

**SUPPLEMENT NO. 2**

**MICHIGAN LAND TITLE STANDARDS**

**SIXTH EDITION**

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of the State Bar of Michigan

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# PREFACE TO MICHIGAN LAND TITLE STANDARDS

## SIXTH EDITION (through Supplement No. 2)

The Sixth Edition of Michigan Land Title Standards (including Supplement No. 1 and Supplement No. 2) has been prepared by the Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan and published by the Real Property Law Section.

First published in the 1950s, the Michigan Land Title Standards is a series of selected statements of the law of land titles, as supported by applicable statutes and case law. Each Standard is a concise statement of a principle of law, accompanied by problems which illustrate the proper application of the principle. Each Standard includes specific references to the statutes and cases which provide the legal authority for the principle addressed. Some of the Standards include explanatory comments by the Committee.

The Committee has taken care to include only those principles of land title law which are clearly supported by the law of Michigan or, where applicable, by the law of the United States, and for which there are supporting statutes or published cases which are definitive in their effect or holding. Points of law that are subject to dispute or uncertainty, or as to which there are conflicting opinions, have not been included in the Standards, even if a particular interpretation may be commonly accepted in practice. The Standards are not intended as a treatise on land title law, but rather consist of selected statements of legal principles to guide lawyers on the legal effect of land title instruments.

The Standards have played a significant role in promoting the certainty and continuity of Michigan's principles of real property law, the importance of which was noted in a recent decision of our Supreme Court:<sup>1</sup>

[I]f there is any realm within which the values served by stare decisis -- stability, predictability, and continuity -- must be most certainly maintained, it must be within the realm of property law. For this reason, "[t]his Court has previously declared that stare decisis is to be strictly observed where past decisions establish 'rules of property' that induce extensive reliance."

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The justification for this rule is not to be found in rigid fidelity to precedent, but conscience. . . . Judicial "rules of property" create value, and the passage of time induces a belief in their stability that generates commitments of human energy and capital.

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<sup>1</sup> 2000 *Baum Family Trust v Babel*, 488 Mich 136, 172; 793 NW2d 633, (2010), citing *Bott v Natural Resources Comm*, 415 Mich 45, 77-78; 327 NW2d 838 (1982).

During the more than 60 years since their initial publication, the Standards have come to be regarded as an authoritative reference on the law of land titles and other aspects of real property law as developed and interpreted in Michigan. Trial and appellate courts have frequently cited the Standards in support of the legal principles relied upon in decisions in real property cases. Indeed, the Michigan Land Title Standards are generally regarded as among the most complete and authoritative of all the state land title standards in the United States.

The Committee has been ably guided by the following Chairpersons: Ralph W. Aigler (1953-54), James H. Hudnut (1954-55), Ralph Jossman (1955-59), Cyrus M. Poppen (1959-61), Ray L. Potter (1961-63), Clarence W. Videan (1963-64), Reuben M. Waterman (1964-65), F. Norman Higgs (1965-66), T. Gerald McShane (1966-69), Frank L. Charbonneau (1969-71), James W. Draper (1971-74), Myron Winegarden (1974-76), Andrew Cooke (1976-78), Paul A. Ward (1978-80), John R. Baker (1980-83), Carl A. Hasselwander (1983-85), Janet L. Kinzinger (1985-88), Thomas C. Simpson (1988-90), Gerard K. Knorr (1990-91), Russell A. McNair, Jr. (1991-92), Anne H. Hiemstra (1992-93), C. Robert Wartell (1993-95), James R. Brown (1995-98), Dennis W. Hagerty (1998-2001), James E. Reed (2001-04), Robert D. Mollhagen (2004-07), Russell E. Prins (2007-10), James M. Marquardt (2010-13), and Brian J. Page (2013- ).

The Committee continuously reviews and revises the Standards and prepares new Standards to include new subject matter and authorities and to reflect changes in the law. New and revised Standards are published in periodic supplements. The Committee welcomes comments and suggestions from all interested members of the Bar.

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Lansing, Michigan  
December, 2014

**2014 - 2015**  
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## CHAPTER IV

### DOWER



#### STANDARD 4.1

#### ESTATE TO WHICH DOWER ATTACHES

**STANDARD: DOWER ATTACHES ONLY TO REAL PROPERTY IN WHICH THE HUSBAND WAS SEIZED OF AN ESTATE OF INHERITANCE DURING THE MARRIAGE.**

**Problem A:** John Doe, a married man, owned Blackacre subject to a life estate. Doe, as a married man, deeded Blackacre to Richard Roe. Doe's wife did not sign the deed. Is Roe's interest in Blackacre free of any dower of Doe's wife?

**Answer:** No.

**Problem B:** John Doe, a married man, was the lessee of Blackacre under a ninety-nine year lease. During the term of the lease, Doe, as a married man, assigned his interest in Blackacre to Richard Roe. Doe's wife did not sign the lease. Is Roe's interest in Blackacre free of any dower of Doe's wife?

**Answer:** Yes. An estate of inheritance means a fee simple estate. An estate for a term for years is not an estate of inheritance.

**Problem C:** John Doe, a married man, was the lessee of Blackacre under a ninety-nine year lease. During the term of the lease, Doe died testate. Doe's widow elected to take dower in his estate. The fiduciary of Doe's estate, acting under a testamentary power of sale, assigned Doe's interest to Richard Roe. Is Roe's interest in Blackacre free of the dower of Doe's widow?

**Answer:** Yes.

**Problem D:** John Doe, a married man, was the holder of a life estate in Blackacre. Doe, as a married man, conveyed his interest in Blackacre to Richard Roe. Doe's wife did not join in the conveyance. Is Roe's interest in Blackacre free of any dower of Doe's wife?

**Answer:** Yes. Doe had no estate of inheritance to which dower could attach.

**Authorities:** Generally: MCL 554.2, 558.1.

Problem B: *Redman v Shaw*, 300 Mich 314, 1 NW2d 555 (1942).

Problem D: *Spears v James*, 319 Mich 341, 29 NW2d 829 (1947); *Case v Green*, 53 Mich 615, 19 NW 554 (1884).

**Comment A:** See Standard 7.9 as to the effect of dower on probate sales.

**Comment B:** Other interests in real property, in addition to those set forth above, to which dower will not attach, are tenancies by the entireties (*Agar v Streeter*, 183 Mich 600, 150 NW 160 (1914)); joint tenancies, including joint life estates with remainder to the survivor (*Schmidt v Jennings*, 359 Mich 376, 102 NW2d 589 (1960); see Standard 4.4); estates in partnership (see Standard 11.2); vendor's interests in land contracts (see Standard 4.2); vendee's interests in land contracts (see Standard 4.3); and oil and gas leasehold interests (*Redman v Shaw*, 300 Mich 314, 1 NW2d 555 (1942)). A wife is not entitled to dower in real property to which her husband held title as trustee where the husband is not the sole beneficiary of the trust (*Sagendorph v Lutz*, 286 Mich 103, 281 NW 653 (1938)).

**Note:** See Chapter V with regard to possible homestead rights.

## STANDARD 4.5

### PRIORITY OF PURCHASE MONEY MORTGAGE OVER DOWER

**STANDARD:** THE LIEN OF A PURCHASE MONEY MORTGAGE EXECUTED BY A MARRIED MAN ALONE HAS PRIORITY OVER HIS WIFE'S DOWER IN THE MORTGAGED REAL PROPERTY.

**Problem:** In connection with his purchase of Blackacre, John Doe, a married man, gave a purchase money mortgage of Blackacre. Mary Doe, his wife, did not sign the mortgage. The mortgage was later foreclosed and the redemption period expired. Was Mary Doe's dower in Blackacre extinguished?

**Answer:** Yes.

**Authorities:** MCL 558.4. *Burrall v Bender*, 61 Mich 608, 28 NW 731 (1886).

**Comment:** A mortgage is a purchase money mortgage if the mortgage proceeds are applied on the purchase price. But see, *Graves v American Acceptance Mortgage Corp*, 469 Mich 608, 677 NW2d 829 (2004).



## STANDARD 4.7

### NONRESIDENT WIFE HAS NO INCHOATE DOWER IN REAL PROPERTY OF HER HUSBAND

**STANDARD:** A WOMAN WHO IS A VOLUNTARY NON-RESIDENT OF MICHIGAN HAS NO INCHOATE DOWER IN THE REAL PROPERTY OF HER HUSBAND, WHETHER OR NOT HE IS A RESIDENT OF MICHIGAN.

**Problem A:** John Doe, the sole owner of Blackacre, deeded Blackacre as "a married man" to Frank Smith. Doe's wife, Mary, did not sign the deed. Mary Doe was a voluntary resident of Indiana at the time of the conveyance. Did Frank Smith acquire Blackacre free of any dower of Mary Doe?

**Answer:** Yes.

**Problem B:** Same facts as in Problem A, except that John and Mary Doe were voluntary residents of Iowa at the time of the conveyance. Did Frank Smith acquire Blackacre free of any-dower of Mary Doe?

**Answer:** Yes.

**Problem C:** John and Mary Doe were residents of Michigan. John Doe, the sole owner of Blackacre, deeded Blackacre as "a married man." Doe's wife, Mary, did not sign the deed. Mary Doe had been involuntarily committed to a mental institution in Indiana where she remained at the time of the conveyance. Did Mary have inchoate dower in Blackacre at the time of the conveyance?

**Answer:** Yes.

**Authorities:** Generally: MCL 558.21. *Pratt v Tefft*, 14 Mich 191 (1866); *Putney v Vinton*, 145 Mich 219, 108 NW 655 (1906).

Problems A and B: MCL 565.453. *Ligare v Semple*, 32 Mich 438 (1875); *First National Bank of Buchanan v Twombly*, 265 Mich 555, 251 NW 777 (1933).

Problem C: MCL 565.453. *Gluc v Klein*, 226 Mich 175, 197 NW

691 (1924).

**Comment A:** The recording of an affidavit to establish recorded evidence of the residence of persons named in deeds, wills and mortgages is permitted. After July 14, 1965, the affidavit must either include a description of the real property or incorporate the description by reference to a recorded instrument containing the description. MCL 565.451a and 565.451c.

**Comment B:** During her husband's lifetime, a wife who is a nonresident of Michigan has no presently vested expectancy that she will obtain dower in her husband's real Michigan property upon his death if she voluntarily resided outside of Michigan. This expectancy of dower upon her husband's death is referred to as inchoate dower. For this reason, a married man whose wife is a voluntary nonresident of Michigan may convey Michigan real property he solely owns free of dower. A nonresident wife does, however, obtain dower in Michigan property her husband owned at the time of his death if he died seized of an estate of inheritance. The dower a wife obtains upon her husband's death is referred to as choate dower. MCL 558.21 and 700.2202 expressly recognize a nonresident wife's right to choate dower upon the death of her husband if he died seized of an estate of inheritance in Michigan real property.

## CHAPTER V

### HOMESTEAD



#### STANDARD 5.1

### DEED OR ASSIGNMENT OF HOMESTEAD LAND BEFORE JANUARY 1, 1964

**STANDARD:** A DEED OR ASSIGNMENT OF ANY INTEREST IN HOMESTEAD LAND EXECUTED BY A MARRIED MAN BEFORE JANUARY 1, 1964 (THE EFFECTIVE DATE OF THE MICHIGAN CONSTITUTION OF 1963), IS INVALID WITHOUT THE SIGNATURE OF HIS WIFE.

**Problem A:** Richard Roe owned Blackacre, and occupied it with his wife, as a homestead. Roe, as a married man, by a deed in which his wife did not join, conveyed Blackacre in 1960 to Simon Grant for a consideration of \$5,000.00. Did Grant acquire marketable title to Blackacre?

**Answer:** No. The Michigan Constitution of 1908, like that of 1850, required the signature of the wife to a conveyance of land constituting a homestead as defined therein. Whether the value of the premises conveyed exceeded the amount of homestead exemption allowed under a sale on execution or other final process was immaterial.

**Problem B:** Richard Roe, a single man, purchased Blackacre from Joan Doe on land contract in 1959. Roe later married. In 1961, while Roe and his wife occupied Blackacre as a homestead, Roe assigned his vendee's interest to Simon Grant. Roe's wife did not join. In 1962, Grant paid the balance owing on the land contract and Joan Doe conveyed Blackacre to him. Did Grant acquire marketable title to Blackacre?

**Answer:** No. A vendee's interest in a land contract may be the subject of a homestead right. Roe's interest in the homestead could not be alienated without his wife's signature. The same result would follow if Roe had surrendered his vendee's interest to Joan Doe voluntarily.

**Authorities:** Generally: Mich Const 1908, art XIV, Sec 2 (effective until January 1, 1964); Mich Const 1850, art XVI, Sec 2; CL 1948 623.74 (repealed, effective January 1, 1963, by MCL 600.9901).

Problem A: *Dye v Mann*, 10 Mich 291 (1862); *Ring v Burt*, 17 Mich 465 (1869); *Hall v Loomis*, 63 Mich 709, 30 NW 374 (1886); *Evans v Grand Rapids, Lansing & Detroit R Co*, 68 Mich 602, 36 NW 687 (1888); *Mailhot v Turner*, 157 Mich 167, 121 NW 801 (1909); *Myers v Myers*, 186 Mich 215, 152 NW 934 (1915); *Maata v Kippola*, 102 Mich 116, 60 NW 300 (1894); *Lozo v Sutherland*, 38 Mich 168 (1878); *King v Welborn*, 83 Mich 195, 47 NW 106 (1890).

Problem B: *Ter Keurst v Zinkiewicz*, 253 Mich 383, 235 NW 191 (1931); *Irvine v Irvine*, 837 Mich 344, 60 NW2d 298 (1953); *Adams v Evans*, 343 Mich 94, 72 NW2d 131 (1955).

**Comment A:** A conveyance of a homestead is rendered invalid by the absence of the wife's signature only where giving validity to such a conveyance would impair or destroy the homestead right. Where a married man, acting alone, conveyed a homestead to a straw man who reconveyed to the married man and his wife, a tenancy by the entireties was created effectively. *Weaver v Michello*, 193 Mich 572, 160 NW 612 (1916).

**Comment B:** A wife who has never been a resident of Michigan can have no homestead in this state, even though her husband may have one. *Stanton v Hitchcock*, 64 Mich 316, 31 NW 395 (1887); *Leonetti v Tolton*, 264 Mich 618, 250 NW 512 (1933).

**Comment C:** This Standard deals with the effect of a conveyance of, or a contract to convey, a homestead. This Standard does not address the possible or partial invalidity of conveyances of, or contracts affecting, parcels of land including, but in excess of, a 40-acre homestead, such as are dealt with in *Engle v White*, 104 Mich 15, 62 NW 154 (1895).

**STANDARD 5.3**  
**MORTGAGE OF HOMESTEAD LAND**

**Standard 5.3 has been withdrawn**



## **STANDARD 5.4**

### **VALIDATION OF MORTGAGES, DEEDS AND ASSIGNMENTS OF HOMESTEAD LAND**

**Standard 5.4 has been withdrawn**



## STANDARD 6.12

### EVIDENCE OF DEATH OF JOINT TENANT OR TENANT BY ENTIRETIES

**STANDARD:** WHEN A JOINT TENANCY, A JOINT LIFE ESTATE WITH REMAINDER TO THE SURVIVOR, OR A TENANCY BY THE ENTIRETIES HAS BEEN CREATED, A DEED FROM LESS THAN ALL THE TENANTS NAMED IN THE INSTRUMENTS WHICH CREATED THE TENANCY SHOULD NOT BE ACCEPTED AS CONVEYING FULL MARKETABLE TITLE IN THE ABSENCE OF RECORD PROOF OF THE DEATH OF EACH SUCH TENANT WHO DOES NOT JOIN IN THE DEED.

**Problem:** Mary Doe and Ruth Roe held title to Blackacre as joint tenants with right of survivorship. Roe executed a deed describing Blackacre naming Simon Grant as grantee. Did Grant acquire marketable title to all of Blackacre?

**Answer:** No, unless there is satisfactory evidence of record that Doe predeceased Roe.

**Authorities:** *Hearns v Hearns*, 333 Mich 423, 53 NW2d 315 (1952); *Albro v Allen*, 434 Mich 271, 454 NW2d 85 (1990).

**Note 1:** See Standard 6.13 as to recordability on or after October 11, 1947 of deeds containing recitals of survivorship.

**Note 2:** See, MCL 700.2702(3) and *In re Leete Estate*, 290 Mich App 647, 803 NW2d 889 (2010), regarding the effect of joint tenants or tenants by the entireties dying within 120 hours of each other.



**CHAPTER VIII**  
**CONVEYANCES BY AND TO TRUSTEES**



**STANDARD 8.1**

**DEED CREATING PASSIVE TRUST**

**STANDARD:** A CONVEYANCE TO A TRUSTEE, WHO HAS NO POWER OF ACTUAL DISPOSITION OR MANAGEMENT OR UPON WHOM NO TRUST DUTIES ARE IMPOSED, CREATES A PASSIVE TRUST AND VESTS TITLE IN THE BENEFICIARY, IF LIVING, NOT IN THE NAMED TRUSTEE.

**Problem:** John Doe deeded Blackacre to “Richard Roe in trust for Mary Doe.” The deed contained no other reference to a trust. Investigation established that there was no will, declaration of trust or other instrument in which Roe was named as trustee for Mary Doe. Later, Mary Doe deeded Blackacre to Simon Grant. Roe did not join, either individually or as trustee. Did Grant acquire marketable title to Blackacre?

**Answer:** Yes.

**Authorities:** MCL 555.3 and MCL 555.5. *Ready v Kearsley*, 14 Mich 215 (1866); *Everts v Everts*, 80 Mich 222, 45 NW 88 (1890); *Rothschild v Dickinson*, 169 Mich 200, 134 NW 1035 (1912); *Woolfitt v Histed*, 208 Mich 308, 175 NW 286 (1919).

**Note:** The prudent title examiner should consider requiring a deed from the named trustee in addition to a deed from the beneficiary, because of the difficulty in establishing with certainty whether a trust exists.

**Comment:** *Nash v Duncan Park Comm*, 304 Mich App 599, 848 NW2d 435 (2014), lv gtd on other grounds Oct 24, 2014 (Docket No.

149168), held that a deed which imposed active duties on the named grantee-trustees created a valid trust, and vested title in the trustees and not the trust beneficiary.

## STANDARD 8.3

### DEED BY TRUSTEE UNDER EXPRESS TRUST

**STANDARD:** A DEED BY A TRUSTEE UNDER A TRUST WHOSE NECESSARY TERMS ARE EXPRESSED IN THE INSTRUMENT CREATING THE TRUSTEE'S ESTATE DOES NOT VEST MARKETABLE TITLE OF RECORD IN THE GRANTEE UNLESS THE INSTRUMENT CONTAINING THE TRUST TERMS OR A CERTIFICATE OF TRUST EXISTENCE AND AUTHORITY COMPLYING WITH THE REQUIREMENTS OF ACT 133 OF THE MICHIGAN PUBLIC ACTS OF 1991 (A) IS OF PUBLIC RECORD, (B) ESTABLISHES A VALID TRUST AND (C) CONTAINS A VALID AUTHORITY FOR THE CONVEYANCE.

**Problem A:** Blackacre was deeded to "Richard Roe as Trustee to collect rents and pay to James Smith for his life." No such trust instrument or certificate appears of public record. Roe, as trustee, deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

**Answer:** No.

**Problem B:** John Doe, a widower and owner of Blackacre, died testate. Doe's will, which was admitted to probate, created a valid trust for the benefit of Doe's children and appointed Richard Roe, Trustee, with power of sale. Doe's estate was probated, debts, taxes and expenses paid, and an order entered distributing Blackacre to the trustee. Roe, as testamentary trustee, deeded Blackacre to Simon Grant. Did Grant acquire marketable title to Blackacre?

**Answer:** Yes.

**Problem C:** Blackacre was owned by Richard Roe as trustee under a trust agreement conferring upon the trustee the express power to sell and convey any real property constituting part of the trust corpus. A certificate of trust existence and authority as to the trust, complying with the requirements of Act 133 of the Michigan Public Acts of 1991, was duly recorded. Roe, as trustee, deeded Blackacre to Simon Grant. Did Grant obtain

marketable title to Blackacre?

**Answer:** Yes.

**Problem D:** Blackacre was deeded to Richard Roe as trustee under a valid recorded trust. The trust agreement conferred power of sale only with the consent of the majority of the beneficiaries. Roe, as trustee, deeded Blackacre to Simon Grant, but a majority of the beneficiaries did not join therein or otherwise evidence their consent of record. Did Grant acquire marketable title of record to Blackacre?

**Answer:** No.

**Problem E:** John Doe, a widower, the owner of Blackacre, deeded it on December 1, 1988, to Richard Roe as trustee under a recorded declaration of trust containing a power of sale. The trust provided that the corpus was to be retained for 50 years and then distributed to Doe's then-living lineal descendants, the income to be distributed annually to Doe's children and grandchildren. Roe, as such trustee, thereafter deeded Blackacre to Simon Grant. Did Grant acquire marketable title of record to Blackacre?

**Answer:** No. The trust was void ab initio as violating either the statute prohibiting suspension of the power of alienation (see Standard 9.6) or the common law rule against perpetuities (see Standard 9.4), whichever is applicable. Since the trust was void at its creation, the power of sale therein contained failed. In the absence of a valid trust and power, title acquired through the trustee was not marketable.

**Comment:** If the trustee's deed had been executed and recorded after December 27, 1988, the effective date of the Uniform Statutory Rule Against Perpetuities, being Act 418 of the Michigan Public Acts of 1988 (MCL 554.71 *et seq.*), it may be valid under the alternative 90-year rule provided by the Act.

**Authorities:** Generally: MCL 555.11 to 555.23 incl; MCL 565.431 to 555.436 incl.

**Problem D:** *Palmer v Williams*, 24 Mich 328 (1872).

**Problem E:** MCL 554.14 to 554.20 incl. (repealed and superseded by 1949 PA 38, MCL 554.51 to 554.53 incl.). *Gardner v City National Bank and Trust Co*, 267 Mich 270, 255 NW 587 (1934); *LaMere v Jackson*, 288 Mich 99, 284 NW 659 (1939); *Grand Rapids Trust Co v Herbst*, 200 Mich 321, 190 NW 250 (1922); *Petit v Flint & Pere Marquette R Co*, 114 Mich 362, 72 NW 238 (1897).

**Comment:** This Standard does not consider the requirements of MCL 700.162 (now repealed) (pertaining to the recording of wills), nor does it attempt to deal with recording problems such as those arising where the declaring or creating instrument appears of public record only in a county or counties other than that in which the land conveyed is located.

**Caveat 1:** This Standard deals with the requirements for establishing a marketable title of record in connection with deeds by trustees where the trust terms and existence are sufficiently expressed to constitute notice of the existence of the trust. It does not apply to deeds from so-called naked trustees or other grantors where the trust is not fully expressed. See Standard 8.2.

**Caveat 2:** Revised Probate Code Section 833 (MCL 700.833, repealed and superseded by MCL 700.7404) seems to protect a third party in dealing with a trustee, allowing the third party to assume the existence and proper exercise of trust powers, even if the trust is fully expressed on the record as long as the third party does not have actual notice that the trustee is exceeding his or her powers or is improperly exercising them. This puts RPC Section 833 (MCL 700.833) and MCL 700.7404 into an apparent conflict with MCL 555.21 and MCL 565.435.

**Note:** The Michigan Trust Code (MCL 700.7101, *et seq.*) became effective on April 1, 2010. Section 7913 (MCL 700.7913) prescribes the contents and execution of a certificate of trust. The provisions of MCL 700.7913 and MCL 565.432-433 are similar but not exactly the same. Both statutes provide protection to parties that rely in good faith on the provisions contained in a trust certificate.

A significant difference between the two statutes relates to the execution of a trust certificate. MCL 700.7913 provides that a “certificate of trust may be signed or otherwise authenticated by the settlor, any trustee, or an attorney for the settlor or trustee.”

MCL 565.433 provides that a “certificate of trust existence and authority shall be executed by the settlor or grantor; an attorney for the settlor, grantor, or trustee; or an officer of a banking institution or an attorney if then acting as a trustee.” Under MCL 565.433 a trustee would not be a proper person to sign a certificate of trust unless the trustee is one of the persons identified therein.

Section 7913 of the Trust Code is not intended to replace the provisions of MCL 565.432-433, which are intended to apply to real property transactions.

**CHAPTER XIII**  
**RECORDED PLATS**



**STANDARD 13.1**

**EFFECT OF DEDICATION OF LAND FOR PUBLIC  
PURPOSE IN A RECORDED PLAT**

**STANDARD:** ACCEPTANCE OF A DEDICATION OF LAND DESIGNATED FOR PUBLIC USE IN A PLAT RECORDED IN COMPLIANCE WITH THE PLAT ACT THEN IN EFFECT CONVEYS A QUALIFIED FEE TITLE IN THE PARCELS OF LAND DESIGNATED FOR PUBLIC USE TO THE MUNICIPALITY IN WHICH THE PLATTED LAND IS LOCATED, IN TRUST ONLY FOR THE USES AND PURPOSES DESIGNATED.

**Problem A:** The plat of Whiteacres Subdivision, recorded in compliance with the Plat Act as it existed at the time of recording, identified part of Whiteacres as Oak Street and specifically dedicated it for use by the public. After the plat was recorded, the public dedication of Oak Street was accepted by Center City, the municipality in which Whiteacres was located. After the acceptance, the proprietor of Whiteacres executed and recorded a deed purporting to convey Oak Street to John Doe. Did John Doe acquire marketable title to Oak Street?

**Answer:** No.

**Problem B:** Same facts as in Problem A, except that after accepting the public dedication of Oak Street, Center City executed and recorded a deed purporting to convey to ABC Oil Co. all of the oil and gas interests under Oak Street. Did ABC Oil Co. obtain any interest in the oil and gas under Oak Street?

**Answer:** No. By accepting the dedication of Oak Street, Center City

acquired only a qualified fee, which did not include any interest in the oil or gas. See Comment B.

**Authorities:** MCL 560.253; *Edison Illuminating Co v Misch*, 200 Mich 114, 166 NW 944 (1918); *Eyde Brothers Dev Co v Roscommon Co Bd of Rd Comm'rs*, 161 Mich App 654, 411 NW2d 814 (1987); *Kalkaska v Shell Oil Co*, 433 Mich 348, 446 NW2d 91 (1989).

**Comment A:** Before 1887 the Plat Act referred to public dedications being a sufficient conveyance to vest title in trust in the county within which the platted land is located. Act 309 of 1887 revised the statute to provide that public dedications vested title in trust in the city or village within which the platted land is located or, if the lands are not in a city or village, in the township within which it is located. Since 1887 there has been no substantive change in the vesting of title provisions. The Plat Act has been known as the Land Division Act since March 31, 1997, the effective date of 1996 P.A. 591. MCL 560.101 *et seq.*

**Comment B:** The fee acquired by a municipality in land designated for public use in a plat is of a qualified nature. Michigan courts have variously described the qualified nature of the fee as: “such a title as would enable the public authorities to devote the lands to all the public uses contemplated,” *Wayne Co v Miller*, 31 Mich 447, 448 (1875); “a fee in trust for the public,” *Edison Illuminating Co v Misch*, *supra* at 122, 166 NW at 947 (1918); “a fee which has a qualification annexed to it,” *West Michigan Park Ass'n v Conservation Dep't*, 2 Mich App 254, 263, 139 NW2d 758, 762 (1966); and lacking “the usual rights of a proprietor,” *Kalkaska v Shell Oil Co*, *supra* at 357, 446 NW2d at 95 (1989). The qualified fee the municipality acquires in a publicly dedicated street within a recorded plat does not include riparian rights where the street is parallel to the water's edge and separates the waterfront lots within the plat from the water's edge. *2000 Baum Family Trust v Babel*, 488 Mich 136, 793 NW2d 633 (2010).

**Note:** See Standard 13.2 for what constitutes acceptance of a dedication of platted land for a public purpose.

## STANDARD 14.6

### EASEMENT CREATED BY GRANT

**STANDARD:** AN EASEMENT MAY BE CREATED BY GRANT.

**Problem A:** Whiteacre, owned by Simon Jones, abutted the west line of a public highway. Jones deeded the back half of Whiteacre to Paul Pack, together with an easement for ingress and egress across the south 20 feet of the front half of Whiteacre for the benefit of the back half of Whiteacre. Did Pack acquire an easement across the south 20 feet of the front half of Whiteacre?

**Answer:** Yes.

**Authorities:** *Tappert v Detroit G. H. & M. Co*, 50 Mich 267, 15 NW 450 (1883); *Von Medling v Strahl*, 319 Mich 598, 30 NW2d 363 (1948).



## STANDARD 14.8

### EASEMENT IMPLIED BY NECESSITY

**STANDARD:** IF A PARCEL OF LAND IS DIVIDED SO THAT ONE OF THE RESULTING PARCELS IS LANDLOCKED EXCEPT FOR ACCESS ACROSS THE REMAINDER, AN EASEMENT BY NECESSITY MAY BE IMPLIED.

**Problem A:** Jane Smith owned a 40-acre parcel of land abutting a private road. Smith conveyed 10 landlocked acres of the parcel to Richard Brown. May a grant of an easement by necessity be implied across Smith's land for access to Brown's landlocked parcel?

**Answer:** Yes.

**Problem B:** Ralph Kline owned 40 acres of land abutting a private road. Kline conveyed 30 acres to Paula Fleet, including the entire private road frontage, retaining 10 landlocked acres. May a reservation of an easement by necessity be implied across Fleet's land for access to Kline's retained parcel?

**Answer:** Yes.

**Authorities:** *Moore v White*, 159 Mich 460, 124 NW 62 (1909); *Goodman v Brenner*, 219 Mich 55, 188 NW 377 (1922); *Waubun Beach Ass'n v Wilson*, 274 Mich 598, 265 NW 474 (1936); *Chapdelaine v Sochocki*, 247 Mich App 167, 635 NW2d 339 (2001); *Murray Trust v Futrell*, 303 Mich App 28, 840 NW2d 775 (2013).

**Comment A:** An easement implied by necessity requires strict necessity; mere convenience or even reasonable necessity will not suffice. *Murray Trust v Futrell*, *supra*.

**Comment B:** An easement implied by necessity is appurtenant to the dominant parcel. *Bean v Bean*, 163 Mich 379, 128 NW 413 (1910).



## STANDARD 14.9

### CESSATION OF AN EASEMENT IMPLIED BY NECESSITY

#### STANDARD: AN EASEMENT IMPLIED BY NECESSITY CEASES WHEN THE NECESSITY ENDS.

**Problem A:** Jane Smith owned a 40-acre parcel of land abutting a private road. Smith conveyed 10 landlocked acres of the parcel to Richard Brown. For many years, Brown used the resulting easement by necessity granted by implication across Smith's land to provide access to Brown's landlocked parcel. Later, the county constructed a public road abutting and providing access to Brown's parcel. Did the easement by necessity over Smith's land cease?

**Answer:** Yes.

**Problem B:** Ralph Kline owned a 40-acre parcel of land abutting a private road. Kline conveyed 30 acres to Paula Fleet, including the entire private road frontage, retaining 10 landlocked acres. Kline later acquired an additional parcel, adjacent to his 10-acre landlocked parcel, that abutted and had access to a public road. Did the easement by necessity over Fleet's land cease?

**Answer:** Yes.

**Authorities:** *Waubun Beach Ass'n v Wilson*, 274 Mich 598, 265 NW 474 (1936); *Murray Trust v Futrell*, 303 Mich App 28, 840 NW2d 775 (2013).



## STANDARD 16.10

### RECORDED MORTGAGE OVER 30 YEARS OLD

**STANDARD:** A RECORDED MORTGAGE, NOT RENEWED OR EXTENDED OF RECORD, IS CONSIDERED TO BE DISCHARGED AFTER 30 YEARS HAVE ELAPSED SINCE ITS DUE DATE, OR SINCE ITS DATE OF RECORDING IF NO DUE DATE IS RECITED IN THE MORTGAGE.

**Problem:** A mortgage, dated and recorded in 1955, was due 15 years after its date. No renewal affidavit, extension agreement or discharge relating to the mortgage was recorded. In 2001, may the mortgage be disregarded?

**Answer:** Yes.

**Authorities:** MCL 565.382. *Austin v Anderson*, 279 Mich 424, 272 NW 730 (1937).

**Comment:** Under MCL 565.382, a mortgage may be renewed by the recording of (1) an affidavit of the owner of the mortgage or any one of the owners of the mortgage (if more than one), or an affidavit of the agent or attorney of the owner of the mortgage or any one of the owners of the mortgage (if more than one), which affidavit shows the amount remaining unpaid on the mortgage, or (2) an extension agreement between the mortgagor and the owner of the mortgage.



## STANDARD 16.13

### RECORDING OF MORTGAGE AND ASSIGNMENT OF MORTGAGE IN FORECLOSURE BY ADVERTISEMENT

**STANDARD:** A MORTGAGE MAY BE FORECLOSED BY ADVERTISEMENT IF ALL OF THE FOLLOWING EXIST:

- (A) THE MORTGAGE CONTAINING A POWER OF SALE HAS BEEN RECORDED;
- (B) THE PARTY FORECLOSING THE MORTGAGE IS EITHER:
  - (1) THE OWNER OF THE INDEBTEDNESS OR OF AN INTEREST IN THE INDEBTEDNESS SECURED BY THE MORTGAGE; OR
  - (2) THE SERVICING AGENT OF THE MORTGAGE; AND
- (C) A RECORD CHAIN OF TITLE EXISTS BEFORE THE DATE OF SALE EVIDENCING THE ASSIGNMENT OF MORTGAGE TO THE PARTY FORECLOSING THE MORTGAGE, IF THAT PARTY IS NOT THE ORIGINAL MORTGAGEE.

**Problem A:** Robert Brown mortgaged Blackacre to Edward Lane. The mortgage contained a power of sale and was recorded. Lane assigned the mortgage to Arthur Mills, but the assignment was not recorded. Mills subsequently assigned the mortgage to William Smith, and the assignment was recorded. Smith foreclosed the mortgage by advertisement. Was the foreclosure valid?

**Answer:** No. If the mortgage is not foreclosed by the original mortgagee, then the mortgage and any assignments of the mortgage

necessary to establish a record chain of title in the foreclosing party must be recorded.

**Problem B:** Robert Brown mortgaged Blackacre to Edward Lane. The mortgage contained a power of sale and was recorded. Lane died July 1, 1990. Lane's estate was probated and William Miller was appointed administrator. No instrument evidencing an assignment of the mortgage to Miller was recorded. In 1991 Miller foreclosed the mortgage by advertisement. Was the foreclosure valid?

**Answer:** Yes. A transfer of a mortgage by operation of law is not an assignment required to be recorded for the foreclosure to be valid.

**Problem C:** Robert Brown mortgaged Blackacre to Northern Bank. The mortgage contained a power of sale and was recorded. Northern Bank assigned the mortgage to Holdings Company, as security for a loan by Holdings Company to Northern Bank. The assignment was not recorded. Northern foreclosed the mortgage by advertisement. Was the foreclosure valid?

**Answer:** Yes. Northern Bank remained the record holder of the mortgage and its right to foreclose the mortgage was not affected by the unrecorded assignment for security only.

**Problem D:** Robert Brown mortgaged Blackacre to Northern Bank. The mortgage contained a power of sale and was recorded. Northern Bank assigned the mortgage to Holdings Company, but continued to service the mortgage as servicing agent for Holdings Company. The assignment to Holdings Company was recorded. The mortgage was foreclosed by advertisement in the name of Holdings Company by Northern Bank, its servicing agent. Was the foreclosure valid?

**Answer:** Yes. A servicing agent may foreclose a mortgage by advertisement in the name of the record holder of the mortgage.

**Problem E:** Same facts as in Problem D, except that the mortgage was foreclosed by advertisement in the name of Northern Bank, the servicing agent, and no evidence of an assignment to Northern Bank was recorded. Was the foreclosure valid?

**Answer:** No. A servicing agent may not foreclose a mortgage by

advertisement in its own name unless evidence of an assignment of the mortgage to the servicing agent is recorded.

**Problem F:** Hometown Financial Company made a mortgage loan to Robert Brown secured by a mortgage on Blackacre. The mortgage contained a power of sale and was recorded. The mortgage identified the Mortgage Electronic Registration Systems, Inc. ("MERS") as the mortgagee, granted the mortgage to MERS solely as nominee for Hometown Financial Company and provided MERS with the right to foreclose Blackacre. MERS foreclosed the mortgage by advertisement. Was the foreclosure valid?

**Answer:** Yes. MERS was the record holder of the mortgage and owned an interest in the indebtedness.

**Authorities:** Generally: MCL 600.3204(1)(d) and 600.3204(3).

Problem A: *Dohm v Haskin*, 88 Mich 144, 50 NW 108 (1891); *Arnold v DMR Financial Services*, 448 Mich 671, 532 NW2d 852 (1995).

Problem B: MCL 600.3204. *Miller v Clark*, 56 Mich 337, 23 NW 35 (1885).

Problem C: *Feldman v Equitable Trust Co*, 278 Mich 619, 624, 270 NW2d 809 (1937); *Arnold v DMR Financial Services*, 448 Mich 671, 532 NW2d 852 (1995).

Problems D and E: MCL 600.3204(1)(d) and 600.3204(3).

Problem F: MCL 600.3204(1)(d). *Residential Funding Co v Saurman*, 490 Mich 909, 805 NW2d 183 (2011).

**Comment A:** If the foreclosing assignee is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage at the time of the first published notice, then evidence of the assignment of the mortgage creating a "record chain of title" in the foreclosing assignee may be recorded at any time before the date of sale. See, MCL 600.3204(3). See, Standard 16.19 with respect to the necessity to include the name of the foreclosing assignee in the published notice of sale.

**Comment B:** It is the opinion of the Committee that the change in the statutory

language in MCL 600.3204(3), effective December 29, 1994, does not affect the holding in *Miller v Clark, supra*, that a transfer of a mortgage effected by operation of law is not an assignment required to be recorded for a foreclosure to be valid. *See, Kim v JPMorgan Chase Bank*, 493 Mich 98, 825 NW2d 329 (2012).

**Comment C:** Section 9-607(b) of the Uniform Commercial Code permits a secured party who has a security interest in an obligation of a debtor/mortgagee secured by a mortgage to record the security agreement creating the security interest and a sworn affidavit to satisfy the requirement that an assignment of the mortgage be recorded to foreclose the mortgage by advertisement. The recorded sworn affidavit must include a statement that a default has occurred and that the secured party is entitled to foreclose the mortgage by advertisement. The recorded security agreement and sworn affidavit may be used to create the necessary record chain of title evidencing the assignment of the mortgage to the foreclosing party. MCL 440.9607(b) and Official Comment 8.

**Comment D:** The Committee expresses no opinion as to what constitutes an interest in the indebtedness sufficient to permit the party foreclosing the mortgage to foreclose the mortgage pursuant to MCL 600.3201(d). *See, Residential Funding Co v Saurman, supra*.

**Comment E:** In *Kim v JPMorgan Chase Bank, supra*, the Supreme Court held that (1) “defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void ab initio,” and (2) “to set aside the foreclosure sale, plaintiffs must show that they were prejudiced by defendant’s failure to comply with MCL 600.3204.” *Id.* at 115. The Committee expresses no opinion as to whether defects or irregularities resulting from the failure to comply with any of the requirements of MCL 600.3204 other than MCL 600.3204(3) or any of the statutory requirements for foreclosure referred to in other Standards in this Chapter 16 would render a foreclosure voidable as opposed to void ab initio. The Committee also expresses no opinion as to the nature of the specific facts which would support a claim of prejudice sufficient to render a foreclosure voidable because of defects or irregularities in the foreclosure proceeding. *See, Diem v Sallie Mae Home Loans, Inc*, Oct 16, 2014 (Mich App Docket No. 317499).

## STANDARD 16.14

### LEGAL PROCEEDINGS THAT BAR FORECLOSURE BY ADVERTISEMENT

**STANDARD:** FORECLOSURE BY ADVERTISEMENT IS BARRED IF LEGAL PROCEEDINGS ARE PENDING IN WHICH JUDGMENT ON THE MORTGAGE DEBT MAY BE RENDERED OR IF A JUDGMENT HAS BEEN RENDERED AND EXECUTION HAS NOT BEEN RETURNED UNSATISFIED IN WHOLE OR IN PART.

**Problem A:** A mortgage given by Robert Brown to Edward Lane was in default. Brown died and his estate was probated. At the hearing on claims, Lane's claim for the mortgage debt was allowed, but it was never paid. Lane later foreclosed the mortgage by advertisement. Was the foreclosure valid?

**Answer:** Yes. The filing of a claim against the estate of a mortgagor is not a "suit or proceeding at law" within the meaning of the statute setting forth the prerequisites for foreclosure of mortgages by advertisement.

**Problem B:** A mortgage given by Robert Brown to Edward Lane was in default. Lane sued to collect the mortgage debt and obtained a judgment for the amount owing on the debt. Execution on the judgment was returned unsatisfied. Lane later foreclosed the mortgage by advertisement. Was the foreclosure valid?

**Answer:** Yes. After execution on the judgment was returned unsatisfied, the mortgagee was entitled to foreclose by advertisement.

**Problem C:** Same facts as in Problem B, except that while the suit was pending Lane foreclosed his mortgage by advertisement. Was the foreclosure valid?

**Answer:** No. Until the suit is discontinued or, if judgment is rendered, execution upon the judgment is returned unsatisfied, in whole or in part, foreclosure of the mortgage by advertisement is barred.

**Authorities:** Generally: MCL 600.3204(1)(b).

Problem A: *Larzelere v Starkweather*, 38 Mich 96 (1878).

- Comment A:** In construing a predecessor statute to MCL 600.3204(1)(b), the Supreme Court has stated that the object of the statute "is to prevent proceedings, at the same time to prosecute the personal liability of the mortgagor and pursue the land." *Lee v Clary*, 38 Mich 223, 227 (1878).
- Comment B:** In *United States v Leslie*, 421 F2d 763 (CA 6, 1970), the court held that a suit against a guarantor of the mortgage debt pursuant to a guaranty which is not conditioned on the mortgagee proceeding against the mortgagor or the property is not an action or proceeding to recover the mortgage debt, and a suit against the guarantor may proceed while foreclosure by advertisement is pending. See also, *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 818 NW2d 460 (2012).
- Comment C:** In *Calvert Assoc v Harris*, 469 F Supp 922 (ED Mich, 1979), the court held that a suit for appointment of a receiver during the pendency of a foreclosure by advertisement is not a suit brought to recover the mortgage debt and does not bar foreclosure by advertisement.

## STANDARD 16.17

### EFFECT ON JUNIOR FEDERAL TAX LIEN OF MORTGAGE FORECLOSURE BY ADVERTISEMENT INITIATED ON OR AFTER NOVEMBER 3, 1966

**STANDARD: FORECLOSURE OF A MORTGAGE BY  
ADVERTISEMENT INITIATED ON OR AFTER  
NOVEMBER 3, 1966, AND FAILURE TO REDEEM FROM  
THE SALE, DIVESTS THE MORTGAGED PREMISES OF  
ANY JUNIOR FEDERAL TAX LIEN, IF:**

- (A) NO NOTICE OF FEDERAL TAX LIEN WAS FILED  
FOR RECORD AND INDEXED (IN ACCORDANCE  
WITH 26 USC 6323 AND MCL 211.661) MORE  
THAN 30 DAYS BEFORE THE FORECLOSURE  
SALE;**
- (B) PROPER NOTICE OF THE SALE WAS GIVEN TO  
THE UNITED STATES NOT LESS THAN 25 DAYS  
BEFORE THE SALE; OR**
- (C) THE UNITED STATES CONSENTS TO THE SALE  
FREE OF THE LIEN.**

**OTHERWISE, THE SALE IS MADE SUBJECT TO AND  
HAS NO EFFECT ON THE FEDERAL TAX LIEN.**

**Problem A:** A mortgage covering Blackacre, recorded in 1998, was foreclosed by advertisement at a foreclosure sale held on May 18, 1999. The redemption period was six months after the date of the sale. A notice of federal tax lien against the owner was filed for record and indexed in the office of the register of deeds for the county in which Blackacre is located on May 9, 1999. No notice of the foreclosure sale was given to the United States. The redemption period expired without redemption. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

**Answer:** Yes. Because the notice of federal tax lien was not filed for record and indexed more than 30 days before the sale, the sale and expiration of the right to redeem divested Blackacre of the federal tax lien.

**Problem B:** Same facts as in Problem A, except that the notice of federal tax lien against the owner was filed for record and indexed on April 12, 1999. The redemption period expired without redemption. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

**Answer:** No. Because the notice of federal tax lien was filed for record and indexed more than 30 days before the foreclosure sale, and because no notice of the sale was given to the United States, the sale was made subject to and would not affect the federal tax lien.

**Problem C:** Same facts as in Problem B, except that proper notice of the foreclosure sale was given to the United States 25 days or more before the sale. The redemption period expired without redemption having been made. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

**Answer:** Yes. Because the notice of federal tax lien was filed for record and indexed more than 30 days before the sale, to divest Blackacre of the federal tax lien, it was necessary that the United States be given notice of the sale.

**Problem D:** Notice of a foreclosure sale to be held on May 18, 1999 to foreclose a mortgage covering Blackacre was published. Notice of the sale was given to the United States 25 or more days before May 18, 1999 in reference to a notice of federal tax lien against the owner filed for record and indexed on April 12, 1999. The sale was adjourned to and held on May 25, 1999, without notice to the United States. The redemption period was six months. The redemption period expired without redemption. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

**Answer:** Yes. Because notice of the sale scheduled for May 18, 1999 had been given to the United States, the only notice of postponement of the sale required to be given was that required by local law.

**Problem E:** Notice of a foreclosure sale to be held on May 18, 1999 to foreclose a mortgage covering Blackacre was published. A notice of a federal tax lien against the owner was filed for record and indexed April 23, 1999. No notice of the sale was given to the United States. The sale was adjourned to and held on May 25, 1999. The redemption period was six months. The redemption period expired without redemption. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

**Answer:** Yes. Had the sale been held on the originally scheduled date, no notice to the United States would have been required because no notice of a federal tax lien was filed for record and indexed more than 30 days before the sale date. If the sale is actually held no more than 30 days after the originally scheduled date, no notice to the United States, pursuant to 26 USC 7425(c)(1), is required even though notice of the federal tax lien is filed for record and indexed more than 30 days before the actual sale.

**Problem F:** Same facts as in Problem E, except that, as a result of one or more adjournments, the sale was held on June 22, 1999. The redemption period expired without redemption. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

**Answer:** No. Because the sale was held more than 30 days after the originally scheduled date and because notice of a federal tax lien was filed for record and indexed more than 30 days before the sale, notice of the adjournment must be given to the United States pursuant to 26 USC 7425(c)(1).

**Problem G:** Notice of a foreclosure sale to be held on May 18, 1999 to foreclose a mortgage covering Blackacre was published. The sale was adjourned to and held on June 25, 1999. A notice of a federal tax lien against the owner was filed for record and indexed on June 8, 1999. No notice of the sale was given to the United States. The redemption period expired without redemption. Did the purchaser at the foreclosure sale acquire Blackacre free of the junior federal tax lien?

**Answer:** Yes. Although the sale was held more than 30 days after the originally scheduled date, it was not necessary to give notice to the United States because no notice of a federal tax lien was filed for record and indexed more than 30 days before the sale.

**Problem H:** Blackacre was a residential parcel less than three acres in size on which a single family dwelling was located. A mortgage of Blackacre recorded in 1999 was foreclosed by advertisement at a foreclosure sale on June 29, 2000. The mortgagee proceeded under MCL 600.3241, and the redemption period was 30 days after the sale date. A federal tax lien against the owner was filed for record and indexed on May 18, 2000. Notice of the foreclosure sale was given to the United States. Did the purchaser at the foreclosure sale acquire Blackacre free of the federal tax lien after expiration of the 30-day redemption period?

**Answer:** No. The United States had 120 days to redeem from the foreclosure sale.

**Authorities:** 26 USC 7425(b), (c)(1) and (2) and (d). Treas Reg §301.7425-2 and 3.

**Comment A:** Notice of Foreclosure Sale.

26 USC 7425(c)(1) provides that notice of sale “shall be given (in accordance with regulations prescribed by the Secretary) in writing by registered or certified mail or by personal service, not less than 25 days prior to such sale, to the Secretary.”

Treasury Regulation §301.7425-3(d) provides:

Contents of Notice

A notice will be considered adequate if it contains the following information:

1. Name and address of the person submitting the notice of sale.
2. A copy of each Notice of Federal Tax Lien (Form 668) affecting the real property to be sold or the following as shown on each such notice:
  - (a) The Internal Revenue District named thereon;
  - (b) The name and address of the taxpayer; and
  - (c) The date and place of filing of the notice.
3. With respect to the property to be sold, the following:

- (a) A detailed description – “in the case of real property, the street address, city and State, and the legal description contained in the title or deed to the property and, if available, a copy of the abstract of title.”
  - (b) The date, time and place and terms of the proposed sale.
4. “The approximate amount of the principal obligation, including interest, secured by the lien sought to be enforced and a description of the other expenses (such as legal expenses, selling costs, etc.) which may be charged against the sale proceeds.”

#### Upon Whom is Notice to be Served?

Notice shall be given to the Area Director for the Internal Revenue District in which the sale is to be conducted, marked for the attention of the Technical Support Group.

#### Time of Service

Although the Internal Revenue Code provides that notice shall be given not less than 25 days before a foreclosure sale, the Treasury Regulation §301.7502-1(c)(2) provides that 26 USC 7502 and 7503 shall apply. The former provides that the date of registering a letter shall be deemed to be the date of delivery. The latter section specifies that if the last day for performing any prescribed act falls on Saturday, Sunday or a legal holiday, the performance of such act will be considered timely if performed on the next succeeding day which is not Saturday, Sunday or a legal holiday. With respect to certified mail, the postmark date is likewise deemed to be the date of delivery if the postmark is made by a postal employee.

If a notice of sale is submitted in duplicate to the Area Director and a written request that receipt be acknowledged is made, the Area Director will so acknowledge, indicating the date and time of receipt of the notice.

#### Inadequate Notice

If the Area Director determines that a notice is inadequate, the Area Director will give notice of the inadequate items to the

person who submitted the notice. In any case where a notice of a foreclosure sale given after December 31, 1976 does not contain the information required under No. 2 above, the Area Director may give written notification of such omission without specification of any other inadequacy. In either event, an adequate notice must be given at least 25 days before the sale date. But if one who submits a timely notice does not receive written notification that the notice is inadequate more than five days before the sale date, the notice is considered adequate.

#### Disclosure of Adequacy of Notice

Upon receipt of a written request indicating the reason therefore, the Area Director is authorized to disclose to any person who has a proper interest whether an adequate notice of sale was given.

#### **Comment B:** Recorded Evidence of Notice to the United States and Service

For the purpose of evidencing that proper and timely notice of mortgage foreclosure sale was given to the United States, the Committee recommends that an affidavit stating that proper notice of the foreclosure sale was given to the United States not less than 25 days before the sale date by personal service, or by registered or certified mail, be recorded. The affidavit, to which a copy of the notice given should be attached, may be recorded with the sheriff's deed or separately, and it should state the date and manner of service, and that no notice of inadequacy as provided for in Treasury Regulation §301.7425-3(d)(2) was received. If service was by registered or certified mail, the receipt or a copy of the notice should be attached to the affidavit and should show timely receipt by the United States. If the receipt does not show timely receipt by the United States, the delivery may still have been made more than 25 days before the sale date if the registered or certified receipt bears a postmark made by a postal employee which postmark was not less than 25 days before the sale date. 26 USC 7502; Treas Reg §301.7502-1(c)(2).

**Caveat:** 26 USC 7425(d) provides in part that “the Secretary may redeem such property within the period of 120 days after the date of such sale or the period allowable for redemption under local law, whichever is longer.”

## STANDARD 16.19

### OMISSION OF NAME OF FORECLOSING ASSIGNEE OF RECORD IN PUBLISHED NOTICE OF SALE ON FORECLOSURE BY ADVERTISEMENT

**STANDARD:** THE PUBLISHED NOTICE OF SALE ON FORECLOSURE OF A MORTGAGE BY ADVERTISEMENT MUST INCLUDE THE NAME OF THE FORECLOSING ASSIGNEE OF RECORD.

**Problem:** A mortgage was assigned of record to Arthur Mills. Mills foreclosed the mortgage by advertisement. The published notice of sale did not name Mills. Was the notice sufficient?

**Answer:** No.

**Authority:** MCL 600.3212(a).

**Comment A:** The words “the assignee” as used in MCL 600.3212(a) designate the foreclosing assignee and not mesne assignees. Mortgage foreclosures were sustained in *Fox v Jacobs*, 289 Mich 619, 286 NW 854 (1939), and *Peterson v Jacobs*, 303 Mich 329, 6 NW2d 533 (1942), where mesne assignments were not set forth in the notice, and in *Guardian Depositors Corp v Keller*, 286 Mich 403, 282 NW 194 (1938), where the name of a mesne assignee was set forth erroneously.

**Comment B:** A foreclosure by advertisement pursuant to a published notice of sale that is defective for failure to include the name of the foreclosing assignee as required by MCL 600.3212(a) is voidable. See, *Kim v JPMorgan Chase Bank*, 493 Mich 98, 825 NW2d 329 (2012).

**Comment C:** See Standard 16.13 with respect to recording evidence of the assignment of the mortgage, ownership of an interest in the indebtedness secured by the mortgage, and the Comments thereto regarding MCL 440.9607(b).



## STANDARD 16.41

### DEED IN LIEU OF FORECLOSURE

**STANDARD:** A DEED IN LIEU OF FORECLOSURE OF A MORTGAGE GIVEN FOR NEW CONSIDERATION, VOLUNTARILY AND WITHOUT FRAUD OR DURESS, IS VALID.

**Problem A:** In February 2000, Henry Roe mortgaged Blackacre to Abigail Lane. Later, Roe defaulted on the mortgage. The mortgage debt exceeded the value of the property. In August 2002, Roe deeded Blackacre to Lane in lieu of foreclosure in consideration of Lane's agreement not to sue Roe on the mortgage debt. Roe did so voluntarily and without fraud or duress. Was the deed valid?

**Answer:** Yes.

**Problem B:** Same facts as in Problem A, except that concurrent with Roe's execution of the mortgage, Roe executed a deed in lieu of foreclosure to Lane for Blackacre which was escrowed with an escrow agent. Under the mortgage, Lane had the right to delivery of the deed after a default in consideration of Lane's agreement not to sue Roe on the mortgage debt. Roe also agreed in the mortgage to waive his right of redemption. In August 2002, Lane obtained the deed from the escrow agent and recorded it. Was the deed valid?

**Answer:** No.

**Authorities:** Problem A: *Batty v Snook*, 5 Mich 231 (1858); *Gillam v Michigan Mortgage Inv Corp*, 224 Mich 405, 194 NW 981 (1923); *Russo v Wolbers*, 116 Mich App 327, 323 NW2d 385 (1982); *Oakland Hills Dev Corp v Lueders Drainage Dist*, 212 Mich App 284, 537 NW2d 258 (1995).

Problem B: *Oakland Hills Dev Corp v Lueders Drainage Dist*, *supra*.

**Comment A:** A deed of mortgaged property which is not given for new consideration, voluntarily and without fraud or duress is insufficient to waive the mortgagor's equitable or statutory right of redemption and violates the doctrine against clogging the

equity of redemption. Courts will scrutinize any transaction in which a mortgagor waives its equitable or statutory right of redemption. See, *Russo v Wolbers, supra*.

- Comment B:** To avoid application of the general rule that when a mortgagee acquires the fee, the mortgage and fee are merged and the mortgage is extinguished, it is common for a deed in lieu of foreclosure to include a non-merger clause containing a statement of intent that the mortgage and fee do not merge. See the Comment to Standard 16.4 and the authorities cited therein with regard to the merger doctrine. Preservation of the mortgage lien enables the mortgagee to foreclose and extinguish any subordinate liens or encumbrances.
- Comment C:** The adequacy of the new consideration is determined by the courts on a case by case basis.
- Comment D:** As a condition to insuring the mortgagee's title under a deed in lieu of foreclosure, title companies often require that the mortgagor furnish written confirmation of the existence of the default, the consideration for the deed and the adequacy thereof, and that the deed was given voluntarily and without fraud or duress. Such written confirmation typically is not recorded.
- Comment E:** In addition to conveying mortgaged property to a mortgagee before or "in lieu" of foreclosure, a deed given after the foreclosure sale for new consideration, voluntarily and without fraud or duress, is also sufficient to waive the statutory right of redemption.

## STANDARD 16.42

### PURCHASE BY MORTGAGEE AT SALE ON FORECLOSURE BY ADVERTISEMENT

**STANDARD: A MORTGAGEE MAY PURCHASE THE MORTGAGED PROPERTY AT THE SALE ON FORECLOSURE BY ADVERTISEMENT.**

**Problem:** John Smith mortgaged Blackacre to Robert Jones. The mortgage was foreclosed by advertisement. Jones was the successful bidder at the foreclosure sale. Was the sale valid?

**Answer:** Yes.

**Authority:** MCL 600.3228.

**Comment A:** A mortgagee may credit the amount of the mortgage debt to the amount of its bid, and if the amount of the mortgagee's bid equals or is less than the amount of the debt, it need not tender cash at the sale. *Feldman v Equitable Trust Co*, 278 Mich 619, 270 NW 809 (1937).

**Comment B:** If the mortgagee bids the full amount of the mortgage debt at the foreclosure sale and is the successful bidder, the debt is satisfied and the lien of the mortgage is extinguished. *Smith v General Mortgage Corp*, 402 Mich 125, 261 NW2d 710 (1978); *Bank of Three Oaks v Lakefront Properties*, 178 Mich App 551, 444 NW2d 217 (1989); *Pulleyblank v Cape*, 179 Mich App 690, 446 NW2d 345 (1989); *Emmons v Lake States Ins Co*, 193 Mich App 460, 284 NW2d 712 (1992).



## STANDARD 16.43

### INADEQUACY OF BID PRICE AT SALE ON FORECLOSURE BY ADVERTISEMENT

**STANDARD:** MERE INADEQUACY OF THE BID PRICE AT A SALE ON FORECLOSURE BY ADVERTISEMENT IS NOT ITSELF SUFFICIENT TO INVALIDATE THE SALE.

**Problem:** Munising Bank made a \$500,000 loan to Shipwreck Inc. secured by a mortgage on Blackacre. Shipwreck defaulted, and Munising foreclosed the mortgage by advertisement. Munising purchased Blackacre at the foreclosure sale by credit bidding \$100,000 of the \$500,000 in outstanding debt. The true value of Blackacre at the time of the sale was \$500,000. Shipwreck sued to set aside the sale because the bid price was less than the true value of the property. Was the sale valid?

**Answer:** Yes.

**Authorities:** MCL 600.3280. *Cameron v Adams*, 31 Mich 426 (1875); *Chabut v Chabut*, 66 Mich App 440, 239 NW2d 401 (1976).

**Comment A:** A sale on foreclosure by advertisement will not be set aside based on an inadequate sale price absent fraud or irregularity. *Cameron v Adams, supra; Macklem v Warren Construction Co*, 343 Mich 334, 72 NW2d 60 (1955).

**Comment B:** In a foreclosure by advertisement, the mortgagor or other person liable on the mortgage debt may have a defense and right of set-off to a deficiency claim under MCL 600.3280, if the property sold was fairly worth the amount of the debt at the time and place of sale or the amount bid was substantially less than its true value.



## STANDARD 16.44

### REDEMPTION PERIODS AFTER MORTGAGE FORECLOSURE SALE

STANDARD: (A) IF A MORTGAGE EXECUTED ON OR AFTER JANUARY 1, 1965 IS FORECLOSED BY ADVERTISEMENT, THE PROPERTY SOLD MAY BE REDEEMED FROM FORECLOSURE WITHIN THE FOLLOWING PERIODS FROM THE DATE OF SALE:

- (1) FOR COMMERCIAL OR INDUSTRIAL PROPERTY, OR MULTIFAMILY RESIDENTIAL PROPERTY IN EXCESS OF FOUR UNITS, SIX MONTHS;
- (2) FOR RESIDENTIAL PROPERTY NOT EXCEEDING FOUR UNITS, IF THE AMOUNT CLAIMED TO BE DUE ON THE MORTGAGE AT THE DATE OF THE FORECLOSURE NOTICE IS MORE THAN 66-2/3% OF THE ORIGINAL DEBT SECURED BY THE MORTGAGE, SIX MONTHS UNLESS SUBPARAGRAPHS (3) OR (4) APPLY;
- (3) FOR RESIDENTIAL PROPERTY NOT EXCEEDING FOUR UNITS, IF THE AMOUNT CLAIMED TO BE DUE ON THE MORTGAGE ON THE DATE OF THE FORECLOSURE NOTICE IS MORE THAN 66-2/3% OF THE ORIGINAL DEBT SECURED BY THE MORTGAGE AND THE PROPERTY IS ABANDONED UNDER MCL 600.3241, ONE MONTH;
- (4) FOR RESIDENTIAL PROPERTY NOT EXCEEDING FOUR UNITS AND THE PROPERTY IS ABANDONED UNDER MCL 600.3241a, THE LATER OF 30 DAYS OR UNTIL THE TIME TO PROVIDE

**NOTICE UNDER MCL 600.3241a(c)  
EXPIRES; AND**

- (5) IF SUBPARAGRAPHS (1) THROUGH (4) DO NOT APPLY OR THE PROPERTY IS USED FOR AGRICULTURAL PURPOSES, ONE YEAR;**

**PROVIDED, HOWEVER, THE REDEMPTION PERIOD CAN BE EXTINGUISHED EARLY UNDER SUBPARAGRAPHS (1), (2) AND (5) ABOVE BY ENTRY OF A DISTRICT COURT JUDGMENT FOR POSSESSION IN FAVOR OF THE PURCHASER UNDER MCL 600.3238(10) IF THE MORTGAGOR UNREASONABLY REFUSES AN INSPECTION OR IF DAMAGE TO THE PROPERTY IS IMMINENT OR HAS OCCURRED.**

- (B) IF A MORTGAGE IS FORECLOSED BY JUDICIAL PROCEEDINGS, THE REAL PROPERTY SOLD MAY BE REDEEMED FROM FORECLOSURE WITHIN SIX MONTHS FROM THE DATE OF SALE.**

**Problem A:** In 2013, Acme Corporation granted a mortgage to State Bank on a manufacturing facility. State Bank foreclosed the mortgage by advertisement and was the successful bidder at the sale held on June 15, 2014. When did the redemption period expire?

**Answer:** December 15, 2014.

**Problem B:** Same facts as in Problem A, except that the property was an apartment project with 100 units. When did the redemption period expire?

**Answer:** December 15, 2014.

**Problem C:** In 2013, John and Mary Doe granted a mortgage to State Bank on their personal residence on a half-acre lot, securing a \$1,000,000 loan. State Bank foreclosed the mortgage by advertisement and was the successful bidder at the sale held on June 15, 2014. The foreclosure notice stated that the amount claimed to be due was \$900,000. When did the redemption period expire?

**Answer:** December 15, 2014.

**Problem D:** Same facts as in Problem C, except that the foreclosure notice stated that the amount claimed to be due was \$500,000. When did the redemption period expire?

**Answer:** June 15, 2015.

**Problem E:** Same facts as in Problem C, except that the Does abandoned their residence. Before commencing foreclosure, State Bank satisfied the inspection, notice and recording requirements of MCL 600.3241. No affidavit was given to State Bank or recorded within one month of the sale stating that anyone was occupying or intended to occupy the property. When did the redemption period expire?

**Answer:** July 15, 2014.

**Problem F:** Same facts as in Problem C, except that the Does abandoned their residence. State Bank did not satisfy the inspection, notice and recording requirements of MCL 600.3241 before commencing foreclosure. On August 15, 2014 (60 days after the foreclosure sale) State Bank satisfied the inspection, posting and notice requirements of MCL 600.3241a. No notice was given to State Bank by August 30, 2014 stating that the property was not abandoned. When did the redemption period expire?

**Answer:** August 30, 2014.

**Problem G:** In 2013, Acme Corporation granted a mortgage to State Bank on a manufacturing facility. State Bank foreclosed the mortgage by judicial proceedings, and was the successful bidder at the sale held on June 15, 2014. When did the redemption period expire?

**Answer:** December 15, 2014.

**Authorities:** (A) For foreclosure by advertisement, MCL 600.3240(7) through (13), 600.3241 and 600.3241a.

(B) For judicial foreclosure, MCL 600.3140.

- Comment A:** This Standard is limited to the statutes in effect as of June 19, 2014, because the statutes applicable to redemption periods have been amended frequently.
- Comment B:** In a foreclosure by advertisement, the mortgagor and its “heirs or personal representative, or any person that has a recorded interest in the property lawfully claiming under” them, are entitled to redeem the property from foreclosure, by paying the bid amount plus interest at the mortgage rate, plus certain fees. MCL 600.3240(1) and (2). In a judicial foreclosure, the mortgagor, its “heirs, executors, or administrators, or any person lawfully claiming” under them may redeem. 600.3140(1). Persons entitled to redeem have been held to include a second mortgagee, and a wife with a dower interest in the property foreclosed. *Chauvin v American State Bank*, 242 Mich 269 (1928) and *Tuller v Detroit Trust Co*, 259 Mich 670 (1932) (in the case of a judicial foreclosure), respectively. The redemption amount may be paid to the purchaser or its assigns or to the register of deeds. MCL 600.3240(1) and 600.3140(1). The purchaser must provide an affidavit with the sheriff’s deed stating the amount required to redeem, including a per diem amount. MCL 600.3240(2) and 600.3140(3).
- Comment C:** In computing the redemption period, the first day is excluded and the last day is included. If the last day is a Saturday, Sunday or legal holiday, the redemption period is extended to include the next day which is not a Saturday, Sunday or legal holiday. MCL 8.6 and MCR 1.108.
- Comment D:** MCL 600.3241 provides that abandonment is conclusively presumed upon satisfaction of the following: (a) within 30 days before commencing foreclosure, the mortgagee mails by certified mail, return receipt requested, to the mortgagor’s last known address, a notice that the mortgage is in default and that the mortgagee intends to foreclose; (b) before commencing foreclosure, the mortgagee executes and records an affidavit stating that the notice was mailed and the mortgagor has not responded; (c) before commencing foreclosure, the mortgagee mails the recorded affidavit to the mortgagor at the mortgagor’s last known address; and (d) before expiration of the applicable redemption period, the mortgagor or anyone else entitled to redeem does not give a written affidavit to the mortgagee and record a duplicate original stating that the mortgagor or person

claiming under the mortgagor is occupying or intends to occupy the premises.

MCL 600.3241a provides that abandonment is conclusively presumed upon satisfaction of the following requirements before the end of the redemption period: (a) personal inspection by the mortgagee which does not reveal that the mortgagor or persons claiming under the mortgagor are occupying or will occupy the premises; (b) posting of a notice at the time of the personal inspection, and mailing of a notice to the mortgagor by certified mail, return receipt requested, stating that the mortgagee considers the premises abandoned and that the mortgagor will lose all rights of ownership 30 days after the foreclosure sale or when the time to provide notice under subsection (c) expires, whichever is later, unless the mortgagor or its heirs, executors or administrators, or a person lawfully claiming under any of them provides notice that the premises are not abandoned; and (c) within 15 days after the notice required by subsection (b) was posted and mailed, the mortgagor or its heirs, executors or administrators, or a person lawfully claiming under any of them, has not given written notice by mail to the mortgagee at the address provided in the mortgagee's notice stating that the premises are not abandoned.

The Committee expresses no opinion as to whether a purchaser at a foreclosure sale who is not the mortgagee may claim the redemption periods under MCL 600.3241 and 600.3241a.

**Comment E:** MCL 600.3240(7) through (13), 600.3241 and 600.3241a do not define the terms “commercial or industrial property,” “multifamily residential property,” “units” or “residential property.” It is not clear from the statutes or case law whether these terms pertain to the actual, intended or legally permitted use of a property, or at what point in time the use is determined (e.g., on the date the mortgage is granted, the date the foreclosure notice is published or the date of the foreclosure sale). Also, the statutes and case law do not explain what is meant by the term “original indebtedness secured by the mortgage.” The Committee expresses no opinion on the meaning of any of these terms.

**Comment F:** There is a rebuttable presumption that property is used for agricultural purposes if the requirements of MCL 600.3240(17) are satisfied.

- Comment G:** The purchaser at a foreclosure sale by advertisement has the right to inspect the interior and exterior of the property after the foreclosure sale, and to request information or evidence regarding the condition of the property, provided certain notices are given. MCL 600.3237. The mortgagor's unreasonable refusal to allow such inspections or imminent or actual damage to the property can be grounds for a district court action granting the purchaser possession and early extinguishment of the right of redemption. MCL 600.3238.
- Caveat A:** If the sheriff's deed is not recorded within 20 days after the foreclosure sale, the redemption period commences when the sheriff's deed is recorded. See Standard 16.28.
- Caveat B:** Military service of a mortgagor tolls the redemption period. See Standard 16.36.
- Caveat C:** If the United States has a junior lien on foreclosed property, the redemption period and redemption amount may be affected. 26 USC 7425(d)(1); 26 CFR 301.7425-4; 28 USC 2410(c) and (d). See Standard 16.17.

## STANDARD 20.18

### LEVY AND DISTRAINT

**STANDARD: REAL PROPERTY TO WHICH A FEDERAL TAX LIEN ATTACHES IS SUBJECT TO LEVY, DISTRAINT AND SALE BY THE UNITED STATES. THE SALE PURCHASER ACQUIRES THE TITLE OF THE TAXPAYER AT THE TIME THE LIEN ATTACHED, PROVIDED:**

- (A) THERE WAS NO REDEMPTION FROM THE SALE;**
- (B) A PROPER DEED WAS ISSUED BY THE UNITED STATES; AND**
- (C) THERE WAS SUBSTANTIAL COMPLIANCE WITH THE APPLICABLE STATUTORY PROCEDURE.**

**Problem:** Donald Brown owned Blackacre, subject to a recorded mortgage. On January 3, 2006, a federal tax was assessed against Brown. On February 1, 2006, a notice of federal tax lien against Brown was recorded in the county in which Blackacre was located. Later the United States levied upon, seized and on March 22, 2006, sold Blackacre to Kevin Smith and recorded a certificate of sale. On April 13, 2006, Brown granted a second mortgage on Blackacre. On October 1, 2006, no redemption having been made within 180 days from the sale, the United States deeded Blackacre to Smith, who recorded the deed. There had been substantial compliance with all of the applicable statutory procedures. Did Smith acquire title to Blackacre subject only to the first mortgage?

**Answer:** Yes. The first mortgage was recorded before the recording of the general tax lien. Smith acquired the title Brown held at the time the tax lien attached. Accordingly, Smith's title was free of the second mortgage. If the second mortgage had been recorded after the assessment but before the recording of the notice of the

federal tax lien, Smith's title would be subject to the second mortgage.

**Authorities:** 26 USC 6331 to 6344, inclusive.

**Comment A:** This Standard applies to all federal tax liens, including general, estate and gift tax liens.

**Comment B:** In *United States v Craft*, 535 US 274, 122 S Ct 1414, 152 L Ed 2d 437 (2002), the Supreme Court held that a federal tax lien against one spouse attaches to real property owned by husband and wife as tenants by the entirety. In *United States v Barr*, 617 F3d 370 (CA 6, 2010), the Court of Appeals held that the Internal Revenue Service could foreclose a lien for unpaid federal taxes owed by Mr. Barr against property held by Mr. and Mrs. Barr as tenants by the entirety, and distribute one-half of the proceeds to the Internal Revenue Service and one-half to Mrs. Barr. The court held that "Title 26 USC § 7403 authorizes federal courts to decree a sale of property to enforce a federal tax lien. When such a foreclosure sale takes place, the proceeds are to be distributed "according to the findings of the court in respect to the interests of the parties and of the United States," thus providing fair compensation both to the government and to any third parties. *Id.* § 7403(c)." The court further held that "[b]ecause Mr. and Mrs. Barr have equal interests in their home, division according to their interests results in an equal distribution of the proceeds of the sale of that home."

**Note:** See Standard 20.2 regarding the scope of a general tax lien for unpaid federal taxes.

## STANDARD 24.5

### OWNERSHIP OF RIPARIAN RIGHTS

**STANDARD: RIPARIAN RIGHTS ATTACH ONLY TO LAND WHICH ADJOINS A NATURAL WATERCOURSE AND MAY NOT BE SEVERED FROM THAT LAND.**

**Problem:** Wilma White was the owner of Blackacre, which adjoined Gun Lake. Brenda Brown was the owner of Greenacre, which was adjacent to Blackacre but had no frontage on the lake. White constructed a channel across Blackacre connecting Gun Lake to Greenacre. Does Brown have riparian rights because of her ownership of Greenacre?

**Answer:** No. Because Greenacre does not adjoin Gun Lake, its owner has no riparian rights. Greenacre does not acquire riparian rights by virtue of the channel constructed across Blackacre because the channel is not a natural waterway.

**Authorities:** *Ruggles v Dandison*, 284 Mich 338, 279 NW 851 (1938); *Thompson v Enz*, 379 Mich 667, 154 NW2d 473 (1967).

**Comment A:** A riparian owner may grant to one or more non-riparians the right to exercise that owner's riparian rights. The exercise of such granted rights is subject to: (a) any limitations the riparian owner imposes on the non-riparian; and (b) any existing limitations on the rights of the riparian owner, including the restriction that the cumulative exercise of rights relating to the riparian parcel not be unreasonable. Thus, in the Problem, if White permits Brown to use the channel to cross Blackacre to gain access to Gun Lake, Brown may exercise White's riparian rights in the lake, to the extent granted by White. However, Greenacre remains non-riparian land, and the rights Brown may exercise are limited by the reasonableness standard applicable to Blackacre (See, Standard 24.4, Problem B).

**Comment B:** A parcel of land separated from a natural watercourse by a highway or walkway, where the highway or walkway is contiguous to the watercourse, is riparian, unless a contrary intention appears in the chain of title. *Croucher v Wooster*, 271

Mich 337, 260 NW 739 (1935); *Meridian Twp v Palmer*, 279 Mich 586, 273 NW 277 (1937); *Thies v Howland*, 424 Mich 282, 380 NW2d 463 (1985); 2000 *Baum Family Trust v Babel*, 488 Mich 136, 793 NW2d 633 (2010). If a dedicated highway or walkway parallels and is contiguous to a natural watercourse, the rights (if any) of the public for access to and use of the watercourse from the highway or walkway are determined by the scope of the dedication. *Thies v Howland*, *supra*; *Meridian Twp v Palmer*, *supra*; *McCardle v Smolen*, 404 Mich 89, 273 NW2d 3 (1978). If a highway or walkway (whether public or private) terminates at a natural watercourse, the way is generally deemed to provide access to the water for the use of those persons entitled to use the highway or walkway. *Backus v Detroit*, 49 Mich 110, 13 NW 380 (1882); *Thies v Howland*, *supra*; 2000 *Baum Family Trust v Babel*, *supra*.

**Comment C:** Riparian rights are not alienable, severable, divisible or assignable apart from the land that includes or is bounded by a natural watercourse. *Thompson v Enz*, *supra*. However, riparian rights may be subject to easements, licenses and similar interests. *Little v Kin*, 468 Mich 699, 664 NW2d 746 (2003).

**Comment D:** Michigan courts have not addressed the question of how far from the water's edge a riparian parcel may extend. It is unclear whether a riparian parcel may extend beyond the watershed or whether non-riparian land becomes riparian when added (by common ownership) to a riparian parcel. For a discussion of these concepts as developed in other jurisdictions, see 1 Beck and Kelley, *Waters and Water Rights*, § 7.02(a)(2), (3d ed, Release 2-12/2010); Tarlock, *Law of Water Rights and Resources*, § 3.47 (2011 ed).

**Caveat:** In *Newaygo Portland Cement Co v Sheridan Twp*, 137 Mich 475, 100 NW 747 (1904), a property tax case, the court approved separate assessment of bottomlands and riparian rights severed from the upland. The court did not address the propriety of the severance of riparian rights. All later cases follow the holding in *Thompson v Enz*, *supra*, that riparian rights are not severable.

## STANDARD 24.6

### BOUNDARY OF REAL PROPERTY ABUTTING GREAT LAKES

**STANDARD: THE WATERFRONT BOUNDARY LINE OF REAL PROPERTY ABUTTING THE GREAT LAKES IS:**

- (A) THE GOVERNMENT LAND OFFICE MEANDER LINE, IF TITLE ORIGINATED WITH A SWAMP LAND PATENT AND THE WATER'S EDGE IS LANDWARD OF THE MEANDER LINE;
- (B) THE GOVERNMENT LAND OFFICE MEANDER LINE OR THE NATURALLY OCCURRING WATER'S EDGE, WHICHEVER IS FURTHER LAKEWARD, IF TITLE ORIGINATED WITH EITHER A BRITISH OR FRENCH LAND GRANT CONFIRMED BY THE UNITED STATES OR A PATENT THAT PREDATES STATEHOOD; OR
- (C) THE NATURALLY OCCURRING WATER'S EDGE, IF TITLE ORIGINATED WITH A PATENT THAT POST DATES STATEHOOD AND IS NOT A SWAMP LAND PATENT.

**Problem A:** Mike White conveyed a government lot abutting Saginaw Bay to Brenda Brown. Private title to the lot originated with a patent from the State under the Swamp Land Patent Act of 1850. In 1997 the water's edge was 100 feet landward of the meander line shown on the original government land office survey. Does Brown's title to the lot extend to the meander line?

**Answer:** Yes.

**Problem B:** Mike White conveyed a parcel of land abutting Lake St. Clair to Brenda Brown. Private title to the land originated with a land grant from the British Crown, confirmed by the United States in 1811. In 1997 the water's edge was 100 feet landward of the meander line shown on the original government land office survey. Did Brown's title extend to the meander line?

**Answer:** Yes.

**Problem C:** Mike White conveyed a parcel of land abutting Lake Michigan to Brenda Brown. Private title to the land originated with a patent in 1840. In 2002 the water's edge was approximately 100 feet lakeward of the meander line shown on the original government land office survey. Does Brown's title extend to the water's edge?

**Answer:** Yes.

**Problem D:** Same facts as in Problem C, except that in 1997 the water's edge was 100 feet landward of the meander line shown on the original government land office survey. Does Brown hold title to that part of the land lying lakeward of the water's edge?

**Answer:** No.

**Authorities:** Problem A: *Sterling v Jackson*, 69 Mich 488, 37 NW 845 (1888); *Brown v Parker*, 127 Mich 390, 86 NW 989 (1901).

Problem B: *Klais v Danowski*, 373 Mich 262, 129 NW2d 414 (1964).

Problems C and D: *Hilt v Weber*, 252 Mich 198, 233 NW 159 (1930).

**Comment A:** A land patent is an instrument issued by a government to convey public land. Black's Law Dictionary (8th ed) p 1156. A meander line is a survey line that is intended to approximate the location of the water's edge at the time of the survey. *Pere Marquette Boom Co v Adams & Lord*, 44 Mich 403, 6 NW 857 (1880).

**Comment B:** *Hilt v Weber*, *supra*, holds that the landward boundary of title to land abutting the Great Lakes moves with the naturally-occurring water's edge, if title originated with a post-statehood patent. However, the Court expressly distinguished the analysis of title under a swamp land patent from the analysis of title under a U.S. patent of public land. 252 Mich at 210-212. The courts have not addressed title under a swamp land patent to exposed land lying between the meander line and the water's edge on the Great Lakes.

**Comment C:** The State and federal governments exercise regulatory authority over the area below the ordinary high water mark and over the area below the level of the Great Lakes. Rivers and Harbors Act, §10, 33 USC 403; Clean Water Act, 23 USC 1251, *et seq.*; Part 325 of the Natural Resources and Environmental Protection Act, MCL 324.32501, *et seq.* (formerly the Great Lakes Submerged Lands Act, 1955 P.A. 247).

**Comment D:** Littoral land on the Great Lakes is subject to a public trust extending to the ordinary high water mark, a line that lies "where 'the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic.'" *Glass v Goeckel*, 473 Mich 667, 674, 703 NW2d 58 (2005), cert den, 546 US 1174, 126 S Ct 1340, 164 L Ed 2d 54 (2006). The public trust includes the right of the public to walk on the beach below the ordinary high water mark. The ordinary high water mark for public trust purposes is different from the regulatory ordinary high water mark under Part 325 of the Natural Resources and Environmental Protection Act, MCL 324.32501 et seq. (formerly the Great Lakes Submerged Lands Act, 1955 P.A. 247). *Burleson v Dep't of Env'l Quality*, 292 Mich App 544, 808 NW2d 792, lv den, 490 Mich 917, 805 NW2d 438 (2011). Part 325 establishes a regulatory boundary at a defined elevation ("ordinary high water mark") for each Great Lake. For regulatory purposes, this artificial boundary avoids uncertainty arising from a boundary line that changes with the water level of the Great Lakes. This regulatory boundary does not, however, determine the lakeward extent of the title to privately-owned land abutting the Great Lakes. *Glass v Goeckel, supra*, at 682.





# MICHIGAN LAND TITLE STANDARDS

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