

EXAMINING AND RESOLVING TITLE ISSUES

Given by Leo Grote of Leo Grote, L.P.A.

- I. THE CONCEPT OF MARKETABLE TITLE
- II. IDENTIFYING THE APPROPRIATE MINDSET FOR THE EXAMINATION AT HAND
- III. MUNIMENTS OF TITLE
 - A. Understanding Conveyances
 - 1. The Definition of Natural Person
 - 2. How Estates Are Affected
 - 3. Execution by an Attorney-in-Fact
 - 4. What You Need to Know About the Grantee
 - 5. Working With Words of Grant
 - 6. Description of the Premises
 - 7. Proper Execution by the Grantor
 - 8. Correct Delivery Methods
 - B. The Effect of Court Decrees
 - 1. Disruptions Caused by Divorce
 - 2. Avoiding Havoc During Probate
 - 3. How Partition Actions Work
 - 4. Quiet Title Action
- IV. EXAMINATION OF LIENS AND ENCUMBRANCES
 - A. Analyzing Liens
 - B. Tackling Other Encumbrances

I. THE CONCEPT OF MARKETABLE TITLE

- A. I believe the standard definition is this: “Marketable title is one that a buyer can be compelled to take in a suit for specific performance.” *Standard of Title Examination 1.1A*. But this only begs the question. There are many possible errors in a title, but only some will require a release, others may be neglected, and for most, time itself will cure.
- B. The task of a title attorney is to correctly apply the law to the facts shown in the abstract of title. Some errors, even though glaring, do not make a title unmarketable. For example, if a deed is not dated, this error does not make a title defective. The important dates for a deed are the date of delivery and the date of recording. The title standard says the date of execution is only important if it is “peculiarly significant.” *Standard of Title Examination 3.7*.

II. IDENTIFYING THE APPROPRIATE MINDSET FOR THE EXAMINATION AT HAND

1. Before you set your mind for the exam you must remember who you represent.

A seller wants assurance that he receives good proceeds and that he is indemnified for the covenants he makes in a general warranty deed, *see ORC, Sec. 3953.01 (A)*. Title insurance protects him against a claim brought under the covenants and closing protection coverage (CPC) insures good funds to him at closing. *ORC Sec. 3953.32*.

A lender wants to win in a foreclosure suit. We must assume a lender will need to foreclose on every examination for a mortgage. Title insurance protects a lender who finds he has less priority than he asked for. The lender brings funds to the closing and closing protection coverage (CPC) provides insurance against the misappropriation of those funds. The CPC can also protect the lender for the failure of the settlement agent to follow closing instructions. If you represent a lender, get CPC, title insurance, and draft some instructions for the settlement agent to follow. Get protection, not just for lost funds, but also for negligently disbursed funds. Closing instructions protect you against negligence by the settlement agent.

CPC is purchased separately at closing with or without the purchase of title insurance in Ohio.

A buyer or seller should not wire money to a settlement agent without contemporaneous instructions and never without closing protective coverage.

2. Title exam as underwriting tool for insurance or as a basis for an attorney's opinion of title.

The examiner's standard of reasonable care is mostly contractual in nature when the exam is an aid to underwriting title insurance. The client looks to the policy and the financial security of the title company when insurance is procured. The insuring company will have rules in place governing the thoroughness of the title exam. The client will be left to his remedy under the policy for defense of claims and payment of damages. The title examiner is generally outside the privity of the insurance contract with the client. If the

examiner abides the contractual standards that the insuring company has set down, the examiner cannot be held to account to the client or to the insuring company.

The attorney's standard of care differs depending on whether he examines to underwrite insurance or whether he renders an opinion of title. Real estate title law rather than insurance company policy tells the examiner whether his exam was diligent. There are no safe harbor title insurance company rules to limit the exam or relieve an attorney examiner from liability under an opinion of title. The Ohio Marketable Title Act is an attempt to limit liability but its exceptions and broad language do little. *ORC Sec 5301.49 et seq.* An attorney giving an opinion as to "good" title is left to search longer than 40 years and much longer to cover the exceptions in the Act. *ORC Sec 5301.53.* In actual practice the attorney *is* "underwriting" marketable title when he examines for his opinion of title. A thorough opinion of title search is often so long and cumbersome that his judgment, experience and skill are employed to shorten the search.

Some of the factors used by an examiner to roughly gauge the length of a search follow:

- A. Depending upon the property, the parties, and the kind of transaction, the title exam may be short or long or focused on certain issues.
 - i. Commercial property exams should run at least 40 years and sometimes much longer. The consequences from an easement, covenant, or long-term lease that is missed can be substantial when the

transaction is worth many millions. Sometimes just the length of time to find a title deed or an important lease or easement can make the search lengthy.

- ii. A title exam does not cover zoning matters or the rights of people disclosed only by their possession or use of the property. *Ohio Standards of Title Examination, Sec 2.3*. A title exam will generally not discover a forged document or a false affidavit. A deed, though proper on its four corners, does not pass the title of a minor or incompetent or one signing under duress or undue influence. A forged deed does not pass title and a title exam is not expected and is unlikely to discover these problems. *Ohio Standards of Title Examination, Sec 2.3*.
- iii. A new subdivision title search should be more thorough since the builder or developer anticipates many closings in rapid succession from the same tract. For an older subdivision, I recommend a special search for easements and restrictions before the subdivision was platted even if that extra search is outside the ordinary scope of the search.

A title examiner who is comfortable with an examination of ten or fifteen years should still search a developer's name in the deed, mortgage, and miscellaneous indices for easements and restrictions during the time a developer obtains approval for his subdivision. It

will often place easements and restrictions against the property prior in time to the plat of subdivision.

And this method should also be used for metes and bounds tracts split off or cut up from larger tracts. Many important easements and restrictions will be neglected in shorter searches, when one or two years before and after the plat will disclose these encumbrances.

- iv. A foreclosure exam may concentrate on only the present owner, but many liens and suits should be anticipated. The doctrine of *lis pendens* applies if your client is buying at the auction. *Martin, Rochford & Durr v. Lawyers Title Insurance Corp.*, 86 Ohio App 3d 20, 619 NE 2d 1130 (1993). If your client expects to buy and have the foreclosure dismissed, all liens must be considered. *ORC Sec. 2703.26*. The doctrine of *lis pendens* serves the practical purpose of preventing the disruption of the court proceeding when many creditors perfect a lien after the process begins. Without the doctrine of *lis pendens* the interest of late parties must be readjudicated after motions and orders and advertisements are underway. *Katz v. Banning*, 84 Ohio App. 3d 543, 617 NE 2d 729 (1992).

Since the client has a commitment, the insurance will cover any prior outstanding encumbrance.

But the late discovery of a prior cloud can defeat a later sale or discourage bidding at the foreclosure auction. *Thatcher v. Dickinson*, 3 Ohio CC 144 (1988); *Society National Bank v. Wolff*, Ohio App.

Lexis 1821 (1991). Some exams to prepare for foreclosure only update from the title insurance commitment for the defaulted mortgage. No liens or mortgages *prior* to the commitment are included in the exam for the suit. A purchaser at sheriff's sale takes subject to the rights of all parties not joined in the suit. *Hollinger v. Bates, 43 Ohio St. 437 (1885)*. A foreclosure exam back to the deed or purchase money mortgage can avoid later problems that a mere update from a policy leaves undiscovered. Often these prior clouds can be easily disposed of in the foreclosure itself.

Once service is perfected on the debtors, the late creditor must ask leave of court to join in the marshalling of liens. *Lis pendens* attaches and the court "takes possession" of the property upon service on the debtor.

During proceeding to sell the mortgaged property, *lis pendens* continues to the auction preventing other late lien holders from perfecting their interest.

Once proceedings are dismissed and the property is conveyed or encumbered without a sheriff's sale, all liens of these late creditors *do* attach.

- v. A search for a residential purchaser should go back 40 years to a root of title.

Many utility easements and other encumbrances now predate the root of title. And many of these interests are protected by the marketable title act. A 40 year search will not find all legitimate encumbrances.

After twenty one years many defects are cured. Dower can last 50 years in the chain of title and interests or interests preserved by specific recitals in deeds within the 40 year chain survive under the Marketable Title Act. *Ohio Standards of Title Examination, Sec. 3.6; ORC Sec. 5301.49.*

But with each deed and each mortgage and each decade of the search, the chances of an undiscovered, unknown, undisclosed interest appearing of record become more remote.

An experienced examiner will know when to quit. And the purchaser of real estate must perform his own physical inspection of the property and inquire as to the nature of any occupation of the property.

If not 40 years, at least 21, and always look behind the plat or survey for one or two years.

- vi. For a lender, 21 years is plenty and often only a one or two owner search is done.

The current owner and often the prior owner are searched. A quick check of the plat is made but not much more. When the owner is not paying for any assurance of title and a lender, even in a foreclosure, may never take title, a short exam is all that is required. The title

insurance companies have authorized their agents to insure over easements and restrictions as a routine matter.

Even with a short exam, a pending divorce, open estate, or a legal description issue may surface. The client must receive a mortgage that can be foreclosed upon and a sheriff's deed that can be recorded.

Deeds without stamps (no consideration, no conveyance fee) are never proper stopping points for an exam. A sheriff's deed always requires at minimum an examination to the point wherein the primary defendant mortgagors took title.

A one or two deed exam often requires hours of work from an experienced attorney.

- vii. The title standards do not recommend a certain length of time for an exam. Report of the real property section (*Ohio State Bar Association Report, Vol. 59, No. 41, October 27, 1986, pg. 1668*). An experienced title examiner should know when to stop and how far to go. At least one deed with stamps should be included in any exam.

III. MUNIMENTS OF TITLE

Muniments of title are the documents that taken together prove title in some person. *ORC Sec. 5301.49*. The recording statute protects one who relies on these muniments of title. *ORC Sec. 5301.25(A)*.

There are several theories that do protect persons who have no recorded documents protecting their interest. These persons enjoy good title *even*

against a person who pays value to the record owner with no actual notice of their interest.

One class that is protected is the heirs or devisees or surviving spouse of a record owner before will is filed or before probate proceedings are commenced. The interests of these are protected even without possession.

Overturf v. Dugan, 29 Ohio St. 230 (1876).

The purchaser of property under an oral agreement can also be protected. Possession and at least part performance is required. *Tier v. Singrey, 154 Ohio St. 521 (1951).*

The occupant of property can be protected just as if he had a perfected record title. Possession and recording are each constructive notice.

The claimant by adverse possession can enjoy full title with possession and time and a little more. *Grace v Koch, 81 Ohio St. 3d 577 (1998).*

At common law property was always conveyed without a written conveyance and today a court will protect and enforce the claim of one who occupies property but who lacks a deed. Possession can substitute for a conveyance. *Introduction to the Law of Real Property (1962), pg. 163, et seq., Cornelius Moynihan.*

A. Understanding Conveyances

A deed is like a check. Both instruments order the transfer of property. A “copy” of a deed and a “copy” of a check are ineffective

to transfer the property. Some of the law of conveyances and commercial paper are similar.

A contract or a witnessed handshake does not pass legal title. A contract passes only equitable title. A deed can pass both legal and equitable title, or it may pass neither.

But can a deed be dated on the day the handshake was made, dated before the day of signing and before the day of acknowledgement? *23 Am Jur 2d, Deed, Secs. 270, 271, 272 (2002)*. Can a deed be properly backdated as in settlement, or as a memorial of a title that ripened before the conveyance? *3 Am Jur 2d, Adverse Possession, Sec. 250 (2002)*. Can we use the words “granted, bargained and sold” instead of “grant, bargain and sell?” *Introduction to the Law of Real Property (1962), pg. 163, et seq., Cornelius Moynihan*. The execution day and acknowledgement day are of course immovable. But if the title ripened other than by conveyance, the “ripening” day can be memorialized by the document.

The signing and acknowledgement are not necessarily the days the title is created in the grantee. And some titles are not created by a deed either.

1. The Definition of Natural Persons

- a. A natural person cannot own real estate indefinitely. Real property law and probate law provide for its disposition after

death. An artificial person, a corporation or other company (not usually a general partnership), may own property perpetually. The title deed from some company owned property may predate the 40 year period under the Marketable Title Act by tens or hundreds of years.

- b. County or state owned property may trace its title back to statehood or before.
- c. A general partnership is treated as a group of individuals for some purposes and it is treated as an entity for other purposes. Regarding the death, bankruptcy, withdrawal or addition of a partner, the company is treated as a group of individuals. Upon the happening of any of the four events above (death, etc) the partnership is dissolved. *ORC Sec. 1775.30, 31.*

However, no spouse of a partner may claim dower. *ORC Sec. 1775.24(B)(5).* A creditor of an individual partner cannot execute against the partnership property (without a charging order.) *ORC Sec. 1775.24(B)(3).* One partner alone may convey partnership property (with authority of partners.) *But see Ohio Standards of Title Examination, Sec. 3.5.* For the above reasons the company is treated as an entity.

The IRS treats the partnership as a pass-through entity but does not allow a partnership to take advantage of Sec. 1031. A

partnership can be created by oral agreement, though a written agreement is regularly used.

The partners hold title as a tenancy in partnership. *ORC Sec. 1775.24*. When one dies the deceased partner's spouse gains his rights and the remaining partners continue the partnership tenancy after winding up. *ibid*.

- d. A corporation (or other company) should be duly organized to hold title. But a de facto corporation, not duly organized, can hold title. *Society Pervin v. Cleveland, 43 OS 481, 3 NE 357*. A deed to a corporation not duly organized may not be disregarded. A corporation or other company is an artificial person. No statute requires an officer to sign a conveyance, but a title standard asks for just that. *Ohio Standards of Title Examination, Sec. 3.11*.
- e. A natural person is a human being, no matter what age or mental or physical capacity. Certain consumer protection laws and civil rights laws protect these natural people, and make certain transfers void. A minor or other incompetent may hold title but may not convey or encumber the property without court supervision. *Alexander v. Greenfield, 109 NE 2d 549 (1951)*; *Schulman v. Villensky, 143 NE 2d 754 (1957)*.
- f. Fictitious persons cannot take title, but you may use a fictitious name in Ohio when holding title. *ORC Sec. 1777.02*. A

general partnership can hold title as a partnership by using the names of all the partners, for example: John Smith and James Jones, a partnership. A fictitious name is not required.

An individual or a partnership can use a fictitious name in lieu of their actual name. An affidavit is all that is required. *ibid.* Originally filed with the clerk of courts, it is now filed with the recorders. A fictitious name does not change the nature of a partnership.

The name change brings a creditor-prejudice issue to the fore. Creditors may of course be prejudiced as to the credit worthiness of a borrower whose name has changed. A past credit history may not be found when a name has since changed. Marriage license records have not been searched as they once were by title examiners. An individual may legally change his name in probate court. A publication notice is required as notice to creditors. These records are typically not searched in a title exam.

But when taking title under a fictitious name, the deed must be stamped as notice for the examiner. *ibid.*

- g. With a fictitious name filing, the title examiner knows who the interested “natural person” is. Partners’ names are disclosed in the public records at the time the company records its title. But with the corporation or limited liability company (LLC), the

examiner often has no idea whose signature to expect. With the corporation or LLC the risk of an unauthorized or fraudulent signature is greater.

The LLC management structure while specified by statute, in effect mirrors that of the general partnership. Most corporations are also small businesses. The partnership, LLC, and the corporation may all grant authority to one “member” to sign deeds. *Ohio Standards of Title Examination, Sec. 3.5; ORC Sec. 1705.24; Ohio Standards of Title Examination, Sec. 3.11.* Other than with the partnership, this person is mostly anonymous. Statutes proscribe the rules as to the sale and conveyance of land by these anonymous signers. *ORC Sec. 1701.59 for corporations; ORC Sec. 1705.24 for an LLC.*

A corporation or other company is run by its board of directors or other manager as the statutes call for. (*Standard of Title 3.11(A) and (B)*). An officer should sign any conveyance or encumbrance.

2. How Estates Are Affected

- a. Tenancy in Common: Each grantee has an undivided discrete interest in the real estate, and the disposition of the property after death is left to probate law. Parol evidence may be accepted in court to show just exactly what interest each owns. *Spector v. Giunta, 20 App. 2d 137, 405 NE 2d 327; Reeves v.*

Grant, 9 NP(NS) 71, 21 OD 789. And, of course, exceptions to an inventory may be filed in Probate Court and the ownership may be litigated in Domestic Relations court or in a partition case. *In re Brunskill's Estate*, 27 NE 2d 492 (1940) as to probate; *Dexter v. Taylor*, 107 NE 2d 402 (1951) as to divorce; and ORC Sec. 5307.01 et seq. as to partition. Tenancy in common may be the preferred way for ownership over survivorship tenancy especially when owners have step-children and have no estate plan.

Should the preferred deed be survivorship or co-tenancy in the absence of an estate plan?

The property of an intestate cotenant will partly pass to his children when the cotenant's spouse is not the parent of all the children. ORC Sec. 2105.06. This may be desirable if his children are not his surviving spouse's children. The statutory allowance decreases for the surviving spouse if she is not the mother of all the deceased's children. The possibility that a mansion house election by the spouse to disinherit her stepchildren is remote.

With a survivorship deed, the parcel passes entirely to the spouse and (eventually?) only to the step-children. The decedent's children inherit part of the property without a will

under the statute of descent, when title is held at tenants in common.

b. Survivorship Tenancies:

- i. The most recent statute on survivorship tenancies makes a conversion of the survivorship tenancy to tenants in common either when a lien is filed against one survivorship tenant or when a husband and wife divorce. *ORC Sec. 5302.20*. Other than the above, when a survivorship tenant conveys his interest, the grantee gets exactly the survivorship interest the grantor had. *ORC Sec. 5302.20(C)(2)*. Prior to April 4, 1985, a conveyance by one survivorship tenant terminated the survivorship character and created a cotenancy. Title vests upon the instance of death to the remaining tenants, not when the death certificate or affidavit is recorded. It is the final decree of divorce that works the conversion to tenancy in common, not the filing of the petition or signing of the separation agreement. *ORC Sec. 5302.20(C)(5)*.

It is the judicial determination that the lien is valid, not the filing of suit to foreclose nor the filing of the lien that severs the survivorship. *ORC Sec. 5302.20(C)(4)*.

- ii. Tenancy by the Entirety is no longer recognized in Ohio. A few titles created during the short period this tenancy was permitted are grandfathered. *ORC Sec. 5302.21*. It was similar

to tenancy in partnership in that no creditor of just one tenant (partner) could attach to the property. It is a survivorship tenancy, and a creditor must be owed by both tenants for a lien to attach. The tenants need to be husband and wife. Tenancy in the entirety is an old common law tenancy, but it only existed in Ohio from February 9, 1972 until April 4, 1985. *ibid.* In Ohio, it was purely a creation of statute, but case law relies on the common law to determine its characteristics. *See former ORC Sec. 5302.17.*

iii. Transfer on Death Deeds. (TOD) This is purely of statutory creation and this did not exist at common law. *ORC Sec. 5302.22.* The transfer on death beneficiaries take the property upon the death of the owner. *ORC Sec. 5302.23(A).* The TOD beneficiaries' interest is contingent, and the owner may revoke the designation at will. No liens attach to the TOD beneficiaries interest.

iv. Dower. A spouse has dower in property only in which his spouse owns legal title. *Miller v. Wilson, 15 Ohio 108 (1846); Am Jur 2d, Dower, Sec. 86.* There is no dower in a vendee's interest in a land contract. No creditor can attach dower (*Geiselman v. Wise, 28 NE 2d 199 (1940)*) but if it is not released, a court can value it and order it paid. *Central Trust Co v. Gilardi, 186 NE 2d 771 (1962).* Holding dower keeps

the legal owner from conveying marketable title. *Ohio Standard of Title Examination, 3.6 B*. It is only “subordinated” in a mortgage, not “released.” It is a way to have your cake and eat it too.

But when a court values dower, its worth is substantially less than an undivided one half. It is a life estate in an undivided one third of property your spouse owned (assuming you did not release it.) Actuarial tables must be used to value it based on the legal title holder expected date of death. *Mandel v. McClave, 22 NE 290 (1889)*.

- v. Other Interests in Real Estate. Easements are a convenient way to control, use, and profit from a parcel of real estate. *Warren v. Brenner, 101 NE 2d 157 (1950)*. Creating them does not require planning and zoning commission approval. *ORC Sec. 711.001(B)(1)*.

Proper drafting of an easement will prevent problems later. A legal description of the easement and of the parcel the easement burdens is recommended. Just as important is a legal description of the benefited parcel. Then the easement will appear in both chains of title.

Is an “exclusive easement for the full use and enjoyment of the grantee” an improper avoidance of the planning and subdivision laws? Is this grant as good as a fee simple?

Restatement of Property, Sec. 450 (1944). If it is less than “full” use, it should be valid.

Don’t forget to get a partial release if any mortgage encumbers the burdened property. If not, a foreclosure could extinguish the easement.

A perpetual lease is also an interest that can serve the same purposes as an easement. It can avoid some of the rules regarding deeds. The reversion in the lease can shift the enjoyment of the property back to the landlord to protect the property from the tenant’s creditors. No lease is perpetual if the rent is not paid. An easement doesn’t have this feature.

Much value can be held as common property in condominiums, PUD’s and co-operatives.

In the condominium, each owner has an undivided interest in the valuable common property. The declaration makes the fee simple absolute quite conditional. *ORC Sec. 5311.04(F); Sec. 5311.08; Slys v. Vokoun, 1986 Ohio App. Lexis 9812*. The common property may not be partitioned.

Agreements not to partition as in the common area of a condominium, can make ownership a bit like a tenancy by the entirety.

I found no statute in Ohio regarding co-operatives. But what I understand to be a “co-operative” can easily be created in Ohio. The real estate including multiple dwellings is owned in its entirety by a corporation or other similar entity. A purchaser gets a share in the company and a lease to use the facilities. In this scenario the individual’s rights become subordinate to the company of which the purchaser owns only a small minority interest. *Rohan, “Co-Operative Housing: An Appraisal of Residential Controls and Enforcement Procedures,” 18; Stan. L. Rev. 1323 (1966)*. Whether this would be personal or real property is a question. How a creditor or appraiser values its rights is another. *“Realty or Personality,” 73 Colum. L. Rev. 250 (1973)*. The Hermitage Club in Anderson Township in Hamilton County is titled this way.

3. Execution by an Attorney-in-Fact

- a. Powers of Attorney are undesirable for many reasons. They are revocable by the principal. *ORC Sec. 1337.02*. The powers of the Attorney-in-Fact are construed strictly by courts. *Pollock v. Cohen, 32 Ohio St. 514 (1877)*. Powers of Attorney are void upon death of the principal. *ORC Sec. 1337.09*. Powers of Attorney are often used to embezzle money from the principal.

NOTE: Intra-family transfers are the most suspicious for fraud. Powers of Attorney are risky; the power must be clear, concise and thorough. General Powers of Attorney are often used inside families. Powers of Attorney are often used after death in a vain attempt to avoid probate. *McDonald v. Black*, 20 Ohio St. 185 (1851); ORC Sec. 1337.091. An attorney-in-fact may not convey to himself, but this often happens.

- b. Should an Attorney-in-Fact sign a note and mortgage for a now permanently disabled principal when the Power-of-Attorney has a durability clause?
- c. A Power-of-Attorney is ineffective to sign affidavits. Can an attorney-in-fact sign affidavits of employment, financial status and occupancy for a recently disabled principal?

4. What You Need to Know About the Grantee

The grantee is concerned about several things: planning the transfer upon death; avoiding creditors; remaining anonymous. If your client is a mortgage lender this grantee will be a “grantor” on the lender’s mortgage.

- a. Anonymous Grantees. If a corporation or a limited liability company takes title to property, the identity of the owners of the company can be undisclosed in the public records. One tip-off is the signature on a mortgage, but if no personal guarantees

are required on the mortgage, the identity of the shareholder can be hidden. Often the signature on the mortgage acts as a disclosure of the majority owner. If an employee who does not own the company acts as the only signer, the ownership remains anonymous.

We need a tax bill mailing address and this information will be public record.

But a trustee or a company can easily be anonymous as they hold title to real estate in Ohio.

- b. Post Mortem Title Planning. Grantees are sooner or later concerned about the descent or devise of their real estate. A will or trust can direct the property as the decedent wishes.

With the intestate owner the way title is held becomes all the more important. A title agency attorney usually prepares a survivorship deed.

- i. Tenants in Common. A deceased co-tenant's property passes to his spouse and sometimes to his own children when he dies intestate. The spouse takes the entire interest of the decedent's realty if he is the parent of all the decedent's children. But the case of the remarried spouse with children separate from his spouse is different. *ORC Sec. 2105.06*. In this case, the children

will always inherit unless the surviving spouse can use the mansion house election. *ORC Sec. 2105.062*.

This is the desired way to hold title if the co-tenants are married and step-children are involved. When not specified on the deed, half and half ownership is presumed. But evidence can show this is not the case. The statute on survivorship deeds requires the ownership share be shown on the deed. The older rule, allowing parol evidence, is followed in tenants in common.

- ii. Survivorship. The title of a deceased survivorship tenant passes (outside probate) to the surviving tenant even during divorce proceedings. *In re Hatch's Estate, 93 NE 2d 585 (1950); ORC Sec. 5302.20*. Upon a final decree, this tenancy converts to a co-tenancy, subject however, to the terms of the divorce decree. Generally speaking, in the absence of a divorce, the property passes entirely to the surviving spouse. *ORC Sec. 5302.20(C)*.

If your surviving spouse is not the parent of your children, a survivorship deed can disinherit them.

But if your spouse is the parent of all your children, this deed may suit the owner well.

A survivorship deed works outside probate and the property will not pass under a devise of a later will.
ibid.

iii. Transfer on Death Deed (TOD). A Transfer on Death deed is purely a statutory creation and not based on any common law estate. With some planning, this deed can be an effective way to transfer real estate at death. The Transfer on Death beneficiary can be amended or revoked at will. This deed can direct a transfer of the property to an inter vivos trust. *ORC Sec. 5302.22.*

If your clients have a plan in mind, the TOD deed works very well.

iv. A Living Trust. With regular review, a living trust works extremely well. For any disclosed trust we need a memorandum recorded. *Ohio Standards of Title Examination, Sec. 3.18.* Federal tax liens can attach to the interests of vested beneficiaries. *26 USC Sec. 6321.* Does an examiner need to inquire as to the identity of vested beneficiaries under a disclosed trust because of possible federal tax liens? The beneficiaries of a trust hold the equitable title. *Thompson v. Thompson, 17 OS 649 (1867).*

The trustee, not the “trust” holds legal title and liens do attach to the trustee’s legal title. But if the trustee holds only a bare legal title and others enjoy the present use and profit, then a lien against a naked trustee attaches to nothing. A trustee with both legal and equitable title has an interest that a lien can attach. Only a creditor’s bill in equity or a federal tax lien will attach to equitable title alone. *Hegler v. Grove*, 63 OS 404 (1900).

c. Keeping Creditors at Bay.

- i. Not holding title at all may be desirable for someone who is subject to the risk of liens or judgments. Keeping only a dower interest prevents a spouse from conveying away full marketable title, and this dower interest retained cannot be attached by creditors. *Geiselman v. Wise*, 137 OS 93, 28 NE 2d 198 (1840); *Ohio Standard of Title Examination*, Sec. 3.6B.

A transfer on death deed can provide for full future ownership but only after the death of the current owners. The TOD beneficiaries hold only a contingent interest and no creditors may attach this interest. *ORC Sec. 5302.23(B)*.

- ii. A Trustee holding naked legal title, or a trustee holding a mortgage against the equity can also keep creditors at bay. *Loring v. Melendy*, 11 Ohio 355 (1842); *Schofield v. Cleveland Trust*, 21 NE 2d 119 (1939).
Owning property in one's own name with substantial equity is like a deep immovable pocket. Legitimate loans secured by mortgages by the owner enable the safe-keeping of cash and the elimination the risk of owning equity in real estate. *Stephens v. CTI Audio, Inc.*, 2004 Ohio 6880 (2004), *contra* *Gooley v. De Witt*, 122 NE 2d 123 (1954).
- iii. But, scrutiny under fraudulent conveyance laws of these friendly mortgages must be prepared for. *McQuade v. Rosecrans*, 36 OS 442, (1881). Also, an owner may not create a spend thrift trust in his own favor. *Domo v. McCarthy*, 612 NE 2d 706 (1993). But a legitimate mortgage will be upheld, and the creditor is left to attaching the cash proceeds.
- d. The oft-repeated rule says a corporation not duly organized cannot hold title. A fictitious person, one not in existence, of course cannot accept delivery of a deed. The conveyance is ineffective. *But see Ohio Standard of Title Examination 3.11.*

But a de-facto corporation can conduct business and so it may accept delivery of a deed. A minor, an incompetent, can inherit property. But nothing as cumbersome as a sales case is required for the “incompetent” de-facto corporation. The ministerial filings and an affidavit should do when the facts show a good faith effort to comply with the incorporation law.

13 Am Jur, Corporations, Secs. 49-56.

5. Working with Words of Grant

- a. We use the words “pay to the order of,” on a check and the word “grant” or “convey” on a deed. The words “agree to convey” or “promise” or “will” convey are ineffective to convey the legal title to real estate. A present intention to transfer, not just a wish of desire is necessary. Words without showing a present intention to transfer are precatory words. *Am Law of Property, Sec. 12.44 (1952)*. They don’t belong on an instrument.

Signing a deed, with words of grant, is the most common way real estate is transferred. But property can change hands without a deed or even a writing. When an owner dies, the title transfers at death to his heirs or devisees. *Overturf v. Dugan, 29 Ohio St 230 (1876)*. A court order without the owner’s signature can memorialize an earlier transfer of title as in a title from adverse possession or the like. *Ohio Rules Civ. Pro.,*

Rule 70. Real estate contracts are unenforceable unless a writing memorializes the agreement. *ORC Sec. 1335.04.* But a court will find an owner has equitable title when an oral agreement is only partially performed. *Eske Properties, Inc. v. Sucher, 2003 Ohio 6520 Lexis 5824.* Sometimes not even a deed in writing perfects the title.

- b. The short form deed in use today contains all the historical clauses automatically by statute. *ORC Sec. 5302.01.* It is not necessary to convey the equitable title by a habendum clause, nor is it necessary to list all the several covenants that make up a limited warranty or general warranty deed. Just the words “limited warranty” or “general warranty” will suffice. *ORC Sec. 5302.06 and ORC Sec. 5302.08.*

Historically, the grant in a deed conveyed the legal title, and the habendum transferred the equitable title. In the newer statutory deeds the grant conveys both titles. The old long form deed had special language conveying appurtenances and profits with the title. Whether specified in the deed or not, an appurtenant easement and the reversion of a lease go with the title in both the old long form and newer statutory short form deed.

- c. A curative statute eliminates the need for a separate clause when a non-owner spouse releases dower. *ORC Sec. 5301.071(A)*.

The old long form deed had the grant for the owners of the legal title, the habendum (to have to hold...) for the equitable title and a separate clause for the spouse of the legal title owners to release dower. Under the above statute and with the newer statutory short form deeds, the dower owner releases at the same place legal and equitable owners' grant: at the top.

We prepare mortgages and deeds and have all the owners and their spouses grant together at the top of the deed. These signers apparently warrant the title even though they may have only a dower interest.

The risk of misclassifying one as owning dower and then only releasing dower on the deed is a greater risk than unintentionally warranting title. If one only releases dower but actually owns the legal title, a serious title problem is caused. A busy title company usually has everyone including dower owners sign as a grantor at the top. Doing it the correct way is best.

An easement in gross does not go with the grant. *Am Law pf Prop, Sec. 8.0 (1954)*. When Duke Energy sells land, their

utility poleline easements are not appurtenant. When the city sells land, waterline easements do not go with the deed.

- d. Neither consideration nor a recital of nominal consideration is necessary for a valid deed. *Vale v. Stephens, 159 NE 114 (1927)*. But the payment of value is important for at least several reasons.

A good faith purchaser, who must pay value, is protected against an earlier deed that the purchaser had no actual or constructive notice of its delivery. *ORC Sec. 5301.25(A)*.

A prudent title examiner will match the conveyance fee value with purchase money mortgages. An exempt deed with no stamps is never a good root of title for an exam. *Contra the Marketable Title Act, ORC Sec. 5301.47(E) and Sec. 5301.48*.

A good title examiner believes in the saying “don’t look a gift horse in the mouth.” When parties receive a gift of real estate, they don’t have the title examined. They don’t look a gift of real estate “in the mouth.” A title examiner fairly relies that the title of a piece of property paid for was most likely examined.

Mortgage loan underwriters and bankruptcy trustees want to discover the payment of value as they will disregard certain transfers to insiders. *ORC Sec. 1313.57 and 1336.11*.

- e. A “grant” in a deed conveys what is described or limited in the deed. It conveys both legal and equitable title if the grantor had both; or just one, if that is all he had. *ORC Sec. 5302.04*.

A grant will convey a leasehold to the new tenant, and neither equitable nor legal title if a leasehold interest is all the grantor has.

A grant will convey an easement or a remainder in the same way.

- f. A Quit Claim deed conveys exactly as much as a Warranty Deed does, just without a warranty of title. A Quit Claim Deed will not convey after acquired title, however. *Hart v. Gregg, 32 OS 50 (1842)*.

Sometimes a grantor does not have title at the time of the deed. If this grantor later acquires title the earlier general warranty deed will pass the grantor’s title. But not so, if the grantor’s earlier deed was a quitclaim. Other than this, a quitclaim conveys exactly the same property a warranty deed does.

A quitclaim deed may be a root of title under the Marketable Title Act.

6. Description of the Premises

A legal description is to a deed, as the “amount” of money is to a check. A legal description is different than that. We can get

specific performance for real estate. The survey is actually more important than the legal description. *Broadsword v. Kaver*, 120 NE 2d 111 (1959). The legal description is one tool for the surveyor to discover the “amount” on the deed. But just a legal description, not a survey, is all that is required for a valid conveyance.

- a. Legal descriptions are the directions a surveyor follows to determine the physical boundaries of a parcel of land. Encroachments of physical improvements can form the basis of ejectment, suits, trespass, and adverse possession. *Gertstenslager v. Lloyd* (1995) Lexis 704. At the very beginning of property law, possession was paramount to proving title, and consideration was once necessary to the early deeds. *Introduction to the Law of Real Property*, Cornelius Moynihan (1963). A survey requires the physical inspection upon the property. The deed is now most important, but possession is still very important today.

Topography will dictate where occupants use property. Even property lines will tend to run straight when the terrain is flat. Improvements will often follow the lines of the terrain rather than the lines of the deed, if the terrain is severe. *Niehaus v. Shephard*, 260 Ohio St. 40 (1875). Boundary liens change with the moving meanders of a stream. There is no substitute for a

survey. Encroachments are more likely when the terrain is tight and severe.

Rules of construction favor natural monuments over artificial ones in a legal description, *McCoy v. Galloway*, 3 Ohio 282 (1827), and the bearings control over distances. And monuments themselves control over the legal description. Natural monument may be a tree or a rock or the bank of a stream. Natural monuments are the controlling factor in the location of property liens, as they may only be located by a survey on the property. A land registration suit can settle boundary lines as well as boundary line agreements. *Kincaid v. Yount*, 459 NE 2d 235 (1983). The neighbors can exchange quitclaim deeds for each others' parcels with the new legal descriptions. But don't forget the mortgage holder.

- b. Blackstone is responsible for the five elements of a cause of action for adverse possession: open, notorious, continuous, hostile, exclusive. But that analysis of the cases hides a couple important points. One theory justifying an occupant's title is that of a lost deed. A lost grant, the idea that a deed for this piece of land has been lost. But these cases often turn not on whether a deed is lost, but that there should have been a deed and none is found. Everything except the deed is evidence to

show a grant. “*Disseisin and Adverse Possession*,” 33 *Yale Law Jor 1* (1923).

A second common element is the ambiguity of a legal description, or a gap or a gore in adjoining legal descriptions. *Humphries v. Huffman*, 33 *Ohio St.* 395 (1878). Evidence that the claimant is or may be paying taxes is also very helpful. *Ewing v. Burnet*, 8 *F. Cas.* 931 (1835). If the court can imagine a lost deed in favor of the claimant or to one the claimant tacks upon, he has a much stronger case. *McNeely v. Langan*, 22 *Ohio St.* 32 (1871).

A surveyor, by giving greater weight to natural and artificial monuments, applies similar Blackstone rules in his survey. Artificial monuments are man made like an old fence line or the call to a lane or road in a deed. Natural and artificial monuments usually reflect occupation. *Swinson v. Mengerink* (1998), *Ohio App. Lexis*. The location of these monuments often varies from the metes and bounds courses of the legal description. Surveys defer to the possession as evidenced by the monuments, as evidenced by the legal description.

- c. Errors in legal descriptions. There are no rules, easy to apply, to determine if an error in a legal description requires a new conveyance. A title standard on the subject begs the question. *Ohio Standard of Title Examination 3.2* (1999). The operative

words are: “substantial uncertainty.” The standard urges for an approval of conveyances with errors in the legal description.

A legal that forgets an exception is fine. That is, it doesn't make the title unmarketable. The deed conveys everything the grantor owns, and it is just a stray deed in the chain of title for the exception. *Ohio Standard of Title Examination 3.13*. The same reasoning works for a mortgage that includes property that the mortgagor does not own. *ORC Sec. 5301.02*. A title examiner is more concerned that there is “enough” property, not if there is “too much” property.

Problems that a title examiner finds to be serious may not be a problem to a surveyor at all. But a title examiner is determining ownership, not boundary lines.

- d. Subdividing real estate requires certain approvals. County planning and zoning, county engineer and tax map, and recorder and registered land. Each county engineer has differing requirements. *ORC Sec. 711.01 et seq.*

Mortgages must not be forgotten when subdividing land. Partial release prices should be agreed to in advance. An adjoining lot owner transfer requires few governmental approvals, but a partial release is difficult to get.

A survey is required for any type of split, cut-up or subdivision. But no approval is necessary for an easement. Sometimes an easement can accomplish the same goal with fewer headaches. But you cannot use an easement as way to avoid subdivision rules. *ORC Sec. 711.01 et seq.*

Best practice is to put new legal descriptions of record *before closing* by using a straw deed. The approvals required by planning and zoning, health department, county engineer and county auditor and recorder can be obtained before closing and clerks delays can be scheduled before closing.

7. Proper Execution by the Grantor

- a. All the owners and their spouses must grant, release, and sign the deed, and acknowledge the signing to an official with the power to certify that (usually a notary).

Name variances may be taken care of with recitals. Before the title standards, new deeds were obtained to clear up a variance of only a middle initial. Now the title standard advises us to pass the title, unless identity cannot be “inferred with reasonable certainty.” *Ohio Standard of Title Examination 3.8.*

Just preparing a deed with a clause stating the correct (or previous name) solves the problem. A recital on a deed is evidence itself after 30 years, without the use of an affidavit.

Trustees of German Township v. Farmers and Citizens Savings Bank, 113 NE 2d 409 (1953).

The identity of the persons executing the deed should be checked by the notary taking the signers acknowledgement, but the certificate of acknowledgement is not required to recite that the identity was proven. *ORC Sec. 5301.01*. A jurat, as in an affidavit, is not sufficient. *1 Am Jur 2d, Acknowledgements, Sec. 98 (2005)*. The correct company name of any grantor together with recitals regarding mergers or name changes should be reflected in the deed. *ORC Sec. 1701.82 and Sec. 1701.81; Ohio Standard of Title Examination 3.8*.

Not too long ago the identity of a mortgage lender and its corporate predecessors was required to be of record in the state before a mortgage release was approved. After the Savings and Loan crisis this requirement was relaxed by the title industry. *ORC Sec. 1701.82*. Now recitals on the instrument are used in lieu of proof from the various secretaries of state.

An indemnity can suffice for a mortgage release but proof of the correct name is needed in foreclosure and on deeds from corporations. *Central Trust Co. v. Cincinnati H&D RR, 169 F 466 (1908)*.

- b. If a trustee of a trust or officer of a company signs individually and his proper office is not disclosed on the deed, the grant is

valid if it can be ascertained on the deed that the grant is from the trust or company. *ORC Sec. 5301.071(D); Ohio Standard of Title Examination 3.11*. The rule is different for an attorney-in-fact. The attorney-in-fact's office must be shown by the notary in the certificate of acknowledgement. *ORC Sec. 1337.03*.

The record title must be supplemented when a deed is improperly executed. Often a recital in the next deed solves the problem, as in the common name variance. Often a sworn affidavit in aid of title is needed. When the representative capacity of an attorney-in-fact is not shown in an acknowledgement, the notary may sign an affidavit to supplement the deed. But if the power of attorney itself is missing and unrecorded, we need a new deed and a new power of attorney. *ORC Sec. 1337.04*. A serious legal description problem will require a new deed.

8. Correct Delivery Methods

- a. The delivery of a properly executed deed transfers the grantors title to the grantees. *Ohio Standard of Title Examination 3.3 (1999)*. But in the typical closing, the grantors never literally hand the deed to the grantee. And the title examiner never knows when the actual delivery occurs.

Disbursement of the grantee's funds to the grantor confirms the required delivery.

- b. Because buyers and sellers wish to disburse at closing, the delivery often takes place before the deed is recorded. *Page 5-8, Ohio Real Property Law and Practice, Robert M Curry (2006)*. If the buyer wishes, and he can persuade the seller to wait, the disbursement can be delayed until after the deed is recorded. Local custom governs just when disbursement and delivery occur.

A delivered deed passes title, but a delivered and unrecorded deed can be defeated by other parties. A bona fida purchase for value without notice of the delivered but unrecorded deed will win on a suit decided by the Recording Act. *ORC Sec 5301.25(A)*. A purchaser takes title to Registered Land free and clear of unrecorded liens even if he has actual notice of the lien or interest. *ORC Sec. 5309.34*.

- c. A recorded but undelivered deed does not pass title. *Kniebber v. Wade, 118 NE 2d 833 (1954)*. (But the invalid deed will "pass" record title for the unknowing examiner.) An affidavit of delivery will reform this deed. *Ohio Standard of Title Examination 3.3*. Delivery could have occurred but other facts tended to put this deed in question. After 21 years of record, delivery may be presumed. *ibid.*

The affidavit of delivery, coupled with evidence of possession, can defeat the claims of a recorded deed. Claims by creditors can be defended by subrogation.

B. Court Decrees

Does a court ordered instrument need to be recorded in the recorder's office to give notice to third parties? The Marketable Title Act *ORC Sec. 5301.47-56* says it does not need to be recorded to be notice. Any filed court order can be a title transaction and is a muniment of title. A court order conveying title is notice under the Marketable Title Act. Title through probate court was not memorialized by a recording until the middle of the twentieth century. The will itself, in probate court, was record notice enough.

But contra the Recording Act. *ORC Sec. 5301.25*. This act specifically says that an unrecorded deed is not notice unless it is filed in the Recorder's office. There are several statutes that require a recording. There is a case law that rules a deed filed in the Recorder's office is not notice if it is indexed outside the chain of title. Any title examiner prefers a filing in the Recorder's office.

Convenience is one thing for a title examiner, but legal requirements are more important. A filed court order with the owner properly before the court, and the court with jurisdiction, can convey title. *ORC Sec. 5301.39; ORC Sec. 5301.49; and Walker v. Scott, 7 App. 335 (1914)*. The court's order is constructive notice to any claimant. But

precatory language in the order will not cause a transfer. Language that the parties “should” or have “agreed to” or “will” or upon some “condition” transfer the property will not convey the title. A land contract does not convey legal title.

1. Disruptions Caused by Divorce

- a. A common problem in a divorce is the refusal of a spouse to release dower when one of them wishes to purchase a new home.

The purchaser in a pending divorce can take title as a trustee to avoid the attachment of dower to this property. *Derusch v. Brown*, 8 Ohio 412 (1838). Even the marital home can be conveyed to one spouse by the other to enable a sale or the refinance of a mortgage, if a trust is used. Signatures are not easy to obtain during a divorce.

- b. Before divorce proceedings are commenced, a proceeds check can be issued to the record title holder alone. After divorce proceedings are commenced, we cut the proceeds check to both spouses, no matter who is in title. And dower is a non-possessory contingent interest and the owner of dower is not entitled to proceeds absent an agreement or formal demand (like a divorce petition). Once divorce proceeding are commenced, the whole gamut of marital rights are in issue and

one check to the husband and wife is proper, even if only one of them holds no title.

If the parties to a divorce wish separate checks, we make each check payable to both and advise them to endorse each other's check as they wish. Then the settlement agent has proof that the amount of each check was disclosed.

- c. If a spouse wishes to claim a lien from the decree of divorce against the marital estate, a case finds that either a certified judgment lien or a mortgage be filed. Language in the decree alone may not be sufficient. At the least, clear language establishing a lien on the real estate in question should be necessary. *Vickroy v. Vickroy*, 44 Ohio App. 3rd 210, 542 NE 2d 700 (1988).

Though a decree of divorce is clearly a muniment of title as it resides in the Clerk of Courts office, cases are relying on the recording statute and requiring a memorial of any lien, mortgage, or judgment from a divorce be filed in the Recorder's Office.

2. Avoiding Havoc during Probate

Title to real estate passes *at the time of death* to the heirs, devisees, or testamentary trustee as the case may be. It doesn't matter when the certificate of transfer is recorded. An

Executor's Deed under a power of sale in a will conveys the property free and clear of the deceased debts and Ohio Estate Tax. *ORC Sec. 2113.39*. The same is true for an Administrator's Deed. A Power of Attorney is void at the principal's death.

- a. Property can avoid probate through trusts, T.O.D. instruments, and survivorship deeds. If property is held in survivorship or in trust, the property transfers at death according to the terms of that trust or deed. But evidence in the way of an affidavit may be placed of record to show death. A trustee may need to convey after death according to the terms of trust. Title passes at death, not when the affidavit is recorded. Title passes under a trust according to the terms of the trust, and outside probate.
- b. If property is transferred to devisees or heirs when the estate does not sell the property, the debts of the decedent are liens until the final account or 4 years pass. A United States Supreme Court case holds that a creditor is not barred from filing a claim if he received no notice and the executor had the creditors' address to give notice. The four year rule seems a better one to follow than the six month rule when there is no good power of sale and the estate is still open and the heirs want to see before the estate is closed. We escrow until the estate is closed. *ORC Sec. 2117.36*.

- c. An heir or devisee may disclaim the property inherited or devised. *ORC Sec. 2105.061*. Ohio's rule differs from the majority rule. When the property is disclaimed in most states it passes as to the remaining heirs and devisees. But in Ohio the property passes as if the disclaimant had predeceased the decedent. The effect is that the disclaimant's next of kin become the ones who take the property. The majority rule sends the property to the brothers and sisters, while the Ohio statute sends the property to his children.

- d. The trustee always holds legal title, and sometimes has beneficial or equitable title. The equitable beneficiaries have an interest that a federal tax lien or a creditor's bill in equity can attach. *26 U.S.C. Sec. 6321; ORC Sec. 2333.01*. If the trust is disclosed, an examiner should ascertain the vested equitable title, the ones who possess, use and collect profits, and search these owners for federal or equitable liens. No settlor can create a spendthrift trust in his favor.

If the trust is undisclosed, no trust agreement must be examined. *ORC Sec. 5301.03*.

- e. I once found an old strip of land remaining after six or eight building lots had been carved out. Each lot had an easement over this strip. The auditor's office had no owner shown. I

realized the “developer” still owned this strip, subject to six or eight rights of way.

This developer was now dead for fifteen years. The property was worth little.

After 4 years, debts are barred, and ten years for estate taxes. *ORC Sec. 2117.36 for debts; ORC Sec. 5731.38 for Ohio estate taxes.* If a property has not been probated during that time, only minimal procedures need accomplished. If there was no will, an affidavit of heirship should do. Otherwise, admission of the will to probate and just an affidavit for transfer may suffice.

- f. There are two different kinds of “consent” when used in probate with incompetents. When there is no power of sale in a will or no will at all, the next of kin and legatees and devisees must unanimously consent to a sale. *ORC Sec. 2127.011.*

If one of these next of kin is incompetent no one may consent on his behalf. A sales case must be brought. And when the property is not sold to satisfy debts or legacies, a second set of non-unanimous consents must be obtained. *ORC Secs. 2127.02, 2127.03, 2127.04.*

The sales case is designed to protect the estate of the incompetents.

- g. If the property is Registered Land, a court order is necessary to transfer the property to confirm the validity of the power of sale or the identity of the heirs or devisees. *ORC Sec. 5309.45 and ORC Sec. 5309.46.*

Generally, when someone other than the individual on the certificate of title grants title, a registered land suit must confirm that person's authority. An execution by an attorney-in-fact is the execution. A conveyance by a trustee under a disclosed trust also requires a suit.

- h. In my opinion, when an estate is insolvent, notice to creditors and claimants must be given before any sale of real estate may be had. This is true even if the Executor has a power to sell. *ORC Sec. 2117.17(B).*

3. How partition actions work to client's advantage

- a. Partition *is available* to co-tenants, life estate tenants and to survivorship tenants, *not available* to TOD beneficiaries, not available (without both spouses) to tenants by the entirety. *ORC Sec 5307.01.*
- b. Most importantly, partition is *not* if a partnership or corporation owns a piece of real estate, even if this real estate is the sole asset of the company. The company must comply

with its operating agreement and statutory rules to wind up affairs. *Moody v. Powers* 16 CC(NS) 586 (1907).

- c. Partition is a straightforward way to force a quick sale of the real estate. Either an auction under the code, or in lieu of an auction, a private sale can be arranged and judicially supervised. An agreement not to partition (maybe similar to partnership agreement) will be enforced.

4. Quiet Title Action

- a. Isn't this the solution always given to our client, but a quitclaim or release is almost always found before the complaint is drafted? *ORC Sec. 5303.01*.
- b. Ordinarily, the lost party with the outstanding interest is served by publication (6 weeks) and then a motion for default can be filed after the 28 days. A lost vendee or mortgagee under a private mortgage or land contract is typical.
- c. I am always grateful with plaintiffs attorney records the entry within the chain of title with the county recorder. Whether recording is necessary was discussed supra.
- d. Time is the issue to your client. We expect no answer from the defendant. If the defendant answers, it is not a "quiet" title action.

- e. Many judicial proceedings in probate and foreclosure are “quiet.” Entries and orders become like deeds and releases in the chain of title.
- f. A contested quiet title may become an action for adverse possession or for the declaration of the invalidity of an encumbrance or a deed.

IV. EXAMINATION OF LIENS AND ENCUMBRANCES

A. Analyzing Liens

1. Judgment liens *not* in favor of State of Ohio or subsidiaries are enforceable:
 - a. For 5 years; Renewable up to 21 years; Filing date of Certificate of Judgment is Operative Date
 - b. Does not attach to after acquired property (the lien must be filed while the debtor owns the property.) This is the minority rule. Ohio follows the “no after acquired property” rule.
 - c. Sheriff’s Return on an execution of “no goods or chattels found” will make the underlying judgment a lien without filing a certificate of judgment. This was the only way to get a judgment lien before the 1950’s Certificate of Judgment statute.
2. Mechanic’s Lien/Condominium HOA payment liens

None of these types of liens require a judicial process before the lien attaches. Ancient property law regarding “charges” as a “real covenant” that “runs” with the land has been used in the past to validate the constitutionality of these liens. Little or no notice is given to the debtor. The “in rem” nature of these liens is also used to justify them. Is the constructive notice of the recording statute enough due process to validate the “running charges of real covenants?”

3. State Certified Judgment Liens (filed in the clerk of courts):

Certain state liens (described below) are now valid for fifteen years. This statute of limitations has been amended three times since September 2003.

In 2003, these liens were made perpetual (September 26, 2003). Then this “rule of perpetuity” for certain state liens was repealed and it provided for a twelve year term (September 27, 2006).

On March 29, 2007, the twelve years was enlarged to the current fifteen years.

~ Only *certain* state liens (recorder’s office) and *all* certified judgment liens (clerk of courts) are governed by the rule

~ Because these liens were perpetual from September 26, 2003 to September 27, 2006, a *special rule* applies to any lien that *would have expired during this interim (perpetual) period.*

a. Liens Governed by the Fifteen Year Rule

1. All Certified judgment liens in favor of the State of Ohio and its subdivisions (clerk of courts liens.)
2. Certain state liens listed in the statute (filed in the recorder's office.) But not all liens are governed by the fifteen year rule. *The liens not listed remain perpetual.*

b. Describing Liens Governed by the Rule

1. Supersedeas and Recognizance Bond Liens. *ORC Sec. 2505.13 and ORC Sec. 2937.25.*
2. Workers Compensation Liens. *ORC Sec. 4123.76 and ORC Sec. 4123.78.*
3. Jobs and Family Services (unemployment compensation) Liens. *ORC Sec. 4141.23.*
4. Financial Responsibility Liens. *ORC Sec. 4509.60.*
5. Personal Property Tax Liens. *ORC Sec. 5719.04.*

c. Other Liens Remain Perpetual

For example, child support enforcement act liens are not covered by the fifteen year or the twelve year rule. This lien and all others should be considered perpetual under *ORC Sec. 2329.07*.

d. Certain Fifteen Year Liens Enjoy a Grace Period

Old six year (recorder's office) state liens *that would have expired during the perpetual period* have been given a grace period.

And old ten year (clerk of courts) state judgment liens that would have expired during the period liens were perpetual are also given a grace period.

This perpetual period from September 26, 2003 through September 27, 2006, is called the "interim period."

Any of these old 6 year and 10 year liens listed by the statute *that would have expired during the perpetual interim period* enjoy a 6 year or 10 year grace period.

These liens are valid for 21 years (6 years plus 15 years) and for 25 years (10 years plus 15 years) respectively.

All other liens listed are valid for 15 years. Those not listed in the statute remain perpetual. Those liens

expiring the day before the perpetual interim period remain dormant.

4. Real Estate Taxes

- a. First and best lien. A foreclosure of this lien was traditionally called purely “in rem.”
- b. If no bids are received in a foreclosure for real estate taxes in two consecutive auctions, the property is then forfeited to the county auditor.
- c. Relatively recently (1974 and earlier,) many tax foreclosures were done without notice and due process. This method has been declared unconstitutional, but many pre-1974 tax foreclosures are defective and the titles are bad.
- d. The only notice for real estate taxes is the bill we receive in the ordinary mail twice a year. The real estate tax collection system has passed constitutional muster. Very recently, this statute was modified to enable quicker sales. May or may not be constitutional.
- e. This statute for treasurer foreclosure and forfeiture to the County Auditor has been amended. The Board of Revision can now hear and exert jurisdiction over tax foreclosures.

5. Federal Tax Liens

- a. They *do* attach to after acquired property. This is contrary to the Ohio rule, but the IRS does follow the majority rule.
- b. Federal tax liens attach to equitable interests, but liens under Ohio law do not in the absence of special court order.

B. Tackling Other Encumbrances in General

1. Any interest in a fee simple absolute that requires the legal title holder to “share” the property with another. An encumbrance changes a fee simple absolute to a mere fee simple.
 - a. Real estate taxes are one encumbrance that cannot be satisfied or released. They may only be paid or prorated.
 - b. A public road is an encumbrance, but it is the only encumbrance that does not impair marketability.
 - c. Condominium documents, covenants, and restrictions and private roads are all examples of encumbrances.
2. All liens are encumbrances but not all encumbrances are liens. A lien gives the creditor an immediate right to foreclosure or seizure without having to establish validity, default, or the amount of the underlying debt.
3. Dower is an encumbrance.
4. All easements, land contracts, and even trust agreements are fairly called an encumbrance.

5. Standard residential real estate contracts call for the buyer to accept the property unless some encumbrance “adversely affects” the use of the property. Often residential buyers in Southwest Ohio never cause and examination of the title before closing.
6. Commercial buyers often take an option on property to be developed where a full title exam and zoning and other issues are researched before contract. If an option were merely “exercised” then the option itself become the contract. Better practice is to write a contract specifying all conditions and exceptions. After a thorough title exam and inspection during the option period.
 - a. Most builders in Southwest Ohio do not have the title examined before a lot is “picked up.”
 - b. Any buyer should of course, pay to have a title examined.