liens on Easements Used for Access

Where access to the property is by means of an easement, the examiner must search the title to the easement. If any liens or deeds of trust appear of record as to the easement tract prior to the easement being vested, they must be listed as title encumbrances, unless they were properly released or a subordination was obtained from the lienholder to avoid termination of the easement by a later foreclosure. Any liens or deeds of trust on the easement tract, after the easement vested, do not affect the easement.

Comment:

In many ways, determining the nature and extent of appurtenant easement interests poses a much more difficult problem for examiners than does the examination of title to the fee simple interest involved in a conveyance or other real property closing transaction. There are also significant distinctions between residential and non-residential properties when easements are involved. In most residential transactions in metropolitan areas of the state, due to subdivision and platting regulations, it is likely that all necessary easements were established by the developer when the property was subdivided. However, this may not be the case with planned non-residential developments such as shopping centers, office parks and industrial or warehouse projects, since many such projects are developed over much longer periods of time than is typical with residential subdivisions, and in many instances the examiner must use special care to ensure that easements for shared facilities, such as storm-water drainage and retention ponds, have been properly established, and released from any tract financing or other debt encumbrances. In metropolitan and urban areas where land costs are high, commercial shopping centers and similar developments are likely to have shared storm-water drainage systems necessitated by governmental regulations that require storm-water runoff to be managed on site, private easements for water and sewer lines within the boundaries of the

overall commercial development, cross access easements to access curb cuts which tend to be limited, especially in retail shopping centers which are generally located on major thoroughfares under the control of the DOT, which limits access rights to certain designated points and also grants of easements for "vehicular parking" (which are often found related to shopping center out-parcels, to meet zoning requirements).

Source:

See generally Peoples Bank and Trust Co. and Bank of Mississippi v. L & T Developers, Inc., 434 So.2d 699, 708 (Miss. 1983)(finding that a trustee's deed cuts off the equity of redemption and any other rights in and to the property (all of which are transferred to the foreclosure sale proceeds), with the sole exception of rights perfected prior to the filing of the deed of trust under which the foreclosure sale is held); Shutze v. Credithrift of America, Inc., 607 So.2d 55, 65 (Miss. 1992)(recognizing that a valid and effective foreclosure extinguishes all subordinate rights; "The foreclosing trustee has the exact same power to convey free and clear of junior liens or interests as though he held a deed absolute filed for record the day the deed of trust was recorded."); Hearn v. Autumn Woods Office Park Property Owners Ass'n, 757 So.2d 155, 162 (Miss. 1999) (finding that (1) a tax sale does not extinguish an easement appurtenant, as long as the easement is properly assessed and included in the value of the property prior to the tax sale, (2) when there is no evidence to the contrary, an assessment for tax purposes may be presumed, as a matter of law, to include the value of an easement, and (3) only when a dispute arises over whether the value of the easement was included in the assessment of a property acquired by tax deed, will the method for assessing the value of the property become determinative on whether the easement survives a tax sale).

History:

Adopted effective as of August 1, 2019.

5.07 Effect of Merger on Easements

Due to the doctrine of merger, special care needs to be taken by examiners to verify that existing easements which may have merged if the property comes under common ownership after the establishment of same, have been properly re-established if the tract is later divided.

Comment:

Generally, a joinder of the dominant and servient estates creates a merger of title. However, the existence of an easement after the date of merger depends on the language of subsequent deeds or other instruments and an application of common law doctrines relevant to the new circumstances. Cox v. Trustmark Nat. Bank, 733 So.2d 353, 355 (Miss. App. 1999).

When one party acquires present possessory fee simple title to both the servient and the dominant tenements, the easement merges into the fee of the servient tenement and is terminated. Cox v. Trustmark Nat. Bank, 733 So. 2d 353, 355 (Miss. Ct. App. 1999). In these cases, the easement terminates because the party in whom the interests coincide may freely use the servient tenement as its owner. Therefore, the easement no longer serves any function. An easement destroyed by merger is not revived when the original tenements are later severed. However, a new easement may arise upon such severance by express provision or by implication. Cox v. Trustmark Nat. Bank, 733 So. 2d 353, 355 (Miss. Ct. App. 1999) ("The existence of an easement after that date [of merger] depends on the language of subsequent deeds or other instruments and an application of common law doctrines relevant to the new circumstances.").

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

CHAPTER 6: CONVEYANCES INVOLVING CORPORATIONS

6.01 Corporate Existence

Where a corporation is a named party to an instrument in the chain of title, an examiner may presume that the corporation was legally in existence at the time the instrument took effect, if the instrument is executed in the proper form.

Comment:

Conveyance before organization. A corporation may exist in fact without being legally constituted. Since the legality of a corporation's existence cannot be questioned, except in a direct proceeding by the state, it is unnecessary in examining title, to investigate in detail whether all measures have been taken for a valid incorporation, so long as the record shows the existence of a corporation de facto. 2 Patton and Palomar on Land Titles § 412 (3d ed.); Paul E. Basye, Clearing Land Titles § 14:9 (3d ed.). See also Dawkins v. Hickman Family Farm Corp., 2010 WL 415279, at *2 (N.D. Miss. 2010)(finding deed to corporation valid where (1) the articles of incorporation were signed (but not filed) at the time the deed was signed, (2) a valid law under which the corporation could be incorporated existed (Miss. Code Ann. 79-3-1), and (3) there was a bona fide attempt to organize a corporation under such law (the articles were executed and recorded with the deed and filed with the Mississippi Secretary of State approximately three weeks later); Milligan v. Milligan, 956 So.2d 1066, 1074 (Miss. App. 2007)(recognizing that the effect of de facto corporate status is that the entity "may be ousted in a direct proceeding brought by the state for that purpose ... but with a few exceptions ... it has a corporate existence ... against individuals and other corporations ...."); Gulf Land & Development Co. v. McRaney, 197 So.2d 212, 217 (Miss. 1967)(finding deed to corporation dated March 25 valid notwithstanding fact that the corporation did not come into existence until June 2); and Allen v. Thompson, 248 Miss. 544, 158 So.2d 503 (1963) (finding that a *de facto* corporation exists and is capable of taking title to property where a *good faith attempt* has been made under existing laws to organize the corporation for some specific purpose authorized by law, and the corporation has exercised corporate functions for an indefinite time).

Conveyance after organization ceases. Upon dissolution of a corporation, the persons winding-up the corporation's affairs may, in the name of, and for and on behalf of, the corporation, dispose of and convey the corporation's property. Miss. Code Ann. § 79-4-14.05.

Caution:

A deed with no named grantee or to a person, natural or artificial, not in existence at the time of conveyance is void. Parsons v. Marshall, 243 Miss. 719, 728 (Miss. 1962) (finding that where an instrument purporting to be a deed and which has no grantee named therein, in esse, a person in being, or corporation, is void) citing Morgan et al. v. Collins School House et al., 133 So. 675 (Miss. 1931)(finding a deed, which has no grantee, either corporation or person in being, is void); Morgan v. Hazlehurst Lodge, 53 Miss. 665 (Miss. 1876)(finding a deed to a dead person to be void); Wilson v. Gerard, 213 Miss. 177 (Miss. 1952); Life Ins. Co. of Virginia v. Page, 172 So. 873, 876 (Miss. 1937)(finding a conveyance to a deceased person or a fictitious person is void); Morgan v. Collins School, 127 So. 565, 566 (Miss. 1930)(finding deed is void for the want of a grantee).

In many states, statutes provide that the title to the property of a corporation passes to its shareholders or to its directors as trustees immediately upon termination of its charter. However, that is not the case in Mississippi. Miss. Code Ann. § 79-4-14.05(b)(1) provides that dissolution of a corporation does not transfer title to the corporation's property.

A deed of trust in which the name of the beneficiary is not disclosed therein may not be recorded, but if it is recorded it does not impart notice to anyone. Miss. Code Ann. § 89-5-37. Unlike a deed, a deed of trust is a three-party arrangement in which the borrower conveys title to an interest in real property to a third party to hold for the benefit of the lender until repayment of the loan. Borries v. Goshen Mortgage, LLC, 219 So.3d 593, 598 (Miss. App. 2017). A deed of trust may be valid between the grantor who borrowed funds and the grantee to whom the property was conveyed as security for the loan, even though the beneficiary was not named. Id.

Source:

Rufford G. Patton & Carroll G. Patton, Patton on Land Titles § 405 (2d ed. 1957 and Supp. 1997) and Paul E. Basye, Clearing Land Titles §§ 296–301 (2d ed. 1970).

History:

Adopted effective as of August 1, 2019.

6.02 Corporate Authority Presumed

In the absence of actual or constructive notice to the contrary, an examiner may presume that the action of the corporation in acquiring or selling the real property affected by an instrument is within its power.

Comment:

Any action taken by a corporation that is beyond the power conferred upon it by its articles of incorporation or by the laws of the state of its incorporation is ultra vires. This may include action contrary to public policy or to some statute expressly prohibiting such action. This excess or abuse of power is ordinarily not within the scope of an examiner to determine or question, without some type of actual or constructive notice.

Source:

Pursuant to Miss. Code Ann. § 79-4-3.02, unless a corporation's articles of incorporation provide otherwise, every corporation has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including, but not limited to, the power to purchase, receive, lease or otherwise acquire, and own, hold, improve, use and otherwise deal with, real or personal property, or any legal or equitable interest in property, wherever located, and to sell, convey, mortgage, pledge, lease, exchange and otherwise dispose of all or any part of its property.

See also Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 12.5 (1960).

History:

Adopted effective as of August 1, 2019.

6.03 Foreign Corporations

Where a corporation organized and doing business under the laws of another state is a named party to an instrument in the chain of title, an examiner may presume that the corporation was authorized to do business in this state or authorized to acquire and dispose of the real property affected by the instrument, if the instrument is executed in the proper form.

Comment:

The failure of a foreign corporation to obtain a certificate of authority does not impair the validity of any contract, deed, mortgage, security interest, lien or act of such foreign corporation or prevent the foreign corporation from defending any action, suit or proceeding in any court in Mississippi.

Pursuant to Miss. Code Ann. § 79-4-15.01(b)(9) "owning, without more, real or personal property" does not constitute transacting business.

Source:

Miss. Code Ann. § 79-4-15.02. See also Lewis M. Simes & Clarence B. Taylor, Model Title Standards, Std. 12.6 (1960).

History:

Adopted effective as of August 1, 2019.

6.04 Corporate Seal

An examiner may presume that a corporate seal does not have to appear on an instrument, unless the examiner has actual or constructive notice that the bylaws of the corporation require the seal to have been placed on the instrument.

Comment:

The Mississippi legislature has abolished all distinctions between sealed and unsealed instruments, except as to corporations. Miss. Code Ann. § 75-19-1. The absence of a corporate seal does not affect the validity of a conveyance by a private corporation. Miss. Code Ann. § 89-1-21. Unlike in other states, a document under seal does not have any enhanced evidentiary or other value. Miss. Code Ann. § 75-19-3, 5.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

6.05 Authority of Particular Officers

Where a corporation is a named party to an instrument in the chain of title, an examiner may presume that the persons executing the instrument were the officers they purported to be and that such officers were authorized to execute the instrument on behalf of the corporation, if the instrument is executed in the proper form.

Comment:

The long-form acknowledgments for corporations and other business organizations set forth in Miss. Code Ann. § 89-3-7 provide that the person (officer) executing the instrument had been duly authorized to do so.

Caution:

The presumption of corporate authority applies to corporate officers and not to an attorney in fact. The examiner should look to the power of attorney to determine the authority of the attorney in fact.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

6.06 Corporate Name or Signer's Representative Capacity Omitted From Signature

Where a corporation appears as a party in the body of the instrument, an examiner may presume that the signature on the instrument by a corporate representative is sufficient notwithstanding the omission of the corporate name over such signature, so long as the signer's representative capacity is clear from a review of the instrument as a whole.

Comment:

A liberal interpretation of acknowledgments encompasses examination of the body of the instrument itself, and an acknowledgment will not necessarily be deemed fatal for an omission which can be supplied from the body of the instrument itself. White v. Delta Foundation, Inc., 481 So.2d 329, 333–34 (Miss. 1985). However, in a foreclosure proceeding the need to meet statutory and legal requirements has more important additional imperatives than an ordinary case. Id.

Regarding the failure of an instrument to reflect the authority of the signer. See generally Morton v. Resolution Trust Corp., 918 F.Supp. 985, 996 (S.D.Miss. 1995)(finding that under Mississippi law, acknowledgment verifying that corporate officer had appeared before notary public to sign appointment of substitute trustee on corporation's behalf, for purposes of conducting deed of trust foreclosure sale, did not have to specify officer's capacity or authority to act on corporation's behalf, as by indicating that officer was president, secretary, or general counsel; it was enough that acknowledgment made it clear that officer was executing appointment in an official capacity on behalf of corporation, rather than as an individual.); Matter of Estate of White, 234 So.3d 1210, 1213 (Miss. 2017)(restating the four corners doctrine for interpreting a conveyance).

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

6.07 Effect of Reinstatement After Dissolution

Where a corporation was dissolved by the expiration of its period of duration, or was administratively or voluntarily dissolved, but in either case was subsequently reinstated, an examiner may presume in the absence of evidence to the contrary that an act taken by the corporation during the period of dissolution is valid.

Comment:

The examiner should take into consideration the effect of Miss. Code Ann. § 79-4-14.22 (Administrative Dissolution) and Miss. Code Ann. § 79-4-14.04 (Voluntary Dissolution), which provide, in general terms, that the reinstatement of such a corporation relates back to the date of dissolution or expiration and that the corporate existence continued without interruption. The administrative dissolution of a corporation does not impair the validity of any contract, deed, mortgage, security interest, lien, or act of the corporation. Miss. Code Ann. § 79-4-14.21(e).

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

6.08 Name Change, Merger, Conversion – Deed Not Required

Where a recorded instrument refers to a corporation as successor to another entity, by use of terms such as "formerly known as," "successor by merger," or "successor by conversion," or by recitation of facts concerning a name change, merger, or conversion, an examiner may presume in the absence of evidence to the contrary that the interest in real property held by the former entity has vested in the new entity without the necessity of a deed, assignment, or of any recorded documentation of the name change, merger, or conversion.

Comment:

Miss. Code Ann. § 79-4-11.07(a)(3) provides with respect to *for-profit corporations* that "all property owned by, and every contract right possessed by, each corporation or eligible entity that merges into the survivor is vested in the survivor without reversion or impairment."

Miss. Code Ann. § 79-11-325 provides with respect to *non-profit corporations* that "title to all real estate and other property owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment."

Miss. Code Ann. § 79-37-406 provides that "all property of the *converting entity* continues to be vested in the converted entity without transfer, reversion, or impairment."

Miss. Code Ann. § 79-37-506 provides that "all property of the *domesticating entity* continues to be vested in the domesticated entity without transfer, reversion, or impairment."

A change in the name of a corporation alone does not affect the existence of the corporation. While not required, it is good practice to document the name change or merger by reference to the date of filing of the amendment or articles of merger in the Secretary of State's office.

Caution:

If the record reflects a break in the chain of title and a conveyance by the surviving entity does not use terms such as “formerly known as,” “successor by merger,” or “successor by conversion,” or contain a recitation of facts concerning a name change, merger, or conversion, then an examiner should determine whether a name change, merger, or conversion was properly filed with the appropriate Secretary of State’s office. In the case of a foreign entity, if evidence of the name change, merger or conversion is not readily available, then an affidavit of name change, merger or conversion should be filed of record to bridge the break in the chain of title.

Source:

Citation in the Comment.

History:

Adopted effective as of August 1, 2019.

CHAPTER 7: CONVEYANCES INVOLVING PARTNERSHIPS

7.01 Conveyance of Real Property Held in Partnership

When title to real property is held in the name of a general partnership, limited liability partnership, limited partnership, and limited liability limited partnership, an examiner may rely upon a conveyance by a general partner on behalf of the partnership if the conveyance appears to be a transfer in the ordinary course of business of the partnership.

Comment:

A general partnership and a limited liability partnership are governed by Chapter 13 of Title 79. A limited liability partnership is a general partnership that has made an limited liability partnership election by filing a statement of qualification. Miss. Code Ann. § 79-13-1001.

A limited partnership and a limited liability limited partnership are governed by Chapter 14 of Title 79. A limited liability limited partnership is a limited partnership that has made a limited liability limited partnership election in its certificate of limited partnership. Miss. Code Ann. § 79-14-201.

With regard to a general partnership or a limited liability partnership, and subject to the limitations imposed by a statement of partnership authority under Miss. Code Ann. § 79-13-303, if property is held in the name of a general partnership or limited liability partnership, it may be transferred by an instrument executed by a general partner in the partnership's name. Miss. Code Ann. § 79-13-302(a)(1).

With regard to a limited partnership or a limited liability limited partnership, subject to the terms and limitations of the certificate of limited partnership, the partnership agreement, and Miss. Code Ann. § 79-14-402, if property is held in the name of a limited partnership or limited liability limited partnership, it may be transferred by an instrument executed by a general partner in the partnership's name. It should be noted that Miss. Code Ann. § 79-14-402 requires that such a conveyance must be for "apparently carrying on in the ordinary course the partnership's activities and affairs" and that "an act of a general partner which is not apparently for carrying on in the ordinary course the limited partnership's activities and affairs or activities and affairs of the kind carried on by the partnership binds the partnership only if the act was actually authorized by **all** the other partners." The partnership agreement can expressly waive the requirement that all partners have to consent to a conveyance outside the ordinary course.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

7.02 Conveyance of GP/LLP Property Held in Name of Partners

If title to the property is in the name of one or more partners, the named partners must execute the conveyance.

Comment:

If the property is held in the name of one or more partners, with or without an indication in the document transferring the property to them of their capacity as partners or the existence of the general partnership or limited liability partnership, the property may be transferred by an instrument executed by the partners holding the property. Miss. Code Ann. § 79-13-302(a)(2) and (3).

Caution:

A general partnership or limited liability partnership may recover partnership property from a transferee who gave value for the property if the transferee knew or received notification of the existence of the general partnership or limited liability partnership (from the face of the instrument or otherwise) and the person who executed the transfer instrument did not have authority to bind the partnership. Miss. Code Ann. § 79-13-302(b).

Source:

Citations in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

7.03 Authority of Less Than All Partners Regarding Transactions that are Not in the Ordinary Course of Business

If a conveyance of a general partnership, limited liability partnership, limited partnership or limited liability partnership that is executed by less than all of the partners appears not to be in the ordinary course of business (such as a sale of the sole asset of the partnership), an examiner should review a copy of the partnership agreement or other satisfactory evidence to verify the authority of the signing partner(s) to act on behalf of the partnership.

Comment:

With regard to a general partnership or a limited liability partnership, and subject to the effect of a statement of partnership authority under Miss. Code Ann. § 79-13-303, partnership property held in the name of the general partnership or a limited partnership may be transferred by an instrument of transfer executed by a general partner in the partnership name. Miss. Code Ann. § 79-13-302.

With regard to a limited partnership or a limited liability limited partnership, subject to the terms and limitations of the certificate of limited partnership, the partnership agreement, and Miss. Code Ann. § 79-14-402, if property is held in the name of a limited partnership or limited liability limited partnership, it may be transferred by an instrument executed by a general partner in the partnership's name. It should be noted that Miss. Code Ann. § 79-14-402 requires that such a conveyance must be for "apparently carrying on in the ordinary course the partnership's activities and affairs" and that "an act of a general partner which is not apparently for carrying on in the ordinary course the limited partnership's activities and affairs or activities and affairs of the kind carried on by the partnership binds the partnership only if the act was actually authorized by **all** the other partners." The partnership agreement can expressly waive the requirement that all partners have to consent to a conveyance outside the ordinary course

A filed statement of partnership authority supplements the authority of a partner to enter into transactions on behalf of the partnership. Miss. Code Ann. § 79-13-303(d). Specifically, a grant of authority to transfer real property held in the name of the partnership contained in a certified copy of a filed statement

of partnership authority recorded in the official land records of the county where that real property is situated is conclusive in favor of a person who gives value without knowledge to the contrary, so long as and to the extent that a certified copy of a filed statement containing a limitation on that authority is not then of record in the office for recording transfers of that real property. Miss. Code Ann. § 79-13-303(d)(2). The recording of a certified copy of a filed cancellation of a limitation on authority in the official land records revives the previous grant of authority. Id.

Caution:

A filed statement of partnership authority is canceled by operation of law five (5) years after the date on which the statement, or the most recent amendment, was filed with the Secretary of State. Miss. Code Ann. § 79-13-303(g).

Source:

Citations in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

7.04 Merger of a Partnership – Statement of Merger Required

Where a partnership merges with a domestic or foreign entity, and a certified copy of the statement of merger is filed of record in the chain of title, an examiner may presume that the interest in real property held by the former entity has vested in the new entity without the necessity of a deed or assignment.

Comment:

With regard to a general partnership or a limited liability partnership, Miss. Code Ann. § 79-13-907 provides with respect to *partnerships* that "real property of the surviving entity which before the merger was held in the name of another party to the merger is property held in the name of the surviving entity upon recording a certified copy of the statement of merger in the office for recording transfers of that real property."

With regard to limited partnerships and limited liability limited partnerships, Miss. Code Ann. § 79-13-1109(a)(3) provides with respect to limited partnerships and limited liability limited partnerships that "when a merger becomes effective … all property owned by each constituent organization that ceases to exist vests in the surviving organization."

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

7.05 Conveyance of Partnership Property Held by LP or LLLP

When title to real property is held in the name of a limited partnership or limited liability limited partnership, an examiner may rely upon a conveyance by a general partner on behalf of the partnership if the conveyance appears to be a transfer in the ordinary course of business of the partnership.

Comment:

Each general partner is an agent of the limited partnership or limited liability limited partnership for the purposes of its activities and affairs. Miss. Code Ann. § 79-14-402(a). An act of a general partner for apparently carrying on in the ordinary course the partnership's activities and affairs binds the partnership, unless the general partner did not have authority to act for the partnership in the particular matter and the person with which the general partner was dealing knew or had notice that the general partner lacked authority.

Caution:

An act of a general partner which is not apparently for carrying on in the ordinary course the limited partnership or limited liability limited partnership's activities and affairs or activities and affairs of the kind carried on by the partnership binds the partnership only if the act was actually authorized by all the other partners. Miss. Code Ann. § 79-14-402(b).

Source:

Citations in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

7.06 Name Change, Merger, Conversion of a LP or LLLP – Deed Not Required

Where a recorded instrument refers to a limited partnership or limited liability limited partnership as successor to another entity, by use of terms such as "formerly known as," "successor by merger," or "successor by conversion," or by recitation of facts concerning a name change, merger, or conversion, an examiner may presume in the absence of evidence to the contrary that the interest in real property held by the former entity has vested in the new entity without the necessity of a deed, assignment, or of any recorded documentation of the name change, merger, or conversion.

Comment:

Miss. Code Ann. § 79-14-1109 provides with respect to *limited partnerships and limited liability limited partnerships* that "all property owned by each constituent organization that ceases to exist vests in the surviving organization."

Miss. Code Ann. § 79-37-406 provides that "all property of the *converting entity* continues to be vested in the converted entity without transfer, reversion, or impairment."

Miss. Code Ann. § 79-37-506 provides that "all property of the *domesticating entity* continues to be vested in the domesticated entity without transfer, reversion, or impairment."

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

CHAPTER 8: CONVEYANCES INVOLVING LIMITED LIABILITY COMPANIES

8.01 Identity of Manager of Limited Liability Company

If the body of a recorded instrument indicates that the person executed the instrument as a manager on behalf of a manager-managed limited liability company, the examiner, in the absence of evidence to the contrary, may presume that the person held the position of a manager of the limited liability company.

Comment:

The term "person" is defined in Miss. Code Ann. § 79-29-105(v) as an individual, entity, trust, or any other legal or commercial nominee or any personal representative.

The term "manager" is defined in Miss. Code Ann. § 79-29-105(p) as a person or persons who are named in or selected or designated pursuant to, the certificate of formation or operating agreement as a manager to manage the limited liability company to the extent and as provided in the certificate of formation or operating agreement.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

8.02 Authority of Member, Manager, or Officer of Limited Liability Company

The examiner, in the absence of evidence to the contrary, may presume that a member of a member-managed limited liability company, a manager of a manager-managed limited liability company, or an officer of a limited liability company was authorized to act on behalf of the company if the member, manager, or officer, as applicable, executed the recorded instrument in the name of the limited liability company for apparently carrying on the business of the limited liability company.

Comment:

Manager is defined in Miss. Code Ann. § 79-29-105(p) as a person or persons who are named in or selected or designated pursuant to, the certificate of formation or operating agreement as a manager to manage the limited liability company to the extent and as provided in the certificate of formation or operating agreement.

Except where management of a limited liability company is vested in a manager, every member is an agent of the limited liability company for the purpose of conducting its business and affairs, and the act of any member, including, but not limited to, the execution in the name of the company of any instrument for apparently carrying on in the ordinary course the business or affairs of the company of which the person is a member, binds the company, unless the member so acting has, in fact, no authority to act for the company in the particular matter and the person with whom the member is dealing has knowledge of the fact that the member has no such authority. Miss. Code Ann. §79-39-307(1).

Every manager is an agent of the manager-managed limited liability company for the purpose of its business and affairs, and the act of any manager, including, but not limited to, the execution in the name of

the company of any instrument for apparently carrying on in the ordinary course the business or affairs of the company of which the person is the manager, binds the company, unless the manager so acting has, in fact, no authority to act for the company in the particular matter and the person with whom the manager is dealing has knowledge of the fact that the manager has no such authority. Miss. Code Ann. §79-39-307(2).

Every officer is an agent of the limited liability company for the purpose of its business and affairs to the extent the agency authority has been delegated to the officer as provided by the operating agreement, and the act of any officer, including, but not limited to, the execution in the name of the company of any instrument for apparently carrying on in the ordinary course the business or affairs of the company of which the person is an officer, binds the company, unless the officer so acting has, in fact, no authority to act for the company in the particular matter and the person with whom the officer is dealing has knowledge of the fact that the officer has no such authority. Miss. Code Ann. § 79-29-307(3).

No act of a manager, member or officer in contravention of a restriction on authority shall bind the limited liability company to persons having knowledge of the restriction. Miss. Code Ann. § 79-29-307(4).Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

8.03 Delegation of a Manager's or Member's Authority

The execution of an instrument affecting real property on behalf of a limited liability company by a person in a capacity other than manager or member shall, in the absence of recorded evidence to the contrary, be deemed sufficient regarding the authority of such person to bind the limited liability company if an acknowledged document executed by a manager (if manager-managed) or member (if member-managed) of the limited liability company delegating authority to such person is recorded in the office of the chancery clerk in the county in which the real property is located. The document shall clearly evidence the delegation of the manager's or member's rights and powers to the person in such person's individual, agent or officer capacity, as applicable, for the purpose of execution of the instrument or instruments on behalf of the limited liability company.

Comment:

Pursuant to Miss. Code Ann. § 79-29-405 a manager of a manager-managed limited liability company may, unless prohibited by the operating agreement, delegate the manager's rights and powers to manage and control the business and affairs of the limited liability company, including to delegate to agents, officers and employees of: (a) a member, (b) a manager or (c) the limited liability company, and to delegate by a management agreement or another agreement with, or otherwise to, other persons. The delegation shall not cause the manager to cease to be a manager of the limited liability company or cause the person to whom any such rights and powers have been delegated to be a manager of the limited liability company.

Pursuant to Miss. Code Ann. § 79-29-305 a member of a member-managed limited liability company has the power and authority to delegate to one or more other persons the member's rights and powers to manage and control the business and affairs of the limited liability company, including to delegate to agents, officers and employees of a member or the limited liability company and to delegate by agreement to other persons. The delegation shall not cause the member to cease to be a member of the limited liability company or cause the person to whom any such rights and powers have been delegated to be a member of the limited liability company.

Caution:

Where an instrument reflects that an agent is acting under a power of attorney, the power of attorney must be filed of record. See Standard 9.01.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

8.04 Conveyances in the Ordinary Course of Business

If title is held by a limited liability company, an examiner may rely upon a conveyance that is executed by a member, in the case of a member-managed company, a manager, in the case of a manager-managed company, , or an officer or agent of either thereof if the conveyance appears to be in the ordinary course of business for carrying on the affairs of the limited liability company.

Comment:

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Caution:

If the certificate of formation or operating agreement provides that management of the limited liability company is vested in a manager or managers, then, except as otherwise provided in the certificate of formation or the operating agreement, no member, acting solely in the capacity as a member, is an agent of the limited liability company. Miss. Code Ann. § 79-29-307(2). While not required, it is good practice for the drafter of an instrument to indicate in the body of the instrument executed on behalf of the limited liability company, that the company is either member-managed or manager-managed.

Execution of deed by minority member of a limited liability company in contravention of operating agreement was void and of no legal effect. Northlake Development L.L.C. v. BankPlus, 60 So.3d 792 (Miss. 2011).

Source:

Citations in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

8.05 Assets of Limited Liability Company Not Subject to Execution for Debts of Members or Managers

Specific property owned by and in the name of a limited liability company is not subject to execution on a claim, judgment or lien against a member or manager of the company.

Comment:

A charging order constitutes a lien on the judgment debtor/member's financial interest. The entry of a charging order is the exclusive remedy by which a judgment creditor of a judgment debtor/member or its assignee may satisfy a judgment out of the judgment debtor/member's financial interest. No creditor of a judgment debtor/member or its assignee shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited liability company. Miss. Code Ann. § 79-29-705.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

8.06 Limited Liability Company Deemed to be Legally in Existence

If a recorded instrument is executed in proper form on behalf of a limited liability company, an examiner may presume that the limited liability company was legally in existence when the instrument was executed.

Comment:

Upon dissolution of a limited liability company, the persons winding-up the limited liability company's affairs may, in the name of, and for and on behalf of, the limited liability company, dispose of and convey the limited liability company's property. Miss. Code Ann. § 79-29-809.

Caution:

While a limited liability company continues after dissolution for the purpose of winding-up its affairs, a deed to limited liability company not in existence at the time of conveyance is void. See caution to Standard 6.01.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

8.07 Foreign Limited Liability Companies

Where a limited liability company organized and doing business under the laws of another state is a named party to an instrument in the chain of title, an examiner may presume that the limited liability company was authorized to do business in this state or authorized to acquire and dispose of the real property affected by the instrument, if the instrument is executed in the proper form.

Comment:

The failure of a foreign limited liability company to register to do business in Mississippi does not impair the validity of any contract or act of the foreign limited liability company. Miss. Code Ann. § 79-29-1013.

Creating or acquiring indebtedness, mortgages, and security interests in real or personal property does not constitute transacting business in Mississippi. Miss. Code Ann. § 79-29-1015(1)(g).

Securing or collecting debts or enforcing mortgages and security interests in property securing the debts and holding, protecting and maintaining property so acquired does not constitute transaction business in Mississippi. Miss. Code Ann. § 79-29-1015(1)(h).

Owning, without more, real or personal property does not constitute transacting business in Mississippi. Miss. Code Ann. § 79-29-1015(1)(i).

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

8.08 Name Change, Merger, Conversion – Deed Not Required

Where a recorded instrument refers to a limited liability company as successor to another entity, by use of terms such as "formerly known as," "successor by merger," or "successor by conversion," or by recitation of facts concerning a name change, merger, or conversion, an examiner may presume in the absence of evidence to the contrary that the interest in real property held by the former entity has vested in the new entity without the necessity of a deed, assignment, or of any recorded documentation of the name change, merger, or conversion.

Comment:

Miss. Code Ann. § 79-29-227 provides with respect to *limited liability companies* that "all property owned by, and every contract right possessed by, each entity that merges into the survivor is vested in the survivor without reversion or impairment."

Miss. Code Ann. § 79-37-406 provides that "all property of the *converting entity* continues to be vested in the converted entity without transfer, reversion, or impairment."

Miss. Code Ann. § 79-37-506 provides that "all property of the *domesticating entity* continues to be vested in the domesticated entity without transfer, reversion, or impairment."

While not required, it is good practice to document the name change or merger by reference to the date of filing of the amendment or articles of merger in the Secretary of State's office.

Source:

Citations in the Comment

History:

Adopted effective as of August 1, 2019.

CHAPTER 9: POWERS OF ATTORNEY

9.01 Validity of Instrument Executed by an Agent

If any instrument in the chain of title is executed by an attorney-in-fact, the examiner should verify that the power of attorney: (a) was dated, properly executed, and recorded; (b) granted sufficient authority to the agent to execute the document; (c) if specific in nature, refers to the real property; and, (d) at the time the agent executed the document: (i) the power of attorney had not been terminated of record by the principal, and (ii) there was no evidence of record that the principal was deceased or mentally incompetent at the time, if the power of attorney does not contain durable language or otherwise provides that it terminates in the event of mental incompetency.

If the examiner is dissatisfied with any of these facts surrounding the power of attorney, then the examiner should raise objections to the client to permit the closing attorney to resolve the matter.

Comment:

In order for an agent operating under a power of attorney to execute and deliver a valid deed "prior in right to the interests of (a) subsequent purchasers for value and without notice, or (b) subsequent judgment lien creditors, the written power of attorney must be acknowledged and recorded in conformity with the requirements generally applicable to instruments of conveyance of interests in land." Estate of Dykes v. Estate of Williams, 864 So.2d 926, 932 (Miss. 2003) (citing Kountouris v. Varvaris, 476 So.2d 599, 603 (Miss.1985)).

There are two types of powers of attorney: a "special" power of attorney, and "general" or "universal" power of attorney. In a special power, the principal grants authority to the agent (also called an attorney-in-fact) to perform a specific act or acts, such as selling the principal's residence. In a general or universal power, the principal grants the agent (attorney-in-fact) broad or universal powers, sometimes expressed as authority "to exercise all legal powers possessed by the principal."

A general power of attorney authorizing an agent to sell and convey property implies a sale for the benefit of the principal. In re Estate of Hardy, 910 So.2d 1052, 1056 (Miss. 2005). An agent must act in the best interest, and not to the detriment of, his principal. Id. at 1055–56 (citing McKinney v. King, 498 So.2d 387 (Miss.1986) (deed void where attorney-in-fact did not justify how conveyance was in the best interest of the principal); Laseter v. Sistrunk, 251 Miss. 92, 168 So.2d 652 (1964); Consumers Credit Corp. v. Swilley, 243 Miss. 838, 138 So.2d 885 (1962)).

In examining a document signed by an agent for a principal, an examiner should determine that the power of attorney granted sufficient authority to validate the act of the agent and that it was not revoked prior to the act. Causes of revocation include a specific act of revocation by the principal, the terms of the power-of-attorney document, the death of the principal, or the incapacity of the principal unless the power-of-attorney provides that it survives incapacity. In the absence of information to the contrary, an examiner frequently relies upon an affidavit from a person knowledgeable of the facts that on the date of the agent's act the principal was alive, that the power of attorney had not been revoked, and that the principal was not incapacitated.

The problems of revocation by incapacity were largely eliminated effective July 1, 1994, after which time a power of attorney, whether a special or general power, could be expressly made "durable." The Durable Power of Attorney Act provides that a durable power is one that is in writing, signed by the principal, and acknowledged and that contains the words: "This power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time," or "This power of attorney shall become effective

upon the disability or incapacity of the principal," or similar words showing the intent of the principal. Miss. Code Ann. § 87-3-105.

Although not affected by disability, a durable power is revoked: (1) at the time of termination, if the power states a time of termination; or (2) by the death of the principal, but only upon becoming aware of the death. Miss. Code Ann. § 87-3-111.

Caution:

Pursuant to Miss. Code Ann. § 89-1-29, a spouse may not be designated as an agent in a power of attorney used to convey, mortgage, or otherwise encumber homestead property. Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

9.02 Recorded Powers of Attorney in Chain of Title

In the absence of evidence to the contrary, an examiner may presume that none of the following events had occurred with respect to a recorded power of attorney, at the time that the attorney-in-fact appointed therein executed any instrument affecting the subject property:

(a) Revocation;

(b) Death of the principal; and,

(c) Incompetence or disability of the principal, where the power-of-attorney is non-durable.

Comment:

The Durable Power of Attorney Act provides that an affidavit executed by an agent under a durable power is conclusive proof of the nonrevocation or nontermination of the power at that time. Miss. Code Ann. § 87-3-113.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

CHAPTER 10: TRUSTS

10.01 Powers of Trustee

An examiner should confirm the identity and powers of the trustee and whether the trust was in effect at the time of a trust transaction.

Comment:

Under the Mississippi Uniform Trust Code, a trustee of an express trust has the powers enumerated in Miss. Code Ann. §§ 91-8-815 – 816, including the power to (a) acquire or sell trust property, (b) mortgage or pledge trust property for a period within or extending beyond the duration of the trust, (c) construct or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries, (d) enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust, or (e) grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired—unless limited by the trust instrument. Id. Although subject to certain limitations, the terms of an express trust prevail over any provision of Miss. Code Ann. §§ 91-8-815(a) – 816(b). Thus, an examiner should examine both the trust instrument and the statute to confirm that the trustee had the authority to perform the act under consideration. As an alternative to being furnished a copy of the trust agreement, an examiner may rely upon a memorandum of trust that complies with Miss. Code Ann. § 91-8-407. See Standard 10.02 (Recording of the Trust Document).

Where the authority of a trustee is not documented by any instrument of record, but the deed by the trustee has been of record for at least twenty years, the examiner is aided by a presumption of the grantor's recited authority under the "ancient document" rule. See discussion in Comment to Standard 14.03 (Reliance upon Recitals). An examiner may also be aided by the statutory requirement that an action to recover property conveyed by an instrument signed by a trustee without record of the authority of the trustee (e.g., without the trust or memorandum of trust being filed of record) or proof of the facts recited in the instrument must be brought within 10 years of the date that the instrument was "recorded" in the office of the clerk of the chancery court of the county in which such real property is situated. Miss. Code Ann. § 15-1-11(7) (Right of action to recover land, instrument defects).

For the duties and powers of the trustee, see Miss. Code Ann. § 91-8-801, et. seq.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

10.02 Recording of Trust Document

Where an instrument is executed by a "trustee" and the instrument itself does not contain the information required for a memorandum of trust, the examiner should determine that the trust agreement

appointing the trustee or a memorandum of trust, is of record and grants sufficient authority to validate the actions of the trustee.

Comment:

While a testamentary trust, because it is created under a will, is a matter of public record, an inter vivos trust instrument is private. Such privacy is compromised if the trust instrument itself is recorded or otherwise distributed to third parties. A memorandum of trust is a document signed by a currently acting trustee that may include excerpts from the trust instrument necessary to facilitate a particular transaction. A memorandum provides the third party with an assurance of authority without having to disclose the trust's dispositive provisions.

To be effective, Miss. Code Ann. § 91-8-407 requires that a memorandum of trust must contain substantially all of the following information:

(A) The name of the trust;

(B) The street and mailing address of the office, and the name and street and mailing address and telephone number of the trustee;

(C) The name and street and mailing address and telephone number of the settlor of the trust;

(D) A legally sufficient description of all interests in real property owned by or conveyed to the trust;

(E) The anticipated date of termination of the trust or the event upon which the trust will be terminated; and

(F) The general powers granted to the trustee, which may be by reference to the statutory powers granted to the trustee under the terms of the trust instrument.

The memorandum may also contain the name and street and mailing address and telephone number of any successor trustee. Miss. Code Ann. § 91-8-407(b).

The memorandum of trust may be filed with the clerk of the appropriate chancery court either **before or after** a deed of conveyance of real property to the trust or trustee, in his capacity as such. Miss. Code Ann. § 91-8-407(b)(2). A memorandum of trust need not contain a legal description if filed immediately before or contemporaneously with a conveyance of the real property. Id. However, while not required, it is good practice to include reference by record location in a subsequent conveyance instrument to a previously recorded memorandum of trust.

With respect to a testamentary trust, a will admitted to probate in the county where the real property is located is deemed to be of record once recorded in the Will Book. If the will was admitted to probate in a different county, either a memorandum of trust or a certified copy of the will should be recorded in the county where the real property is located.

Caution:

Absent the recordation of a memorandum of trust, an examiner is unable to determine from the public record the existence of a trust or the scope of authority, if any, of parties purporting to have executed title documents as trustees. An examiner should treat an attempted conveyance into or out of a trust or trustee(s) of a trust not evidenced by a recorded trust or memorandum of trust as ineffective. See Presbytery of St. Andrew v. First Presbyterian Church PCUSA of Starkville, 240 So.3d 399 (Miss. 2018) ("Mississippi law

requires that "no trust of or in any real property can be created except by written instrument signed by the party who declares or creates such trust...." Miss. Code Ann. § 91–8–407.").

In situations where a trust in real property has been created by a written instrument signed by a settlor pursuant to Miss. Code Ann. § 91-8-407, but neither the trust instrument nor a memorandum thereof has been filed of record, then any attempted conveyance out of the trust should be considered ineffective until either the trust instrument or a memorandum thereof is properly filed of record evidencing the existence of the trust and the scope of the trustee's authority, unless the conveyance out of the trust contains the information required for a memorandum of trust. Miss. Code Ann. § 91-8-407(b)(2).

See discussion in Comment to Standard 10.01 (Powers of Trustee) regarding "ancient document" rule. See also, the ten-year statute of limitation governing actions on express or constructive trusts. Miss. Code Ann. § 15-1-39.

Source:

Citations in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

10.03 Conveyances to Trusts, not Trustees

A conveyance to or from a named trust, rather than to or from a named trustee as the trustee of the trust, may be presumed valid in the absence of contrary evidence.

Comment:

Title to real property to be held in trust should be conveyed to a named trustee as the trustee of the trust, and conveyed out by the then trustee or successor trustee. A trust is not an entity, but an agreement creating a fiduciary relationship between a grantor/settlor and a named trustee. However, effective July 1, 2014 (See S.B. 2211), any estate in real property may be acquired in the trust name. Title so acquired can be conveyed in the trust name or by the trustees, as trustees of the trust. Miss. Code Ann. § 91-8-407.

See Standard 10.02 (Recording of Trust Document) regarding requirements for recording the trust instrument or a memorandum of trust.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

10.04 Trustee's Power of Sale Pursuant to a Testamentary Trust

Unless the trustee's power of sale is limited by the terms of the will, court approval is not necessary in connection with the sale of real property by the trustee of a testamentary trust.

Comment:

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

Caution:

This standard pertains only to the trustee's power of sale pursuant to a testamentary trust. In order to rely on the will, it must still be probated.

Source:

Miss. Code Ann. § 91-8-815 (General powers of trustee); Miss. Code Ann. § 91-8-816 (Specific powers of trustee).

History:

Adopted effective as of August 1, 2019.

10.05 Trust Established in Accordance with Testamentary Additions to Trust Statute

In reviewing marketability of conveyances by trustees, an examining attorney must keep in mind where applicable the provisions of the Miss. Code Ann. § 91-5-11 – the "Testamentary Additions to Trusts" statute.

Comment:

Mississippi permits a testamentary disposition to an existing trust. Pursuant to Miss. Code Ann. § 91-5-11, a devise or bequest in a will of a testator dying on or after May 6, 1958, may be made to the trustee of a trust established by the testator if the trust is identified in the testator's will and its terms are set forth in a written instrument, other than a will, executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator. The devise or bequest will not be invalid because the trust is amendable, revocable, or both or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised or bequeathed shall not be deemed to be held under a testamentary trust of the testator but shall be administered and disposed of in accordance with the provisions of the instrument creating the trust, including any written amendments or modifications thereto made before the death of the testator. An entire revocation of the trust prior to the testator's death shall invalidate the devise or bequest.

Source:

Miss. Code Ann. § 91-5-11.

History:

Adopted effective as of August 1, 2019.

CHAPTER 11: CAPACITY TO CONVEY

11.01 Minority

In the absence of actual or constructive notice to the contrary, a grantor is presumed to be an adult. If it appears that a person in the chain of title was a minor, an examiner should first determine that a conveyance **from that person** occurred after:

(1) the person obtained the age of majority as defined at the time of the conveyance;

(2) the person had the disability of minority removed by a court of competent jurisdiction; or

(3) the person was legally married, had attained the age of 18 years, and the conveyance in question pertained to the residence or intended residence of said person.

Comment:

The age of majority in Mississippi is 21 years of age. Miss. Code Ann. § 1-3-27. While a person 18 or older, if not otherwise disabled, has the capacity to enter into binding contractual relationships affecting personal property (see Miss. Code Ann. § 93-19-13), the same cannot be said for real property.

A minor that seeks to purchase, sell, convey, mortgage, lease or encumber title to real property must either have:

- reached the age of 18, be married, and currently occupies or intends to occupy the property as their principal place of residence. Miss. Code Ann. 93-3-11; or
- a Chancery Court order/decree authorizing the removal of the disability of minority for the express purpose of allowing the minor to purchase, sell, convey, mortgage, lease or encumber title to real property. Miss. Code Ann. 93-19-1 et seq.; or
- a Chancery Court order/decree authorizing the minor's guardian to purchase, sell, convey, mortgage, lease or encumber title to real property on behalf of the minor. Miss. Code Ann. § 93-13-47 (**to create, extend or renew any encumbrance**); Miss. Code Ann. § 93-13-49 (**to purchase**); Miss. Code Ann. § 93-13-51 (**to sell**).

Caution:

See discussion in Comment and Caution to Standard 1.02 (Review by Examiner) regarding a search of the chancery index and the potential effect of a limited search.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

11.02 Mental Capacity

In the absence of actual or constructive notice to the contrary, an examiner may presume that a grantor of an instrument in the chain of title had the mental capacity to convey. If the lack of capacity has been established, evidence of the restoration of capacity should be required.

Comment:

Where a mentally incompetent seeks to purchase, sell, convey, mortgage, lease or encumber title to real property, a Chancery Court order/decree appointing a guardian and authorizing the guardian to purchase, sell, convey, mortgage, lease or encumber title to real property on behalf of the incompetent should be filed of record. Miss. Code Ann. § 93-13-121 et seq.

A facially valid deed is rebuttably presumed to have been executed by a person with the requisite mental capacity. Mullins v. Ratcliff, 515 So.2d 1183, 1190 (Miss. 1987) (citing Richardson v. Langley, 426 So.2d 780, 786 (Miss. 1983)). The grantor's mental capacity is to be measured as of the time of the execution of the deed, Richardson, 426 So.2d at 783; Moore v. Stone, 208 So.2d 585, 586 (Miss.1968), although the challenging party may carry his burden by showing that the grantor was permanently insane up to and beyond that moment in time.

In Mississippi, three ways exist to establish the mental incapacity of a person to execute a deed: (1) the grantor suffered from a total lack of capacity to execute the deed (i.e., that the grantor did not understand the legal consequences of his or her actions); (2) the grantor suffered from a general "weakness of intellect" coupled with either (a) inadequate consideration given for the transfer or (b) a confidential relationship between the grantor and grantee; or (3) the grantor suffered from permanent insanity up to and after the date of execution. Mapp v. Chambers, 25 So.3d 1096, 1100 (Miss. App. 2010) (citing Smith v. Smith, 574 So.2d 644, 653–54 (Miss.1990)).

The same rule for testing mental capacity applies alike to wills and deeds. Young v. Martin, 125 So. 2d 734, 738 (1961). Temporary or intermittent insanity or mental incapacity does not raise a presumption that such disability continued to the date of execution. Id.

The burden of proving a lack of mental capacity rests squarely on the party seeking to have such deed set aside. Smith v. Smith, 574 So. 2d 644 (Miss. 1990). Mental incapacity or insanity "is not always permanent, and a person may have lucid moments or intervals when that person possesses the necessary capacity to convey property." Whitworth v. Kines, 604 So. 2d 225, 228 (Miss. 1992)(citing Smith, 574 So.2d at 653).

Caution:

See discussion in Comment and Caution to Standard 1.02 (Review by Examiner) regarding a search of the chancery index and the potential effect of a limited search.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

11.03 Guardians and Conservators

In reviewing a sale or encumbrance of property by a guardian or conservator, an examiner should determine that all statutory requirements and requirements established by the court have been met.

Comment:

In considering a guardian's sale of property, including leases, or deed of trust or other encumbrance of property, the examiner should first review the documents involved in the appointment of the guardian. Among these are:

(1) the petition for appointment;

(2) the service and notice of service;

(3) the order appointing the guardian; and

(4) the guardian's oath and bond.

The examiner must also determine that the guardian's appointment was in effect at the time of the sale or lease.

A guardianship terminates in any of the following circumstances:

(1) when the ward dies;

(2) when a minor ward marries, reaches majority (age 21), or has disabilities removed;

(3) when a court issues an order of restoration in the case of an incapacitated ward (Miss. Code Ann. § 93-13-151); and

(4) when a court determines the guardianship is no longer necessary. Conservators have the same duties, powers, and responsibilities as guardians of minors, and all laws relative to the guardianship of minors are applicable to conservators. Miss. Code Ann. § 93-13-259.

Subject to statutory limitations on "fair and reasonable market" value of the ward's interest and joinder of the appropriate relatives as described in Miss. Code Ann. § 93-13-281, a ward's property may be sold by a next friend without the appointment of a guardian by obtaining a court order authorizing the sale. Miss. Code Ann. § 93-13-217.

For related standards, see Standard 11.01 (Minority), and Standard 11.02 (Mental Capacity). The holder of a durable power of attorney may have authority to convey the property of an incapacitated person. See Chapter 9: Powers of Attorney.

Caution:

The appointment of a guardian in another jurisdiction does not give the guardian any authority over a ward's estate in Mississippi. A foreign guardian may be appointed by a Mississippi court, without service or notice of service, in the manner prescribed by Miss. Code Ann. § 93-13-181.Source:

Miss. Code Ann. § 93-13-47 (**to create, extend or renew any encumbrance**); Miss. Code Ann. § 93-13-49 (**to purchase**); Miss. Code Ann. § 93-13-51 (**to sell**).

History:

Adopted effective as of August 1, 2019.

CHAPTER 12: DECEDENT'S ESTATES

12.01 Passage of Title Upon Death

A decedent's property passes to his or her heirs at law or devisees (assuming the will is subsequently and properly admitted to probate) immediately upon death, subject to payment of debts, including federal estate taxes.

Comment:

Title is vested immediately in the decedent's heirs at the time of death in the absence of a will. Miss. Code Ann. § 91-1-3; Beach v. State, 178 Miss. 336, 173 So. 429 (1937); Parker v. Newell, 245 So. 2d 575, 576 (Miss. 1971); See also Tolbert v. Southgate Timber Co., 943 So. 2d 90 (Miss. Ct. App. 2006, citing Moore v. Ware, 51 Miss. 206, 1875 WL 4690 (1875)).

Caution:

If a will of the decedent is later found and successfully probated, then the property may revest into the devisees under the will. If no will is found and successfully probated, then the title will remain with the intestate heirs as determined pursuant to laws of descent and distribution. Virginia Trust Co. v. Buford, 123 Miss. 572, 86 So. 356 (1920), suggestion of error overruled, 123 Miss. 572, 86 So. 516 (1920). Thus, any conveyance of a decedent's real property must be given special care to ensure that the proper parties are conveying the property and that estate requirements have been met.

See discussion in Caution to Standard 12.02 (Estate Proceedings) regarding effect of failure to probate will in Mississippi resulting in will not being effective "as an instrument of title."

Source:

Citations in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

12.02 Estate Proceedings

If a property owner dies, and the examiner has actual or constructive notice that the owner left a will, then the examiner must determine whether there is a probate proceeding or administration pending, and whether a personal representative is acting. If the records of the county where the land is located do not indicate that a will has been filed for probate, and in the absence of information to the contrary, an affidavit which complies with Standard 12.07 (Heirship Affidavits) may be relied upon as satisfactory evidence that the owner died intestate.

Comment:

If the will of the decedent is probated and found to be valid, then the title is vested in the decedent's devisees. Anderson v. Gift, 156 Miss. 736, 126 So. 656 (1930). The vesting automatically relates back to the decedent's death.

Caution:

Property situated in Mississippi descends according to Mississippi law, regardless of where the decedent resided or was domiciled. In re Estate of High, 19 So.3d 1282, 1287 (Miss. App. 2009). This is true whether the property is real or personal, and whether the estate is testate or intestate. See, e.g., Miss. Code Ann. § 91–1–1 (Rev.2004); In re Estate of Mason, 616 So.2d 322, 328 (Miss.1993); Bolton v. Barnett, 131 Miss. 802, 827, 95 So. 721, 726 (1923); Heard v. Drennen, 93 Miss. 236, 243–44, 46 So. 243, 244 (1908).

A will not submitted for probate in Mississippi is not effective "as an instrument of title." Gunn v. Heggins, 964 So.2d 586, 592 (Miss. App. 2007); Robberson v. Burton, 790 So. 2d 226 (Miss. Ct. App. 2001) (quoting Virginia Trust Co. v. Buford, 123 Miss. 572, 86 So. 356 (1920), suggestion of error overruled, 123 Miss. 572 (1920)). In instances where a will is not submitted for probate, the property belonging to the decedent is deemed to pass pursuant to the laws of descent and distribution. Virginia Trust Co. v. Buford, 123 Miss. 572 (1920), suggestion of error overruled, 123 Miss. 572 (1920).

See Comment to Standard 12.05 (Conveyances by Heirs of an Estate) for discussion on renunciation of a will and private agreement detailing how the property should be divided.

Source:

Citations in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

12.03 Conveyances by an Executor or Administrator – Without Court Authority

Before accepting a deed from an executor or administrator, an examiner should be satisfied that the executor or administrator was properly appointed and that the will directs or vest authority in the executor or administrator to convey real property held by the deceased at the time of his death.

Comment:

An executor or administrator may sell real property without a court order if the will contains a testamentary power of sale. Davis v. Sturdivant, 197 Miss. 139, 19 So. 2d 499 (1944); Stone Investment Company, Inc. v. Estate of Robinson, 82 So. 3d 631 (Miss. Ct. App. 2011) (finding that "When an executrix possesses power under the will to sell the land, the sale of such land is not considered a 'judicial sale.' Therefore, when a valid testamentary power of sale exists, there is no need to obtain a court order justifying the sale."). All proceeds from the sale by the executor or administrator without a court order are proceeds of the estate and must be paid into the estate.

Caution:

Where an executor or administrator conveys title pursuant to a testamentary power of sale, the heirs of the decedent need not join the executor or administrator in the execution of the conveyance, unless the will devises the real property being sold to a devisee. In that case, the devisee must join the executor or administrator in the execution of the conveyance.

Source:

Citations in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

12.04 Conveyances by an Executor or Administrator – With Court Authority

Before accepting a deed from an executor or administrator, an examiner should be satisfied that the executor or administrator was properly appointed and obtained an order authorizing the sale of real property where:

(a) the sale of the real property is in preference to the personal property and is in the best interest of the distributees or legatees;

(b) the decedent had, during his/her lifetime, executed an enforceable option contract for the sale of the subject property, and the executor's or administrator's deed was given to fulfill the same;

(c) the personal property of the decedent's estate will not be sufficient to pay the debts and expenses of the estate; or

(d) an order of insolvency has been entered with respect to the decedent's estate, and the Court has approved the sale of the real property to pay debts of the estate.

Comment:

If the will does not contain a testamentary power of sale in favor of the executor or administrator or does not specifically direct the sale of real property by the executor or administrator, then the executor or administrator may not sell real property without a court order. There are four situations in which an executor or administrator may petition the court for an order authorizing the sale of real property:

- pursuant to Miss. Code Ann. § 91-7-187 authorizing the sale of land, with due consideration given to the interests of the distributees, in preference to the personal property;
- pursuant to Miss. Code Ann. § 91-7-189 authorizing the sale of land if a decedent had purchased land prior to his death and died before completing payment for it and the decedent's personal property is not sufficient to pay the debt;
- pursuant to Miss. Code Ann. § 91-7-191, if the executor or administrator determines that the personal property will not be sufficient to pay the debts and expenses of the estate; and
- pursuant to Miss. Code Ann. § 91-7-261, if the executor or administrator determines that both the real and personal property will be insufficient to pay the debts of the estate.

All parties in interest must be cited by summons or publication. Miss. Code Ann. § 91-7-197; Turner v. Hightower's Estate, 417 So. 2d 919 (Miss. 1982). A decree ordering lands sold without notice to the parties in interest is void. Eastman Gardiner Lumber Co. v. Carr, 175 Miss. 36, 166 So. 401 (1936); Miss. Code Ann. § 91-7-205. However, if all parties in interest join in the petition so that the matter may proceed *ex parte* then notice is not necessary. The court may require the proceeds from the sale of land to be held in trust by the executor or administrator. Miss. Code Ann. § 91-7-205.

The effect of an order authorizing the sale of land is to divest the heirs and devisees of their title to the real property and place it with the executor or administrator. McWilliams v. Brown's Estate, 183 So. 2d 820 (Miss. 1966); Brown v. McAfee, 421 So. 2d 1061 (Miss. 1982). Therefore, where an executor or administrator conveys title pursuant to a court order, the heirs of the decedent need not join the executor or administrator in the execution of the conveyance. Miss. Code Ann. § 89-1-67 (providing the statutory form

of conveyance to be executed by an executor or administrator selling land under a decree). However, all parties in interest (devisees or heirs) must be cited by summons or publication. Miss. Code Ann. § 91-7-197 (requiring all parties interested shall be cited by summons or publication); Miss. Code Ann. § 91-7-261 (requiring the devisees or heirs to be made parties to the proceeding); Eastman Gardiner Lumber Co. v. Carr, 175 Miss. 36 (1936) (finding a decree ordering lands sold without notice to the parties in interest to be void). Whenever an executor or administrator sells land pursuant to a decree, the executor or administrator must execute a bond in an amount equal to the proceeds of the sale of the land, unless waived by the court. Miss. Code Ann. § 91-7-205. All proceeds from a sale by the executor or administrator with a court order are proceeds of the estate and must be paid into the estate unless the court order directs otherwise.

Caution:

If a petition for an order authorizing the sale of real property under Miss. Code Ann. § 91-7-191 does not specifically allege that the personal property is insufficient to pay the debts, then any sale pursuant to the order is void. McWilliams v. Brown's Estate, 183 So.2d 820, 822 (Miss. 1966) (finding that compliance with the statute is necessary to divest title to real property out of the devisees or heirs and vest the same in the executor or administrator).

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

12.05 Conveyances by Heirs of an Estate

If the property owner died intestate, or if the owner died testate but the will is not probated, the examiner should, in the absence of administration, identify the heirs of the decedent, along with the devisees in any unprobated will, and require that all of them join in a conveyance of the property of the decedent.

Comment:

See discussions in Standard 12.07 regarding heirship affidavits; in Standard 12.09 regarding adjudication of heirship; and in Standard 12.10 regarding foreign wills.

Beneficiaries of a will may agree not to probate the will, in some instances because the estate is small and does not justify the cost. A commonly accepted procedure is to attach a copy of the will, if available, to an affidavit of heirship and to file the documents in the county records. In those cases, the examiner should require the joinder in the conveyance of each party who would take by intestacy and each party who would take under the will. The conveyance should include a recital that those grantors who would take under the will do renounce the will and no other will exists. If the will was not attached to the affidavit but is available, the examiner should obtain a copy of the will in order to confirm the identity of the devisees under the will. If possible, the examiner should file a certified copy of the will of record.

While a testator does have the right to dispose of his property as he sees fit, he cannot compel the devisees in his will to accept the will or the property so devised. Parker v. Broadus, 91 So. 394, 395 (Miss. 1922). Devisees have the right to renounce the will when it contains no trust or other limitation upon the property devised or bequeathed by the will. Id. When a will is renounced the effect of the renunciation relates back to the time the will became effective so as to make it void. Id. Upon renunciation of a will, the devisees may then enter into a private agreement detailing how the property should be divided. In re Estate of Woodfield, 968 So.2d 421, 428 (Miss. 2007).

Real property that passes to the heirs/devisees may be conveyed by the heirs/devisees without a court order if all of the heirs/devisees join in the execution of the conveyance and the sale of the real property is not made for the purpose of satisfying the debts of the estate or as a preference to the sale of personal property. In re Estate of McRight, 766 So. 2d 48, 50 (Miss. Ct. App. 2000).

Caution:

See discussion in Comment to Standard 12.06 (Estate Debts and Taxes) regarding title to property of a decedent passing subject to unpaid debts and taxes of the estate.

It is a crime in Mississippi to destroy or secret a will. Miss. Code Ann. § 97-9-77. A court may compel anyone having a will to produce it so that it may be probated. Miss. Code Ann. § 91-7-5.

Mississippi has no statute of limitations on probating a will. In re Will of Wilcher, 994 So.2d 170, 175 (Miss. 2008) (citing Belt v. Adams, 87 So. 666, 668 (1921)). However, a will proponent may be estopped from procuring probate where there was fraudulent conduct or "long delay in propounding the will for probate during which property of the estate was transferred to subsequent purchasers for value and without notice of the will." Id. at 640. See Logan v. Smith, 229 Miss. 513, 516–517, 91 So.2d 707 (1956).

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

12.06 Estate Debts and Taxes

Property of a decedent, if not exempt, passes subject to unpaid debts and taxes of the estate. Therefore, an examiner should determine whether any unpaid debts and taxes have been paid or have become barred by limitations.

Comment:

Property of a decedent passes subject to unpaid debts and taxes of the estate, and the examiner should determine whether any exist.

Absent information to the contrary, an examiner may rely upon the affidavit of an executor, administrator, or another person who has knowledge of the facts that all debts of the estate have been paid. As evidence that an estate is not large enough to incur federal estate taxes, an examiner may rely upon a court-approved inventory, or in the absence of an inventory, the affidavit of a person who has knowledge of the facts.

An examiner may accept, as proof that debts and taxes have been paid, an order closing a court supervised administration or an affidavit closing an independent administration. If federal estate taxes are due, the satisfaction of the taxes may be proven by a Federal Estate and Generation-Skipping Transfer Tax Closing Letter together with proof of payment of the taxes shown by the letter to be due to the United States.

An examiner may not accept an order of the court probating a will as a muniment of title as evidence that the real property under examination is free of all obligations of the estate other than debts secured by liens on the real property and as evidence that administration is not otherwise necessary, unless three years and six months have passed since the date of the death.

A lien for federal estate taxes attaches to the gross estate of a decedent as of the date of death and, in general, exists for a period of ten years. 26 U.S.C. § 6324. There is no requirement for filing the notice in the county records.

The State of Mississippi does have an estate tax. See Section 16.01 (Liens, Generally). See also, Miss. Code Ann. §§ 27-9-35, 27-9-37, 27-9-41.

Most relatively simple estates (cash, publicly traded securities, small amounts of other easily valued assets, and no special deductions or elections, or jointly held property) do not require the filing of a federal estate tax return. A filing is required for estates with combined gross assets and prior taxable gifts exceeding $1,500,000 in 2004 - 2005; $2,000,000 in 2006 - 2008; $3,500,000 for decedents dying in 2009; and $5,000,000 or more for decedent's dying in 2010 and 2011 (note: there are special rules for decedents dying in 2010); $5,120,000 in 2012, $5,250,000 in 2013, $5,340,000 in 2014, $5,430,000 in 2015, $5,450,000 in 2016, $5,490,000 in 2017, and $11,180,000 in 2018. Any unused estate tax exemption of a married person who died in 2011 or later can be transferred to the surviving spouse under a concept commonly called "portability." 26 U.S.C. § 2010(c).

If estate taxes are due and have not been paid, the District Director of the Internal Revenue Service has the authority to release the lien upon being furnished a bond conditioned on the payment of the tax. U.S. Treas. Reg. 301.6325–1(a)(2). Similarly, the District Director may release the lien if the fair market value of the remaining property is at least double the amount of the outstanding tax plus all prior liens against the property. U.S. Treas. Reg. 301.6325–1(b)(1). Other release authority is set out in U.S. Treas. Reg. 301.6325–1. A federal estate tax lien is divested regarding property sold under court order to pay debts and administration expenses. 26 U.S.C. § 6324(a)(1).

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

12.07 Heirship Affidavits

In the absence of information to the contrary, an examiner may rely upon a recorded affidavit of heirship with respect to the family history and the identity of heirs of a decedent, so long as the affidavit identifies the affiant, is not self-serving, and recites a reasonable basis for the factual statements contained therein, and three (3) years and ninety (90) days have passed since the date of the death of the decedent.

Comment:

An examiner commonly relies upon affidavits of heirship when the family history and the identity of the heirs of a decedent are not otherwise known. Miss. Code Ann. § 89-5-8(3) provides that any affidavit so recorded shall be admissible as evidence in any action involving the instrument to which it relates or the title to the real estate affected by the instrument and shall be prima facie evidence of the facts stated therein and the marketability of the title to real estate.

To be reliable, an affidavit of heirship should set out facts from which the reader can determine the heirs at law, rather than stating conclusions of law. While not all are required, some of the facts that are important to include in the Affidavit of Heirship are:

- The date and place of birth of the decedent;

- The date and place of death of the decedent, and his residence and address;
- How long the affiant knew the decedent;
- The marital history of the decedent;
- The names of the decedent's children and any of their descendants, birth dates, and current addresses;
- Whether the decedent had any adopted children;
- If there are no descendants, the names, birth dates, and current addresses of other surviving and non-surviving ancestors, such as parents and siblings;
- The names and contact information for others that may know about the decedent and his or her descendants;
- That the decedent died without leaving a written will (if that is true);
- That there has been no administration of the decedent's estate (if that is true);
- Whether the decedent left unpaid debts or inheritance taxes; and
- A list of any real property owned by the decedent.

Heirs can also be determined by bringing a suit to determine heirship under Miss. Code Ann. § 91-1-27. See Standard 12.09 (Adjudication of Heirship).

Caution:

While affidavits of heirship are the most commonly used alternative to a judicial determination of heirship, they are used for the limited purpose of evidencing of record the transfer of title to real property. Unlike a judicial proceeding to determine heirship, a recorded affidavit of heirship is not a conclusive determination of the heirs, only prima facie evidence of the facts stated therein.

The affiant must be a disinterested party. To be a disinterested party, one must be knowledgeable about the decedent and his or her family history, but not someone who will benefit financially from the estate. Essentially, each affiant will provide a sworn statement that they knew the decedent, the date and county of death, the identity of family members, and other facts important to identifying the heirs. An affiant may be a person related to the decedent, provided they do not stand to inherit from the decedent or otherwise benefit financially by executing the affidavit.

Although legal title to real property passes automatically by operation of law directly to a decedent's heirs or devisees upon death, title remains subject to the claims of the decedent's creditors. Parker v. Newell, 245 So. 2d 575 (Miss. 1971); Gidden v. Gidden, 176 Miss. 98, 167 So. 785 (1936); Anderson v. Gift, 156 Miss. 736, 126 So. 656 (1930). *See also* Standard 12.01(Passage of Title Upon Death). In order for the heirs or devisees to obtain full or marketable title to the real property, the decedent's creditors' claims must first be satisfied from estate assets. Therefore, in order to rely on an affidavit of heirship, at least three (3) years and ninety (90) days must have passed since the date of the decedent's death. Miss. Code Ann. § 91-7-91 (if administration of an estate is not commenced within three (3) years, then claims of unsecured creditors will be barred unless within three (3) years and ninety (90) days from the date of the death of the decedent, the unsecured creditor files of record a lis pendens containing the name of the decedent, a brief statement of the nature, amount and maturity date of his claim and a description of the real property sought to be charged therewith; filing of notice is not required for secured creditors having a recorded lien on real property).

While not required by statute, title insurers generally require two (2) heirship affidavits or one (1) heirship affidavit executed by an affiant and corroborating witness.

Source:

Citations are in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

12.08 Wills as a Muniment of Title

An examiner may rely upon an order admitting a will as a muniment of title only, so long as the order is filed of record in the county in which the real property is located and three (3) years and ninety (90) days have passed since the date of the death of the decedent.

Comment:

When a person dies testate owning real property in Mississippi, and his or her will purports to devise such property, the will may be admitted to probate as a muniment of title only. This is accomplished by a petition signed and sworn to by all beneficiaries named in the will, and the spouse of the deceased person if he or she is not named as a beneficiary. The appointment of an executor or administrator with the will annexed is not necessary, if it is shown in the petition that: (a) the value of the decedent's personal estate in Mississippi at the time of his or her death, exclusive of any interest in real property, did not exceed $10,000, exclusive of exempt property; and (b) all known debts of the decedent and his or her estate, including estate and income tax, have been paid. Miss. Code Ann. § 91-5-35. In such cases, a petition must be signed by all beneficiaries named in the will, including the spouse if not named as a beneficiary. Id.

Caution:

While the muniment of title does establish the devisees of the real property, it does not cut off the claims of creditors of the deceased, address Medicaid recovery, or inheritance tax or estate tax.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

12.09 Adjudication of Heirship

An examiner may rely upon an order adjudicating heirship of the intestate estate only, if the order is filed of record in the county in which the real property is located and three (3) years and ninety (90) days has passed since the date of the death of the decedent.

Comment:

When a person dies wholly or partially intestate (without a will) owning real property in Mississippi, any heir at law or anyone interested in any of the property as to which the decedent died intestate, may petition the chancery court for an order confirming the heirs of the intestate estate only. Miss. Code Ann. §

91-1-27, -29. There is no statutory requirement that a suit to determine heirship must be brought within any prescribed time period. Matter of Heirship of McLeod, 506 So. 2d 289, 291 (Miss. 1987). However, once a question arises as to a person's status as a lawful heir of the estate, an action to establish heirship must be brought, and it must be brought within the general statute of limitations period provided by Mississippi Code Annotated § 15-1-49. McLeod, 506 So. at 292–293.

Caution:

While an order confirming heirship does establish the heirs at law of intestate property, it:

- does not cut off the claims of creditors of the deceased, address Medicaid recovery, or inheritance tax or estate tax; and
- remains subject to collateral attack by anyone not made a party to the suit to determine heirship for two years from the date of rendition, save for minors and persons of unsound mind. Miss. Code Ann. § 91-1-31. See Johnson v. Howell, 592 So. 2d 998 (Miss. 1991).

Therefore, before relying on an order adjudicating heirship, an examiner should confirm that at least three (3) years and ninety (90) days have passed since the date of the death of the decedent, and at least two (2) years has passed since the date of rendition of the order, with no evidence of involvement of minors or incompetents.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

12.10 Foreign Wills

The probate of a will in another state has no effect on real property in Mississippi. An examiner should not rely upon a will made and probated in another state, unless the will has been admitted to probate by a Mississippi Chancery Court.

Comment:

A foreign will is one probated outside of Mississippi in any of the United States, its territories, the District of Columbia, or any foreign nation. Administration of an estate in Mississippi is not ancillary to the administration of the same estate in a foreign jurisdiction. Wilson's Estate v. Nat'l Bank of Commerce, 364 So. 2d 1117, 1122 (Miss. 1978); Carroll v. McPike, 53 Miss. 569, 577 (1876).

A will made and probated in a foreign state has no effect as a conveyance as to property in Mississippi until the same is probated, but when probated will relate back to testator's death and be given effect unless the property has been acquired in good faith for value by a person without notice of the existence of the will. Belt v. Adams, 125 Miss. 387 (Miss. 1921).

Caution:

Administration of the estate of the non-resident administered in the court of his residence has no effect on the claims of creditors in Mississippi. Buckingham Hotel Co. v. Kimberly, 138 Miss. 445, 103 So. 213 (1925) (finding disallowance of a claim by a Missouri court did not bar allowance of the same claim in Mississippi probate proceedings). All creditors, no matter where they reside, nor where the debts were

contracted, are entitled to prove their claims in Mississippi, and proceed in Mississippi courts to enforce them, and to share in the assets in Mississippi. Id.

Source:

Citations in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

CHAPTER 13: BANKRUPTCIES

13.01 Relevance of Bankruptcy Cases to Real Property Transactions

The examiner is not required to examine the records of the Clerk of the United States Bankruptcy Court for the District in which the real property is located. However, if a person in the chain of title has been or is a debtor in a bankruptcy proceeding, the land may have been or may be property of the bankruptcy estate, subject to the jurisdiction and control of the bankruptcy proceeding. For this reason, if the examiner has actual or constructive notice of any proceeding in bankruptcy, then the examiner should report to his client the effect the bankruptcy has upon marketability of title.

Comment:

A "debtor" is a person or municipality concerning which a bankruptcy case has been commenced since October 1, 1979, the effective date of the Bankruptcy Code. 11 U.S.C. § 101(13). A "person" includes individual, partnership, and corporation. 11 U.S.C. § 101(41). Formerly, the person subject to a bankruptcy case was commonly known as a "bankrupt."

There are generally four types of bankruptcy cases: a Chapter 7 "liquidation"; a Chapter 11 "reorganization"; a Chapter 12 "adjustment of debts of a family farmer or fisherman with regular annual income"; and a Chapter 13 "adjustment of debts of an individual with regular income." A Chapter 9 case applies only to a political subdivision or public agency or instrumentality of a state. A Chapter 15 case concerns ancillary and other cross-border insolvency cases.

The commencement of a voluntary case (filed by the debtor alone or jointly with a spouse) or an involuntary case (filed by another person, such as a creditor) creates an estate. The estate includes all legal and equitable interests of the debtor in property as of the commencement of the case. The estate also includes property that the debtor acquires or becomes entitled to acquire within 180 days after the commencement of the case by bequest, devise or inheritance, by property settlement agreement with the debtor's spouse or in an interlocutory or final divorce decree, or as a beneficiary of a life insurance policy or death benefit plan. 11 U.S.C. § 541.

The trustee may avoid post-petition transactions (transactions occurring after the commencement of the bankruptcy case of the debtor), unless protected under §§ 549 (b) and (c) of Title 11 or unless the transaction is authorized by the bankruptcy court or the Bankruptcy Code. 11 U.S.C. § 549(a). The trustee may not avoid a transfer made by the debtor in an involuntary bankruptcy case before the order for relief, to the extent any value is given in exchange for the transfer, notwithstanding any notice or knowledge of the bankruptcy case that the transferee has. 11 U.S.C. § 549(b). The trustee may not avoid a transfer of an interest in real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed in the real property records before the transfer was perfected. 11 U.S.C. § 549(c). A "purchaser" is a transferee of a voluntary transfer and includes the immediate or mediate transferee of such transferee. 11 U.S.C. § 101(43). A "transfer" includes the creation of a lien, the retention of title as a security interest, a foreclosure, and each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing or parting with property or an interest in property. 11 U.S.C. § 101(54).

The automatic stay does not apply to a transfer that is not avoidable under 11 U.S.C. § 544 and that is not avoidable under Section 549. 11 U.S.C. § 362(b)(24). See Comment to Standard 13.04 for a discussion of the automatic stay.

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

Caution:

The examiner should routinely require proof at closing that no bankruptcies are pending which may affect title to the real property being conveyed or encumbered. Such proof may be obtained by the execution of an affidavit executed by the selling party. Further, bankruptcy records are easily accessible to the public through the Federal Courts PACER system. If there is any question, the examiner may search the PACER system for any related cases.

Absent actual or constructive notice of a prior or pending bankruptcy, the examiner should also include an exception in his certificate of title for matters outside of the real property records, including, but not limited to, applicable bankruptcy, insolvency, reorganization, fraudulent conveyances, moratorium and similar laws in effect from time to time.

Source:

Citations in the Comment; 5 Collier on Bankruptcy, Chapters 541, 549 (Alan N. Resnick & Henry J. Sommer eds. Matthew Bender & Company, Inc., a member of LexisNexis, 16th Revised 2014).

History:

Adopted effective as of August 1, 2019.

13.02 Authority for Prior Transfer

If the examiner has actual or constructive notice that the owner or transferor in a prior real property transaction recorded within two years prior to the current examination was then a debtor in a bankruptcy case, the examiner should determine that the prior transfer was authorized in that case.

If a prior real property transaction in the chain of title was recorded more than two years prior to the current examination and if a bankruptcy case filed by or against the transferor or owner in that prior transaction is not disclosed in the chain of title, the examiner need not determine whether the prior real property transaction was authorized in a bankruptcy proceeding, regardless of whether the examiner has knowledge that the owner or transferor in the prior transaction was then a debtor in a bankruptcy case.

Comment:

Notice is commonly given by a copy or notice of the bankruptcy petition filed by or against the owner or transferor. 11 U.S.C. § 549(c).

The trustee in a bankruptcy case may not avoid a transfer of an interest in real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed in the real property records before the transfer was perfected. 11 U.S.C. § 549 (c). An action or proceeding under 11 U.S.C. § 549 to set aside a post-petition transaction must be commenced no later than the earlier of (1) two years after the date of the transfer, or (2) the time the case is closed or dismissed. 11 U.S.C. § 549 (d).

Source:

Citations in the Comment; 5 Collier on Bankruptcy, Chapter 549 (Alan N. Resnick & Henry J. Sommer eds. Matthew Bender & Company, Inc., a member of LexisNexis, 16th Ed. Revised 2014).

History:

Adopted effective as of August 1, 2019.

13.03 Reliance Upon Recitals of Authority for Prior Transfer

If a copy of an order in the bankruptcy case authorizing a prior real property transaction in the chain of title has been recorded, the examiner may rely upon the order to determine that the transaction was authorized in the bankruptcy case. If the instrument evidencing the transaction was recorded more than two years prior to the examination, the examiner may rely upon any recitals in the chain of title that the transaction was authorized in the bankruptcy case. Recitals may include a statement in the instrument in the chain of title that the grantor was acting as trustee or debtor in possession, that the property had been exempted or abandoned, that the automatic stay had been lifted or annulled to authorize a foreclosure, or that the transaction evidenced by the instrument had been otherwise authorized in the bankruptcy case.

Comment:

Although the Bankruptcy Code does not explicitly authorize reliance upon recitals in an instrument executed by the debtor or trustee, there are numerous legal principles that will generally justify reliance upon the apparent authority set forth in an instrument in the chain of title. An action or proceeding by the trustee to set aside a transfer of property of the estate made after the commencement of the bankruptcy case and that is not properly authorized may not be commenced after the earlier of (1) two years after the date of the transfer sought to be avoided or (2) the time the case is closed or dismissed. 11 U.S.C. § 549 (d). A motion to set aside a judgment or order must be made within one year if for (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; or (3) fraud, misrepresentation, or other misconduct of an adverse party. This time limit to file a motion to set aside a judgment or order does not apply if the judgment is void. Fed. R. Civ. P. 60(b); Fed. Rules Bankr. Proc. Rule 9024 (adopts some, but not all of the provisions of Fed. R. Civ. P. 60).

The Bankruptcy Code also favors reliance upon court orders, notwithstanding appeals from those orders. The reversal or modification of an authorization of sale or lease under 11 U.S.C. § 363 (b) or (c) does not affect the validity of the sale or lease to an entity that purchased or leased in good faith, whether or not the entity knew of the pendency of an appeal, unless the sale or lease was stayed pending appeal. 11 U.S.C. § 363 (m). The reversal or modification on appeal of an authorization to obtain credit and grant a lien does not affect the validity or priority of the lien to an entity that extended such credit in good faith, whether or not the entity knew of the pendency of the appeal, unless the granting of the lien was stayed pending appeal. 11 U.S.C. § 364 (e). A motion to revoke a confirmation of a plan must be filed before 180 days after entry of the order of confirmation. 11 U.S.C. §§ 1144, 1230, 1330.

Source:

Citations in the Comment; 3 Collier on Bankruptcy, ¶ s 363.11, 364.06; 5 Collier on Bankruptcy, ¶ 549.07; 8 Collier on Bankruptcy, Chapters 1144, 1230, 1330 (Alan N. Resnick & Henry J. Sommer eds. Matthew Bender & Company, Inc., a member of LexisNexis, 16th Ed. Revised 2014).

13.04 Authority for Proposed Transfer by Debtor or Trustee

If the examiner has knowledge that the owner is the debtor in a bankruptcy case or if the bankruptcy is disclosed in the chain of title in the real property records, the examiner should determine whether the proposed transaction is authorized in that case and should require that a certified copy of the order or other evidence of authority be recorded in the real property records.

Comment:

The commencement of a bankruptcy case creates an estate, which includes legal or equitable interests of the debtor in property as of the commencement of the case, and in property the debtor acquires within 180 days after the commencement of the case by bequest, devise or inheritance, or as a result of a property settlement agreement with the debtor's spouse. 11 U.S.C. § 541(a). A bankruptcy petition creates an automatic stay, which includes a stay against enforcement against the debtor or property of the debtor of a claim that arose before the commencement of the case. 11 U.S.C. § 362. The debtor or trustee may not sell or mortgage property of the estate, except as authorized by 11 U.S.C. §§ 363, 364. The trustee in a bankruptcy proceeding may not avoid a transfer of an interest in real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed in the real property records before the transfer was perfected. 11 U.S.C. § 549 (c). An action or proceeding under 11 U.S.C. § 549 to set aside a post-petition transaction must be commenced no later than the earlier of (1) two years after the date of the transfer or (2) the time the case is closed or dismissed. 11 U.S.C. § 549 (d). If the examiner has knowledge that the current owner is a debtor in a bankruptcy case, the examiner should require satisfactory evidence that the current transaction is authorized.

Source:

Citations in the Comment; 3 Collier on Bankruptcy, Chapters 362, 363, 364; 5 Collier on Bankruptcy, Chapters 541, 549 (Alan N. Resnick & Henry J. Sommer eds. Matthew Bender & Company, Inc., a member of LexisNexis, 16th Ed. Revised 2014).

History:

Adopted effective as of August 1, 2019.

13.05 Authority to Convey Exempted Land in Proposed Transaction

If the examiner has knowledge that the current owner is the debtor in a bankruptcy case and the property is to be sold by the debtor based on the debtor's claim of exemptions in the bankruptcy case, the examiner should require evidence that (1) the land was claimed in the Schedule of Exempt Property as exempt under state law and (2) no objections were made within 30 days after the conclusion of the "first" meeting of creditors or the filing of any amendment to the list or supplemental schedules or such longer time for objection as was granted by the court. The examiner should require that evidence that the property has been exempted be recorded in the real property records.

Comment:

An individual debtor may exempt from property of the estate that property claimed as exempt under state law or under the applicable federal exemptions. In a joint case, both spouses must choose the same exemptions. 11 U.S.C. § 522 (b)(1). Fed. R. Bankr. P. 4003 (b) provides that the trustee or any creditor may file an objection to the claimed exemptions within 30 days after the conclusion of the meeting of creditors or the filing of any amendment to the list or supplemental schedules, unless the court grants additional time for

objection within that period. If objection has been filed, the examiner should also be furnished for review any order by the bankruptcy court overruling or otherwise resolving such objection.

Non-exempt real and personal property are listed on Schedule B-1 for cases filed prior to August 1, 1991, Schedule A for cases filed on or after August 1, 1991, and Schedule A/B for cases filed after December 1, 2015. Property claimed as exempt must be listed on Schedule B-4 for cases filed prior to August 1, 1991, or Schedule C for cases filed on or after August 1, 1991). The Schedules should be reviewed to verify whether the exemptions under state law (pursuant to 11 U.S.C. § 522(b)(3)) are chosen or whether the federal exemptions (pursuant to 11 U.S.C. §§ 522(b)(2), 522(d)) are chosen. If the federal exemptions are chosen, only an equity interest is exempted (subject to indexing of the allowed amount pursuant to 11 U.S.C. § 104) and the remaining value of the land remains part of the estate until abandoned. If the state exemptions are chosen, the exemptions are subject to the limitations set forth in 11 U.S.C. § 522. The title examiner also should be aware that even though property is exempt, a mortgagee or other lien creditor may not commence or continue a foreclosure action against the debtor or obtain a conveyance from the debtor, so long as the automatic stay continues in effect. Unless relief from the automatic stay has been obtained (by final order of the bankruptcy court to permit the action) or an exception to the stay applies under § 362(b), the stay continues until the earliest of (a) the closing of the bankruptcy case, (b) the dismissal of the bankruptcy case or (c), in a Chapter 7 case concerning an individual or in a case under Chapters 9, 11, 12 or 13, the grant or denial of discharge. 11 U.S.C. § 362; Fed. R. Bankr. P. 4001.

Source:

Citations in the Comment; Fed R. Bankr. P. 1007 (c); 4 Collier on Bankruptcy, Chapter 522, ¶ 522.05 (Alan N. Resnick & Henry J. Sommer eds. Matthew Bender & Company, Inc., a member of LexisNexis, 16th Ed. Revised 2014).

History:

Adopted effective as of August 1, 2019.

13.06 Authority to Convey Abandoned Land in Proposed Transaction

If the examiner has knowledge that the current owner is the debtor in a bankruptcy case and the property is to be sold by the debtor based on abandonment of the property in the bankruptcy case, the examiner should require evidence that (1) the trustee in the bankruptcy case or the debtor in possession gave notice of intent to abandon the property and that no objections were filed within 14 days after the mailing of the notice or such other time fixed by the court, (2) the bankruptcy court ordered the property abandoned, by a final nonappealable court order, or (3) the property is listed on Schedule A in the bankruptcy case and is not dealt with prior to the closing of the case. The examiner should require that a certified copy of the order of abandonment or other evidence of authority to abandon be recorded in the real property records.

Comment:

After notice and a hearing, the trustee (or debtor in possession) may abandon property of the bankruptcy estate. On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon property of the estate. A party in interest must file and serve an objection to the notice of proposed abandonment by the trustee or debtor in possession within 14 days of the mailing of the notice, or within the time fixed by the court. 11 U.S.C. §§ 554, 1107; Fed. R. Bankr. P. 6007. Upon abandonment, control of the property abandoned reverts to and revests in the debtor. In such event, unless the automatic stay has terminated, a mortgagee or other lien creditor must obtain relief from the automatic stay as to the debtor by final order of the bankruptcy court before foreclosing the debtor's interest. 11 U.S.C. § 362; Fed. R. Bankr. P. 4001. An order of abandonment is not final and nonappealable until 14 days after the entry of

the order. Fed. R. Bankr. P. 8002. Unless the court orders otherwise, property scheduled and not otherwise administered at the time of the closing of the estate is abandoned to the debtor. Property that is not abandoned and that is not administered (such as property never scheduled or dealt with) remains property of the estate. 11 U.S.C. § 554(d).

Source:

Citations in the Comment; 5 Collier on Bankruptcy, Chapter 554 (Alan N. Resnick & Henry J. Sommer eds. Matthew Bender & Company, Inc., a member of LexisNexis, 16th Ed. Revised 2014).

History:

Adopted effective as of August 1, 2019.

13.07 Authority to Foreclose Land in Proposed Transaction

If a deed of trust encumbering property of the estate or property of the debtor is to be foreclosed and the automatic stay has not otherwise terminated, the examiner should require satisfactory evidence that the mortgagee filed a motion to lift stay, that notice of the motion for relief from the automatic stay was served in accordance with the Bankruptcy Rules and applicable local rules, and that the bankruptcy court granted the motion prior to commencement of the foreclosure. The examiner should require that a certified copy of the order lifting the stay or other evidence the stay was lifted be recorded in the real property records.

Comment:

The filing of a bankruptcy petition operates as an automatic stay that prevents enforcement of any lien against property of the estate and that prevents enforcement of a lien that secured a claim that arose before the commencement of the case. 11 U.S.C. § 362(5). A motion for relief from the automatic stay must be served in accordance with Fed. R. Bankr. P. 4001 and 9014. The motion must be served on the official committees, or on scheduled creditors, if there are no committees appointed. The motion also must be served on such other entities as the court may order and as provided by local rules. Fed. R. Bankr. P. 4001(a)(1). An agreement for relief from the stay may be granted after notice, unless objections are filed within 14 days after mailing of notice (or such other time fixed by the court). Fed. R. Bankr. P. 4001(d). Fed. R. Bankr. P. 9006(f) provides three additional days for taking action after service by mail, the so-called mailbox rule.

A bankruptcy court may grant relief from a stay. The automatic stay may be terminated, annulled, modified or conditioned or, for a variety of reasons, may not exist, such as (1) without court order after passage of 30 days after motion for relief, unless the court continues the stay (or after 60 days, if the debtor is an individual in a Chapter 7, 11, or 13 proceeding), 11 U.S.C. § 362(e), Advisory Committee Note to R4001; (2) by court order recorded in the real property records and effective for two years that finds the petition was part of a scheme to delay, hinder, and defraud creditors involving multiple filings or transfers without lender consent, 11 U.S.C. §§ 362(b), 362(d)(4); (3) where a case is filed in violation of a bankruptcy court order in a prior case, 11 U.S.C. § 362(b)(21)(B); or (4) by court order confirming that the stay has been terminated because of certain frequent filings, 11 U.S.C. § 362(j). The court may annul a stay after a foreclosure has been commenced or conducted. 11 U.S.C. § 362(d). The stay does not otherwise terminate until the case is closed, until the case is dismissed, or, if the case is under Chapter 7 concerning an individual or under Chapter 9, 11, 12, or 13, until the time the discharge is granted or denied. The discharge is granted or denied in a case under Chapter 11 upon confirmation of the plan, unless the debtor is an individual. 11 U.S.C.A. § 1141(d). The discharge is granted or denied in a case under Chapter 12 or 13, or in a case of an individual under Chapter 11, after completion of the plan. 11 U.S.C.A. §§ 1141(d), 1228, 1328. An order granting a lift or annulment of stay is not final and nonappealable until 14 days after the entry of the order. Fed. R. Bankr. P. 8002. An order granting a motion for relief from the automatic stay is stayed until the

expiration of 14 days after the entry of the order, unless the court orders otherwise. Fed. R. Bankr. P. 4001(a)(3).

Source:

Citations in the Comment; 3 Collier on Bankruptcy, Chapter 362 (Alan N. Resnick & Henry J. Sommer eds. Matthew Bender & Company, Inc., a member of LexisNexis, 16th Ed. Revised 2014).

History:

Adopted effective as of August 1, 2019.

13.08 Authority to Convey or Lease Property of the Bankruptcy Estate not in the Ordinary Course of Business in Proposed Transaction

If property will be sold or leased by the bankruptcy trustee or debtor in possession, other than in the ordinary course of business, the examiner should require evidence of the following: (1) 21 days' notice of sale to the debtor, the trustee, all creditors and indenture trustees by mail, unless the court orders the time shortened; (2) no objections to the sale were made or the court by order overruled the objections and authorized the sale; and (3) the order of sale, if any, is nonappealable or is not stayed pending appeal. The examiner should require that a certified copy of the order or other evidence of authority to sell or lease be recorded in the real property records.

Comment:

The trustee or debtor in possession, after notice and a hearing, may sell property of the estate other than in the ordinary course of business. 11 U.S.C. §§ 363(b)(1), 1107. The clerk or some other person as the court may direct must give the debtor, the trustee, all creditors and indenture trustees at least 21 days' notice by mail of a proposed sale of property of the estate other than in the ordinary course of business, unless the court for cause shortens the time or directs another method of notice. Fed. R. Bankr. P. 2002 (a)(2), 6004. The reversal or modification on appeal of an order of sale does not affect the finality or validity of a sale to an entity that bought the property in good faith, whether or not the entity knew of the appeal, unless the sale was stayed pending appeal. 11 U.S.C. § 363 (m). An order authorizing a sale is not final and nonappealable until 14 days after the entry of the order. Fed. R. Bankr. P. 8002. An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise. Fed. R. Bankr. P. 6004(h). An objection to a proposed sale must be filed and served no less than seven days before the date set for the proposed action or in the time set by the court. Fed. R. Bankr. P. 6004(b). If timely objection is not made, court approval of the sale is not required. Fed. R. Bankr. P. 6004(e); 11 U.S.C. §§ 102(1), 363(b).

Source:

Citations in the Comment; 3 Collier on Bankruptcy, Chapter 363 (Alan N. Resnick & Henry J. Sommer eds. Matthew Bender & Company, Inc., a member of LexisNexis, 16th Ed. Revised 2014).

History:

Adopted effective as of August 1, 2019.

13.09 Authority to Convey Property of the Bankruptcy Estate in the Ordinary Course of Business in Proposed Transaction

If property will be sold or leased by the bankruptcy trustee or debtor in possession, in the ordinary course of business, the examiner should require evidence of the following: (1) if the trustee is acting in a Chapter 7 case, the court must authorize the trustee to operate the business and should authorize real property sales in the ordinary course of business; or (2) if the debtor in possession or trustee is acting in a Chapter 11 case, the authority of the debtor or trustee has not been limited by court order (and no plan has been confirmed). The examiner also should require evidence that the sale will be made in the ordinary course of business and be recorded in the real property records.

Comment:

The trustee or debtor in possession may sell or lease property of the estate in the ordinary course of business if authorized to operate the business under 11 U.S.C. §§ 721, 1108, 1203, 1204 or 1304. 11 U.S.C. § 363(c)(1). The court may authorize the trustee to operate the business of the debtor for a limited period in a Chapter 7 case. 11 U.S.C. § 721. Unless the court orders otherwise, the trustee may operate the debtor's business in a Chapter 11 case. 11 U.S.C. § 1108. A debtor in possession in a Chapter 12 case has the rights of a trustee serving in a Chapter 11 case, unless the court orders otherwise. 11 U.S.C. § 1203. Unless the court orders otherwise, a debtor engaged in business may operate the business of the debtor and has the powers of a trustee under § 363 (c). 11 U.S.C. § 1303.

Source:

Citations in the Comment; 3 Collier on Bankruptcy, Chapter 363 (Alan N. Resnick & Henry J. Sommer eds. Matthew Bender & Company, Inc., a member of LexisNexis, 16th Ed. Revised 2014).

History:

Adopted effective as of August 1, 2019.

13.10 Authority to Convey Property of the Bankruptcy Estate Free and Clear of Liens in Proposed Transaction

If property will be sold by the bankruptcy trustee or debtor in possession free and clear of liens, the examiner should require evidence that: (1) 21 days' notice of sale disclosing that the sale would be made free and clear of liens was given to the debtor, the trustee, all creditors, including the creditors secured by liens on the land, and indenture trustees by mail, unless the court orders the time shortened; (2) the court by order authorized the sale free and clear of liens; and (3) the order of sale is nonappealable or is not stayed pending appeal. The examiner should require that a certified copy of the order be recorded in the real property records.

Comment:

The trustee or debtor in possession, after notice and a hearing, may sell property of the estate free and clear of liens. 11 U.S.C. §§ 363 (f), 1107. The clerk or some other person as the court may direct must give the debtor, the trustee, all creditors and indenture trustees at least 21 days' notice by mail of a proposed sale of property of the estate, unless the court for cause shortens the time or directs another method of notice. Fed. R. Bankr. P. 2002 (a), 6004. A motion for authority to sell free and clear of liens must be served on the parties who have liens or other interests in the property. The notice shall include the date of the hearing on the motion and the time within which objections may be filed and served. Fed. R. Bankr. P. 6004 (c). The reversal or modification on appeal of an order of sale does not affect the finality or validity of a sale to an entity that bought the property in good faith, whether or not the entity knew of the appeal, unless the

sale was stayed pending appeal. 11 U.S.C. § 363 (m). An order authorizing a sale is not final and nonappealable until 14 days after the entry of the order. Fed. R. Bankr. P. 8002. The date of "entry" of an order is the date that the order is noted on the docket; the date of signature of an order is not determinative of the date of entry. Fed. R. Bankr. P. 5003(a). An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise. Fed. R. Bankr. P. 6004(h).

Caution:

In most jurisdictions, ad valorem taxes are secured by a lien on the property taxed. Absent the consent of the local taxing authority, the tax lien will generally pass through bankruptcy unaffected unless the local taxing authority is provided notice of the proposed sale of the property free and clear of liens and is adequately protected by the attachment of the tax lien to the sale proceeds. 11 U.S.C. § 363(f).

Source:

Citations in the Comment; 3 Collier on Bankruptcy, Chapters 342, 363 (Alan N. Resnick & Henry J. Sommer eds. Matthew Bender & Company, Inc., a member of LexisNexis, 16th Ed. Revised 2014).

History:

Adopted effective as of August 1, 2019.

13.11 Authority to Convey Property after Confirmation of Plan

If the debtor is selling land and the debtor's bankruptcy plan has been confirmed, the examiner should (1) review the confirmed plan and order confirming plan to determine that the land is revested in the debtor and to determine that the plan and order do not limit the authority of the debtor to convey, and (2) determine that the order is final and nonappealable. The examiner should require that a certified copy of the order confirming the plan be recorded in the real property records.

Comment:

Except as provided in the plan or order confirming the plan, the confirmation of the plan vests all property of the estate in the debtor. 11 U.S.C. §§ 1141 (b), 1227 (b), 1327 (b). A notice of appeal must be filed with the clerk within 14 days of the date of the entry (on the docket) of the order of confirmation. A timely motion to amend or make additional findings of fact, to alter or amend the judgment, for a new trial, or for relief from a judgment because of mistakes, inadvertence, excusable neglect, newly discovered evidence, or fraud, must be filed within 14 days of the entry of the order of confirmation; in the event of such motion, the time for appeal runs from the entry of the order disposing of the motion. Fed. R. Bankr. P. 8002. An order confirming a Chapter 9 (Municipality) or a Chapter 11 (Reorganization) plan is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise. Fed. R. Bankr. P. 3020(e).

Source:

Citations in the Comment; 8 Collier on Bankruptcy, Chapters 1141, 1227, 1327 (Alan N. Resnick & Henry J. Sommer eds. Matthew Bender & Company, Inc., a member of LexisNexis, 16th Ed. Revised 2014).

History:

Adopted effective as of August 1, 2019.

13.12 Authority to Mortgage in Proposed Transaction

If property will be mortgaged by the bankruptcy trustee or debtor in possession, the examiner should require evidence of the following: (1) notice of the proposed deed of trust to interested parties, including the debtor, all creditors and indenture trustees, by mail; (2) no objections to the deed of trust were made or the court by order overruled the objections and authorized the deed of trust; and (3) the order allowing the deed of trust is nonappealable or is not stayed pending appeal. The examiner should require that a certified copy of the order be recorded in the real property records.

Comment:

The debtor in possession, or the trustee if the trustee is authorized to operate the business, may, after notice and a hearing, be authorized by the bankruptcy court to incur debt secured by a lien on the land. 11 U.S.C. § 364 (c). The reversal or modification on appeal of the authorization does not affect the priority or lien granted to an entity that extended the credit in good faith, unless the authority was stayed pending appeal. 11 U.S.C. § 364(e).

Source:

Citations in the Comment; 3 Collier on Bankruptcy, ¶ 364.01, et seq. (Alan N. Resnick & Henry J. Sommer eds. Matthew Bender & Company, Inc., a member of LexisNexis, 16th Ed. Revised 2014).

History:

Adopted effective as of August 1, 2019.

13.13 Filings in Violation of the Automatic Stay

The examiner should not disregard a judgment lien, tax lien notice, or other instrument filed after the commencement of a bankruptcy case and in apparent violation of the automatic stay, because the filing of the instrument may be treated as voidable and may not be considered void, absent action in the bankruptcy case to avoid the instrument.

Comment:

The automatic stay prevents any act to create or perfect any lien against property of the estate or any act to create or perfect against property of the debtor any lien to the extent the claim arose prior to the commencement of the case. 11 U.S.C. § 362 (a)(4), (a)(5). However, there are different opinions as to whether the violation of a stay is automatically void or is simply voidable. Bronson v. U.S., 46 F.3d 1573 (Fed.Cir.1995); In re Soares, 107 F.3d 969 (1st Cir. 1997).

Caution:

One exception to the automatic stay is the “creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition.” 11 U.S.C. §362(b)(18).

Source:

Citations in the Comment; 3 Collier on Bankruptcy, ¶ 362.11 (Alan N. Resnick & Henry J. Sommer eds. Matthew Bender & Company, Inc., a member of LexisNexis, 16th Ed. Revised 2014).

History:

Adopted effective as of August 1, 2019.

13.14 The Discharge and Judgment Liens

An examiner may presume that a judgment filed against a person who was a debtor in a bankruptcy case is extinguished as a lien against property of the debtor if: (1) the debtor files a motion in the bankruptcy case pursuant to 11 U.S.C. § 522(f) to extinguish the lien as to homestead, notifies the creditor in accordance with the applicable Bankruptcy Rules and local rules, and secures a final nonappealable order of the bankruptcy court removing the lien; (2) the debtor acquires the property after receiving a discharge from the debt evidenced by the judgment; or, (3) the property is exempt or is not abandoned in the bankruptcy proceeding, and the debtor receives a discharge from the debt.

Comment:

A proceeding under 11 U.S.C.A. § 522(f) by the debtor to avoid a judicial lien must be treated as a contested matter, and notice must be served in accordance with Fed. R. Bankr. P. 7004. Fed. R. Bankr. P. 4003(d), 9014. An order will not be final until 14 days after the entry of the order (or after a timely motion to amend, or alter a judgment, or for mistake or fraud). Fed. R. Bankr. P. 8002(a)(1). A dismissal of the bankruptcy case will reinstate a judgment lien, unless the court orders otherwise. 11 U.S.C. § 349. The judgment lien may not be extinguished pursuant to 11 U.S.C. § 522(f) if the lien secures a domestic support obligation. 11 U.S.C.A. §§ 101(14A), 522(f)(1)(A).

If the judgment debtor receives a discharge from the debt of the judgment, property acquired by the debtor after the bankruptcy discharge will not be encumbered by the judgment. See 11 U.S.C. § 524(a)(3); In re Marshall, 204 B.R. 838, 840 (Bankr. S.D. Ga. 1997)("The discharge issued pursuant to § 524 extinguishes that personal liability. Therefore, the lien, as it pertains to any after acquired property of the Debtor, does not survive the discharge, does not affix and cannot affect the after acquired property."); In re Norvell, 198 B.R. 697, 699 (Bankr. W.D. Ky. 1996)("A judgment lien will not attach to any real estate acquired by the debtor after the filing of a Chapter 7 bankruptcy proceeding in which the debtor received a discharge."); In re Ogburn, 212 B.R. 984 (Bankr. M.D. Ala. 1995) ("Judgment lien which had not attached, on date debtor filed for Chapter 7 relief, to any real property of debtor did not survive debtor's bankruptcy as floating lien, and did not attach to homestead property that debtor acquired after conclusion of his bankruptcy case, even assuming that debtor had interest in this property over and above homestead exemption amount; rather, upon discharge of debtor's personal liability on judgment debt, this unattached judgment lien was also discharged."); and In re Fuller, 134 B.R. 945 (Bankr. 9th Cir.1992) (relating to tax lien).

Exemption of property, together with the discharge of claims, lets the debtor maintain an appropriate standard of living as he or she goes forward after the bankruptcy case.'" In re Pace, 521 B.R. 124, 126 (Bankr. N.D. Miss. 2014) (quoting In re Urban, 361 B.R. 910, 913 (Bankr. D. Mont. 2007)). The federal exemptions are enumerated in § 522(d). Pursuant to § 522(b)(2), however, states can choose to "opt out" of the federal exemptions contained in § 522(d), permitting a debtor to exempt property only under state or local law and applicable nonbankruptcy law. 4 COLLIER ON BANKRUPTCY ¶ 522.01 (16th ed. 2015). Mississippi has elected to "opt out" of the federal exemptions in favor of its own state exemption statute. Miss. Code Ann. § 85-3-2.

A judgment lien is automatically released if the debt is discharged and the land is exempt or is otherwise not abandoned. The examiner should review the bankruptcy docket and judgment to verify that the debt was discharged, and should review the docket and Schedule A to verify that the property was scheduled, and was exempt or otherwise was not abandoned.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

13.15 Extension of Time

An examiner should be aware that the filing of the bankruptcy case tolls the limitation period in which the trustee may commence an action, if the limitation period had not expired at the time of the filing of the case, until the later of (1) the end of the period under other law, or (2) two years after the order for relief (filing of voluntary bankruptcy). The filing of the bankruptcy case tolls the period in which the trustee may file a pleading or cure a default until the later of (1) the end of the period under other law, or (2) 60 days after the order for relief. If applicable nonbankruptcy law or an agreement fixes a period for commencing an action on a claim against the debtor, then the limitation period does not expire until the later of (1) the end of the period under other law, or (2) 30 days after the notice of termination or expiration of the stay as to the claim.

Comment:

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

Source:

Citations in the Comment; 2 Collier on Bankruptcy, Chapter 108 (Alan N. Resnick & Henry J. Sommer eds. Matthew Bender & Company, Inc., a member of LexisNexis, 16th Ed. Revised 2014).

History:

Adopted effective as of August 1, 2019.

13.16 Effect of Dismissal of Case

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

Comment:

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

Source:

Citations in the Comment; 3 Collier on Bankruptcy, Chapter 349 (Alan N. Resnick & Henry J. Sommer eds. Matthew Bender & Company, Inc., a member of LexisNexis, 16th Ed. Revised 2014).

History:

Adopted effective as of August 1, 2019.