



Mississippi Title Examination Standards

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The Title Standards Board of the Real Property
Section of The Mississippi Bar

MISSISSIPPI TITLE EXAMINATION STANDARDS

(Adopted effective as of August 1, 2019)

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FOREWORD

Background

In 2018, the Executive Committee of the Real Property Section of The Mississippi Bar (the “Section”) approved the formation of a committee to study the formulation and development of title examination standards. After a great deal of study of the use of title examination standards in other states and many hours of drafting and meeting time, the committee (the “Title Standards Board” or “Board”), proposed the first Mississippi title examination standards, which were approved by the Section at The Mississippi Bar Annual Meeting on July 12, 2019, as the first Mississippi title examination standards (the “Standards”).

The Board will meet as needed to consider additional standards, amendments to existing standards, and commentary. Amendments and new standards will be presented to the membership of the Section prior to formal adoption by the Section. The Board itself will make changes to the comments and cautions as needed. The Board welcomes comments and suggestions, which may be submitted to the Section chair.

Purpose

The Standards are guidelines intended to assist land title attorneys (hereinafter referred to as “title examiners” or as an “examiner”) called upon to assess the marketability of land titles, focusing on the manner in which a prudent examiner approaches matters that may be encountered during the course of an examination. The Standards address a variety of concerns, including the attitudes and relationships among examiners and between examiners and the public, the appropriate duration of a title search, the effect of the lapse of time on a defective or improperly recorded title document, the appropriate presumptions of fact that can be relied upon in the course of an examination, and the law applicable to commonly encountered situations.

The purpose of Standards is to reflect consensus among members of the bar regarding real property transactions and to set forth propositions (standards) with which title examiners can generally agree concerning title documents to promote uniformity in the preparation, use, and meaning of such documents. In other words, the Standards can be viewed as a reference that can be consulted in both the preparation and examination of title documents. Although the Standards do not, by themselves, impose compulsory legal requirements, they do establish guidelines upon which a reasonable and practical examination can be based, and all lawyers throughout the state are encouraged to follow the standards in all cases in which they might apply. However, because the regulations, ordinances, statutes and case law upon which the Standards rely are subject to change and the facts and circumstances involved in any transaction may be unique, the judgment and discretion of the examiner must ultimately determine whether a particular Standard should be applied to the facts before the examiner.

Application

Even with the Standards, title examiners should advise their clients honestly as to their beliefs and opinions regarding the ownership of a particular interest in land. The judgment of an examiner should reflect rules of law (both statutes and case law) as well as justifiable presumptions that are applicable to title documents and to fact situations arising from the chain of title appearing of record. For example, when the name of a grantee in one deed corresponds with the name of the grantor in a later deed, the universal practice is to presume that they are the same person. Although there is nothing of record to show that the grantor was competent, that the signature is genuine, or that the deed was actually delivered, the universal practice is to presume that these are facts. Indeed, any attempt to require proof of these matters regarding each document in the chain of title would create chaos.

When minor title questions do arise, the reaction of different examiners may not always be the same. For example, title examiners may respond differently regarding the effect of a recorded, unacknowledged deed;

of a deed that fails to state the marital status of the grantor; or of a deed from a married grantor that does not contain the signature of the grantor's spouse. Thus, a chief objective of the Standards is to set forth uniform principles to resolve certain common title problems.

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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.

For a sample form, see Form 21.01 (Sample Form of Title Opinion).

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 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, court orders, 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

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Source	Minimum Search Period
State Tax Lien Registry	7 years
Construction Liens	1 year
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 the index being searched)	Greater of 10 years or Period of Current Ownership
Chancery Docket	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 of 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 for 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 to -23.

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.

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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 property); 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 to -319.

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, -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 & Tr., FSB, 941 So. 2d 219 (Miss. Ct. 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 cases which have been finally disposed of in the courts of the county (commonly known as the “chancery docket” or “chancery index”). Miss. Code Ann. § 19-15-7. While the chancery index is not part of the official land records, it is good practice to search the chancery index for the names of all owners in the chain of title for the greater of 10 years or the period of current ownership for 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 further back 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 Cty 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 whether the seven-year statute of limitations applicable to the judgment lien was tolled.

Mississippi Title Examination Standards

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:

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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 the 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.

Mississippi Title Examination Standards

2.02 Period of Examination

A title examination covering, in the case of single-family one-to-four family 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 (excluding forfeited tax land patents), 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 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 the 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 rely.

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 the 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 Comm'n of Miss. v. McDonald's Corp., 509 So. 2d 856, 861 (Miss. 1987) (citing Miss. Code Ann. §§ 65-5-7 to -17 (finding that there is no right of access to controlled access highway or frontage road to such highway,

Mississippi Title Examination Standards

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, overlap 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:

Citations in the Comment; 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 deed of trust 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, -3. A deed of trust 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 a 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) (citing 65 C.J.S. Names § 14; State v. Murrury, 192 S.E.2d 688, 689 (1972)) (finding where names sound substantially alike, minor variances in their form are considered immaterial; “Lewis” and “Louis” are plainly idem sonans; 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. 1840) (finding that whether the name is spelled Wanser or Wanzer makes no difference).

History:

Adopted effective as of August 1, 2019.

Mississippi Title Examination Standards

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:

The 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 13.04 (Authority for Proposed Transfer by Debtor or Trustee)), 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 the 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.

Mississippi Title Examination Standards

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 a 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 legal entities 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 Found., 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 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 Found., Inc., 481 So. 2d 329, 334 (Miss. 1985) (citing Fed. Land Bank v. Collom, 28 So. 2d 126, 127-28 (Miss. 1946)).

Where there is conflicting language found in the granting clause and the descriptive or recital clause, the granting clause controls. McDonald v. Miss. 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 and Caution.

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.

Mississippi Title Examination Standards

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 (Miss. 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, 62 So. 2d 328, 329 (Miss. 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 at 518; McMillan v. Gibson, 76 So. 2d 239, 240 (Miss. 1954)). This presumption is rebutted once it is shown that there was no delivery. *Id.* at 930.

Mississippi Title Examination Standards

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 (Review by Examiner).

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 acknowledgment 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 at 1054). 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 the 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 the 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 Found., 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. In re Estate of Hardy, 910 So. 2d 1052, 1055 (Miss. 2005) (citing Grubbs v. Everett, 111 So. 2d 923, 924 (Miss. 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, 129 So. 3d at 146-47 (citing Grubbs, 111 So. 2d at 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.

Mississippi Title Examination Standards

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.” Cnty. Tr. Bank of Miss. 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 and Caution.

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. Ct. 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 maybe only a day or two or as long as a week or more.

Source:

Citations in the Comment; 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. Ct. 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 (Miss. 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, 925 So. 2d at 876. 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 and Caution.

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 an 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. Ct. 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

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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 the 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. R. Prof. Conduct 1.6) or former client (Miss. R. 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 Mort., LLC, 219 So. 3d 593 (Miss. Ct. 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 and Caution.

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. Ct. 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 (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 to -39) (UETA), (2) the Uniform Real Property Electronic Recording Act (Miss. Code Ann. §§ 89-5-101 to -113) (URPERA), and (3) standards promulgated by the Mississippi Electronic Recording Commission (Miss. Admin. Code 36-201:1.1to .12; Miss. Code Ann. 89-5-109). The federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001-7006) (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 & Assocs., 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.

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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. Ct. 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 (Miss. 1952); Holcomb v. McClure, 52 So. 2d 922, 924 (Miss. 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, 6 So. 844 (Miss. 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). But see 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).

"[T]he canons of construction for deeds make specific boundaries control over acreage and fractions of property." Harrison v. Roberts, 989 So. 2d 930, 932 (Miss. Ct. 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 the 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 refers 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 to the present owner may be sufficient to cure this matter, depending upon the particular facts.

Source:

Citations in the Comment; Title Standards Board.

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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., 950 So. 2d at 970 (citing Sec’y of State v. Wiesenberger, 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).

There are issues related to real property which are difficult if not impossible for a title examiner to ascertain from the record or involve complicated or esoteric legal issues outside the scope of most real estate transactions. For example, under the Mississippi Constitution, lands belonging to, or under the control of the State, may not be donated, directly or indirectly, to private individuals or privately held companies. Miss. Const. Art. 4, Sec. 95. Based on this provision, a complex area of law has developed around artificial accretions. Such issues are rarely apparent on the record, and where they are, their treatment is beyond the scope of these Standards.

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, 35 So. 2d 68 (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 (Miss. 1952) (citing 6 David A. Thompson, Thompson on Real Property § 3396, 606-07 (1940)) (“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 Dev., 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).

Caution:

Whether a right-of-way acquired by the Mississippi Transportation Commission (formerly the State Highway Commission) is a fee simple or easement interest depends on when it was acquired. In Whitworth v. Mississippi State Highway Commission, 33 So.2d 612, 613 (Miss. 1948), the Mississippi Supreme Court construed Mississippi Code § 8023 (1942) (now Mississippi Code Annotated § 65-1-47 (1972)) as granting the State the authority to acquire no more than a right-of-way or easement. As a result of Whitworth, on April 14, 1948, the legislature amended Mississippi Code § 8023 (1942) (now Mississippi Code Annotated § 65-1-47 (1972)) to expressly authorize the Mississippi Transportation Commission to acquire by deed or condemnation all rights, title and interest to property being acquired, excluding only oil, gas and minerals

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and any other interest expressly excepted or reserved by the grantor in the deed or condemnation petition by which the property was acquired. Mississippi Code Annotated § 65-1-47 was further amended to provide that the Mississippi Transportation Commission may decide what right, title and interest is necessary for highway purposes on each particular project. The Mississippi Transportation Commission, by minutes dated November 12, 2002, has defined pre-Whitworth easement property as property obtained before September 14, 1949. Thus, any warranty deed to the Mississippi Transportation Commission signed before September 14, 1949, conveys only a right-of-way or easement, while conveyances after that date convey fee simple title, subject only to mineral rights and express reservations, and any other reservations included in the deed or complaint to condemn.

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 (Miss. 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:

Citations in the Comment; 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 Tr. Co. and Bank of Miss. 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 Am., 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 Prop. 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.

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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 when property comes under common ownership after the establishment of the easement, have been properly re-established if the tract is later divided.

Comment:

Generally, joinder of the dominant and servient estates creates a merger of title. However, the existence of an easement after the date of the 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. Ct. 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 simple title of the servient tenement and is terminated. Cox, 733 So. 2d at 355. 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. *Id.* (“The existence of an easement after that date [of the 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 Joyce Palomar, 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. Jan. 28, 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. Ct. 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 & Dev. 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); Allen v. Thompson, 158 So. 2d 503 (Miss. 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 the 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, 139 So. 2d 833, 837 (Miss. 1962) (finding that where an instrument purporting to be a deed and which has no grantee named therein, in actual existence, a person in being, or corporation, is void) citing Morgan et al. v. Collins Sch. 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, 56 So. 2d 471 (Miss. 1952); Life Ins. Co. of Va. v. Page, 172 So. 873, 876 (Miss. 1937) (finding a conveyance to a deceased person or a fictitious person is void); Morgan v. Collins Sch., 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 of the corporation's property.

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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 Mortg., LLC, 219 So. 3d 593, 598 (Miss. Ct. 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.

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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:

Citations in the Comment; 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 an 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 Found. 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.*

See generally Morton v. Resolution Tr. Corp. regarding the failure of an instrument to reflect the authority of the signer. 918 F.Supp. 985, 996 (S.D. Miss. 1995) (finding that under Mississippi law, acknowledgment verifying that the corporate officer had appeared a before notary public to sign the appointment of a substitute trustee on the corporation's behalf, for purposes of conducting deed of trust foreclosure sale, did not have to specify the officer's capacity or authority to act on the corporation's behalf, as by indicating that the officer was the president, secretary, or general counsel; it was enough that acknowledgment made it clear that the officer was executing an appointment in an official capacity on behalf of the 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 action 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.

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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:

Citations 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 a 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.

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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)-(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.

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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 of 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 of 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 an 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

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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 of 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 (Validity of Instrument Executed by an Agent).

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:

See Comment to Standard 8.02 (Authority of Member, Manager, or Officer of Limited Liability Company) for discussion on authority.

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.

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

Source:

Citations in the 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.

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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 a limited liability company not in existence at the time of conveyance is void. See Caution to Standard 6.01 (Corporate Existence).

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

Mississippi Title Examination Standards

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, 168 So. 2d 652 (Miss. 1964); Consumers Credit Corp. v. Swilley, 243 Miss. 838, 138 So. 2d 885 (Miss. 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

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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 and Caution.

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 non-revocation 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) to - 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 20 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 to -817.

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

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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 and 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:

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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 a trustee); Miss. Code Ann. § 91-8-816 (Specific powers of a 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 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 have reached the age of majority at the time of conveyance. 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 has been emancipated 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/decreed 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 to -15; or
- a Chancery Court order/decreed authorizing:
 - if prior to January 1, 2020, 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); or
 - if after January 1, 2020, a conservator to purchase, sell, convey, mortgage, lease or encumber title to real property on behalf of the minor. See Section 414 of Mississippi Guardianship and Conservatorship Act.

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.

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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/decreed appointing:

- if prior to January 1, 2020, 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 to -135; or
- if after January 1, 2020, a conservator and authorizing the conservator to purchase, sell, convey, mortgage, lease or encumber title to real property on behalf of the incompetent should be filed of record.

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, although the challenging party may carry his burden by showing that the grantor was permanently insane up to and beyond that moment in time. Richardson, 426 So. 2d at 783; Moore v. Stone, 208 So. 2d 585, 586 (Miss. 1968).

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. Ct. 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 (Miss. 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, 574 So. 2d at 652-53. 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 real property by a guardian or conservator (before January 1, 2020) or a conservator (on or after January 1, 2020), an examiner should determine that all statutory requirements and requirements established by the court have been met.

Comment:

For transactions consummated and reflected of record prior to January 1, 2020, when considering a guardian's or conservator's purchase, sale, conveyance, mortgage, lease or encumbrance of real property, the examiner should first review the documents involved in the appointment of the guardian or conservator. Among these are:

- (1) the petition for appointment;
- (2) the service and notice of service;
- (3) the order appointing the guardian or conservator; and
- (4) the guardian's or conservator's oath and bond.

Next, the examiner must confirm that the guardian or conservator was expressly authorized by a court order to effect the purchase, sale, conveyance, mortgage, lease or encumbrance of the subject real property. Finally, the examiner must also determine that the guardian's or conservator's appointment was in effect at the time of the sale or lease.

A guardianship or conservatorship 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.

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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 transactions consummated and reflected of record on or after January 1, 2020, the Mississippi Guardianship and Conservatorship Act (also known as the “Gap Act”), defines a guardian as “a person appointed by the court to make decisions with respect to the personal affairs of the ward.” A “conservator,” on the other hand, is defined as “a person appointed by a court to make decisions with respect to the property or financial affairs of a ward.” These definitions make it clear that under the Gap Act a guardian does not have any power to deal with the real property of a ward. Only a conservator has the power to deal with the real property of a ward, and then only to the extent expressly set out in a court order.

In considering a conservator’s purchase, sale, conveyance, mortgage, lease or encumbrance of real property, the examiner should first review the documents involved in the appointment of the conservator. Among these are:

- (1) the petition for appointment;
- (2) the service and notice of service;
- (3) the letters of conservatorship;
- (4) the order appointing the conservator; and
- (5) the conservator’s oath and bond.

Next, the examiner must confirm that the conservator was expressly authorized by a court order to effect the purchase, sale, conveyance, mortgage, lease or encumbrance of the subject real property. Finally, the examiner must also determine that the conservator’s appointment was in effect at the time of the sale or lease.

Under the Gap Act, a conservatorship terminates in any of the following circumstances:

- (1) when a minor ward dies;
- (2) when a minor ward becomes an adult (reaches age 21) or becomes emancipated;
- (3) when a court determines that the basis for appointment no longer exists, termination would be in the best interest of the ward, or for other good cause; or
- (4) when the conservator is removed by the court or a conservator’s petition to resign is approved by the court.

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. Prior to January 1, 2020, 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. After

January 1, 2020, if a conservator has been appointed in another state, and a petition for conservatorship is not pending in Mississippi, then the foreign conservator, after giving notice to the appointing court, may register the conservatorship in Mississippi by filing certified copies of (1) the order of conservatorship, (2) letters of conservatorship, and (3) any bond or other asset-protection arrangement required by the appointing court, as a foreign judgment in the court of the county in which real property belonging to the individual is located.

Source:

Prior to January 1, 2020, see 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); after January 1, 2020, see the Gap Act (citation not yet available). See additional citations in the comment.

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, 173 So. 429 (Miss. 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 (Miss. 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. Va. Tr. Co. v. Buford, 86 So. 356 (Miss. 1920), suggestion of error overruled, 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 the 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 (Affidavits of Heirship) 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, 126 So. 656 (Miss. 1930). The vesting automatically relates back to the decedent's death.

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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. Ct. 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; In re Estate of Mason, 616 So. 2d 322, 328 (Miss. 1993); Bolton v. Barnett, 95 So. 721, 726 (Miss. 1923); Heard v. Drennen, 46 So. 243, 244 (Miss. 1908).

A will not admitted for probate in Mississippi is not effective “as an instrument of title.” Gunn v. Heggins, 964 So. 2d 586, 592 (Miss. Ct. App. 2007); Robberson v. Burton, 790 So. 2d 226 (Miss. Ct. App. 2001) (quoting Va. Tr. Co. v. Buford, 86 So. 356 (Miss. 1920), suggestion of error overruled, 86 So. 516 (1920)). In instances where there is no will, the property belonging to the decedent is deemed to pass pursuant to the laws of descent and distribution. Miss. Code Ann. 91-1-3.

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, 19 So. 2d 499 (Miss. 1944); Stone Inv. Co. v. Estate of Robinson, 82 So. 3d 631 (Miss. Ct. App. 2011) (finding that “[w]hen 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.

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, 166 So. 401 (Miss. 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

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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., 166 So. 2d 401 (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 and Caution.

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 (Affidavits of Heirship); Standard 12.09 (Adjudication of Heirship); and Standard 12.10 (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 (Miss. 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 175. See Logan v. Smith, 91 So. 2d 707 (Miss. 1956).

Source:

Citations in the Comment and Caution.

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.

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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, -37, -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 Affidavits of Heirship

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 property affected by the instrument and shall be prima facie evidence of the facts stated therein and the marketability of the title to real property.

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:

- A list of any real property owned by the decedent;

- How long the affiant knew the decedent;
- The date and place of birth of the decedent;
- The date and place of death of the decedent, and his residence and address;
- The marital history of the decedent;
- The names, birth dates, and current addresses 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); and
- Whether the decedent left unpaid debts or inheritance taxes.

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).

For a sample form, see Form 21.02 (Sample Form of Affidavit 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, 167 So. 785 (Miss. 1936); Anderson v. Gift, 126 So. 656 (Miss. 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).

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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 have 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 Miss. Code Ann. § 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 have passed since the date of rendition of the order, with no evidence of involvement of minors or incompetents.

Source:

Citations in the Comment and Caution.

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 (Miss. 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, 103 So. 213 (Miss. 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

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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 an 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 (Authority for Proposed Transfer by Debtor or Trustee) for a discussion of the automatic stay.

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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 title opinion 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 chs., 541, 549 (Alan N. Resnick & Henry J. Sommer eds., Matthew Bender & Company, Inc. 16th ed. Rev. 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 ch. 549 (Alan N. Resnick & Henry J. Sommer eds., Matthew Bender & Company, Inc. 16th ed. rev. 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. R. Bankr. P. 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 chs. 1144, 1230, 1330 (Alan N. Resnick & Henry J. Sommer eds., Matthew Bender & Company, Inc. 16th ed. rev. 2014).

History:

Adopted effective as of August 1, 2019.

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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 chs. 362, 363, 364; 5 Collier on Bankruptcy chs. 541, 549 (Alan N. Resnick & Henry J. Sommer eds., Matthew Bender & Company, Inc. 16th ed. rev. 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 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 the 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 the 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 ¶ 522.05 (Alan N. Resnick & Henry J. Sommer eds., Matthew Bender & Company, Inc. 16th ed. rev. 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 non-appealable 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 reverts 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 non-appealable 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).

Mississippi Title Examination Standards

Source:

Citations in the Comment; 5 Collier on Bankruptcy ch. 554 (Alan N. Resnick & Henry J. Sommer eds., Matthew Bender & Company, Inc. 16th ed. rev. 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 the 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 Chapter 7, 11, or 13 proceedings), 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 non-appealable 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 ch. 362 (Alan N. Resnick & Henry J. Sommer eds., Matthew Bender & Company, Inc. 16th ed. rev. 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 non-appealable 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 non-appealable 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 a 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, ch. 363 (Alan N. Resnick & Henry J. Sommer eds., Matthew Bender & Company, Inc. 16th ed. rev. 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.

Mississippi Title Examination Standards

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 ch. 363 (Alan N. Resnick & Henry J. Sommer eds., Matthew Bender & Company, Inc. 16th ed. rev. 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 non-appealable 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 non-appealable 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 and Caution; 3 Collier on Bankruptcy chs. 342, 363 (Alan N. Resnick & Henry J. Sommer eds., Matthew Bender & Company, Inc. 16th ed. rev. 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 non-appealable. 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 chs. 1141, 1227, 1327 (Alan N. Resnick & Henry J. Sommer eds., Matthew Bender & Company, Inc. 16th ed. rev. 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 non-appealable or is not stayed pending appeal. The examiner should require that a certified copy of the order be recorded in the real property records.

Mississippi Title Examination Standards

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. 16th ed. rev. 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 and Caution; 3 Collier on Bankruptcy ¶ 362.11 (Alan N. Resnick & Henry J. Sommer eds., Matthew Bender & Company, Inc. 16th ed. rev. 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 non-appealable 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 non-bankruptcy law. 4 Collier on Bankruptcy ¶ 522.01 (16th ed. rev. 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.

Mississippi Title Examination Standards

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 non-bankruptcy 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 ch. 108 (Alan N. Resnick & Henry J. Sommer eds., Matthew Bender & Company, Inc. 16th ed. rev. 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 revest 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 the 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 ch. 349 (Alan N. Resnick & Henry J. Sommer eds., Matthew Bender & Company, Inc. 16th ed. rev. 2014).

History:

Adopted effective as of August 1, 2019.

CHAPTER 14: AFFIDAVITS AND RECITALS

14.01 Affidavit Defined

An affidavit is a written statement of fact, under oath or affirmation, signed by an individual with personal knowledge before a person authorized by law to administer such oath or affirmation.

Comment:

Affidavits are used to attest to facts that clarify issues raised by the record regarding a particular parcel. Affidavits are permitted to be recorded provided they relate to the identification, marital status, heirship, relation, or date or time of death of a person who is a party to an instrument affecting title to real property, or the identification of a legal entity who is a party to an instrument affecting title to real property. Miss. Code Ann. § 89-5-8(1).

Both form and function play an important role in determining the sufficiency of an affidavit. When preparing an affidavit to be used in real property transactions for purposes of clarifying an issue on the record, the following structure, while not required, is customary and encouraged:

Affiant: The name of the affiant should be inserted in the introductory paragraph.

Legal Description: It is recommended that the legal description, if necessary, be described in the first numbered paragraph – either directly or by reference to an attached exhibit – as it is of prime importance in a real property transaction. Because the description of the affiant may take several averments or some of the provided language may change on a case by case basis, placing the legal description in the first numbered paragraph will ensure that it is not affected by subsequent paragraphs of the affidavit and ensures it is more easily picked up by abstractors.

Description of Affiant: The description of the affiant and relationship to the real property should be included as part of the averments in order to tie the affiant to the transaction. If the affiant is an individual, then the affiant should aver that they are signing on personal knowledge. If the affiant is acting in a fiduciary capacity, then the affiant should aver that they are signing on personal knowledge and on behalf of the principal.

Averments: The next numbered paragraphs on the affidavit should include all averments necessary to clarify the issue on the record.

Execution: The affidavit must be executed in front of the notary. The name of the affiant should be printed below the signature line. If the affiant is also a fiduciary, his/her capacity and name of the principal should also be inserted. Because affidavits are signed on personal knowledge, the description of the affiant's capacity should not be prefixed by the word "as."

Jurat: Following the signature, the venue where the notary is signing the jurat (also known as a "verification upon oath or affirmation") should be stated. The name of the affiant should be printed following the capacity, if any, and the name of the principal, if any. Again, the description of the affiant's capacity should not be prefixed by the word "as."

Notary Signature and Seal: The notary must sign their name, complete the blank spaces below the signature and place the notary seal. Always check that the commission has not yet expired.

Mississippi Title Examination Standards

An “acknowledgment” is a formal statement by the person executing (signing) a document, affirming that he executed the document as his free act and deed. The statement – acknowledgment – is made in the presence of an official authorized to “take acknowledgments,” such as a notary public, who then completes and signs an “acknowledgment.” An acknowledgment is generally required to allow a document to be filed in the real property records.

A “jurat” (also known as a “verification upon oath or affirmation”) is a certificate signed by an officer authorized to administer oaths before whom an instrument was executed, stating that the instrument was subscribed and sworn to before the officer by the person executing the instrument. In a jurat, a notary certifies that a signer declared under oath or affirmation that the content of the signed document is true and was signed in the notary’s presence. An affidavit must contain a jurat to be effective.

The standard form of a jurat is as follows:

Subscribed and sworn to before me this _____ day of _____, 20____.

(Notary Stamp)

Notary Public

My Commission Expires: _____

For purposes of recording, the affidavit should also be acknowledged. If the affidavit is not separately acknowledged, then the affidavit may state that the affiant acknowledged his/her execution in addition to swearing or affirming the averments and the jurat should indicate whether the affiant was personally known to the notary or produced the proper identification.

An affidavit must contain a jurat to be effective. A modified form of a jurat (modified to include acknowledgment) is as follows:

Subscribed, sworn to (or affirmed) and acknowledged before me this _____ day of _____, 20____, by _____, who [] is personally known to me, or [] has produced _____, as identification.

(Notary Stamp)

Notary Public

My Commission Expires: _____

For a listing of notarial officers who may administer oaths and supply a jurat, see Miss. Code Ann. § 25-33-1 to -30.

Caution:

An instrument containing an acknowledgment, but not a jurat, is not an affidavit since the facts stated therein are not sworn to by the affiant.

Source:

Citations in the Comment. See also 1-5 Miss. Code R. § 1.10, which defines “jurat” to mean a notarial act in which an individual at a single time and place: (a) appears in person before the notary and presents a document; (b) is personally known to the notary or identified by the notary through satisfactory evidence; (c) signs the document in the presence of the notary; and (d) takes an oath or affirmation from the notary vouching for the truthfulness or accuracy of the signed document.

History:

Adopted effective as of August 1, 2019.

14.02 Reliance Upon Affidavits

An examiner may rely upon an affidavit which sets forth the identity of the affiant, provides a reasonable basis for the factual statements contained therein and appears not to be self-serving unless the examiner has a reasonable basis to question its reliability.

Comment:

The use of affidavits in determining title to real property is based upon long-established custom and practice. During the course of title examination, an examiner may encounter many types of affidavits. Some are expressly authorized by statute, such as affidavits relating to the identification, marital status, heirship, relation, or date or time of death of a person who is a party to an instrument affecting title to real property, or the identification of a legal entity who is a party to an instrument affecting title to real property. Others, such as non-production of oil and gas, lack of drilling operations, and boundaries, are not expressly authorized by statute. The examiner may find it necessary to rely upon affidavits in the interpretation of title documents, clarification of title ownership, or establishment of title. In deciding whether to rely upon an affidavit expressly authorized by Miss. Code Ann. § 89-5-8, the title examiner may consider relevant factors, such as:

- The date on which the affidavit was made, and if recorded, the length of time it has been recorded;
- Whether the party or parties making the affidavit were interested or disinterested; and
- The completeness of the affidavit, whether it recites facts or merely draws conclusions, and whether it discloses the basis of the maker's knowledge.

In deciding whether to rely upon an affidavit not expressly authorized by statute, the title examiner may, in addition to the above factors, consider additional factors, such as:

- The value of the interest in the property under examination;
- Whether more reliable and readily obtainable proof is available; and
- The cost and feasibility of alternative procedures to establish title.

On many occasions, the examiner has no practical alternative but to rely upon an affidavit. However, in relying upon an affidavit, an examiner does not become a guarantor of the truth of the affidavit. An affidavit may qualify as an ancient document.

Any affidavit filed of record in the chain of title is admissible as evidence in any action involving the instrument to which it relates or the title to the real property affected by the instrument and serves as *prima facie* evidence of the facts stated therein and the marketability of the title to real property. Miss. Code Ann. § 89-5-8(3).

See Standard 12.07 (Affidavits of Heirship) for discussion on Heirship Affidavits.

Source:

Miss. Code Ann. § 89-5-8 was adopted in response to Ferrara v. Walters, 919 So. 2d 876, 879 (Miss. 2005), which held that “[a] break in the chain of title renders the title to the realty unmarketable.”

Mississippi Title Examination Standards

History:

Adopted effective as of August 1, 2019.

14.03 Reliance Upon Recitals

Recitals are statements of fact made in deeds, leases, mortgages, and other documents. Because documents containing recitals are not typically sworn statements, and such recitals are frequently self-serving, recitals should generally be regarded as having less probative force than affidavits and should not be relied upon without supporting evidence; however, an examiner having no reasonable basis for doubt or suspicion may rely upon recitals as establishing the recited facts.

Comment:

Recitals encountered during the course of title examination often remove doubt or explain apparent gaps in the chain of title. Recitals are not sworn statements, however, and are often much less thorough than affidavits intended to establish similar facts. They should, therefore, be appraised somewhat more critically than affidavits, although the indicia of reliability the examiner should consider are much the same as those mentioned for affidavits in the Comment to Standard 14.02 (Reliance Upon Affidavits). Reliance on a recital is particularly warranted if it occurs in an ancient document (one in existence at least twenty years, in a condition that arouses no suspicion, and in a place where it would likely be if authentic). *Miss. R. Evid.* 803(16), 901(b)(8). See generally *Burkley v. Jefferson Cty.*, 58 So. 2d 22 (Miss. 1952) (finding that recitals in ancient documents are evidence of the facts stated therein); *White v. Inman*, 54 So. 2d 375 (Miss. 1951) (60 years); *City of Lexington v. Hoskins*, 50 So. 561 (Miss. 1909) (finding ancient surveys of a city, showing streets and lots appearing on the county records, are presumed to have been recorded by authority, though not formally certified for record); *Hughes v. Wilkinson*, 37 Miss. 482, 487 (Miss. 1859) (30 years); *Nixon v. Porter*, 34 Miss. 697, 706 (Miss. 1858) (38 years).

In order to impute constructive notice to a purchaser by reason of recitals in instruments affecting his title, the recitals relied upon must be so clear and distinct as to put an ordinary prudent person upon inquiry and must be so far correct and intelligible that upon proper inquiry they would lead the purchaser to knowledge of the particular fact, or encumbrance with notice of which it is sought to charge him. *Spellman v. McKeen*, 51 So. 914 (Miss. 1910).

Caution:

This Standard is intended to recognize the examiner's latitude in accepting the truth of a recital whose source appears to be reliable; nevertheless, some degree of subjective judgment is required to appraise the likelihood that a person in the declarant's position would misstate the pertinent facts, either from lack of knowledge or from self-interest.

Further, the existence and contents of necessary written documents may not rest on a mere recital. For example, see Standard 9.01 (Validity of Instrument Executed by an Agent), regarding the necessity for examination of powers of attorney, and Standard 10.01 (Powers of Trustee), indicating that an examiner's assessment of a trustee's authority must be based on the provisions of the trust instrument. It should go without saying that a recital of the existence of an essential deed should not take the place of the deed itself. For example, a recital identifying a grantor as "John Smith, successor by conveyance to the interest of William Jones" may not be accepted in lieu of the recorded deed from Jones to Smith. Reliance on recitals is misplaced where any circumstances appear to cast suspicion on their accuracy.

Nothing is better settled than that the purchaser of real property is bound to take notice of all recitals in the chain of title through which his own title is derived. A purchaser is bound by everything in the several

conveyances constituting the chain of title and to fully investigate and explore everything to which his attention is thereby directed. Deason v. Taylor, 53 Miss. 697 (Miss. 1876).

Examiners are cautioned that a mere recital of heirship issues, such as “X, Y, and Z, being the only heirs of John Doe”, is potentially self-serving. However, reliance upon heirship affidavits is anticipated by Miss. Code Ann. § 89-5-8(1).

Source:

Citations in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

14.04 Affidavits of Scrivener’s Error

Affidavit of scrivener’s error may be utilized to correct “typographical or other minor errors.” Such corrections should be unquestionably the original intention of the parties, minimal in extent, and supportable by extrinsic evidence if called into question and must be recorded.

Comment:

Miss. Code Ann. § 89-5-8(2), enacted March 25, 2013, expressly sanctions the use of an affidavit of scrivener’s error to correct typographical or other minor error in an instrument affecting the title. An examiner may rely on information provided in an affidavit of scrivener’s error purporting to correct typographical or other minor errors to give effect to a previous instrument’s clarified intent where there is no apparent reason to question the affidavit’s factual accuracy.

For a sample form, see Form 21.03 (Sample Form of Affidavit of Scrivener’s Error).

Caution:

Such an affidavit may be prepared “only by an attorney licensed to practice law in this state who prepared any instrument in the chain of title to the subject real [property].”

Source:

Citation in the Comment.

History:

Adopted effective as of August 1, 2019.

CHAPTER 15: MARITAL INTERESTS

15.01 Divorce

A judgment of divorce which purports to divest one party of title to the subject property, should be examined to ensure that said judgment (1) is final, non-appealable, (2) contains express language to divest title from one party and revest in another, and (3) contains a sufficient legal description of the subject property.

Comment:

Upon dissolution of a marriage, the chancery court has the discretion to divide real and personal property, including the divesting of title, and may consider awarding future interests to be received by each spouse. Ferguson v. Ferguson, 639 So. 2d 921, 929 (Miss. 1994). The chancellor in a divorce case now has the authority to divest title from one spouse, and vest it in the other spouse, when equitably dividing the marital assets. Draper v. Draper, 627 So. 2d 302, 305 (Miss. 1993).

Caution:

When a property settlement agreement (“PSA”) is used by the parties to settle property rights, they normally list all of their property and then prepare a list of property that each is to receive. Following the list of property that one party is to receive, the other party may use granting or conveyancing language such as “does hereby grant, bargain, and sell” such property to the receiving spouse. In such a case, the agreement itself may be relied upon to divest title and a deed is not necessary provided such agreement, and the judgment to which it is incorporated, is filed of record.

In some cases, the parties may enter into a PSA and schedule the property that each is to receive with a provision that each party will execute all necessary instruments to carry out the PSA. In such cases, the PSA alone is not effective to convey title and a separate deed must be properly executed and filed of record in order to divest title.

For the division of marital property to be accomplished by judgment of divorce, the judgment must be duly recorded in the official land records and should sufficiently identify the property (by valid legal description) that each party is to receive and include wording similar to: “It is therefore ordered adjudged and decreed by the Court that title to such property is hereby divested from ... and vested in ...”. If title is vested and divested in this manner, it is not necessary that the parties execute deeds.

Miss. R. Civ. P. 70 provides that if a judgment directs the conveyance of land or delivery of deeds and the party so directed fails to comply within the time specified, the court may direct that the act be done at the cost of the disobedient party by some person appointed by the court. However, Rule 70 applies only (a) after a judgment is entered, and (b) if the judgment directs a party to execute a conveyance of land or to deliver deeds and the party has failed to comply within the time specified. Comment to Miss. R. Civ. Pro. 70.

Source:

Citations in the Comment and Caution; Title Standards Board.

History:

Adopted effective as of August 1, 2019.

Mississippi Title Examination Standards

15.02 Homestead

If the property conveyed is or may be the homestead of married persons, an examiner must require the joinder of both spouses unless it is determined that the property is not, or is no longer, homestead or an exception to the spousal joinder requirement applies.

Comment:

This Standard is intended to apply to the preparation of an instrument for the current transaction. Unless an examiner has actual or constructive knowledge that the property was homestead in a prior transaction, the examiner is not required to verify the status of homestead at the time of prior conveyances.

There are five (5) exceptions to the spousal joinder requirement:

(1) *Non-owner-Occupied Property*. The property is not an owner-occupied residence as evidenced by either (a) a statement that no part of the property, or any adjacent land, constitutes the grantor's homestead, or (b) the lack of a declaration of homestead covering the property filed of record pursuant to Miss. Code Ann. § 85-3-29 or the fact that property is not assessed as the grantor's homestead (coupled with evidence that the grantor maintains another property as their homestead).

(2) *Purchase Money Mortgages*. A deed of trust given to secure funds used to purchase a homestead is valid without the non-titled spouse's signature. Jarvis v. Armstrong, 48 So. 1 (Miss. 1909). Likewise, a titled spouse's deed of trust to secure payment of a debt for money advanced to the titled spouse for the construction of a house converted into a homestead is valid without the non-titled spouse's signature. Id; see also In re Burks, 421 B.R. 762 (Bankr. N.D. Miss. 2009) (finding a second lien deed of trust invalid where non-titled spouse failed to join the execution thereof and the proceeds were non-purchase money in nature). It should be noted that *this exception does not apply* where the grantor already owns the property and resides on it at the time the deed of trust is signed. In re Rhymes, No. 0553572ERG, 2008 WL 723975, at *4 (Bankr. S.D. Miss. Mar. 14, 2008).

(3) *Inter-spousal Conveyances*. One spouse conveys to another spouse his or her interest in homestead property. Ward v. Ward, 517 So. 2d 571, 573 (Miss. 1987); see also Miss. Code Ann. § 89-1-29; Williams v. Green, 91 So. 39, 40 (Miss. 1922) (recognizing the general rule that "[i]n jurisdictions requiring conveyances or mortgages of homestead property to be executed by both husband and wife, the husband may make a valid conveyance, or according to some decisions, mortgage of the homestead premises to his wife, without her joining").

(4) *Separated Spouses, Living Apart*. If a married couple is separated and not living together, and the non-titled spouse voluntarily leaves the homestead with no intent to return, then a conveyance, mortgage, deed of trust or other encumbrance executed thereafter by the titled spouse is valid though not signed by the non-titled spouse. Sylvester v. Stevens, 191 So. 483 (Miss. 1939) (finding that if a spouse voluntarily separates from the other and abandons the intention of living with him or her through no fault of the latter, he or she has abandoned any homestead rights); Lewis v. Ladner, 172 So. 312 (Miss. 1937) (finding that abandonment of homestead may be obtained by a free and voluntary separation of the parties); Bd. of Mayor and Alderman of Town of Booneville v. Clayton, 124 So. 490 (Miss. 1929); Philan v. Turner, 13 So. 2d 819, 821 (Miss. 1943) (finding the test to be whether "the husband was away from the homestead with the mature intention not to return to it").

(5) *Voluntary Abandonment*. If a titled spouse acts in good faith to adopt a new homestead and not to deprive the non-titled spouse of any of the non-titled spouse's homestead rights which the non-titled spouse had when residing in the homestead, the titled spouse may move the family from their homestead, which thereupon loses its character as such, to a new homestead. Biglane v. Rawls, 153 So. 2d 665, 668 (Miss. 1963) ("the husband, as head of the family, has the right to select the homestead, and the wife is

bound by his selection, if it is made in good faith and not for the purpose of defeating her rights”); see also Grantham v. Ralle, 158 So. 2d 719, 724 (Miss. 1963); Livelar v. Kepner, 146 So. 2d 346, 349-50 (Miss. 1962).

Caution:

A conveyance, mortgage, deed of trust or other encumbrance upon a homestead exempted from execution shall not be valid or binding unless signed by the spouse of the owner if the owner is married and living with the spouse. Countrywide Home Loans, Inc. v. Parker, 975 So. 2d 233, 234 (Miss. 2008) (finding the deed of trust on homestead property null and void due to failure of the non-titled spouse to sign the deed of trust as required by Miss. Code Ann. § 89-1-29). The validity of the deed of trust is judged by the circumstances existing at the time of its execution. Craddock v. Brinkley, 671 So. 2d 662, 665 (Miss. 1996) (citing Hughes v. Hahn, 46 So. 2d 587 (Miss. 1950)). Subsequent actions by the spouse who failed to join in the execution cannot cure the invalidity of the instrument. Welborn v. Lowe, 504 So. 2d 205, 206 (Miss. 1987).

Exceptions 4 and 5 are fact-based exceptions. Because it is impossible to determine at a later date whether the homestead was abandoned by the non-titled spouses, these exceptions must be supported by an affidavit duly executed by both the titled and non-titled spouse and recorded in the chain of title with the conveyance, mortgage, deed of trust, or other encumbrance executed by the titled spouse.

For a sample form, see Form 21.04 (Sample Form of Affidavit of Non-homestead).

See Caution to Standard 9.01 (Validity of Instrument Executed by an Agent) regarding the prohibition on spouse serving as an agent in a power of attorney used to convey, mortgage, or otherwise encumber homestead property.

Source:

Miss. Code Ann. § 89-1-29; Citations in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

CHAPTER 16: JUDGMENT LIENS

16.01 Liens Generally

An examiner should identify all liens, both contractual (voluntary) and statutory (involuntary), relevant to the interests under examination and advise the client regarding any actions that are appropriate to the purpose of the examination. An examiner need not identify a lien that is barred by limitations or is otherwise unenforceable.

Comment:

Determining the significance of a lien or encumbrance and drafting appropriate requirements for a particular situation requires careful and skillful analysis by the examiner. The examiner ordinarily disclaims coverage of liens that might not appear of record or ripen until after the closing date of the opinion (such as involuntary mechanics' and materialman's liens); however, if the purpose of the examination is to determine the validity and priority of liens, an examiner should caution the client about the possible existence of unrecorded liens or make exception in his opinion to matters of title not appearing of record.

Caution:

Once perfected, many involuntary liens, including judgment liens and federal and state tax liens, but excluding liens securing ad valorem taxes, encumber all of the debtor's nonexempt property located in the county where notice of the lien is recorded. The lien attaches to nonexempt property owned at the time of perfection as well as to nonexempt property acquired thereafter until the debt is discharged or enforcement is barred by limitations. Thus, an examiner should not rely on a search of the relevant indices only from the time of the party's acquisition forward. Rather, the search for liens concerning each party in the chain of title should also extend back from the time that a party acquires an interest for the longest possible period of limitation. Nevertheless, a title examiner may reasonably rely exclusively on materials furnished to the examiner, such as an abstract of title or run sheets.

COA Liens. Miss. Code Ann. § 89-9-21 states that a condominium assessment lien may be subordinated to "any other lien" if provided in the declaration of restrictions. It is common for condominiums to subordinate their lien to that of a first mortgage.

HOA Liens. An examiner should use caution to determine whether a home owner's association was created within a declaration of protective and restrictive covenants. The examiner should review those covenants to determine if membership in a home owner's association is mandatory or voluntary and to determine if any such association is empowered to levy assessments against property within the purview of such an association. When mandatory assessments are authorized by the covenants of a home owner's association, the covenants should be examined to determine if such assessments are subordinated to deeds of trust made subsequent to the recordation of the covenants.

County Garbage Liens. Under Miss. Code Ann. § 19-5-22, the fees for garbage or rubbish collection or disposal are assessed jointly and severally against the generator and the owner of the property furnished the service. If the fees are assessed annually, the fees for each calendar year shall be a lien upon the real property beginning on January 1 of the next immediately succeeding calendar year. If fees are assessed on a basis other than annually, the fees shall become a lien on the real property offered the service on the date that the fees become due and payable. However, no real or personal property may be sold to satisfy any lien imposed under Miss. Code Ann. § 19-5-22.

Mississippi Title Examination Standards

A county garbage lien is a statutory lien that is created by operation of law. Miss. Att’y Gen. Op. No. 2010-00626 (December 17, 2010). The statute does not provide a mechanism for recording garbage liens and does not specify what information should be utilized when recording and indexing these liens. Miss. Att’y Gen. Op. No. 2013-00323 (September 13, 2013). However, since they are liens on real property, the chancery clerk should maintain a book of garbage liens and include any information determined to be needed for recording and indexing the liens. Id. A lien for garbage fees will not attach to property or impose personal liability upon a new owner of property subject to a county garbage lien if the board of supervisors determines the new owner to be a bona fide purchaser without notice of the county garbage lien. Miss. Att’y Gen. Op. No. 2015-00475 (January 29, 2016).

Municipal Solid Waste Liens. Fees for garbage collection or disposal are assessed jointly and severally against the generator of the garbage and the owner of the property furnished the service. Miss. Code Ann. § 21-19-2(3)(a). The fees constitute a lien upon the real property offered garbage collection or disposal service. Miss. Code Ann. § 21-19-2(3)(b). However, the real property cannot be sold to satisfy the garbage lien. Miss. Code Ann. § 21-19-2(3)(b).

Medicaid Liens. The Mississippi Division of Medicaid may seek recovery of payments for nursing facility services, home- and community-based services and related hospital and prescription drug services from the estate of a deceased Medicaid recipient who was fifty-five (55) years of age or older when he or she received the assistance. Miss. Code Ann. § 43-13-317. Mississippi does not have an actual Medicaid lien statute (e.g., a statute that permits a direct lien to be placed on real property even before the death of the recipient). Nor has Mississippi adopted a statute that expands the definition of “estate” for the purpose of allowing recovery beyond probate assets (e.g., allowing the Division of Medicaid to reach property exempt under Miss. Code Ann. § 85-3-1 (personal property and financial assets) or Miss. Code Ann. § 85-3-21 (homestead property)). Instead, the Mississippi Division of Medicaid must be noticed as an identified creditor against the estate of any deceased Medicaid recipient under Miss. Code Ann. § 91-7-145. See Miss. Code Ann. § 43-13-317(1). Property exempt under Miss. Code Ann. § 85-3-21 is not part of the estate. Darby v. Stinson, 68 So. 3d 702 (Miss. 2011).

Estate Tax Liens. While Mississippi does have an estate tax statute, the Mississippi estate tax was a “pick-up” tax or “sponge” tax that was designed and imposed to absorb the federal credit for state death taxes (under I.R.C. § 2011(b)). As a result of the federal 2012 Taxpayer Relief Act (American Taxpayer Relief Act of 2012, Pub. L. 112-240, 126 Stat. (2013)), the Mississippi estate tax has been eliminated for deaths in 2013 and after unless action is taken by the Mississippi Legislature to impose an estate tax. The IRS requires an estate tax return to be filed if the total taxable estate exceeds a certain dollar amount. If assets passing to persons other than the surviving spouse exceed the applicable exclusion amount (e.g., \$5,490,000 in 2017, \$11,180,000 in 2018, etc.), then estate tax will be owed by the estate. The statute of limitations for a federal estate tax lien is ten (10) years from the date of the decedent’s death. 26 U.S.C. § 6324(a). A federal estate tax lien attaches, as of the death of the decedent, to all property constituting the gross estate of the decedent and attaches without assessment of or demand for the tax due. 26 U.S.C. § 6324.

Tolling, interrupting, or suspending the running of a statute of limitations depends on a variety of bases. Some of these relate to disabilities of the plaintiff (e.g., like infancy and mental incapacity under Miss. Code Ann. § 15-1-59). Others relate to the position or conduct of the defendant (e.g., absence from the state under Miss. Code Ann. § 99-1-5, fraudulent concealment of a cause of action under Miss. Code Ann. § 15-1-67, bankruptcy under 11 U.S.C. § 108). Some relate to both the defendant and plaintiff (e.g., death under Miss. Code Ann. § 15-1-55).

Source:

Citations in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

16.02 Judgment Liens

The examiner should identify all enrolled judgments affecting the title under examination.

Comment:

The clerk of the circuit court must, within 20 days of the adjournment of the court, enroll all final judgments rendered during the term of the circuit court on "The Judgment Roll". Miss. Code Ann. § 11-7-189. A judgment rendered or enrolled in one county (or judicial district) does not constitute a lien upon or bind any property of the judgment debtor in another county until a certified abstract of the judgment or decree is enrolled by the clerk of the circuit court in the foreign county. Miss. Code Ann. § 11-7-191 (a judgment operates as a lien only in the district or districts in which it is enrolled); Miss. Code Ann. § 11-7-195.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

16.03 Notice of Judgments

Judgments do not become a lien upon the title to real property until said judgment is entered in the judgment roll in the applicable records in the office of the circuit clerk of the county (or judicial district) in which the real property is located.

Comment:

The final judgment of any other court outside of the county—state or federal—does not constitute a judgment lien on the real property of the judgment debtor within the county (or judicial district) in which the judgment or decree was rendered until a certified abstract of the judgment or decree is enrolled by the clerk of the circuit court. Miss. Code Ann. § 11-7-197.

Caution:

This Standard does not apply if the parties have actual notice of the existence of a judgment, decree or order on same.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

Mississippi Title Examination Standards

16.04 Lis Pendens

The examiner should inquire as to the nature of the cause of action giving rise to a notice of lis pendens, should evaluate whether the pending litigation may be relevant to the interests under examination, and should advise the client regarding any actions that are appropriate to the purpose of the examination or make exception in his opinion to the unreleased notice of lis pendens.

Comment:

The purpose of the filing of a lis pendens is to give notice of a potential claim on real property. Hooker v. Greer, 81 So. 3d 1103, 1109 (Miss. 2012). The filing of a lis pendens is not required where the claim is founded upon an instrument which is recorded, or upon a judgment duly enrolled, in the county (or judicial district) in which the real property is situated. Miss. Code Ann. § 11-47-3.

Caution:

A lien is not obtained by the mere filing of a notice of lis pendens. Aldridge v. Aldridge, 527 So. 2d 96, 99 (Miss. 1988). The lis pendens notice itself does not constitute an independent basis for imposition of a lien. *Id.* A chancellor must make specific findings of fact sufficient to constitute an independent basis for imposing a lien on real property rather than simply relying on the presence of a notice of lis pendens. *Id.*

In order to enforce a lien upon, right to, or interest in, any real property, other than a claim founded upon a recorded instrument or upon a duly enrolled judgment, a notice of lis pendens must be filed with the clerk of the chancery court of each county where the real property, or any part thereof, is situated, containing the names of all the parties to the suit, a description of the real property, and a brief statement of the nature of the lien, right, or interest sought to be enforced. Aldridge, 527 So. 2d at 100; McKenzie v. Fellows, 52 So. 628 (Miss. 1910). Failure to do so results in no valid or legal notice being imparted to bonafide purchasers for value without notice. *Id.* A bonafide purchaser for value without notice is “one who has in good faith paid a valuable consideration without notice of the adverse rights of another.” Am. Pub. Fin., Inc. v. Smith, 45 So. 3d 307, 311 (Miss. Ct. App. 2010) (citing Giesbrecht v. Smith, 397 So. 2d 73, 77 (Miss. 1981)). See also, Miss. Code Ann. § 11-47-9 (which provides if a person beginning a suit fails to have the required notice entered in the lis pendens record, such suit shall not affect the rights of bonafide purchasers or encumbrancers of such real property, unless they have actual notice of the suit).

Source:

Citations in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

16.05 Failure to Release Notice of Lis Pendens

An unreleased notice of the pendency of proceedings does not impair marketability after the noticed proceedings have terminated in the court where pending.

Comment:

If the lis pendens is for an action in a court other than the chancery court of the county in which the real property lies, the better practice is to evidence the termination of the proceedings on the record. Miss. Code Ann. § 11-47-11 (providing that once court proceedings are concluded, the clerk shall file of record a notice of the proceeding results).

Source:

Citation in the Comment; Title Standards Board.

History:

Adopted effective as of August 1, 2019.

CHAPTER 17: DEEDS OF TRUST AND OTHER VOLUNTARY LIENS

17.01 Satisfaction of Deed of Trust Lien

An examiner may presume that a deed of trust lien on real property is extinguished upon establishing that the secured debt has become unenforceable upon expiration of the applicable limitations period.

Comment:

Except for security agreements governed by the Mississippi Uniform Commercial Code and deeds of trust securing a “line of credit,” payment of the money secured by any mortgage or deed of trust shall extinguish it, and revest the title in the mortgagor as effectually as if reconveyed. Miss. Code Ann. § 89-1-49.

To determine whether a deed of trust has become barred of record as to subsequent purchasers and creditors, an examiner must determine what statute of limitations applies to bring actions on the underlying debt obligation (i.e., promissory note).

Negotiable Notes. An action to enforce the obligation to pay a note payable at a definite time must be commenced within six (6) years after the due date stated in the note or, if a due date is accelerated, within six (6) years after the accelerated due date. Miss. Code Ann. § 75-3-118(a).

Non-negotiable Notes. Prior to July 1, 2012, an action to enforce the obligation to pay a non-negotiable note payable at a definite time must be commenced within three (3) years after the due date stated in the non-negotiable note or, if a due date is accelerated, within three (3) years after the accelerated due date. Miss. Code Ann. § 15-1-49. For non-negotiable notes for which the statute of limitations had not expired prior to July 1, 2012, the action to enforce the obligations of a party to pay the non-negotiable note at a definite time must be commenced within six (6) years after the due date stated in the non-negotiable note or, if a due date is accelerated, within six (6) years after the demand. Miss. Code Ann. § 15-1-81.

Demand Notes. A promissory note is “payable on demand” if it states that it is payable on demand, payable at sight, or otherwise indicates that it is payable at the will of the holder or does not state any time for payment. If a promissory note is payable on demand, there are two limitations periods. If demand for payment is made to the maker, an action to enforce payment must be commenced within six (6) years after the demand. Miss. Code Ann. § 75-3-118(b). However, if no demand for payment is made, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of ten years. See Miss. Code Ann. § 75-3-118(b) (for negotiable demand notes); Miss. Code Ann. § 15-1-81(2) (for non-negotiable demand notes).

No Maturity Date. Under Miss. Code Ann. § 89-5-19, a purchaser or creditor searching the land records is entitled to take free and clear of a deed of trust when it appears from the face of the recorded deed of trust that the statute of limitations has expired on the secured indebtedness (which, as to a series of notes or a note payable in installments, shall begin to run from and after the maturity date of the last note or last installment), unless within six (6) months after such remedy is barred, the renewal or extension of such mortgage, deed of trust, or lien has been entered on the margin of the record of such instrument. If the date of final maturity of such indebtedness so secured cannot be ascertained from the face of the record, the same shall be deemed to be due one (1) year from the date of the instrument securing the same.

Mississippi Title Examination Standards

Caution:

With respect to demand notes, because there is no way of knowing—by merely examining the chain of title—whether (1) a demand has been made, or (2) the borrower has paid a particular amount of principal or interest, if any, on a demand note within the last ten (10) years, there is no way to determine if a deed of trust securing a demand note is barred of record. Therefore, if a deed of trust secures a demand note, cancellation should be obtained or a suit to cancel the deed of trust securing the demand note should be brought.

Lines of Credit. Although the payment in full of money secured by a deed of trust typically extinguishes a deed of trust, this principle does not apply to deeds of trust that secure a “line of credit.” Miss. Code Ann. § 89-1-49(4). Instead, in order for a line of credit to be satisfied of record, the lender must, upon payment in full and either (i) maturity of or termination of the line of credit by the lender, or (ii) written request of the borrower to cancel the line of credit, cancel of record the deed of trust securing the line of credit. Miss. Code Ann. § 89-5-21.

Federal Agencies. Unless the lien is no longer enforceable under federal law, an examiner should require a release of any lien held by the United States, any agency of the United States, or any assignee of such a lien. See 12 U.S.C. § 1821(d)(14), enacted as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA); 28 U.S.C. § 2415(a).

Property Acquired By Farm Credit System. After January 6, 1988, agricultural real property acquired by an institution of the Farm Credit System (a Federal Land Bank, a Farm Credit Bank or a Production Credit Association) as a result of a loan foreclosure or a voluntary conveyance from a borrower is subject to a right of first refusal vested in the “previous owner” to repurchase or lease the property. A “previous owner” is the person or entity from which or from whom the Farm Credit System lender acquired title. If the previous owner waived his right of first refusal, the original or an authentic copy of the executed waiver should be furnished and recorded. See 12 U.S.C. § 2219a (Farm Credit Act of 1971, § 4.36, as amended by the Agricultural Credit Act of 1987, Pub. L. No. 100-233, tit. I, § 108, 101 Stat. 1582 (1988) and Agricultural Credit Technical Corrections Act of 1988, Pub. L. No. 100-399, tit. I, § 104, 102 Stat. 990 (1988)).

Property Acquired By Farmers Home Administration. After January 6, 1988, agricultural real property acquired by the Farmers Home Administration as a result of a loan foreclosure or a voluntary conveyance from a borrower is subject to a number of rights and preferences in favor of the borrower, and certain other entities (e.g., the party from which or from whom the Farmers Home Administration acquired title), to repurchase or lease the property. The examiner should be furnished satisfactory evidence that, in compliance with the applicable statutes, regulations, and cases, the Farmers Home Administration has either obtained waivers from the borrower and other protected entities, or has complied with the appropriate notice procedures, and that all administrative appeal rights, if any, have been exhausted. See 7 U.S.C. § 1985 (Consolidated Farm and Rural Development Act, Pub. L. No. 87-128, tit. VII, § 335(c), 75 Stat. 315 (1961), as amended by the Agricultural Credit Act of 1987, Pub. L. No. 100-233, tit. VII, § 610, 101 Stat. 1568 (1988)); 7 C.F.R. § 1951.911; Food, Agricultural, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 103 Stat. 3359 (1990).

Source:

Citations in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

17.02 Satisfaction of Assignments of Rent or Financing Statements

When a deed of trust is preceded or followed by an assignment of rents or a financing statement showing that the latter is between the same parties and is a part of the transaction referred to in the deed of trust, an examiner may presume that a release of the deed of trust without any specific mention of the assignment of rents or financing statement will be sufficient to release the assignment of rents or financing statement.

Comment:

Commonly, a satisfaction or release of a deed of trust may fail to expressly release a related assignment of rents or a separate financing statement which may have been given to the same lender as additional security. If a deed of trust was filed for record at or about the same time as the filing of a financing statement or the recordation of an assignment of rents and leases, financing statement, or other collateral to the same lender and appears to be part of the same transaction evidenced by the deed of trust, it is common practice for an examiner to presume that a full release of the deed of trust without specific reference to the financing statement or assignment is sufficient as a release of the financing statement or assignment.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

17.03 Lien Priority and Subordination

Subject to exceptions, an examiner may presume that a lien created and filed for record has priority over a subsequently created and filed competing lien or interest in the same property unless the priority has been altered by a subordination agreement.

Comment:

A subordination agreement is a contractual modification of lien priorities which establishes different lien priorities than those provided under the statutory or common law rules. In agreeing to subordinate a superior lien secured by real property to a subsequent lien or other interest in the same property, the superior lienholder voluntarily contracts to be paid after a junior lienholder if the liens are foreclosed or agrees that foreclosure will not extinguish a previously junior interest.

Caution:

If there are more than two liens against a real property interest at the time of subordination, the subordinated lien is placed directly after the lien to which it is subordinated. Any liens not participating in the subordination agreement that have a priority ranking between the liens participating in the subordination move up in priority, becoming superior to the liens involved in the subordination. Liens that have a lower priority ranking than the liens involved in the subordination do not move up in priority. For example, if four liens against a parcel of real property are ranked A, B, C, and D, and lien A is contractually subordinated to lien C, the ranking after subordination would be B, C, A, and D.

See discussion in Comment to Standard 4.04 (Race-Notice Recording System).

Mississippi Title Examination Standards

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

17.04 Corrective or Re-Recorded Instruments – Assignment or Release of

Generally, each instrument of record evidencing a lien or encumbrance must be described in an assignment or release thereof. However, when an instrument referencing a lien or encumbrance appears in the chain of title, followed by a similar instrument in which it is stated on the face of the instrument that the latter instrument is given to correct some defect in the former instrument, or when it appears on the face of the latter instrument that it evidences the identical lien or encumbrance as the former instrument and is merely a re-recording of the former instrument, an examiner may presume that an assignment or release of either the latter or former instrument, which does not specifically describe the other, is sufficient to assign or release said lien or encumbrance.

Comment:

Deeds of trust are often re-recorded to correct clerical or scrivener's errors. The re-recording of a deed of trust does not alter, amend or otherwise change the obligations of the borrowers under the deed of trust. Historically, deeds of trust were released by marginal notation, which clearly indicated the lender's intention to release the deed of trust as recorded, and as re-recorded, since the notation of release was on the original instrument. Now, lenders more frequently record releases of deeds of trust by separate instrument. Those separate instruments may, in error, fail to reference the original book and page of recording of the deed of trust and/or the books and pages of any re-recordings thereof. Such defects in releases of deeds of trust being made by separate instruments do not cause the subject real property to be considered unmarketable and an examiner may omit from his opinion reference to any such rerecorded deed of trust if: (a) a release of deed of trust by separate instrument correctly references either the book and page (or instrument number) of the recording or of any re-recording thereof, and (2) such release was recorded after all re-recordings of the deed of trust.

Caution:

If a release of a previously filed deed of trust is filed contemporaneously with a re-recorded deed of trust, then the re-recording of the deed of trust may constitute an attempt by the lender to assert a deed of trust canceled in error, and in such an instance the re-recorded deed of trust should still be identified as an encumbrance against the real property.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

17.05 Errors in Assignments and Releases

An instrument is sufficient as an assignment or release, notwithstanding typographical or other minor errors in dates, amounts, book and page or instrument number of record, or the names and positions of

parties, if said assignments or releases give enough correct data to identify the instruments being assigned or released with reasonable certainty.

Comment:

When an assignment or release is recorded by a lender with a name different from the lender or assignee of record, the instrument should recite the relationship of the present holder to the holder of record and any intervening holders. However, in the case of a bank assignee where such a relationship is not recited, it may be possible to confirm the successor status of the most recent holder by reference to official bank histories available on a government website such as the National Information Center (<https://www.ffiec.gov/NPW>), or on the listings in a private publication such as the Lane Guide (<https://www.laneguide.com>). See also the “MERS® System,” a national electronic database that tracks changes in mortgage servicing rights and beneficial ownership interests in loans secured by residential real property maintained by Mortgage Electronic Registration Systems, Inc. (MERS). The MERS® ServicerID helps you identify the servicer associated with a mortgage loan registered on the MERS® System (<https://www.mers-servicerid.org/>).

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

17.06 Lapsed Financing Statements

A financing statement which constitutes a “fixture filing” under Miss. Code Ann. § 75-9-102(40) and Miss. Code Ann. § 75-9-502 (a)-(b), other than:

(A) a deed of trust effective as a financing statement filed as a fixture filing;

(B) a financing statement filed in connection with a public-finance transaction or manufactured-home transaction; or

(C) a financing statement filed to perfect a security interest in collateral of a transmitting utility; may be disregarded by an examiner as lapsed provided:

(1) that (a) five (5) years have elapsed from the date of filing such financing statement, or (b) the date of commencement of the most recent five-year period through which the financing statement has been continued; and

(2) no continuation statement has been filed in the office of the chancery clerk in the county in which the financing statement was originally filed within the six (6) months prior to the expiration of the current five-year period of such financing statement.

Comment:

A “fixture filing” means the filing of a financing statement covering goods that are or are to become fixtures and satisfying Miss. Code Ann. § 75-9-502(a)-(b). Miss. Code Ann. § 75-9-102(40). The term includes the filing of a financing statement covering goods of a transmitting utility which are or are to become fixtures. Id.

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A financing statement filed in connection with a public-finance transaction or manufactured-home transaction is effective for a period of thirty (30) years after the date of filing if it indicates that it is filed in connection with a public-finance transaction or manufactured-home transaction. Miss. Code Ann. § 75-9-515(b).

If the debtor is a transmitting utility (Miss. Code Ann. § 75-9-401(5)) and a filed financing statement so states, it is effective until a termination statement is filed. Miss. Code Ann. § 75-9-403(6). The office in which to file a financing statement to perfect a security interest in collateral, including fixtures, of a transmitting utility, is the Office of the Secretary of State. Miss. Code Ann. § 75-9-501(b).

A deed of trust is effective as a financing statement filed as a fixture filing from the date of its recording if: (a) the goods are described in the deed of trust by item or type; (b) the goods are or are to become fixtures related to the real property described in the deed of trust; (c) the deed of trust complies with the requirements for a financing statement in this section other than a recital that it is to be filed in the real property records; and (d) the deed of trust is duly recorded. Miss. Code Ann. § 75-9-502(c).

A record of a deed of trust that is effective as a financing statement filed as a fixture filing under Miss. Code Ann. § 75-9-502(c) remains effective as a financing statement filed as a fixture filing until the deed of trust is released or satisfied of record or its effectiveness otherwise terminates as to the real property. Miss. Code Ann. § 75-9-515(g).

Source:

Citations in the Standard and Comment.

History:

Adopted effective as of August 1, 2019.

17.07 Implied Vendor's Liens

Absent an express vendor's lien, if the record indicates, or the examiner has actual or constructive knowledge that purchase money remains unpaid, the examiner should consider the possible existence of an implied vendor's lien.

Comment:

When land is sold upon credit, and the vendor executes and delivers a deed therefor, the purchaser becomes a trustee of the vendor's implied equitable lien upon the land. Dodge v. Evans, 43 Miss. 570 (Miss. 1870); Perkins v. Gibson, 51 Miss. 699, 714 (Miss. 1875).

A vendor/grantor may include within a deed language that indicates that the property will serve as security for payment. Mississippi courts have recognized that such language will serve to create a valid security interest in the land conveyed. There are no particular words that must be used to create a security interest as long as the language clearly demonstrates that the party's grantor/vendor intended to retain a lien on the property. Moore v. Lackey, 53 Miss. 85, 91 (Miss. 1876).

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

17.08 Record of Expired Leases

In the absence of notice of renewal arising from possession, record, or otherwise, an examiner may omit from his opinion reference to a recorded lease or memorandum of lease when the term expressed in the lease and all options to extend or renew the term have expired.

Comment:

In an environmental study, it is helpful to know the identities of lessees in both expired and unexpired leases and the purposes for which the premises have been leased, since past or present uses may be associated with environmental problems, such as dry cleaners, service stations and the like. If the known or specified purpose of the examination is related to concerns about environmental liability, an examiner should report all leases, whether expired or unexpired.

Caution:

Generally, it is not the function of the title examiner to certify as to possession. However, an examiner should make an exception in his opinion to rights of tenants in possession, if any, unless he is called upon to certify as to possession. If asked to certify to possession and rights of tenants in possession, then a proper inquiry should be made with the present record owner and proper affidavits should be taken from him and any tenant actually in possession.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

17.09 Record of Expired Contract or Options

An examiner should report any and all contracts, options or memorandums thereof appearing within the applicable period of examination that have not expired.

Comment:

It is recommended that proof of expiration be obtained at closing. Where the expiration date is more than one year prior to closing, an affidavit of the seller may be adequate. Where the expiration date is one year or closer to the date of the closing, additional proof of expiration should be obtained. It is a better practice that this proof be in writing from the optionee.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

CHAPTER 18: FEDERAL AND STATE TAX LIENS

18.01 Federal Tax Liens

An examiner should determine whether the land under examination is subject to a general federal tax lien. Unless an examiner has record notice or actual notice of an extension, an examiner may presume that a federal tax lien has lapsed ten (10) years and thirty (30) days from the date of assessment. An examiner should require a release of any general federal tax lien, or any assignee of such a lien unless the lien is no longer enforceable under federal law.

Comment:

Scope: Any federal tax, with any applicable interest, penalties and costs, without notice and from the time of assessment, is a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to the person liable to pay the tax. Although the lien is effective as of the time of assessment, an enforceable general federal tax lien arises only when the following three (3) events have occurred: (1) a tax assessment is made; (2) the taxpayer is given proper notice of the assessment and demand for payment; and (3) the taxpayer fails to pay the assessed taxes within ten (10) days after notice of assessment and demand for payment. The lien is not valid as to any purchaser, holder of a security interest (under federal law, "security interest" means a lien on real or personal property), mechanic's lienor or judgment lien creditor until notice thereof has been filed for record in the office of the county clerk in which the land is located. 26 U.S.C. §§ 6321, 6322, 6323.

Duration: The general federal tax lien continues until it is satisfied or becomes unenforceable by reason of lapse of time. The limitation period for such liens is ten (10) years and thirty (30) days from the date of assessment. 26 U.S.C. §§ 6322, 6502, 6503.

Renewal: A general federal tax lien may be renewed by refileing the Notice of Federal Tax Lien. In order to maintain the enforceability of the lien from date of assessment through the renewal period, a notice of lien must be refiled within the one (1) year period ending thirty (30) days after the expiration of ten (10) years after the date of the assessment of the tax. 26 U.S.C. § 6323(g)(3)(A). If the Notice of Federal Tax Lien is not refiled during this period, the lien shall be deemed to have expired at the end of the applicable limitation period. Provisions exist in the statute for a second and subsequent renewal of the lien period by a second refileing of the notice of lien within the time periods set out in the statute. See 26 U.S.C. § 6323(g)(3)(B).

Release and Discharge: A certificate of release, discharge, subordination or non-attachment of any internal revenue lien generally may be relied upon by a bona fide purchaser, holder of a security interest, mechanic's lien or judgment lien creditor for value, as conclusive that the entire lien has been released or that the lands described in the certificate have been discharged from the tax lien. 26 U.S.C. § 6325(f). However, the issuance of such a certificate is not conclusive in all cases that the lien is extinguished. The certificate may be revoked for reasons cited in 26 U.S.C. § 6325(f)(2). It is not conclusive that the tax liability has been paid and, in the hands of the taxpayer, such property may still be subject to a lien upon notice and refileing. A certificate of release of a lien may be issued if either of the conditions set forth in 26 U.S.C. § 6325(a)(1) or (2) is met. A certificate of discharge of property may be issued if any of the conditions set forth in 26 U.S.C. § 6325(b)(1), (2), or (3) is met. A certificate of subordination may be issued if the conditions set forth in 26 U.S.C. 6325(d)(1), (2), or (3) is met. A certificate of non-attachment may be issued where, because of a confusion of names or otherwise, a notice of lien has been filed, and the lien is clouding title to property belonging to a person other than the taxpayer. See 26 U.S.C. § 6325(e).

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Caution:

The lapse of the applicable statutory period for the general federal tax lien does not, in itself, constitute conclusive evidence that the lien has expired. The examiner should be aware of the various methods, set out in the statute, by which the applicable limitation period may be extended or suspended, and the general federal tax lien may be renewed. Examples of some of these methods are set out below.

The effective period of a lien may be extended, and the running of such period may be suspended. For example, the effective period may have been extended or suspended: (1) by written agreement with the taxpayer (26 U.S.C. § 6502(a)); (2) by waiver of the statute of limitation by the taxpayer pending acceptance or rejection by the government of a compromise offer; (3) for the period during which assessment or use of creditors' process was prohibited (and while a related proceeding is on the docket of the Tax Court) and for sixty (60) days thereafter (26 U.S.C. § 6503(a)(1)); (4) for the period during which assets of the taxpayer were in the control or custody of any court and for six (6) months thereafter (26 U.S.C. § 6503(b)); (5) for the period during which collection is hindered or delayed by the fact that the taxpayer is outside of the United States, if such absence is continuous for a period of at least six (6) months (such period not to expire until six (6) months after the date of return to the United States) (26 U.S.C. § 6503(c)); (6) for the period, not in excess of two (2) years from the date of instituting bankruptcy or receivership proceedings, to thirty (30) days after the notice from the receiver or other fiduciary is given (26 U.S.C. § 6872); (7) for the period equal to the period from the date property of a third party is wrongfully seized or received by the Secretary to the date the Secretary returns the property or the date on which a judgment secured pursuant to 26 U.S.C. § 7426 with respect to such property becomes final and for thirty (30) days thereafter (26 U.S.C. § 6503(f)); (8) as to estate taxes, for the period of any extension of time for payment granted under the provisions of 26 U.S.C. § 6161(a)(2) or (b)(2) or under the provisions of 26 U.S.C. §§ 6163 or 6166 (26 U.S.C. § 6503(d)); or (9) as to Title 11 cases, for the period during which the Secretary is prohibited by reason of such case from making the assessment and for sixty (60) days thereafter (26 U.S.C. § 6503(h)). Various statutory provisions also suspend the running of time on account of military service. See 50 U.S.C. § 4000; 26 U.S.C. § 7508. The period during which a tax may be collected by levy is not extended or curtailed by reason of a judgment against the taxpayer. See 26 U.S.C. § 6502(a).

A notice of lien may be refiled after the last refile date stated on the face of the notice of lien, in instances in which the limitation period on collection after assessment has not expired. In such instances, the notice of lien refiled after the last stated refiling date shall be effective from the date of such refiling. See 26 U.S.C. § 6325(f)(2).

Source:

Citations in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

18.02 Federal Estate Tax Liens

Unless an examiner has record notice or actual notice of an extension, an examiner may presume that a federal estate tax lien has lapsed ten (10) years from the taxpayer's date of death, unless a notice is filed. An examiner should require a release of any federal estate tax lien, or any assignee of such a lien unless the lien is no longer enforceable under federal law.

Comment:

Scope: The total estate tax ultimately determined to be due in respect of the gross estate of a decedent is a lien in favor of the United States upon such gross estate, except that part of such gross estate as is used for the payment of charges against the estate and expenses of its administration allowed by any court having jurisdiction thereof. Said lien attaches immediately upon death and without notice. 26 U.S.C. §§ 2031-2044, 2056, 6324(a). The federal estate tax lien is not valid as against a mechanic's lien or, subject to the conditions provided in 26 U.S.C. § 6323(b), any other lien or security interest described in 26 U.S.C. § 6323(b). See 26 U.S.C. § 6324(c)(1).

Duration: The federal estate tax lien continues as a lien on all of the property in which the decedent's gross estate for ten (10) years from the date of death or until it becomes unenforceable by reason of lapse of time. 26 U.S.C. § 6324(a)(1). However, the granting of a request for an extension of time for filing the return or paying the tax will prolong the period for assessment and may create a later lien under the general federal tax lien. See 26 U.S.C. § 6503(d).

Divestiture or Release. Lands included in a decedent's estate sold to pay charges and expenses are divested of the federal estate tax lien to the extent that the proceeds are used to pay charges and expenses allowed by the chancery court, provided no notice of a general federal tax lien has been filed/recorded in the county clerk's office. 26 U.S.C. § 6324(a)(1). Release of estate tax liens or discharge of property from such liens can be secured for sales during administration if the tax has been fully satisfied or otherwise provided for, 26 U.S.C. § 6325(a)-(b). Applications for release or discharge should be made to the District Director, Attention: Estate and Gift Tax. See 26 U.S.C. § 6325(c). Probate files should contain the Estate Tax Closing Letter (IRS form letter 627(SC)(Rev. 9-83)) and, if proof of settlement of the federal estate tax is required by a title examiner or other interested party, such proof should be made by a copy of said letter together with canceled check(s) or receipt(s) showing payment of the net estate tax set forth in said letter and interest and penalties (if any). A certificate of non-attachment may be issued where, because of a confusion of names or otherwise, a notice of lien has been filed, and the lien is clouding title to property belonging to a person other than the taxpayer. See 26 U.S.C. § 6325(e).

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

18.03 Federal Gift Tax Liens

Unless an examiner has record notice or actual notice of an extension, an examiner may presume that a federal gift tax lien has lapsed ten (10) years from the date of the gift, unless a notice is filed. An examiner should require a release of any federal gift tax lien, or any assignee of such a lien unless the lien is no longer enforceable under federal law.

Comment:

Scope: The federal gift tax lien attaches at the date of the gift to all property transferred by a donor to a donee. 26 U.S.C. § 6324(b). This lien is a "secret" lien since it does not require recording to be effective. The federal gift tax lien is not valid as against a mechanic's lien or, subject to the conditions provided in 26 U.S.C. § 6323(b), any other lien or security interest described in 26 U.S.C. § 6323(b). See 26 U.S.C. § 6324(c)(1). This lien is in addition to, and not in lieu of, the general federal tax lien available under 26 U.S.C. § 6321. (Treas. Reg. § 301.6324-1(d)).

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Duration: The federal gift tax lien continues until it becomes unenforceable by lapse of time or for ten (10) years after the date of the gift. 26 U.S.C. § 6324(b).

Divestiture: Any part of the gift transferred by the donee (or by a transferee of the donee) to a purchaser or holder of a security interest is divested of the federal gift tax lien; such lien, to the extent of the value of the gift, attached to all the property (including after-acquired property) of the donee (or the transferee) except any part transferred to a purchaser or holder of a security interest. 26 U.S.C. § 6324(b). The lien is removed, unless discharged by payment or lapse of ten (10) years, only by a transfer to a bona fide purchaser or mortgagee for adequate and full consideration in money or money's worth. To the extent property is thereby divested of the lien, the lien attaches to all the property of the donee including after-acquired property, except to the extent transferred to a bona fide purchaser or mortgagee for adequate and full consideration in money or money's worth. (Treas. Reg. § 301.6324-1(b)).

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

18.04 State Tax Liens

The examiner should determine whether the land under examination is subject to any state tax liens.

Comment:

Various state tax liens may constitute a claim against a taxpayer's property. These include an income tax lien (Miss. Code Ann. § 27-7-55), estate tax lien (Miss. Code Ann. § 27-9-35), corporate franchise tax lien (Miss. Code Ann. § 27-13-29), sales tax lien (Miss. Code Ann. § 27-65-57), tobacco tax lien (Miss. Code Ann. § 27-69-41), and alcoholic beverage tax lien (Miss. Code Ann. § 27-71-33).

State tax liens are perfected and attach to all property and all rights to property belonging to the debtor, both real and personal, tangible and intangible, located in any and all counties within the state upon enrollment of a notice of tax lien in the state tax lien registry. Miss. Code Ann. § 85-11-9(1). State tax liens are valid as against mortgagees, pledgees, entrusters, purchasers, judgment creditors, and other persons from the time of enrollment in the tax lien registry. Miss. Code Ann. § 85-11-9(2). The notice of tax lien shall also serve as authority for the commissioner to issue warrants under Miss. Code Ann. §§ 27-7-57 (income taxes), 27-13-31 (corporate franchise taxes), and 27-65-59 (sales taxes) for the collection of the tax lien. Id.

Upon payment in full of a tax lien enrolled in the tax lien registry, including payment of any additionally accruing interest, penalty, fees and/or costs, the Department of Revenue must, within 15 working days from receipt thereof, file in the tax lien registry a notice of release of the tax lien being paid. Miss. Code Ann. § 85-11-17.

Subject to renewal, a notice of state tax lien is valid for seven (7) years from the date of enrollment. Miss. Code Ann. § 85-11-13. Any notice of tax lien that is reenrolled before the expiration of the seven (7) years is fully enforceable as of the date of re-enrollment. Id. Any notice of tax lien that is reenrolled after the lapse of the seven-year period loses the priority it had prior to its expiration. Id. There is no limit upon the number of times that the Department of Revenue may reenroll notices of tax liens. Id.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

18.05 Payment of Ad Valorem Taxes

The examiner should ordinarily determine the status of payment of ad valorem taxes.

Comment:

Taxes (state, county (Miss. Code Ann. §§ 19-9-109; -111; -114), and municipal (Miss. Code Ann. § 21-33-45)) are assessed upon real property, as of January 1st of each year, and personal property, at any time prior to March 1st of each year (unless otherwise provided). Miss. Code Ann. §§ 27-35-1, -3.

Ad valorem taxes are due and payable in arrears on or before February 1 of the following year. Miss. Code Ann. § 27-41-1. This means, that although ad valorem taxes become liens against the property as of January 1st of the current year, they do not become due and payable until February 1st of the next year. Equity Services Co. v. Hamilton, 257 So. 2d 201, 205 (Miss. 1972) (noting that taxes accrue and become due on or before the first day of February next succeeding the date of the assessment and levying of such taxes, although one-half of the taxes due may be paid in two equal installments at a later date). For example, 2019 taxes are due and payable on February 1, 2020.

Tax sales may be held on the first Monday of April if the tax collector elects to hold them on that date. Miss. Code Ann. § 27-41-55. If the tax collector so elects, the sale's advertisement may be made after February 15. If the collector does not, the sale is held on the last Monday of August and the sale's advertisement shall be made after the fifth day in August.

Counties and certain municipalities are authorized to accept partial payments for ad valorem taxes as follows: (i) one-half on or before February 1st; (ii) one-fourth on or before May 1st; and (iii) one-fourth on or before July 1st. Miss. Code Ann. § 27-41-1. However, if any unpaid balance exists on August 1st, the lands will be sold at the land sale on the last Monday in August for the unpaid balance.

Municipalities are authorized to levy and collect special assessments for certain improvements enumerated in Miss. Code Ann. § 21-41-3. Their governing authorities are required to maintain an assessment roll and book whose entries constitute public notice of the lien against the land assessed. Miss. Code Ann. § 21-41-13. These books will be delivered to the municipal clerk for purposes of public inspection. Id. The governing authorities will certify the annual installment of the assessment due from each tract affected to the municipal tax collector who will enter this information on the municipal tax roll. Miss. Code Ann. § 21-41-19. Payments will be noted in the assessments book. Miss. Code Ann. § 21-41-21.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

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18.06 Priority of Ad Valorem Tax Lien

The examiner should ordinarily assume that an ad valorem tax lien is superior to any deed of trust, judgment, other lien, or homestead right.

Comment:

Ad valorem tax assessments constitute a lien upon real or personal property as of the date of assessment and are entitled to preference over all judgments, executions, encumbrances or liens when so ever created. Miss. Code Ann. § 27-35-1 (provides that it shall not be necessary for the tax to be assessed to the property's true owner in order for the tax to be valid, but rather the tax shall be assessed against the land or personal property itself). However, the lien for municipal taxes is secondary and subordinate to the lien for state and county taxes. Miss. Code Ann. § 27-35-1.

A special assessment levied by a municipality shall be a lien on the property against which it is levied from the date of levy to the same extent as a lien for ad valorem taxes on real property. Miss. Code Ann. § 21-41-25.

Ad valorem tax and special assessment liens are superior to a federal tax lien. 26 U.S.C. § 6323(b)(6).

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

CHAPTER 19: CONSTRUCTION LIENS

19.01 Inchoate Nature of Lien Right

Mechanics, contractors, subcontractors, materialmen, machinists, manufacturers, registered architects, registered foresters, registered land surveyors, and registered professional engineers possess a special statutory lien upon the real property for their effort or materials furnished to improve the real property, but the statutory requirements for the perfection of said lien are strictly construed. The term “construction lien” as used in this chapter refers to the statutory lien provided to the above-named parties as set forth in Miss. Code Ann. §§ 85-7-401 to -433.

Comment:

Construction liens are considered inchoate liens since claimants have lien rights “only to the extent that they have brought themselves within the terms of the statute.” Riley Bldg. Supplies, Inc. v. First Citizens Nat’l Bank, 510 So. 2d 506, 508 (Miss. 1987). Except for certain specific circumstances, a lien claimant must first file a payment action against the party he contracted with before he can actually seek perfection of his lien and foreclosure against the property. Miss. Code Ann. § 85-7-405(1)(d)(i).

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

19.02 Priority of Construction Liens

Construction liens are inferior to (a) liens for taxes, (b) liens, deeds of trust, mortgages and encumbrances filed before the date and time of the filing of the notice of construction lien, and (c) a construction deed of trust if the construction deed of trust is filed in the official land records before a notice of a claim of lien is filed and the lender obtained either: (i) an affidavit or sworn statement from the owner to the effect that no work has been performed on, or materials delivered to, the real property; or (ii) an affidavit or sworn statement from the contractor, or owner if there is no contractor, regarding payment for work, materials or services provided. Properly perfected construction liens are superior to all liens which are not enumerated in the previous sentence.

Comment:

Miss. Code Ann. §§ 85-7-401 to -433 codifies the rules of priority, not only between construction liens and other land encumbrances but also between competing construction liens.

As to Other Liens. Other than tax liens, priority between construction liens and competing deeds of trusts, mortgages, and other encumbrances are determined in a strict “first to file” basis. Miss. Code Ann. § 85-7-405(2). Original priority is not affected by the amendment, restatement, or assignment of the lien, deed of trust, mortgage, or other encumbrance. Such amendments, restatements, or assignments relate back to the date of original filing for the purposes of priority.

As to Competing Liens. Construction liens have equal priority, no matter when filed, and are to be paid out either from the proceeds of any foreclosure sale of the property or from monies paid by the owner.

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If there are insufficient funds to satisfy all of the existing liens, lien claimants are paid either on a pro-rata basis or in any manner ordered by a court of competent jurisdiction. Miss. Code Ann. § 85-7-405(3)(d).

Source:

See Miss. Code Ann. § 85-7-405; Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

19.03 No Release of Lien Necessary

A construction lien may be disregarded once it is determined that no payment action was filed within 180 days from the date when the claim of lien was filed for recording and no release of such lien need be required by the title examiner. A claim of lien expires and is void 180 days from the date of filing of the claim of lien if no payment action is filed within that time period.

Comment:

In order for a construction lien to be perfected, a “claim of lien” must be filed within ninety (90) days after the last date upon which the lien claimant provided labor, services or materials for use in improvements to the property. This date is also referred to as the date when the lien claimant’s claim became due. Failure of a lienholder to (a) commence a “payment action” to collect the amount of his claim within 180 days from the date his claim was filed for recording, or (b) include in the claim of lien the statutorily required notice that the lien will expire in 180 days and that the owner of the property on which a claim of lien is filed has the right to contest the lien, renders the claim of lien unenforceable.

Source:

See Miss. Code Ann. § 85-7-405 (requirements for an enforceable lien); Miss. Code Ann. § 85-7-413 (dissolving of liens); Miss. Code Ann. § 85-7-421 (extinguishment of liens).

History:

Adopted effective as of August 1, 2019.

19.04 Bond to Discharge Lien

A properly filed construction lien may be discharged by filing a bond in the amount of 110% of the amount claimed under the lien in the Office of the Chancery Clerk of the county in which the lien was filed. The form and sufficiency of a statutory bond must be approved by the Clerk of the Chancery Court and upon the filing of the bond, the real property shall be discharged from the lien.

Comment:

The examining attorney may rely upon the appearance of a cash bond or a bond with good security as evidence of the discharge of the lien only if said bond has been recorded in the correct county and if said bond clearly shows that it has been accepted by the Clerk of the Chancery Court. Mere recordation of a bond without the clerk’s statutory approval appears to negate the validity of the bond. The examining attorney must always look for this approval.

Source:

See Miss. Code Ann. § 85-7-415 (“Upon approval by the clerk of the bond, the real property shall be discharged from the lien.”).

History:

Adopted effective as of August 1, 2019.

19.05 Satisfaction of Construction Lien

A construction lien may be satisfied of record as follows:

(a) By filing a cancellation of claim of lien following payment in full in the official land records of the county where the real property is situated. Miss. Code Ann. § 85-7-421(3).

(b) By quitclaim deed from the mechanic or materialman to the current holder of record title or the grantee to whom title is being conveyed. Said quitclaim deed should set forth the specific purpose of releasing the property described therein from the specific lien.

(c) By filing a “notice of contest of lien” substantially in the form provided by statute in the official land records of the county where the lien was filed and, within seven days of filing, sending a copy of the notice of contest to the lien claimant by registered or certified mail or statutory overnight delivery. If the lien holder does not commence a payment action within 90 days after the filing of the notice of contest of lien, then the construction lien is automatically extinguished. Miss. Code Ann. § 85-7-423(3).

Comment:

A notice of contest of lien should substantially follow the statutory form. Miss. Code Ann. § 85-7-433(4). The effect of the filing of a notice of contest of lien is to shorten the time within which a lien claimant can file a payment action from 180 days from the filing of the claim of lien to ninety (90) days after the filing of the notice of contest of lien. Once the notice is filed and the ninety-day period has run without a filing of a payment action, then no further action is needed by the owner or contractor to void the lien.

Source:

Citations in the Standard and Comment.

History:

Adopted effective as of August 1, 2019.

19.06 Affidavits to Dissolve Construction Lien Rights

A construction lien is “dissolved and unenforceable” if the owner, the purchaser from an owner, or a lender providing construction or purchase money, or any other loan secured by real property shows that payment was made in reliance upon:

(a) a lien waiver issued by the lien claimant pursuant to Miss. Code Ann. § 85-7-419; or

(b) a sworn written statement of the contractor that the agreed price or reasonable value of the labor, services or materials has been paid or waived in writing by the lien claimant.

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Comment:

Where an owner's defense of payment applies, the lien claimant's claim of lien is "dissolved and unenforceable." Miss. Code Ann. § 85-7-413(1). Therefore, an owner who is presented with either lien waivers by a contractor, signed by a potential lien claimant (subcontractor or materialman), or a sworn affidavit of payment by the contractor, and makes payment in good faith reliance upon the validity of such lien waivers or sworn written statements, and has no actual knowledge of the filing of a lien or an affidavit of nonpayment by a potential lien claimant, has an absolute defense to the lien and a lien action.

Caution:

If an owner makes a payment, with actual or constructive notice of the filing of a claim of lien or the filing of an affidavit of nonpayment, then the owner's payment defense is dissolved, and his property is subject to the lien and a lien action. Miss. Code Ann. § 85-7-413. Additionally, an owner who is not an innocent owner, but knows that the contractor is not spending the loan money as represented in a lien waiver or contractor affidavit to pay subcontractors and materialmen, has no defense of payment. Miss. Code Ann. § 85-7-413(2). To assert the defense of payment, the owner must have paid "in good-faith reliance upon receipt of a lien waiver . . . or upon receipt of a sworn written statement," a situation that does not exist if the owner knows that the contractor is not using the funds to pay outstanding bills of subcontractors and suppliers as represented. *Id.*

Source:

See Miss. Code Ann. § 85-7-421; see also Clyde X. ("Trey") Copeland, III & Robert P. Wise, Expansion of Mississippi's Construction Lien Laws to Include Mississippi Subcontractors, Materialmen, Consulting Engineers, and Surveyors, 84 Miss. L.J. 905 (2015); Citations in the Standard, Comment, and Caution.

History:

Adopted effective as of August 1, 2019.

CHAPTER 20: FORECLOSURES

20.01 Nonjudicial Foreclosure

An examiner should determine that all statutory and contractual requirements for a nonjudicial foreclosure sale have been satisfied to the extent a determination can be made based on instruments filed in the official land records. Specifically, an examiner should determine:

- that the deed of trust confers the power of sale;
- that there has been a default under the terms of the instrument;
- that the trustee or substitute trustee was properly appointed;
- that all statutory requirements in effect at the time of sale have been met;
- that all additional requirements, if any, contained in the security instrument have been met; and
- that a trustee's deed has been delivered.

Comment:

The first determination should be made from an examination of the security instrument. The other determinations may be made by examining the trustee's deed and other related instruments that may be available or of record. These may include an affidavit by the trustee, a copy of the notice of the trustee's sale, and an appointment of substitute trustee. Ordinarily, the examiner may determine default from the recitals in affidavits accompanying or incorporated in the trustee's deed. If not, the examiner should search for other evidence or take into consideration other factors, such as the passage of time since the foreclosure. The trustee or trustees are appointed in the security instrument, but a substituted trustee is frequently appointed prior to the commencement of the foreclosure by the recording of an appointment of substitute trustee prior to the commencement of the advertising of the notice of the foreclosure sale.

Condominiums. A power of sale conferred by statute or contained in a condominium declaration is sufficient to foreclose by sale an assessment lien.

Homeowners' Association. A dedicatory instrument or restrictions of a homeowners' association may provide for nonjudicial foreclosure of a lien for assessments.

Rescission. A mortgagee or trustee may rescind a foreclosure sale after its occurrence if the statutory requirements for the sale were not met.

Reinstatement. In the event the debtor cures its default prior to the sale, the deed of trust is reinstated, and the foreclosure sale is canceled. Miss. Code Ann. § 89-1-59.

Caution:

Even though a federal tax lien may be subordinate to the lien of the security instrument being foreclosed, a federal tax lien is not cut off by the foreclosure unless there has been compliance with I.R.C. § 7425. Thus, where an unreleased subordinate federal tax lien has been filed or recorded more than 30 days prior to the date of the foreclosure sale, the examiner should determine either that the notice of lien has expired (I.R.C. § 6323) or that the Internal Revenue Service was notified in compliance with I.R.C. § 7425. If the examiner determines that this notice was given by mail, the examiner should confirm that the mailing complied with I.R.C. § 7502 and the applicable regulations, 26 C.F.R. § 301.7502-1. If notified, the

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Internal Revenue Service has the right to redeem foreclosed property for a period of 120 days after the date of sale. I.R.C. § 7425(d). If the required notice is not given, any transfer remains subject to the federal tax lien. I.R.C. § 7425(b)(1). If making a determination as to whether proper notice was given, consider (a) a copy of the notice, (b) an affidavit of mailing, (c) recitals in the trustee's deed, and (d) a receipt from the United States Postal Service indicating that the notice was timely sent to the Internal Revenue Service or other evidence that the IRS received timely notice. However, the IRS is not bound by the affidavits of mailing and recitals.

The filing of a petition in bankruptcy generally results in an automatic stay against the enforcement of a lien and any action to obtain possession of property of the bankrupt estate. 11 U.S.C. §§ 362, 922. An examiner who becomes aware of a bankruptcy filing should require evidence that the stay was lifted.

The Servicemembers Civil Relief Act of 2003, formerly the Soldiers' and Sailors' Civil Relief Act of 1940, as amended by the Housing and Economic Recovery Act of 2008, prohibits foreclosure of property against an owner who acquired the property before military service and who is currently in the military service of the United States or has been in the military service within a specified number of days (e.g., 90 days effective January 1, 2015) prior to the attempted foreclosure. These limitations do not apply to obligations that were incurred during military service. 50 U.S.C. §§ 3911, 3918, 3937, 3953.

Source:

Citations in the Comment and Caution.

History:

Adopted effective as of August 1, 2019.

20.02 Deeds in Lieu of Foreclosure

When examining a deed taken by a lienholder in satisfaction of its secured debt, the examiner should consider the possible survival of a junior lienholder and the validity of a subordinate interest created during the existence of the extinguished debt.

Comment:

Frequently, a mortgagor will convey mortgaged land to a mortgagee in satisfaction of the debt. These conveyances, commonly called deeds in lieu of foreclosure, are sometimes taken, not only to avoid the problems inherent in foreclosures but in the belief that they extinguish all subordinate liens and interests. The intended result does not always follow.

Acceptance of a deed in lieu does not extinguish inferior liens on the property unless the fair market value of the property is actually and distinctly less than the debt and foreclosure cost. Jaubert Bros. v. Walker, 33 So. 2d 827, 829 (Miss. 1948) (recognizing that equitable foreclosure occurs when a borrower conveys mortgaged property to a lender and the property is actually and distinctly worth less than the debt and foreclosure costs); Tulane Hardwood Lumber Co. v. Perry, 84 So. 2d 519, 520 (Miss. 1956) ("foreclosure may be effected by conveyance by the owner of the mortgaged property in satisfaction of the mortgage debt when the fair market value of the property is not in excess of the debt and the cost of realizing on the security"). Where the fair market value of the mortgaged property exceeds the debt and foreclosure costs, the lender takes the property subject to any other claims or liens affecting the real property. Because it is impossible for an examiner to determine from the record whether the fair market value of the property was actually and distinctly less than the debt and foreclosure cost, the examiner should assume that a deed in lieu will not extinguish any junior liens.

Under the “*doctrine of merger*,” if both title to property and title to a deed of trust on the property are held under the same name, the deed of trust, as a lesser interest, merges into the greater fee interest. As a result, the deed of trust becomes extinguished, and any junior lienors are elevated to a higher priority security interest in the property. Thus, if a merger occurs subsequent to a deed in lieu that does not result in an equitable foreclosure, the lender will lose its first priority lien status and will be unable to foreclose if the deed in lieu is set aside. To prevent this loss of priority, a lender should conduct a thorough title search to determine if junior liens exist. In addition, all of the conveyance **documents should indicate that the intent is not to merge the deed of trust into the fee and that the debt remains unsatisfied**. Such an expression of intent is usually effective in averting merger. Santa Cruz v. State, 78 So. 2d 900 (Miss. 1955). A lender may want to consider having the deed conveyed to a subsidiary or nominee in order to prevent a merger.

Caution:

If a deed in lieu indicates that the intent is not to merge the deed of trust into the fee and that the debt remains unsatisfied (e.g., anti-merger language), then the lien of the subject deed of trust must be satisfied of record.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

20.03 Trustee’s Deed in Chain of Title

Where a Trustee’s Deed or Substituted Trustee’s Deed appears in the chain of title following an apparent foreclosure of the subject property, an examiner should review the notice of sale to ensure that said notice was published in the manner required by law, that the subject property was correctly described in said notice and that the mortgagor was properly identified in said notice.

Comment:

Miss. Code Ann. § 89-1-53 (deed must recite names of all parties to and the date and book and page of deed of trust, and book and page of substitution of trustee); Miss. Code Ann. § 89-1-55 (must (1) advertise for three consecutive weeks in a paper published in the county or having a general circulation therein where the land is located, and (2) post notice at the courthouse for the time of sale and disclosing the name of the original borrower); Miss. Code Ann. § 1-3-69 (there must be three weeks between the first publication and the foreclosure sale; if only three publications, they must be on the same day of the week for three consecutive weeks, with the sale being held on the same day of the fourth week).

It has become common practice to publish the notice once a week for four consecutive weeks and conduct the sale within seven days after the last publication. This approach serves two purposes. First, it provides an opportunity to correct any typographical errors made in the first publication without having to start the entire process again. Second, it provides more flexibility for permissible dates of sale after the last publication.

Inconsequential scrivener’s errors in the legal description in the deed of trust may be corrected when describing the property in the notice of sale and trustee’s deed. However, an invalid legal description in the deed of trust cannot be corrected by a foreclosure sale. Seal v. Anderson, 108 So. 2d 864, 866 (Miss. 1959).

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Source:

Citations in the Comment; Title Standards Board.

History:

Adopted effective as of August 1, 2019.

20.04 Effect of Foreclosure Sale Generally

A valid foreclosure sale terminates the debtor's interest in the property sold at the foreclosure sale and there is no right of redemption in favor of the debtor or junior lienholders, except those of the United States. A foreclosure sale eliminates all interests and liens against the property which were junior to the interest being foreclosed, unless the purchaser at the foreclosure sale is the debtor, with the exception of the lien for taxes.

Comment:

Purchase money mortgages take "super priority" over senior federal tax liens even though the mortgage may arise after notice of federal tax lien has been filed, provided the purchase money mortgage is valid under [Mississippi] law. Rev. Rul. 68-57, 1968-1 C.B. 553.

Caution:

See Standard 20.05 (Effect of Foreclosure Sale on Junior Federal Tax Liens) and Standard 20.06 (Effect of Foreclosure Sale on Other Governmental Liens and Interests).

Source:

Miss. Code Ann. § 27-35-1 (except for state, county and municipal taxes assessed upon land, which shall be entitled to preference over judgments, encumbrances or liens whenever created); Crystal v. Duffy, 493 So. 2d 942, 944 (Miss. 1986) (finding that a foreclosure sale "will normally cut off the rights of one holding a secondary deed of trust where amounts paid are sufficient to absolve only a primary deed of trust.").

History:

Adopted effective as of August 1, 2019.

20.05 Effect of Non-Judicial Foreclosure Sale on Junior Federal Tax Liens

If the chain of title reflects that a federal tax lien was filed of record more than 30 days prior to a non-judicial foreclosure sale date, the examiner should confirm that the record reflects (a) a written notice of the foreclosure sale was properly given to the Internal Revenue Service at least 25 days prior to the sale date, and (b) if the foreclosed property was sold by the purchaser at the foreclosure sale within 120 days following the foreclosure sale date, a waiver of the right of redemption by the Internal Revenue Service.

Comment:

Federal tax liens are established pursuant to 26 U.S.C. § 6321. Federal tax liens are perfected against real property by filing pursuant to 26 U.S.C. § 6323(f) and Miss. Code. Ann. § 85-8-5. See 26 U.S.C. § 7425(b)-(d).

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

20.06 Effect of Foreclosure Sale on Other Governmental Liens and Interests

Rights similar to those afforded the Internal Revenue Service are provided to the United States and federal governmental agencies. When property is foreclosed, and the record indicates, or the examiner has actual knowledge, that the property was owned, or a junior security interest held by the United States or a federal agency at the time of such foreclosure, inquiry as to rights and enforcement policy of the United States or the federal agency with regard to notice, consent to the foreclosure sale and right of redemption must be made. If it is determined that the agency owning the property or holding a junior security interest claimed any such rights, satisfactory evidence should be of record indicating that any required notice was given and, if applicable, consent to the foreclosure sale was obtained and, if applicable, the right of redemption must have been waived or the redemption period must have expired.

Comment:

28 U.S.C. § 2410(c) provides a one year right of redemption to the United States where real property is sold to satisfy a lien prior to the lien held by the United States other than a federal tax lien.

12 U.S.C. § 1825(b) provides that when acting as a receiver, no property of the Federal Deposit Insurance Corporation (FDIC) shall be subject to foreclosure without the consent of the FDIC. Pursuant to 12 U.S.C. § 1441a(b)(1) the Resolution Trust Corporation (RTC) has the same power and status of the FDIC.

It appears that various divisions of the United States and federal agencies do not consistently or uniformly interpret or enforce rights under 28 U.S.C. § 2410 and 12 U.S.C. § 1825. For example, FDIC and RTC have published policy statements on Foreclosure Consent and Redemption Rights. These policies differ in certain respects and enforcement varies depending on the capacity in which property or security interest are held by FDIC or RTC and the type of senior security interest being foreclosed. FDIC, RTC and other agency regulations and policies are published in the Federal Register and the Code of Federal Regulations.

Source:

Citations in the Comment.

History:

Adopted effective as of August 1, 2019.

CHAPTER 21: SAMPLE FORMS

21.01 Sample Form of Title Opinion

Date _____

Via E-Mail _____

[Name of Addressee]

RE: TITLE OPINION

Parcel No.: _____

Indexing: Lot ____, Block ____, _____

County: _____ County, Mississippi

Dear _____:

This is to certify that I/we, _____, have conducted or caused to be conducted an examination of the official land records in the office of the Chancery Clerk of _____ County, Mississippi, with regard to title to the following described land, situated, lying and being in _____ County, Mississippi (the "Property"), to-wit:

SEE EXHIBIT "A", ATTACHED HERETO AND MADE A PART HEREOF.

My/our examination of the official land records was limited to the following indices ("Records Searched") for the periods shown:

[General][Sectional] Index	[32/50] years (from _____ to _____)
State Tax Lien Registry	7 years
Construction/Special Liens	1 year
Lis Pendens	Greater of 10 years or Period of Current Ownership
Federal Tax Liens	10 years
Federal Civil Judgments	20 years
Circuit Court Judgment Roll	7.5 years
Tax Sale Books	Greater of 10 years or Period of Current Ownership
Chancery Docket	Greater of 10 years or Period of Current Ownership
Ad Valorem Taxes	20__ through 20__
Solid Waste/Municipal Liens	7 years

Based upon my/our examination of the foregoing, I/we are of the opinion that as of _____, at 8:00 o'clock a.m., good and marketable title to the Property is vested in _____, in [fee simple, as joint tenants with full rights of survivorship and not as tenants in common] by virtue of that certain [Warranty Deed] from _____, dated _____, and filed of record on _____ at _____ .m., and recorded in [Book _____, Page _____], subject to the following record exceptions, to-wit:

1. Those taxes, special assessments and other governmental liens which become due and payable subsequent to the date hereof.

2. All restrictions, dedications, conditions, reservations, easements and other matters, if any, shown on the plat of _____, as recorded in Plat Book _____, Page(s) _____.

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3. [Insert other matters of record, as necessary]

This opinion is expressly limited to the matters described above. I/we have not examined, and therefore express no opinion as to any matter not described above which might affect title to the Property, including:

A. Rights, interests or claims of parties in possession of the subject property not shown by the Records Searched or which may be revealed by competent inspection of the Property.

B. Rights, interests or claims affecting the Property which a complete and accurate survey would disclose, including, but not limited to, abutter's rights, 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.

C. Matters of title not appearing of record or which are not properly indexed in the Records Searched of the county in which the Property is located, including, but not limited to unrecorded servitudes or easements, roadways, other uses of the Property not visible from the surface, other similar conditions not disclosed by Records Searched.

D. Forged or fraudulent contracts, deeds or other instruments affecting title or whether or not documents in the chain of title were executed to or from a party of sound and disposing mind or a nonexistent corporation, person or entity, or whether or not a person signing for or on behalf of a corporation, unincorporated association, or another person in a representative capacity was duly authorized to execute any documents in the chain of title in such capacity.

E. Any transfers, the substance and subject of which may be attacked as a fraudulent conveyance within the meaning of the Federal Bankruptcy Code or Mississippi law.

F. Any and all flood plain regulations, encroachment limits, flood plain zoning or wetland regulations as established by local, state or federal law or agencies.

G. Any changes in the boundaries caused by a change in the location of any water body within or adjacent to the Property, and any adverse claim to all or part of the Property that is or was previously under water.

H. Any security interests in fixtures attached to the Property of which notice may be given by a financing statement that has not been filed of record.

I. All liens for services, labor, or materials in connection with improvements, repairs or renovations provided before, on, or after the date hereof, not shown by the Records Searched.

J. All taxes or special assessments not shown as a lien in the Records Searched or in the records of the local tax collecting authority as of the date of examination.

K. Any claim to (i) ownership of or rights to minerals and similar substances, including but not limited to ores, metals, coal, lignite, oil, gas, uranium, limestone, clay, rock, sand, and gravel located in, on, or under the Property or produced from the Property, whether such ownership or rights arise by lease, grant, exception, conveyance, reservation, or otherwise; and (ii) any rights, privileges, immunities, rights of way, and easements associated therewith or appurtenant thereto.

L. All facts or conditions which would be revealed by competent inspection of the Property, including, but not limited to, the existence or non-existence of any hazardous substances on or under the Property that may constitute a violation of any and all laws, statutes, ordinances, rules, regulations, orders, or determinations of any governmental authority pertaining to health or the environment, including, without limitation, the Clean Air Act, the Clean Water Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Occupational Safety and Health Act, the Resource Conservation and

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Recovery Act, the Safe Drinking Water Act, and the Toxic Substances Control Act, all as amended and including all regulations, permits, and orders issued thereunder.

M. All zoning ordinances of any governmental authority applicable to the Property.

N. Compliance with the Federal Truth-In-Lending Act and Regulation Z which allow a rescission under certain circumstances.

You are advised to inform yourself of these matters by an independent investigation.

You should also obtain a professional environmental assessment to determine whether any solid waste, hazardous substances, pollutants, above or below ground storage tanks, drainage wells, water wells, landfill sites or other environmentally regulated conditions exist on the Property. Such conditions are not ordinarily shown in the official land records, but they may result in injunctions, fines, required clean-up, or other remedial action under federal, state, or local laws. These laws may impose liens against the Property and personal liability against the owner, even though the owner did nothing to create the condition and acquired the Property without knowing about it.

You may purchase additional protection of your interest in the Property through an owner's or lender's title insurance policy issued by [_____] Title Insurance Company] and purchased through my/our firm. A title insurance policy provides certain protection of your interest in the Property which exceeds the protection available through this opinion. If you are interested in obtaining a title policy or have questions concerning title policies, please contact us/me.

This Title Opinion is directed only to the addressee above and has been prepared for said addressee's use and reliance only. No other persons, firms, corporations or entities are authorized to rely on this opinion. No other person, including the addressee, shall be entitled to rely on this opinion for the purpose of writing any title insurance policy, either owner's or lender's, from any title insurance company authorized to sell title insurance in the state of Mississippi.

WITNESS OUR SIGNATURE on this the ____ day of _____, 20____, but effective; however, as of the date stated above.

Sincerely,

[NAME OF LAW FIRM]

[Attorney Name]

Comment:

The foregoing sample form of title opinion is intended to be used as an example for Mississippi lawyers in drafting or reviewing a title opinion. This sample form is not the exclusive form for title opinions and use of a different form (or a modified version of this form) may be appropriate in certain situations.

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

Mississippi Title Examination Standards

21.02 Sample Form of Affidavit of Heirship

[Format for Recording]

AFFIDAVIT OF HEIRSHIP

Before me, the undersigned authority, on this day personally appeared _____ (insert name of affiant) ("Affiant") who, being first duly sworn, upon his/her oath states:

1. To the best of my knowledge, _____ ("Decedent") (insert name of decedent) owned an interest in that certain real property more particularly described in Exhibit A attached hereto.

2. I live at _____ (insert address of affiant's residence). I am personally familiar with the family and marital history of the Decedent, and I have personal knowledge of the facts stated in this affidavit, due to having the following relationship to the decedent: _____.

3. I knew decedent from _____ (insert date) until _____ (insert date). Decedent was born on _____ (insert date of birth) and died on _____ (insert date of death). Decedent's place of death was _____ (insert place of death). At the time of decedent's death, decedent's residence was _____ (insert address of decedent's residence).

4. Decedent's marital history was as follows: _____ (insert marital history and, if decedent's spouse is deceased, insert date and place of spouse's death).

5. Decedent had the following children: _____ (insert name, birth date, name of other parent, and current address of child or date of death of child and descendants of the deceased child, as applicable, for each child).

6. Decedent did not have or adopt any other children and did not take any other children into decedent's home or raise any other children, except: _____ (insert name of child or names of children, or state "none").

7. (Include if the decedent was not survived by descendants.) Decedent's mother was: _____ (insert name, birth date, and current address or date of death of the mother, as applicable).

8. (Include if the decedent was not survived by descendants.) Decedent's father was: _____ (insert name, birth date, and current address or date of death of the father, as applicable).

9. (Include if the decedent was not survived by descendants.) Decedent had the following siblings: _____ (insert name, birth date, and current address or date of death of each sibling and parents of each sibling and descendants of each deceased sibling, as applicable, or state "none").

10. The following persons have knowledge regarding the decedent, the identity of decedent's children, if any, parents, or siblings, if any: _____ (insert names and contact information of persons with knowledge, or state "none").

11. Decedent died ☐ without leaving a written will, ☐ with a will, ☐ unknown.

12. The decedent's estate ☐ has been administered, ☐ has not been administered, ☐ unknown.

13. Decedent left no debts that are unpaid, except: _____ (insert list of debts, or state "none" or "unknown").

14. I am aware of the penalties of perjury under Federal Law, which includes the execution of a false affidavit, pursuant to 18 U.S.C.S. § 1621 wherein it is provided that anyone found guilty shall not be

fined more than \$2,000 or imprisoned not more than 5 years or both. I am also aware that filing of a false affidavit is perjury and punishable under Miss. Code Ann. § 97-9-19. Finally, I am also aware that under Miss. Code Ann. § 97-19-39, if a person with the intent to cheat or defraud another uses a false token or any other false pretense to obtain a signature of a person on a writing, or obtain money, personal property, or value, the person is guilty of a crime and will be punished by a fine of not more than three times the amount of the thing obtained and imprisonment in the penitentiary for not more than three years or in a jail for not more than one year.

The undersigned certifies under penalty of perjury that the foregoing is true and correct.

[•], Affiant

STATE OF MISSISSIPPI
COUNTY OF [•]

Subscribed, sworn to (or affirmed) and acknowledged before me this _____ day of _____, 20____, by _____, who [] is personally known to me, or [] has produced _____, as identification.

(Notary Stamp)

Notary Public
My Commission Expires: _____

CORROBORATING AFFIDAVIT

STATE OF MISSISSIPPI
COUNTY OF [•]

[•], being of lawful age and first duly sworn, under oath states that the information given in the above and foregoing affidavit, made by [•], is true, to the personal knowledge of this affiant.

[•], Affiant

STATE OF MISSISSIPPI
COUNTY OF _____

Subscribed, sworn to (or affirmed) and acknowledged before me this _____ day of _____, 20____, by _____, who [] is personally known to me, or [] has produced _____, as identification.

(Notary Stamp)

Notary Public
My Commission Expires: _____

Comment:

The foregoing sample form of Affidavit of Heirship sets forth the facts most commonly used to determine the heirs at law. For a detailed discussion regarding reliance on affidavits of heirship, see Standard 12.07 (Affidavits of Heirship). This sample form is not the exclusive form to be used for the purposes described herein, and a different form (or modified version of the foregoing sample form) may be appropriate in certain situations.

Mississippi Title Examination Standards

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

21.03 Sample Form of Affidavit of Scrivener's Error

[Format for Recording]

AFFIDAVIT OF SCRIVENER'S ERROR

(Miss. Code Ann. § 89-5-8(2))

Before me, the undersigned authority, on this day personally appeared _____ (insert name of affiant) ("Affiant") who, being first duly sworn, upon his/her oath states:

1. I am a licensed attorney admitted to practice in the State of Mississippi with personal knowledge of the facts and matters stated herein. [If Affiant is not the preparer, then add: My office address is _____].

2. I prepared an instrument in the chain of title to the real property more particularly described in Exhibit A attached hereto.

3. The instrument(s) identified by the following information (each, a "Subject Instrument") contains one or more scrivener's errors:

<u>Grantor</u>	<u>Grantee</u>	<u>Book/Page or Instrument No.</u>	<u>Date Recorded</u>
[●]	[●]	[●]	[●]
[●]	[●]	[●]	[●]

4. The purpose of this Affidavit is to provide notice of the scrivener's error described in this Affidavit and to correct the typographical or other minor errors contained in the Subject Instrument(s).

5. A brief description of each scrivener's error in the Subject Instrument(s) that this Affidavit is designed to correct is as follows:

[set forth the error(s) that was made and any other pertinent information regarding the error(s)]

6. The correct information to be inserted or reflected in or the information to be removed from the Subject Instrument(s) is as follows:

[set forth the correction desired to be made by the recordation of this affidavit]

7. **Pursuant to Miss. Code Ann. § 89-5-8(2)(a), the Chancery Clerk is hereby requested to index this affidavit in both the general index under the names of the original parties to each Subject Instrument and in the sectional index.**

8. I am aware of the penalties of perjury under Federal Law, which includes the execution of a false affidavit, pursuant to 18 U.S.C.S. § 1621 wherein it is provided that anyone found guilty shall not be fined more than \$2,000 or imprisoned not more than 5 years or both. I am also aware that filing of a false affidavit is perjury and punishable under Miss. Code Ann. § 97-9-19. Finally, I am also aware that under Miss. Code Ann. § 97-19-39, if a person with the intent to cheat or defraud another uses a false token or any other false pretense to obtain a signature of a person on a writing, or obtain money, personal property,

or value, the person is guilty of a crime and will be punished by a fine of not more than three times the amount of the thing obtained and imprisonment in the penitentiary for not more than three years or in a jail for not more than one year.

The undersigned certifies under penalty of perjury that the foregoing is true and correct.

[•], Affiant

STATE OF MISSISSIPPI
COUNTY OF [•]

Subscribed, sworn to (or affirmed) and acknowledged before me this _____ day of _____, 20____, by _____, who [] is personally known to me, or [] has produced _____, as identification.

(Notary Stamp)

Notary Public
My Commission Expires: _____

[Add Exhibit A – Legal Description]

Comment:

The foregoing sample form of Affidavit of Scrivener's Error must be executed by an attorney that has prepared any instrument in the chain of title and may only be used to correct typographical or other minor errors for the purpose of giving effect to a previous instrument's clarified intent where there is no apparent reason to question the affidavit's factual accuracy.

For a detailed discussion regarding reliance on affidavits of scrivener's error, see Standard 14.04 (Affidavits of Scrivener's Error).

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

21.04 Sample form of Affidavit of Non-homestead

[Format for Recording]

AFFIDAVIT OF NON-HOMESTEAD (Must be signed by the non-titled spouse)

Before me, the undersigned authority, on this day personally appeared _____ (insert name of affiant) ("Affiant") who, being first duly sworn, upon his/her oath states:

1. Affiant is the non-titled spouse of the owner of that certain real property having a street address of [•], phone number of [•], and being more particularly described as set forth on Exhibit A attached hereto (the "Property").

Mississippi Title Examination Standards

2. Affiant has (select only one):

☐ [Voluntary Abandonment] together with the titled spouse, (a) freely and voluntarily abandoned the Property and secured and currently occupies with Affiant's family a new homestead residence having a street address of [●], (b) removed all of Affiant's family's personal belongings from the Property and relocated the same to the new homestead residence, (c) having no intent to return to the Property for the purpose of residing therein, temporarily or permanently, or otherwise, and (d) specifically renounces, disclaims, quit-claims and abandons for all purposes any and all homestead rights, if any, which the Affiant has in and to the Property.

☐ [Separated and living apart] (a) freely and voluntarily separated from Affiant's spouse with no intent to return to Affiant's spouse or to reside, either temporarily or permanently, with Affiant's spouse on the Property, (b) currently maintains and occupies Affiant's own separate homestead residence at [●], (c) removed all of Affiant's personal belongings from the Property and relocated the same to Affiant's new homestead residence, and (d) specifically renounces, disclaims, quit-claims and abandons for all purposes any and all homestead rights, if any, which the Affiant has in and to the Property.

3. This affidavit is made in order to induce the acceptance of a conveyance, mortgage, deed of trust or other encumbrance on the Property executed solely by the titled spouse.

4. I am aware of the penalties of perjury under Federal Law, which includes the execution of a false affidavit, pursuant to 18 U.S.C.S. § 1621 wherein it is provided that anyone found guilty shall not be fined more than \$2,000 or imprisoned not more than 5 years or both. I am also aware that filing of a false affidavit is perjury and punishable under Miss. Code Ann. § 97-9-19. Finally, I am also aware that under Miss. Code Ann. § 97-19-39, if a person with the intent to cheat or defraud another uses a false token or any other false pretense to obtain a signature of a person on a writing, or obtain money, personal property, or value, the person is guilty of a crime and will be punished by a fine of not more than three times the amount of the thing obtained and imprisonment in the penitentiary for not more than three years or in a jail for not more than one year.

The undersigned certifies under penalty of perjury that the foregoing is true and correct.

[●], Affiant

STATE OF MISSISSIPPI
COUNTY OF [●]

Subscribed, sworn to (or affirmed) and acknowledged before me this _____ day of _____, 20____, by _____, who [] is personally known to me, or [] has produced _____, as identification.

(Notary Stamp)

Notary Public
My Commission Expires: _____

CORROBORATING AFFIDAVIT (Must be signed by the titled spouse)

STATE OF MISSISSIPPI
COUNTY OF [●]

[●], being of lawful age and first duly sworn, under oath states that I am the owner (titled spouse) of the Property and that the information given in the above and foregoing affidavit, made by [●], is true, and accurate, to the personal knowledge of this affiant.

[•], Affiant

STATE OF MISSISSIPPI
COUNTY OF [•]

Subscribed, sworn to (or affirmed) and acknowledged before me this _____ day of _____, 20____, by _____, who [] is personally known to me, or [] has produced _____, as identification.

(Notary Stamp)

Notary Public
My Commission Expires: _____

Comment:

The foregoing sample form of Affidavit of Non-homestead should be executed by both the titled spouse and the non-titled spouse.

For a detailed discussion regarding reliance on affidavits of non-homestead, see Standard 15.02 (Homestead).

Source:

Title Standards Board.

History:

Adopted effective as of August 1, 2019.

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THE TITLE EXAMINATION STANDARDS (THE "STANDARDS") REPRESENT THE CONSENSUS OF THE TITLE STANDARDS BOARD (THE "BOARD") ESTABLISHED BY THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR (THE "SECTION"). THE STANDARDS SHOULD NOT BE CONSTRUED AS REFLECTING THE OPINION OF THE MISSISSIPPI BAR, ITS OFFICERS, MEMBERS OR STAFF. THE STANDARDS ARE PRESENTED WITH THE UNDERSTANDING THAT NEITHER THE SECTION NOR THE BOARD IS ENGAGED IN RENDERING LEGAL SERVICES. IN NO EVENT SHALL THE BOARD, ITS MEMBERS, OR THE SECTION BE LIABLE FOR ANY DIRECT, INDIRECT, OR CONSEQUENTIAL DAMAGES RESULTING FROM THE USE OF THE STANDARDS. TITLE INSURANCE IS A CONTRACT OF INDEMNITY. THE STANDARDS DO NOT APPLY TO THE EXERCISE OF DISCRETION BY A TITLE INSURANCE COMPANY IN DETERMINING THE INSURABILITY OF TITLE. USERS OF THE STANDARDS ARE CAUTIONED THAT INDIVIDUAL STANDARDS, INCLUDING ANY COMMENTS AND CAUTIONS CONTAINED THEREIN, MAY NOT REFLECT CURRENT CASE LAW AND STATUTES. THERE IS A LAPSE OF TIME BETWEEN THE TIME THAT CHANGES IN LAW OCCUR AND THE UPDATING OF THE STANDARDS. USERS ARE INVITED TO NOTIFY THE BOARD (THROUGH THE SECTION CHAIR) IF THEY BELIEVE THAT ANY OF THE STANDARDS FAIL TO REFLECT CURRENT LAW.

THE STANDARDS ARE SUBJECT TO AMENDMENT AS REQUIRED BY CHANGES IN GOVERNING LAW AND IN TITLE AND CONVEYANCING PRACTICE. THE STANDARDS ARE BEING PUBLISHED ONLY ON BEHALF OF THE REAL PROPERTY SECTION. THEY HAVE NOT BEEN REVIEWED OR APPROVED BY THE BOARD OF COMMISSIONERS OF THE MISSISSIPPI BAR AND, ACCORDINGLY, SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE MISSISSIPPI BAR.



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