TITLE STANDARDS

October 10, 2019

10305
Who are we?

SOLACE is a program of the State Bar of Georgia designed to assist those in the legal community who have experienced some significant, potentially life-changing event in their lives. SOLACE is voluntary, simple and straightforward. SOLACE does not solicit monetary contributions but accepts assistance or donations in kind.

How does SOLACE work?

If you or someone in the legal community is in need of help, simply email SOLACE@gabar.org. Those emails are then reviewed by the SOLACE Committee. If the need fits within the parameters of the program, an email with the pertinent information is sent to members of the State Bar.

What needs are addressed?

Needs addressed by the SOLACE program can range from unique medical conditions requiring specialized referrals to a fire loss requiring help with clothing, food or housing. Some other examples of assistance include gift cards, food, meals, a rare blood type donation, assistance with transportation in a medical crisis or building a wheelchair ramp at a residence.

Contact SOLACE@gabar.org for help.
The purpose of the SOLACE program is to allow the legal community to provide help in meaningful and compassionate ways to judges, lawyers, court personnel, paralegals, legal secretaries and their families who experience loss of life or other catastrophic illness, sickness or injury.

**TESTIMONIALS**

In each of the Georgia SOLACE requests made to date, Bar members have graciously stepped up and used their resources to help find solutions for those in need.

A solo practitioner’s quadriplegic wife needed rehabilitation, and members of the Bar helped navigate discussions with their insurance company to obtain the rehabilitation she required.

A Louisiana lawyer was in need of a CPAP machine, but didn’t have insurance or the means to purchase one. Multiple members offered to help.

A Bar member was dealing with a serious illness and in the midst of brain surgery, her mortgage company scheduled a foreclosure on her home. Several members of the Bar were able to negotiate with the mortgage company and avoided the pending foreclosure.

Working with the South Carolina Bar, a former paralegal’s son was flown from Cyprus to Atlanta (and then to South Carolina) for cancer treatment. Members of the Georgia and South Carolina bars worked together to get Gabriel and his family home from their long-term mission work.

Contact SOLACE@gabar.org for help.
Dear ICLE Seminar Attendee,

Thank you for attending this seminar. We are grateful to the Chairperson(s) for organizing this program. Also, we would like to thank the volunteer speakers. Without the untiring dedication and efforts of the Chairperson(s) and speakers, this seminar would not have been possible. Their names are listed on the AGENDA page(s) of this book, and their contributions to the success of this seminar are immeasurable.

We would be remiss if we did not extend a special thanks to each of you who are attending this seminar and for whom the program was planned. All of us at ICLE hope your attendance will be beneficial as well as enjoyable. We think that these program materials will provide a great initial resource and reference for you.

If you discover any substantial errors within this volume, please do not hesitate to inform us. Should you have a different legal interpretation/opinion from the speaker’s, the appropriate way to address this is by contacting him/her directly.

Your comments and suggestions are always welcome.

Sincerely,

Your ICLE Staff

Jeffrey R. Davis
Executive Director, State Bar of Georgia

Michelle E. West
Director, ICLE

Rebecca A. Hall
Associate Director, ICLE
AGENDA

PRESIDING:
Hilary Herris Fentress, Program Chair; Vice President and Georgia State Counsel, Chicago Title Insurance Company, Commonwealth Land Title Insurance Company, Atlanta

7:30  REGISTRATION AND CONTINENTAL BREAKFAST (All attendees must check in upon arrival. A jacket or sweater is recommended.)

8:10  WELCOME AND PROGRAM OVERVIEW
Hilary Herris Fentress

8:15  PROFESSIONALISM IN REAL ESTATE PRACTICE: IF WE DON’T HAVE STIMULUS HABITUATION TO CALM OURSELVES, WHAT DO WE RELY ON? HINT: IT’S PROBABLY BAD FOR YOU. AND OTHER TOPICS.
T. Matthew Mashburn, Aldridge Pite LLP, Atlanta

9:15  EASEMENTS/SURVEYS – CHAPTER 38
Kyle J. Levstek, Calloway Title and Escrow LLC, Atlanta

9:45  BREAK

10:00  THE BASICS
THE TITLE EXAMINER – CHAPTER 1
USE OF THE RECORD – CHAPTER 2
NAME VARIANCES – CHAPTER 3
Mark S. Robinson, Old Republic National Title Insurance Company, Alpharetta

10:45  DECEDENT’S ESTATE – CHAPTER 13
Tania R. Tuttle, McLain & Merritt PC, Atlanta

11:30  EXECUTIONS AND ATTESTATION – CHAPTER 4
AFFIDAVITS AND RECITALS – CHAPTER 6
Michael Cotton, Chicago Title Insurance Company and Commonwealth Land Title Insurance Company, Atlanta

12:00  LUNCH (Included in registration fee.)

12:30  TRANSFERS AND AGENTS – CHAPTER 8
CONVEYANCES BY AND TO TRUSTEES – CHAPTER 29
Michael C. Obertone, Stewart Title Guaranty Company, Roswell

1:15  TITLE STANDARDS AND LAWYER LIABILITY
Jennifer M. Guerra, Carlock Copeland & Stair LLP, Atlanta

1:50  BREAK

2:15  ENTITY CONVEYANCES INSTRUMENTS EXECUTED BY CORPORATIONS – CHAPTER 9
CONVEYANCES INVOLVING LIMITED PARTNERSHIPS – CHAPTER 10
CONVEYANCES INVOLVING GENERAL PARTNERSHIPS – CHAPTER 11
CONVEYANCES INVOLVING LIMITED LIABILITY COMPANIES – CHAPTER 12
Nathan P. Sycks, McManamy McLeod Heller LLC, Alpharetta

3:15  ADJOURN
TABLE OF CONTENTS

FOREWORD ........................................................................................................................... 6

AGENDA................................................................................................................................. 7

TITLE STANDARDS:

PROFESSIONALISM IN REAL ESTATE PRACTICE: IF WE DON’T HAVE
STIMULUS HABITUATION TO CALM OURSELVES, WHAT DO WE RELY ON?
HINT: IT’S PROBABLY BAD FOR YOU. AND OTHER TOPICS ......................................................... 10

EASEMENTS/SURVEYS – CHAPTER 38 .................................................................................. 76

THE BASICS:
THE TITLE EXAMINER – CHAPTER 1
USE OF THE RECORD – CHAPTER 2
NAME VARIANCES – CHAPTER 3 .......................................................................................... 79

DECEDEED’S ESTATE – CHAPTER 13 .................................................................................... 126

EXECUTIONS AND ATTESTATION – CHAPTER 4
AFFIDAVITS AND RECITALS – CHAPTER 6 ........................................................................... 173

TRANSFERS AND AGENTS – CHAPTER 8
CONVEYANCES BY AND TO TRUSTEES – CHAPTER 29 ......................................................... 179

TITLE STANDARDS AND LAWYER LIABILITY ..................................................................... 268

ENTITY CONVEYANCES:
INSTRUMENTS EXECUTED BY CORPORATIONS – CHAPTER 9
CONVEYANCES INVOLVING LIMITED PARTNERSHIPS – CHAPTER 10
CONVEYANCES INVOLVING GENERAL PARTNERSHIPS – CHAPTER 11
CONVEYANCES INVOLVING LIMITED LIABILITY COMPANIES – CHAPTER 12 ......................... 270
# TABLE OF CONTENTS

## APPENDIX:

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICLE BOARD</td>
<td>435</td>
</tr>
<tr>
<td>GEORGIA MANDATORY CLE FACT SHEET</td>
<td>436</td>
</tr>
<tr>
<td>CHIEF JUSTICE’S COMMISSION ON PROFESSIONALISM</td>
<td>437</td>
</tr>
</tbody>
</table>
PROFESSIONALISM IN REAL ESTATE PRACTICE: IF WE DON’T HAVE STIMULUS HABITUATION TO CALM OURSELVES, WHAT DO WE RELY ON? HINT: IT’S PROBABLY BAD FOR YOU. AND OTHER TOPICS.
Professionalism in Real Estate Practice: If We don’t have Stimulus Habituation to Calm Ourselves, what do We rely on? HINT: It’s probably bad for You and Other Topics –

Presentation to ICLE in Georgia Title Standards Seminar - October 10, 2019 by Matt Mashburn

"We remember what we understand; we understand only what we pay attention to; we pay attention to what we want." - Edward Bolles
Why should we aspire to Professionalism in Law Office Management?

1. The difference between Ethics and Professionalism. See *King v. State*, 262 Ga. 477, 421 S.E.2d 708, 709 (1992), Benham J., concurring. (“Recently, in commenting on the need for professionalism, Chief Justice Clark said, ‘Ethics is that which is required and professionalism is that which is expected.’”).

2. The difference between “following the Rules” and Ethics & Professionalism. See *Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.*, 265 Ga. 374, 453 S.E.2d 719 (1995), Benham, J., concurring. (“While I applaud the desire of this court to clear up perceived confusion in the trial of legal malpractice cases and agree with the disallowance of ethical violations as a basis for malpractice actions, I must sound a note of caution with regard to our holding that ethical rules are relevant to the standard of care in legal malpractice actions.”).

3. The difference between ethically supervising your staff and running your law office like a Professional.
What are the Characteristics exhibited by a Professional?

Honesty.
Trustworthiness.
Truthfulness.
Integrity.
Fairness.
Civility.

See *King v. State*, 262 Ga. 477, 421 S.E.2d 708, 709 (1992), Benham J., concurring. (Professionalism comes when one realizes that all of the problems encountered in a closing practice cannot be solved by passing laws, rules or regulations).

See “A Lawyer’s Creed” or The Aspirational Statement on Professionalism,
A Professional also has a client, who is either a human or the authority of which can be traced to a direct grant from one or more humans.

A Professional can not represent a “Closing” any more than a Professional could represent the Tree that Owns Itself or a Sidewalk. Or a Swing set. Or a Porch. Or a Deed. Or a Stapler.

How would a “Closing” execute an engagement letter? How would a “Closing” write a check?

People will fight me as to whether it’s ethical; but nobody can seriously argue with a straight face that it’s professional.
Hypothetical 1:

[Appellant] now appeals, contending that the trial court erred by (1) granting partial summary judgment to [Appellee], (2) directing a defense verdict by erroneously construing the purchase agreement and ignoring the evidence supporting a finding that [Appellant’s] contractual right to cancel was triggered, (3) making certain evidentiary rulings, and (4) denying [Appellant’s] motion for attorney fees and awarding fees to [Appellee].” Footnote 2

Footnote 2 “We have endeavored to address the merits of [Appellant’s] arguments properly made in [Appellant’s] appellate brief.”

IOLTA Trust Account Basics

What is an IOLTA account and what are its characteristics?

A segregated account for the purpose of holding money received in trust.

Short term account (don’t put long term escrow money in your IOLTA closing account).

Each and every single closing within the IOLTA should balance to zero (there should be no “excess” in your IOLTA trust account and for goodness sake there should not be a “deficit.”).

The interest on the IOLTA account goes to the Georgia Bar Foundation.

Participation in the IOLTA program is mandatory.
Trust Account Basics (continued)

Setting up the Account

Use only an “approved institution” (i.e. one that has agreed to operate in accordance with the Bar’s IOLTA rules). Not every bank is an approved institution.

*Practice Note: If I try to set up an IOLTA account and the business services officer knows less than I do, I will ask for their supervisor or go to another bank.

If your Law Firm’s policies and procedures allow, you may have more than one IOLTA account and you may have IOLTA accounts at more than one Bank.

There is no requirement that the signer be a lawyer. (A Professional would say “What, are you, crazy?!”). Can you see the difference between Professionalism versus the minimum of what is required here?
Receiving and Disbursing from a Trust Account

Moving other people’s money around safely, accurately and leaving a paper trail.

Our first efforts were to eliminate the thinking that an IOLTA account is “one bucket” full of fungible dollars.

We’re seeing your trust accounts start to show separation; but it’s still a little fuzzy.
What your Trust Account *SHOULD* look like

Each Closing or Each Matter within the Trust Account is in its own column with no crossover to any other Closing or Matter.
You are responsible for the funds from the second you accept the funds to the second that you properly disburse the funds (but only if you properly disburse the funds).

Transfer funds to your Firm’s operating account as soon as the fees are earned, but leave a trail showing conclusively the date, the amount and the reason that the funds were transferred. *In the Matter of Shanina Nashae Lank, S16Y0723, S16Y0724, S16Y0725* (January 23, 2017)(…the $59.88 item that presented against insufficient funds in her attorney trust account was a re-occurring renewal payment for the law firm’s website hosting services…”)* Id. at 4. Why was this lawyer drawing website hosting fees out of a trust account?
DO NOT UNDER ANY CIRCUMSTANCES EVER WITHDRAW MONEY FROM AN IOLTA ACCOUNT USING AN ATM.

IN FACT, DON’T EVEN GET AN ATM CARD OR ANY OTHER KIND OF CARD FOR AN IOLTA ACCOUNT.
Hypothetical Number 2:

Attorney is retained to handle a personal injury matter.

Attorney obtains a $75,000 settlement in the personal injury matter.

Attorney fails to promptly disburse the settlement funds to the client or the client’s medical providers.

Attorney fails to render a full accounting of the funds to his client.

Voluntary surrender of license accepted.

“The maximum penalty for a single violation of Rule 1.15(I) is disbarment.”

*In re: Richard V. Merritt, S18Y0387* (January 29, 2018)
Maintaining Trust Account Records

Cash in minus cash out equals zero. All the time, every time.
Maintain a “general trust account ledger” to tell you the amount in your account and a “client ledger” to tell you how the amount in your account is divided among your clients.

Reconcile early, reconcile often. Reconcile, reconcile, reconcile. (One of the most important “red flags” of trust account theft is revealed through either reconciliation or the LACK of reconciliation).

You are required to maintain records on your account for six years after the termination of the client’s matter. (Bar Rule 1.1.5(1)(a)).

What if I bounce a check? DON’T. JUST DON’T.

1. Don’t write checks off of your deposits until you know that they have cleared.
2. Disburse only off of wired funds.
3. Don’t wire out before you receive the wire in. (i.e. Don’t float a wire out.)

Why do the checks have to say that the account is a trust account? (It is helpful in the prevention of fraud. It might just save you).
What are the Advantages of Three Way Reconciliation?

Three way reconciliation is your canary in the coal mine to let you know about trouble before it hits. See Creed, Lines 62-66.

A Professional will use Reconciliation to be **AHEAD** of the following becoming a crisis:

1. Find out that payoffs have not been sent.
2. Find out that documents have not been recorded.
3. Find out that there is a delay in issuing title policies.
4. Find out that you are being stolen from.
5. Find out that taxes have not been paid on a timely basis.
6. Find out that you have any number of post closing problems
• An Honest lawyer does not steal from a trust account.
• An Ethical lawyer does not allow others to steal from a trust account.
• A Professional knows how to do the job of every person who touches the lawyer’s trust account and not only exercises general supervision of the trust account but is aware of every aspect of the trust account’s operation.

Professionalism
Trust Account Security

There are three sources of attack on Trust Accounts:

- Insiders
- Outsiders
- The Attorney

For just about all agents, there will be some attempt to take money from their accounts at some point.

Whether the attempts are successful depends on the preventive measures the agent has incorporated into their processes.
The Security of a Trust Account is directly proportional to the interest and attention the lawyer devotes to the oversight and operation of the account. Curiosity not only kills unwanted cats, it stops you from being ripped off.

1. Separation of Powers is not only good for government, it’s good for trust account security.
2. Limit the possible damage by setting transactional limits per person.
3. Maintain physical control over unused checks, escrow files and undeposited receipts.
4. Apply the advice that you give to your clients and “paper” everything.
5. Management Review. Somebody’s got to have your back.
Practical Tips for Trust Account Safety

1. Have your bank require an actual signature before any outgoing wire is sent unless you, yourself, are the one initiating the wire. (I know that some of you have the ability to wire from your desktop). Professionalism Aspiration, not an ethical duty.

2. Don’t ever, ever, ever, ever, ever use a signature stamp. Ever. Professionalism Aspiration/Tip, not an ethical duty.

3. Don’t ever, ever, ever, ever, ever sign a blank check. Professionalism Aspiration/Tip, not an ethical duty.

4. Breaks in check numbers don’t always mean that a check is uncashed, sometimes it means that somebody stole checks from the back of your checkbook. Professionalism tip, not an ethical duty.

5. Be very, very suspicious of payoff checks where the endorsement on the back shows an account number and nothing else. Professionalism tip, not an ethical duty.
Professionalism Tips (Continued), none of these are REQUIRED by the ethics rules.

5. Bank statements and correspondence regarding the trust account should be periodically opened by someone other than the bookkeeper.

6. The person who is the most indignant about you asking questions is probably the most likely to be stealing from you.

7. Be curious, ask questions, check statements, look at the check register.

8. Title company auditors report that the most likely person to be embezzling from trust accounts is the person who is “the most trusted employee in the Firm.”
Mashburn goes from Preaching to Meddling.

Remember, this is a Professionalism Hour
We’re aspiring to do better than just the minimum
When is it ok to sign someone else’s name?

Never

Not on any document that you want me to insure or any document that provides authority for any document that you want me to insure.

Let’s don’t worry about the past for a moment, let’s worry about doing it right going forward.
<table>
<thead>
<tr>
<th>Fraud</th>
<th>Theft</th>
</tr>
</thead>
<tbody>
<tr>
<td>Embezzle</td>
<td>Conspiracy</td>
</tr>
<tr>
<td>Bribery</td>
<td>Money Laundering</td>
</tr>
<tr>
<td>Perjury</td>
<td>Smuggling</td>
</tr>
<tr>
<td></td>
<td>Misrepresentation</td>
</tr>
<tr>
<td></td>
<td>Defamation</td>
</tr>
</tbody>
</table>

People also search for: Forgery
• Forge: To invent; to create.
• First Known Use: 1583

A Lawyer must not forge. A Professional does not appear to forge. A Professional makes it very very clear who is signing. Creed, Lines 51, 53.
Ask Yourself: What is the purpose to create/invent this signature on this document?

Is the purpose to appear as if the purported signor executed the copy?

What are you trying to do that can’t be done through a conformed copy?

What impression are you trying to create in the recipient?

What conclusion are you trying to have the recipient draw?
Other signature problems

Attorney notarized the wife’s signature on a deed. Closing proceeds were paid jointly to order of H and W. Attorney believed that the spouse had signed a deed. Closing proceeds were deposited in joint account. Attorney did not see the wife sign the deed. Wife later ratified the sale of the property. The wife did not sign the document in the attorney’s presence.

Voluntary discipline rejected.

_In re Edward Neal Davis_, S17Y1993 (May 7, 2018).
Involves **FOUR** misrepresentations when “signed, sealed and delivered in the presence of” is not.

1. Not signed,
2. Not sealed,
3. Not delivered,
4. Not in the presence of.

Also involves violation of Oath of Office when involving a notary public and not “just” an unofficial witness. “I do solemnly swear or affirm that I will well and truly perform the duties of a notary public to the best of my ability; and I further swear or affirm that I am not the holder of any public money belonging to the state and unaccounted for, so help me God.”

- O.C.G.A. § 45-17-3.

The biggest problem that I experienced trying to prohibit the unauthorized practice of law in the closing arena is lack of proper witnessing by lawyers.

**Subscribing Witness**
Where does the second witness at a “witness only closing” come from?

Rule 8.4(a)(4): “It shall be a violation of the Georgia Rules of Professional Conduct for a lawyer to…engage in professional conduct involving dishonesty, fraud, deceit[,] or misrepresentation.”

Creed – Lines 51 and 53.
• Rule 8.4(a)(4) does NOT require harm and it does NOT require an intent to mislead or deceive. Rather, Rule 8.4(a)(4) can be violated by conduct “likely to mislead or deceive another.” *In re Davis*, at 3.

• Lack of intent to deceive is a mitigating factor. *Id.*, at 4.
• “Based on that record, this Court agreed to accept West’s renewed petition for voluntary discipline without an admission of a Rule 8.4(a)(4).


“The Bar adds that a reprimand is appropriate where an attorney’s misconduct includes signing a client’s name to a document, even where violation of Rule 8.4(a)(4) is found, and says that it is not aware of any case in which this court has imposed a suspension where the sole misconduct was improperly signing a client’s name.”

*In re West, 804 SE2d at 342*
Hypothetical Number 2:

Husband and Wife purchased a home in Dekalb County. Husband and Wife refinanced first loan with a new loan. Wife was not present at the refinance. Wife was not listed as borrower on the note. Husband testified that he did not sign a security deed at the closing. Both Husband and Wife testified that neither of them ever signed a Deed to Secure Debt. Later, an Affidavit of Lost/Misplaced Deed for Recording Was recorded to which was attached a purported copy of The Deed to Secure Debt signed by BOTH Husband & Wife. Husband received a call from the DeKalb County Clerk’s Office “advising him that someone was requesting to ‘force’ A security deed into the records for the Property.” The trial court found that the filed DSD was forged.

The Signatures of Others
Hypothetical Number 2:

Trial Court denied request for reformation and for declaratory judgment. Trial Court declined to equitably subordinate against two other creditors who appeared in the meantime. Trial Court awarded attorneys fees to Husband and Wife.

Ruled: No equitable subordination due to unclean hands. Attorney fees reversed for factual findings supporting the award. (The only reference to attorney fees was a statement by the borrower’s attorney during closing argument that they incurred costs “upwards of $9,000” in defending the case).

*Bank of New York Mellon v. Edmondson, A17A1640*  
(March 1, 2018)
Ask yourself: “If it’s not important that the actual person sign the document, why is the document being signed in the first place?”

Law firm required to pay nearly $1.2MM in damages plus $550,000 in attorney fees. Associate alleged to have “forged the signature of an associate general counsel at [well regarded company] on a visa document.” ABA Journal, March 22, 2018 accessed May 29, 2018. Law Firm says associate “signed the document on the corporate lawyer’s behalf after Plaintiff told associate that Plaintiff had power of attorney that permitted Associate to sign.” Id. Defense admits associate “had made some mistakes, but it was wrong to characterize her signature as a forgery…” Id.

If you are signing for someone else, don’t.
But if you do, make it absolutely clear that you are not that person.
“Well, that defeats the whole purpose if I did that!” is NOT the right response.

Signing for other people
The closer it looks to the person’s actual signature or initial, the more likely it becomes that the signature is an “invention” which is being “forged” to look like that which it is not (the real person’s real signature), and therefore a forgery.

The more “lifelike,” the more an “invention” and the more an invention the more likely that it was “forged.”

Ask yourself, “How close do I sound to the drinking driver who responds to the field sobriety test with “I couldn’t even do that if I was sober!”

Initialing for other people
A Common Practice is to “reimburse” the IOLTA Account for costs that exceed expectations by a few dollars. For example, a deed recorded at the courthouse costs $5.00 more than anticipated. You cut the correct amount in your check to the Clerk and reimburse the IOLTA account $5.00 from your operating account.
However, it would be better practice to cut the check from the IOLTA for the amount predicted and cut your check to the CLERK rather than to reimburse IOLTA. You are still cutting one check from the Operating Account, all you have done is change the Payee.

It’s easy!
Professionalism

Fact Pattern # 1. Attorney self reported an overdraft in his IOLTA Trust Account. The Office of Disciplinary Counsel did a forensic analysis of his accounts. The Attorney paid all sums owed to respective clients.

Attorney disbursed from his IOLTA account all or part of his attorneys fees and out-of-pocket expenses in anticipation of receipt of settlement proceeds for the cases associated with those fees.

He also distributed to some clients their shares of anticipated settlement proceeds from his IOLTA trust account before he received the settlement proceeds in their cases.

He used IOLTA funds that belonged to other clients and his own earned fees from settled cases to cover the money improperly withdrawn from his trust account.

The amount of money the attorney used belonging to others was approximately $180,000.

Held: While this was not deliberate stealing from the trust account, it does represent “an egregious example of an attorney who took virtually no steps to maintain even the semblance of an accounting of his clients’ funds.” Suspended for no less than 7 months.

In re Foust, Supreme Court of Montana, PR16-0301 (June 6, 2017).
Professionalism

Fact Pattern # 2. Attorney became subject to collection efforts after he was hospitalized due to illness and unable to work while on bed rest.

He made withdrawals for personal expenses from his trust account.

He deposited personal funds into his trust account to conceal them from his creditors.

After Attorney’s Bank notified the Bar of trust account NSF, the Bar advised attorney to attend a general consultation on trust account management with the Bar’s Law Practice Management Program.

Attorney’s participation in the Law Practice Management Program cited as mitigating factor.

Attorney cooperated with the Bar by submitting a detailed letter concerning his misconduct to the State Bar and has expressed remorse for his conduct.

Six month suspension.

In re Clarence R. Johnson, Jr: S16Y1709 (October 3, 2016) S17Y1918 (January 29, 2018)
Professionalism

Fact Pattern #3.

Attorney’s bank notified the State Bar about insufficient funds checks.
Attorney admitted that he misappropriated funds for his personal use and did not otherwise account to his client for funds.
Attorney admitted that he provided false and misleading information to the Office of General Counsel during its investigation of the matter.

Voluntary surrender of license, tantamount to disbarment, accepted.

*In re Lorne Howard Cragg*, S18Y0269 (January 29, 2018).
Examine how the two cases turned out:

Cooperation v. Misleading.

Remorse v. No remorse.

Explaining the situation to the investigators v. the investigators having to dig out the information.

Penalties: Six month suspension versus voluntary surrender or disbarment.

What do the cases suggest? (This is not advice):

1. Self report (but do your own investigation first so that you know what you are reporting and that your reporting is accurate and thorough).

2. Know *WHY* your account was out of balance and immediately put in place remedial measures and correct systemic flaws so that it doesn’t happen any more.

A Professional acts with complete Honesty. Creed, Line 129.
Professionalism

Fact Pattern # 4.
Attorney completed all conditions for reinstatement following Attorney’s suspensions by the Court.
Attorney ordered reinstated to the practice of law in the State of Georgia.

Reinstated. In the Matter of Tony C. Jones, S11Y1626, S13Y0138, S15Y1641 (January 19, 2016)
A FINAL WORD ON PROTECTING YOU FROM YOURSELF (AND YOUR CLIENTS AND THE PUBLIC FROM UNPROFESSIONALISM).

There is a stigma to bankruptcy; but the stigma of having your law license revoked is much greater.

Always remember that you can file bankruptcy and still practice law; but you won’t be allowed to practice law if you take money from a trust account.

If it ever gets so bad that you think your only option is to take money from your trust account, call me up any time of the day or night and explain it to me. I promise that I will listen for as long as you want to talk. You are ethically required to seek help and We have a professional duty to help you.
Professionals are the ones who exercise voluntary restraint, self-regulation, self-awareness and have a grasp of The Greater “Why do we do it this way?” Mashburn,  *Professionalism in Law Office Management* (2017).
Professionalism

TOPIC TWO

MENTAL WELLNESS AS AN ETHICAL DUTY AND A HALLMARK OF PROFESSIONALISM
Is there a Problem?

21 percent of licensed, employed lawyers qualify as problem drinkers.

For lawyers under age 30, its 31.9 percent.

By comparison only 6.8 percent of the adult population as a whole has a drinking problem.

Lawyers have twice the rate of problem drinking than among surgeons.

The same study reports that the most common barrier to a lawyer seeking treatment for a drinking problem is the concern that others will find out that they need help.

“Upon arrival, though, instead of making a brilliant argument before a judge, these young lawyers may find themselves competing with their similarly gifted peers for the privilege of proofreading documents for a high-ranking partner. If they do a great job, they may get to proofread all weekend.” Smith, The most terrifying part of my drug addiction? That my Law Firm would find out. Washington Post, March 24, 2016.
For the First time in my lifetime:

Lawyers have passed Dentists in the rate of suicide;

Lawyers have passed Nurses and Teachers in self-rated “Low Decision Latitude” (the second highest contributing factor behind family history in predicting coronary artery disease and heart attacks) Ridley, *Genome: The Autobiography of a Species in 23 Chapters* (Harper Perennial 2006)(citing a study of 17,000 British civil servants and another study of over 1,000,000 employees of Bell Telephone Company); and

Younger lawyers (those under 30) have surpassed Native Americans in alcoholism rates.
In addition to high rates of substance abuse and alcoholism, lawyers have three times (3.6 actually) the rate of depression than society as a whole. Lukasik, wwwlawyerswithdepression.com, November 2, 2016 citing Hazelden Betty Ford Foundation study).

Lawyers self reporting issues that they themselves had experienced during their career as a Lawyer:

<table>
<thead>
<tr>
<th>Issue</th>
<th>Percentage</th>
<th>Currently Experiencing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anxiety</td>
<td>61.1%</td>
<td>19%</td>
</tr>
<tr>
<td>Depression</td>
<td>45.7%</td>
<td>28%</td>
</tr>
<tr>
<td>Social Anxiety</td>
<td>16.1%</td>
<td></td>
</tr>
<tr>
<td>Suicidal Thoughts</td>
<td>11.5%</td>
<td></td>
</tr>
<tr>
<td>Panic Attacks</td>
<td>8.0%</td>
<td></td>
</tr>
<tr>
<td>Self-Injury</td>
<td>2.9%</td>
<td></td>
</tr>
<tr>
<td>Suicide Attempt</td>
<td>0.7%</td>
<td></td>
</tr>
</tbody>
</table>
Among the lawyers who used a drug, how many used that drug in the last week:

- Stimulants: 74.1%
- Sedatives: 51.3%
- Tobacco: 46.8%
- Marijuana: 31.0%
- Opioids: 21.6%

One risk factor not present in other professions is the requirement of a pessimistic thinking style to do the job of lawyering well.

One study tested the entire entering class of the University of Virginia Law School in 1990 and followed the students throughout their three year career. As a whole, pessimists outperformed the optimists in grade point average and law journal success. Seligman, Ph.D., Why are Lawyers so Unhappy? from Authentic Happiness: Using the New Positive Psychology to Realize Your Potential for Lasting Fulfillment.

If you think about it, all of due diligence is based on pessimism.
The ability to anticipate the whole range of problems and betrayals that non-lawyers are blissfully blind to is highly adaptive for the practicing lawyer who can, by doing so, protect clients from dangerous events.


Police Officer. Kevin M. Gilmartin, *Emotional Survival for Law Enforcement*, (E-S Press, Tuscon, AZ), pg. 35 (“The average citizen has the neurological advantage of stimulus habituation. The capacity to be non-reactive to stimuli whose threshold of perceived potential danger is insufficient to warrant attention. The law enforcement perceptual style considers stimulus habituation to be potentially lethal carelessness.”)

In other words, just like a police officer and a combat soldier, a lawyer must develop a skill to recognize when “things just don’t look right” in order to survive.

“Angry or irritable outbursts,” “self-destructive behavior,” “hyper-vigilance,” “exaggerated startle response,” and in more severe cases “problems with concentration,” and “sleep disturbance.”

Remind you of anybody you know?
REAL ESTATE LAWYERS ARE USUALLY VERY GOOD AT RECOGNIZING AND SOLVING PROBLEMS.

The adversarial nature of law, trial by combat, confrontation, maximizing billable hours and the “ethic” of getting as much as you can for your clients are not going away.

You (i) either already have the ability to turn it off when you go home; (ii) you can learn to turn it off when you go home (your spouse and family will thank you); (iii) you can take it home with you and you and those around you will suffer from it (or most likely already do) or (iv) you live in a household where pessimistic judgment is embraced within the household. If not and there is no let up, you will either (i) become completely reliant on some sort of coping mechanism (almost certainly one that is probably bad for you); (ii) suffer from a serious bout of depression (or worse) or (iii) do both. Seligman, Verkuil & Kang, Why Lawyers are Unhappy, 10 Deakin Law Review 49 (2005).

But what you CAN do is treat your mental wellness as your professional duty (just as important as reconciling your trust accounts and getting your CLE Professionalism hour).
Professionalism

Fact Pattern # 5.
An Assistant District Attorney overheard a Criminal Defendant’s Attorney on a telephone call in the courthouse men’s restroom apparently attempting to purchase controlled substances for himself.

The telephone call was on the afternoon before the beginning of a jury trial.

The ADA brought the Attorney’s behavior to the attention of the presiding judge. The next morning, the Attorney appeared in court for jury selection but seemed to be under the influence of a controlled substance.

The Attorney had bloodshot eyes and welts and bruises on his face.

The Attorney fell asleep at counsel’s table.

The Court held the attorney in contempt and imposed jail time to be immediately served.

The Attorney failed to refund the unearned portion of the retainer paid to the Attorney by the client.

Disbarred. Multiple offenses and a pattern of misconduct. Failed to timely respond.


• The Court of Appeals upheld the conviction of former prosecutor and criminal defense lawyer Rand Csehy, who was charged with possession of meth after a judge ordered him to take a urine test when he appeared unsteady and disheveled in court.

What would YOU do?
Professionalism

Hypothetical Number 3. In response to Bar Complaint, Attorney:

Referred to the proceeding as “a Star Chamber proceeding.”

Referred to the special master as the “High Executioner.”

Suggested that the hearing be held at the Varsity restaurant in Athens.

Referred to the Special Master as “Ms. Hyphenated.”

Inquired as to whether the Special Master was married so as to get her spouse the “Congressional Medal of Honor and/or sainthood.”

After being instructed by the Special Master not to contact her *ex parte* persisted in sending emails about his case without copying counsel for the State Bar.

After presenting seven character witnesses in mitigation, abruptly walked out of the hearing remarking that he had a more pressing engagement – a card game – to attend.

The seven character witnesses testified only that he had a reputation as an effective advocate, that he generally got good results for his clients, and that he had not made any false statements of which they were aware.

Disbarred.*  *In the Matter of Christopher G. Nicholson, S16Y1446 (October 3, 2016).*
“Mental Wellness as a Professionalism Issue rather than an Ethical Issue”
The Special Master found that Attorney’s behavior was proof of an ongoing mental health issue.

The Special Master found that if the Attorney were not mentally ill, the Special Master would recommend disbarment.

The Special Master recommended one year suspension minimum with conditions.

The Review Panel recommended two year suspension minimum with conditions.

Attorney disavowed any mental illness.

Georgia Supreme Court: “With all of the outrageous conduct throughout this disciplinary process, it is easy to forget what this case is about: dishonesty.”

Thus, LYING was an ETHICAL BREACH; but there is no doubt that the behavior was a Professionalism breach. Creed, Lines 2-5, 64-66. Did the lawyer witnesses comply with their professional obligations to the client and the public and the lawyer (Creed, Lines 13-15) or did they just “not lie”? 
Remember that true professionals know when to ask for help and delegate responsibility. Be familiar with the resources available to you - be they personal or professional - and utilize them. If you feel you are constantly "stressed out," depressed, or struggling with substance abuse/dependence issues, get professional help immediately. Just as any psychologist would consult an attorney when addressing legal issues outside of their area of expertise, so too, an attorney should be prepared to consult a mental health worker if a lawyer feels ill-equipped to address the psychological stressors in the lawyer’s life. Latham, The Depressed Lawyer, Psychology Today, May 2, 2011 (emphasis added)
While the image of “A Psychiatrist drafting a Deed” might be silly, the consequences of an attorney attempting to “heal thyself” could be devastating, even deadly.

Consider that you have an ethical duty to seek help when you are in a crisis; but a Professional seeks out help before there is a crisis.

You’ve already paid for six sessions. Why not get your money’s worth? If you wait until you’re thirsty to take a drink of water… You’re already dehydrated.
• We have an Ethical Duty to ourselves. We have a Professional Obligation for each other.

• “To my colleagues in the practice of law, I offer concern for your welfare.” Chief Justice’s Commission on Professionalism’s “A Lawyer’s Creed.”

• “What could have helped?...I still wish for that chance to try.” Barclay, The Importance of Lawyers Abandoning the Shame and Stigma of Mental Illness Georgia State Bar Journal, June, 2018 p. 79.
The State Bar of Georgia Wellness Program

https://www.gabar.org/wellness/about.cfm

The Wellness Program has four major parts:

Lawyer Assistance Program

Suicide Awareness Campaign

SOLACE | Support of Lawyers, All Concern Encouraged

Law Practice Management

All of them are free, all of them are confidential.

While it’s too early to have a cite to a Bar Complaint where participation in the Wellness Program was cited as a positive, mitigating factor, doesn’t it make sense that one would rather be the one who sought help than one who didn’t?
Additional Resources:

Helping Others:

Helping Ourselves:

Understanding the Issues:
Helping Others: 
Kreisman, MD *I Hate You – Don’t Leave Me: Understanding the Borderline Personality* TarcherPerigee; Revised, Updated edition (2010)

Helping Ourselves: 

Understanding the Issue: 
Amateur athletics has “Sportsmanship” as its good.

Teaching has “Learning” as its good.

Medicine is a practice that has “Healing” as its good.

What does the practice of law have as its good if not “Professionalism in the Administration of Justice?”
A Final Word on Professionalism

A Professional NEVER utters the words “Well, if nothing else, we have title insurance” PRIOR to a closing.

It’s not an ethical violation to say that but it sure identifies you as unprofessional.
Easements / Surveys
Chapter 26
and
Chapter 38
Title Standards

Kyle J. Levstek
Calloway Title and Escrow, LLC
4170 Ashford Dunwoody Road
Suite 525
Atlanta, Georgia 30319
678-406-8915
KyleL@titlelaw.com
Easements / Surveys Chapter 26 and Chapter 38 Title Standards

I. Introduction

II. Surveys
   A. Title Standard 26.1 In General
   B. Title Standard 26.2 Surveys Which Meet Minimum State Requirements for Recordation
   C. Title Standard 26.3 As-Built Surveys
   D. Title Standard 26.4 Composite Surveys

III. Discovering Appurtenant Easement Rights
   A. Title Standard 38.1 Nature and Extent of Title Examiner’s Duties with Respect to Appurtenant Easements
      1. Express Grant
      2. Prescription
      3. Implication
      4. Condemnation
      5. Survey Evidence
   B. Title Standard 38.4 Effect of Deed Recitals on Easement Rights
   C. Title Standard 38.5 Parol Licenses
   D. Title Standard 38.6 Notice

IV. Examination of the Servient Estate
   A. Title Standard 38.3 Debt Encumbrances
   B. Title Standard 38.8 Real Estate Taxes on Easements
   C. Title Standard 38.2 Merger

V. Terms, Conditions and Obligations of Use
   A. Title Standard 38.7 Charges Imposed for Use of Easements
   B. Title Standard 38.9 Environmental Issues Relating to Easements

VI. Conclusion
THE BASICS:  
THE TITLE EXAMINER  
CHAPTER 1  
USE OF THE RECORD  
CHAPTER 2  
NAME VARIANCES  
CHAPTER 3
Standard 1.1 – Attitude

Purpose of Title Exam

- marketable title
- no unknown defects or encumbrances
Standard 1.1 – Attitude
How to use Title Standards
Eliminate objections
Eliminate “fly specking”

Standard 1.2 – Prior Examination
Title Defects
Contact the prior closing attorney
• *How did you fix it?*
• *Is there a title policy?*
Standard 1.2 – Prior Examination

Title Defects

Cooperate to clear the defect

Communicate this to your staff!

Contact the title insurance co.

➢ Will you insure over it?

Discuss title insurance w/client
Standard 1.3 – TS in a PSA

**Put in your sales contracts:**

Marketability shall be determined in accordance with Georgia Law as supplemented by the Title Standards.

"Good and Marketable Title":

"title which a title insurance company licensed to do business in Georgia will insure at its regular rates, subject only to standard exceptions."

- 2019 GAR Purchase and Sale Agreement, ¶ Sec.B, Par.(1)(b)
**Standard Exceptions**

1. Taxes
2. Rights/claims of parties in possession
3. Mechanic's/materialmen's liens
4. Survey matters
5. Easements
6. Amount of Acreage
7. Covenants, conditions, restrictions of record
8. Water, sewer, sanitation bills
9. Mineral rights
10. Riparian rights
11. Prior or assumed encumbrances

Old Republic OXGA policy, Sch. B-I

**Standard 24.1 – Opinion as a Duty of Title Attorney**


Rendering of title opinion to real property is the practice of law.

- Can use non-attorney examiners.
- Attorney is responsible for the examination used in the opinion.
Standard 24.1 – Opinion as a Duty of Title Attorney

_Hines et al. v. Holland et al._


- Discussion of what is and is not permitted in a 3rd party action, including contribution and indemnity.
- Bottom line: to bring in a 3rd party defendant, such 3rd party defendant must have some liability for the original plaintiff’s claim.
- Underlying claim in Hines was legal malpractice. Holland was title examiner, but not an attorney. Hines (an attorney) had other possible actions against Holland (e.g. negligence, breach of contract), but not as a 3rd party defendant.

Standard 24.2 – Duty to Inform

Point out to client any title exceptions.

Explain title insurance availability.
Standard 24.3 – Actual Knowledge

If you have **ACTUAL** knowledge of title defects not in the record, *exception must be in title certificate.*

- Encroachments (fence/driveway/structures)
- Easements
- Occupancy/possession
- Adverse claims

Standard 24.5 – Title Rejection

If you reject a title as *unmarketable or uninsurable*:

Back up with O.C.G.A. citations or GA case law

No legal support = unprofessional
Standard 2.1 – Period of Search

Period of search sufficient to determine **MARKETABILITY**

**50 years**

**IS THIS LONG ENOUGH?**

- easements
- right-of-way deeds
- covenants/restrictions
- minerals
- reservations
Standard 2.1 – Period of Search

50 years

Must find a “root deed” or “start deed”

- Matters subsequent to the root deed must be considered
- Go further back if reference or indication of prior instruments or title defects

Warranty Deed
Quit Claim Deed(s)
SD and DUP
Grant from State
Probate Proceeding
Other instrument w/reasonable probability of title and possession
Standard 2.1 – Period of Search

**Limited Search**

*Check with TCo Underwriter*

- Refinance
- Existing Owner’s Policy
- Subdivision Developer – A&D Loan

• As agreed upon by the parties

• Always include disclaimer in the attorney’s certification
Standard 2.1 – Period of Search

**Limited Search Disclaimer**

THIS CERTIFICATE OF TITLE IS BASED UPON A LIMITED EXAMINATION OF RECORD TITLE AND DOES NOT PURPORT TO CERTIFY THOSE MATTERS WHICH A FULL EXAMINATION OF RECORD TITLE WOULD REVEAL.

---

**Standard 2.1 – Period of Search**

**GAP PERIOD**

Record Effective Date

Examination/Recording Date

- Effective date needs to be the oldest date of all the indices searched.
Standard 2.2 – Extent of Search

Search only for properly indexed and recorded instruments in the chain of title.

What is outside of the chain of title?

Instrument from a person in the COT filed:

(A) after the date of filing of another instrument from that same person purporting to part with the same interest;

(B) prior to the date of the deed conveying title into that person, absent circumstances pointing to the existence of the instrument.
Standard 2.2 – Extent of Search

Search only for properly indexed and recorded instruments in the COT.

**Middle Ga. Realty Inc. v. IDS Homes, Inc.**

231 Ga. 57, 200 S.E.2d 141 (1973)

- *SD given out of COT not valid against a BFP*
Standard 2.2 – Extent of Search

Search only for properly indexed and recorded instruments in the COT.

Middle GA. Realty Inc. v. IDS Homes, Inc.
231 Ga. 57, 200 S.E.2d 141 (1973)

- BFP could not have discovered 1968 SD given by person not in the COT
- IDS has good title
- SD given out of COT not valid against a BFP
Standard 2.2 – Extent of Search

- **Nov. 2017**: B owns Property. A is anticipating buying Property from B. C loans A $$, and A gives a SD to C with Property as collateral.
- **Jan. 2018**: A buys Property from B. WD recorded (B to A).
- **Feb. 2018**: A conveys to D - a BFP. WD recorded (A to D). D has no notice of the SD to C.

**D has good title**

- C’s SD is out & does not attach.
- SD was filed BEFORE A took title.

Standard 14.1 – SD Recorded Prior to RTV Deed

Validity of a SD is not impaired by the fact that it is filed for record prior to the filing for record of the instrument by which ownership is acquired…

…except to the extent that rights of 3rd parties may have intervened.
Standard 14.1 – SD Recorded Prior to RTV Deed

To Place the SD in the COT:

➢ File a title affidavit pursuant to O.C.G.A. § 44-2-20 giving notice of the SD

All parties after the affidavit now have notice.

1256/40

1256/32

SD is still valid and in the chain of title
Standard 2.2 – Extent of Search

**NOTICE**

**Constructive**

**Actual**

**Inquiry**

What is outside of the chain of title?

...*possession is notice of the rights or title of the occupant…*

_and notice isn’t limited to just a title examination._
Standard 2.2 – Extent of Search

Caraway et al. v. Spillers
774 S.E.2d 162 (2015), 332 Ga.App. 588

Actual, open, visible, exclusive and unambiguous possession gives rise to notice of inquiry and will defeat 3rd party claim…

…even if the 3rd party records their deed first.

Standard 2.3 – Strangers

Instruments executed by strangers to the chain of title – at the time such instrument is recorded – should give rise to additional investigation.
Standard 2.3 – Strangers

Don’t ignore deeds from strangers or “wild” Instruments in title.

Title is not automatically unmarketable.

Must investigate reason for stranger’s deed.

**Attorney’s duty to disclose.**

---

Standard 2.3 – Strangers

If spouse is on SD of record, but not on title,

obtain a QCD from spouse when selling the property.
Standard 2.4 – Expired Leases

Omit expired recorded lease or MOL.

- Review the terms for expiration
- Review any renewal periods and **do the math**
- Review for termination conditions

---

Certifying attorney should except to rights of tenants in possession

**Exceptions:**

- Rights of tenants, as tenants only.
- Rights of tenants under unrecorded leases.
Standard 2.5 – Expired Contract or Options

Show as title exceptions:

• All contracts
• Options
• Memorandums
• Rights of 1st Refusal
• Contracts for Deed

Standard 2.6 – Age of Instruments

Time heals SOME wounds,

Lower Risk:
• Age of instrument/time of record
• Statutes of limitation
• Additional conveyances
• Feasibility of corrections

but time does NOT cure everything.
Standard 2.6 – Age of Instruments

**O.C.G.A. § 44-5-163:** period of possession for prescriptive title through adverse possession is 20 years.

**O.C.G.A. § 44-5-164:** period of possession for prescriptive title under color of title is 7 years.

*Pindar’s, 7th Edition, §§ 12:1-12:73*

Standard 3.1 – Idem Sonans

*Differently spelled names are presumed to be the same when they sound alike*
Standard 3.1 – Idem Sonans

“Differently spelled names are presumed to be the same when they sound alike.”

John = Jon
Katelyn = Caitlin
Stephen = Steven
Hilary = Hillary
Phillip = Philip
Neal = Neil

Standard 3.2 – Middle Name and Initials

Use of middle names or initials in one instrument and nonuse in another does not create a question of identity affecting title...

Unless notice to inquire
Standard 3.3 – Abbrev./Nicknames

All customary and generally accepted abbreviations, derivatives and nicknames of first and middle names are recognized as equivalents.

- Robert = Robt. = Bob = Bobby
- John = Johnny = Jack
- Jennifer = Jenny = Jen
- William = Bill = Billy
- Donald = Don = Donny
- Catherine = Cathy = Kate
- Susan = Susy = Susie
- Michael = Mike = Mikey
Standard 3.3 – Abbrev./Nicknames

Robert John Smith
- Robert Smith
- R. John Smith
- R.J. Smith
- Robt. John Smith
- Robt. J. Smith
- R. Johnny Smith
- Robt. Smith
- Bob Smith
- Bobby Smith
- Bobby John Smith
- B.J. Smith

- Rob John Smith
- John Smith
- Johnny Smith
- R. John Smith
- Bob J. Smith
- Bobby J. Smith
- Rob J. Smith
- Rob Smith
- Bobby Smith
- Robby Smith
- Robby J. Smith
- Rob J. Smith
- Robby John Smith

Standard 3.4 – Recitals

Rely on recitals in recorded documents with respect to names and identity

UNLESS evidence or circumstances creating suspicion
Standard 3.5 – Effect of Suffix

Addition of a suffix may rebut the presumption of identity

Jr.    Sr.     II     III

Standard 3.6 – Name ≠ Signature

Where the signature is different than the name in the body of the deed, but the signature matches the name in chain of title …

**Signature rules over the body of the deed**

*Sterling v. Park*
129 Ga. 309, 58 S.E. 828 (1907)

*Pindar’s § 19:26*
Standard 3.7 – Name Changes

If surname changes through legal proceeding after a party has acquired title, they can convey with new name and recital.

Ex 1: Mary Jones n/k/a Mary Smith

Mary Jones marries John Smith and takes Smith as her surname

Ex 1: Mary Jones n/k/a Mary Smith

Ex 2: Mary Smith f/k/a Mary Jones (preferred)
Standard 3.8 – Name of Wife

Problems if title is taken or conveyed in a “Mrs.” format.

Further evidence of identity is required to pass title.

Took Title As: John Smith and Mrs. John Smith
Conveyed As: John Smith and Mary Smith

Took Title As: John Smith and Mary Smith
Conveyed As: John Smith and Mrs. John Smith
Standard 3.10 – Correcting Recitals

Rely on a recital in a subsequent deed from the same Grantor correcting the name of the Grantee, UNLESS the corrected name is distinctly dissimilar to the original.

Standard 3.13 – GA Corp & Ptnrshp

For GEORGIA corporations and partnerships:

Can be satisfactorily identified although exact names not used and variations exist between instruments, IF:

from the names used and other circumstances of record, identity can be inferred with REASONABLE CERTAINTY.
Standard 3.13 – GA Corp & Ptnrshp

**Use or nonuse of**

- The
- &/and
- Co.
- Ltd.
- Corp.
- Inc.

ordinarily **may be ignored.**

---

Standard 21.1 – Scope of Search

**Not required to examine the bankruptcy records**

...unless there is notice of BK proceeding
Standard 21.2 – Title Through BK Debtor or Estate

**U.S. Code: Title 11 - BANKRUPTCY**

- **CHAPTER 7** - LIQUIDATION (§§ 701 to 784)

- **CHAPTER 13** - ADJUSTMENT OF DEBTS OF AN INDIVIDUAL WITH REGULAR INCOME (§§ 1301 to 1330)

- **CHAPTER 11** - REORGANIZATION (§§ 1101 to 1174)

(a) **Proper Conveyancing Party**

- CH7 or CH11 where trustee is appointed
  - Trustee is the proper party
- CH7 where trustee has abandoned interest
- CH11 where no trustee is appointed
- CH13 with confirmed plan
  - Debtor is the proper party
Standard 21.2 – Title Through BK Debtor or Estate

(a) Proper Conveyancing Party

- CH13 with confirmed plan or Order where property re-vests in debtor ONLY upon discharge
  - Trustee is the proper party

(b) CH7 - Trustee’s Sale

- Appointed trustee
  - No separate Order in GA cases
  - Assigned on the Notice of Bankruptcy
- Order authorizing the sale
- Proof the property was included in the BK as property of the estate and not exempted
  - BK Schedule A
Standard 21.2 – Title Through BK Debtor or Estate

(c) CH7 – Property Abandoned by Trustee

☐ Notice of Abandonment

• May be done by Trustee on taped recording of § 341 Meeting of Creditors
• Best practice to obtain a written notice in the record

Standard 21.2 – Title Through BK Debtor or Estate

(c) CH11 – Plan of Reorganization

☐ Confirmed Plan

☐ Authorization of Sale in Plan

☐ Order for sale of property
Standard 21.2 – Title Through BK Debtor or Estate

(f) CH13

- Order authorizing the sale
  - Order will dictate distribution of the proceeds

- Written consent of the Trustee

Standard 21.2 – Title Through BK Debtor or Estate

(h) Discharge

11 U.S. Code § 524 - Effect of discharge

Discharge renders certain debts unenforceable against the debtor personally
Standard 21.2 – Title Through BK Debtor or Estate

(h) Discharge

Discharge does not:

⇒ Eliminate liens not avoided
⇒ Affect co-signer liability

(d) CH7 / (g) Ch13 – Lien Avoidance

⇒ Judicial lien may be avoided if it impairs the Debtor’s homestead exemption


• Exemptions provided by GA and Fed statutes
  o O.C.G.A. § 44-13-100
  o 11 U.S.C. § 522
Standard 21.2 (d) & (g) – Lien Avoidance

**Review:**

- **Motion to Avoid Lien**
  - Identifies the lien
  - Any calculation of impairment of exemption

- **BK Case Summary**
  - Objections
  - Orders

- **Order Avoiding Lien**
  - Lien Fully Avoided
  - *to the extent...*

...to the extent such lien impairs an exemption to which Movant would have been entitled...
Standard 21.2 (d) & (g) – Lien Avoidance


\[ X - Y = Z \]

- \( X \) (total liens + exemptions)
- \( Y \) (value of the property)
- \( Z \) (amount avoided from lien)

\textit{In re John Gary Graham, Debtor, USBC, S.D.GA, Waycross Division (2010)}

\[ \$161,000 \text{ (mortgages + liens + exemptions)} - \$136,000 \text{ (property value)} = \$25,000 \text{ (amount avoided from lien)} \]

Lien – \( Z \) = amount remaining on lien

\[ \$31,000 - \$25,000 = \$6,000 \]
Standard 21.2 (d) & (g) – Lien Avoidance

Is there any **EQUITY** in the property

**NO EQUITY**

Lien is fully avoided
### Standard 21.2 (d) & (g) – Lien Avoidance

Property Value (Schedule A)  
LESS  
Secured Loans (Schedule D)  
= **EQUITY**  
LESS  
Exemptions (Schedule C)  
= **AMOUNT NOT AVOIDED**

<table>
<thead>
<tr>
<th>Property Value</th>
<th>Claimed BK Exemptions</th>
<th>Total Mortgages</th>
<th>Judgment Lien</th>
</tr>
</thead>
<tbody>
<tr>
<td>$136,000</td>
<td>$15,000</td>
<td>$115,000</td>
<td>$31,000</td>
</tr>
</tbody>
</table>

- **Value**  
  - Loans  
  = **Equity**  
  - Exemption  
  = Amt **not** Avoided

- **Value**  
  - Loans  
  = **Equity**  
  - Exemption  
  = Amt **not** Avoided
Standard 21.2 (d) & (g) – Lien Avoidance

If lien **is not** fully avoided

- Obtain a written payoff letter from the judgment creditor
- Pay at closing and record QCD or release

Standard 21.2 (d) & (g) – Lien Avoidance

If discharged, debt/FIFA listed, **BUT no Order avoiding lien:**

- Reopen the Case
- File Motion to Avoid Lien
Effective 12/01/2018, lien avoidance can be included in the CH13 Plan in **ALL Georgia Districts**

All Districts require Notice to the Creditor under their Local Bankruptcy Rules. If the Chapter 13 Plan includes the Avoidance of Lien request, it must be served on the Creditor.
Standard 21.2 (g)(1) – CH13 Judicial Lien Avoidance

Checklist if lien avoidance is included in the CH13 Plan:

- Chapter 13 has not been Dismissed.
- Request to Avoid the Judicial Lien against the subject real property in the Debtor’s Chapter 13 Plan.
- Service of the Plan on the Creditor must be confirmed.
- No Objection filed to the Plan by the Creditor.
- Confirmation of the Plan that includes the Requests to Avoid the Liens.
- Completion of the Plan by Debtor.
- Discharge of the Debtor.
Standard 21.2 (g)(2) – CH13 Consensual Lien Avoidance

Lien Stripping for 2nd Mortgage – CH13

Checklist:

- No Equity in the property
- Motion / Order
- Sometimes may be included in the CH13 plan
- Debtor completed the plan
- Discharge of Debtor

Cannot strip 2nd mortgage in CH7

Bank of America, N.A. v. Caulkett

- Could strip off 2nd mortgage in the 11th Circuit only from May 2012 – June 2015

  - In Re McNeal, Case No. 11-11352 (11th Cir., May 11, 2012)
  - In re Campbell, 498 B.R. 370 (2013)

§362 of the Bankruptcy Code provides that the filing of a bankruptcy petition "operates as a stay, applicable to all entities," of most actions, against the debtor.

**CANNOT:**

- obtain a judgment
- collect on a judgment
- perfect a security interest
- enforce a security interest (NO foreclosure/DIL)

Critical Points about the Automatic Stay:

1. It arises **AUTOMATICALLY**.
2. It is a very **BROAD** (applies to all entities).
3. Actual knowledge not necessary.

Stay lasts until discharge or Order lifting it

Exceptions:
- If 2nd BK is filed within 1 year of previous dismissal – stay lasts only 30 days
- If 3rd or more – no stay

GET A COMFORT ORDER

- GA Title Std. 21.3(c)
- 11 U.S.C. § 362(c)(3) and (4)


21.3(a) – Express Order

1. Provides stay relief and authorizes action
2. Creditor complied with the terms of the order
3. Order expressly says stay is:
   • vacated;
   • terminated;
   • annulled;
   • modified; or
   • lifted
Mark Robinson
Georgia State Counsel
VP, Old Republic Title

770-475-6199
MRobinson@oldrepublictitle.com
PROBATE/DECEASED PARTIES IN CHAIN OF TITLE:
WHAT HAPPENS NOW?

I. INTRODUCTION

It is impossible to practice in most areas of real estate law without having to address the issue of probate or deal with the question of how death affects title to real property. This presentation will explore the most common and reoccurring title issues stemming from probate and how real estate practitioners – closing attorneys, underwriters and title curative litigators – can be prepared to handle the same. Issues with probate can grind a closing to a halt and can come back to haunt you years later. Furthermore, title problems stemming from probate can often be extremely expensive to remedy.

This presentation is an overview of probate law from a real estate perspective and will explore common investigation strategies for title litigation. Properly investigating a title that “sees dead people” and obtaining the most information possible prior to fix title or, if necessary, file litigation is going to assist in clearing title efficiently and is more likely to lead to a resolution that is satisfactory to your client. Further, if the investigation leads to a resolution without litigation that is always the best result for your client as quiet title actions can be lengthy, onerous and expensive.

II. PROBATE INVOLVED IN TITLE – NOW WHAT?

Once probate or deceased party is recognized in title, red flags should go up and bells should go off. Probate issues are one of the most common errors that end up causing problems down the line – either at the closing table or years later when a foreclosure is stopped or a long lost heir starts knocking on the door with his or her hand out. The below are some common tips to refer to when dealing when probate shows up in title.

A. Initial Title Investigation

Titles that involve probate are often very difficult to map out. The process is much easier if you have your initial investigation done from the start. Getting into the habit of researching your title and the property in question thoroughly from the beginning will reduce the likelihood of missing important details and will actually assist in moving the title process along more efficiently.
1. **Title examination**
   - Full 50 year title exam
   - Consider possibility of needed testimony; choose reputable examiner
   - Consider whether to tell examiner of issue prior to title search; use as a “test”

2. **Plat/Survey**
   - Tax Maps can be useful for determining location of property as well as neighboring lots
   - Survey needed if question as to legal/boundary line
   - Compare available plats, surveys, tax maps, etc.

3. **Appraisal**
   - Useful when determining value of property vs. cost of litigation
   - Negotiation purposes with heirs
   - Can provide useful information from property visit

4. **Legal description**
   - Always have saved document of correct legal
   - Double/triple check; most common mistake

5. **Name/addresses of necessary parties (see below)**


1. **WHO: Who are the heirs?**

   There are a variety of different ways that death can become an issue in your chain of title. The most obvious form of notification is when probate documents pop up in your title examination. However, do not assume that the lack of probate means that your title isn’t affected by probate. It is important to read deeds and the chain of title carefully. Sometimes it’s a break in the chain of title that signifies a death of a party in the chain of title while other times it is conversations with a borrower or a simple google search. Regardless of the means of discovery, the issue must be dealt with in order for title to be properly conveyed. There are a variety of different means out there that can assist in determining the heirs at issue.
Helpful Documents: There are a number of documents that can be obtained in order to determine a party’s heirs.

- Wills
- Probate filings
- Death Certificates (see http://www.cdc.gov/nchs/w2w/georgia.htm for an outline of how to obtain death certificates, birth certificates, marriage certificates and divorce records)
- Court records (lawsuits, bankruptcy, etc)
- Direct requests to a known relative
- Obituaries
- Wills and probate filings of other heirs
- Google

**Careful:** Investigation regarding the heirs of men is more difficult that the evaluation of women due to the possibility of unknown children.

**Careful:** In today’s age, watch out for second marriages, adoptions, stepchildren, etc.

2. WHAT: What does death do to title?

When reviewing a title that involves probate, it is very important to exam how a title is held. The determination of how a title is held plays a direct role in how death actually affects title. In order to determine how a title is held, you simply need to look at the language of the deeds.

**Tenants in Common:** Tenancy in common is created whenever two or more people are entitled to simultaneous possession/ownership of any property. Property is held as tenants in common unless specified to the contrary. Title is held in equal shares unless the deed states otherwise. See, O.C.G.A. § 44-6-120.

- Deceased title holder’s interest in the property vests into the estate upon death
- The property is subject to potential debts of the estate
- Assumption is tenants in common even if married

**Joint Tenants with Rights of Survivorship (JTWROS):** The deed must specify that two or more people hold title to property as joint tenants with rights of survivorship. The deed must state “joint tenants”, “joint tenants and not as
tenants as common”, “joint tenants with rights of survivorship” or “jointly with survivorship”. See, O.C.G.A. § 44-6-190.

- Property skips probate completely
- Automatically vests with the remaining title holder(s)
- Note generally divorce does not sever joint tenancy with rights of survivorship. However, if decedent holding as joint tenant with rights of survivorship is divorced prior to death, it is important to review the divorce decree as certain language in divorce decree can sever joint tenancy with right of survivorship. See, Cahill v. United States, 303 Ga. 148, 810 S.E.2d 480 (2018).

3. WHERE: Where is the property located and where did the death occur?

The question of “where” applies in two different contexts when investigating probate in a real estate title: Where is the property located and where did the person at issue reside at the time of death?

**Property Location:** An obvious question that must be asked is where the property is located. What is the address? In what county does the property lie? These questions are clearly important as all recorded deeds dealing directly with this Property will be found in that county’s real estate records and possibly the probate records. A good title examiner will check for probate documents if there is a hint of death in the title.

**Location of Death:** Another important question is where the person lived at the time of his/her death. Remember – the place of death does not always mean the property address. A number of reasons can mean a different location of death including nursing homes, second homes, family caregivers, etc.

- Probate filed where the person died
- County of death also helpful in obtaining death certificate
- Obituaries can be a good source of information

4. WHEN: When was the date of death?

In general, there are two distinct reasons why the date of death is important. First, Georgia probate law was revised in 1998. Second, title companies and lenders often look at the time frame at issue when determining what clearance steps are necessary.
Georgia Law: As this is an overview of real estate law, not probate law, this discussion will not include an in-depth analysis of Pre-1998 Georgia Code versus Post-1998 Georgia Code. Just be aware when the death at issue occurred prior to 1998 as many aspects of the law changed. (For example, the rules of intestacy changed from a spouse being entitled to ¼ to a spouse being entitled to 1/3, See, O.C.G.A. 53-2-1.)

Time Frame of Death: Although probate rules are often very strict, it is important to being practical. How long ago did the person in question pass away? How many years has it been since an estate was probated? It is important to look carefully at these issues but it is also important to balance the risk.

5. WHY: Why was title prepared this way? How did this error happen?

One of the biggest mistakes that can be made when dealing with probate in a real estate context is to not ask why. When you ask why a title looks a certain way, you can often discover the intent of the parties. This is especially important when individuals attempt to prepare probate documents and/or convey property without the advice of counsel.

**Careful:** Look out for fraud! Oftentimes, the death of a relative can provide the perfect opportunity for fraud.

6. HOW: How do you fix the problem?

So you have looked at the basic five “Ws”: Who, What, Where, When and Why. Now what do you do now that you have all this information? The probate process is necessary to take property out of the estate – will or no will – unless the property avoids probate altogether via a survivorship deed. This is where the title standards become very useful. Use them as your guide and don’t be afraid to reach out to your local underwriter for assistance. When it comes to probate, there are no stupid questions as the failure to ask can have expensive ramifications.

C. Miscellaneous Practice Tips

1. **Death does not stop foreclosure:** However, still be aware of the same and any change of notice requirements, etc.

2. **Power of Attorney ends at death:** A deed that is conveyed by POA when the actual grantor is deceased is void.
3. **Death may stop a sale:** A death can change the grantors of title. Make sure the parties conveying title have the legal authority to do so.

4. **Beware of minors:** Children can receive title without court permission but cannot convey title without probate court permission. A parent is not automatically a guardian who can convey property on a minor child’s behalf. See *Chase Manhattan Mortgage Corp. v. Shelton*, 290 Ga. 544 (2012).


**D. New Case Law of Note**

   


3. **Patel v. Patel:** 342 Ga. App. 81 (2017): Default judgment available in quiet title action; also discusses complainant is party that can seek special master under OCGA § 23-3-40 matters and sua sponte grant of appointment of special master unauthorized.


lies where a defendant resides; quiet title against all the world is in rem.

7. Elrod v. Reliance Development Company, LLC, 350 Ga. App. 113, 828 S.E.2d 126 (2019): Service by publication was improper as clerk of court is required to mail a copy of the order for publication, notice of the order and the complaint to the defendant’s last known address.

III. SPECIFIC TITLE STANDARDS OF NOTABLE IMPORTANCE

A. Judgment against Heirs (13.1)

Judgments against the heirs or devisees of an estate do not constitute a lien against property sold by an executor or an administrator under specific circumstances. However, when an estate is not properly probated and results in a missing interest(s), liens can attach to the property. If unknown heirs are located who have an interest in the property, make sure a title examiner goes back and confirms not additional liens have attached.

B. Year’s Support (13.2)

Year’s Support is an area of the law that causes great confusion for many people. The following are some important reminders when it comes to reviewing a title that references Year’s Support:

- An Order is required for Year’s Support.
- The Order must contain the grantee (the surviving spouse and any minor children, if any) and must have the legal description of the Property.
- The Order must be recorded in the real property records.
- The Order conveys fee simple title.
- If the Order only conveys title to a surviving spouse, then the Order acts as a full conveyance and no further court action is needed for a refinance or a sale.
If the Order grants any interest, even partial, to a minor child, the surviving spouse and the child(ren) must obtain court approval prior to any refinance or sale. The failure to obtain court approval creates an invalid conveyance.

C. **No Will** = Permission needed to do ANYTHING!!!

D. **Will:** Often will still require probate court permission but read the title standards and follow the map created by the title standards. Time frames and risk are often involved in deciding the appropriate action.
347 Ga.App. 463
Court of Appeals of Georgia.

REPUBLIC TITLE COMPANY, LLC
v.
ANDREWS.

A18A1205
| October 2, 2018

Synopsis
Background: Purported landowner filed equitable petition to quiet title. Title insurer moved to dismiss and landowner moved for summary judgment. The trial court denied title insurer's motion and granted landowner's motion. Title insurer appealed.

Holdings: The Court of Appeals, Dillard, C.J., held that:

[1] petition was a conventional quia timet action, and thus venue was proper in either of the counties where one of the defendants resided, rather than county in which property was located;

[2] title insurer did not waive defense of improper venue;

[3] title insurer met its evidentiary burden to prove lack of venue; and


Reversed in part, vacated in part, and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion for Summary Judgment.

West Headnotes (9)

[1] Quieting Title
   Form of remedy
   Venue
      Setting aside conveyances, assignments, incumbrances, judgment, liens, etc

Equitable petition to quiet title brought by purported landowner was a “conventional quia timet action,” and thus venue was proper in either of the counties where one of the defendants resided rather than county in which property was located; rather than framing action as one against the property itself, landowner named two individuals and title insurer as defendants, asserted a cloud on her title resulting solely from the deeds held by these defendants, and sought cancellation of these specific instruments as her remedy. Ga. Const. art. 6, § 2 para. 3; Ga. Code Ann. § 23-3-40.

Cases that cite this headnote

[2] Quieting Title
   Form of remedy
   In order to quiet title to real property, one may seek relief under the procedures and standards for conventional quia timet or under those for quia timet against all the world. Ga. Code Ann. §§ 23-3-40 et seq., 23-3-60 et seq.

Cases that cite this headnote

[3] Venue
   Setting aside conveyances, assignments, incumbrances, judgment, liens, etc
   Venue in a conventional quiet-title action is controlled by provision of State Constitution providing that equity cases shall be tried in the county where a defendant resides against whom substantial relief is prayed. Ga. Const. art. 6, § 2 para. 3; Ga. Code Ann. § 23-3-40.

Cases that cite this headnote

[4] Quieting Title
   Nature and scope of remedy
   A quiet title action against the world is a proceeding taken directly against property to establish title to the land. Ga. Code Ann. § 23-3-60.

1 Cases that cite this headnote

[5] Quieting Title
Nature and scope of remedy

A quiet-title action against the world is in rem; as a result, it is an action against the underlying property, itself, and its purpose is to remove any and all clouds on the title of that property. Ga. Code Ann. § 23-3-60.

Cases that cite this headnote

[6] Quieting Title

Plea or Answer

Venue

Objections and exceptions, estoppel, and waiver

Title insurer did not waive defense of improper venue in quiet title action, where insurer asserted defense based on facts explicitly alleged in purported landowner's petition in its answer and motion to dismiss. Ga. Code Ann. §§ 9-11-12(b)(3), 9-11-12(h)(1)(B).

1 Cases that cite this headnote

[7] Venue

Objections and exceptions, estoppel, and waiver

It is not necessary to set forth in a responsive pleading reasons why venue is improper, in order to assert the defense; rather, it is only necessary that a defendant make reference to venue. Ga. Code Ann. §§ 9-11-12(b)(3), 9-11-12(h)(1)(B).

Cases that cite this headnote

[8] Venue

Place in which party may sue or be sued in general

Title insurer met its evidentiary burden to prove lack of venue in conventional quiet title action, where insurer specifically contended in its motion to dismiss that venue was proper in either of the counties where the resident defendants resided, and in support cited the sheriff's entries of service in the record indicating that landowner served the defendants in those counties. Ga. Const. art. 6, § 2 para. 3; Ga. Code Ann. § 23-3-40.

Cases that cite this headnote

[9] Venue

Objections and exceptions, estoppel, and waiver

Trial court's grant of summary judgment in purported landowner's favor in quiet title action did not cure defect of improper venue, where title insurer did not waive defense of improper venue but asserted defense in both its answer and motion to dismiss. Ga. Code Ann. § 5-6-34(d).

1 Cases that cite this headnote

Attorneys and Law Firms

**890 Price Boyd Law Firm, Tynesha R. Walls, for appellant.

Fletcher Law Firm, James R. Fletcher II, for appellee.

Opinion

Dillard, Chief Judge.

*463 Annie Andrews filed an equitable petition to quiet title in the Superior Court of DeKalb County and named Matthew Callahan, Jr., Darlene Ray, and Republic Title Company, LLC ("RTC"), as defendants. RTC filed an answer and a motion to dismiss, arguing that Andrews’s petition was improperly brought in the county where the property was located rather than a county where any of the defendants resided. The trial court denied RTC’s motion and, shortly thereafter, granted summary judgment in favor of Andrews. On appeal, RTC contends that the trial court erred in denying its motion to dismiss, again arguing that venue in DeKalb County was improper. For the reasons set forth infra, we agree and, thus, reverse the trial court’s ruling granting summary judgment to Andrews, vacate its ruling denying RTC’s motion **891 to dismiss, and remand the case for further proceedings consistent with this opinion.

The facts in this matter are largely undisputed. The subject property is located at 257 Norwood Avenue in a part of
the city of Atlanta that is within DeKalb County. Annie Andrews claims that Clyde Andrews, Jr., conveyed title to the property to her via a quitclaim deed dated October 13, 2005. On July 18, 2017, Andrews filed what she characterized as a conventional quiet-title petition in the Superior Court of DeKalb County, seeking cancellation of deeds to secure debt held by Callahan, Ray, and RTC, which she alleged clouded her title to the property. Thereafter, Andrews served Ray at her address in Tulsa, Oklahoma; Callahan at his address in Fulton County; and RTC through its registered agent, C. T. Corporation, in Gwinnett County.

On September 27, 2017, RTC filed an answer, in which it asserted that venue in DeKalb County was improper, and a motion to dismiss, in which it more specifically argued that venue was improper in DeKalb County because both of the resident defendants, Callahan and itself, were served in Fulton and Gwinnett Counties, respectively. One month later, Andrews filed a response, arguing, inter alia, that venue in DeKalb County was proper because under the Long Arm Statute, under which she served Ray, venue lay in the county in which the real property was located and establishing venue as to one defendant was sufficient to establish it as to the remaining defendants.

A few weeks later, and prior to the trial court ruling on RTC’s motion to dismiss, Andrews filed a motion for summary judgment. Subsequently, on December 14, 2017, the trial court issued a cursory order denying RTC’s motion to dismiss, and on January 16, 2018, it granted summary judgment in favor of Andrews. This appeal follows.

In ruling on a motion to dismiss, the trial court must accept as true “all well-pled material allegations in the complaint and must resolve any doubts in favor of the plaintiff,” but we review the trial court’s ruling de novo.

[1] In its sole enumeration of error, RTC contends that the trial court erred in denying its motion to dismiss, arguing that Andrews’s equitable petition to quiet title was improperly brought in the county where the property was located rather than a county where either of the two Georgia defendants resided. We agree that venue in DeKalb County was improper.

[2] [3] In order to quiet title to real property, one may seek relief under the procedures and standards for conventional quia timet, under OCGA § 23-3-40 et seq., or under those for quia timet against all the world, under OCGA § 23-3-60.

The proceeding quia timet is sustained in equity for the purpose of causing to be delivered and canceled any instrument which has answered the object of its creation or any forged or other iniquitous deed or other writing which, though not enforced at the time, either casts a cloud over the complainant’s title or otherwise subjects him to future liability or present annoyance, and the cancellation of which is necessary to his perfect protection.

As explicitly stated in the language of the statute, a conventional quiet-title action is an action “sustained in equity” and, therefore, venue is controlled by Article VI, Section II, Paragraph III of the Georgia Constitution, which provides: “Equity cases shall be tried in the county where a defendant resides against whom substantial relief is prayed.”

[4] [5] In contrast, a quiet-title action against the world is a proceeding “taken directly against property to establish title to the land.” The purpose of this action, as explained by our General Assembly,
uncertainty as to the owner of every interest therein. 10

Essentially, a quiet-title action under this statute is in rem. 11 As a result, it is an action against “the underlying property, itself, and its purpose is to remove any and all clouds on the title of that property.” 12 And under OCGA § 23-3-62 (a), “[t]he proceeding in rem shall be instituted by filing a petition in the superior court of the county in which the land is situated.” 13

*466 Here, although Andrews filed her petition in the Superior Court of DeKalb County, where the property was undisputedly located, and claimed in the petition that venue was proper in that county because the property was located there, 14 her cause of action, nevertheless, constitutes a conventional quiet-title action under OCGA § 23-3-40. In fact, in the sole count of the petition, Andrews expressly characterizes her petition as a “conventional quia timet.” In addition, rather than framing her action as one against the property itself, 15 she named two individuals and RTC as defendants, asserted a cloud on her title resulting solely from the deeds held by these defendants, and sought cancellation of these specific instruments as her remedy. In summary, Andrews was not seeking to “establish superior title to all the world, but to remove clouds on the title in the form of specific instruments and liens, the cancellation of which is necessary to [her] perfect protection.” 16 Accordingly, the present action was “properly prosecuted as a conventional quia timet action.” 17 And given these particular circumstances, the proper venue for Andrews’s quiet title action was not DeKalb County, but rather, either of the counties where one of the resident defendants **893 resided. 18 Consequently, as Andrews’s petition “fails to set forth facts establishing venue it is subject to dismissal.” 19

[6] On appeal, despite her petition specifically asserting that venue was proper because she was seeking to quiet title to property located in DeKalb County, Andrews now acknowledges that the proper venue for her conventional quiet-title action lies in the county of any one of the defendants. Nevertheless, she claims that venue in DeKalb County was still proper, arguing that RTC waived any contention that the facts as alleged in her petition did not establish venue by failing to specifically cite to § 9-11-8 (a) (2), which in part provides that “[a]n original complaint shall contain facts upon which the court’s venue depends...” We disagree.

*467 [7] OCGA § 9-11-12 (b) (3), in part, provides:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion in writing: Improper venue....

Additionally, and particularly relevant to this matter, OCGA § 9-11-12 (h) (1) (B) further provides:

A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived ... [i]f it is neither made by motion under this Code section nor included in a responsive pleading, as originally filed. 20

Here, it is undisputed that RTC asserted the defense of improper venue based on the facts explicitly alleged in Andrews’s petition in its answer and motion to dismiss. And it is not necessary to “set forth in a responsive pleading reasons why venue is improper, in order to assert the defense[.]” 21 Rather, it is only necessary that a defendant make reference to venue. 22 Thus, RTC did not waive its defense of improper venue. 23

[8] In a somewhat related argument, Andrews also contends that RTC failed to meet its evidentiary burden of proving lack of venue. 24 This argument is a nonstarter. Setting aside the fact that Andrews’s petition explicitly asserts
a legally erroneous basis for venue. RTC specifically contended in its motion to dismiss that venue was proper in either of the counties where the resident defendants resided (i.e., Fulton or Gwinnett Counties), and in support cited the sheriff’s entries of service in the record indicating that Andrews served the defendants in those counties. Accordingly, RTC met its burden of showing that venue in DeKalb County was improper.

**894** [9] Finally, Andrews further claims that the trial court’s grant of summary judgment in her favor cured any potential amendable defect in her petition regarding venue, citing C. E. Morgan Building Products, Inc. v. Safe-Lite Manufacturing, Inc., in support. But in that case, the Supreme Court of Georgia held that the amendable defect of failing to verify a petition for a writ of possession was cured by the judgment only because “the parties went to trial on the merits of the plaintiff’s petition for writ of possession without the defendant’s raising any objection concerning the plaintiff’s failure to verify the petition until appeal.” Here, in stark contrast, RTC did not waive its defense of improper venue but asserted this defense in both its answer and motion to dismiss. Accordingly, the trial court’s grant of summary judgment in favor of Andrews did not cure the defect of improper venue or preclude RTC from seeking appellate review of the trial court’s denial of its motion to dismiss pertaining to that issue.

For all these reasons, we reverse the trial court’s grant of summary judgment in favor of Andrews, vacate its denial of RTC’s motion to dismiss for improper venue, and remand the case for further proceedings consistent with this opinion.

Judgment reversed in part and vacated in part, and case remanded.

Doyle, P.J., and Mercier, J., concur.

All Citations

347 Ga.App. 463, 819 S.E.2d 889

Footnotes

1 Both Ray and Callahan filed answers in which they admitted to the allegations in Andrews’s petition and consented to the relief sought.

2 See OCGA § 9-10-93 (“Venue in cases under this article shall lie in any county wherein ... the real property is located.”).


4 See id.


6 Patel, 342 Ga. App. at 90 (2) (a) (ii), 802 S.E.2d 871.

7 See OCGA § 23-3-40.

8 See Johnson v. Red Hill Assocs., Inc., 278 Ga. 334, 335 (1), 602 S.E.2d 572 (2004) (holding that venue in a conventional quiet-title action was controlled by Art. VI, ¶ III of the Georgia Constitution, which required that equity cases be brought in the county where a defendant resides); see also OCGA § 9-10-30 (“All actions seeking equitable relief shall be filed in the county of the residence of one of the defendants against whom substantial relief is prayed....”).


10 OCGA § 23-3-60; see Smith, 264 Ga. at 756 (2), 449 S.E.2d 85 (“The legislature enacted the 1966 Act to create an efficient and effective way to adjudicate disputed title claims.”); Heath v. Stinson, 238 Ga. 364, 365, 233 S.E.2d 178 (1977) (noting that the 1966 Act creates an efficient, speedy, and effective means of adjudicating disputed title claims).


12 Id.; see Black’s Law Dictionary 797 (7th ed. 1999) (defining an “action in rem,” as one in which “the named defendant is real or personal property”).

13 See Smith, 264 Ga. at 755-56 (1), 449 S.E.2d 85 (noting that, as an in rem proceeding, venue in a quiet-title action against the world is in the county in which the land is located).
In support of her claim that venue is proper in DeKalb County, Andrews cites Smith v. Ga. Kaolin Co., Inc., see supra note 9. But that case exclusively concerned a petition filed to quiet title against the world, and, indeed, is noteworthy for Justice Fletcher’s detailed explication of the history and purpose of the 1966 legislation that created the action. See id. at 755-57 (1), (2), 449 S.E.2d 85.

See supra note 10.

Johnson, 278 Ga. at 335 (2), 602 S.E.2d 572 (punctuation omitted); see OCGA § 23-3-40.

Johnson, 278 Ga. at 335 (2), 602 S.E.2d 572.

See id. at 335 (1), 602 S.E.2d 572 (holding that venue of tax sale purchaser’s conventional quiet title action against several defendants was proper in county where several resided).


See also Agri-Cycle LLC v. Couch, 284 Ga. 90, 91 (1), 663 S.E.2d 175 (2008) (“A defense based on improper venue must be brought to the attention of the trial court at the earliest opportunity to plead.” (punctuation omitted)).


See id. (holding that answer stating as affirmative defense that venue is improper without naming proper county was sufficient to raise issue concerning venue).


See supra note 17.

See M&M Mortg. Co., Inc. v. Grantville Mill, LLC, 302 Ga. App. 46, 47 (1), 690 S.E.2d 630) (2010) (holding that venue may be proper in the county where corporate defendant’s registered agent for service of process was located); Coastal Transp., Inc., 270 Ga. App. at 140 (3), 605 S.E.2d 865 (same).

244 Ga. 475, 260 S.E.2d 870 (1979).

Id. at 475–476, 260 S.E.2d 870.

We note that as part of Andrews’s above-referenced claim in this regard, she also cites Middlebrooks v. Daniels, 129 Ga. App. 790, 201 S.E.2d 338 (1973) and Hatfield v. Leland, 143 Ga. App. 528, 239 S.E.2d 169 (1977) as supporting authorities. Neither case has any relevance here. In Middlebrooks, we merely held that the plaintiff’s allegation as to venue in the petition could be amended. See 129 Ga. App. at 790, 201 S.E.2d 338. But RTC has not claimed otherwise and, regardless, it does not appear that Andrews attempted to do so. In Hatfield, this Court uncontroversially held that venue could be waived and that defendant’s failure to appear constituted such a waiver. See Hatfield, 143 Ga. App. at 529, 239 S.E.2d 169. As we have already explained, no such waiver occurred in this case.

See OCGA § 5-6-34 (d) (“Where an appeal is taken under any provision of subsection (a), (b), or (c) of this Code section, all judgments, rulings, or orders rendered in the case which are raised on appeal and which may affect the proceedings below shall be reviewed and determined by the appellate court, without regard to the appealability of the judgment, ruling, or order standing alone and without regard to whether the judgment, ruling, or order appealed from was final or was appealable by some other express provision of law contained in this Code section, or elsewhere...”); see also Pierce v. Wendy’s Int’l, Inc., 233 Ga. App. 227, 228 (1), 504 S.E.2d 14 (1998) (holding that having filed a notice of appeal from the grant of summary judgment, appellant could also appeal the trial court’s earlier order denying appellant’s motion to strike).

See Chung, 322 Ga. App. at 432, 745 S.E.2d 681 (“A trial court without venue lacks authority to issue an order or judgment, and any such order or judgment is void.”).
See Tillery, 270 Ga. App. at 140 (3), 605 S.E.2d 865 ("Even when a party moves to dismiss a complaint due to improper venue, the appropriate response is to transfer the case."); see also Ga. Const. Art. VI, § II, ¶ VIII; Unif. Sup. Ct. R. 19.1 (B).
350 Ga.App. 113  
Court of Appeals of Georgia.

ELROD  
v.  
RELIANCE DEVELOPMENT COMPANY, LLC.

A19A0406  
|  
May 8, 2019

Synopsis

Background: Purchaser of property that had been sold at foreclosure filed complaint against borrower and successor-in-interest to lender's nominee, seeking declaratory judgment that it was sole owner of real property, in fee simple, to quiet title to property, and for other relief. The Superior Court, Fulton County, Eric Kernard Dunaway, J., granted purchaser's motion for service by publication of complaint against borrower, and then granted purchaser's motion for default judgment as to borrower, and entered final judgment against borrower based on consent judgment between purchaser and successor. Borrower appealed.

Holdings: The Court of Appeals, Brown, J., held that:

[1] order granting purchaser's request for service by publication was supported by trial court's findings that borrower was evading personal service;

[2] service by publication was ineffective;

[3] federal rule requiring dismissal of complaint if defendant was not served with process within 90 days after complaint was filed did not apply; and

[4] consent judgment was not binding on borrower.

Default judgment and consent judgment vacated; remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss for Lack of Personal Jurisdiction; Motion for Default Judgment/Order of Default.

West Headnotes (10)

[1] Declaratory Judgment

Scope and extent of review in general
Borrower abandoned claim on appeal from entry of default judgment that trial court erred in granting his appeal in forma pauperis, with stipulation that appeal was limited to appeal of default judgment entered against him, in action brought by purchaser of property for declaratory judgment that it was sole owner in fee simple of real property that had previously been sold at foreclosure, to quiet title, and for other relief, where borrower failed to support enumeration of error with any argument, citation of authority, or record citations. Ga. Ct. App. R. 25(c) (2).

Cases that cite this headnote

[2] Appeal and Error

Process

Weight and sufficiency
Factual disputes regarding service are to be resolved by the trial court, and the court's findings will be upheld on appeal if there is any evidence to support them.

Cases that cite this headnote


Process and appearance
Order granting request by purchaser for service by publication on borrower of complaint for declaratory relief that it was owner of property that had previously been sold at foreclosure, to quiet title, and for other relief was supported by trial court's findings that borrower was evading personal service. Ga. Code Ann. § 9-11-4(f) (1) (A).

Cases that cite this headnote


Process and appearance
Judgment

Proof of jurisdictional matters

Service by publication of purchaser's complaint against borrower for declaratory relief that it was sole owner in fee simple of property that had previously been sold at foreclosure, to quiet title, and for other relief was ineffective, and thus, trial court lacked jurisdiction to enter default judgment against borrower, absent any indication that clerk of court mailed copy of order for service of publication, notice of publication, and complaint to borrower's last known address, and filing of certification of such action on complaint. Ga. Code Ann. § 9-11-4(f) (1) (C).

Cases that cite this headnote


Process and appearance

Federal rule requiring dismissal of complaint if defendant was not served with process within 90 days after complaint was filed did not apply to complaint filed in state court by purchaser for declaratory judgment that it was sole owner in fee simple of real property that had previously been sold at foreclosure, to quiet title, and for other relief. Fed. R. Civ. P. 4(m).

Cases that cite this headnote

[6] Process

Nature and necessity in general

There is no authority to dispense with the clear requirements of the statute governing service by publication merely because the defendant may otherwise obtain knowledge of the filing of the action. Ga. Code Ann. § 9-11-4(f).

Cases that cite this headnote


Requisites and sufficiency

Consent judgment entered into between successor-in-interest to lender's nominee and purchaser, in action by purchaser for declaratory judgment that it was sole owner in fee simple of property sold at foreclosure, to quiet title, and for other relief, was not binding on borrower, where borrower was not party to consent judgment, consent judgment affected borrower's rights to property, to which he did not consent, in that consent judgment also declared that purchaser was entitled to possession of property and that borrower had no right to possession of property.

Cases that cite this headnote

[8] Judgment

Consent of Parties

A consent judgment differs from a judgment rendered on the merits, in that it results from an affirmative act of the parties rather than the considered judgment of the court following litigation of the issues.

Cases that cite this headnote


Consent of Parties

A “consent judgment” is one entered into by stipulation of the parties with the intention of resolving a dispute, and generally is brought to the court by the parties so that it may be entered by the court, thereby compromising and settling an action.

Cases that cite this headnote

[10] Judgment

Construction and operation of judgment

A consent judgment resolves the issues by agreement of the parties and obviates the necessity of proof of the agreed-upon facts or resolution thereof by a jury.

Cases that cite this headnote

Attorneys and Law Firms

**127 James T. Elrod Jr., for Appellant.

Joseph Kelsey Grodzicki, for Appellee.
Opinion

Brown, Judge.

*113 Reliance Development Company, LLC filed an action to quiet title against James T. Elrod, Jr. and Bank of America. Elrod appeals the trial court’s entry of default judgment against him, arguing that (1) service by publication was not proper in this case; (2) the trial court erred in permitting Bank of America and Reliance to enter a consent judgment which entered final judgment against him; and (3) the trial court erred in granting Elrod’s appeal in forma pauperis, but stipulating that his appeal was limited to the appeal of the default judgment entered against him. For the reasons explained below, we *114 vacate both the default judgment and the consent judgment, and remand the case.

The instant appeal stems from the sale of certain real property at 1175 Windsor Parkway NE, Atlanta, Georgia, 30319 (“the Property”), and the subsequent dispute over title to the Property. The record shows that Elrod bought the Property in 2005. In 2008, Elrod refinanced the loan he had obtained to finance his purchase of the Property, by obtaining another loan from Primary Capital Advisors LC (“PCA”). To secure repayment of the second loan, Elrod conveyed the Property to Mortgage Electronic Registration Systems, Inc. (“MERS”), as nominee for PCA via a security deed. MERS transferred the security deed to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP (“BAC”) via an assignment in 2011. Elrod defaulted under the terms of the security deed, and on July 7, 2015, Bank of America, as successor by merger to BAC, conducted a non-judicial foreclosure sale of the Property at which Bank of America was the highest bidder. Bank of America then executed a deed under power, conveying the Property to itself.

Elrod has since filed multiple lawsuits related to the security deed and subsequent foreclosure. Elrod also filed a 78-page “Affidavit Regarding Claim of Lien Equitable Notice and Affidavit” in the real estate records related to the Property on April 6, 2016. On May 4, 2016, Reliance purchased the Property from Bank of America via limited warranty deed. On June 9, 2016, the day before the warranty deed was recorded, a “Corrective Warranty Deed” purporting to convey the Property from Bank of America to Elrod was recorded in the Fulton County Deed Book. The Corrective Warranty Deed stated that it was given in exchange for no consideration.

On April 11, 2017, Reliance filed its “Complaint for Declaratory Judgment, Petition to Remove Cloud from Title, Equitable Relief, Breach of Warranty of Title, and Attorneys’ Fees” in Fulton County Superior Court against Bank of America and Elrod. Reliance sought *115 a declaration that it is the owner of the Property in fee simple and that Elrod has no right of title or possession to the Property. Reliance alleged that the corrective warranty deed filed was fraudulent and that Elrod had forged the signatures.

On May 2, 2017, a sheriff from Fulton County unsuccessfully attempted to serve Elrod at the address of record he had provided during the pendency of the federal action he filed in 2017. The entry of service states that a “diligent search [was] made and defendant Elrod James T., Jr. [was] not to be found in the jurisdiction of this Court. Address in DeKalb Co.” On July 5, 2017, a sheriff from DeKalb County unsuccessfully attempted to serve Elrod at the same address. The entry of service states that a “[d]iligent search [was] made and defendant [was] not to be found in the jurisdiction of this Court. [U]nable to make contact after several attempts.”

On August 11, 2017, Reliance filed a motion to serve Elrod by publication pursuant to OCGA § 9-11-4 (f) (1) (B). In its motion, Reliance alleged that it had conducted Internet searches in an attempt to locate Elrod. Additionally, Reliance alleged that in its extensive correspondence with Elrod, he had only given one address, which was not a physical address, but a Post Office box, and that this same address was listed as his address of record during the 2017 federal action. Reliance attached an affidavit of its attorney who averred that he had “caused to be requested the Sheriff of Fulton County to locate and serve James T. Elrod, Jr. at the Property [1175 Windsor Parkway NE, Atlanta, Fulton County, Georgia, 30319] to no avail.” No entry of service was attached to the motion showing that the sheriff had attempted service on Elrod at the Property. The trial court granted Reliance’s motion for service by publication on August 18, 2017.

On October 16, 2017, Elrod filed a “Special Appearance Motion to Dismiss,” in which he alleged that he learned of Reliance’s action “while doing background work on an unrelated case.” He further alleged the following: that Reliance had not attempted to serve him; that he could have been served “at the UPS Store, where [his] mail is delivered, much like a Post Office Box”; that service was not attempted at his known residence, the Property listed in Reliance’s complaint; and that if Reliance had made a diligent
search, it would have properly served him at the address for the Property. Elrod attached a copy of his Georgia driver’s license, showing his address as the Property address.

In its response to Elrod’s motion, Reliance alleged that there was a delay in obtaining the Notice of Service by Publication from the clerk of court and having it run in the legal organ in accordance with *116 Georgia law. As a result, Reliance had withdrawn the prior affidavit of its attorney and filed a new affidavit, **129 along with the affidavit of a private process server retained to attempt service on Elrod at the Property. In his affidavit attached to Reliance’s response, the process server averred that the following occurred on November 16, 2017:

Upon arrival I knocked on the door and observed a white male inside the location getting up from a seated position and pe[el]king at me from across the room then slowly walking across the room to the right of the front door. It appeared that the unidentified male was trying to move slowly so that I would not see him through the glass door. I then knocked on the door again and rang the doorbell. A moment or two later I observed the same male subject peeking out from the right side of the room and looking at me. I then walked to the right side of the residence, which is almost entirely made of windows, hoping to see the subject and get his attention but observed no one. I then returned to the front door and again knocked and rang the doorbell but did not receive a response. I continued to knock and ring the doorbell over the next ten minutes or so but never observed the male or anyone else.

The process server also averred that he attempted service again on November 17, 2017, but no one answered the door. Reliance then filed a renewed and amended motion for service by publication, which the trial court granted on December 5, 2017. Service by publication was subsequently effected. On February 2, 2018, Elrod filed a notice of special appearance in which he objected to service by publication. He also pointed out that the trial court had yet to rule on his prior Motion to Dismiss, filed October 16, 2017. Elrod alleged that Reliance had never attempted to personally serve him, but that he had learned that the trial court granted Reliance’s amended motion for service by publication while “in the Fulton County Courthouse for an unrelated matter.” He also alleged that the process server’s affidavit was “less than truthful,” and implied that the notary’s signature on the affidavit was forged based on hearsay.

Reliance filed a motion for default judgment as to Elrod on February 22, 2018, alleging that Elrod had failed to file or serve an answer to the complaint within 60 days of the date of the order granting service by publication and that 15 days had passed since the date of default. Elrod filed a response in opposition to Reliance’s motion for default and requested that the trial court set aside any default. On May 25, 2018, the trial court entered a “Consent Judgment and Final Order as to Bank of America, N.A.,” in which the court declared Reliance the sole owner of the Property. On June 7, 2018, the trial court entered an order of default judgment against Elrod.

1. Elrod argues that the trial court erred in granting his appeal in forma pauperis, but stipulating that the appeal was limited to appeal of the default judgment entered against him. Elrod fails to support this enumeration of error with any argument, citation of authority, or record citations, and it is therefore deemed abandoned. See Court of Appeals Rule 25 (c) (2). See also Bennett v. Quick, 305 Ga. App. 415, 416-417, 699 S.E.2d 539 (2010). Nonetheless, we do not read the trial court’s order as limiting our authority to consider any argument properly raised with regard to the consent judgment.

2. In related enumerations of error, Elrod contends that service by publication was not proper in this case. We agree.

2] [3] [4] [5] “Factual disputes regarding service are to be resolved by the trial court, and the court’s findings will be upheld if there is any evidence to support them.” (Citation and punctuation omitted.) Styles v. Spyke Ten, LLC, 342 Ga. App. 122, 802 S.E.2d 369 (2017). Here, Reliance proffered evidence suggesting that Elrod was evading personal service and, thus, the trial court did not err **130 in granting Reliance’s motion for service by publication pursuant to OCGA § 9-11-4 (f) (1) (A). However, “[a] OCGA § 9-11-4 (f) (1) (C)] requires the clerk of court to mail a
copy of the order for service by publication, notice of publication, and the complaint to [Elrod]’s last known address and to certify such action on the complaint filed in the case.” (Emphasis omitted.) Vasile v. Addo, 341 Ga. App. 236, 241 (2), 800 S.E.2d 1 (2017). Elrod averred that he never received these documents from the clerk of court, and the record contains no evidence of the clerk’s certification or even evidence that Reliance’s attorney directed the clerk of court to mail the documents to Elrod’s alleged address.

[6] Reliance argues that we must presume that the clerk here complied with OCGA § 9-11-4 (f) (1) (C) because “there is a general presumption that public officials perform all of their duties as required by law.” This Court rejected the same argument made by the plaintiff in Vasile:

[The plaintiff] offers no proof that the clerk mailed the documents and instead argues that clerks and deputy clerks of court are public officers who are presumed to discharge their duties properly. In the cases upon which [the plaintiff] relies in support of this argument, however, the documents at issue were certified by and on file with the respective clerks of court and neither address the requirements for service by publication. See Taylor v. Young, 253 Ga. App. 585, 586 (1) (b), 560 S.E.2d 40 (2002) (addressing validity of order appointing probate court clerk as hearing officer); Oller v. State, 187 Ga. App. 818, 820 (2), 371 S.E.2d 455 (1988) (holding sufficient proof of prior conviction based upon authenticated records “certified as a true and correct copy of the original ‘indictment, plea and sentence’ ”). Additionally, in both cases, it was noted that the authenticated records of the office of the clerk of court are presumed to speak the truth. Taylor, supra; Oller, supra. In this case, there is a complete absence in the record of any entry by the clerk of court showing that the documents were mailed.

341 Ga. App. at 241 (2), 800 S.E.2d 1. Similarly, here, there is a complete absence in the record of any entry by the clerk of court showing that the documents were mailed to Elrod. “[O]ur Supreme Court has held that service must be made as provided by the Code section, and ‘substantial compliance’ in matters involving service of process is insufficient.” (Footnote omitted.) Hutcheson v. Elizabeth Brennan Antiques & Interiors, Inc., 317 Ga. App. 123, 127 (1), 730 S.E.2d 514 (2012). Indeed, “there is no authority to dispense with the clear requirements of the Code section merely because the defendant may otherwise obtain knowledge of the filing of the action.” (Footnote and punctuation omitted.) Id. Accordingly, the trial court lacked personal jurisdiction over Elrod, and we must vacate the trial court’s order entering default judgment against him. See Vasile, 341 Ga. App. at 242 (2), 244 (3), 800 S.E.2d 1 (partially reversing trial court’s denial of motion to set aside default judgment where no evidence in record showed clerk of court had mailed documents to defendant); Hutcheson, 317 Ga. App. at 127-128 (1), 730 S.E.2d 514 (while trial court did not err in granting the motion for service by publication based on evidence defendant evaded personal service, service by publication did not comply with statute because clerk of court conceded she did not mail the documents); Focus Healthcare Med. Ctr., Inc. v. O’Neal, 253 Ga. App. 298, 299, 558 S.E.2d 818 (2002) (“‘When there has been no actual service, the judgment can successfully be collaterally attacked for lack of personal jurisdiction as void, because there has been no ‘real’ default for failure to answer a complaint that was never served. ...’”).

**131** [7] 3. Elrod argues that the trial court erred in entering the consent judgment as to Bank of America because it is a final judgment in the case, affecting his rights to the Property, to which he did not consent. We agree.

The consent judgment here declares that Reliance is the sole owner of the Property in fee simple. It also declares the “Forged Deed” and Elrod’s affidavit recorded in the records for the Property “a cloud upon [Reliance]’s title” and proceeds to cancel them. Finally, the consent judgment declares that Reliance is entitled to possession of the Property and that Elrod has no right to possession of the Property. Thus, it is clear that the consent judgment entered into by Bank of America and Reliance, and not consented to by Elrod, affects Elrod’s rights to the Property. In spite of this, Reliance argues that Elrod lacks standing to challenge the consent judgment because he is not a party to it. It defies logic to state that a person is bound by the terms of an agreement to which he has not agreed, but may not challenge the agreement because he is not a party to it. Accordingly, the consent judgment is vacated to the extent it purports to enter final judgment binding on Elrod. See Wilson v. Norfolk S. Corp., 200 Ga. App. 523, 527 (5) (a) (2), 409 S.E.2d 84 (1991) (because appellant was not a party to the consent judgment entered in related case and had not consented to it, the consent judgment and the determination therein that the settlement was “just and fair” was not binding upon appellant). See also Container Corp. of America v. Charlton County, 259 Ga. 389, 391 (1), 383 S.E.2d 105 (1989).
4. Elrod contends that the trial court erred by finding — with no hearing or evidence — that the Corrective Warranty Deed purporting to convey the Property from Bank of America to Elrod was forged. We disagree.

[A] consent judgment differs from a judgment rendered on the merits in that it results from an affirmative act of the parties rather than the considered judgment of the court following litigation of the issues. A consent judgment is one entered into by stipulation of the parties with the intention of resolving a dispute, and generally is brought to the court by the parties so that it may be entered by the court, thereby compromising and settling an action. Brown & Williamson Tobacco Corp. v. Gault, 280 Ga. 420, 423 (3), 627 S.E.2d 549 (2006). A consent judgment resolves the issues by agreement of the parties and obviates the necessity of proof of the agreed-upon facts or resolution thereof by a jury. Trust Co. of New Jersey v. Atlanta Aluminum Co., 149 Ga. App. 605, 610 (3), 255 S.E.2d 82 (1979). See also Estes v. Estes, 192 Ga. 94, 96-97, 14 S.E.2d 681 (1941).

Thus, to the extent the trial court entered the consent judgment without requiring proof of facts therein, it was not error. But, given our holding in Division 3, this argument is moot.

5. For the reasons discussed above, we vacate the default judgment entered against Elrod, vacate the consent judgment between Bank of America and Reliance, and remand the case for further proceedings. Our decision in this appeal is not based on the underlying merits of the case. Reliance may still effect service by publication on Elrod pursuant to OCGA § 9-11-4 (f) (1), Bank of America may still offer sworn evidence that it did not execute or file the allegedly forged corrective deed, and Reliance may still obtain a default judgment against Elrod assuming the prerequisites are met. But all of these things must be done in accordance with the law and the procedures set forth therein.

Judgments vacated and case remanded.

Footnotes

1 Reliance alleges that Elrod obtained a loan from First Franklin to finance the purchase of the Property, and that in order to secure repayment of the loan, Elrod executed a security deed in favor of First Franklin. However, there are no documents in the record purporting to show this.

2 In 2010, Elrod filed a complaint in the United States District Court for the Northern District of Georgia against BAC, PCA, and others in relation to the security deed. He voluntarily dismissed the action. In 2015, Elrod filed another complaint related to the security deed in the United States District Court for the Northern District of Georgia against Bank of America. The district court dismissed Elrod's complaint for failure to state a claim. In 2017, Elrod filed a third complaint related to the security deed in the United States District Court for the Northern District of Georgia against PCA, Bank of America, Reliance, and various others, including a Fulton County magistrate judge. Elrod voluntarily dismissed the complaint.

3 The trial court order granting service by publication was signed and filed on August 18, 2017. The notice for service by publication is dated September 7, 2017. The fourth and final publication occurred on November 1, 2017, more than 60 days after the trial court's order granting publication. Accordingly, the publication did not comply with OCGA § 9-11-4 (f) (1) (C).


5 Elrod also asked the trial court to strike the process server's affidavit as well as the affidavit of Reliance's attorney, to set aside Reliance's amended motion for service by publication, and to dismiss Reliance's complaint.

6 Elrod also argues that Reliance has failed to follow Rule 4 (m) of the Federal Rules of Civil Procedure, which states that
[7] If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

Fed. R. Civil P. 4 (m). However, this a Federal Rule of Civil Procedure, which does not apply to actions filed in courts of the State of Georgia.

On June 21, 2017, Reliance moved for default judgment as to Bank of America. Nothing in the record shows that default judgment was actually entered against Bank of America. Counsel for Bank of America filed an entry of appearance in the case on May 23, 2018, two days prior to the entry of the consent judgment.

We note that Reliance and Bank of America never filed a motion for consent judgment, nor was a hearing held at any point in this case. The consent judgment abruptly appears in the record, signed by the trial court.
Synopsis

Background: Lender filed suit against borrower and borrower's wife, seeking to reform security deed that secured loan to add wife as co-grantor, based on alleged mutual mistake in omission of wife as co-grantor. The trial court entered summary judgment for lender, and borrower and wife appealed.

Holdings: The Court of Appeals, Phipps, C.J., held that:

[1] seven-year limitations period governing action to reform security deed was not tolled due to mutual mistake;

[2] wife would be prejudiced by reformation of security deed; and

[3] borrower and wife were not judicially estopped from asserting that there was no mutual mistake in omitting wife as co-grantor, based on representations in bankruptcy schedules regarding encumbrances on property.

Reversed.

West Headnotes (11)

[1] Equity

Mistake

Equity will relieve against mutual mistake, but only at the instance of a complainant who moves with reasonable diligence.

Cases that cite this headnote

[2] Reformation of Instruments

Limitations and laches

An action to reform a written document may be brought within seven years from the time the cause of action accrues.

Cases that cite this headnote

[3] Limitation of Actions

Discovery of mistake

Limitation of Actions

Discovery of Fraud

As a general rule, the seven-year statute of limitations does not commence to run against an equitable action for reformation of a written instrument based on mutual mistake or fraud until the mistake or fraud has been, or by the exercise of reasonable diligence should have been, discovered.

Cases that cite this headnote

[4] Limitation of Actions

Want of diligence by one entitled to sue

A plaintiff cannot sit quietly by for a length of time exceeding that named in the statute of limitations, and avoid its operation and save his cause of action by the mere allegation that he made the discovery.

Cases that cite this headnote

[5] Reformation of Instruments

Limitations and laches

An action to reform a deed may not be barred by the seven-year statute of limitations if the non-complaining party will not be prejudiced.

Cases that cite this headnote

[6] Limitation of Actions

Discovery of mistake

Seven-year limitations period governing lender's action to reform security deed executed by borrower to secure loan was not tolled due to mutual mistake in omitting borrower's wife as co-grantor; lender had record notice of wife's interest in property at issue by having conducted
examination of public property records, and it had actual notice of her interest, in that lender had issued prior loans to borrower and wife for which wife had executed security deed conveying her interest in property as security for loan, and borrower disclosed in instant loan application that he was married and that title would be held as joint tenancy with right of survivorship.

Cases that cite this headnote

[7] Reformation of Instruments

Limitations and laches

It is incumbent on the plaintiff, in order to repel the presumption of unreasonable delay in bringing suit to reform an instrument, to allege in his petition the impediments to an earlier prosecution of his claim.

Cases that cite this headnote

[8] Reformation of Instruments

Limitations and laches

Borrower's wife would be prejudiced by reformation of security deed on property that secured promissory note, in order to add wife as co-grantor on deed, more than seven years after borrower executed deed; borrower and wife denied mutual mistake with respect to omission of wife's name as co-grantor, and averred that they specifically intended that wife not convey her 50% interest in property when borrower executed promissory note, borrower was not authorized by wife to convey her interest in property, and reformation of deed would result in wife no longer having unencumbered interest in property.

Cases that cite this headnote

[9] Estoppel

Claim inconsistent with previous claim or position in general

Representations in borrower's and wife's bankruptcy schedules that they were joint owners of real property which was encumbered by security deed that secured loan, that borrower was only debtor on loan, and that no portion of loan was unsecured, was not clearly inconsistent with position taken in lender's action to reform security deed executed by borrower to add wife as co-grantor, and thus, borrower and wife were not equitably estopped from asserting that borrower and wife never intended to convey wife's 50% interest in property when borrower executed security deed to secure loan; rather, representations in bankruptcy schedules, when compared with averments in lender's action to reform deed, merely reflected ambiguity in bankruptcy petition with respect to encumbrances on property.

Cases that cite this headnote

[10] Estoppel

Claim inconsistent with previous claim or position in general

Under the doctrine of "judicial estoppel," a party is precluded from asserting a position in a judicial proceeding which is inconsistent with a position previously successfully asserted by it in a prior proceeding.

Cases that cite this headnote


Claim inconsistent with previous claim or position in general

Pertinent to the decision whether to apply the doctrine of judicial estoppel in a particular case is that the party's later position must be clearly inconsistent with its earlier position.

Cases that cite this headnote

Attorneys and Law Firms

**18 Ryan Thomas Strickland, Marietta, for Appellant.

Donald Paul Boyle Jr., Deborah J. Livesay, Gregory George Schultz, John Hinton IV, Atlanta, for Appellee.
PHIPPS, Chief Judge.

On March 11, 2011, Wachovia Mortgage Corporation (hereinafter “WMC”) filed a law suit against Richard Cohen and Vikki Cohen (husband and wife), seeking the equitable reformation of a 2002 security deed to add Vikki Cohen as a grantor, where previously only Richard Cohen was a grantor under the deed. WMC claimed that it was through a mutual mistake of fact that Vikki Cohen had not been included as a grantor of the 2002 security deed. Discovery ensued. Thereafter, WMC moved for summary judgment, which the trial court granted. Because the statute of limitation bars WMC’s suit and judicial estoppel does not apply, we reverse.

“In reviewing a trial court’s order granting summary judgment, this Court views the evidence and all reasonable inferences drawn from it in the light most favorable to the party opposing summary judgment.”

The following is undisputed. On or about July 23, 1998, a quitclaim deed was executed conveying a certain tract or parcel of land to Richard Cohen and Vikki Cohen. That same day, both Richard and Vikki Cohen executed a promissory note and a security deed for the property in favor of Wachovia Mortgage Company in exchange for a loan from Wachovia Mortgage Company in the amount of $338,000. On or about July 24, 1998, both Richard and Vikki Cohen executed a promissory note and a deed to secure debt for the property in favor of Wachovia Bank, N.A. in exchange for a loan in the amount of $50,000. The July 24, 1998 deed to secure debt was executed “subject to” the security deed dated July 23, 1998. On or about October 31, 2002, Richard Cohen obtained from WMC a “refinance loan” in the amount of $450,000. At the loan closing in 2002, Richard Cohen executed a security deed for the property in favor of Mortgage Electronic Registration Systems, Inc., as nominee for WMC, to secure the 2002 loan.

In its complaint (filed in 2011), WMC alleged that Richard Cohen had defaulted on the payments due on the 2002 loan, and that when WMC “prepared to conduct a foreclosure of the Property[,] [i]t was at that time that [WMC] discovered that, by reason of the mistaken omission of Ms. Cohen as a grantor in the 2002 Security Deed, the 2002 Security Deed did not encumber a 100% interest in the Property.” WMC alleged that “[a]s a result of the mistaken omission of Ms. Cohen as a grantor in the 2002 Security Deed, and as a result of Ms. Cohen’s failure to execute the 2002 Security Deed as a grantor, [WMC] is unable to foreclose on the entire fee simple interest in the Property.”

Richard and Vikki Cohen denied the existence of any mutual mistake of fact. They both averred by affidavit that they had not intended for Vikki Cohen's 50 percent interest in the property to be conveyed in the 2002 refinance transaction. Richard Cohen further averred that WMC had not intended for Vikki Cohen's interest in the property to be conveyed “at the time of executing the 2002 Loan.”

“Equity will relieve against mutual mistake, but only at the instance of a complainant who moves with reasonable diligence.” An action to reform a written document may be brought within seven years from the time the cause of action accrues. As a general rule, the statute of limitation does not commence to run against an equitable action for reformation of a written instrument based on mutual mistake or fraud until the mistake or fraud has been, or by the exercise of reasonable diligence should have been, discovered.

“A plaintiff cannot sit quietly by for a length of time exceeding that named in the statute of limitations, and avoid its operation and save his cause of action by the mere allegation that he made the discovery.” An action to reform a deed may not be barred by the seven-year statute of limitations, however, if the non-complaining party will not be prejudiced.

The Cohens claimed that WMC’s suit was barred because the statute of limitation in which to bring an action for reformation had expired. But the trial court disagreed, determining that the statute of limitation had been tolled by WMC’s discovery of the “mutual mistake” in 2011, and that even if the statute of limitation had not been tolled based thereon, Vikki Cohen would not be prejudiced by a reformation of the 2002 deed.

1. The statute of limitation had not been tolled. In its appeal brief, WMC posits that “unbeknownst to [WMC], Mr. Cohen did not obtain from Ms. Cohen her one-half interest in the Property prior to the closing of the 2002 Loan.” But the evidence reflects that WMC could not avail itself of the mutual mistake defense because it knew or should have
known in 2002 (before the loan closing) of Vikki Cohen's interest in the property.

The record reflects that had WMC conducted an examination of the public property records in 2002, it would have shown Vikki Cohen's interest in the property. And beyond the record notice of Vikki Cohen's interest in the property, WMC had actual notice because it was the lender on one of the prior loans on the subject property about four years earlier, for which Vikki Cohen had executed a deed and promissory note conveying to WMC her interest in the property as security for the loan. Furthermore, on the 2002 loan application, Richard Cohen stated that the purpose of the loan was for a "Refinance" of his primary residence, and he disclosed that he was married and that the "Manner in which Title will be held [is] JT TENANTS W/RT OF SURVIVORSHIP."

[7] It is incumbent on the plaintiff, in order to repel the presumption of unreasonable delay, to allege in his petition the impediments to an earlier prosecution of his claim. This was not done. The laches of the plaintiff is so palpable from the petition that WMC was not entitled to relief thereunder. WMC waited “nine years before [it] aroused [it]self from lethargy;” and under the facts of this case, the statute of limitation was not tolled.

[8] Vikki Cohen would be prejudiced by a reformation of the 2002 deed. Relying upon *DeGolyer v. Green Tree Servicing, LLC,* the trial court ruled that the reformation of the 2002 security deed to reflect that the entire property was subject to the 2002 security deed would not prejudice the Cohens. According to the trial court,

[1]he undisputed record evidence ... shows that the Cohens will not be prejudiced if the 2002 Security Deed is equitably reformed such that it conveys a full, first priority security interest and title in the Property to [WMC's successor in interest]. The Cohens received the loans they bargained for and used the proceeds of the 2002 Loan to pay off [both 1998 loans] on the Property, on which instruments both Mr. and Mrs. Cohen were jointly obligated. The Cohens also used a portion of those funds to retire approximately $66,000 in debt to other creditors. In addition, they have continued to enjoy the unfettered use of the Property, even though they have not made a mortgage payment in three years.

But *DeGolyer* is distinguishable; in that case, reformation of a security deed was an appropriate remedy where it was undisputed that the parties had intended for a certain property to be the subject of a security deed and the collateral for a loan, but the grantors had executed the deed and note documents in their individual capacities instead of as officers of their corporation, and title to the property was held in the corporation's name.

In this case, Richard and Vikki Cohen denied the existence of any mutual mistake of fact. They both averred by affidavit that they had not intended for Vikki Cohen's 50 percent interest in the property to be conveyed in the 2002 refinance transaction. Specifically, Vikki Cohen testified that she had "refused to convey her interest in the property with [the terms proposed by WMC].” and that “[Richard] Cohen and [WMC] later came to an agreement on a loan for Mr. Cohen's 50% interest in the Property.... Mr. Cohen has never been empowered to convey my 50% interest in the Property, and has never intended to do so.” Richard Cohen's statements were similar to Vikki Cohen's statements; he stated, pertinently, “I never owned the entirety of the Property. I never intended, nor did I convey the entire interest in the Property. I conveyed my 50% interest in the Property to [WMC] in exchange for the 2002 Loan. Any statement to the contrary is either false or intentionally deceptive.” Richard Cohen further averred that WMC had not intended for Vikki Cohen's interest in the property to be conveyed “at the timing of executing the 2002 Loan.”

As WMC alleged in its complaint, “the 2002 Security Deed did not encumber a 100% interest in the Property,” and “as a result of Ms. Cohen's failure to execute the 2002 Security Deed as a grantor, [WMC] is unable to foreclose on the entire fee simple interest in the Property.” WMC claimed, “it would be inequitable to allow the use of the 2002 Loan proceeds to result in Ms. Cohen's ½ interest in the Property being unencumbered by the 2002 Security Deed, by reason of the mistaken omission of Ms. Cohen as a grantor in the 2002 Security Deed.” Therefore, it is plain that reformation of the 2002 deed would result in Vikki Cohen no longer having an unencumbered one-half interest in the property, and such reformation would be to Vikki Cohen's prejudice.

Accordingly, this action was barred by the seven-year statute of limitation, and the trial court erred by granting summary judgment to WMC.

[9] 3. Judicial estoppel does not apply. The trial court erred by ruling that the doctrine of judicial estoppel
applied, precluding the Cohens from asserting in this case a position contrary to that taken previously in a bankruptcy case. “Under the doctrine of judicial estoppel, a party is precluded from asserting a position in a judicial proceeding which is inconsistent with a position previously successfully asserted by it in a prior proceeding.”

The trial court found that representations the Cohens had made in a bankruptcy petition they had filed in 2005 were in “direct contradiction” to their argument in the instant case that they had never intended the 2002 loan to encumber Vikki Cohen’s interest in the property. The court found the following: in Schedule A of the sworn bankruptcy petition, the Cohens identified the value of the property as $550,000 and the amount of a secured claim with regard to the property as $515,000; in Schedule D of the petition, the Cohens indicated that no portion of the 2002 loan was unsecured; and in Schedules E and F, the Cohens did not include the 2002 loan as an unsecured claim.

Pertinent to the decision whether to apply the doctrine of judicial estoppel in a particular case is that “the party's later position must be ‘clearly inconsistent’ with its earlier position.” WMC contends that the Cohens made “unequivocal representations in their 2005 bankruptcy schedules that no **22 portion of the 2002 loan ... was unsecured.” But this is not accurate.

In the underlying case, the Cohens represented that they jointly owned the property, and that Richard Cohen, but not Vikki Cohen, was a party to the 2002 finance transaction. With regard to encumbrances on the property, in Schedule A of the bankruptcy petition, the Cohens indicated that they were joint owners of the property; and in Schedule D, they indicated that only Richard Cohen was the debtor on the loan. Considering these representations in connection with the representations in the petition that no portion of the 2002 loan was unsecured, reflects ambiguity in the bankruptcy petition with regard to encumbrances on the property, but certainly does not amount to a position “clearly inconsistent” with the position taken in the underlying case. Therefore, the trial court erred in ruling that the doctrine of judicial estoppel applied in this case.

Judgment reversed.

ELLINGTON, P.J., and McMILLIAN, J., concur.

All Citations
332 Ga.App. 109, 770 S.E.2d 17

Footnotes
5 Ehlers, supra at 153–154(1), 733 S.E.2d 723.
6 See Brandenburg v. Navy Federal Credit Union, 276 Ga.App. 859–861(1), 625 S.E.2d 44 (2005) (lender that failed to conduct title examination was charged with notice of recorded property interest).
7 In its summary judgment brief, WMC also held itself out as Wachovia Mortgage Company; the same is true in WMC's appeal brief.
8 Parker, supra at 7, 59 S.E.2d 715 (citations omitted).
9 Id.
10 See Evans, supra (seven-year limitation period was not tolled due to mistake or fraud when the tenant-in-common failed to conduct a survey of the property at the time it was partitioned and a visual inspection should have made him aware that the tract he received did not consist of the purported 50 acres; “when a defendant pleads laches or the statute of limitation, as in this case, it is incumbent upon the party applying for the relief to show what impediments stopped him or her from discovering the mistake or fraud through reasonable diligence”); Parker, supra at 6–7, 59 S.E.2d 715; Brandenburg, supra at 861, 625 S.E.2d 44.
12 Id. at 444–447, 662 S.E.2d 141.
See Haffner, supra at 756–757(3), 725 S.E.2d 286 (loss of ownership interest in property constituted prejudice so as to bar tolling of statute of limitation).

Id.; cf. Ehlers, supra at 153–154(1), 733 S.E.2d 723.


(Emphasis supplied.)

Synopsis

Background: Successor in title brought quiet-title action to remove restrictive covenants regarding the sale of motor fuel on the property. The Superior Court, DeKalb County, Daniel M. Coursey, Jr., J., entered judgment for grantor of restrictive covenants, a gas station operator. Successor in title appealed.

Holdings: The Court of Appeals, McFadden, P.J., held that:

[1] restrictive covenants were enforceable;

[2] grantor of restrictive covenants had standing to enforce the covenants; and

[3] restrictive covenants did not violate state constitutional provision and state statute that rendered contracts in general restraint of trade unenforceable.

Affirmed.

West Headnotes (6)

[1] Covenants

Persons liable on real covenants

Restrictive covenants, which were granted by gas station operator, regarding the sale of motor fuel on property were enforceable against successor in title; the covenants concerned the use of the land, and successor in title had notice of them when it purchased the property. Ga. Code Ann. § 23-1-16.

Cases that cite this headnote

[2] Covenants

Persons Entitled to Enforce Real Covenants

Grantor of restrictive covenants, a gas station operator, regarding the sale of motor fuel on a parcel of real property had standing to enforce the covenants, even though it retained no interest in the burdened property or an adjacent property; grantor was intended to benefit from the covenants’ imposition of certain limits on competition, and grantor conveyed entire parcel via the deed that contained the covenants.

Cases that cite this headnote

[3] Covenants

Persons Entitled to Enforce Real Covenants

The person entitled to the benefit of a covenant has standing to enforce it.

Cases that cite this headnote

[4] Covenants

Covenants which may run with land in general

Though no language of the promise in a restrictive covenant in a deed may suggest an intention that the benefit of the promise shall run, the advantage from its running may be so obvious that it is proper to infer that the parties intended it to do so.

Cases that cite this headnote
**Covenants**

General rules of construction

Covenants are to be construed so as to carry into effect the intention of the parties.

Cases that cite this headnote

---

**Covenants**

Nuisances and particular occupations

Restrictive covenants regarding the sale of motor fuel on a parcel of real property so as to limit competition for grantor, a gas station operator, did not violate state constitutional provision and state statute that rendered contracts in general restraint of trade unenforceable as against public policy; constitutional provision and statute did not apply to restrictive covenants on the use of real property. Ga. Const. art. 3, § 6, para. 5; Ga. Code Ann. § 13-8-2(a) (2).

Cases that cite this headnote

---

Attorneys and Law Firms

**511** John Alan Sugg, Matthew Robert Thiry, Ron L. Quigley, Atlanta, Davis, Matthews & Quigley, for Appellant.


Opinion

McFadden, Presiding Judge.

**This case involves the enforceability of restrictive covenants in a deed. The trial court ruled that the restrictive covenants run with the land and bind appellant North Bay Avalon, LLLP as successor in title to the original grantee, and that the benefits of the restrictive covenants are held in gross, so that they are enforceable by appellee Speedway, LLC, the grantor, even though Speedway no longer owns an interest in the property or nearby property. We conclude that the covenants are enforceable in equity, regardless of whether or not the burdens and benefits of the covenants run with the land or are held in gross. We reject North Bay’s argument that the covenants are unconstitutional restraints of in trade. So we affirm the trial court.**

---

**Facts.**
The facts are largely undisputed. In May 2002, Speedway SuperAmerica, LLC (Speedway, LLC’s predecessor) sold land at the intersection of Bouldercrest Road and Interstate 285 to one of North Bay’s predecessors in title. The deed, which was recorded in the DeKalb County property records, contains two restrictive covenants limiting use of the land for a gas station:

By acceptance hereof, Grantee agrees that for a period of twenty-five (25) years from and after the date of this conveyance, the premises shall not be used as a Truck Stop for the sale, marketing, storage or advertising of truck diesel and the premises shall also be restricted from the sale of any petroleum fuels other than Marathon, Texaco, Mobil, BP or Shell brand fuels for a period of fifteen (15) years from and after the date of this conveyance, and that this restriction shall be a covenant running with the land and shall be contained in and made a part of every deed, mortgage, lease or other instrument affecting title to said premises.

North Bay purchased the property in 2013. It was aware of the restrictive covenants when it purchased the property. Two months **512** later, North Bay filed this quiet title action to remove the restrictive covenants in its chain of title.

---

2. **Enforceability.**

North Bay argues that the covenants are unenforceable...
because Speedway no longer owns an interest in the property or an adjacent property, and no Georgia court ever has enforced a covenant where the benefits are held “‘in gross,’ i.e., as a personal right and not running with the land on the benefit side.” Barton v. Gammell, 143 Ga.App. 291, 293 (2) (b), 238 S.E.2d 445 (1977) (citation omitted). We find that regardless of whether the covenants or their benefits run with the land or are held in gross, the covenants are enforceable in equity.

Our Supreme Court has held that

covenants relating to land, or its mode of use or enjoyment, are enforceable against subsequent grantees with notice, whether named in the instrument or not, and though there is no privity of estate. It is immaterial in such cases whether the covenant runs with the land or not, the general rule being that it will be enforced according to the intention of the parties. It is only necessary that the covenant concern the land or its use, and that the subsequent grantee has notice of it. Covenants are so enforced on the principle of preventing a party having knowledge of the just rights of another from defeating such rights. Whether the covenant runs with the land or is an equitable servitude, it is clear that a restrictive covenant is an enforceable covenant against a purchaser with notice.

[3] [4] The person entitled to the benefit of a covenant has standing to enforce it. See generally Jones v. Gaddy, 259 Ga. 356, 357, 380 S.E.2d 706 (1989); Barton v. Atkinson, 228 Ga. 733, 743 (2), 187 S.E.2d 835 (1972). Thus as long as Speedway was intended to benefit from the covenants, it has standing to enforce them, even if it retained no interest in the burdened property nor an adjacent property. Barton, 228 Ga. at 743 (2), 187 S.E.2d 835. And the circumstances make clear that the covenants were intended to benefit Speedway by imposing certain limits on competition. “Though no language of the promise may suggest an intention that the benefit of the promise shall run, the advantage from its running may be so obvious that it is proper to infer that the parties intended it to do so.” Jones, 259 Ga. at 358, 380 S.E.2d 706 (citation omitted).

[5] Further, to hold that the covenants are not enforceable because Speedway retained no interest in the burdened or nearby property would mean that the covenants were void from their inception; Speedway conveyed its entire parcel via the deed that contained the covenants, so from the beginning of the covenants’ duration, Speedway no longer possessed an interest in the property. Speedway as grantor and the original grantee could not have intended the covenants to be void ab initio, and “covenants are to be construed so as to carry into effect the intention of the parties....” Smith v. Gulf Refining Co., 162 Ga. 191, 194, 134 S.E. 446 (1926) (citation and punctuation omitted).

In addition, the trial court expressly found as fact that Speedway has an interest in enforcing the covenants. He held that the covenants “provide a legitimate competitive advantage to Speedway by preserving an attractive opportunity for Speedway to reenter the Georgia market.” The court held that the original reason Speedway entered the covenants—to prevent the property from being developed and used as a competitive truck stop or gas station—persists. Nothing in the record contradicts these factual findings.

Because Speedway and the initial grantee intended Speedway to benefit from the covenants, the trial court did not err in ruling that Speedway has standing to enforce them.


[5] North Bay argues that Speedway’s lack of interest in the property or an adjacent property, as well as its lack of any legitimate interest in the covenants’ enforcement, defeats standing. We disagree.

4. Unconstitutional restraint of trade.

[6] North Bay argues that the restrictive covenants are not enforceable because they are unconstitutional, illegal restraints of trade. We disagree.

In its order transferring this appeal to our court, our
Supreme Court held that “any issue as to whether the prohibition found in Ga. Const. Art. III, Sec. VI, Para. V[, which concerns restraints of trade,] applies to restrictive covenants on the use of land is well settled,” citing Godley Park Homeowners Assn. v. Bowen, 286 Ga.App. 21, 23, 649 S.E.2d 308 (2007). In that case, we held that the constitutional provision and OCGA § 13-8-2 (a) (2), which renders contracts in general restraint of trade unenforceable as against public policy, do not apply to restrictive covenants on the use of real property. Godley Park, 286 Ga.App. at 23 (c), 649 S.E.2d 308. We observed that, “[i]n Georgia, it is clear that two parties may contract away or extend their rights as they please regarding the use of real property so long as public policy is not violated.” Id. (citation omitted). For these reasons, we do not find that the trial court erred by holding that the covenants at issue were not unenforceable restraints of trade.

Judgment affirmed.

Miller, P.J., and McMillian, J., concur.

All Citations

340 Ga.App. 899, 797 S.E.2d 510
Synopsis

Background: Assignee of security deed brought action against property owner, seeking to reform the security deed by removing description of tract identified in the deed and substituting the legal description of the entire property. The Superior Court, Bartow County, Smith, J., denied owner’s motion for judgment on the pleadings. Owner’s application for leave to appeal the interlocutory order was granted.

[ Holding: ] The Court of Appeals, Ellington, P.J., held that property owner did not show that it would be prejudiced by reformation of legal description in security deed, and thus was not entitled to judgment on the pleadings on its claim that seven-year statute of limitation barred action.

Affirmed.

West Headnotes (11)

[1] Pleading

Judgment on Pleadings

The issue in a motion for judgment on the pleadings is whether the undisputed facts appearing from the pleadings show the movant is entitled to judgment as a matter of law.

Cases that cite this headnote
until the mistake or fraud has been, or by the exercise of reasonable diligence should have been, discovered.

Cases that cite this headnote

[6] **Reformation of Instruments**

<table>
<thead>
<tr>
<th>Limitations and laches</th>
</tr>
</thead>
<tbody>
<tr>
<td>An action to reform a deed based on mutual mistake or fraud may not be barred by the seven-year statute of limitation if the non-complaining party will not be prejudiced. Ga. Code Ann. § 23-2-32(b).</td>
</tr>
</tbody>
</table>

Cases that cite this headnote

[10] **Reformation of Instruments**

<table>
<thead>
<tr>
<th>Limitations and laches</th>
</tr>
</thead>
<tbody>
<tr>
<td>In the case of a mutual mistake, reformation of an agreement to reflect the parties’ actual intent is not necessarily prejudicial to the non-complaining party, and thus, the seven-year statute of limitation period would not necessarily bar the reformation claim.</td>
</tr>
</tbody>
</table>

Cases that cite this headnote

[7] **Courts**

<table>
<thead>
<tr>
<th>Operation and effect in general</th>
</tr>
</thead>
<tbody>
<tr>
<td>A decision’s holding is limited to the factual context of the case being decided and the issues that context necessarily raises; language that sounds like a holding but actually exceeds the scope of the case’s factual context is not a holding no matter how much it sounds like one.</td>
</tr>
</tbody>
</table>

Cases that cite this headnote

[14] **Pleading**

<table>
<thead>
<tr>
<th>Insufficient Cause of Action or Defense</th>
</tr>
</thead>
<tbody>
<tr>
<td>Property owner did not show that it would be prejudiced by reformation of legal description in security deed to include owner’s entire property, and thus was not entitled to judgment on the pleadings on its claim that seven-year statute of limitation barred action brought by assignee of security deed to reform the deed on grounds of mutual mistake; although it could be inferred from deed that property owner paid value for property, owner did not point to anything in the pleadings establishing that it had no notice of alleged mutual mistake in security deed.</td>
</tr>
</tbody>
</table>

Cases that cite this headnote

[8] **Assignments**

<table>
<thead>
<tr>
<th>Equities and Defenses Between Original Parties</th>
</tr>
</thead>
<tbody>
<tr>
<td>An assignee takes the assignment subject to defenses against the assignor, including the defense of the bar of the statute of limitations.</td>
</tr>
</tbody>
</table>

Cases that cite this headnote

[11] **Assignments**

<table>
<thead>
<tr>
<th>Nature and extent of rights of assignee in general</th>
</tr>
</thead>
<tbody>
<tr>
<td>An assignee “stands in the shoes” of its assignor, and thus obtains no greater rights than the assignor possessed at the time of assignment; in other words, the assignee has no more rights under the contract than the assignor would have in dealings with the other contracting party.</td>
</tr>
</tbody>
</table>

Cases that cite this headnote

[9] **Assignments**

<table>
<thead>
<tr>
<th>Nature and extent of rights of assignee in general</th>
</tr>
</thead>
<tbody>
<tr>
<td>An assignee “stands in the shoes” of its assignor, and thus obtains no greater rights than the assignor possessed at the time of assignment; in other words, the assignee has no more rights under the contract than the assignor would have in dealings with the other contracting party.</td>
</tr>
</tbody>
</table>

Cases that cite this headnote

**Attorneys and Law Firms**

**Brandon Lowell Bowen, Cartersville, Sarah Grace Hegener, Jenkins & Bowen, for Appellant.**

Steven James Flynn, Atlanta, Kimberly Anne Wright, Norcross, Jennifer Nicole Keskeny, Roswell, Jimmy Thomas Howell Jr., McCalla Raymer, Joshua Neil Tropper, Baker, Donelson, Bearman, Caldwell & Berkowitz, Atlanta, for Appellee.

**Opinion**

Ellington, Presiding Judge.

*342* Wells Fargo Bank, N.A. sued The Cline Drive Land Trust seeking, on the grounds of mutual mistake, to reform the legal description *343* of a security deed to include certain Bartow County real property owned by the Trust. The Trust moved for judgment on the pleadings, contending that Wells Fargo’s action was barred by the statute of limitation. The trial court rejected the Trust’s statute of limitation defense, finding that the statute of limitation did not begin to run against Wells Fargo until it had acquired an interest in the document in 2011. After the trial court denied the Trust’s motion, this Court granted its application for leave to appeal the interlocutory order. For the reasons set forth below, we find that the trial court erred in concluding that Wells Fargo’s claim could have accrued no earlier than the date of the assignment of the security deed to Wells Fargo by the original grantee. However, we affirm the trial court’s judgment under the right-for-any-reason rule because the pleadings do not show that the Trust is entitled to prevail as a matter of law.

The pleadings show that on May 11, 2005, Robert Garnto obtained a $359,650 loan from Lending Street Mortgage ("LSM"). As part of that transaction, Garnto delivered a security deed to Mortgage Electronic Registration Systems, as nominee for LSM, in order to secure repayment of the loan. The security deed identifies a 3.56 acre tract in Bartow County as the property granted and conveyed thereunder. On the day the security deed was executed, Robert Garnto and Drusilla Garnto owned 18.56 acres of land (the “Property”) in Bartow County (which included the 3.56 acre tract) on which was located a single family residence.1 LSM assigned the security deed to Wells Fargo on June 10, 2011. The Trust acquired the Property from Drusilla Garnto in 2012.

*344* In its complaint against the Trust,2 Wells Fargo alleged that the parties to the loan intended for the Garntos’ residence to serve as security for the loan but that the residence does not lie on the 3.56 acre tract identified by the security deed. Wells Fargo sought to reform the security deed by removing the description of the 3.56 acre tract and substituting the legal description of the entire Property.

The Trust moved for judgment on the pleadings on the ground that the seven year statutory limitation period had run. The Trust maintained that the cause of action accrued in 2005, almost ten years before Wells Fargo filed suit. The trial court denied the Trust’s motion, rejecting the Trust’s argument that, because Wells Fargo stood in LSM’s shoes as assignee, its claim was barred by the statute of limitation. Rather, the trial court concluded, in view of Barron v. Wells Fargo Bank, N.A., 332 Ga.App. 180, 769 S.E.2d 830 (2015), that the statute of limitation began to run against Wells Fargo only upon the assignment of the security deed to Wells Fargo by LSM.

On appeal, the Trust contends that the trial court erred in relying on Barron for the proposition that the statute of limitation accrued when LSM assigned the security deed to Wells Fargo. We agree. “[A]n action to reform a written document may be brought within seven years from the time the cause of action accrues.” (Citation omitted.) Haffner v. Davis, 290 Ga. 753, 756 (3), 725 S.E.2d 286 (2012). And “[a]s a general rule, the statute of limitation does not commence to run against an equitable action for reformation of a written instrument based on mutual mistake or fraud until the mistake or fraud has been, or by the exercise of reasonable diligence should have been, discovered.” (Citation and punctuation omitted.) Id. However, “[a]n action to reform a deed may not be barred by the seven-year statute of limitation ... if the non-complaining party will not be prejudiced.” (Footnote omitted.) Cohen v. Wachovia Mortg. Corp., 332 Ga.App. 109, 111, 770 S.E.2d 17 (2015). See OCGA § 23–2–32 (b) (“Relief may be granted even in cases of negligence by the complainant if it appears that the other party has not been prejudiced thereby.”);

We applied the foregoing principles in *Barron*. In that case, the appellee bank, also Wells Fargo, sued Barron to reform the legal description of property securing a debt owed by Barron to the bank on the ground that the security deed mistakenly identified only a portion of Barron’s tract of property. 332 Ga.App. at 180, 769 S.E.2d 830. The trial court granted summary judgment to the bank based on judicial estoppel, finding that Barron had contended in his personal bankruptcy proceeding that he owned one parcel of real property and not two, as he now maintained. Id. We devoted the greater portion of our analysis in concluding that the trial court correctly decided the issue of judicial estoppel. Id. at 183–185 (1), 769 S.E.2d 830. We also, however, considered Barron’s contention that the bank’s complaint was untimely. Id. at 186–187 (2) (c), 769 S.E.2d 830. We noted that “Wells Fargo was first assigned an interest in the property on April 3, 2007, and it filed suit on August 20, 2012; thus, Wells Fargo filed suit approximately five years and four months after it reasonably could have been expected to discover an error regarding the May 2004 security deed.” Id. at 186 (2) (c), 769 S.E.2d 830. We also found, “moreover,” that “Barron cannot be prejudiced by the contract reformation because he is judicially estopped from asserting an unencumbered interest in the property. Thus Wells Fargo’s complaint was timely.” Id. at 186–187 (2) (c), 769 S.E.2d 830.

[7] We did not hold in *Barron* that the statute of limitation necessarily begins to accrue as to an assignee’s action for reformation of contract at the time of assignment. Unlike in this case, whether the bank’s predecessor should have discovered the error in the security deed upon exercise of reasonable diligence was not expressly at issue. Nor do the facts of *Barron* imply that we necessarily considered the question: “A decision’s holding is limited to the factual context of the case being decided and the issues that context necessarily raises. Language that sounds like a holding—but actually exceeds the scope of the case’s factual context—is not a holding no matter how much it sounds like one.” (Citation and punctuation omitted.) *Ga. Interlocal Risk Mgmt. Agency v. City of Sandy Springs*, 337 Ga.App. 340 n.1, 788 S.E.2d 74 (2016).

[8] Notwithstanding Wells Fargo’s reliance on *Barron*, “an assignee takes the assignment subject to defenses against the assignor,” including the defense of the bar of the statute of limitation. *Pridgen v. Auto-Owners Ins. Co.*, 204 Ga.App. 322, 323, 419 S.E.2d 99 (1992). *See Houghton v. Sacor Financial, Inc.*, 337 Ga.App. 254, 258–259 (1) (b) (i), 786 S.E.2d 903 (2016) (assignee of a contract could not start a new limitation period for filing breach of contract action by demanding that the other party pay the assignee an amount due under the contract). Thus, Wells Fargo took the security deed subject to the defense of the bar of the statute of limitation and stood in the shoes of LSM insofar as when the claim for reformation of the security deed began to accrue. It follows that the trial court erred in concluding that the statute of limitation accrued no earlier than the assignment of the security deed to Wells Fargo. Further, the pleadings show that the alleged mistake in the legal description was apparent on its face and could have been ascertained by LSM with reasonable diligence by reading the security deed. See, e.g., *Cohen v. Wachovia Mortg. Corp.*, 332 Ga.App. at 111, 770 S.E.2d 17 (statute of limitations not tolled where the lender alleged a mutual mistake in the mistaken omission of the co-owner of secured property as a grantor under the security deed, but the lender knew or should have known of the co-owner’s interest in the property at the time of the loan); *Layfield v. Sanford*, 247 Ga. 92, 93, 274 S.E.2d 450 (1981) (reformation of instrument denied where complaining party had “not bothered to read the deed or have it read to him or have the property surveyed”).

[10] [11] Although the trial court erred in its analysis, the pleadings do not establish that Wells Fargo would be unable to prevail on its claim for reformation of the security deed. In the case of a mutual mistake, reformation of an agreement to reflect the parties’ actual intent is not necessarily prejudicial to the non-complaining party. See, e.g., *Hill v. Agnew*, 199 Ga. 644, 646, 34 S.E.2d 702 (1945) (“If [defendant] gets what he bought, then he can not be hurt by reforming the instrument, so as to keep him from getting what he did not buy.”) (citation and punctuation omitted); *McCollum v. Loveless*, 187 Ga. 262, 267 (3), 200 S.E. 115 (1938) (“[T]he defendant will not be prejudiced by the reformation of the deed so as to make it speak the truth.”). And, as we noted above, the limitation period may not bar a reformation claim if the non-complaining party will not be prejudiced. *Cohen v. Wachovia Mortg. Corp.*, 332 Ga.App. at 111, 770 S.E.2d 17. The Trust argues that it would necessarily be prejudiced by the reformation of the security deed in that the Trust was a bona fide purchaser for value who took without notice that Wells Fargo claimed an interest in all of the Property. See *Haffner v. Davis*, 290 Ga. 753, 757 (3), 725 S.E.2d 286 (2012) (subsequent purchasers would be prejudiced by the reformation of the warranty deed as they were “bona fide purchasers who had no notice of the mistake until two years after” they bought the property). Here, although it can be inferred from the deed to the Trust that it paid value for the Property, the Trust does not point to
anything in the pleadings that establishes it had no notice of the alleged mutual mistake in the security deed or that, as a matter of law, Wells Fargo could not prevail by showing a lack of prejudice to the Trust if the security deed was reformed. See, e.g., Whiten v. Murray, 267 Ga.App. 417, 421(2), 599 S.E.2d 346 (2004) (“Notice sufficient to excite attention and put a party on inquiry shall be notice of everything to which it is afterwards found that such inquiry might have led.”). The Trust has not established, at this stage of the litigation, that it is entitled to judgment. See Gamble v. Pilcher, 242 Ga. 556, 558, 250 S.E.2d 416 (1978) (trial court erred in granting judgment on the pleadings where appellee had not shown that it took the security deed without knowledge of the materialman’s claim against the property). Accordingly, we affirm the trial court’s denial of the Trust’s motion for judgment on the pleadings under the principle of right for any reason. See Ford v. Atkinson Dredging Co., 222 Ga.App. 593, 594 n.1, 474 S.E.2d 652 (1996) (“[A] judgment right for any reason will be affirmed.”).

Judgment affirmed.

Branch and Mercier, JJ., concur.

All Citations
339 Ga.App. 342, 793 S.E.2d 550

Footnotes

1 On the date of the loan transaction, Drusilla Garnto conveyed her interest in the 3.56 acre tract portion of the Property to Robert Garnto, who conveyed the 3.56 acre tract to LSM under the security deed. Robert Garnto then conveyed the 3.56 acre tract to Robert Garnto and Drusilla Garnto, as joint tenants with right of survivorship.

2 Robert Garnto was originally named as a co-defendant but later disclaimed all interest in the Property. By consent order, the trial court found the Trust to be the appropriate defendant.

3 The evidence in Barron showed that, following the assignment to the bank, an employee of a title agency filed an affidavit of a scrivener’s error that “‘someone’ at the title agency” had caused the security deed at issue to be filed with an incorrect legal description. 332 Ga.App. at 182, 769 S.E.2d 830.

4 An assignee “stands in the shoes” of its assignor, and thus “obtains no greater rights than the assignor possessed at the time of assignment.” (Citations omitted.) Southern Telecom Inc. v. TW Telecom Inc. of Georgia L.P., 321 Ga.App. 110, 114, 741 S.E.2d 234 (2013). In other words, “the assignee has no more rights under the contract than the assignor would have in dealings with the other contracting party.” Algernon Blair, Inc. v. Nat. Surety Corp., 222 Ga. 672, 673, 151 S.E.2d 724 (1966).

5 See Harper v. Patterson, 270 Ga.App. 437, 439 (2), 606 S.E.2d 887 (2004) (A motion for judgment on the pleadings, absent the introduction of affidavits, depositions or interrogatories in support of the motion, is equivalent to a motion to dismiss for failure to state a claim, which “should not be granted unless the averments in the complaint disclose with certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of [its] claim.”) (citation and punctuation omitted); Auerback v. Maslia, 142 Ga.App. 184, 185 (2), 235 S.E.2d 594 (1977) (“Judgment on the pleadings may be granted only where it appears from the pleadings themselves that the person against whom judgment is sought can in no event prevail.”) (citation omitted).
342 Ga.App. 81  
Court of Appeals of Georgia.  
PATEL et al.  
v.  
PATEL.  
A17A0235  
June 27, 2017  

Synopsis  
Background: Brother and sister brought action against former stepmother, seeking to quiet title to four tracts of real property. The trial court, after sua sponte appointing a special master, found brother and sister in contempt for failing to pay special master’s fees, denied motion to set aside order awarding additional fees, denied motion to recuse, and dismissed notice of appeal. Brother and sister appealed.  

Holdings: The Court of Appeals, Rickman, J., held that:  

[1] the trial court abused its discretion in dismissing brother and sister’s notice of appeal from order awarding special master additional fees on the ground of unreasonable delay in the filing of a transcript;  

[2] brother and sister were entitled to default judgment as a matter of law;  

[3] trial court’s sua sponte invocation of the procedures and standards for a quiet title action against the world, and its appointment of a special master over the objection of brother and sister, particularly in light of their immediate and repeated declarations that they were unable to pay for the services, was patently unauthorized; and  

[4] trial court’s unqualified dismissal of brother’s and sister’s quiet title action terminated the action, and thus, because the court lacked jurisdiction to take further action, its subsequent contempt order, incarceration order, and order awarding additional special master fees were void.  

Judgment reversed in part, vacated in part, and remanded.  

West Headnotes (6)  

[1] Appeal and Error  
Defects, objections, and amendments  
Trial court abused its discretion in dismissing brother’s and sister’s notice of appeal from order awarding special master additional fees on the ground of unreasonable delay in the filing of a transcript, when no hearing or proceeding in quiet title action was ever transcribed, and when 15 days after filing their notice of appeal, brother and sister amended the notice to specify that “no transcripts” were to be transmitted with the record. Ga. Code Ann. § 5-6-48.  

Cases that cite this headnote  

[2] Appeal and Error  
In proceedings for review  
Appeal and Error  
Defects, objections, and amendments  
The trial court’s discretion to dismiss a notice of appeal is a legal discretion which is subject to review in the appellate courts. Ga. Code Ann. § 5-6-48.  

Cases that cite this headnote  

Operation and Effect of Default  
After brother and sister served their former stepmother by publication, and former stepmother failed to file an answer within 60 days, the quiet title action automatically went into default, and because former stepmother made no effort to open the default within 15 days, brother and sister were entitled to default judgment as a matter of law.
802 S.E.2d 871

9-11-4(f) (1) (C), 9-11-55(a).

Cases that cite this headnote

Quieting Title
- Scope of inquiry and powers of court
- Reference
  - Reference on court’s own motion

Trial court’s sua sponte invocation of the procedures and standards for a quiet title action against the world, and its appointment of a special master over the objection of the claimants, particularly in light of their immediate and repeated declarations that they were unable to pay for the services, was patently unauthorized, when the action was initiated pursuant to statutes governing a conventional quiet title action, and as such, an appointment of a special master would be made only at the option of the claimant. Ga. Code Ann. §§ 23-3-40, 23-3-43, 23-3-60.

Cases that cite this headnote

Contempt
- Scope and Extent of Authority
- Courts
  - Acts and proceedings without jurisdiction
- Pretrial Procedure
  - Operation and Effect

Trial court’s unqualified dismissal of brother’s and sister’s quiet title action terminated the action, and thus, the court lacked jurisdiction to take further action, and its subsequent contempt order, incarceration order, and order awarding additional special master fees were void.

Cases that cite this headnote

Pretrial Procedure
- Operation and Effect

The unqualified dismissal of a case terminates the action, divests the trial court of jurisdiction to take further action in the case, and renders all orders entered after the dismissal a mere nullity; furthermore, upon dismissal of the case, all prior orders that were entered in the case are superseded and can no longer be enforced against the parties.
he denied having executed the deeds on their behalf. The remaining two deeds were alleged to have been executed by an individual lacking the authority to do so.

After numerous attempts to serve the Defendant were unsuccessful, on December 3, 2013, the trial court issued an order authorizing the Patels to serve her by publication, and service by publication was thereafter effected. The Defendant never filed an answer or otherwise made an appearance in the case.

In March 2014, the Patels moved for a default judgment against the Defendant. Following a hearing attended by Roshni Patel, the trial court acknowledged that the Patels were seeking a default judgment, but instead of granting their motion, sua sponte appointed a special master pursuant to OCGA § 23-3-63, a statutory scheme not invoked by the Patels’ petition (the “Appointment Order”). The Appointment Order gave the special master full authority to control case management; entertain all motions and discovery; hold evidentiary hearings; and submit a report, which was to include findings of fact, conclusions of law, and a proposed final judgment and order, to the trial court. It further required the Patels to bear the costs of the special master at an hourly rate of $275.00.

The following week, the special master sent out a request pursuant to OCGA § 23-3-60 et seq. that the Patels file with the clerk “[a]ny abstract of title, title examination, and/or title report upon which [they] rely in the prosecution of this case; and ... [p]lat of survey for each of the tracts of real property at issue in this case to the extent [the] same are not filed as part of any title examination.” Additionally, the special master filed an “initial report and recommendation,” in which he stated that the Defendant had not been served; noted that the petition lacked certain information required by OCGA § 23-3-62, namely a plat of survey and a recorded lis pendens for each of the Properties; and recommended that the Patels amend their petition to include the missing documents or face dismissal and serve the amended petition upon the Defendant.

The Patels filed a timely motion to set aside the Appointment Order, strenuously objecting to the appointment of a special master and explicitly stating that they were unable and unwilling to pay for a special master’s services. The Patels reasserted their position that they were entitled to a default judgment and encouraged the trial court to rule on their motion. Alternatively, the Patels requested that the trial court issue a ruling based solely upon the petition and exhibits submitted.

The Patels contemporarily forwarded their motion directly to the special master, requesting that he not perform any work on the case and informing him that they “[were] not in position to incur any additional cost” and “[would] not be able to pay [his] invoice.” The Patels also informed the special master that the Defendant had been served by publication in accordance with the trial court’s order authorizing such service, and they objected to the special master’s assertion that plats of surveys were needed to resolve the action, which alleged cloud on title caused solely by fraudulent or defective deeds as set forth and included in the verified petition.

In a summary order, the trial court denied the Patels’ motion to set aside the Appointment Order. In a separate order, the trial court adopted the special master’s initial report and recommendation, thereby commanding the Patels to comply with the special master’s direction to amend their petition to submit the additional documentation and to serve the amended petition upon the Defendant.

The Patels filed a timely motion to reconsider, again reiterating their objection to the appointment of a special master and reemphasizing that they “are NOT WILLING to spend” money on a special master. They further pointed to alleged inaccuracies in the special master’s initial report and recommendation regarding the lack of service on the Defendant and repeated their belief that a special master was unnecessary to address the allegations against the named Defendant as set forth in the petition. Finally, the Patels stated that “[i]f [the] court deems that [it] cannot make [a] determination without [a special master’s] report, [the Patels] ask the court to enter default judgment or dismiss the action,” noting that the court’s imposition “of [an] additional financial burden on [them]” would “force[e] [them] to withdraw a legitimate claim.”

The trial court issued a notice of hearing on the Patels’ motion to reconsider. The Patels in turn filed a motion for summary judgment and contemporaneously therewith, filed a motion to continue the hearing, requesting that the hearing be rescheduled until a date and time on which the trial court would be willing to consider their summary judgment and all other outstanding motions.

On August 8, 2014, following the originally scheduled hearing date and without ruling on the Patels’ motion for a continuance, the trial court issued an order noting that the Patels failed to appear at the hearing and thereafter “grant [ed] their motion to dismiss” and dismissed the case “for want of prosecution” (the “Dismissal Order”). The trial court then ordered that the Patels remit payment
to the special master “for all costs incurred for his work”7 in the case within 60 days of its order and warned that “[f]ailure to comply may result in contempt proceedings” against them.

The Patels filed a motion to set aside and/or modify the Dismissal Order, arguing that the trial court’s dismissal of their petition under these circumstances was unjust and constituted an abuse of judicial power. The Patels again asserted that they were entitled to a default judgment and that the trial court erred in appointing a special master sua sponte, explicitly noting that the statutory scheme invoked by their petition authorized the appointment of a special master only “[a]t the option of the complainant.”8 They further objected to the trial court’s order requiring them to pay the special master without any evidence or testimony in the record justifying his expenses, and asked at the very least that the order be modified to eliminate the mandate to pay. The Patels also filed a notice of appeal seeking review of the Dismissal Order.

Approximately two months later, the special master filed a “report on nonpayment of fees,” informing the trial court that his “fees in the amount of $1,155.00 remain unpaid” despite the mandate in the Dismissal Order that they be paid within 60 days. This is the first mention in the record of the special master’s claimed expenses and it was otherwise unsupported by any documentation or other evidence.

The trial court noticed a hearing to address the Patels’ motion to set aside and/or modify the Dismissal Order, to “[s]how cause why [the Patels] shouldn’t be held in contempt for failure to pay the [s]pecial [m]aster as ordered,” and to “[s]how cause why [the Patels’] [n]otice of [a]ppeal shouldn’t be dismissed for their failure to comply with the [c]lerk’s deficiency memo.” The record does not contain a copy of a “deficiency memo” or any other correspondence sent from the court clerk to the Patels related to their notice of appeal, nor is any such correspondence reflected on the trial court’s record index of filings.9

The Patels filed a motion to waive and/or continue the hearing, or alternatively, for permission to be represented at the hearing by their father. In the motion, the Patels asserted that they were students living in Texas caring for their mentally impaired mother, and that they did not have the financial means to travel to Georgia or to retain an attorney. They again set forth the procedural history of the case and asserted that

The Patels repeated their request that the trial court make a ruling based upon the filings and/or grant them a continuance; alternatively, they requested that their father be permitted to attend and represent their interests. Finally, the Patels denied having received any “deficiency memo” or other correspondence from the clerk of the court with regard to their notice of appeal.

On December 4, 2014, following the date of the scheduled hearing and without ruling on the Patels’ motion to waive and/or continue the hearing, the trial court noted that the Patels failed to attend and entered a summary order denying their motion to set aside and/or modify the Dismissal Order. In addition, the trial court dismissed the Patels’ notice of appeal “for failure to comply with the statutory mandates regarding the same.” And finally, the trial court stated that it had “received evidence from” the special master, who had attended the hearing, and found the Patels “jointly and severally, in willful contempt in the amount of $1,358.09” (the “Contempt Order”).10 The trial court ordered that the Patels pay that amount to the special master within ten days, and stated that the failure to pay “shall result in an order for [their] immediate incarceration.”11

The Patels timely filed a motion to set aside the Contempt Order. They again repeated the history of the case, citing statutory and other legal authority in support of their objection to the special master’s appointment, and reiterated that they had promptly communicated to both the court and the special master that they could not afford to pay for his services. They reasserted that they did not receive any “deficiency notice” or other correspondence from the clerk regarding their notice of appeal. Finally, they objected to the reasonableness of the special master’s fees, requesting that the court set aside the Contempt Order or, alternatively, “reduce the amount of billing from the special master to a reasonable amount that [they] can pay.”12

Around the same time, the Patels filed a notice of appeal seeking review of the Contempt Order, a motion to stay the order pending appeal, and a motion to transfer venue. The special master filed a “response” to the Patels’ various motions, asserting that they each lacked merit.13

The trial court summarily denied the Patels’ motions and on December 17, 2014, issued an order of incarceration based upon their failure to pay the special master’s fees (the “Incarceration Order”). The trial court ordered the Patels “to be immediately incarcerated ... and held ... until such time when they purges (sic) themselves of this contempt by paying the arrearages of $1,358.09 by payment of cash ... including any interest therein.
Due to a procedural deficiency in the Patels’ pro se appellate brief, this Court was unable to reach the merits of their appeal of the Contempt Order and in an unpublished opinion, affirmed the trial court’s dismissal of their notice of appeal. The case was remitted back to the trial court in February 2016.

Meanwhile, on January 28, 2016, the special master filed a “supplemental report on nonpayment of fees,” asserting that his fees in the amount of $1,358.09 remained unpaid, thereby requesting that the trial court reissue its order of incarceration. The special master also requested an additional award of $932.66 for “time which [he] spent in dealing with the [Patels’] appeal and in drafting these pleadings,” and requested that a total amount of $2,290.75 be reduced to a judgment and that a writ of fieri facias issue on the same. The special master requested a hearing “to consider [his] requests.”

The trial court thereafter issued an order that its Incarceration Order “[was] in full force and effect” and that “there has been an unreasonable delay in the filing of the transcript and it has been shown that the delay was inexcusable and was caused by the [Patels].” The trial court lacked jurisdiction to order them to continue paying the special master after dismissing the hearing or proceeding had been transcribed. The trial court denied the Patels’ motion to set aside the Order Awarding Additional Fees and the motion to recuse. It further dismissed their notice of appeal after concluding that “there has been an unreasonable delay in the filing of the transcript and it has been shown that the delay was inexcusable and was caused by the [Patels].”

The Patels filed a timely motion to reinstate the notice of appeal, asserting that they had not requested that any transcript be included in their appeal and were not aware that any hearing or proceeding had been transcribed. The trial court denied their motion in a summary order. This appeal is governed by OCGA § 5-6-48. Subsection (c) provides that, in appeals that involve the filing of a transcript, “the trial court may, after notice and opportunity for hearing, order that the appeal be dismissed where there has been an unreasonable delay in the filing of the transcript and it is shown that the delay was inexcusable and was caused by such party.” In cases that involve only the transmission of a record in the absence of a transcript, “the trial court may order the appeal dismissed where there has been an unreasonable delay in the transmission of the record to the appellate court.”

Nevertheless, the trial court conducted the scheduled hearing, noted that the special master appeared and the Patels did not, and issued an order that “the proper foundation for an award of additional fees and costs to the [s]pecial [m]aster has been laid” and awarded him “an additional $1,482.66 against the [Patels] for his fees and costs associated with efforts ... since the original order was entered.” Thus, while recognizing that the Patels had deposited the original amount of $1,358.09 into the court’s registry, the trial court ordered that they “shall remit” the additional payment to the special master within 60 days of the order and “[f]ailure to comply may result in contempt proceedings against” them (the “Order Awarding Additional Fees”).

The Patels filed a motion to set aside the Order Awarding Additional Fees and a motion to recuse, and filed a notice of appeal. The trial court scheduled a hearing *877 on the motion to set aside and in a separate order, set a hearing on a different day for the Patels to “show cause why [their] [n]otice of [a]ppeal shouldn’t be dismissed for failure to pay appellate costs.” Ultimately, the hearings were rescheduled to occur on the same day and Roshni Patel appeared. Following the hearing, the trial court denied the Patels’ motion to set aside the Order Awarding Additional Fees and the motion to recuse. It further dismissed their notice of appeal after concluding that “there has been an unreasonable delay in the filing of the transcript and it has been shown that the delay was inexcusable and was caused by the [Patels].”

The Patels filed a motion to reinstate the notice of appeal, asserting that they had not requested that any transcript be included in their appeal and were not aware that any hearing or proceeding had been transcribed. The trial court denied their motion in a summary order. This appeal follows.

1. The Patels assert that the trial court erred in dismissing its notice of appeal of the Order Awarding Additional Fees. We agree.

[1] [2] The trial court’s authority to dismiss a notice of appeal is governed by OCGA § 5-6-48. Subsection (c) provides that, in appeals that involve the filing of a transcript, “the trial court may, after notice and opportunity for hearing, order that the appeal be dismissed where there has been an unreasonable delay in the filing of the transcript and it is shown that the delay was inexcusable and was caused by such party.” In cases that involve only the transmission of a record in the absence of a transcript, “the trial court may order the appeal dismissed where there has been an unreasonable delay in the transmission of the record to the appellate court.”
appeal requires us to first return to the trial court’s refusal to specify that “notice of appeal at issue, the Patels amended the notice in no transcripts” were to be transmitted with the record. Thus, there was no basis in law or fact for the trial court to dismiss the notice of appeal due to an alleged delay in filing a transcript and the court clearly abused its discretion in doing so. See generally Hammontree v. Hammontree, 186 Ga.App. 819, 820, 368 S.E.2d 576 (1988) (reversing the trial court’s dismissal of appellant’s notice of appeal); White v. Olderman Realty & Development Co., 163 Ga.App. 57, 293 S.E.2d 726 (1982) (same); Ray, 144 Ga.App. at 155-156 (1), 240 S.E.2d 577. Accordingly, the trial court’s judgment dismissing the Patels’ notice of appeal of the Order Awarding Additional Fees is hereby reversed.

2. Having reversed the trial court’s dismissal of the Patels’ notice of appeal, we will now address the merits of the underlying appeal. See generally OCGA § 5-6-34 (d) (“Where an appeal is taken ... all judgments, rulings, or orders rendered in the case which are raised on appeal and which may affect the proceedings below shall be reviewed and determined by the appellate court...”); McKinnon v. McKinnon, 158 Ga.App. 776, 777 (2), 282 S.E.2d 220 (1981).

(a) The Appointment Order. Proper resolution of this appeal requires us to first return to the trial court’s refusal to grant the Patels a default judgment and instead appoint, sua sponte, a special master. Both were erroneous.

(i) Under Georgia law, a defendant may be served with process by publication upon order of the court in accordance with OCGA § 9-11-4 (f). A defendant has 60 days from the order of publication in which to file an *878 answer. OCGA § 9-11-4 (f) (1) (C). “If in any case an answer has not been filed within the time required by [statute], the case shall automatically become in default unless the time for filing the answer has been extended as provided by law.” OCGA § 9-11-55 (a). With exceptions not applicable here, if the default has not been opened within 15 days, “the plaintiff at any time thereafter shall be entitled to verdict and judgment by default, in open court or in chambers, as if every item and paragraph of the complaint or other original pleading were supported by proper evidence, without the intervention of a jury....” (Emphasis supplied.) Id.

Here, the Patels obtained a court order on December 3, 2013 to serve the Defendant by publication, and service by publication was thereafter effected. As set forth in the published notice, the Defendant had 60 days from the date of the order in which to file an answer, yet failed to do so. The case thus automatically went into default on February 3, 2014. See OCGA §§ 9-11-4 (f) (1) (C); 9-11-55 (a). After the Defendant made no effort to open the default within 15 days, the Patels were entitled to default judgment as a matter of law. See OCGA § 9-11-55 (a); Cavender v. Taylor, 285 Ga. 724, 724-725 (2), 681 S.E.2d 139 (2009) (affirming the trial court’s entry of default judgment in a quiet title action); SRM Realty Services Group, LLC v. Capital Flooring Enterprises, Inc., 274 Ga.App. 595, 604 (2), 617 S.E.2d 581 (2005) (“The plain language of [OCGA § 9-11-55 (a)] ‘entitles’ a plaintiff default judgment where ... a defendant has failed to serve an answer timely, 15 days have elapsed from the time an answer was due without an answer served and costs paid, the defaulting defendant has made no attempt to open the default, and the action does not fall within any of the exceptions set forth in that Code section.”); see also H. N. Real Estate Group, LLC v. Dixon, 298 Ga.App. 124, 125-126, 679 S.E.2d 130 (2009). Accordingly, the trial court erred in denying their motion for default judgment.

(ii) Compounding that error, the trial court appointed a special master, sua sponte, over the Patels’ objection. This was also in direct contravention of Georgia law.

“To quiet title to real property, one may seek relief under the procedures and standards for conventional quia timet, see OCGA § 23-3-40 26 et seq., or under those for quia timet against all the world, see OCGA § 23-3-60 et seq.” Vatacs Group, Inc. v. U. S. Bank, N.A., 292 Ga. 483 (1), 738 S.E.2d 83 (2013). The contemplated procedures of the two proceedings are entirely distinct from each other. See Vatacs Group, Inc., 292 Ga. at 483 (1), 738 S.E.2d 83; compare OCGA § 23-3-40 et seq. with OCGA § 23-3-60 et seq. In their petition, the Patels filed a conventional quiet title action, expressly invoking OCGA § 23-3-40 et seq., asserting cloud on title resulting solely from the allegedly defective and/or fraudulent deeds held...
by the Defendant.

By the plain language of the statutory authority, when a quiet title action is instituted pursuant to OCGA § 23-3-40 et seq., the appointment of a special master is made “[a]t the option of the complainant.” OCGA § 23-3-43. Here, the trial court’s sua sponte invocation of OCGA § 23-3-60 et seq. and its appointment of a special master over the Patels’ objection—particularly in light of their immediate and repeated declarations that they were unable to pay for the services—was patently unauthorized. See OCGA § 23-3-43; Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 643 (2), 755 S.E.2d 675 (2014) (recognizing that the power to dictate the appointment of a special master in an action *879 under OCGA § 23-3-40 et seq. rests exclusively with the plaintiff). Cf. Stephens v. Department of Transp., 170 Ga.App. 784, 787-788 (1), 318 S.E.2d 167 (1984) (holding, under a separate statutory scheme, that the trial court erred in sua sponte appointing a special master when the statute contemplated that appointment was to occur upon the petition of a party). Therefore, the trial court’s Appointment Order is hereby reversed.

[5] [6](b) The Contempt Order, the Incarceration Order, and The Order Awarding Additional Fees. Although clear legal error permeates each of these orders for separate and distinct reasons, we need go no further than holding that each is void because each was issued after the trial court dismissed the Patels’ petition.

Under Georgia law, the unqualified dismissal of a case terminates the action, divests the trial court of jurisdiction to take further action in the case, and renders all orders entered after the dismissal a mere nullity. Furthermore, upon dismissal of the case, all prior orders that were entered in the case are superseded and can no longer be enforced against the parties. Thus, the dismissal of a case divests the court of jurisdiction to consider a subsequent contempt motion and precludes the court from finding a party in contempt of an order previously entered in that case.


Upon issuing the Dismissal Order, the propriety of which we need not address, on August 8, 2014, the trial court no longer retained jurisdiction over the action. See Lewis, 336 Ga.App. at 129 (1), 784 S.E.2d 1; Montgomery, 322 Ga.App. at 561 (1), 745 S.E.2d 778; Gallagher, 300 Ga.App. at 436 (1), 685 S.E.2d 387. It follows that the Contempt Order, the Incarceration Order, and the Order Awarding Additional Fees were mere nullities without force or effect. See Lewis, 336 Ga.App. at 129 (1), 784 S.E.2d 1; Montgomery, 322 Ga.App. at 561 (1), 745 S.E.2d 778; Gallagher, 300 Ga.App. at 436 (1), 685 S.E.2d 387. We therefore vacate those orders as void.

3. The Motion to Recuse. The Patels assert as error the trial judge’s refusal to recuse herself from this case. We cannot say that the judge’s denial of the Patels’ motion was erroneous because the motion itself was legally deficient. See Uniform Superior Court Rule 25.1 (“All motions to recuse or disqualify a judge presiding in a particular case or proceeding shall be timely filed in writing and all evidence thereon shall be presented by accompanying affidavit(s) which shall fully assert the facts upon which the motion is founded.”). We note, however, that the legal deficiency of the Patels’ motion did not in any way diminish the judge’s obligations under the Code of Judicial Conduct. See Rule 2.11 (A) (“Judges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned ...”) (emphasis in original); see also Rule 2.3 (A), (B) (“Judges shall perform judicial duties without bias or prejudice... [and] shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice ...”); Rule 2.4 (A) (“Judges shall be faithful to the law and maintain professional competence in it.”) (emphasis in original); Rule 2.13 (A) (1), (2) (“In making administrative appointments, a judge ... shall exercise the power of appointment impartially and on the basis of merit; and ... shall avoid nepotism, favoritism, and unnecessary appointments.”) (emphasis in original).

4. In summary, the Patels were entitled to an entry of default judgment as a matter of law when they filed their motion in March 2014, and the trial court’s decision to instead issue an order appointing a special master is hereby reversed. Moreover, all orders issued subsequent to the dismissal of the petition demanding that the Patels pay for a special master whose appointment was neither lawful nor necessary are hereby vacated.
Judgment reversed in part, vacated in part, and case remanded.

Ellington, P.J., and Andrews, J., concur.

Footnotes

1. The petition included two additionally named defendants, whom the Patels later dismissed from the action.

2. The published notice of service ran for four consecutive weeks, beginning on January 2, 2014, in accordance with OCGA § 9-11-4 (f) (1) (C).

3. The Patels’ petition included a claim for fraud and sought punitive damages against the Defendant, but in an effort to facilitate an entry of default judgment, they dismissed the fraud claim and moved forward solely on the quiet title action.

4. The trial court appointed James P. Blum, Jr., of Beloin, Brown & Blum, LLC as special master.

5. The Appointment Order also provided that in any given month, “[t]he parties appearing in the case” shall each pay a pro rata share of the special master’s invoice; the Patels, however, were the only parties appearing in the case because the Defendant was in default and the other defendants had been dismissed.

6. (Emphasis in original.)

7. The only record evidence evincing the special master’s work is his letter request to the Patels that they obtain and file additional documentation and his initial report and recommendation to the trial court that the Patels amend their petition to include the additional documentation and serve the amended petition upon the Defendant.

8. See OCGA § 23-3-43.

9. Indeed, although the trial court’s notice was issued on November 20, 2014, the first notice to the Patels contained in the record relating to court costs associated with their notice of appeal is dated December 18, 2014.

10. The record contains no evidence supporting the special master’s expenses, nor does it explain why the contempt amount differed from the originally claimed unpaid balance of $1,155.00.

12. (Emphasis in original.)

13. The Patels’ motion also included an allegation that the special master had “misled” them by advising them that he had no objection to their father representing them at the hearing and indicating that their father would have the opportunity to speak in court.

14. The special master denied having misled the Patels, asserting that he told them only that he did not object to their father speaking on their behalf at the hearing, but that the trial court may not allow it.

15. The Patels subsequently amended their notice of appeal, and the trial court thereafter issued a stay of the Incarceration Order only as to Roshni Patel because although the notice of appeal was in both their names, it contained only his signature. The Patels filed a motion to modify the order staying the Incarceration Order to include both of them, but that motion was denied.

16. Because this Court expressly declined to rule on the underlying merits, the law of the case rule does not foreclose us from addressing them now. See OCGA § 9-11-60 (h) (“[A]ny ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be.”) (emphasis supplied); Parks v. State Farm Gen. Ins. Co., 238 Ga.App. 814, 815 (1), 520 S.E.2d 494 (1999) (“[T]he [law of the case] rule applies only to actual decisions, not to issues raised by the
The Patels filed a motion to add their father as an additional plaintiff to the lawsuit, asserting that he had communicated with the special master on their behalf and would be the one ultimately responsible paying his fees, but that motion was denied.

The only record evidence purporting to support the special master’s claimed expenses is an invoice he sent to the Patels containing nothing more than a non-itemized list of his charges and the Patels’ alleged overdue balance.

In the interim, the Patels filed a motion to transfer venue, a motion for sanctions against the special master, a motion to reduce the original judgment, a motion to add party, and a motion to enter an order on the pleadings and/or a motion to continue. The trial court denied each motion in summary orders. The Patels moved to set aside each denial order in their motion to set aside the Order Awarding Additional Fees.

A conventional quiet title action “is sustained in equity for the purpose of causing to be delivered and canceled any instrument which has answered the object of its creation or any forged or other iniquitous deed or other writing which, though not enforced at the time, either casts a cloud over the complainant’s title or otherwise subjects him to future liability or present annoyance, and the cancellation of which is necessary to his perfect protection.” OCGA § 23-3-40.

A quiet title action against all the world “is ... a procedure for removing any cloud upon the title to land, including the equity of redemption by owners of land sold at tax sales, and for readily and conclusively establishing that certain named persons are the owners of all the interests in land defined by a decree entered in such proceeding, so that there shall be no occasion for land in this state to be unmarketable because of any uncertainty as to the owner of every interest therein.” OCGA § 23-3-60.
EXECUTIONS AND ATTESTATION
CHAPTER 4

AFFIDAVITS AND RECITALS
CHAPTER 6
Chapter 4 - Execution, Attestation, Acknowledgment and Recording

4.1- Date, Omissions and Inconsistencies

Inconsistencies within or an omission of date of execution are not, on their own, a marketability issue and a proper sequence of execution vs. attestation vs. recording will be presumed unless there is something significantly off about one of the dates.

4.2- Delivery, Delay in Recording

- Delay in recording of a document does not, on its own, rebut the presumption that it was delivered (in an arm’s length transaction). However, if a deed is recorded after the date of the grantor and does not appear arms’ length (i.e. between family members), it is not entitled to the same presumption.

4.3- Georgia State Transfer Tax

- Failure to pay, or notate as paid on its face, does not impair the marketability or constructive notice of a deed. However, if the deed was recorded between January 1, 1968 and March 16, 1983, it should include a certificate of the clerk if the consideration was more than $100.00 or require correction to ensure it provides constructive notice.

4.4- Internal Revenue Service Real Estate Reporting

- Failure to properly report real estate transactions to the IRS, when required, doesn’t impair marketability of title.

4.5- Requirements for Recording a Deed in Georgia

- Due to the passage of HB 322, which became effective as of July 1, 2015, this section, along with 4.6 and 4.7, were revised in 2016. However, you must be familiar with both rules, because the old rule would apply to deed recorded prior to July 1, 2015.

  - OLD RULE: All deeds required signature of the grantor(s), 2 attesting witnesses and 1 official witness, who could act as the second attesting witness or who could acknowledge the grantor(s)’ signature(s) if there were 2 other attesting witness signatures present.

  - NEW RULE: All deeds require the signature of the grantor(s), 1 attesting unofficial witness, and 1 attesting official witness. The official witness is no longer allowed to utilize an acknowledgment jurat for the deed to be entitled to be recorded.
4.6- Constructive Notice of Security Deeds

- Security Deeds must comply with the relevant deed recording requirements (which were in effect as of the date of recording) to be entitled to recorded, or to be considered “duly recorded” for the purposes of constructive notice.

- Therefore, all Security Deeds recorded after July 1, 2015 must comply with the new rule requiring the attestation by the official witness and 1 other witness. Only Security Deeds recorded prior to July 1, 2015 may utilize a notary acknowledgment with 2 additional attesting witnesses.

- To provide notice of defectively executed Security Deeds under either rule, it can be corrected by:
  
a. Corrective Deed
  
b. Modification Agreement
  
c. Affidavit of a subscribing witness pursuant to O.C.G.A. § 44-2-15
  
d. Affidavit of a third party in accordance with the requirements of O.C.G.A. § 44-2-19

4.7- Actual and Constructive Notice

- Although defectively executed deeds provide no constructive notice, and can even be rejected by the clerk prior to recordation, once recorded, it can provide actual notice or inquiry notice to a subsequent purchaser if actually seen by said purchaser or his attorney.

- Actual notice can also apply to an unrecorded deed, if the purchaser was aware of its existence despite its lack of recording.
Chapter 6 - Affidavits and Recitals

Most common title affidavits include:

a) Affidavit of Descent  
b) Scrivener’s Affidavit  
c) Notary Affidavit  
d) Name Affidavit  
e) Lost Deed Affidavit  
f) Intangible Tax Affidavit  
g) Affidavit of Possession

6.1 Affidavits

Affidavits are governed by O.C.G.A. § 44-2-20

Utilization of affidavits is an acceptable practice and reasonable reliance may be placed upon them.

- Proper and recorded affidavits constitute notice of the facts recited therein and create a rebuttable presumption that such facts are true and correct.

- Exhibits may be incorporated in an affidavit in order to introduce such matters into the chain of title.

(b) Affidavits should reference the current property owner and a recorded instrument in the chain of title.

(c) Affidavits may be made by any person and should set forth information within the personal knowledge of the affiant.

Note however, if the Affidavit purports render an opinion as to the status of title, it should be completed by an attorney to comply with O.C.G.A 15-19-50

(d) Affidavits should be given under oath before and attested by a notary public or other official authorized to take an oath.

Affidavits are not curative documents: They only provide notice of the facts stated therein. Therefore if the item noted in the Affidavit is a major issue, additional curative action is likely required to provide insurable or clear title.
6.2 Recitals

Factual recitals in conveyances are widely utilized and are good practice, particularly when engaging in curative measures. However, recitals do not comply with the statutory requirements of an affidavit and therefore, should be for informational purposes and not in lieu of an affidavit.

Note: Often recitals are used for conveyances from estates. For intestate estates, an Affidavit of Descent is still required for most conveyances even if recitals are present in the deed. See Chapter 13 of the Title Standards for additional information.

6.3 Affidavits of Possession

These Affidavits should set forth the period of time with which the affiant has been familiar with the property, the names of those current and prior owners of the property of which the affiant has knowledge, and the indicia of ownership upon which such knowledge is based. Affiant may be a party in interest or a disinterested party.

Since the underlying purpose of such affidavit is to establish adverse possession, affiant should typically be familiar with the history of the property for not less than 7 years but preferably 20.

6.4 Affidavits of Descent

Documentation of the family history of a deceased holder of record title and potential heirs establishes that all parties have been or should be properly divested. The affidavit of descent should state:

a) Residence;

b) Date of death;

c) That the estate was intestate (or testate if applicable)

d) Identify spouse(s) of the decedent;
   a. Number of marriages including date terminated if applicable
   b. How marriages terminated (i.e. death or divorce including case information if available)

e) Indicate death with or without issue;
   a. Issue by birth or adoption

f) Identify children and grandchildren (i.e. the children of any child of the decedent who predeceased the decedent);

g) Disclose respective dates of death or addresses, and disabilities (as applicable)

h) State whether all debts including estate or inheritance taxes have been paid

Although there is nothing prohibiting the Affidavit being given by an interested party, some title insurers may require a disinterested party to agree to insure the closing.
6.5 Scrivener’s Affidavits

Scrivener’s affidavits may be used by the preparer of a document (or some other party with the knowledge) to address clerical errors and should be used when the original parties are unavailable. The corrections should unquestionably be the original intention of the parties, minimal in nature and supportable by extrinsic evidence.
2019 Georgia Title Standards Chapters 8 and 29

Presented by Michael C. Obertone, Underwriting Counsel
8.1 Effective of Designation “Trustee”, “Agent”, “Nominee”, or “Custodian”

- When title vests in a party with the titles of Trustee, Agent, Nominee or Custodian after the name of the party, 8.1 states that the property is owned by the individual, in the individual capacity.

- “Michael C. Obertone, trustee of the MCO trust.”

- The title (Trustee, Agent, Nominee or Custodian) is considered surplusage and there is no need to investigate their capacity.
8.1 Continued

• However, when the property is a party’s name with “as Trustee, Agent, Nominee, or Custodian”, the above Standard does not apply and an investigation should be made to determine whether there is a trust, etc. and whether the party is acting within terms of that instrument.

• For organizations, such as unincorporated church groups or societies (labor union), the entity has become an legal entity holding title even without the existence of an actual trust.

• A purchaser with notice of some form of agency is bound by the terms of that instrument and cannot take good title in violation of its terms.
8.2 Termination of a Trust

• A deed from a trustee to the beneficiary of a trust under a recorded document is not necessary as long as the attorney has verified that the trust has not been terminated either on its face (fixed date) or on the occurrence of some event.

• Whenever possible, attorneys should make every effort to enter any verification documents in the public records, such that it can aid future examiners in the examination process.
8.3 Deeds Executed in Representative Capacity

• Generally speaking the use of the word “as” is sufficient to indicate that a document has been executed in the party’s representative capacity.

• If “as” is omitted, the error can be cured via the heading of the conveyance or via recitals in the text of the conveyance which serves to show that the party has signed in the representative capacity, and not in their individual one.
8.4 Formality Necessary to Create or Exercise an Agency

• Prior to July 1, 1993, when a document was executed with greater formality than the document creating the agency, the document itself was considered void.

• This relates directly to instruments signed under Seal.

• After the above date, the document would be valid, but would have the lesser formality.

• As always, an investigation should be made to ensure that the exercise of agency does not exceed the purposes for which the agency is granted.
Effective July 1, 2017, Georgia enacted the Uniform Power Of Attorney Act (UPOAA) which corresponds to legislation first enacted by other states starting in 1979.

The Act is for a financial power of attorney and is not meant to be used to make health care directives.
New POA Statute does not affect POAs

- Benefitting creditors
- Health Care POAs
- Voting Rights POAs
- Governmental Powers
- Transaction specific POAs-The ones the majority of firms use in GA and is still preferred for a real estate transaction
- Domestic Relations (Adoption) and Insurance POAs (Lawsuits)
Sections of the New POA

• Information to the principal about the form and the admonition to seek legal advice if the principal has any questions.

• Designation of an Agent and the optional appointment of a successor agent.

• Grant of General Authority whereby the principal can initial the last choice of “All preceding subjects” or the principal can go through and initial the general authority he/she wishes to grant to the agent.

• Grant of Specific Authority (Optional) which has a list of powers which the agent will not be granted unless the specific power has been initialed beside. The special instruction below could be used for any other power the principal wants to grant which is not one of the itemized ones in this section.
Sections of the New POA-Continued

- Limitation of Agent’s Authority which limits self-dealing, ie. conveying property to themselves.
- Special Instructions (Optional) where the principal can make the POA non-durable or specifically list real property and the power to be given, ie. purchase, sell, encumber.
- Effective Date of POA-would be the date of execution.
- Nomination of a Conservator
- Reliance statement to the general public
- Signature and acknowledgement by principal
The form also states the agent’s responsibilities and when the agency will terminate:

- Death
- Revocation
- Occurrence of a termination event specified in the POA
- Purpose of POA having been met
- Case of divorce (whereby agent is a spouse) will generally terminate the power
Optional Affidavit

- Separate form known as Agent’s Certification as to validity and subsequent signature lines for the agent.

- The above highly recommended optional form is meant to have the agent certify to facts concerning the POA.
29.1 Verification of Existence of Trust and Authority of Trust

• Title coming out of a trust via the trustee should reference the trust indenture to allow parties to verify that the trust has been not terminated, such that title continues to reside in the trustee.

• Reference should also reference the indenture to allow for verification that the trustee is duly appointed and qualified, i.e. that the trust has proper authority to exercise the document in question.

• Attorneys should make every effort to place any trust documents or a trust certification of record to assist examiners going forward.
29.2 Effect of Designation “Trust” and “Trustee”

- A deed or any instrument of conveyance out of or entering a trust should be vested in “party, as trustee for the trust”, rather than into the “trust” itself.

- “Michael C. Obertone, as trustee for the MCO Trust, dated 1/1/19” versus “MCO Trust, dated 1/1/19”.

- The use of the “as trustee” is imperative as under Georgia law only a trustee may hold legal title.
July 1, 2018 Revision of OCGA 53-12-25

• After July 1, 2018, a deed of conveyance found in the record in which the trust is named as grantee is deemed to be a transfer as though the trustee had been named.

• This revision was meant to address conveyances into statutory trust entities, like those found in Delaware. In those states that have such a trust, the trust is a registered entity and can legally hold title to property.

• When conveying title to such an entity in Georgia, the jurisdiction should be referenced in the deed of conveyance.

• Best real estate practice is still to put the property properly in the name of the trustee on behalf of the trust.
29.3 Trust Established in Accordance of Provisions of “Testamentary Additions to Trust Act”

• Since May 31, 1968, under the enactment of “Testamentary Additions to Trust Act”, a devise or bequest in a will of a testator may be made to the trustee or trustees of a trust created in the will.

• The trust must either be established in the will itself or in a written trust executed prior or concurrently with the will.

• The devise will not be invalid because the trust was amendable, revocable, or both or because the trust was amended after the execution of the will or after the death of the testator.
Powers of Attorney

Presented by Michael C. Obertone
What is a power of attorney (POA)?

A power of attorney is a written instrument executed by one person, usually called the principal, which authorizes another, usually called the attorney-in-fact, to act on behalf of the principal.
Caveats

By their very nature, a power of attorney can be utilized to commit fraud. A forged power of attorney gives the "attorney-in-fact" the apparent power to buy, sell or mortgage property. Therefore, you should view transactions involving a power of attorney carefully to minimize the risk.

Ensure that the power of attorney is not forged and make sure the actions taken by the attorney-in-fact are within his/her scope.
What not to rely on POAs for:

- Execute or revoke a codicil or a will for the principal.
- Make an affidavit as to the personal knowledge for the principal.
- Vote in any public election on behalf of the principal.
What not to rely on POAs for (2):

- A power of attorney should not be relied on when the sale or conveyance is to the attorney in fact.

- The closing attorney cannot act as an attorney-in-fact as that constitutes a conflict of interest. Best practice would be to not allow for mortgage brokers to sign security deeds on behalf of borrowers or realtors to sign deeds on behalf of sellers. O.C.G.A. §10-6-23.
Requirements of the attorney-in-fact

- An attorney-in-fact must be of age and competent. See O.C.G.A. §10-6-3.

- Individuals may act as attorneys-in-fact for other individuals or for corporations. Fiduciaries, such as trustees, guardians, executors and administrators, can act through attorneys in fact under a special power, however, they cannot delegate their entire function. O.C.G.A. §10-6-4.

- An attorney-in-fact may not delegate his or her authority unless he/she is specifically empowered to do so. O.C.G.A. §10-6-5.
Recording

The recording requirements for powers of attorney are the same as the recording requirements for a deed.

A revocation should also be recorded in every county in which there is recordation of the original (or certified copy) of the power of attorney.

For title insurance purposes, all acts by an attorney-in-fact must be authorized by a duly recorded power of attorney. Where possible, the power of attorney with the corresponding power should specifically describe the property to be sold, conveyed or encumbered.
Forms Of POAs

Generally, a power of attorney should not be relied on where it is possible to obtain the signature of the grantor on the document.

• If it must be used, the form must describe the property, but the description may be general, such as "all lands of grantor situated in the State of Georgia."

• The terms need not be spelled out, but if they are, they must be strictly adhered to.
Forms Of POAs

• There must always be a specific authority to sell real estate. A power to manage the estate or do all things that the Grantor can do is insufficient. Likewise, the power to borrow money must be specifically granted; a power to sell will not also authorize a power to execute a mortgage or security deed.

• A power to make a deed of gift must be specified.

• An attorney-in-fact is given only those powers granted to him/her by the principal as specifically set forth in the Power of Attorney.

  ➢ For example, the power to receive sales proceeds must be specifically set forth in the Power of Attorney. The Power of Attorney should specifically authorize the sale, conveyance and/or encumbrance of property and describe the property to be sold and conveyed.
Practice Note #1

ISSUING AGENTS should carefully examine the language of the Power Of Attorney to determine if the attorney-in-fact is authorized to perform particular acts.

Do not accept a Power of Attorney which does not authorize the attorney-in-fact to perform all the acts necessary to complete a specific transaction.
Interpretations

In this respect, the following are some generally accepted interpretations of the language in a power of attorney:

- Power to sell is not a power to convey.
- Power to transfer is not a power to mortgage.
- Power to sell and convey does not grant the authority to exchange.
- Power "to make and execute conveyances" authorizes a transfer of real estate, but a power "to attend to all business affairs appertaining to real or personal estate" is too indefinite.
- Power to "negotiate" a lease does not authorize the execution of a lease by the attorney-in-fact. Neither does a mere power to sell, without further authorization, ordinarily authorize the execution of a contract or sale.
- General words in a power of attorney are limited and controlled by particular terms. Thus, where the authority to perform specific acts is given, and general words are also employed, the latter are limited to the particular acts authorized.
Practice Note #2

You must be satisfied that the use of the power of attorney is reasonable and that the attorney-in-fact has only such powers with respect to the property as given him by the terms of the instrument.

A special/specific power of attorney tailored to a specific property and transaction is the most reliable form.
Who can be an attorney-in-fact?

Generally, any person who is competent to contract may execute or act under a Power of Attorney unless he has an interest adverse (i.e. transaction involving a conflict of interest) to those of the principal. Agents should give the transaction careful scrutiny where the attorney-in-fact is benefited by the use of the power.
Corporations and POAs

A corporation may convey through a power of attorney upon a specific Resolution by the Board of Directors. Where the Power of Attorney is signed by the President and Secretary with the corporate seal, a resolution of the Board of Directors is not necessary as long as the transaction is within of the ordinary business of the corporation.
Partnerships and POAs

Where a partnership or partner in a partnership executes a Power of Attorney, the Power of Attorney must be authorized by all the partners or the authority must be granted in the Partnership Agreement to the General Partner.
LLCs and POAs

Where a Manager, Managing Member or Member of a Limited Liability Company executes a Power of Attorney, the Power of Attorney must be authorized by all the members or the authority must be granted in the Operating Agreement.
Special Power for Fiduciaries

In Georgia, executors, administrators, guardians and trustees may convey land through attorney-in-fact, but this requires special power. However, an attorney-in-fact cannot use a power of attorney as a device enabling a fiduciary to transfer his functions over to another and thus appoint his own successor. Such persons may not delegate the powers granted to them in their office personally to someone unless this power is specifically granted to the fiduciary by instrument granting these powers or by a Court Order. Likewise, if a Trust document granting powers to a Trustee makes no provision for execution of a Power of Attorney, the Trustee may not grant these powers to an attorney-in-fact. O.C.G.A. §10-6-4 and §10-6-5.
ISSUING AGENTS may not accept a Power Of Attorney from a Trustee, personal representative or other fiduciary without either a court order, trust document, or other instrument granting the principal the power to delegate to someone else. Be sure to confirm that Power(s) Of Attorney from business entities are properly authorized either by the formation documents or with proper authorization from the entity.
Duration and Durability

In Georgia, powers of attorney are durable under the Uniform Durable Power of Attorney Act. (O.C.G.A. §10-6-36).

• After July 1, 1999, the incompetence or incapacity of the principal will not terminate a written power of attorney unless expressly states otherwise in the document and confirmed under the UPOAA of 2017.

• POAs remain valid even though the grantor becomes incompetent unless there has been an appointment of a guardian or receiver or the power has been terminated by a judicial proceeding.

• POAs are automatically revoked by the death of the principal or by the appointment of a new agent.
Issuing Agents should carefully review the terms and provisions of the Power of Attorney to determine if the Power of Attorney has expired and whether the provisions of the instrument provide for termination.

We prefer that all Powers of Attorney be durable. This shows the intent of the principal that the powers granted continue notwithstanding his/her later disability, incapacity, or incompetency. O.C.G.A. §10-6-36.
Practice Note #4

If the reason given for the Power Of Attorney is that the Grantor is sick or incapacitated, issuing Agents should examine whether the Power Of Attorney is of the DURABLE type –that is, whether it authorizes the ATTORNEY-IN-FACT to act while the Grantor is incapacitated.
Acceptable ways to Sign

The form of execution of instruments affecting property should be in the name of the owner of the property, acting by and through his attorney-in-fact.

The following are acceptable forms in Georgia:

- (Signature of Jim Smith)
  Jim Smith by Larry Jones, Attorney-in-fact; or
  Jim Smith, acting by and through his attorney in fact Larry Jones

- (Signature of Jim Smith)
  Larry Jones, as Attorney-in-fact for Jim Smith

- Jim Smith (handwritten by Larry Jones or pre-typed)
  By: (Signature of Larry Jones)
  Larry Jones, Attorney-in-fact

The following form is not acceptable in Georgia:

- Larry Jones (no indication of capacity)
Practice Note #5

If the power is granted to several persons, all should sign unless otherwise provided for in the power of attorney. For title insurance purposes, all acts by an attorney-in-fact must be authorized by a duly recorded power of attorney. If properly attested to under Georgia law, the original power of attorney should be recorded prior to the deed of conveyance. Otherwise, the power may be recorded as an exhibit to the deed.
POAs and ........
Don’t risk it all…..

Ask yourself the following:

• Why is the power of attorney being used?
• Where does the principal reside?
• Why can't the principal complete the transaction?
• Has a determination been made as to the death, incompetence or insanity of the principal?
• Is the power to be exercised by the attorney-in-fact specifically authorized in the power of attorney? Is there any ambiguity as to the powers conveyed?
• Has the power of attorney been acknowledged or proved?
• Has the power of attorney been recorded? (even in states where recordation is not required, it is necessary to file it of record in order to maintain continuity in the chain of title).
• Has a revocation been filed?
Further risks.....

- Is the attorney-in-fact exceeding any limitation imposed on him by the power of attorney, rules of agency or local statutes?
- Are there any circumstances, evidence or information making it necessary to raise any question as to the bona fide condition of the transaction or the good faith of the parties?
- Is the principal affected by bankruptcy proceedings?
- Are there any statutory limitations?
- Is there any possibility of the power of attorney being a forged instrument?
- How long ago was the power of attorney executed?
- Can you confirm with the principal that the power of attorney has not been revoked and that the principal wants to complete the transaction per the sales contract?
“Ensure” there is a reason

In order to accept any Power of Attorney, be sure to confirm that the principal wants to complete the transaction. Issuing Agents should always want to know why a power of attorney is being used. Why is the grantor unavailable? Is the principal aware of the terms of the transaction? This is best accomplished by a direct conversation with the principal via phone where the Issuing Agent can review the details of the transaction and obtain the principal’s consent. The conversation should be documented, if possible, by requesting the principal to verify the conversation in writing or in an email.
Beware of the Copy

• Issuing Agents should always want to know why a copy of a power of attorney is being used rather than the original. Is the original available? In certain circumstances, we will accept a copy of the Power along with an affidavit from the attorney-in-fact or attorney who prepared the power. The affidavit must state that the original is lost or misplaced before recording and that the copy provided to us is a true and correct copy of the original Power of Attorney.

• Generally, there is a presumption that a Power of Attorney, which is executed by the principal within a year of the transaction, is acceptable unless the Issuing Agent has specific knowledge to the contrary.

• A Power of Attorney that is more than a year old should be approved by underwriting.
Verify, Verify, Verify

In order to rely on a power of attorney, one must satisfy himself that the power of attorney has not been revoked and that the person granting the power of attorney is still alive
Verify, Verify, Verify 2

• Any real property in a grantor's estate after death should pass through probate or intestate administration.

• The closing attorney should speak to a treating physician to verify that the grantor had capacity at the time the POA was signed. Further, a health care professional should be consulted to determine that the principal is still alive and under a disability which prevents him/her from attending the closing or executing the closing documents.
Military POAS-Federal Law Controls

- A military power of attorney is given effect even if it does not comply with state law under the provisions of 10 U.S.C.A. §1044b. Under §1044b(a)(2), a military power of attorney “shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the State concerned. Section 1044b does not give a form for a military power of attorney, or even define recognizable elements of one. It says in §1044b(b) "... a military power of attorney is any general or special power of attorney that is notarized in accordance with section 1044a of this title or other applicable State or Federal law."

- The authentication requirements of 10 U.S.C. 1044a are more relaxed than general POAs. However, if the authentication of a power of attorney complies with §1044a, it qualifies under §1044b.
Lies, Lies....Fraud and POAs
Don’t Accept if:

• The attorney-in-fact has "exercised" the power of attorney to make a broader grant of powers.

• The attorney-in-fact has a conflict of interest (e.g., the attorney-in-fact conveys property to himself).

• The principal has attempted to grant fiduciary powers to the attorney-in-fact. A fiduciary cannot delegate his powers to another person (e.g. partner in a partnership, an officer of a corporation, or a trustee under a trust agreement).

• The attorney-in-fact has "exercised" the power to sign affidavits and sworn statements.

• The attorney-in-fact has exercised the power of attorney to execute a will for the principal, and title has passed by the will.

• Where you are suspicious that the power of attorney is forged, has been revoked, has terminated by its terms, or terminated by the death or incapacity of the principal.
POAs in the Title Search

When examining title where a deed or mortgage has been executed by an attorney-in-fact, you should:

- Look for a recorded copy of the Power of Attorney authorizing the attorney in fact to act.

- Examine the power of attorney to assure yourself that it:
  - Authorizes the attorney-in-fact to execute the instruments in the transaction
  - Has not terminated by its terms
  - Is properly executed and acknowledged by the Principal
  - Meets all statutory requirements
POAs in the Title Search #2

Look for an affidavit by the attorney-in-fact asserting that he or she had no notice that the power of attorney had been revoked, or that the principal had died, or if the power of attorney is not a durable power of attorney, that the principal is not disabled or incapacitated.
POAs offered at closing

When an instrument is executed by an attorney-in-fact pursuant to a power of attorney, the power of attorney must be recorded.

• At the time of the closing, the closing attorney should arrange to speak to the person who gave the power of attorney to be sure the person is still alive, has not revoked the power of attorney, and agrees to the execution of the document/s.

• If the grantor is incompetent, the closing attorney should speak to a nurse or other health care professional and verify that the grantor is still alive.
Requirements for POA/Closing

• An original power of attorney either already recorded or in recordable form, executed by the party holding legal title to the property;
• An affidavit from the attorney-in-fact stating that the attorney-in-fact does not have actual knowledge of the revocation or the termination of the power of attorney as a result of the death or incapacity of the principal;
• A written explanation why the principal is not able to execute the transaction documents;
• The approval or permission of the lender is necessary if its' borrower or the seller is using an attorney-in-fact to execute documents. The lender may not allow the use of a power of attorney, particularly if it is not specific to the transaction.
• If an entity, such as a partnership, corporation or limited liability company, gives a power of attorney, you should examine and confirm that the entity has the authority to enter into the transaction. If you are unsure about the entity's authority to enter into the transaction, you should require a legal opinion from the entity's counsel.
POA Affidavit

• When an instrument is executed by an attorney-in-fact pursuant to a power of attorney, the power of attorney must be recorded. It is not necessary to record an affidavit that the attorney-in-fact had no notice that the principal was incapacitated at the time of execution of the power of attorney. If such an affidavit were recorded, there is no statute or case law stating that the recording of the affidavit would protect the grantee in the deed from the consequences of the incapacity of the principal at the time of execution.

• The principal has not revoked, modified or amended the Power of Attorney in writing. At the time of closing and insuring, an affidavit (by the attorney-in-fact or principal) affirming that the principal is not deceased or incapacitated (if not a durable power of attorney) and that the power of attorney has not been revoked will satisfy this requirement.
Effective July 1, 2017, Georgia enacted the Uniform Power Of Attorney Act (UPOAA) which corresponds to legislation first enacted by other states starting in 1979.

The Act is for a financial power of attorney and is not meant to be used to make health care directives.
New POA Statute does not affect POAs

- Benefitting creditors
- Health Care POAs
- Voting Rights POAs
- Governmental Powers
- Transaction specific POAs-The ones the majority of firms use in GA and still preferred by Stewart
- Domestic Relations (Adoption) and Insurance POAs (Lawsuits)
Sections of the New POA

• Information to the principal about the form and the admonition to seek legal advice, if the principal has any questions.

• Designation of an Agent and the optional appointment of a successor agent.

• Grant of General Authority whereby the principal can initial the last choice of “All preceding subjects” or the principal can go through and initial the general authority he/she wishes to grant to the agent.

• Grant of Specific Authority (Optional) which has a list of powers which the agent will not be granted unless the specific power has been initialed beside. The special instruction below could be used for any other power the principal wants to grant which is not one of the itemized ones in this section.
• Limitation of Agent’s Authority which limits self-dealing, ie. conveying property to themselves.

• Special Instructions (Optional) where the principal can make the POA non-durable or specifically list real property and the power to be given, ie. purchase, sell, encumber.

• Effective Date of POA-would be the date of execution.

• Nomination of a Conservator

• Reliance statement to the general public

• Signature and acknowledgement by principal
• The form also states the agent’s responsibilities and when the agency will terminate:
  • Death
  • Revocation
  • Occurrence of a termination event specified in the POA
  • Purpose of POA having been met
  • Case of divorce (whereby agent is a spouse) will generally terminate the power
Optional Affidavit

- Separate form known as Agent’s Certification as to Validity and subsequent signature lines for the agent.

- The above highly recommended optional form is meant to have the agent certify to facts concerning the POA.
Trust Property

Presented by Michael C. Obertone
What is a Trust?

• A legal relationship whereby property (real or personal, tangible or intangible) is held by one party for the benefit of another.

• Conventionally arises when property is transferred by one party to be held by another party for the benefit of a third party.
Why Would You Want a Trust?

- A trust is a method of separating the right to control and manage property from the beneficial ownership of the property. There is a separation of the CONTROL and the OWNERSHIP.

- Trusts are used for both personal and commercial reasons - they may provide benefits in estate planning, asset protection, and taxes.
Definitions

A trust is created by a settlor, who transfers some or all of his property to a trustee, who holds that trust property (also called the principal or corpus) for the benefit of the beneficiaries.
### Types of Trusts

<table>
<thead>
<tr>
<th><strong>Inter vivos/Living Trust</strong></th>
<th><strong>Testamentary</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Created and comes into existing during the settlor’s life.</td>
<td>Created in a will and becomes effective upon the testator’s death</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Different Names</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>May go by many different names, depending on the characteristic(s) or purpose(s)- e.g., a living trust might be an express revocable incentive trust.</td>
</tr>
</tbody>
</table>
Elements of an Express Trust

- An express trust can be created by:
  - Deed
  - Will
  - Separate trust instrument
- MUST have:
  - Intent to create the trust
  - Designation of the property being transferred into the trust (certainty of subject-matter)
  - Designation of the beneficiaries or class of beneficiaries (certainty of objects)
- MAY have:
  - Detailed powers and duties of the trustees (power to sell, powers of investment, powers to vary the interests of the beneficiaries, and powers to appoint new trustees).
- Trustee must administer in accordance with both the terms of the trust and state law.
Testamentary Trusts

• The will establishes the trust and sets the boundaries of the trustee’s authority.

• The creation of a testamentary trust depends on:
  1. The death of the testator (who is also the settlor)
  2. The validity of the will (and the completion of probate proceedings)
Certificates of Trust

A certificate of trust is NOT a trust – it is a condensed version of a trust declaration or agreement. It typically leaves out the details of what property is held in the trust and the identity of the beneficiaries. It is similar to a “memorandum of lease” or a “memorandum of first right of refusal”. Sometimes a financial institution will require that a certificate of trust be prepared and recorded in the public records in order to evidence the establishment of a valid trust, without revealing specifics that people may choose to keep private. This document is sometimes called a certification of trust or an abstract of trust.
Transfers INTO a Trust

- A trust is not a legal entity capable of holding title in its name.
- Title is held by the trustee in his, her or its fiduciary capacity (legal title) for the benefit of the trust beneficiary or beneficiaries (equitable title).
- The trustee’s name typically appears of record. The beneficiaries’ names typically do not appear of record.

DEED

Transfers property from John Doe to Jack Black, as Trustee under the Living Trust dated July 10, 2000
July 1, 2018 Revision of OCGA 53-12-25

• After July 1, 2018, a deed of conveyance found in the record in which the trust is named as grantee is deemed to be a transfer as though the trustee had been named.

• This revision was meant to address conveyances into statutory trust entity’s, like those found in Delaware. In those states that have such a trust, the trust is a registered entity and can hold title to property.

• When conveying title to such an entity in Georgia, the jurisdiction should be referenced in the deed of conveyance.

• Best real estate practice is still to put the property properly in the name of the trustee on behalf of the trust.
Transfers OUT of a Trust

If (i) the title into the trust was accomplished correctly and (ii) the trustee named in the vesting deed (i.e. the “trustee of record”) remains the trustee and (iii) the trust has not terminated, then title OUT of the trust looks just like the title IN:

Jack Black, as Trustee under The Jack Black Living Trust dated July 10, 2000

BUT:
What if the trustee of record is deceased or no longer serving as trustee?

You must consult the trust instrument. If a successor trustee is named in the trust instrument, a recital in the transfer document may be sufficient to clarify title. If there is no named successor trustee, there may be a procedure set out in the trust instrument for the appointment or designation of a successor trustee, in which case that procedure must be followed and documented with filings in the real estate records. If there is no serving trustee and the trust instrument does not provide a procedure for naming a successor trustee, a legal proceeding may be required in order for the court to appoint a successor. No person other than a duly appointed trustee can act on behalf of or sign documents for a trust.
Real Life Examples

We represent the purchaser of real property. Jack Black signs the purchase contract as the “seller”. When the title report comes back, it turns out that “Jack Black”, the individual, does not own any of the property. Title is held as follows:

**Parcel I:** Samuel J. Black, sole Trustee, or his successors in Trust, under The Samuel J. Black Living Trust dated July 10, 2000.


**Parcel II:** Beth Jones, as to Fee Simple Title; Jane Smith as to a Life Estate Interest.

Vesting Deed: Deed from Jane Smith to Beth Jones dated January 14, 1975, filed January 29, 1975, in Deed Book XX, Page YY, Fulton County, GA records (Jane Smith retained a Life Estate)
Gather your information

Contact the seller to determine who these people are.

As it turns out, our Jack Black who signed the contract is also known as Samuel J. Black, and also known as Samuel Jackson Black, and is the same person referenced in the vesting deed to Parcel 1. Jane Smith is Jack Black’s grandmother, now deceased, and Beth Jones is Jack Black’s mother, also now deceased.

Gather the supporting documents.

We obtain a copy of Mr. Black’s trust, Jane Smith’s death certificate, and Beth Jones’ letters testamentary and probated will.
Parcel I: Owned by Samuel J. Black, sole Trustee, or his successors in Trust, under The Samuel J. Black Living Trust dated July 10, 2000.

Mr. Black’s trust is an EXPRESS LIVING TRUST. It specifically authorizes the trustee to sell or otherwise dispose of real estate.

Regarding Parcel 1, Mr. Black will sign a trustee’s deed conveying the property from Samuel J. Black, as sole Trustee under The Samuel J. Black Living Trust dated July 10, 2000 (the "Grantor") to the purchaser (the “Grantee”).
Parcel II: Owned by Beth Jones, as to Fee Simple Title; Jane Smith as to a Life Estate Interest.

We obtain a copy of Jane Smith’s Death Certificate, which evidences the termination of her life estate interest, and file an Affidavit of Death signed by her grandson to evidence the termination of her life estate interest.

Beth Jones’s will provides that her son, Samuel J. Black, is the executor of her estate and that “all of my property of whatever nature and kind, wherever situated, shall be distributed to my revocable living trust. The name of my trust is: Beth Jones, sole Trustee, or her successors in trust, under the Beth Jones Living Trust dated December 1, 1999, and any amendments thereto.”
Parcel II: Owned by Beth Jones, as to Fee Simple Title; Jane Smith as to a Life Estate Interest.

We obtain a copy of Beth Jones’ trust. Her trust provides that on her death, Samuel Jackson Black shall replace all of her initial trustees and specifically authorizes the trustee to sell or otherwise dispose of real estate.

Regarding Parcel 2, Mr. Black signs an executor’s deed conveying the property from Samuel J. Black as Executor of the Estate of Beth Jones, Deceased (the "Grantor"), to Samuel Jackson Black, as sole successor trustee under the Beth Jones Living Trust dated December 1, 1999 (the "Grantee"). He then signs a trustee’s deed conveying the property from Samuel Jackson Black, as sole successor trustee under the Beth Jones Living Trust dated December 1, 1999 (the "Grantor") to the purchaser (the “Grantee”).
Think through your Affidavits and Certificates.

- What have you been told?
- What have you relied on?
- Who has personal knowledge and the ability to sign the Affidavits or Certificates?
- Should any of them be recorded?

In our real life example, in order to evidence the termination of Jane Smith’s life estate interest, we prepared a separate Affidavit of Death in recordable form. It was signed by Jack Black, recited that he was her grandson and attached a copy of the Death Certificate.
Review the Affidavits with the Affiant!

Affidavits not only have to be complete, they have to be accurate.

It is especially important to walk through the affidavits with the signer.

YOU WILL BE SHOCKED at how many times you find out relevant information that way.

(… that there was an amendment to the Trust, for example, or that the property is not vacant after all …)
Title Underwriting Standards

✓ You must obtain and review a copy of the trust instrument before insuring a sale or refinance from a trust.

✓ If the trust is in a will, you must obtain and review a copy of the probated will.

✓ You should obtain UW approval prior to the issuance of a policy if there is not a clear express POWER TO SELL the trust assets.

✓ You must obtain company approval prior to issuance of a policy involving “self-dealing” (conveyance of trust property to the trustee in his individual capacity).
State of Georgia

County of _____________

STATUTORY FORM POWER OF ATTORNEY

IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in O.C.G.A. Chapter 6B of Title 10.

This power of attorney does not authorize the agent to make health care decisions for you.

You should select someone you trust to serve as your agent. Unless you specify otherwise in the Special Instructions, generally the agent's authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you.

Your agent is not entitled to any compensation unless you state otherwise in the Special Instructions. Your agent shall be entitled to reimbursement of reasonable expenses incurred in performing the acts required by you in your power of attorney.

This form provides for designation of one agent. If you wish to name more than one agent, you may name a successor agent or name a coagent in the Special Instructions. Coagents will not be required to act together unless you include that requirement in the Special Instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney shall be durable unless you state otherwise in the Special Instructions.

This power of attorney becomes effective immediately unless you state otherwise in the Special Instructions.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

DESIGNATION OF AGENT

I ____________________________________________________ (Name of principal) name the following person as my agent:

Name of agent: ________________________________________________________________

Agent's address: _____________________________________________________________

Agent's telephone number: ____________________________________________________
AGENT'S e-mail address: __________________________________________________

DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

Name of successor agent: _________________________________________________
Successor agent's address: ________________________________________________
Successor agent's telephone number: ________________________________________
Successor agent's e-mail address: ____________________________________________

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

Name of second successor agent: __________________________________________
Second successor agent's address: __________________________________________
Second successor agent's telephone number: _________________________________
Second successor agent's e-mail address: ______________________________________

GRANT OF GENERAL AUTHORITY

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in O.C.G.A. Chapter 6B of Title 10:

(INITIAL each subject you want to include in the agent's general authority. If you wish to grant general authority over all of the subjects you may initial "all preceding subjects" instead of initialing each subject.)

(__) Real property
(__) Tangible personal property
(__) Stocks and bonds
(__) Commodities and options
(__) Banks and other financial institutions
(__) Operation of entity or business
(__) Insurance and annuities
(__) Estates, trusts, and other beneficial interests
(__) Claims and litigation
(__) Personal and family maintenance
(__) Benefits from governmental programs or civil or military service
(__) Retirement plans
(__) Taxes
(__) All preceding subjects
GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent SHALL NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent. You should give your agent specific instructions in the Special Instructions when you authorize your agent to make gifts.)

(__) Create, fund, amend, revoke, or terminate an inter vivos trust
(__) Make a gift, subject to the limitations of O.C.G.A. § 10-6B-56 and any Special Instructions in this power of attorney
(__) Create or change rights of survivorship
(__) Create or change a beneficiary designation
(__) Authorize another person to exercise the authority granted under this power of attorney
(__) Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
(__) Exercise authority over the content of electronic communications sent or received by the principal
(__) Exercise fiduciary powers that the principal has authority to delegate and that are expressly and clearly identified (including the persons for which the principal acts as a fiduciary) in the Special Instructions
(__) Renounce an interest in property, including a power of appointment

LIMITATION ON AGENT’S AUTHORITY

An agent that is not my ancestor, spouse, or descendant SHALL NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions.

SPECIAL INSTRUCTIONS (OPTIONAL)

You may give special instructions on the following lines (you may add lines or place your special instructions in a separate document and attach it to the power of attorney):

____________________________________________________________________
____________________________________________________________________
____________________________________________________________________
____________________________________________________________________
____________________________________________________________________

EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions.
NOMINATION OF CONSERVATOR (OPTIONAL)

If it becomes necessary for a court to appoint a conservator of my estate, I nominate the following person(s) for appointment:

Name of nominee for conservator of my estate:

__________________________________________________

Nominee's address: _____________________________________________________

Nominee's telephone number: ____________________________________________

Nominee's e-mail address: ______________________________________________

RELIANCE ON THIS POWER OF ATTORNEY

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person has actual knowledge it has terminated or is invalid.

SIGNATURE AND ACKNOWLEDGMENT

____________________________________________    ________________
Your signature        Date

_____________________________________________
Your name printed

_____________________________________________
Your address

_____________________________________________
Your telephone number

_____________________________________________
Your e-mail address

This document was signed or acknowledged in my presence on _________________________________, (Date) by

_____________________________________________
(Name of principal)
IMPORTANT INFORMATION FOR AGENT

Agent’s Duties

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked.

You must:

(1) Do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;
(2) Act in good faith;
(3) Do nothing beyond the authority granted in this power of attorney; and
(4) Disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and signing your own name as "agent" in the following manner:

(_________ Principal's name _________) by (_________ Your signature _________) as Agent.

Unless the Special Instructions in this power of attorney state otherwise, you must also:

(1) Act loyally for the principal's benefit;
(2) Avoid conflicts that would impair your ability to act in the principal's best interest;
(3) Act with care, competence, and diligence;
(4) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
(5) Cooperate with any person that has authority to make health care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest; and
(6) Attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest.

Termination of Agent's Authority

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

(1) Death of the principal;
(2) The principal's revocation of your authority or the power of attorney;
(3) The occurrence of a termination event stated in the power of attorney;
(4) The purpose of the power of attorney is fully accomplished; or
(5) If you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the Special Instructions in this power of attorney state that such an action will not terminate your authority.

Liability of Agent

The meaning of the authority granted to you is defined in O.C.G.A. Chapter 6B of Title 10. If you violate O.C.G.A. Chapter 6B of Title 10 or act outside the authority granted, you may be liable for any damages caused by your violation.

If there is anything about this document or your duties that you do not understand, you should seek legal advice.
(The following optional form may be used by an agent to certify facts concerning a power of attorney.)

AGENT'S CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT'S AUTHORITY

State of Georgia

County of ________________________

I, _________________________________________(name of agent), certify under penalty of perjury that ________________________________________ (name of principal) granted me authority as an agent or successor agent in a power of attorney dated __________________________.

I further certify that to my knowledge:

(1) The principal is alive and has not revoked the power of attorney or my authority to act under the power of attorney and the power of attorney and my authority to act under the power of attorney have not terminated;
(2) If the power of attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;
(3) If I were named as a successor agent, the prior agent is no longer able or willing to serve; and
(4) __________________________________________________________________
    __________________________________________________________________
    __________________________________________________________________
    __________________________________________________________________

(Insert other relevant statements)

SIGNATURE AND ACKNOWLEDGMENT

____________________________________________     _______________
Agent's signature          Date

____________________________________________
Agent's name printed

____________________________________________
____________________________________________
Agent's address
Agent's telephone number

Agent's e-mail address

This document was signed or acknowledged in my presence on _____________________, (Date)
by ____________________________
(Name of agent)

______________________________ (Seal)
Signature of notary

My commission expires: _____________________

This document prepared by: ________________________________.
TITLE STANDARDS
AND LAWYER LIABILITY
Materials unavailable.
ENTITY CONVEYANCES:
INSTRUMENTS EXECUTED BY CORPORATIONS
CHAPTER 9
CONVEYANCES INVOLVING LIMITED PARTNERSHIPS
CHAPTER 10
CONVEYANCES INVOLVING GENERAL PARTNERSHIPS
CHAPTER 11
CONVEYANCES INVOLVING LIMITED LIABILITY COMPANIES
CHAPTER 12
ENTITY CONVEYANCES UNDER GEORGIA TITLE STANDARDS

Nathan P. Sycks, Esq.
Atlanta, GA
October 10, 2019
Overview of Entity Conveyances

• Recommendations
• Authority and Limitations
• Conveyancing
• Post-Dissolution or Termination Conveyances
• Foreign Entities
• Mergers
Recommendations - Generally

• Always start by verifying registration. Check w/ state specific Secretary of State.
Recommendations - Generally

• Request all entity documents immediately including:

• articles of incorporation (Inc) or organization (LLC), certificates of formation (if DE), certificates of partnership, etc.

• Bylaws, operating agreements or partnership agreements (and all amendments, restatements and revisions),

• all resolutions/consents,

• member/shareholder/partner rolls,

• employer ID numbers or social security numbers of responsible party
Recommendations - Corporations

• Verify registration by checking the Secretary of State (and obtain Certificate of Existence / Good Standing if appropriate)

• Review Articles of Incorporation and Bylaws for any statement or limitation on authority of officers or incumbency certificate/Affidavit of Authority (signed by Secretary or officer not signing documents)

• Resolution or Consent authorizing transaction and specifying party to sign (i.e. Authorized Signatory)

• Four (4) signature lines on a deed:
  • President
  • Secretary attestation
  • Unofficial Witness
  • Notary and seal

• Seal if the Corporation has one (required if officer other than President or VP to sign) – Corporation doesn’t have a seal? Use a blank seal instead. If all else fails, a quarter.

• Record authorizing resolution if officers other than President or VP are signing
Recommendations - LLCs

- Verify Secretary of State registration (and obtain Certificate of Existence / Good Standing if appropriate)
- Review articles of organization and operating agreement including any amendments to date to determine if member managed or manager managed (remember – if silent, member managed)
- Certificate of Authority / Certificate of Incumbency - preferably signed by members, managers or officer not executing the deed
- Resolution or Consent authorizing transfer and specifying party to sign
- At least three (3) signature lines on deed:
  - Member, Manager or officer authorized to sign (can be more than one)
  - Unofficial Witness
  - Notary and seal
Recommendations - Partnerships

• Ask for partnership documents from parties. Note that partnership filing requirements are different.

• Check for documents filed with the Secretary of State or County Clerk. If you know partnership has place of business in another county, also check in that county. Incumbency certificate/ Certificate of Authority naming all partners

• Consent authorization/resolution/acknowledgement document signed by all parties

• Whenever possible, have ALL partners sign the deed (or at least the resolution or consent documents)

• Preferably at least four (4) signature lines on deed
  • Partner 1
  • Partner 2
  • Unofficial Witness (for each partner if they execute separately)
  • Notary and Seal (for each partner if they execute separately)
Authority - Corporations

Title Standards § 9.1

• If the name of the corporation is omitted from above the signatures of the signers, it's OK so long as the corporate name appears as the party to the instrument.
STATE OF GEORGIA
COUNTY OF ___________

LIMITED WARRANTY DEED

THIS INDENTURE made this ___ day of August, 2016 between

123 Any Street, Inc., a Georgia corporation

as party or parties of the first part, hereinafter called Grantor, and

123 Peachtree, LLC, a Georgia limited liability company

as party or parties of the second part, hereinafter called Grantee (the words "Grantor" and "Grantee" to include their respective heirs, successors and assigns where the context requires or permits).

WITNESSETH that: Grantor, for and in consideration of the sum of TEN DOLLARS and other good and valuable consideration ($10.00) in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, aliened, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, convey and confirm unto the said Grantee, the following described property:

See Exhibit "A" attached hereto and made a part hereof.

THIS CONVEYANCE IS MADE SUBJECT TO ALL ZONING ORDINANCES, BASEMENTS AND RESTRICTIONS OF RECORD AFFECTING SAID BARGAINED PREMISES.

TO HAVE AND TO HOLD the said tract or parcel of land, with all and singular the rights, members and appurtenances thereof, to the same being, belonging, or in anywise appertaining, to the only proper use, benefit and behoof of the said Grantee forever in FEET SIMPLE.

AND THE SAID Grantor will warrant and forever defend the right and title to the above-described property unto the said Grantee against the claims passing by or through Grantor.

IN WITNESS WHEREOF, Grantor has hereunto set grantor's hand and seal this first day and year first above written.

Signed, sealed and delivered in the presence of:

Unofficial Witness

[Signature]

By: ______________________ [SRAL]
John Smith, CEO

By: ______________________ [SRAL]
Jason Smith, Secretary

Notary Public
Authority - Corporations

Title Standards § 9.2

• Corporate authority is presumed when documents are executed by President or Vice President, and attested by secretary (Gold Standard!)

• Corporate authority may be delegated to other officers of the corporation by resolution. However, the resolution should be recorded along with the conveyancing document. In practice however, this rarely happens.
Authority - Corporations

• Practice tip – thoroughly review articles, bylaws, verify authority through consent or resolution, incumbency certificate

• Be diligent with non-profits as their documentation may not be clear (assuming they have any at all).

• Example – last year conducted a closing for sale of church parking lot. Church’s governing documents were not clear as to authority and required numerous signatories. Closing ended up requiring congregation approval and head pastor, deacon, treasurer and other officers as signatories.
123 ANYSTREET, L.L.C.

CERTIFICATE OF AUTHORIZATION

AND

CERTIFICATE OF INCUMBENCY

The undersigned, being all of the Members of 123 Anystreet, L.L.C., a Delaware limited liability company (the "Borrower"); DO HEREBY CERTIFY to Love My Lender, a Georgia corporation, its successors and assigns, as follows:

1. I Own Lots Of Properties Corp., a Florida corporation ("Managing Member"), is the sole Member of the Borrower, and is referred to in the Operating Agreement of the Borrower alternatively as the "Member," "Member," "Operating Member," and "Managing Member.

2. Attached hereto as Exhibit A is a true, correct and complete copy of Articles of Incorporation of Managing Member, filed on March 1, 1999, and restated on August 2, 1999, which have not been amended or modified except as therein set forth.

3. Attached hereto as Exhibit B is a true, correct and complete copy of the By-Laws of the Managing Member, as amended on March 1, 1992, which have not been amended or modified except as therein set forth.

4. Attached hereto as Exhibit C is a true, correct and complete copy of the Certificate of Good Standing of the Managing Member, issued by the Florida Secretary of State on _____, 2016.

5. Attached hereto as Exhibit D is a true, correct and complete copy of Articles of Organization of the Borrower, filed on November 5, 2014, which have not been amended or modified except as therein set forth.

6. Attached hereto as Exhibit E is a true, correct and complete copy of the Operating Agreement of the Borrower, dated as of October 23, 2015, which have not been amended or modified except as therein set forth.

7. Attached hereto as Exhibit F is a true, correct and complete copy of the Certificate of Existence of the Borrower, issued by the Delaware Secretary of State on November 17, 2016.

The following resolutions (the "Resolutions") were adopted by the Board of Directors of the Managing Member of the Borrower on November, 2016, in compliance with all applicable laws, the Operating Agreement of the Borrower, and the By-Laws of the Managing Member, have not been modified or rescinded, and are in full force and effect as of the date of this Certificate.

"WHEREAS, it is in the best interest of 123 Anystreet, L.L.C. (the "Borrower") to obtain a loan (the "Loan") from Love My Lender, a Georgia corporation (the "Lender") in the approximate principal amount of $100,000,000.00 for the

purpose of financing the real estate or real property known as 123 Anystreet Apartments located in Alpharetta, Georgia ("the Property") through Lender;

NOW, THEREFORE, BE IT RESOLVED, that Minnie Mouse, being the president of I Own Lots Of Properties Corp., ("Authorized Officer") be, and hereby are, each individually authorized and directed, in the name and on behalf of the Borrower, to: (a) execute and deliver to the Lender such instruments, documents and agreements as the Lender may require, including loan agreements, promissory notes, mortgages, security agreements, financing statements, indemnities, assignments and fixture filings, and any supplement, modification, amendment, renewal or extension thereof, all of the same to be on such terms as may be acceptable to the Authorized Officer; and (b) take such other action as may be necessary or appropriate to carry out these resolutions (the acceptability of any instruments, documents or agreements or the terms thereof to the Authorized Officer to be conclusively evidenced by such Authorized Officer's signature thereon), and

"RESOLVED FURTHER, that the Lender shall be entitled to rely on these resolutions; and

"RESOLVED FURTHER, that any action previously taken by the Authorized Officer in furtherance of the matters authorized by these resolutions is hereby ratified, approved and confirmed as the act and deed of the Borrower."

9. The undersigned FURTHER CERTIFIES that all of the members of the Board of Directors of the Managing Member are named below, that each individual named below has been duly elected to the office of the Managing Member as set forth opposite his name, that such individual continues to hold such office at the present time, and that the signature set opposite his title is the genuine, original signature of such individual:

Minnie Mouse Secretary, I Own Lots Of Properties Corp.

This certificate is executed and delivered in order to induce Lender to extend the Loan to the Borrower and with the understanding that the statements made herein will be relied upon by Lender and its successors and assigns.

[Signatures Follow on Next Page]
The Case of the Headless Corporation:

- Non-profit had been in existence since the 1950’s. Original civic association corporation (predecessor to homeowner’s association).
- Owned less than acre of real property that served as buffer between homes and I-285. No other assets.
- CEO, Treasurer and Secretary were all the same person for last four years (2012-2016). Same or similar board members for seven (or so) years prior (2004 – 2012).
- CEO died leaving a corporation owning real property. All records destroyed or non-existent.
- What to do?
Title Standards § 10.2 - Limited Partnership

• A Limited Partnership may acquire property in the name of the partnership. Three Sets of Code provisions, depending upon when the partnership formed. See title standards.

Title Standards § 11.1 - General Partnership

• Uniform Partnership Act - each partner is an agent and may bind the partnership, UNLESS...

• Where title is held in the partnership, any partner may convey in the partnership name
Authority - Partnerships

• Practice tip – partnership authority can be tough to pin down due to their structure (i.e. like a Russian nesting doll).
Authority - Partnerships

• Example –
  • Limited partnership
  • General partner (GP) = LLC
  • Limited partner (LP) = LLC
  • Members of each GP / LP

• Same example applies to LLCs (more prevalent these days)

• This means you’ll be looking at a LOT of documents. Paper your file by requesting them all including the organization chart.
Title Standards § 12.1

• LLCs are relatively new entities - first authorized in GA in the 1990’s. WY was the first state back in 1977.

• Articles of organization should state whether member or manager managed; if silent, assume member managed.

• If member managed, any member can bind.

• If manager managed, no member has agency powers, but every manager does unless otherwise specified in Articles.

• Practice tip – verify operating agreement (if any).

• Absolute must – require consent or resolution approving action and granting authority. Company’s cannot act on their own.
Authority - LLCs

Practice tips

• Review articles of organization, operating agreement, consents or resolutions
• Keep in mind, GA law does NOT require operating agreements
• You may have to hunt for authority section in the operating agreement.
Authority - LLCs

Practice tips

• If no operating or LLC agreement, have company member prepare a consent or resolution stating no such agreement exists, include the description of the transaction, the property to be conveyed and have the member sign it.

• Save this in your file. Again, company’s cannot act for themselves. An entity needs an authorized signatory to act on its behalf.
WRITTEN CONSENT OF
THE MEMBER AND SOLE MANAGER OF
2001 INVESTMENT GROUP, LLC

October 13, 2017

The undersigned, Tyler Durden, being respectively, the sole member (the “Sole Member”) of 2001 Investment Group, LLC, a Georgia limited liability company (the “Company”) hereby consent and agree to the adoption of the resolutions below and the actions described therein.

PURCHASE AND TRANSFER OF REAL PROPERTY

WHEREAS, ABC Enterprises, LLC, a West Virginia limited liability company (the “Seller”) holds title to that certain tract and parcel of land lying and being in Land Lot 635, in the 19th District, 3rd Section, Cobb County, Georgia, being commonly known as 123 Any Ave, Marietta, GA 30065 and being more particularly described on Exhibit A, attached hereto and the improvements located thereon (the “Property”);

WHEREAS, the Company, as buyer, has offered to purchase the Property for a purchase price of $300,000.00 pursuant to that certain Commercial Purchase and Sale Agreement dated September 14, 2017 (the “PSA”), as amended;

WHEREAS, the Company has no written operating agreement and no managers.

WHEREAS, the undersigned believes it is in the best interests of the Company to purchase the Property from the Seller on such terms (the “Sale”);

NOW, THEREFORE, BE IT RESOLVED, that the Sale be, and hereby is, approved; and be it

FURTHER RESOLVED, that the Sole Member be, and hereby is, authorized to enter into, execute, deliver and perform such agreements, deeds, instruments and certificates as are necessary to document the purchase of the Property from the Seller (collectively, the “Purchase Documents”); and be it

FURTHER RESOLVED, that Tyler Durden (“Authorized Signatory”), be, and hereby is, authorized and directed, in the name of, for and on behalf of the Company, be, and hereby are, authorized empowered and directed to execute, deliver and perform the Purchase Documents, pursuant to the PSA, as well as execute or file any certificates as are necessary or appropriate for the Company to execute and deliver in connection with the Sale, including without limitation, any notices, consents, requests, amendments or modifications thereto consistent therewith, the doing by the Authorized Signatory of any such act conclusively establishing the authority of such Authorized Signatory and the approval and ratification of such act, if necessary, by the Company, the Authorized Signatory and the Sole Member.

ADOPTION AND RATIFICATION OF ACTION

RESOLVED, that any and all acts taken on or prior to the date hereof by any agent or attorney of the Sole Member, the Authorized Signatory or the Company, in such entity’s name and on its behalf, in connection with any of the foregoing resolutions, be, and the same hereby is, approved, ratified and adopted in all respects.

IN WITNESS WHEREOF, the undersigned have executed this Written Consent as of the date first written above.

MEMBER:

Tyler Durden
Limitations on Authority - Corporations

Title Standards § 9.7(c)

• If there is a question as to the authority of the CEO/President O.C.G.A. §14-2-841 says they shall have authority "to conduct all ordinary business and execute and deliver any ... conveyance ... not requiring approval by the board or shareholders as provided in this chapter."
Limitations on Authority - Corporations

• Practice tip – officer designations matter (i.e. president, CEO)
• Some corporations separate the CEO and President functions. Take note.
• NOTE: GA SOS uses CEO, CFO, secretary designations, whereas many corporate documents use president, treasurer, secretary instead. These designations can be used interchangeably UNLESS the bylaws have different provisions for CEO v. President, CFO v. treasurer.
• Review the GA SOS records (articles, annual reports and merger docs, if any)
• Review bylaws, consents and resolutions
Limitations on Authority - LLCs

Title Standards § 12.1 - 12.2

• An act of a manager or member that is not apparently carrying on in the usual way the business of the LLC does not bind the LLC unless authorized in accordance with a written operating agreement...

• Recorded copies of Articles - limitation on authority of managers or members may be reflected in Articles and recorded in Clerk's records in the county where real estate is located. O.C.G.A. 14-11-302

• So, unless you can verify the sale of the property is "carrying on the business of the LLC in the usual way," you will want a Resolution or other supporting documentation.
Limitations on Authority - LLCs

• Practice tip – require consent or resolution
• If no operating agreement, require certificate including representations and warranties:
  • That there is no written operating agreement,
  • The names of the members and managers (if any),
  • That the company is in good standing with the GA SOS,
  • The purchase and sale specifics: parties, purchase and loan amount, property description, etc
  • The purchase or sale is in furtherance of carrying on the usual business of the LLC, and
  • Signatures of all members and managers.
Limitations on Authority - LLCs

• Also, look for major decisions clause limiting action of manager and requiring certain members or percentage of membership to approve certain actions such as sale of real property, reorganization, etc.

• Example: Major Decisions. Notwithstanding Section x.1 above or any other provision of this Agreement to the contrary, and notwithstanding any other provision of the Operating Company Agreement to the contrary, neither the Manager nor an officer of the Company shall take, nor shall they permit the Company, the Operating Company or an officer of the Operating Company to take, without the prior written approval of the 123 Member, any of the matters listed on Exhibit B attached hereto and made a part hereof (individually, a “Major Decision” and collectively, the “Major Decisions”).
Limitations on Authority - LLCs

• **Example: EXHIBIT B Major Decisions**

• The following actions constitute **“Major Decisions”** (for purposes hereof, references to the Company and to the Operating Company shall also include each Subsidiary of the Company and each Subsidiary of the Operating Company), and such Major Decisions shall apply to the Company and each of its Subsidiaries and to the Operating Company and each of its Subsidiaries, irrespective of whether the same specifically refers to each such entity:
  
  • to amend the Certificate of Formation of the Company, to amend the Certificate of Formation of the Operating Company, or to change the mission and purpose of the Company or Operating Company;
  • to amend this Agreement except as expressly provided herein or to amend the Operating Company Agreement except as expressly provided therein;
  • to make any political contribution;
  • to change the income tax classification of the Company or Operating Company or to make any tax election that could reasonably be expected to result in a material adverse effect on a Member of the Company or member of Operating Company;
  • to sell, exchange, lease, assign or otherwise dispose of all or a substantial portion of the properties and assets of the Company or Operating Company in a single transaction or series of related transactions, other than the operation of the Property in the normal course of business, or to assign or Transfer any Units in the Operating Company held by the Company;
  • to cause, permit, or effectuate any merger, consolidation, conversion, recapitalization, business combination, reorganization, or similar corporate transaction of the Company or Operating Company;
  • to guaranty or agree to satisfy any debts or obligations of another Person, or to lend any funds or assets of the Company or Operating Company to any Person;
  • to enter into any transaction resulting in the liquidation or dissolution of Operating Company, or to file a petition for relief under any provisions of the United States Bankruptcy Code, as amended or superseded from time to time;
  • to agree or commit to any of the foregoing.
Conveyancing - Corporations

Title Standards § 9.3

- Instrument signed by corporate officer, attested by secretary & sealed, OR Signed by President or Vice President, & attested by secretary, then Examiner may presume:
  - (a) Officer holds the stated position
  - (b) they are authorized and
  - (c) Signature is genuine
Conveyancing - Corporations

Title Standards § 9.6

• Special provisions for transfer or satisfaction of Security Deeds by a corporate grantee (i.e. corporate entity lender), which are similar to deed requirements.

• Transfer or release can be executed by one corporate officer (President, Vice President, or Assistant Secretary) without seal or Secretary attestation, just notary and unofficial witness as required to record.

• By resolution recorded and referenced on the face of the transfer or release Corporation can authorize other corporate officers to execute such documents
Conveyancing - Partnerships

Title Standards § 10.3 - Limited Partnership
• Again, due to the fact that there are three different date specific requirements for limited partnerships, presumptions of what is acceptable is dependent on the time when the LP was established. See the title standards.

Title Standards § 11.4 & 11.5 - General Partnership
• Similar to LPs, pre and post UPA executions are dependent on when the GP was established. See the title standards.
Conveyancing - LLCs

Title Standards § 12.1

• Check the Articles to determine whether member or manager managed.
• If silent, LLC is member managed and any member can bind.
• If manager managed, no member has agency powers but every manager does.
Conveyancing - LLCs

• Practice tip – just because someone may have the authority to sign doesn’t mean that the sale was approved by the members.
• There can be frequent disagreement amongst members.
• Example – last year we had a commercial deal in our office with LLC as seller. There were multiple LLC members. One party told the attorney to close the deal, prepare the docs, etc. Another party disagreed and flooded our attorney’s email inbox with communications casting doubt on the effectiveness of the member’s authority. Lots of nasty stuff. The deal died a fiery death.
Post-Dissolution or Termination Conveyances

Corporation

Title Standards § 9.7(e) - Corporation Reinstatement
• Acts of previously dissolved corporation - reinstatement relates back such that the corporate existence deemed continuous and uninterrupted.

Title Standards § 9.7 (f) - Corporation Post Dissolution
• If deed executed post-dissolution (and no reinstatement) GA law allows documents to be executed by any two of the last officers or directors of the corporation without need of seal.
Post-Dissolution or Termination Conveyances

Title Standards § 10.3 - Limited Partnership

• Post Termination - OCGA 14-9-805 - deeds and transfer documents requiring execution post dissolution may be signed by any person who had authority to wind up affairs.

Title Standards § 11.3 - General Partnership

• Dissolved Partnership - if the business of a dissolved partnership is continued as a partnership (i.e. new partnership) title to property vested in the dissolved partnership shall be vested in the partnership continuing the business without any further act, deed or instrument of conveyance.
Post-Dissolution or Termination Conveyances

Title Standards § 12.4 - LLC

• Terminated LLC's - deeds, etc. after filing Certificate of Termination may be signed by any person with authority to wind up.

• Dissolved LLC’s
  • the members or managers in whom management was vested prior to dissolution may wind up a dissolved limited liability company's affairs, or,
  • if there are no such members or managers at the time of or at any time after such dissolution, such persons as may be designated to wind up the limited liability company's affairs
Foreign v. Alien
Foreign v. Alien Corporation

- Foreign Corporation = US corporation registered in US state other than Georgia
- Alien Corporation = non US corporation
Foreign Entities

Title Standards § 9.5 - Foreign Corporation
• No need to inquire whether such corporation was authorized to do business in Georgia.

• Title Standards § 9.8 - Alien Corporation
• Any corporation organized under laws outside the US must have (a) registered office and (b) registered agent in Georgia, (c) the registered agent must accept the designation and (d) the corporation must submit annual reports to the Secretary of State.
Corporations - § 14-2-1501. Authority to transact business required

(a) A foreign corporation may not transact business in this state until it obtains a certificate of authority from the Secretary of State.

(b) The following activities, among others, do not constitute transacting business within the meaning of subsection (a) of this Code section:

(3) Maintaining bank accounts, share accounts in savings and loan associations, custodian or agency arrangements with a bank or trust company, or stock or bond brokerage accounts;

(7) Making loans or creating or acquiring evidences of debt, mortgages, or liens on real or personal property, or recording same;

(8) Securing or collecting debts or enforcing any rights in property securing the same;

(9) Owning, without more, real or personal property;

(13) Owning (directly or indirectly) an interest in or controlling (directly or indirectly) another entity organized under the laws of, or transacting business within, this state; or

(14) Serving as a manager of a limited liability company organized under the laws of, or transacting business within, this state.

(c) The list of activities in subsection (b) of this Code section is not exhaustive.

Similar list under § 14-11-702 for LLCs
Foreign Entities

Title Standards § 10.4 - Limited Partnership
• Lack of Certificate of Authority does not invalidate corporate acts, so no need to determine if the former Limited Partnership was qualified at the time of acquisition or conveyance.

Title Standards § 12.5 - LLC
• Foreign LLCs - Failure to procure Certificate of Authority does not impair validity of contracts or corporate acts.
Mergers – Corporations and LLCs

Title Standards § 9.7(d) - Corporation
• Title to all real property of each corporation is vested in the survivor.

Title Standards § 12.3 - LLC
• LLC Surviving entity takes title
• Helpful Tip – Recorded affidavit of title/merger can assist those who examine the title after your involvement. The same goes for name changes. Anything you can do to help clean up the record for those that come after...
Mergers - Partnerships

Title Standards § 10.5 - Limited Partnership

• Same as corporations - title goes to surviving entity without requirement of any further action.

Title Standards § 11.3 - General Partnership

• Dissolved Partnership - if the business of a dissolved partnership is continued as a partnership (i.e. new partnership) title to the property vested in the dissolved partnership shall be vested in the partnership continuing the business without any further act, deed or instrument of conveyance.
Key Take Aways

• Examine corporate documents (all of them)
• Require consents and resolutions signed by all parties (members, directors, shareholders, etc.).
• Know your players (officers, directors, shareholders, members, managers, partners)
• When in doubt, ask your title underwriter

THANK YOU!
Contact Info

Nathan P. Sycks, Esq.
McManamy | McLeod | Heller
Direct: 404.442.6603
Main: 404.442.6630
Fax: 888.998.7373
nathan@mmhfirm.com
PREFACE

[NOTE: The following Preface was prepared in June 1994 by Comer W. Padrick, Jr. as Reporter for the Title Standards Revision Committee of the Real Property Law Section, was adopted by the Section and published in the 1995 "Real Property Law Deskbook".]

On November 1, 1963, the Board of Governors of the volunteer Georgia Bar Association approved 42 title standards, which the Real Property and Titles Committee had prepared. On December 4, 1965, the Board of Governors of the State Bar of Georgia, upon the recommendation of the Section of Real Property, adopted and approved those standards. On March 18, 1966, the Board of Governors adopted 12 additional standards and on June 2, 1972 the Board of Governors, upon recommendation of the Section of Real Property, approved standards which had been substantially revised and to which new standards had been added. Those standards, which were approved on June 2, 1972, have remained unchanged until June 18, 1994, on which date the Board of Governors of the State Bar of Georgia adopted these Revised Standards, upon recommendation of the Real Property Law Section.

A title standard is a statement officially approved by a bar association, which declares the answer to a question or a solution for a problem involved in the process of title examination. It is not a law, but gains its effect from voluntary compliance by attorneys.

A set of standards may be called a crystallization of the practice of title attorneys. Their main purpose is to eliminate technical objections which do not impair marketability, as well as objections which arise from misapprehension of the law.

The late Joseph L. Abraham, the father of the original Georgia standards, commenting on the desired effect of uniform standards, posed the following query in the Introduction to the 1972 Revisions: "How many times has it been said (perhaps even by yourself): `I think the title is good all right, but I am afraid that some other attorney will turn it down?' If all attorneys in this state abide by uniform standards, this fear will be eliminated as to all problems the standards embrace."

The Georgia standards rely heavily upon Simes and Taylor, Model Title Standards (1960) -- a research project sponsored by the University of Michigan Law School and the American Bar Association's Section of Real Property, Probate and Trust Law.

The nine principal title companies doing business in Georgia in 1963 approved in writing the portion of the standards initially adopted that year and agreed to be governed by them.

In approving these standards originally, the Board of Governors resolved:

"That all members of the Bar Association and all other lawyers throughout the state are urged to follow such title standards in all cases in which they might apply."

If the members of the State Bar of Georgia will comply with this resolution, the standards should be of great benefit both to the lawyers in Georgia and to the public at large.
The Revised Title Standards are the result of the efforts of many members of the Bar who have devoted precious time, thought and energy to the improvement and expanded coverage of the standards. In 1989 the Title Standards Revision Committee of the Real Property Section of the State Bar of Georgia was formed with Gregory A. Ward and Donald J. Schliessmann, Jr. as Co-Chairmen. "Comments on Existing Title Standards" dated September 27, 1990, was prepared by the Committee's study group comprised of Richard J. Beam, Jr., David E. Bullard, Bruce P. Cohen, A. Zachry Everitt, Henry S. Rogers, III, and Donald J. Schliessmann, Jr. The Title Standards Revision Committee has continued to remain active in its revision activities with Gregory A. Ward and Bruce P. Cohen as Co-Chairmen.

Using the comments of the above study group as a beginning point, and expanding the coverage of the standards from recommendations and suggestions of and numerous conferences with the Co-Chairmen of the Title Standards Revision Committee and Eric D. Ranney, Chairman of the Real Property Section of the State Bar of Georgia, the Reporter has been assisted immeasurably in this project by the personal professional expertise and contributions of the following "Specialists/Experts:"

<table>
<thead>
<tr>
<th>Danny C. Bailey</th>
<th>James B. Jordan</th>
</tr>
</thead>
<tbody>
<tr>
<td>Richard J. Beam, Jr.</td>
<td>Barbara E. Keon</td>
</tr>
<tr>
<td>Robert Park Bryant</td>
<td>Tom L. Lane, Jr.</td>
</tr>
<tr>
<td>Georgia E. Butler, II</td>
<td>William J. Lieberbaum</td>
</tr>
<tr>
<td>Brian P. Cain</td>
<td>Karen Comeau McDade</td>
</tr>
<tr>
<td>Janice E. Carpi</td>
<td>Paul M. McLarty, Jr.</td>
</tr>
<tr>
<td>John D. Cartledge</td>
<td>Martin L. McLendon</td>
</tr>
<tr>
<td>Leigh L. Clack</td>
<td>Charles E. Moore</td>
</tr>
<tr>
<td>Carol V. Clark</td>
<td>Theodore W. Morris</td>
</tr>
<tr>
<td>Bruce P. Cohen</td>
<td>Mark A. Nelson</td>
</tr>
<tr>
<td>Linda B. Curry</td>
<td>James M. Ney</td>
</tr>
<tr>
<td>William J. Dawkins</td>
<td>Ernest C. Ramsay</td>
</tr>
<tr>
<td>William H. Dodson, II</td>
<td>Eric D. Ranney</td>
</tr>
<tr>
<td>Mark D. Euster</td>
<td>Richard E. Raymer</td>
</tr>
<tr>
<td>Ralph S. Force</td>
<td>Henry S. Rogers, III</td>
</tr>
<tr>
<td>Alan S. Gaynor</td>
<td>Joan Boilen Sasine</td>
</tr>
<tr>
<td>William R. Harp</td>
<td>Donald J. Schliessmann, Jr.</td>
</tr>
<tr>
<td>Suellen M. Henderson</td>
<td>Robert W. Storey</td>
</tr>
<tr>
<td>D. Byron Hilley</td>
<td>Gregory A. Ward</td>
</tr>
<tr>
<td>Ellis C. Hooper</td>
<td>Michael T. Westfall</td>
</tr>
<tr>
<td>Amelia H. Huskins</td>
<td>John A. White, Jr.</td>
</tr>
<tr>
<td>Philip E. Johns</td>
<td>Joe D. Whitley</td>
</tr>
<tr>
<td>Joann G. Jones</td>
<td>Marvin H. Zion</td>
</tr>
</tbody>
</table>

The Reporter wishes to also recognize the valuable research performed by the Research Assistant, Nancy Yanowitz.
Title Standards of 19 other states along with the Uniform Standards referred to above have been reviewed. It is the opinion of the members of the Revision Committee and the Reporter that the format presently used in Georgia is the preferred method for setting forth each standard. Generally, the standard, which is a statement of a general proposition, presented as concisely as practicable, is set forth first, followed, where necessary, by the commentary, which is a broader explanation of the standard. Where possible, the commentary contains references to Code and case citations.

If these Revised Title Standards assist members of the Real Estate Bar to obtain for their clients marketable titles free of needless technical and legally unfounded objections, then the purpose of these Standards will have been achieved.

Comer W. Padrick, Jr.
Reporter
June 1994

Addendum

Various revisions to the Title Standards were prepared by the Title Standards Revision Committee of the Real Property Law Section in 2005. After approval by the Executive Committee of the Section on April 19, 2005, the revisions were submitted and approved by the Section membership at the annual meeting and Property Law Institute seminar at Amelia Island on May 14. On August 18, 2005, the revised Title Standards became effective when they were adopted by the Board of Governors of the State Bar of Georgia.

In addition to a general updating of cases and statutory cites throughout the Title Standards, substantive changes were made to Section 11.1, dealing with limited liability partnerships; Section 14.7, relating to cancellation of deeds to secure debt; Section 15.8, relating to cancellation of mechanics liens; Section 16.5, dealing with cancellation of judgments; and Section 31.12, covering federal estate tax liens.

A copy of the official version of the current Title Standards is posted on the Section website at www.garealpropertylaw.com. Notice of subsequent revisions will be posted there, also.

Leon Adams, Jr.
Chair, Title Standards Revision Committee
January 2008
Addendum

Further revisions to the Title Standards were adopted by the Section at the May, 2014 Real Property Law Institute, having been previously approved by the Section’s Executive Committee. Subchapters 4.5, 4.6, and 4.7 were added to address attestation and notice issues raised by recent appellate court decisions. Chapters 40 and 41 were added to address issues relating to title acquired through the FDIC and through court appointed receivers. The Title Standards Subcommittee of the Section’s Executive Committee continually attempts to keep the Standards relevant and current as the practice of real estate evolves over time. Please feel free to contact a member of the Executive Committee if you have suggestions as to how the Standards might be further improved.

Scott Logan  
Chair, Title Standards Subcommittee  
August 2014

Addendum

Further revisions to the Title Standards were approved by the Executive Committee of the Real Property Law Section on April 19, 2016 and adopted by the Section at the May, 2016 Real Property Law Institute, having been previously approved by the Section’s Executive Committee. Subchapters 4.5, 4.6, and 4.7, 8.5 and 9.2 were revised to address House Bill 322 and the revisions to the following statutes: O.C.G.A. §44-5-30, §44-14-33,34 and §44-14-61,62. Subchapter 17.1 was revised to reflect the change in the notice requirements from 15 to 30 days including commercial properties. The Title Standards Subcommittee of the Section’s Executive Committee continually attempts to keep the Standards relevant and current as the practice of real estate evolves over time. Please feel free to contact a member of the Executive Committee if you have suggestions as to how the Standards might be further improved.

Hilary Herris Fentress  
Chair, Title Standards Subcommittee  
August 2016
Addendum

Further revisions to the Title Standards were approved by the Executive Committee of the Real Property Law Section on April 18, 2018 and adopted by the Section at the May, 2018 Real Property Law Institute, having been previously approved by the Section’s Executive Committee. Subchapter 8.5 was revised to address the adoption of the Uniform Power of Attorney Act. Subchapters 15.8 and 15.9 were revised to add a method of cancellation for mechanics’ liens that had been left out of the last revision as well as update some of the references in the comments. Subchapters 16.3 and 16.4 were revised to address the adoption of statewide lien filing by the Georgia Department of Revenue. Subchapters 16.6 and 16.7 were revised to include updates to the Georgia Uniform Commercial Code from 2013. Finally, Chapter 21 was revised to update changes in case law as well as reflect the current bankruptcy standards of practice. The Title Standards Subcommittee of the Section’s Executive Committee continually attempts to keep the Standards relevant and current as the practice of real estate evolves over time. Please feel free to contact a member of the Executive Committee if you have suggestions as to how the Standards might be further improved.

Hilary Herris Fentress
Chair, Title Standards Subcommittee
August 2018

Addendum

Further revisions to the Title Standards were approved by the Executive Committee of the Real Property Law Section on April 10, 2019 and adopted by the Section at the May, 2019 Real Property Law Institute, having been previously approved by the Section’s Executive Committee. Subchapter 8.5 was revised to address the revisions to the Uniform Power of Attorney Act which among other things, renamed the act to The Georgia Power of Attorney Act. Subchapter 29.2 was revised to address the amendment of O.C.G.A. §53-12-25 which creates a safe harbor for deeds incorrectly conveying title to a trust. The Title Standards Subcommittee of the Section’s Executive Committee continually attempts to keep the Standards relevant and current as the practice of real estate evolves over time. Please feel free to contact a member of the Executive Committee if you have suggestions as to how the Standards might be further improved.

Hilary Herris Fentress
Chair, Title Standards Subcommittee
August 2019
# Table of Contents

## CHAPTER 1 • THE TITLE EXAMINER

1.1 Examining Attorney’s Attitude .................................................................1
1.2 Prior Examination ..................................................................................1
1.3 Reference to Title Standards in Sales Contract ........................................2

## CHAPTER 2 • USE OF THE RECORD

2.1 Period of Search ....................................................................................2
2.2 Extent of Search ....................................................................................3
2.3 Instruments by Strangers to the Record Chain of Title ............................4
2.4 Record of Expired Leases .......................................................................4
2.5 Record of Expired Contract or Options ..................................................5
2.6 Age of Instruments ................................................................................5

## CHAPTER 3 • NAME VARIANCES

3.1 Rule of Idem Sonans .............................................................................6
3.2 Use or Nonuse of Middle Names or Initials ..............................................6
3.3 Abbreviations, Derivatives, and Nicknames .............................................6
3.4 Recitals ..................................................................................................6
3.5 Effect of Suffix .......................................................................................6
3.6 Variance Between Signature and Name in Body of Deed ..........................6
3.7 Name Changes .....................................................................................6
3.8 Variance in Name of Wife ........................................................................7
3.9 Variance in Indication of Sex ..................................................................7
3.10 Correct Name of Grantee .........................................................................7
3.11 Correcting Designation of Plat ...............................................................7
3.12 Indexing Notation ................................................................................7
3.13 Name Variances for Corporations and Partnerships ...............................8

## CHAPTER 4 • EXECUTION, ATTESTATION, ACKNOWLEDGMENT AND RECORDING

4.1 Date Omissions and Inconsistencies ......................................................8
4.2 Delivery Delay in Recordation ...............................................................9
4.3 Georgia State Transfer Tax .....................................................................9
4.4 Internal Revenue Service Real Estate Reporting ....................................9
4.5 Requirements For Recording a Deed in Georgia .....................................10
4.6 Constructive Notice of Security Deeds ....................................................11
4.7 Actual and Constructive Notice .............................................................12
CHAPTER 11 • CONVEYANCES INVOLVING GENERAL PARTNERSHIPS .......26

11.1 General; Authority; Execution .................................................................................26
11.2 Statements of Partnership ..........................................................................................27
11.3 Vesting of Property of Dissolved Partnerships ..........................................................27
11.4 Conveyances of Real Property Prior to UPA Held in Partnership Name .................28
11.5 Conveyances of Real Property Subsequent to UPA Held in Name of Partnership Formed Prior to UPA ...............................................................28

CHAPTER 12 • CONVEYANCES INVOLVING LIMITED LIABILITY COMPANIES ....29

12.1 General Authority ......................................................................................................29
12.2 Recorded Copies of Articles of Organization .............................................................29
12.3 Mergers ........................................................................................................................29
12.4 Terminated Limited Liability Companies ...................................................................30
12.5 Foreign Limited Liability Companies .........................................................................30

CHAPTER 13 • TITLE THROUGH DECEDENTS’ ESTATES ........................................30

13.1 Judgments Against Heirs or Devisees .....................................................................30
13.2 Surviving Widow, Widower or Minor Children ........................................................30
13.3 No Will, No Administration, Death Within Twelve Months ..................................31
13.4 No Will, No Administration, Death From One to Three Years Past ....................32
13.5 No Will, No Administration, Death More Than Three Years Past .......................32
13.6 No Will, Administration Pending on Estate — Sale by Administrator .....................32
13.7 No Will, Administration Pending on Estate-Sale by Heirs at Law with Disclaimer by Administrator .............................................................................33
13.8 No Will, But Administrator Discharged Prior to Sale .............................................33
13.9 Will Probated in Solemn Form Authorizes Sale — Executor Qualified Within Past Six Months .......................................................................................33
13.10 Will Probated in Solemn form Does Not Authorize Sale — Executor Qualified Within Past Six Months ..........................................................33
13.11 Will Probated in Solemn Form Authorizes Sale — Executor Qualified More Than Six Months — No Assent to Devise ...................................................34
13.12 Will Probated in Solemn Form Authorizes Sale — Executor Qualified More than Six Months — Deed From Executor and All Devisees ...............35
13.13 Will Probated in solemn Form Does Not Authorize Sale — Executor Qualified For More than Six Months .................................................................35
13.14 Will Probated in Common Form ............................................................................35

CHAPTER 14 • DEEDS TO SECURE DEBT (SECURITY DEEDS) .......36

14.1 Security Deed Recorded Prior to Deed by Which Ownership Acquired ...............36
14.2 Deed from Owner to Holder of Security Deed ..........................................................36
14.3 Satisfaction of Assignment of Rents ..........................................................................37
14.4 Releases Corrective or Re-recorded Security Deed ..................................................37
14.5 Reference to Unrecorded Security Deed ...................................................................37
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>14.6</td>
<td>Reversion of Property Conveyed to Secure Debt</td>
<td>38</td>
</tr>
<tr>
<td>14.7</td>
<td>Satisfaction of Deeds to Secure Debt</td>
<td>39</td>
</tr>
<tr>
<td>14.8</td>
<td>Failure to Pay Intangible Recording Tax</td>
<td>40</td>
</tr>
<tr>
<td>14.9</td>
<td>Waiver of Borrower’s Rights</td>
<td>41</td>
</tr>
<tr>
<td></td>
<td><strong>CHAPTER 15 • MECHANICS’ AND MATERIALMEN’S LIENS</strong></td>
<td>41</td>
</tr>
<tr>
<td>15.1</td>
<td>Scope of Search</td>
<td>41</td>
</tr>
<tr>
<td>15.2</td>
<td>Inchoate Nature of Lien Right</td>
<td>41</td>
</tr>
<tr>
<td>15.3</td>
<td>Priority of Mechanics’ and Materialmen’s Liens</td>
<td>42</td>
</tr>
<tr>
<td>15.4</td>
<td>Recitals of Ownership</td>
<td>42</td>
</tr>
<tr>
<td>15.5</td>
<td>No Release of Lien Necessary</td>
<td>42</td>
</tr>
<tr>
<td>15.6</td>
<td>Bond to Discharge Lien</td>
<td>43</td>
</tr>
<tr>
<td>15.7</td>
<td>Preliminary Notice of Liens</td>
<td>43</td>
</tr>
<tr>
<td>15.8</td>
<td>Satisfaction of a Mechanics’ and Materialmen’s Lien</td>
<td>43</td>
</tr>
<tr>
<td>15.9</td>
<td>Affidavits to Dissolve Mechanics’ and Materialmen’s Lien Rights</td>
<td>44</td>
</tr>
<tr>
<td></td>
<td><strong>CHAPTER 16 • MISCELLANEOUS</strong></td>
<td>45</td>
</tr>
<tr>
<td>16.1</td>
<td>Failure to Release Notice of Lis Pendens</td>
<td>45</td>
</tr>
<tr>
<td>16.2</td>
<td>Quitclaim, Limited Warranty, Executor’s and Administrator’s Deeds</td>
<td>45</td>
</tr>
<tr>
<td>16.3</td>
<td>Judgments and Executions</td>
<td>45</td>
</tr>
<tr>
<td>16.4</td>
<td>Dormancy of Judgments</td>
<td>46</td>
</tr>
<tr>
<td>16.5</td>
<td>Cancellation of General Execution Docket Recordings</td>
<td>46</td>
</tr>
<tr>
<td>16.6</td>
<td>Liens Arising from the Uniform Commercial Code</td>
<td>47</td>
</tr>
<tr>
<td>16.7</td>
<td>Methods of Canceling UCC Financing Statements and Notice Filings</td>
<td>49</td>
</tr>
<tr>
<td></td>
<td><strong>CHAPTER 17 • FORECLOSURES</strong></td>
<td>50</td>
</tr>
<tr>
<td>17.1</td>
<td>Foreclosure in General</td>
<td>50</td>
</tr>
<tr>
<td>17.2</td>
<td>Deed Under Power of Sale</td>
<td>51</td>
</tr>
<tr>
<td>17.3</td>
<td>Effect of Foreclosure Sale</td>
<td>52</td>
</tr>
<tr>
<td>17.4</td>
<td>Federal Tax Liens</td>
<td>53</td>
</tr>
<tr>
<td>17.5</td>
<td>Other Governmental Liens and Interests</td>
<td>53</td>
</tr>
<tr>
<td>17.6</td>
<td>Deed in Lieu of Foreclosure</td>
<td>54</td>
</tr>
<tr>
<td></td>
<td><strong>CHAPTER 18 • TRANSACTIONS UNDER FEDERAL TRUTH-IN-LENDING AND</strong></td>
<td>54</td>
</tr>
<tr>
<td></td>
<td>REGULATION Z</td>
<td>54</td>
</tr>
<tr>
<td>18.1</td>
<td>Right of Rescission</td>
<td>54</td>
</tr>
<tr>
<td></td>
<td><strong>CHAPTER 19 • PLANNED UNIT DEVELOPMENTS</strong></td>
<td>55</td>
</tr>
<tr>
<td>19.1</td>
<td>In General</td>
<td>55</td>
</tr>
<tr>
<td>19.2</td>
<td>Condominiums - Georgia Condominium Act</td>
<td>55</td>
</tr>
<tr>
<td>19.3</td>
<td>Condominiums - Apartment Ownership Act</td>
<td>61</td>
</tr>
<tr>
<td>19.4</td>
<td>Time-Share Estates</td>
<td>63</td>
</tr>
<tr>
<td>19.5</td>
<td>Property Owners’ Association — Not Subject to Statute</td>
<td>63</td>
</tr>
</tbody>
</table>
33.2 Sales of Real Property Interests Held by RTC .......................................................... 89
33.3 Use of Powers of Attorney by RTC ........................................................................ 89
33.4 Pass-Through Receivership Title Issues ............................................................... 89
33.5 Validity of Foreclosure Conducted by Holder of Superior Interest of Property in which RTC as Receiver of a Failed Association Holds an Interest ...................................................................................................................... 90

CHAPTER 34 • ZONING ................................................................................................. 91

34.1 Title Opinion ........................................................................................................ 91

CHAPTER 35 • FEDERAL STATUTES WHICH DO NOT AFFECT TITLE ................. 93

35.1 Americans with Disabilities Act (‘‘ADA’’) ............................................................ 93
35.2 Bank Bribery Act .................................................................................................... 93
35.3 Home Mortgage Disclosure Act (‘‘HMDA’’) ......................................................... 93
35.4 The Real Estate Settlement Procedures Act (‘‘RESPA’’) ........................................ 93

CHAPTER 36 • GEORGIA STATUTES WHICH DO NOT AFFECT TITLE ................. 93

36.1 Georgia Residential Mortgage Act (‘‘GRMA’’) .................................................... 93
36.2 Georgia Withholding Tax on Sale or Transfer of Real Property by Nonresidents of Georgia ........................................................................................... 94

CHAPTER 37 • CONDEMNATIONS — THE RIGHT OF EMINENT DOMAIN ........... 94

37.1 In General Right of Eminent Domain — Its Power and Exercise Thereof .......... 94
37.2 Title Examination for Condemnor or Person Exercising Condemnation Right .......................................................................................................................... 94
37.3 The Right of Eminent domain is Statutory in Nature Involving Statutory Civil Procedure ......................................................................................................................... 95
37.4 Rights of Reversion in Condemnee or Successors in Title to Condemnee .......... 95
37.5 Just Compensation Awarded in the Form of Future Uses ..................................... 95
37.6 Rights Lost to the Property Remaining after Condemnation Paid for as Consequential Damages ........................................................................................................... 95
37.7 Condemnation of Air Rights by Government Condemnor .................................... 96
37.8 Condemnation of Rights Less Than Fee Simple Title Rights in Addition to Air Rights ......................................................................................................................... 96
37.9 Property Exempt from Condemnation or Eminent Domain Laws of Georgia ...... 96
37.10 Property Conveyed from Condemnor to Private Individuals .............................. 96
37.11 Adverse Possession Cannot Be Obtained Against Certain Condemnors .......... 97
37.12 Condemnation — Plats Involved ......................................................................... 97

CHAPTER 38 • EASEMENT TITLE ISSUES ......................................................................... 97

38.1 Nature and Extent of Title Examiner’s Duties with Respect to Appurtenant Easements ......................................................................................................................... 98
38.2 Merger .................................................................................................................... 100
38.3. Debt Encumbrances .................................................................................................. 100
38.4 Effect of Deed Recitals on Easement Rights ......................................................... 101
38.5 Parol Licenses .......................................................................................................... 101
38.6 Notice ...................................................................................................................... 101
38.7 Charges Imposed for Use of Easements ................................................................. 102
38.8 Real Estate Taxes on Easements ............................................................................ 102
38.9 Environmental Issues Relating to Easements ....................................................... 102

CHAPTER 39 • Titles Involving Judicial Confirmation or Conveyance .................... 103

39.1 Quiet Title Actions ................................................................................................. 103

CHAPTER 40 • FDIC Title Issues ................................................................................. 98

40.1 Ownership of Real Property of Failed Institution ............................................... 98
40.2 Foreclosure of Deeds to Secure Debt Naming a Named Institution as Grantee ... 98
40.3 Transfer of Real Property By FDIC or Partner Entities ....................................... 99
40.4 Use of Powers of Attorney By the FDIC .............................................................. 99

CHAPTER 41 • Title Acquired Through a Court-Appointed Receiver ....................... 99
CHAPTER 1
THE TITLE EXAMINER

1.1 Examining Attorney’s Attitude

The purpose of the examination of title and objections, if any, shall be to secure for the examiner’s client a title which is in fact marketable and which is shown by the record to be marketable and subject to no other encumbrances than those expressly provided for by the client’s contract. Objections and requirements should be made only when the irregularities or defects reasonably can be expected to expose the purchaser or lender to the hazard of adverse claims or litigation.

Comment: Title Standards are primarily intended to eliminate technical objections which do not impair marketability and some common objections which are based upon misapprehension of the law. The examining attorney, by way of a test, may ask after examining the title, what defects and irregularities have been discovered by the examination, and as to each such irregularity or defect, who, if anyone, can take advantage of it as against the purported owner, and to what end. For example, the omission of the zip code of the property in the description thereof in a conveyance is not a material defect for which an objection should be raised. To enter an objection of such nature is considered to be “fly specking” or to be over-meticulous in the examination of the title. Title Standards, if properly utilized, should reduce to a bare minimum, if not eliminate, “fly specking and over-meticulousness.

1.2 Prior Examination

When an attorney discovers a situation which the attorney believes renders a title defective and he/she has notice that the same title has been examined by another attorney who has passed the defect, it is recommended that the attorney communicate with the previous examiner, explain the matter objected to, and afford an opportunity for discussion, explanation, and correction. The attorney contacted should cooperate fully and promptly in investigating his/her records and taking whatever steps are necessary to explain and/or correct the title defect complained of.

Comment: It is ethically incumbent upon the attorney raising the objection, prior to discussing the objection with the client, to locate the prior attorney, to discuss same with that attorney in order to afford that attorney an opportunity to explain what steps, if any, had been taken to clear the objection and to offer the prior attorney the opportunity to clear the objection. In discussing the objection with the prior attorney, the current policy had been issued insuring against any loss by reason of such defect. If the title company will insure the purchaser against any loss by reason of such defect, should the transaction involve a purchase, or if the title company will insure the lender against any loss by reason of such title defect, should the transaction involve only a loan, the attorney might consider recommending the purchase of the title insurance as a solution to the title objection. However, the attorney should counsel his/her client as to the distinctions between marketable title and insurable title and the possible consequences of failing to obtain a marketable title.
Under the provisions of the 1994 amendment to O.C.G.A. Section 44-2-14, any affidavit, prepared under O.C.G.A. Section 44-2-20, and any instrument by which the title to real property or any interest therein is conveyed, created, assigned, encumbered, disposed of, or otherwise affected, which is executed on or after July 1, 1994, shall not be entitled to recordation unless the name and mailing address of the natural person to whom the affidavit or instrument is to be returned is legibly printed, typewritten or stamped upon the document at the top of the first page thereof. If any instrument or affidavit is titled or recorded without compliance with this amendment, such noncompliance does not alone impair the validity of the filing of recordation of or the construction notice imparted by filing or recordation.

1.3 Reference to Title Standards in Sales Contract

An attorney drawing a real estate contract is urged to recommend that the terms of the contract provide that marketability be determined in accordance with Georgia Law as supplemented by Title Standards then in force and that the existence of encumbrances and defects, and the effect to be given to any found to exist, be determined in accordance with such Standards. An attorney drawing a real estate sales contract is urged to recommend inclusion of the following clause or its equivalent:

It is understood and agreed that the title herein required to be furnished by the seller shall be good and marketable and that marketability shall be determined in accordance with Georgia law as supplemented by the Title Standards of the State Bar of Georgia. It is also agreed that any defect in the title which comes within the scope of any of said Title Standards shall not constitute a valid objection on the part of the buyer provided the seller furnishes the affidavits or other title papers, if any, required in the applicable Standard to cure such defect.

CHAPTER 2
USE OF THE RECORD

2.1 Period of Search

A record title covering a period of 50 years or more is considered sufficient to determine marketability; provided that the basis thereof is a warranty deed, one or more quitclaim deeds supported by a reasonable proof that they convey the full title, or a grant from the state, a probate proceeding in which the property is reasonably identifiable, a security deed if subsequently regularly foreclosed or any other instrument which shows of record reasonable probability of title and possession thereunder; provided further that the period actually searched does not refer to or indicate prior instruments or defects in title, in which case such prior instruments may be used in turn as a start, and that the period actually searched discloses instruments which confirm and carry forward the title to be established.

This Standard, however, shall not prevent an attorney from certifying a title as marketable based upon a search for a period of less than 50 years where the parties
involved agree and accept less than 50 years, in which even the attorneys’ title certificate shall state the period covered thereby.

As a result of the recording process, the effective date of the various indices examined may not coincide with the date the record examination is conducted. The period between the record effective date and the examination date or document filing date of a subsequent transaction is commonly referred to as the “gap period.” This gap period varies by county and by indices within a county and in some instances this interim period may be substantial. When examining title and computing dates referred to in these Standards, the effect of the gap period must be taken into consideration. The oldest effective date of all record indices examined should be reported as the effective date of the attorney’s title certificate unless a report of the effective date of such record index is requested by the client or is of particular significance to the transaction upon which the record search will be relied.

Comment: In applying this Standard, it is necessary to trace the record title back to a “root” or “start,” which may be, and generally is, more than the 50 years back. Any defects in the record title subsequent to the date of recording of the “root” or “start” must be considered by the examiner. Thus, suppose the record shows a warranty deed from A to B in fee simple, recorded in 1914. The next instrument in the chain of record title is a conveyance of an easement across the land from B to X, recorded in 1916. The next instrument is a warranty deed from B to C in fee simple, recorded in 1954, in which the easement is not mentioned. In 1993, D who has contracted to purchase the land from C, employs an attorney to examine the title. The title examiner will have to go back to the deed of 1914 and will have to report that the record title is subject to the easement in favor of X created by the deed of 1916.

In situations in which the parties engage and direct the attorney to certify title for a period less than 50 years, the attorney’s certification should contain a disclaimer to the following effect:

THIS CERTIFICATE OF TITLE IS BASED UPON A LIMITED EXAMINATION OF RECORD TITLE AND DOES NOT PURPORT TO CERTIFY THOSE MATTERS WHICH A FULL EXAMINATION OF RECORD TITLE WOULD REVEAL.

2.2 Extent of Search

In examining a title, the examiner is required to search only for properly indexed and recorded instruments in the chain of title. For this purpose the following instrument is outside the chain of title: (A) An instrument from a person in the chain of title filed for record after the date of filing for record of another instrument from the same person purported to part with the same interest; (B) An instrument from a person in the chain of title recorded prior to the date of the deed conveying title into that person in the absence of other circumstances which point to the existence of the instrument. The starting date for the search in the name of each new record title holder should be the date of the vesting instrument rather than the filing date.
Comment: The following example will illustrate the factual situation set out in example (A) of this Standard: A, having a good record title, conveys a tract of land to B in 1955. In 1956, A conveys the land to C, who at once records. C has actual notice of the Deed to B. In 1957, B records. In 1958, C conveys the land to D, who pays value and has no actual notice of the Deed to B. D at once records. D's title is good. The title examiner is under no duty to search for the Deed to B.

The following example will illustrate the factual situation set out in example (B): A, who anticipates purchasing a tract of land from B executes a Security Deed conveying the said tract in favor of C to secure a loan made by C to A. The Security Deed is dated November 15, 1985 and recorded December 15, 1985. A acquires title to the tract from B by warranty deed dated January 15, 1986 and recorded January 20, 1986. On February 20, 1986, A conveys the tract to D who pays value and has no actual notice of the Security Deed to C. D at once records. D's title is good. The title examiner is under no duty to search for the Security Deed to C.


2.3 Instruments by Strangers to the Record Chain of Title

An instrument executed by a person who is a stranger to the record chain of title at the time such instrument is recorded does not of itself make title unmarketable; however, such an instrument should give rise to additional investigation. Although the instrument from the stranger to the record chain of title does not necessarily render the title unmarketable, the attorney is under a duty to disclose this information to the client.

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

Record title is vested in the husband but the lender has consistently required the wife to join with the husband in executing all security deeds pertaining to the property. In examining title for a sale of the property by the husband, a title examiner should require a quitclaim deed from the wife for the purpose of divesting any and all interest which she might have or claim to the property by reason of having executed said security deeds.

2.4 Record of Expired Leases

In the absence of notice of renewal arising from possession, record, or otherwise, an examiner may omit from his opinion reference to a record lease or memorandum of lease when the term expressed in the lease has expired. It is not the function of the title examiner to certify as to possession. HOWEVER, the certifying attorney should always make
except in his opinion to rights of tenants in possession, if any, unless he is called upon to certify as to possession also. If asked to certify to possession and rights of tenants in possession, then proper inquiry should be made with present record owner and proper affidavits taken from him and any tenant actually in possession. If the purpose of the examination is related to concerns about environmental liability, an examiner should report all leases, whether expired or unexpired.

Comment: In an environmental study, it is helpful to know the identities of lessees in both expired and unexpired leases, and the purposes for which the premises have been leased, since past or present uses may be associated with environmental problems, such as dry cleaners, service stations and the like.

2.5 Record of Expired Contract or Options

An examiner should report any and all contracts, options or memorandums thereof whether or not they appear to have expired and the closing attorney should decide whether to rely upon the record or seek additional proof.

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

2.6 Age of Instruments

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

Comment: Although not statutes of limitation, O.C.G.A. Section 44-5-163 provides that the period of possession for prescriptive title through adverse possession is twenty years and O.C.G.A. Section 44-5-164 provides that the period of possession for prescriptive title under color of title is seven years. The true owner may be barred by laches in applying for a cancellation of a cloud upon his/her title where the adverse claimant is in possession. Pierce v. Middle Ga. Land & Lbr. Co., 131 Ga. 99, 61 S.E. 1114 (1908). The seven-year limitation placed upon an action to set aside or cancel a deed by a court of equity is analogous to the period required for prescriptive title under color of title. Payton v. Daughtry, 223 Ga. 438, 156 S.E.2d 29 (1967).
CHAPTER 3
NAME VARIANCES

3.1 Rule of Idem Sonans

Differently spelled names are presumed to be the same when they sound alike, or when their sounds cannot be distinguished easily, or when common usage by corruption or abbreviation has made their pronunciation identical. A greater degree of liberality should be indulged with the greater lapse of time and in the absence of circumstances causing any reasonable doubt as to the identity of the parties.

3.2 Use or Nonuse of Middle Names or Initials

In all instruments or court proceedings the use on one occasion and the nonuse in another of a middle name or initial ordinarily does not create a question of identity affecting title, unless the examiner is otherwise put on inquiry.

3.3 Abbreviations, Derivatives, and Nicknames

All customary and generally accepted abbreviations, derivatives, and nicknames of first names and middle names should be recognized as the equivalent thereof.

3.4 Recitals

In the absence of special circumstances creating suspicion, recitals with respect to names and identity in recorded documents should be relied upon without requiring additional proof.

3.5 Effect of Suffix

Although identity of name raises the presumption of identity of person, the addition of a suffix such as “Jr.” or “II” to the name of a subsequent grantor may rebut the presumption of identity with the prior grantee.

3.6 Variance Between Signature and Name in Body of Deed

Where the given name or names or the initials as used in a grantor’s signatures on a deed vary from their name as it appears in the body of the deed but the name as used in the signature is the same as that in whom record title then exists, the signature should be accepted as providing adequate identification.

3.7 Name Changes

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

3.8 Variance in Name of Wife

If the grantees in one instrument of conveyance are “John Smith and Mrs. John Smith,” and the grantors in a succeeding instrument in the chain of title are “John Smith and Mary Smith,” further evidence should be required to show that Mrs. John Smith is the same person as Mary Smith. The same conclusion should be reached if the grantees were “John Smith and Mary Smith” and the grantors in a succeeding instrument in the chain of title were “John Smith and Mrs. John Smith.” Conveyances should not be prepared using a wife’s name as “Mrs. John Smith” as there could be a former deceased or divorced Mrs. John Smith different from the party in the proposed conveyance.

3.9 Variance in Indication of Sex

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

3.10 Correct Name of Grantee

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

3.11 Correcting Designation of Plat

An error in a conveyance with respect to the name or designation of a recorded plat may be corrected by a certificate of the Clerk of the Superior Court when the nature of the error is reasonably clear.

评论：John Doe conveyed land describing it as Lot 1, Block A of Blackacres, Plat Book 5, Page 3 of Blank County, Georgia, instead of the correct description of Plat Book 5, Page 31. The Clerk of the Superior Court of Blank County may issue a certificate stating that the only plat of record in Blank County under the name Blackacres is one recorded in Plat Book 5, Page 31, of said county.

3.12 Indexing Notation

If at the end of any conveyance and following the execution thereof, there is set forth an “indexing Notation” which contains a recital identifying the surname of any grantor or grantee therein, such designation shall be used by the Clerk in indexing said conveyance
and any title examiner shall only be obligated to search under such name. However, any ambiguity or confusion about the correct surname requires a search under all possible names.

Comment: This Standard is intended to address those situations in which the surname of the party is not the last name found in a group of names. For example, in the name Pi Yong Si, if Pi is the surname this Standard will assist in having the document indexed as Yong Si Pi.

3.13 Name Variances for Corporations and Partnerships

Corporations chartered under the laws of the State of Georgia and partnerships formed under the laws of Georgia are satisfactorily identified although their exact names are not used and variations exist from instrument to instrument if, from the names used and other circumstances of record, identity of the corporation or partnership can be inferred with reasonable certainty. Among other variances, addition or omission of the word “the” preceding the name; use or nonuse of the symbol “&” for the word “and;” use or nonuse of the abbreviations for “company,” “limited,” “corporation” or “incorporated” ordinarily may be ignored. Affidavits and recitals of identity are encouraged to explain variances and good practice dictates that they be recorded to assist future examiners.

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

This Standard is based upon original Standard 9.1, which was cited In the Matter of Neal Gray, 7 B.R. 535 (N.D. Ga. 1980).

CHAPTER 4
EXECUTION, ATTESTATION, ACKNOWLEDGMENT AND RECORDING

4.1 Date Omissions and Inconsistencies

Omission of the date of execution from a conveyance or other instrument affecting title does not, in itself, impair marketability. Even if the date of execution is of peculiar significance, an undated instrument will be presumed to have been timely executed if the dates of acknowledgment and recordation, and other circumstances of record, support that presumption.

Inconsistencies in recitals, or indications of dates of execution, attestation, acknowledgment, or recordation, do not, in themselves, impair marketability. Absent a peculiar significance of one of the dates, a proper sequence of formalities will be presumed notwithstanding such inconsistencies.
4.2 Delivery Delay in Recordation

Delivery of instruments attested or acknowledged and recorded is presumed in all cases in which the instrument appears to be the result of an arm’s length transaction. Specifically, delay in recordation does not customarily dispel the presumption. However, a deed recorded after the death of the grantor which does not appear to reflect an arm’s length sale transaction is not entitled to the presumption and necessitates inquiry.

4.3 Georgia State Transfer Tax

Whether or not the Georgia state transfer tax was in fact paid on any deed filed or recorded on or after March 16, 1983 shall not impair marketability or constructive notice.

Any deed dated on or after January 1, 1968 and filed or recorded prior to March 16, 1983, which appears upon its face to have been conveyed for a monetary consideration in excess of $100.00, and which does not have any certificate of the Clerk of the Court affixed or stamped to the same might be ruled by the Courts to be a violation of O.C.G.A. Section 48-6-4, before its 1983 amendment, and that it affords no constructive notice. The deed must be inquired into and corrected.

Comment: In Higdon v. Gates, 238 Ga. 105, 231 S.E.2d 345 (1976), the Supreme Court, in reviewing this Code Section prior to its 1983 Amendment, held that a recorded deed on which the required tax had not been paid did not constitute constructive notice. Until and unless the Court holds that the 1983 Amendment retroactively affected deeds filed or recorded prior to March 16, 1983, care must be taken to determine that the requisite amount of tax has been paid on the transfer recorded during the period from January 1, 1968 to March 16, 1983.

As a practical matter the Clerk of the Superior Court is not required to accept for filing and recording purposes a conveyance deed if the deed is not accompanied with the Transfer Tax Declaration, signed by purchaser and seller, reflecting the consideration for the conveyance, along with payment of the transfer tax due based upon the Declaration. Certain grantors and grantees are exempt from the tax, but the Declaration form must still be submitted with the consideration or value shown, and the Clerk will stamp such deeds “No Tax due.” the Clerk’s certificate of tax paid or “No Tax Due” may be relied upon by subsequent purchasers or lenders as evidence that the proper tax has been paid. However, as this Standard provides, whether or not the transfer tax was in fact paid on any deed filed or recorded after March 16, 1983 shall not affect marketability or constructive notice.

If a quitclaim deed contains a recital regarding the release of property from the lien of a creditor’s such as, for example, a security deed, assignment of rents, U.C.C. financing statement, judgment or mechanics’ and materialmen’s lien or any claim of similar nature, no declaration form is required and no tax is due.

4.4 Internal Revenue Service Real Estate Reporting

The failure to report a real estate transaction subject to the federal Tax Reform Act
of 1986 to the Internal Revenue Service does not impair marketability of title to real estate.

Comment: See 26 U.S.C. Section 60445. Although failure to report a transaction subject to the Act on an IRS 1099 will subject the closing attorney to penalties, such failure does not impair marketability of title to the property.

4.5 Requirements for Recording a Deed in Georgia

AS OF JULY 1, 2015:

For a deed to be recorded, Georgia law requires that it be signed by the maker (grantor), attested by an officer as provided in O.C.G.A. 44-2-15, and attested by one other witness. O.C.G.A. Section 44-5-30. A deed is attested when an officer as provided in O.C.G.A. 44-2-15 and one or more natural persons see the maker sign the deed and they "attest" to the fact by signing the deed as officer and witness.

As of the July 1, 2015 revision to O.C.G.A. 44-5-30, an acknowledged deed will not be entitled to be recorded. "Acknowledging" a deed is not the same as "attesting" a deed. To be recorded, a deed must be "attested" by an officer as provided in O.C.G.A. 44-2-15, and attested by one other witness ". If there is only one (1) "attesting" witness, the deed is not entitled to be recorded, even if the deed is subsequently "acknowledged" and even if the one "attesting" witness is an authorized officer. O.C.G.A. Section 44-2-14.

The above requirements are the same for all deeds, regardless of their nature. Therefore, when attestation is not proper, it must be reported as a title defect.

PRIOR TO JULY 1, 2015:

For a deed to be recorded, Georgia law requires that it be signed by the maker (grantor) and attested by at least two (2) witnesses. O.C.G.A. Section 44-5-30. A deed is attested when two or more natural persons see the maker sign the deed and they "attest" to the fact by signing the deed as witnesses.

Also, the deed must be attested or acknowledged by an officer authorized by Georgia statutes. O.C.G.A. Section 44-2-14, 44-2-15. The official witness can be one of the two (2) required attesting witnesses. If the deed is not attested by an official witness, it may be acknowledged after execution and the acknowledgment certified on the deed by the official witness entitling the deed to be recorded. O.C.G.A. Section 44-2-16.

Acknowledgment involves the grantor's declaration before a notary public or other officer that, in fact, he is the maker named in the deed, that he signed the deed, and that the signature on the deed is in fact his signature; these facts provide the substance of the officer's certification of acknowledgment. White v. Margarahan, 87 Ga. 217, 13 S.E. 509 (1891) (overruled on other ground by Leeds Building Product, Inc. v. Sears Mortgage Corp. 267 Ga. 300, 477 S.E. 2d 565 (1996) which allows a deed that was properly attested or
An acknowledgment does not eliminate the requirement for at least two (2) attesting witnesses. "Acknowledging" a deed is not the same as "attesting" a deed. To be recorded, a deed must be "attested" by two (2) witnesses; if one of the "attesting" witnesses is an authorized officer, there is no need for an "acknowledgment". If there are two (2) unofficial "attesting" witnesses, the deed is still not entitled to be recorded until "acknowledged" by an authorized officer. If there is only one (1) "attesting" witness, the deed is not entitled to be recorded, even if the deed is subsequently "acknowledged" and even if the one "attesting" witness is an authorized officer. O.C.G.A. Section 44-2-14.

The above requirements are the same for all deeds, regardless of their nature. Therefore, when attestation or acknowledgment is not proper, it must be reported as a title defect.

4.6 Constructive Notice of Security Deeds

AS OF JULY 1, 2015:

To admit deeds to secure debts or mortgages to record, they must be attested by an officer as provided in Code Section 44-2-15 and attested by one other witness. O.C.G.A. Section 44-14-61 and O.C.G.A. Section 44-14-33. A deed to secure debt or mortgage is attested when an officer as provided in O.C.G.A. 44-2-15 and one or more natural persons see the maker sign the deed to secure debt or mortgage and they "attest" to the fact by signing the deed to secure debt or mortgage as officer and witness.

When a security deed is defectively attested, it may be corrected by a new corrective deed or a modification agreement. See Revised State Bar of Georgia Title Standards §14.4. O.C.G.A. Section 14-2-18 provides that if a mortgage or security deed is not properly attested, the security deed may be recorded upon the affidavit of a subscribing witness, and the officer must testify to the execution of the deed and its attestation according to law. Also, O.C.G.A. Section 44-2-19 outlines procedures for recording a deed by affidavit when the subscribing witness or witnesses are dead, insane or have moved outside the state or otherwise incapacitated to make an affidavit.

Comment: Assignments and Releases

O.C.G.A. §44-14-64 sets out that all transfers of deeds to secure debt..."shall be witnessed as required for deeds".

When a quit claim deed is executed to release property from a Security Deed it should be attested in the same manner required for deeds, see Chapter 4.5. When a cancellation is executed to cancel the security deed of record, OCGA 44-14-67 provides a form and requires
that any cancellation shall be substantially similar to the form provided, see Chapter 14.7. 
The form provides for a witness and notary, therefore good title practice requires that the
cancellation should be executed in the same manner as deeds.

PRIOR TO JULY 1, 2015:

To admit deeds to secure debts to record, they must be attested or proved in the same
manner prescribed by law for mortgages.  O.C.G.A. Section 44-14-61.  To admit a
mortgage to record, it must be attested by or acknowledged before an officer as prescribed
for the attestation or the acknowledgment of deeds of bargain and sale.  In the case of real
property, a mortgage must also be attested or acknowledged by one additional witness.
O.C.G.A. Section 44-14-33.

When a security deed is defectively attested or acknowledged, it may be corrected
by a new corrective deed or a modification agreement.  See Revised State Bar of Georgia
Title Standards §14.4.  O.C.G.A. Section 14-2-18 provides that if a mortgage, or security
deed, is neither attested by nor acknowledged before one of the officers set out in O.C.G.A.
Section 44-2-15, the security deed may be recorded upon the affidavit of a subscribing
witness, and the officer must testify to the execution of the deed and its attestation
according to law.  Also, O.C.G.A. Section 44-2-19 outlines procedures for recording a deed
by affidavit when the subscribing witness or witnesses are dead, insane or have moved
outside the state or otherwise incapacitated to make an affidavit.

4.7  Actual and Constructive Notice

AS OF JULY 1, 2015

A deed that is not properly attested is ineligible for recording, and may be rejected
by the clerk of the court, or, even if recorded, will not serve as constructive notice.  Coniff
v. Hunnicutt, 157 Ga. 823, 122 S.E. 694 (1924).  However, that actual notice from record, if
seen in the record by the purchaser or his attorney, will be effective even if the deed is
539 (1876).  This conforms with Georgia's race/notice standard which provides that a
purchaser who has actual notice of a prior instrument does not have priority over a
subsequent purchaser even if that prior instrument is unrecorded or defectively recorded.
O.C.G.A. Section 44-2-3.
PRIOR TO JULY 1, 2015

A deed that is not properly attested or acknowledged is ineligible for recording, and
may be rejected by the clerk of the court, or, even if recorded, will not serve as constructive
notice.  Coniff v. Hunnicutt, 157 Ga. 823, 122 S.E. 694 (1924).  However, that actual notice
from record, if seen in the record by the purchaser or his attorney, will be effective even if
the deed is ineligible for recording, and thus will trigger inquiry notice.  Gardner v.
Granniss, 57 Ga. 539 (1876).  This conforms with Georgia's race/notice standard which
provides that a purchaser who has actual notice of a prior instrument does not have
priority over a subsequent purchaser even if that prior instrument is unrecorded or
defectively recorded. O.C.G.A. Section 44-2-3.

Comment: Effect of Gordon Cases:

Taken together, U.S. Bank National Association v. Gordon, 709 S.E. 2d 258 Ga (2011) and Wells Fargo Bank v. Gordon, 292 Ga. 474 (2013) establish that for a security deed to be "duly filed, recorded and indexed," in satisfaction of O.C.G.A. Section 44-14-33 and the 1995 Amendment, the security deed must not be facially defective and thus cannot be missing any required signatures or attestations and acknowledgments. The Supreme Court in the Gordon cases explicitly voiced concern that the relaxation of execution formalities, for equitable reasons, would increase the risk of fraud and would undermine the efficacy and purpose of such requirements for the recording system. Note that under §544(a) of the Bankruptcy Code, the Trustee enjoys a heightened hypothetical bona fide purchaser status, regardless of actual notice, that has not yet been applied outside of the bankruptcy context by the Georgia Supreme Court.

CHAPTER 5
DESCRIPTIONS

5.1 When Defective Descriptions Do Not Impair Marketability

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

Comment: It is good practice to state the source of title as part of the legal description. A suggested form for this statement would be as follows; “being all of the property obtained by Grantor herein under Warranty Deed dated _________, recorded _________, in Book _____, Page _____, _____________ County, Records.” It is also good practice to record, where possible, all surveys which are used to describe the property. If this is not possible for whatever reason, including failure to comply with the survey statute, (see Standard 26.2, infra), it is highly desirable that the description refer to the plat as fully as possible, i.e., Lot 5, Block “A,” Blackacre Subdivision, Property of Tom Smith, Blank City, Any County, Georgia as prepared by John Doe on _____________ (date) which is unrecorded, so that further inquiry can be made.

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

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

CHAPTER 6
AFFIDAVITS AND RECITALS

6.1 Affidavits in General

(a) Utilization of affidavits is an acceptable practice and reasonable reliance may be placed thereon. Proper and recorded affidavits constitute notice of the facts recited therein and create a rebuttable presumption that such facts are true and correct. However, absent extraordinary circumstances, affidavits should not be utilized in lieu of normal conveyancing, probate or judicial procedures.

Comment: Certified copies of certificates of death, birth and marriage are preferable to affidavits to establish the facts of death, birth and marriage, respectively. However, such certified certificates may best be incorporated in an affidavit in order to facilitate introduction into the chain of title.

(b) Affidavits should reference the current property owner and a recorded instrument in the chain of title. Affidavits should address the entire issue which is the subject of said affidavit, state facts rather than conclusions, and not be worded so as to mislead or leave unanswered questions.

(c) Affidavits may be made by any person, even those connected with the chain of title, and should set forth information within the personal knowledge of the affiant.

Comment: The affidavit may set forth in the body of the document that affiant is acting in some capacity which is a source of authority or insight as to the facts set forth therein. However, the facts recited are to be those personally known to the affiant and not to a corporation, grantor of a power of attorney or other represented person or entity, and no corporate title or other representative designation should be indicated for the signatory.

(d) Affidavits should be given under oath before and attested by a notary public.
or other official authorized to take an oath.

6.2 Recitals

Factual recitals in conveyances are widely utilized but such recitals do not comply with the statutory requirements of an affidavit. Generally, such factual recitals should be for purposes of information and not in lieu of an affidavit. However, certain conclusive presumptions of law arise regarding recitals in conveyances as against the grantor and those claiming under said grantor, and regarding recitals in ancient deed and other instruments more than thirty years old. Recitals are most useful when supported by matters of public record other than the deed records.

6.3 Affidavits of Possession

Affidavits of the history of the possession of the property should set forth the period of time with which the affiant has been familiar with the property, the names of those current and prior owners of the property of which the affiant has knowledge, and the indicia of ownership upon which such knowledge is based. Affiant may be a party in interest or a disinterested party.

Comment: The underlying purpose of such affidavit being to establish adverse possession, affiant should normally be familiar with the history of the property for not less than seven years, although circumstances may dictate a still longer period. Although affiant may be a party in interest, preference should be given to one having no interest in the property.

6.4 Affidavits of Descent

Documentation of the family history of a deceased holder of record title and potential heirs thereof establishes that all parties have been or should be properly divested. Such affidavit should state the residence, date of death and testacy or intestacy of the deceased, identify all spouses, indicate death with or without issue, identify children and grandchildren, and disclose respective dates of death or addresses, and disabilities, as applicable. The affidavit should identify the number of marriages including date, place and evidence thereof, i.e., marriage record in court records or lack of knowledge, how marriages are terminated, i.e., death or divorce including style of case, decree date, case number, from which court obtained and any other relevant information; issue by birth or adoption and if adopted such information as can be obtained including birth certificates. The affidavit should indicate whether all debts including estate or inheritance taxes have been paid.

Comment: Affidavits of Descent will almost always need to be from someone in the family of the decedent and therefore very well could be a party in interest. This fact should not detract from the reliance placed upon the affidavit.
6.5 Scrivener’s Affidavits

Scrivener’s affidavits may be utilized by the preparer of a document, or other party in a valid position to know, to correct clerical errors when the original parties are unavailable. Such corrections should be unquestionably the original intention of the parties, minimal in extent, and supportable by extrinsic evidence if called into question and should be recorded.

CHAPTER 7
CO-TENANCIES

7.1 Conveyances by Co-tenants

Where title is in two or more persons, including spouses, in any form of co-tenancy, an otherwise effective conveyance by them without reference to the tenancy is sufficient. An erroneous reference to the type of tenancy, or an indication of a mistaken impression as to the type of tenancy is unobjectionable. After all co-tenants have effectively conveyed, all questions as to the type of tenancy which existed are moot, and any indication of a mistaken impression by the co-tenants or their grantor as to the type of tenancy which existed is unobjectionable.

7.2 Conveyances by Survivor of Joint Tenancy with Right of Survivorship, or Surviving Grantee in Survivorship Deed

The survivor of a joint tenancy with right of survivorship, or the surviving grantee in a survivorship deed, can convey good title to the property so owned without the necessity of probate or administration of the estate of the deceased co-tenant by:

(a) Proof in the case of a joint tenancy created subsequent to The Joint Tenancy Act of 1976 (Ga. Laws 1976, Page 1388; O.C.G.A. Section 44-6-190), that there has been no severance by lien or conveyance of record; and

(b) Proof, in recordable form, of the death of the deceased joint tenant or co-tenant, as the case may be, which includes, (i) probate or administration of the decedent’s estate, (ii) certified copy of Georgia death certificate, or (iii) affidavit of proof of death by a disinterested third party;

(c) The survivor in both of the above circumstances may cause the proof of death to be recorded at any time after the death, or at the time of a conveyance, at which time such proof may be more difficult to obtain by virtue of the passage of time.

Comment: Prior to The Joint Tenancy Act of 1976, there was no joint tenancy in Georgia by operation of law. Questions may still exist as to the possibility of a severance, but it is felt that the amendment of 1984 (Ga. Laws 1984, Page 1335) protects bona fide purchasers from a severance by any lifetime transfer which is unrecorded. A survivorship deed is not subject to such severance problems, and has been upheld by case law. (Epps v.

7.3 Recitals as to Percentage of Interest Being Conveyed

A recital that a conveyance is intended to convey all of the grantor’s interest in the real estate controls over an inconsistent specification of the percentage of undivided interest being conveyed.

CHAPTER 8
TRANSFERS AND AGENTS

8.1 Effect of Designation “Trustee,” “Agent,” “Nominee,” or “Custodian”

(1) Subject to the provisions of O.C.G.A. Sections 14-05-46 through -50, when the sole word “Trustee” follows the name of a party to an instrument, and no trust is declared and no beneficiary is named either in this instrument or in any other recorded instrument in the chain of title, the word “Trustee” is mere surplusage and the named person takes title for his own use free from any trust; and a title from such person can be approved without investigation of the capacity of such person to convey. However, when the words “as Trustee” follow the name of a party to an instrument, this Standard does not apply and investigation should be made as to any trust under which such person is acting. The trust instrument or order of Superior Court must authorize sale or conveyance of trust property.

Comment: If, however, a purchaser has notice that a trust exists, he is bound by its terms and cannot take a good title in violation of such terms. Andrews v. The Atlanta Real Estate Company, 92 Ga. 260, 18 S.E. 548 (1893); Brenner v. Wright, 185 Ga. 280, 194 S.E. 553 (1937); O.C.G.A. Section 53-12-257.

Even if there is in fact no trust, Code Sections 14-5-46 through -50 have the effect of creating a legal entity when a deed to named trustees of an unincorporated church or other unincorporated society, such as a labor union, has been recorded in the Clerk’s Office. See Crumbley v. Solomon, 243 Ga. 343, 254 S.E.2d 330 (1979), Smith v. International Ladies Garment Workers Union, 58 Ga. App. 26, 197 S.E. 349 (1938).

(2) When the sole word “Agent” follows the name of a party to an instrument and no agency is declared and no principal is named either in this instrument or in any other recorded instrument in the chain of title, the word “Agent” is mere surplusage and the named person takes title for his own use free from any agency; and a title from such person can be approved without investigation of the capacity of such person to convey. However, when the words “as Agent” follow the name of a party to an instrument, this Standard does not apply and investigation should be made as to any agency under which such person is acting.
Comment: If, however, a purchaser has notice that an agency exists, he is bound by its terms and cannot take a good title in violation of its terms.

(3) When the sole word “Nominee” follows the name of a party to an instrument, the word Nominee” is mere surplusage and a title from such person can be approved without investigation of the capacity of such person to convey. However, when the words, “as Nominee” follow the name of a party to an instrument, this Standard does not apply and investigation should be made as to any agency under which such person is acting.

Comment: If, however, a purchaser has notice that an agency exists, he is bound by its terms and cannot take a good title in violation of such terms.

(4) When the sole word “Custodian” follows the name of a party to an instrument, the word “Custodian” is mere surplusage and a title from such person can be approved without investigation of the capacity of such person to convey. However, when the words “as Custodian” follow the name of a party to an instrument, this Standard does not apply and investigation should be made as to any custodianship under which such person is acting.

Comment: See The Georgia Transfers to Minors Act, O.C.G.A. Section 44-5-110, et seq. If, however, a purchaser has notice that a trust or agency exists, he/she is bound by its terms and cannot take a good title in violation of such terms.

8.2 Termination of Trust

A deed from the trustee to the beneficiary of a trust under a recorded instrument at the time such trust terminates by its terms on a fixed date or upon the happening of a named event is unnecessary. Verification, however, must be made of the happening of the named event. It is, however, recommended that attorneys make every effort to place such instrument on record in the future as will aid title examiners in ascertaining the facts.

8.3 Deeds Executed in Representative Capacity

Generally, the word “as” indicates and shows that the instrument is executed in a representative capacity. If “as” is omitted after the signature of grantor, the error is cured if the heading of the conveyance or recitals within the conveyance clearly show that the deed is being executed in a representative capacity rather than an individual capacity.

8.4 Formality Necessary to Create or Exercise an Agency

Unless a contrary intent is expressly stated in the document creating the agency, when an agency is created by written instrument it is conclusively deemed to authorize execution by the agent of instruments with the formalities necessary or appropriate to accomplish the purposes for which the agency was granted, regardless of the formality with which the document creating the agency was executed. When an agency is exercised by
written instrument, it must also be created by written instrument. Thus, an investigation should be made to determine the existence of a written grant of agency and that the exercise of the agency is reasonably within the purposes for which the agency was granted. If a document is executed under seal by an agent and the grant of agency is not under seal, the document executed by the agent is also deemed not under seal.

Comment: The source of this Standard is Georgia Laws 1993, Page 457; (O.C.G.A. Section 10-6-2). This statute, which repealed the so-called “Equal Dignity Rule,” became effective July 1, 1993. Under prior law, documents executed by agents having greater formality than that of the document creating the agency were void. See, e.g., Thomason v. Wilson, 127 Ga. 141, 56 S.E. 302 (1906); Byrd v. Piha, 165 Ga. 397, 131 S.E. 48 (1927). Prior law was modified effective July 1, 1991 to provide that documents executed by an agent under seal were not invalid merely because the agency grant was not under seal (Ga. Laws 1991, Page 410).

8.5 Power of Attorney

If the execution of any document in the chain of title is made by an attorney-in-fact, it is better practice that the title examiner be able to verify that: the power of attorney is dated, properly executed, witnessed and recorded; it empowers the attorney-in-fact to execute the document; it refers to the real property as specifically as possible; and at the time the attorney-in-fact executed the document, the power of attorney had not been terminated of record by the principal, nor was there any evidence of record that the principal was deceased or mentally incompetent at that time (if the power of attorney provides that it terminates in the event of mental incompetency). As of July 1, 1999, a power of attorney is not terminated and remains durable if the principal becomes mentally incompetent, unless the power of attorney provides to the contrary. The original power of attorney should be recorded, or a copy of said power of attorney should be recorded, as an exhibit to any conveyance document signed under power. If the examiner is dissatisfied with any facts surrounding the power of attorney, then the examiner should raise his/her objections to the client to permit the closing attorney to resolve the matter. If a specific power of attorney form is used, it does not have to follow the form or execution requirements under the GA UPOAA (See O.C.G.A. § 10-6B-3(5)).

Comment: Georgia Power of Attorney Act (GA POAA)

The Uniform Power of Attorney Act was adopted in 2017 and amended on July 1, 2018 renaming the Act to the Georgia Power of Attorney Act and providing further revisions. Among other things, the act provides for a statutory power of attorney form. The initial act appeared to exempt real estate related transactions but was unclear, so OCGA 10-6B-3(5) was revised to exempt “Powers of attorney that only grant authority with respect to a single transaction or series of related transactions involving real estate.” If title insurance is being sought by parties to the transaction, verify whether the title company will require a specific power of attorney or accept the statutory form.

Comment: See the Comment above to Standard 8.4.
Comment: Attestation

In order for a power of attorney to be entitled to be recorded, it should be attested in the same manner as deeds. See Dodge v. American Freehold Land Mortg. Co. of London, 109 Ga. 394, 34 S.E. 672 (1899). As of July 1, 2015, to be entitled to be recorded, the power should be attested by an officer as provided in O.C.G.A. 44-2-15, and attested by one other witness. O.C.G.A. Section 44-5-30. See Section 4.5, infra.

CHAPTER 9
INSTRUMENTS EXECUTED BY CORPORATIONS

9.1 Name Omitted from Signature

The signature to a corporate instrument is sufficient notwithstanding the omission of the corporate name over the signatures of the signers, if the corporation appears as the party to the instrument and the instrument is otherwise properly executed.

Comment: This Standard is based upon prior Standard 9.2 as now amended by Georgia Laws 1992, Page 1180 [O.C.G.A. Section 14-5-7(a)], effective July 1, 1992.

9.2 Authority of Officer to Execute Instruments

When a corporate instrument is either (i) executed by a corporate officer, that person’s signature is attested by the secretary or assistant secretary (or other officer authorized to authenticate corporate records), and the corporate seal or a facsimile thereof is affixed, or (ii) executed by the president or vice president and that person’s signature is attested by the secretary or assistant secretary (or other officer authorized to authenticate corporate records), a title examiner may assume that the officer executing the document in fact holds the position indicated, that such person is authorized to execute the document, and that the officer’s signature is genuine.

Comment: Source — O.C.G.A. Section 14-2-151. See also O.C.G.A. Section 14-5-7, Clause (ii) above became effective July 1, 1992.

The Examiner should bear in mind that the evidentiary presumption afforded by O.C.G.A. Sections 14-2-151 and 14-5-7 do not establish recording requirements. Recording is governed by O.C.G.A. Section 44-2-14, which requires, with respect to execution, a signature, attested by an officer as provided in O.C.G.A. 44-2-15, and attested by one other witness. Neither the presence of a corporate seal, nor the signature of an officer specified in O.C.G.A. Section 14-5-7, is required for recording.

9.3 Evidence of Corporate Authority

There exists a conclusive presumption of corporate authority to execute an instrument conveying an interest in real property when the documents executed by the
president or vice president and attested by the secretary or an assistant secretary or the cashier or assistant cashier of the corporation. For other corporate instruments, the title examiner may assume that corporate authority exists if the document is either executed by a corporate officer, that person’s signature is attested by the secretary or assistant secretary (or other officer authorized to authenticate corporate records), and the corporate seal or a facsimile thereof is affixed, or executed by the president or vice president and that person’s signature is attested by the secretary or assistant secretary (or other officer authorized to authenticate corporate records).

Comment: The first sentence is based upon O.C.G.A. Section 14-5-7 and the second sentence is based upon O.C.G.A. Section 14-2-151. Both of these Sections were effective July 1, 1992. Under prior law, a document executed by the president or vice president and attested by a secretary or assistant secretary required the presence of a corporate seal to create the presumption of authority. Note that O.C.G.A. Section 14-5-7 provides that a corporation may by proper resolution authorize the execution of instruments of conveyance by other officers of the corporation.

9.4 Corporate Existence

Where an instrument of a private corporation appears in the chain of title and has been of record for a period of at least seven years, and the instrument is executed in proper form, the examiner may assume that the corporation was legally in existence at the time the instrument took effect, and that the officers who executed such document were authorized to do so.

Comment: This is the same as former Standard 9.4. It appears that the seven-year measurement is based upon the period used in the Statute of Limitations for adverse possession under color of title or for an action for fraud or forgery in procuring title to land, although the Statute does not commence until the fraud is or should have been discovered. Jones v. Spindel, 239 Ga. 68, 235 S.E.2d 486 (1977).

9.5 Foreign Corporations

When an instrument of a corporation organized in and doing business in another state appears in the chain of title, an examiner need not inquire whether such corporation was authorized to do business in this State.

Comment: The failure of a foreign corporation to obtain a certificate of authority does not impair the validity of its corporate acts. O.C.G.A. Section 14-2-1502(d).

9.6 Transfer or Satisfaction of a Security Deed by a Corporate Grantee

(a) A transfer of a security deed from a corporate grantee does not impair marketability if executed, without a corporate seal, by one corporate officer or by a person so authorized by corporate resolution and witnessed in the same manner as required for
Comment: This is based upon O.C.G.A. Section 14-5-7(b) which requires less formality for the execution of corporate transfers than does O.C.G.A. Section 14-5—7(a) for other corporate instruments. See Standards 9.2 and 9.3, supra.

(b) A satisfaction of a security deed by a corporate grantee does not impair marketability if executed, without a corporate seal, by one corporate officer or by a person so authorized by a corporate resolution in any of the three ways approved by Standard 14.7, infra. All approved methods for satisfaction, other than that of an entry on the face of the original security deed itself, must be witnessed in the same manner as required for recording a deed.

Comment: This is based upon O.C.G.A. Section 14-5-7(b).

9.7 Other Useful Provisions of the Georgia Business Corporation Code

In appropriate circumstances, the examiner should also take into consideration the following provisions of the Georgia Business Corporation Code:

(a) If the valid filing of an instrument with the Secretary of State is relevant to the examination, the examiner should take into consideration O.C.G.A. Section 14-2-127, which provides that a certified copy of a document filed with the Secretary of State is “prima-facie evidence that the original document has been filed with the Secretary of State.”

(b) If in an examination a question arises as to the authority of the directors of a corporation, the examiner should take into consideration, in addition to the presumptions provided by other Standards, O.C.G.A. Section 14-2-801, which provides that “no limitation upon the authority of the directors, whether contained in the articles of incorporation, bylaws, or an agreement among the shareholders, shall be effective against persons, other than shareholders and directors, who are without actual knowledge of the limitation.”

(c) If the authority of the chief executive officer of a corporation (or the president of the corporation if no person has been designated as chief executive officer) is relevant to the examination, the examiner should take into consideration, in addition to the other Standards, O.C.G.A. Section 14-2-841, which provides that such person “shall have authority to conduct all ordinary business on behalf of such corporation and may execute and deliver on behalf of a corporation any contract, conveyance, or similar document not requiring approval by the board of directors or shareholders as provided in this chapter.”

Comment: This provision became effective on July 1, 1993, and changed existing Georgia case law holding that a president of a Georgia corporation had no such authority.

(d) If the effect on title of a merger of a corporation appearing in the title is relevant to the examination, the examiner should take into consideration O.C.G.A. Section
14-2-1106(a)(2), which provides that “when a merger takes effect: . . . (2) the title to all real estate and other property owned by each corporation party to the merger is vested in the surviving corporation without reversion or impairment.”

(e) If the validity of acts taken by a corporation that was dissolved by expiration of its period of duration or that was administratively dissolved, but that in either case subsequently was reinstated, is relevant to the examination, the examiner should take into consideration the effect of O.C.G.A. Sections 14-2-1409 and -1422, which provide, in general terms, that the reinstatement of such a corporation relates back to the date of dissolution or expiration and that the corporate existence continued without interruption.

(f) If the execution of deeds or other transfer instrument after the dissolution of a corporation is relevant to the examination or is a matter that the examiner must pass upon in connection with the execution of an instrument, the examiner should take into consideration O.C.G.A. Section 14-2-1408(c), which provides that “deeds or other transfer instruments requiring execution after the dissolution of a corporation may be signed by any two of the last officers or directors of the corporation” (without need of a corporate seal) “and shall operate to convey the interest of the corporation in the real estate or other property described.”

9.8 Alien Corporations

When an instrument of an alien corporation as defined in O.C.G.A. Section 16-14-3(1) appears in the chain of title, the examiner must require that proper certification be furnished that the corporation has complied fully with the requirements of O.C.G.A. Section 16-14-15(h) of the Georgia RICO Act which provides:

“Each alien corporation that fails to file [with the Secretary of State] a report as required by subsection (c) of this Code section or fails to maintain a registered office and a registered agent as required by subsection (a) of this Code section shall not be entitled to own, purchase, or sell any real property and shall not be entitled to bring an action or defend in the courts of the state until such requirements have been complied with.”

Comment: An “‘alien corporation’ means a corporation organized under laws other than the laws of the United States or the laws of any state of the United States.” (O.C.G.A. Section 16-14-3(1)).

CHAPTER 10
CONVEYANCES INVOLVING LIMITED PARTNERSHIPS

10.1 Governing Law

Georgia has three limited partnership statutes in effect. O.C.G.A. Sections 14-9A-110 through -130 govern limited partnerships formed prior to February 15, 1952, that have not elected to be governed by one of the other statutes, O.C.G.A. Section 14-9A-1 through -99 govern limited partnerships formed after February 15, 1952, and before July 1, 1988,
that have not elected to be governed by the Georgia Revised Uniform Limited Partnership Act (“GRULPA”). GRULPA (O.C.G.A. Sections 14-9-100 through -1204) governs limited partnerships formed on or after July 1, 1988, and those formed earlier that have elected to be governed by GRULPA. To the extent the law governing a limited partnership with an instrument in the title affect matters of title, the examiner should first determine which law governs the limited partnership.

10.2 Authority

The statute governing limited partnerships formed prior to February 15, 1952, does not address in detail the authority of partners to act for the partnership. O.C.G.A. Section 14-9A-123(a) provides that “only the general partners shall be authorized to transact business, sign for the partnership, and bind the partnership.” It may generally be expected that, in cases not expressly provided for in a limited partnership statute, the provisions of the general partnership statute (O.C.G.A. Sections 14-8-1 through -43) would govern. Accordingly, the examiner should consider the agency powers of general partners discussed in Chapter 11 of these Standards.

(b) The statute governing limited partnerships formed between February 15, 1952, and July 1, 1988, expressly provides (O.C.G.A. Section 14-9A-70) that each general partner of such a limited partnership has all of the rights and powers, and is subject to all of the restrictions and liabilities, of a partner in a general partnership, although these provisions may be altered by the terms of the limited partnership agreement. Accordingly, the examiner should consider the agency powers of general partners discussed in Chapter 11 of these Standards. The examiner should take note, however, that O.C.G.A. Section 14-9A-70 requires the written consent or ratification of all of the limited partners in order for any general partner or all of the general partners to have authority to “do any act which would make it impossible to carry on the ordinary business of the partnership.” If the examiner is unable to establish to the examiner’s satisfaction, through affidavit or otherwise, that the conveyancing of the real property at issue would not have such effect, the examiner may reasonably require evidence that all of the limited partners have so consented.

(c) GRULPA also refers to the general partnership statute to supplement the powers of general partners expressly stated in GRULPA (O.C.G.A. Section 14-9-403(a)). Accordingly, the examiner should consider the agency powers of general partners discussed in Chapter 11 of these Standards.

10.3 Conveyancing by Limited Partnerships

(a) The statute governing limited partnerships formed prior to February 15, 1952, does not address directly the manner in which such limited partnerships may hold or convey title to real estate. Accordingly, the examiner should consider the agency powers of general partners discussed in Chapter 11 of these Standards as well as former Standard 10.1, which was to the effect that real property acquired by a general partnership and held in
the general partnership name should be conveyed in such name by an instrument executed by all general partners or joint venturers unless otherwise provided by recorded instruments executed by all partners or joint venturers.

(b) The statute governing limited partnerships formed between February 15, 1952, and July 1, 1988, provides that “a limited partnership may acquire property of any nature and take title thereto in the name of the partnership.” (O.C.G.A. Section 14-9A-21).

(c) GRULPA (O.C.G.A. Section 14-9-106) provides in relevant part as follows:

“Any estate in real property may be acquired in the name of a domestic limited partnership or of a foreign limited partnership (whether or not such foreign limited partnership has procured, or is required under the provisions of Code Section 140-9-902 to procure, a certificate of authority to transact business in this state), and title to any estate so acquired shall vest in the domestic or foreign limited partnership itself rather than the partners individually . . . .

“Instruments executed by a domestic or foreign limited partnership conveying an interest in real property located in this state, when signed on behalf of such limited partnership by a person purporting to be a general partner of such limited partnership, shall be presumed to have been duly authorized by and binding upon such limited partnership unless contrary limitations on the authority of the general partner are set forth in the certificate of limited partnership and a copy of the certificate of limited partnership certified by the Secretary of State is filed in the office of the clerk of the superior court of the county where the real property is located and recorded in the book kept by such clerk for statements of partnership pursuant to Code Section 14-8-10.1.”

Accordingly, subject to the other provisions of these Standards, the signature of only one general partner of a GRULPA-governed partnership is required on a conveyancing instrument.

(d) If a limited partnership governed by GRULPA improperly executed an instrument in the chain of title and the partnership has terminated and a certificate of cancellation has been filed with the Secretary of State, the examiner should consider O.C.G.A. Section 14-9-805, which provides that “deeds or other transfer instruments requiring execution after the filing of a certificate of cancellation by a dissolved limited partnership may be signed by any person who had authority to wind up the dissolved partnership under the provisions of subsection (a) of Code Section 14-9-803.”

10.4 Foreign Limited Partnerships and Foreign General Partners

Foreign limited partnerships transacting business in this state on or after July 1, 1988, are governed by the foreign limited partnership provisions of GRULPA. O.C.G.A. Section 14-9-907 provides that “the failure of a foreign limited partnership to obtain a
certificate of authority does not impair the validity of any contract or act of the foreign limited partnership.” Accordingly, there should be no need for the examiner to establish whether a foreign limited partnership was qualified to do business in this state at the time it acquired or conveyed real property. If a general partner of a limited partnership with an instrument in the title is a foreign corporation, the examiner should take note of O.C.G.A. Section 14-2-1501(b)(13), which provides that “Owning (directly or indirectly) an interest in or controlling (directly or indirectly) another entity organized under the laws of, or transacting business within, this state” is an activity that does not constitute transacting business for purposes of requiring the foreign corporation to qualify to do business in this state.

10.5 Mergers

If the effect on title of a merger of a GRULPA-governed limited partnership appearing in the title is relevant to the examination, the examiner should consider O.C.G.A. Section 14-9-206.1(f), which provides in part as follows: “When the certificate of merger required by subsection (b) of this Code Section is effective, then for all purposes of the law of this state: (1) the surviving entity shall thereupon and thereafter possess all of the rights, privileges, immunities, franchises and powers of each of the merging domestic partnerships, and all property, real, person and mixed . . . shall be taken and deemed to be transferred to and vested in the surviving entity without further act or deed; and the title to any real estate, or any interest therein, vested in any of the merged domestic limited partnerships shall not revert or be in any way impaired by reason of such merger.”

10.6 Limited Liability Limited Partnership

In regard to a conveyance by or into a limited liability limited partnership, the examiner should consider O.C.G.A. Section 14-8-2(6.1) which provides that a limited liability limited partnership is a limited partnership that has elected to be a limited liability partnership. The examiner should further consider O.C.G.A. Section 14-8-63(b) which provides that the name of a limited partnership that is a limited liability limited partnership shall contain the words “limited liability limited partnership” or appropriate abbreviation such as “Ltd.” for “limited” or the abbreviation “L.L.L.P” or the designation “LLLP” as the last words or letters of its name.

CHAPTER 11
CONVEYANCES INVOLVING GENERAL PARTNERSHIPS

11.1 General; Authority; Execution

The Uniform Partnership Act (“UPA”) as adopted in this state went into effect on April 1, 1985. UPA Section 10 (O.C.G.A. Section 14-8-10) contains specific rules regarding the manner in which real property of a general partnership may be conveyed, depending in part on whether it is titled in the name of the partnership or in the names of the partners. UPA Section 9 (O.C.G.A. Section 14-8-9) deals with the authority of general partners to act on behalf of the partnership and, in general, establishes that each partner is an agent of the
partnership and that the act of every partner, including the execution in the partnership name of any instrument for apparently carrying on in the usual way the business of the partnership, binds the partnership. The examiner should note, however, that less than all of the partners do not have authority to “do any other act which would make it impossible to carry on the ordinary business of a partnership.” (O.C.G.A. Section 14-8-9(3)(C)). Accordingly, if the examiner is unable to establish to the examiner’s satisfaction, by affidavit or otherwise, that the conveyance of the real property at issue would not have such effect, the examiner may reasonably require execution by all of the partners. The examiner also should be aware that UPA Section 4 (O.C.G.A. Section 14-8-4) provides that “the validity of an instrument executed on behalf of the partnership by a partner shall not be affected by the formality with which the partnership contract was executed.” A limited liability partnership (“LLP”) is a general partnership that has registered either with the Secretary of State or county superior court clerk. In 1994, Georgia allowed foreign LLP’s to register to transact business in Georgia, and in 1995 allowed domestic LLP’s to form. Foreign LLP’s must register with the Secretary of State (O.C.G.A. Section 14-8-45). Domestic LLP’s must record with the clerk of superior court of any county in which it has an office a limited liability partnership election (O.C.G.A. Section 14-8-62). (This section was revised effective August 18, 2005 to add the last four sentences relating to limited liability partnerships.)

11.2 Statements of Partnership

UPA Section 10.1 (O.C.G.A. Section 14-8-10.1) authorizes the filing by a general partnership of a “statement of partnership” in the office of the clerk of the superior court of any county. Among other things such a statement may disclose limitations on the authority of one or more partners to act on behalf of the partnership. The existence of facts disclosed in a statement of partnership are conclusively presumed in favor of the partnership and against the grantee from the partnership, or a person claiming through such grantee, of partnership real property located in a county within which a statement of partnership or a certified copy thereof has been recorded. Accordingly, the examiner should determine whether a statement of partnership has been recorded by any partnership with an instrument in the title in the county in which the real property is located. If a statement of partnership has been so recorded, the examiner should consider the effect of the facts stated therein. Facts stated in a statement of partnership are conclusively presumed against the partnership if the statement has been recorded in any county. Accordingly, the examiner may wish to establish, by affidavit or otherwise, whether a partnership with an instrument in the title has filed a statement of partnership in a county other than the county in which the real property is located. Similarly, the examiner may wish to establish, by affidavit or otherwise, whether an affidavit of the kind authorized by O.C.G.A. Section 14-8-10.1(f) (which in some circumstances can negate the conclusive presumptions against a partnership established by a statement of partnership) has been recorded.

11.3 Vesting of Property of Dissolved Partnerships

If a partnership with an instrument in the title is dissolved, the examiner should
consider the provisions of O.C.G.A. Section 14-8-38.1 and -38.2, which provide, respectively, as follows:

“When a partnership is dissolved for any reason, either pursuant to the provisions of this chapter or the partnership agreement or otherwise, and the business is continued as a partnership, the title to any real property or other property vested in such dissolved partnership shall, by operation of law, be vested in the partnership continuing the business without reversion or impairment and without further act or deed or other instrument of transfer or conveyance.”

“In every instance prior to July 1, 1989, where a partnership has been dissolved for any reason, either pursuant to the provisions of this chapter or the partnership agreement or otherwise and the business is continued as a partnership, but no deed or other instrument of transfer or conveyance for any real property or other property to the partnership continuing the business has been duly executed and properly recorded, title to such real property or other property, shall, by operation of law, be vested in such partnership continuing the business without reversion or impairment and in as valid and effectual a manner in every case as if a deed or other instrument of transfer or conveyance from such dissolved partnership to such partnership continuing the business had been duly executed and properly recorded.”

11.4 Conveyances of Real Property Prior to UPA Held in Partnership Name

Prior to UPA, real property acquired by a partnership and held in the name of the partnership generally could be conveyed, in such name, only by an instrument executed by all general partners unless otherwise provided by recorded instrument executed by all partners.


11.5 Conveyances of Real Property Subsequent to UPA Held in Name of Partnership Formed Prior to UPA

Subsequent to UPA (April 1, 1985) a conveyance of real property acquired prior to UPA and held in the name of a partnership formed prior to UPA can be conveyed in such name only by an instrument executed by all general partners unless otherwise provided by recorded instrument executed by all partners.
CHAPTER 12
CONVEYANCES INVOLVING LIMITED LIABILITY COMPANIES

12.1 General Authority

Limited liability companies may be created under the laws of this state from and after March 1, 1994. With respect to third parties, the articles of organization, which are filed with the Secretary of State, establish whether the limited liability company is managed by its members or managed by managers. If the articles of organization do not state that the limited liability company is managed by managers, then it is managed by its members. The examiner should consider the agency powers of members and managers as set forth in O.C.G.A. Section 14-11-301. In general, in a member-managed limited liability company, every member is an agent of the limited liability company, and the act of any member, including, but not limited to, the execution in the name of the limited liability company of any instrument for apparently carrying on in the usual way the business and affairs of the limited liability company, binds the limited liability company. If a limited liability company is manager-managed, no member has such agency powers and every manager has such agency powers.

12.2 Recorded Copies of Articles of Organization

O.C.G.A. Section 14-11-302 authorizes the filing of a copy of the article of organization certified by the Secretary of State in the office of the superior court of a county where real property owned by the limited liability company is located. Any limitations on the authority of any or all members or managers that are set forth in articles of organization so filed shall be conclusively presumed in favor of the limited liability company and against a grantee of the limited liability company, or a person claiming through such grantee, with respect to real property of the limited liability company located in that county. Accordingly, the examiner should determine whether a limited liability company with an instrument in the title has recorded a copy of its articles of organization in the county in which the real property is located. If a copy of the limited liability company’s articles of organization has been so recorded, the examiner should consider the effect of any limitations on authority stated therein.

12.3 Mergers

If the effect on title of a merger of a limited liability company appearing in the title is relevant to the examination, and if the limited liability company was the surviving entity in such merger, the examiner should consider O.C.G.A. Section 14-11-905(a) which provides that “if the surviving entity is a limited liability company, when a merger takes effect . . . (3) the title to all real estate and other property owned by each constituent business entity is vested in the surviving limited liability company without reversion or impairment.”
12.4 Terminated Limited Liability Companies

If a limited liability company with an instrument in the title has terminated and a certificate of termination has been filed with the Secretary of State, the examiner should consider O.C.G.A. Section 14-11-611, which provides that “deeds and other instruments requiring execution after the filing of a certificate of termination by a dissolved limited liability company may be signed by any person who had authority to wind up the dissolved limited liability company under the provisions of subsection (a) of Code Section 14-11-604.”

12.5 Foreign Limited Liability Companies

O.C.G.A. Section 14-11-711(b) provides that “the failure of a foreign limited liability company to procure a certificate of authority does not impair the validity of any contract or act of the foreign limited liability company.” Accordingly, there should be no need for the examiner to establish whether a foreign limited liability company was qualified to do business in this state at the time it acquired or conveyed real property.

CHAPTER 13
TITLE THROUGH DECEDEANTS’ ESTATES

13.1 Judgments Against Heirs or Devisees

Judgments against the heirs or devisees of an estate do not constitute a lien on land sold by the personal representative (executor or administrator) of such estate, and the examiner need not conduct a search therefor in any of the following circumstances:

1. The sale is made by an executor pursuant to express authority in the will and the sale is made to parties other than the heirs or devisees; or

2. The sale is made by an executor with the unanimous consent of the beneficiaries under the will as evidenced by a court order; or

3. The sale is made by an executor or administrator which has been given the power of sale (and usually other powers) by court order with the unanimous consent of the beneficiaries or heirs.

Comment: The personal representative (executor or administrator) of an estate may be given the power of sale and other powers with the unanimous consent of the beneficiaries or heirs by court order pursuant to O.C.G.A. Section 53-7-1(b). The court order may simply indicate that the powers itemized in O.C.G.A. Section 53-12-232 have been granted to the personal representative.

13.2 Surviving Widow, Widower or Minor Children

Where facts show that a decedent has left a surviving widow, widower or minor children, inquiry and examination should be made concerning the rights of said widow,
widower or minor children to year’s support and in case of intestacies, inquiry should be made concerning the right of the widow or widower for a child’s part in said estate.

Comment: Pursuant to O.C.G.A. Section 53-3-1(b)(1), any person who becomes widowed is entitled to a year’s support from the estate of the deceased spouse. The surviving spouse, whether husband or wife, is entitled to obtain this support. Hunnicutt v. Hunnicutt, 180 Ga. App. 798, 350 S.E.2d 770 (1986).

O.C.G.A. Section 53-2-1 states the intestate succession rules for children when a parent dies leaving a surviving spouse. These rules would govern the entitlement of a widow or widower to a child’s share.

13.3 No Will, No Administration, Death Within Twelve Months

Where a decedent leaves no will and there has been no administration on his estate and death has occurred within twelve months, a marketable title may be conveyed by: (1) proof showing the death intestate, identifying the decedent’s heirs at law and showing them to be of age and of sound mind (such proof should be in the form of affidavits recordable under O.C.G.A. Section 44-2-20), (2) a conveyance from the above heirs at law as identified by the proof, provided that they are of age and of sound mind, (3) the entry of an order from the Probate Court dispensing with the administration upon the estate of the decedent, and (4) proof that federal estate taxes cannot result in a lien against the property.

Comment: Prior to 1998, title to real property in an intestate estate vested in the heirs immediately upon the decedent’s death “subject to be administered by the legal representative, if any....” Former O.C.G.A. Section 53-4-8. The Revised Probate Code of 1998 caused title to the real property of an intestate decedent to be treated the same as a decedent who died with a will and to vest in the administrator, who would then assent to the transfer to the heirs. O.C.G.A. Section 53-2-7 (effective January 1, 1998). In 2000, this section was again amended in an effort to reinstate the prior law but added some confusion by providing that title to the intestate decedent’s real property vests immediately in the heirs of the decedent, “subject to divestment by the appointment of an administrator of the estate.” There is no time limitation in which an administrator must be appointed under this statute.

Comment: Issues may arise when it is assumed that the decedent died intestate but a will is later offered for probate. O.C.G.A. Section 53-5-3 provides a five year period beyond which a will may not be probated. However, the five year period does not begin to run until the filing of a petition for one of the following:

1) the appointment of a personal representative (administrator) for the estate; or

2) an order for year’s support; or

3) an order that no administration is necessary.

For decedents who died prior to January 1, 1998, a will can be offered for probate until the later of such five year period or December 31, 2002.
13.4 No Will, No Administration, Death From One to Three Years Past

Where a decedent leaves no will and there has been no administration on his estate and death has occurred from one to three years past, a marketable title may be conveyed by: (1) proof showing the death intestate, identifying the decedent’s heirs at law and showing them to be of age and of sound mind (such proof should be in the form of affidavits recordable under O.C.G.A. Section 44-2-20), (2) a conveyance from the above heirs at law as identified by the proof, provided that they are of age and of sound mind, (3) either the entry of an order from the Probate Court dispensing with the administration upon the estate of the decedent or an indemnify agreement, escrow deposit or surety bond indemnifying the grantee and his successors in title against any debts of the estate of the decedent, and (4) proof that federal estate taxes cannot result in a lien against the property.

13.5 No Will, No Administration, Death More Than Three Years Past

Where a decedent leaves no will and there has been no administration on his estate and death has occurred more than three years past, a marketable title may be conveyed by: (1) proof showing the death intestate, identifying decedent’s heirs at law and showing them to be of age and of sound mind (such proof should be in the form of affidavits recordable under O.C.G.A. Section 44-2-20), (2) a conveyance from the above heirs at law as identified by the proof, provided that they are of age and of sound mind, (3) proof being furnished that all debts of the estate of the decedent have been fully paid, and (4) proof that federal estate taxes cannot result in a lien against the property.

13.6 No Will, Administration Pending on Estate — Public Sale by Administrator

Where decedent leaves no will and where there is an administration pending on his estate, a marketable title may be conveyed in either of the following manners:

(A) Sale pursuant to specific court order which requires (1) a court order which sets forth the specific terms and conditions of the sale, (2) a deed from the personal representative (administrator) pursuant to such court order, (3) a determination that no application for year’s support has been made, and (4) proof that federal estate taxes cannot result in a lien against the property; or

(B) Sale pursuant to power of sale which requires (1) a court order giving the personal representative the power of sale (and usually other powers), (2) a deed from the personal representative, (3) a determination that no application for year’s support has been made, and (4) proof that federal estate taxes cannot result in a lien against the property.

Comment: A surviving spouse or minor child cannot attach a lien for a year’s support to property that is conveyed by the executor or administrator in an authorized sale. O.C.G.A. Section 53-3-13. See Comment under 13.1 above regarding the grant of powers to personal representatives by court order with the unanimous consent of the heirs.
13.7 No Will, Administration Pending on Estate-Sale by Heirs at Law with Disclaimer by Administrator

Where a decedent leaves no will and there is an administration pending on his estate, a marketable title may be conveyed by: (1) proof showing the death intestate, identifying the decedent’s heirs at law and showing them to be of age and of sound mind (such proof should be in the form of affidavits recordable under O.C.G.A. Section 44-2-20), (2) a conveyance from the above heirs at law as identified by the proof, provided that they are of age and of sound mind, (3) a conveyance from the Administrator to disclaim any administrative rights therein, (4) the furnishing of an indemnity agreement, escrow deposit or surety bond indemnifying the grantee and his successors in title against any debts of the estate of the decedent, and (5) proof that federal estate taxes cannot result in a lien against the property.

13.8 No Will, But Administrator Discharged Prior to Sale

Where a decedent leaves no will and there has been an administration on his estate but the administrator has been discharged, a marketable title may be conveyed by: (1) proof showing the death intestate, identifying the decedent’s heirs at law and showing them to be of age and of sound mind (such proof should be in the form of affidavits recordable under O.C.G.A. Section 44-2-20), (2) a conveyance from the above heirs at law as identified by the proof, provided that they are of age and of sound mind, and (3) proof that federal estate taxes cannot result in a lien against the property.

*Comment: O.C.G.A. Section 53-8-15(c) provides that “In the absence of prior assent, the discharge of a personal representative shall be conclusive evidence of the personal representative’s assent.”*

13.9 Will Probated in Solemn Form Authorizes Sale — Executor Qualified Within Past Six Months

Where a decedent leaves a will which has been probated in solemn form and the executor has qualified within the past six months and the will authorizes sale, a marketable title may be conveyed by: (1) a deed from the executor containing recitals showing that it is made pursuant to the power of sale conferred under the terms of the will of the decedent, joined in by the beneficiary of any specific devise of the land to be conveyed, (2) a determination that no application for year’s support has been made, and (3) proof that federal estate taxes cannot result in a lien against the property.

*Comment: A surviving spouse or minor child cannot attach a lien for a year’s support to property that is conveyed by the executor or administrator in an authorized sale before the year’s support is set aside. O.C.G.A. Section 53-3-13.*

13.10 Will Probated in Solemn Form Does Not Authorize Sale — Executor Qualified Within Past Six Months
Where a decedent leaves a will which has been probated in solemn form and the executor has qualified within the past six months but the will does not authorize a sale, a marketable title may be conveyed in any of the following manners:

(A) conveyance by executor and all devisees which requires (1) a deed from the executor and all devisees of the property to be conveyed, (2) a determination that no application for year’s support has been made, (3) the furnishing of an indemnity agreement, escrow deposit or surety bond indemnifying the grantee and his successors in title against any debts of the estate of the decedent, and (4) proof that federal estate taxes cannot result in a lien against the property; or

(B) conveyance by executor pursuant to a court order specifically authorizing such sale which requires (1) a court order obtained pursuant to O.C.G.A. Section 53-8-13 which authorizes the specific sale, (2) a deed from the executor pursuant to such court order, (3) a determination that no application for year’s support has been made, (4) the furnishing of an indemnity agreement, escrow deposit or surety bond indemnifying the grantee and his successors in title against any debts of the estate of the decedent, and (5) proof that federal estate taxes cannot result in a lien against the property: or

(C) conveyance by executor pursuant to a court order granting a general power of sale which requires (1) a court order obtained with the unanimous consent of the beneficiaries pursuant to O.C.G.A Section 53-7-1(b) granting the power of sale, (2) a deed from the executor pursuant to such court order, (3) a determination that no application for year’s support has been made, (4) the furnishing of an indemnity agreement, escrow deposit or surety bond indemnifying the grantee and his successors in title against any debts of the estate of the decedent, and (5) proof that federal estate taxes cannot result in a lien against the property.

Comment: O.C.G.A. Section 53-5-14 (now 53-3-13) was not intended to exempt devises and legacies from year’s support. Anderson v. Groover, 242 Ga. 50, 247 S.E.2d 851 (1978).

13.11 Will Probated in Solemn Form Authorizes Sale — Executor Qualified More Than Six Months — No Assent to Devise

Where a decedent leaves a will which has been probated in solemn form and the executor has been qualified more than six months and the will authorizes a sale, a marketable title may be conveyed by: (1) a deed from the executor containing recitals showing that it is made pursuant to the power of sale conferred under the terms of the will of the decedent, (2) a determination that no application for a year’s support has been made, (3) proof in the form of an affidavit recordable under O.C.G.A. Section 44-2-20 that the executor of the will has not assented to any general devise of the property under the will and that the property now remains in his hands for administration, (if the land to be conveyed is the subject of a specific devise, the devisee(s) should join in the deed) and (4) proof that federal estate taxes cannot result in a lien against the property.

13.12 Will Probated in Solemn Form Authorizes Sale — Executor Qualified More than
Six Months — Deed From Executor and All Devisees

Where a decedent leaves a will which has been probated in solemn form and the executor has been qualified for more than six months, and the will authorizes a sale, a marketable title may be conveyed by: (1) a deed from the executor in which all of the devisees of the property to be conveyed join as grantors, (2) a determination that no application for year’s support has been made, (3) proof that all debts of the estate have been fully paid, and (4) proof that federal estate taxes cannot result in a lien against the property.

13.13 Will Probated in Solemn Form Does Not Authorize Sale — Executor Qualified For More than Six Months

Where a decedent leaves a will which has been probated in solemn form and the executor has been qualified for more than six months and the will does not authorize a sale, marketable title may be conveyed in any of the following manners:

(A) conveyance by executor and all devisees which requires (1) a deed from the executor and all devisees of the property to be conveyed under the will, (2) a determination that no application for year’s support has been made, (3) proof that all debts of the estate have been fully paid, and (4) proof that federal estate taxes cannot result in a lien against the property; or

(B) conveyance by executor pursuant to a court order specifically authorizing such sale which requires (1) a court order obtained pursuant to O.C.G.A. Section 53-8-13 which authorizes the specific sale, (2) a deed from the executor pursuant to such court order, (3) a determination that no application for year’s support has been made, (4) proof that all debts of the estate have been fully paid, and (5) proof that federal estate taxes cannot result in a lien against the property; or

(C) conveyance by executor pursuant to a court order granting a general power of sale which requires (1) a court order obtained with the unanimous consent of the beneficiaries pursuant to O.C.G.A Section 53-7-1(b) granting the power of sale, (2) a deed from the executor pursuant to such court order, (3) a determination that no application for year’s support has been made, (4) proof that all debts of the estate have been fully paid, and (5) proof that federal estate taxes cannot result in a lien against the property.

13.14 Will Probated in Common Form

Where a decedent leaves a will which has been probated in common form on or after July 1, 1984, it is conclusive after the passage of four years except as against minor heirs. Minor heirs have four years from the later of (a) coming of age with no other disability, or (b) four years after probate of the will in common form, within which to contest the will. Where a decedent leaves a will which has been probated in common form before July 1, 1984, it is conclusive after the earlier of July 1, 1988 or the expiration of seven years from the date of probate except as against minor heirs. Minor heirs have four
years from the later of (a) coming of age with no disability, or (b) the date which is the earlier of July 1, 1984 or seven years after the date of the probate. Title which is obtained through the probate of a will in common form should not be accepted unless proof is obtained that all heirs were of age at the time of the probate and four years have passed. The probate of the will in solemn form should be required where four years have not elapsed or proof should be obtained as to the identity of all heirs and the appropriate deeds should be obtained from all heirs.

Comment: Pursuant to O.C.G.A. Section 53-5-19, when a will is probated in common form and is not attacked for four years, it is conclusive against all parties except minor heirs. It will also be conclusive four years after the year in which all minors have reached the age of majority. Prior to the 1984 amendment of this Code Section, the period required for conclusiveness of the probate was seven years, but minors coming of age with no disability had four years after reaching maturity in which to interpose a caveat to the probate. See Anderson v. Green, 46 Ga. 361 (1872); Churchill v. Corker, 25 Ga. 479 (1858).

This Standard was cited in Alston v. Stubb's, 170 Ga. App. 4417, 317 S.E.2d 272 (1984), in supporting a claim for cost of litigation in defending third-party action as a result of negligence of attorney in failure to comply with this Standard.

NOTE: Testamentary trusts are dealt with in Chapter 29 on Trusts.

CHAPTER 14
DEEDS TO SECURE DEBT (SECURITY DEEDS)

14.1 Security Deed Recorded Prior to Deed by Which Ownership Acquired

The validity of a security deed is not impaired by the fact that it is filed for record prior to the filing for record of the instrument by which ownership is acquired, except to the extent that rights of third parties may have intervened.

The recordation of an affidavit pursuant to O.C.G.A. Section 44-2-20 giving notice of a security deed recorded prior to the date of the deed into the grantor will place the security deed in the chain of title of the grantor as to parties acquiring interests from the grantor subsequent to the recordation of the affidavit.

Comment: If A has conveyed to B by warranty deed, and B thereafter has executed a security deed to A or a third party, the validity of the security deed is not affected by its being filed for record prior to the filing for record of the conveyance. Further, after recordation of the conveyance, the security deed is in the line of search unless it was filed for record prior to the indicated date of the conveyance. Of course, rights may have intervened between recordation of the security deed and recordation of the conveyance.

14.2 Deed from Owner to Holder of Security Deed

(a) Marketability is not impaired by the fact that title is derived through a
conveyance from an owner to the holder of a security deed. In the absence of a statement in such conveyance that it is in lieu of foreclosure, the examiner should consider any other facts available from the record and should make further inquiry if indicated, to determine whether the conveyance was in fact in lieu of foreclosure, or whether it was given merely as further security for the debt. In addition, if the record shows or the examiner has knowledge of the act that the mortgagor has or claims grounds for setting aside the conveyance or that a petition for bankruptcy has been filed by or against the owner prior to or within twelve months following the conveyance, further inquiry is necessary, whether title is held by the mortgagee or by a grantee from him.

(b) Marketability is not impaired by an undischarged security deed where an unqualified conveyance has been made by a person who was both record holder of the security deed and record holder of equitable title. Inquiry, or discharge of the security deed is unnecessary unless the record affirmatively discloses an intention that the security deed continue in effect.

Comment: A conveys to B, the holder of a security deed, with a recital that no merger was intended; and B thereafter conveys to C and the deed is silent as to the security deed. No cancellation of the security deed is required although the better practice would have been the inclusion of recital in the deed from B to C that a merger was intended at that point in time.

14.3 Satisfaction of Assignment of Rents

Failure to release an assignment of rents does not impair marketability, if from the record it can be determined or inferred with reasonable certainty that the assignment was given as additional security for an obligation secured by a security deed which has been discharged of record. Otherwise, the assignment of rents must be satisfied in the same manner as a security deed.

14.4 Releases Corrective or Re-recorded Security Deed

Where a security deed is followed by another which can be determined from the record to have been given to correct or modify the former, or to be a rerecording of the former, or to secure the same obligation, if the cancellation of one of the security deeds contains recitals which make it clear that no debt remains between the grantor and the grantee, failure to cancel the other security deed does not impair marketability.

Marketability is not impaired by a failure to discharge a modification agreement where the original security deed so modified has been canceled and satisfied of record. However, it would be better practice to have both instruments canceled of record.

14.5 Reference to Unrecorded Security Deed

A reference in an instrument in the chain of title to a security deed which cannot reasonably be identified with any security deed in the chain of title impairs marketability and necessitates corrective action.
14.6 Reversion of Property Conveyed to Secure Debt

Title to real property conveyed to secure debt reverts to the Grantor:

(a) Where the maturity of the debt is stated in the record of such conveyance, and the indebtedness has not been renewed, seven years from such maturity; or

(b) Where no maturity is stated, and the conveyance does not contain any affirmative statement as to the establishment of a perpetual or indefinite security interest (as specified in subparagraph (c), infra), seven years from the date of the conveyance provided the affidavit specified in subparagraph (f), infra, has not been recorded; or

(c) Where no maturity is stated but the conveyance contains an affirmative statement that the parties intend to establish a perpetual or indefinite security interest in the real property conveyed to secure a debt or debts, twenty years from the date of the conveyance, provided that the affidavit specified in subparagraph (f), infra, has not been recorded; or

(d) If no maturity is stated nor is there a date shown for the conveyance, at the expiration of seven years from the date the conveyance is recorded, provided the affidavit specified in subparagraph (f), infra, has not been recorded; or

(e) Where there is a dated written renewal of the indebtedness signed by the original grantor or grantor’s heirs, personal representative, or successors in title to the real estate conveyed, either seven or twenty years from the date of the renewal according to the appropriate reversion period set out above; or

(f) If grantee or grantee’s personal representatives, heirs, successors, or assigns, or any of them if more than one, or an officer of a corporation having an interest files of record an affidavit in accordance with the provisions of O.C.G.A. Section 44-14-80 (c) specifying the maturity date of the indebtedness secured, and if the debt has been renewed or extended, the terms thereof, either seven or twenty years from the maturity date specified in the affidavit according to the appropriate reversion period set out above.

Comment: O.C.G.A. Section 44-14-80 provides very specific rules for the application of the reversion. Specific reference should be made to this section before passing title based on the reverter. Deeds executed prior to the passage of this original section (March 27, 1941) are not affected by the section. See Smith v. Merchants & Farmers Bank of Milledgeville, 226 Ga. 715, 177 S.E.2d 240 (1970); Drake v. Barrs, 225 Ga. 597, 170 S.E.2d 684 (1969); Todd v. Morgan, 215 Ga. 220, 109 S.E.2d 803 (1959). Prior to the 1994 amendment this code Section established a 20 year reverter following maturity of the debt or recording or delivery if no maturity was stated. This Code Section, as amended, should not be relied upon as to security deeds executed prior to the effective date, April 19, 1994, of the 1994 amendment.
14.7 Satisfaction of Deeds to Secure Debt

Deeds to secure debt may be satisfied of record in any one of the following four ways:

(1) By written order of the record holder of the deed to secure debt, entered on the face of the deed, directing that the deed be canceled and that the Clerk enter it satisfied in the appropriate deed records.

(2) By quitclaim deed containing a reference to the deed to secure debt and reciting that the quitclaim deed is given for the purpose of either: (a) satisfying of record the deed to secure debt, the debt secured thereby having been paid in full, or (b) releasing the described property from the lien of the deed to secure debt. The Grantee in such quitclaim deed should be one of the following:

(A) The current holder of record title, or
(B) The person into whom title is to be conveyed, or
(C) The original Grantor in the deed to secure debt.

(3) In instances in which the original deed to secure debt has been lost, stolen, or otherwise mislaid, by document in substantially the following form, executed by the owner of the security interest and who swears in such document, which document shall be recorded:

____ County, Georgia

The indebtedness referred to in that certain deed to secure debt from _____ to ________, dated ________, and of record in Deed Book _____, Page _____, in the office of the clerk of the Superior Court of ________ County, Georgia, having been paid in full, and the undersigned being the present record owner of such secured interest by virtue of being the original grantee or the heir, assign, transeree, or devisee of the original grantee, the clerk of such Superior Court is authorized and directed to cancel that deed of record as provided in Code Section 44-14-4 of the O.C.G.A. for other mortgage cancellations.

In witness whereof, the undersigned has set his or her hand and seal, this ___ day of ______, 20__.

______________________________(SEAL)

Signed, sealed, and delivered on the date above shown

______________________________

Unofficial witness

______________________________

Notary Public

(SEAL)
My commission expires: ____

Comment: The above three methods of cancellation are based upon O.C.G.A. Section 44-14-67. The absence of a recital identifying the security deed in the quitclaim deed suggested in (b) above does not render the quitclaim deed ineffective provided that there is no limitation on the grant. However, a recital specifying the security deed to be canceled is preferable practice in that it gives rise to the possibility that the Clerk will in fact satisfy the security deed by virtue of O.C.G.A. Section 44-14-67(b)(2) or at least cross reference the quitclaim deed on the record of the security deed.

(4) In instances where a grantee or holder of record of a deed to secure debt fails to transmit to the court a legally sufficient satisfaction or cancellation, the clerk is authorized and directed to cancel the deed to secure debt upon the recording of an affidavit by an attorney who has caused the secured indebtedness to be paid in full or by an officer of a regulated or chartered financial institution whose deposits are federally insured if that financial institution has paid the secured indebtedness in full. The affidavit shall include a recital of actions taken to comply with O.C.G.A. Section 44-14-3(c.1). The affidavit shall also include as attachments the following items:

(1) A written verification that was given at the time of payment by the grantee or holder of record of the amount necessary to pay off the loan secured by the deed to secure debt; and

(2) Any one of the following:

(A) Copies of the front and back of a canceled check to the grantee or holder of record paying off such loan, or

(B) Confirmation of a wire transfer to the grantee or holder of record paying off such loan, or

(C) A bank receipt showing payment to the grantee or holder of record of such loan.

Comment: The fourth method of cancellation is based upon O.C.G.A. Section 44-14-3(c.1), effective July 1, 1999. This method of cancellation is only effective in the event that the grantee or holder of record of the paid deed to secure debt fails to transmit a proper cancellation to the clerk of the superior court within 60 days after written notice has been mailed to the grantee or holder of record. The notice to be mailed to the grantee or holder of record shall identify the indebtedness and include a recital or explanation of O.C.G.A. Section 44-14-3(c.1). (This section was revised effective August 18, 2005, primarily to add Paragraph 4 and related Comment.)

14.8 Failure to Pay Intangible Recording Tax

Although failure to pay intangible recording tax pursuant to O.C.G.A. Section 48-6-
60 et seq. constitutes a bar to collection of the indebtedness secured by a mortgage, deed to secure debt or other form of security instrument, an instrument otherwise in a form sufficient for recording and actually recorded by the Clerk of Superior Court in the appropriate county is effective as legal notice of the interest of the secured party, even if the intangibles tax has not been paid.  [O.C.G.A. Section 48-6-62(a)(2)].

14.9 Waiver of Borrower’s Rights

It is recommended that at closing the borrower execute a Waiver of Borrower’s Rights.  this will allow the loans to be sold in any market, However, the failure of such waiver to be attached to the security deed as recorded shall not invalidate the security deed nor prevent the exercise of an otherwise proper power of sale.

Comment:  Prudent closing procedure since 1973, following the decision of Law v. United States Dept. of Agriculture, 366 F. Supp. 1233 (N.D. Ga. 1973), has included the use of the Borrower’s Waiver in conjunction with the execution of the deed to secure debt containing the power of sale by non-judicial foreclosure.  It is settled that state action is not involved in the exercise of the private power of sale by a private lender and therefore there can be no violation of the due process requirements of the fourteenth Amendment [Global Industries, Inc. v. Harris, 376 F. Supp. 1379 (N.D. Ga. 1974); Ruff v. Lee, 230 Ga. 426, 197 S.E.2d 376 (1973)], and likewise it is settled that federal action is not involved in the exercise of the power of sale by a private lender in a mortgage financed under a federal loan program and therefore there can be no violation of the due process requirements of the Fifth Amendment [Roberts v. Cameron Brown, 556 F.2d 356 (5th Cir. 1977)].  However, prudence dictates that the execution of such a waiver at closing is one more indication that the borrower understands that he/she will not be sued on the note prior to the exercise of the private non-judicial power of sale.

CHAPTER 15
MECHANICS’ AND MATERIALMEN’S LIENS

15.1 Scope of Search

The examining attorney is not required to examine the records of the Clerk of Court of the County in which the property lies in the names of any party other than that of the record title holder of the interest being examined.

Comment: While the scope of a record search need not be expanded to include the name of the general contractor, it is suggested that should the examination be for a leasehold interest, the name of the fee holder, as well as the tenant, should be searched.

15.2 Inchoate Nature of Lien Right

Mechanics, contractors, subcontractors, materialmen, laborers, architects, registered foresters, registered land surveyors, and suppliers of rental tools possess a special statutory lien upon the real estate for their effort or materials furnished to improve the real estate, but the statutory requirements for the perfection of said lien are strictly
The term “mechanics’ and materialmen’s lien” as used in this chapter refers to the statutory lien provided to the above named parties as set forth in O.C.G.A. Sections 44-14-361 and 361.1.

15.3 Priority of Mechanics’ and Materialmen’s Liens

Mechanics’ and materialmen’s liens are inferior to liens for taxes, to the general and specific liens of laborers, to the general lien of landlords for rent when a distress warrant is issued out and levied, to claims for purchase money due persons who have only given bonds for titles, and to other general liens when actual notice of the general lien of landlords and others has been communicated before the work was done or materials or services furnished. Properly perfected mechanics’ and materialmen’s liens are superior to all liens which are not enumerated in the previous sentence.

Comment: See O.C.G.A. Section 44-14-361.1(c).

15.4 Recitals of Ownership

The mere statement of ownership in a mechanics’ and materialmen’s lien does not create a cloud on title. Where such a lien is filed against someone who does not have record title to the subject property, the lien and the statement of ownership may be disregarded by a title examiner. Also, a Notice of Commencement filed by an owner or general contractor shall not constitute a cloud, lien or encumbrance upon or a defect in the title of the property described within the Notice of Commencement.

Comment: Source - Old Title Standard 13.2; O.C.G.A. Section 44-14-361.5(d).

15.5 No Release of Lien Necessary

In order for a mechanics’ and materialmen’s lien to be perfected, it must be filed within ninety (90) days after the last date upon which the lien claimant provided labor, services or materials for use in improvements to the property. This date is also referred to as the date when the lien claimant’s claim became due. Failure of a lienholder to commence an action to collect the amount of his claim within 365 days from the date his claim was filed for recording or failure of the lienholder to file the statutory notice of filing of suit to collect the claim in the county wherein the property is located renders the claim of lien unenforceable. The notice of filing suit is to be cross-indexed by the Clerk of Court. A mechanics’ or materialmen’s lien may be disregarded once it is determined that no notice of suit was filed within the period of twelve (12) months plus thirty (30) days from the date when the claim of lien was filed for recording. No release of such liens shall be required by the title examiner. The claim of lien expires and is void 395 days from the date of filing of the claim of lien if no notice of commencement of lien action is filed within that time period.

Comment: Amendments to O.C.G.A. Section 44-14-360, et seq., effective March 30, 2009. For liens dated prior to the effective date of these amendments, see previous statutory deadlines.
15.6 Bond to Discharge Lien

A properly filed mechanics’ or materialmen’s lien, before or during the institution of foreclosure proceedings, may be discharged by filing a bond in the Office of the Clerk of the Superior Court of the county in which the lien was filed. The form and sufficiency of said statutory bond must be approved by the Clerk of the Court and upon the filing of the bond, the real estate shall be discharged from the lien.

Comment: Source — O.C.G.A. Section 44-14-364(a). The examining attorney may rely upon the appearance of a property bond or cash bond as evidence of the discharge of the lien only if said bond has been recorded in the correct county and if said bond clearly shows that it has been accepted by the Clerk of Superior Court. Mere recordation of a bond without the clerk’s statutory approval appears to negate the validity of the bond. The examining attorney must always look for this approval.

15.7 Preliminary Notice of Liens

The examining attorney must inspect the deed records or the Index of Preliminary Notice of Lien Rights or such separate index as established by the Clerk of Court to ascertain the identity of potential lien claimants.

Should there be a Preliminary Notice of Lien Rights filed, then the examining attorney may rely upon a cancellation form which substantially conforms to the Code.

Comment: Source — O.C.G.A. Sections 44-14-361.3, 361.4, 362(b).

15.8 Satisfaction of a Mechanics’ and Materialmen’s Lien

Mechanics’ and materialmen’s liens may be satisfied of record as follows:

1. By written order of the mechanic or materialman or its attorney upon the original lien or by separate written cancellation directing that the instrument be satisfied and that the Clerk enter it satisfied; or,

2. By Quitclaim Deed from the mechanic or materialman to the current holder of record title or the Grantee to whom title is being conveyed. Said Quitclaim Deed should set forth the specific purpose of releasing the property described therein from the specific lien.

3. By recording a Notice of Contest of Lien in the superior court clerk’s office using the format provided for in the code, along with proof of delivery upon the lien claimant within seven days of filing. If the lien holder does not commence a lien action within 60 days from the receipt of the notice and file a notice of commencement of lien action within 30 days of the filing of the lien action, the lien is automatically extinguished 90 days after the filing of
the Notice of Contest of Lien.

Comment: The third method for cancellation of a mechanics’ and materialmen’s lien, is based upon O.C.G.A. § 44-14-368 which became effective March 31, 2009. The format for the Notice of Contest, including who is authorized to take advantage of this method, is provided for in the code and should be substantially followed. Prior to relying on this method of cancellation the good through date of the county deed records should be at least 90 days past the filing of the Notice of Contest of Lien.

15.9 Affidavits to Dissolve Mechanics’ and Materialmen’s Lien Rights

A mechanics’ and materialmen’s lien “shall be dissolved if the owner, purchaser from the owner, or lender providing construction or purchase money or any other loan secured by real estate shows that:

(A) The lien has been waived in writing by the lien claimant; or

(B) They or any of them have obtained the sworn written statement of the contractor or person other than the owner at whose instance the labor, services, or materials were furnished, or the owner when conveying title in a bona fide sale or loan transaction, that the agreed price or reasonable value of the labor, services, or materials have been paid or waived in writing by the lien claimant; and

(C) When the sworn statement was obtained or given as a part of a transaction:

(i) Involving a conveyance of title in a bona fide sale;
(ii) Involving a loan in which the real estate is to secure repayment of the loan; or
(iii) Where final disbursement of the contract price is made by the owner to the contractor

there was not of record, at the time of the settlement of the transaction a valid preliminary notice or claim of lien which had not been previously canceled, dissolved, or expired.” (O.C.G.A., Section 44-14-361.2). This Code Section provides that the term “Person other than the owner” shall not include a subcontractor and that the term “Final Disbursement” of the contract price “means payment of the agreed price between the owner and contractor for the improvements made upon the real estate or the reasonable value of the labor, services, and materials incorporated in the improvements upon the real estate and includes payment of the balance of the contract price to an escrow agent.”
CHAPTER 16
MISCELLANEOUS

16.1 Failure to Release Notice of Lis Pendens

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

Comment: If the lis pendens is for an action in a Court other than the Superior Court of the County in which the real estate lies, the better practice is to evidence the termination of the proceedings on the record.

16.2 Quitclaim, Limited Warranty, Executor’s and Administrator’s Deeds

The fact that a conveyance necessary to the chain of title, including the conveyance to the proposed grantor, is a quitclaim, limited warranty, executor’s or administrator’s deed does not impair marketability or necessitate full inquiry or corrective action.

Comment: “If the grantor has title to or an interest in land, a deed of quitclaim is just as effective to pass that title as a deed with covenants of warranty.” McDonald v. Dabney, 161 Ga. 711, 714, 132 S.E. 547 (1926). It is good practice to include within a quitclaim deed a recital as to the purpose for which the deed is given.


16.3 Judgments and Executions

Judgments, decrees, orders and writs of fieri facias issued pursuant to any judgment, decree or order do not become a lien upon the title to real property until said judgment, decree or writ of fieri facias is entered in proper indices in the applicable records in the Office of the Clerk of the Superior Court of the county in which the real property is located. However, this section does not apply if the parties have actual notice of the existence of a judgment, decree or order or a fi fa issued on same.

A State tax execution does not become a lien upon the title to real property of the taxpayer until said execution is filed with the clerk of the county where the real property is located. State tax executions filed with the county clerk by electronic transmission to the Georgia Superior Court Clerks’ Cooperative Authority (“GSCCCA”) are deemed filed and
perfected upon receipt by the GSCCCA as evidenced by inclusion in the pending lien database maintained by the GSCCCA. O.C.G.A. 48-3-42(e).

Comment: O.C.G.A. Section 9-12-86(b). “The purpose of the statute is to protect third persons acting in good faith and without notice by requiring that any judgment, decree or order must be recorded before it will in any way affect or become a lien on title to real property...The period between the taking of the judgment and its recording is merely a period of dormancy. When the judgment is recorded as provided for in the Code, the dormancy ends and the judgment becomes effective as a lien on real estate. We hold that for priority purposes, the judgment then relates back to the date of its rendition and shall be considered of equal date with other perfected liens arising from judgments on verdicts rendered at the same term of court.” National Bank of Georgia v. Morris-Weathers Co., 248 Ga. 798, 800, 286 S.E.2d 17 (1982).

16.4 Dormancy of Judgments

Judgments (except Federal liens in certain situations) become dormant after seven years from their being indexed in the General Execution Docket. In the absence of an entry upon the judgment showing levy or nulla bona and re-recording of same in the General Execution Docket, the judgment is not effective for an additional seven-year period. Thus, judgments which were entered seven years prior to the date of examination and which have not been re-filed and re-indexed in the General Execution Docket do not affect marketability of title (O.C.G.A. Section 9-12-60). The same rule applies for County and City tax executions (O.C.G.A. Section 48-3-21).

State tax executions or writs of fieri facias issued by the Georgia Department of Revenue and filed or recorded prior to January 1, 2018 are invalid and do not affect marketability of title unless filed as a renewed state tax execution with the Office of the Clerk of Superior Court on or after January 1, 2018 and by February 20, 2018. For priority purposes, a filed renewed state tax execution shall retain its original date of filing as reflected on the filed execution document (O.C.G.A. 48-3-42 (b)). State tax executions or writs of fieri facias filed or renewed after January 1, 2018 expire ten years from the date of filing and cannot be renewed by nulla bona or otherwise. (O.C.G.A. 48-3-42 (g)).

16.5 Cancellation of General Execution Docket Recordings

General Execution Docket recordings may be satisfied of record as follows:

1. By written order of the Plaintiff in execution or its attorney upon the original instrument directing that the instrument be satisfied and that the Clerk enter it satisfied.

2. By Quitclaim Deed from the Plaintiff to the current holder of record title or the Grantee to whom title is being conveyed. Said Quitclaim Deed should set
forth the property described therein from the lien of the specific General Execution Docket recording.

3. In instances where the plaintiff in execution or any person who owns or holds an execution has failed to properly transmit a legally sufficient satisfaction or cancellation to authorize and direct the clerk to cancel the execution of record, the clerk is authorized and directed to cancel the execution of record upon the recording of an affidavit by the attorney for the judgment debtor against whom the execution was issued or any attorney who has caused the indebtedness and other obligations under the execution to be paid in full or any attorney who has actual knowledge the indebtedness has been paid in full. The affidavit shall include a recital of actions taken to comply with O.C.G.A. Section 9-13-80(e). Such affidavit shall also include as attachments the following items:

(1) A written verification which was given at the time of payment by the plaintiff in execution or owner or holder of record of the amount necessary to pay off such obligations; and

(2) Any one of the following:

   (A) Copies of the front and back of a canceled check to the plaintiff in execution or owner or holder of record showing payment of such obligations; or

   (B) Confirmation of a wire transfer to the owner or holder of record showing payment of such obligations; or

   (C) A bank receipt showing payment to the plaintiff in execution or owner or holder of record of such obligations.

Comment: The third method for a cancellation of a General Execution Docket recording is based upon O.C.G.A. Section 9-13-80(e), effective July 1, 2004. This method of cancellation is only effective in the event that a plaintiff in execution or any person that owns or holds an execution has failed to properly transmit a legally sufficient satisfaction or cancellation to the clerk within 60 days after written notice mailed to such plaintiff in execution or owner or holder of record has been sent. The notice mailed to the plaintiff in execution or owner or holder of record shall identify the execution, and shall include a recital or explanation of O.C.G.A. Section 9-13-80(e). (This section was revised effective August 18, 2005 to add Paragraph 3 and related Comment.)

16.6 Liens Arising from the Uniform Commercial Code

Marketability of title is adversely affected by any or all of (1) any UCC financing statement filed in the real estate records affecting the subject property which purports to cover fixtures, crops, minerals or any other real estate related collateral (a "Fixture Filing"),
(2) any deed to secure debt or mortgage filed as a fixture filing on or after July 1, 2013 (a “Security Deed Filing”), or (3) any UCC financing statement filed on or after January 1, 1995, if a Fixture Filing has been filed in the real estate records affecting the subject property. Marketability of title continues to be affected until the (A) Fixture Filing, or (B) Security Deed Filing have been terminated or cancelled or the subject property has been released from the lien of the security deed or mortgage. A Fixture Filing of record for more than five (5) years will affect marketability only if a continuation statement has been filed of record in accordance with O.C.G.A. Section 11-9-515. In order to discover any UCC financing statements, Fixture Filings, or Security Deed Filings that may affect title, the examiner currently must search the real estate records. Any UCC financing statements filed in the real estate records, deeds to secure debt or mortgages filed as Security Deed Filings, or Fixture Filings which purport to affect the real estate must be reported to the client as an exception to title to enable the closing attorney to have any or all of the financing statement, Security Deed Filing, or the Fixture Filing, terminated of record. The examiner is not required to examine title to personal property unless specifically directed to do so by the client.

Comment:

The Uniform Commercial Code (“UCC”) Central Indexing and Local Filing System for Georgia, which became effective on January 1, 1995, created a new “file anywhere” system for UCC financing statements and a new Georgia Superior Court Clerks Cooperative Authority (the “Authority”) to administer and regulate the new system (O.C.G.A. Section 11-9-519, et. seq.). All pre-January 1, 1995 financing statements have been continued either in the central indexing system, have lapsed, or been terminated. Pre-January 1, 1995 real estate deeds to secure debt filed as fixture filings are released or satisfied of record or until their effectiveness otherwise terminates as to the real estate.

After January 1, 1995 and prior to July 1, 2013, a “notice filing” was required to be made in connection with security interests in related real estate collateral [i.e. filings covering crops, minerals or the like, including oil and gas and accounts resulting from the sale of minerals and the like (including oil and gas) at the wellhead or minehead (hereinafter referred to as “UCC Related Real Estate”); in order for a secured party to have a perfected security interest in UCC Related Real Estate. This “notice filing” was required to be recorded in addition to and not in place of a financing statement otherwise required to be filed. The “notice filing” was required to be made notwithstanding the fact that a financing statement covering the collateral was filed in the county in which the real estate is located or elsewhere as permitted under the “file anywhere” rule [O.C.G.A. Section 11-9-502]. The rules regarding a “notice filing” remain in effect after July 1, 2013 for Fixture Filings. Security deeds filed prior to January 1, 1995 or on or after July 1, 2013 can also serve as fixture filings under previous and the current versions of the UCC.

Prior to July 1, 2013, “notice filings” were to be made in the real estate records in the county or counties where the relevant UCC Related Real Estate is located. If the UCC Related Real Estate was located in multiple counties, separate “notice filings” had to be made in each county in which the UCC Related Real Estate is located and indexed in the grantor/grantee index of the real estate records under the name of any owner or lessee of record shown on the
“notice filing”. The same rule applies to Fixture Filings after July 1, 2013: the Fixture Filing must be filed in the real estate records of each county in which UCC Related Real Estate is located.

Note that a security interest in UCC Related Real Estate arising under the UCC must follow the rules of the UCC, which may differ from other Georgia laws generally applicable to real property. For example, under the UCC, a financing statement naming the debtor as “[individual or registered entity], as trustee” does not sufficiently state the name of the debtor and will be ineffective under the UCC. O.C.G.A. Section 11-9-503(a)(3). As a result, if a trustee is the record owner of real property in Georgia, any filing against the fixtures (whether in the form of a Fixture Filing or a Security Deed Filing) must follow the UCC naming conventions for a trust if the filing is to be effective under the UCC.


1. All financing statements may be terminated or released by filing a statement of termination with any filing office. This form is prescribed by the Authority.

2. Releases and terminations (as well as amendments and assignments) of “notice filings” and Fixture Filings may be on forms prescribed by the Authority or may be in the same form as “comparable instruments” used to release or terminate (amend or assign) mortgages in the real estate records and must be recorded in the county in which the UCC Related Real Estate is located.

3. The release or termination of a Security Deed Filing will be in the same form as used to release or terminate deeds to secure debt or mortgages in the real estate records and must be filed in the county where the UCC Related Real Estate is located.

Comment:

See O.C.G.A. Section 11-9-501, 502, and 513. It appears that a secured party may cancel both its security deed and Fixture Filing in the same document. While the law states the releases or terminations of Fixture Filings need not be attested or acknowledged, it is silent regarding whether the documents nonetheless need to be in recordable form. Until the issue is clarified, prudent practice would dictate having any release documents other than that prescribed by the Authority properly witnessed and notarized. Amendments, releases, assignments and terminations must be filed in the county or counties in which the original Fixture Filing(s) were recorded.
CHAPTER 17
FORECLOSURES

17.1 Foreclosure in General

Foreclosures in Georgia may be conducted in equity; pursuant to statutory procedures; by execution, levy and sheriff’s sale; and by non-judicial power of sale. The non-judicial power of sale is the most common method of foreclosure in Georgia. The most common security instrument in Georgia is the deed to secure debt also referred to as a security deed.

When a foreclosure appears in the chain of title, an examination of the security instrument which was foreclosed is necessary. The security instrument and succession of transfers to the current holder authorized to conduct the sale should be recorded. A foreclosure sale conducted after the statute of limitations has run on the security instrument is void. Failure to pay intangible recording tax applicable to the security instrument constitutes a bar to foreclosure. Such bar to foreclosure may be removed by payment of the tax plus penalty and interest. Since non-judicial power of sale is a contractual remedy, the terms and procedures for conducting the foreclosure sale must be set forth in the security instrument to be foreclosed. The instrument must also contain a valid power of attorney empowering the grantee to conduct the foreclosure sale and execute the deed under power of sale as the attorney in fact for the grantor.

While there is no statutory procedure for conducting non-judicial foreclosure sales, it is required that a non-judicial foreclosure sale be advertised and conducted in the same manner as sheriffs’ sales. Written notice of the sale must be given to the debtor by registered or certified mail sent no later than 30 days prior to the foreclosure sale date.

Comment: For a comparison of security deeds with other security instruments, see Pindar and Pindar, Ga. Real Est. Law, Section 21-4 (4th ed.).

Security deeds and transfers recorded after July 1, 1989, should include the mailing address of the grantee or transferee. However, failure to include the mailing address is not a defense to foreclosure (O.C.G.A. Sections 44-14-63 and 64). O.C.G.A. §44-14-162(b) requires that the assignment into the foreclosing lender must be recorded prior to the time of the foreclosure sale.

O.C.G.A. Section 44-14-80 establishes a 7-year reverter following maturity of the debt or recording or delivery if no maturity is stated and a 20-year reverter from the date of the conveyance if no maturity is stated and the conveyance contains an affirmative statement that the parties intend to establish a perpetual or indefinite security interest in the property conveyed to secure a debt or debts. (See Standard 14.6). Prior to the 1994 amendment, this Code Section established a 20-year reverter following maturity of the debt or recording or delivery if no maturity was stated. The amended Code Section should not be relied upon as to security deeds executed prior to the effective date, April 19, 1994, of the 1994 amendment. O.C.G.A. Section 44-14-81 bars a foreclosure after the reversion period. The expiration of the
statute of limitations on a note secured by a security deed does not bar foreclosure (O.C.G.A. Section 44-14-43).

O.C.G.A. Section 48-6-61 imposes a tax of $1.50 for each $500.00 or fraction thereof of the face amount of a long-term note secured by real estate as defined at O.C.G.A. Section 48-6-60 (2). O.C.G.A. Section 48-6-77(a) bars foreclosure unless applicable intangible recording tax is paid. This same Code Section imposes a penalty of 50% of the amount of the tax plus interest if such tax is not paid within 90 days of the date of the instrument.

For standards regarding powers of attorney, see Standard 8.5.

See O.C.G.A. Section 23-2-114 for power of sale in deed to secure debt and O.C.G.A. Section 44-14-162 for conducting as a sheriff’s sale.

See O.C.G.A. Sections 44-14-162.1 through 162.4 for notice requirements to debtor and deed recitals.

17.2  Deed Under Power of Sale

A deed under power of sale executed by the grantee of a security instrument or any subsequent assignee thereof pursuant to a valid power of attorney contained in the security instrument conveys marketable title (provided title was marketable at the time the security instrument was given) to the property described therein if the deed under power of sale contains recitals as to the security instrument containing the power of sale, default, proper legal advertisement, the time, place and results of the sale and compliance with notice requirements of O.C.G.A. Section 44-14-162.2 or facts which render such notice inapplicable. All such recitals in a deed under power of sale may be relied on if there is no irregularity on its face and no other matters appear of record which would render any such recital questionable and necessitate further inquiry. The deed under power of sale should be cross-referenced to the foreclosed security instrument.

Inconsequential scrivener’s errors in the legal description in the security instrument can be corrected in describing the property in the deed under the power of sale. However, an invalid legal description in the security instrument cannot be corrected by a foreclosure sale.

A deed under power of sale resulting from the foreclosure of a junior security instrument should reference senior security instruments. If a deed under power of sale of a junior security instrument does not reference senior security instruments, it should be established that reference to such senior instruments in the foreclosure advertisement was made and a corrective deed under power of sale required. Such inquiry and corrective work is not necessary if in the opinion of the examiner sufficient time following the foreclosure sale has elapsed to render an action to set aside the foreclosure sale unlikely.

Comment: The deed under power of sale should be executed by the holder of the security instrument as attorney in fact for the debtor. However, a deed under power of sale
executed by the holder in its own name will not render title unmarketable if sufficient recitals in the deed indicate that it was executed in representative capacity of the debtor. [Garrett v. Crawford, 128 Ga. 519, 57 S.E. 792 (1907)]. Unless expressly prohibited by the security instrument, successors may exercise the power of sale. (O.C.G.A. Section 23-2-114). For requirements of transfers see O.C.G.A. Section 44-14-64.

The foreclosed security instrument should be notated as “foreclosed” and reference should be inserted to the deed book and page of the deed under power of sale. See O.C.G.A. Section 44-14-160.

O.C.G.A. Section 9-13-140 requires the legal advertisement to give a full and complete description of the property to be sold. [Shantha v. West Georgia National Bank, 145 Ga. App. 712, 244 S.E.2d 643 (1978)].

Failure to include existence of senior security interests creates a question of fact as to chilling of the bidding. [Smith v. Citizens & Southern Financial Corporation, 245 Ga. 850, 268 S.E.2d 157 (1980)].

The 20-year statute of limitations found in O.C.G.A. Section 9-3-23 has been conversely applied to actions for breach of covenants against the holder of a security deed. [Brice v. National Bondholders Corporation, 187 Ga. 511, 1 S.E.2d 426 (1939)]. Other factors such as subsequent sales to bona fide purchasers may reduce this period. [O.C.G.A. Section 9-3-3].

17.3 Effect of Foreclosure Sale

A valid foreclosure sale terminates the debtor’s interest in the property sold at the foreclosure sale and there is no right of redemption in favor of the debtor or junior lienholders, except those of the United States as discussed herein. A foreclosure sale does not require judicial confirmation in order to convey marketable title. However, if a confirmation action is pending or subject to appeal, title is considered to be unmarketable. Except as noted herein a foreclosure sale eliminates all interests and liens against the property which were junior to the interest being foreclosed, unless the purchaser at the foreclosure sale is the debtor.

Comment: See Mutual Loan & Banking Co. v. Haas, 100 Ga. 111, 27 S.E. 980 (1896)
Confirmation is a prerequisite to seeking a deficiency following a foreclosure sale. [O.C.G.A. Section 44-14-161].

Repurchase, even after intervening third party owners, by the debtor promotes the priority of liens from the debtor which were junior to the foreclosed security interest. [Bowlin v. Hemphill, 180 Ga. 435, 179 S.E. 341 (1935)]. Purchase money security interests used by the debtor to repurchase the property may be afforded priority over pre-existing junior liens. [Federal Land Bank of Columbia v. Bank of Lenox, 192 Ga. 543, 16 S.E.2d (1941)].
17.4 Federal Tax Liens

An exception of the effect of a foreclosure sale of a senior security interest exists with respect to federal tax liens. If a federal tax lien is properly filed more than 30 days prior to the foreclosure sale date, written notice of the foreclosure sale must be given to Internal Revenue Service at least 25 days prior to the sale date. If such notice is not given, a federal tax lien is not eliminated by the foreclosure sale of a senior security interest. If a junior federal tax lien is of record more than 30 days prior to a foreclosure sale date, the better practice is to record evidence of proper notice to the Internal Revenue Service. If a federal tax lien is eliminated by the foreclosure sale, the United States has a period of 120 days from the date of sale to redeem the property. If foreclosed property to which a junior federal tax lien attached is sold by the purchaser at the foreclosure sale within 120 days following the foreclosure sale date, evidence of waiver of the right of redemption by the Internal Revenue Service should be recorded.

Comment: Federal tax liens are established pursuant to 26 U.S.C. Section 6321. Federal tax liens are perfected against real property by filing pursuant to 26 U.S.C. 6323(f) and O.C.G.A. Sections 4-14-571 through 574. See 26 U.S.C. Section 7425(b), (c) and (d). See Chapter 31 of these Standards.

17.5 Other Governmental Liens and Interests

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

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

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

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

17.6 Deed in Lieu of Foreclosure

A conveyance of property in lieu of a foreclosure sale may be made by quitclaim deed, limited warranty deed or general warranty deed. Unless a contrary result is intended by the parties, the doctrine of merger terminates the security interest in the property. Since merger is a question of intent of the parties, it is better practice to express the parties’ intent on merger in the deed. Upon subsequent conveyance of the property by a secured creditor who acquired title by a deed in lieu of foreclosure, satisfactory evidence should be placed of record that the secured creditor no longer claims an interest in the property pursuant to the security instrument unless a conveyance subject to such security interest is intended.

A deed in lieu of foreclosure to the holder of a senior security interest does not eliminate junior security interests. Unless lack of merger is shown, acceptance of a deed in lieu of foreclosure by the holder of a senior security interest promotes the priority of junior security interests.

Comment: If a mortgagee enters possession of property without a deed, the debtor retains the right to redeem the property for a period of ten years. (O.C.G.A. Section 44-14-42.1).


If the secured indebtedness has not been fully discharged, a release or quitclaim deed may be used to release the property rather than the presentment of the original security instrument or a cancellation indicating that such indebtedness has been paid. (O.C.G.A. Section 44-14-67).

See Kidd v. Kidd, 158 Ga. 546, 124 S.E. 45 (1924) for the basis of the last paragraph of this standard.

CHAPTER 18
TRANSACTIONS UNDER FEDERAL TRUTH-IN-LENDING AND REGULATION Z

18.1 Right of Rescission

Where the attorney is certifying to the creditor or its assigns as to the priority of a
security deed given to the creditor in a transaction subject to the right of rescission of the Truth-in-Lending Act and Regulation Z, and the attorney is unable to verify that the right of rescission has been legally terminated, the attorney may take exception to any violations affecting the enforceability of the security deed as a result of Truth-in-Lending and Regulation Z.

Comment: Not all transactions subject to the Federal Truth-in-Lending Act (15 U.S.C. Sections 1601 et seq.) and Regulation Z (15 U.S.C. following Section 1700) are subject to the right of rescission. The right now applies only to those transactions in which (a) an existing indebtedness on the consumer’s dwelling is being paid off by the proceeds of the new loan from a different creditor, (b) a second or junior lien is being placed on the consumer’s existing dwelling, (c) an existing loan is being increased in amount or the terms thereof are being amended (but the loan is not subject to the right of rescission if the “amount financed” of the new loan does not exceed the unpaid principal balance, any unearned unpaid finance charge on the existing debt, and amounts attributed solely to the costs of the refinancing or consolidation; but the right of rescission extends only to any additional sums advanced by the creditor) and (d) the consumer who holds title to the dwelling free and clear is placing a lien in favor of the creditor as security for the transaction.

In a transaction subject to the right of rescission, the creditor is required to furnish the consumer the notice of the right of rescission along with “material disclosures” which are the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule. The period for rescission runs until midnight of the third business day following the later of consummation of the transaction or delivery of the notice of the right of rescission and all “material disclosures.” If the required disclosures are not given, the right of rescission terminates three years from the date of consummation or upon the sale or transfer of all of the consumer’s interest in the property, whichever occurs first, provided, that the consumer has not already elected to exercise the right of rescission during this period. “A sale or transfer of the property need not be voluntary to terminate the right of rescission. For example, a foreclosure sale would terminate an unexpired right to rescind.” See Commentary, Reg Z Section 226.23(b).

CHAPTER 19
PLANNED UNIT DEVELOPMENTS

19.1 In General

Where title to real estate purports to be affected by a declaration of covenants, conditions, and restrictions the title examiner must ascertain that the declarant submitting the property was the owner of the property at the time the property was submitted, or that the owner consented in writing to the submission of the property.

19.2 Condominiums - Georgia Condominium Act

(a) Where property has been submitted to a declaration of condominium which creates a condominium under the Georgia Condominium Act, O.C.G.A. Section 44-3-70, et
seq. (“GCA”), the examiner must ascertain that the declaration, plats, and plans for the condominium meet the requirements of the GCA.

Comment: O.C.G.A. Section 44-3-77(a) requires that the declaration contain the following as to all condominiums:

a. Name of the condominium including the word “condominium” or “a condominium”;
b. Name of the county or counties in which the condominium is located;
c. A metes and bounds legal description of the submitted property, including horizontal, as well as vertical, boundaries;
d. A description of the boundaries of the unit, including horizontal, as well as vertical, boundaries;
e. A description of any limited common elements designating the unit or units to which they are assigned;
f. A description of all common elements which may be assigned limited common elements;
g. The allocation to each unit of an undivided interest in the common elements, a number of votes in the association, and a share of the liability for common expenses;
h. Limitations or restrictions on the powers of the association or board of directors;
i. Name and address of the person who prepared declaration; and
j. A statement of use restrictions or that there are no such restrictions.

(b) If the condominium is an expandable condominium that is still subject to expansion, then, the examiner must ascertain that the declaration (or the plats or plans) contain the information required by O.C.G.A. Section 44-3-77(b).

Comment: O.C.G.A. Section 44-3-77(b) requires that the declaration (or the plats and plans) contain the following information as to an expandable condominium:

a. An option to expand the condominium;
b. A time limit for expansion of the condominium, not to exceed seven (7) years, and a statement of any other circumstances which will terminate the expansion option;
c. Any limitations on the option or that there are no limitations;
d. A legal description by metes and bounds of the additional property, including any horizontal, as well as vertical, boundaries;
e. A statement as to whether portions of the additional property may be added to the condominium at different times, any limitation on the boundaries of the portions setting forth the boundaries of those portions or the order in which the portions may be added, or that there are no limitations;
f. The maximum units to be created on the additional property, on each portion, if applicable, and if boundaries are not fixed for each portion, then the maximum average number of units per acre that may be created on any portion added to
the condominium;
g. A statement as to whether any additional units may not be restricted exclusively
to residential use, and, if so, the maximum extent of non-residential use;
h. A statement as to the extent to which structures erected on any portion of the
additional property added to the condominium will be compatible with
structures on the submitted property (quality of construction, principal
materials, architectural style) or a statement that no such assurances are made;
i. A description of all other improvements to be made on any portion of the
additional property, or any limitations on other improvements, or that no
assurances are made;
j. A statement that any units created on the additional property will be
substantially identical to the units on the submitted property, or a statement of
any limitations as to what types of units may be created, or that no assurances
are made;
k. A description of the declarant’s right, if any, to create limited common elements
within any portion of the additional property, or to designate common elements
that may be subsequently assigned as limited common elements, or a statement
that no limitations are placed on that right; and
l. A statement as to a formula, ratio, or other method whereby upon expansion the
undivided interests in the common elements, votes in the association, and
liability for common expenses are to be reallocated.

(c) If the condominium is an expandable condominium that contains convertible
space, it must be ascertained that pursuant to the provisions of O.C.G.A. Section 44-3-77(c), the declaration contains a statement of a formula, ratio, or other method whereby, upon conversion of all or a portion of the convertible space, there shall be allocated among the units created therefrom the undivided interests in the common elements, the number of votes in the association and the liability for common expenses as previously pertained to such convertible space.

(d) If the condominium is a leasehold condominium, it must be ascertained that
the declaration contains the information required by O.C.G.A. Section 44-3-77(d).

Comment: O.C.G.A. Section 44-3-77(d) requires that the declaration contain the
following:

a. The county or counties of recordation and deed book and page number for each
ground lease, other lease, or other instrument creating an estate for years, the
termination of which may terminate or reduce the condominium;
b. The date on which the lease or estate for years will expire;
c. A statement of whether any property will be owned in fee simple by the owners,
and, if so, a metes and bounds legal description of such property and a
statement of any rights the owners have to remove such improvements at the
end of the lease or estate for years, or that they have no such rights;
d. The name and address of the person or persons to whom rent payments must be
made by the owners unless such rent is collected as part of the common
expenses; and

e. A statement of the share of liability for payments under the lease which are chargeable against each unit.

(e) The title examination must ascertain that prior to the first conveyance of a condominium unit, one or more plats of survey have been prepared in accordance with the requirements of O.C.G.A. Section 44-3-83(a) and have been recorded in the county records.

Comment: O.C.G.A. Section 44-3-83(a) requires the plat of survey to show the following:

a. Location and dimensions of submitted property;
b. Location and dimensions of all structural improvements located on any portion of the submitted property tied down to a fixed locatable point on the boundary line of the property;
c. The intended location and dimensions of all contemplated structural improvements committed to be provided by the declaration on any portion of the submitted property;
d. The location and dimensions of all easements appurtenant to the submitted property or otherwise submitted as common elements;
e. Structural improvements not yet constructed labeled “NOT YET BEGUN;”
f. Leasehold and estate for years portions leased labeled “LEASED LAND;”
g. If non-contiguous parcels, plats are to indicate approximate distances between such parcels (unless disclosed in Declaration);
h. All easements to which any portion of the submitted property is subject;
i. All encroachments by or on any portion of the submitted property;
j. Any portion of vertical boundaries of units lying outside structure as shown on plans must be shown with identifying number of unit;
k. Certificate of compliance with section by a registered land surveyor as follows:
   I, __________________________, Georgia Registered Land surveyor
   No. ________, do hereby certify that this plat is accurate and complies with the provisions of Section 44-3-83(a) of the Georgia Condominium Act.
l. All other items customarily shown or required by law to be shown for land title surveys; and
m. A statement on the plat as follows:
The condominium declaration for__________ is recorded in
Deed Book _____, Page ___, of the Superior Court _____ County,
Georgia records.

(f) The examiner must ascertain that prior to the first conveyance of a condominium unit one or more plans for the units have been prepared in accordance with the requirements of O.C.G.A. Section 44-3-83(b) and have been recorded in the county records.

Comment: O.C.G.A. Section 44-3-83(b) requires that the plans show the following:
a. Prepared signed and sealed by a registered architect or registered engineer;
b. Plan of every structure which contains or constitutes all or part of a unit which show:
   (1) Location and dimensions of exterior walls and the height and location of the roof;
   (2) the walls, partitions, floors, and ceilings constituting the horizontal boundaries, if any;
   (3) vertical boundaries (including convertible space) to the extent such boundaries lie within or coincide with the boundaries of the structure; and
   (4) the identifying numbers of all units.
c. The following certification of the floor plans is required which must be signed and dated by the same engineer or architect;
   The undersigned, a registered architect or engineer, has visited the site known as ______________ Condominium and viewed the property and to the best of his (her) knowledge, information, and belief: (i) the exterior walls and roof of each structure are in place as shown on the plans; and (ii) such walls, partitions, floors and ceilings, to the extent shown on said plans, as constitute the horizontal boundaries, if any, and the vertical boundaries of each unit (including convertible pace) have been sufficiently constructed so as to establish clearly the physical boundaries of such unit.
d. Convertible space labeled “CONVERTIBLE SPACE;” and
e. A statement on the plans, as follows:
   A condominium declaration for ______________ Condominium is recorded in Deed Book ___ , Page _____ of the Superior Court of ______ County, Georgia records.

O.C.G.A. Section 44-3-115 provides that the provisions of the GCA and the condominium instruments are to be construed in favor of the valid establishment of a condominium and that substantial compliance with the requirements for establishing a condominium are sufficient to bring the property described in the condominium instruments within the purview of the Georgia Condominium Act. The examining attorney must analyze any defects in the declaration, plats, or plans for the condominium in order to determine whether, in spite of technical defects, the condominium instruments are sufficient to meet the substantial compliance requirements.

(g) A lien for assessments under the GCA arises automatically, and the recording of the declaration constitutes record notice of the lien; a physical lien is not required. [O.C.G.A. Section 44-3-109(a)].

Comment: The GCA provides that an owner, mortgagee, purchaser under contract, or prospective lender may request a statement from the association or its management agent of all past due assessments, late charges, and interest applicable to a unit. The request must be in writing, delivered to the registered office of the association, and include an address for
response. If no response is sent within five business days, the lien is extinguished and no longer effective as to title. The information contained in such a statement is binding on the association. [O.C.G.A. Section 44-3-109(d)]. All assessments owed to the association as of the date of closing must be paid at closing. The owner’s affidavit signed by the seller at closing should contain a statement that all assessments owed to the association are paid in full.

(h) Any right of first refusal or other restraint on the free alienability of condominium units under the GCA requires that the condominium instruments make provision for furnishing, upon request, to a unit owner or person who has executed a contract for the purchase of a unit a recordable statement certifying any waiver or refusal to exercise such rights whenever such waiver or failure has occurred. Failure or refusal to furnish such a statement within 30 days or such lesser period provided in the condominium instruments renders the rights or restraint inapplicable to that unit. [O.C.G.A. Section 44-3-110].

Comment: As in any other transaction involving a right of first refusal or restraint on alienation, it is recommended that a release of such rights be recorded simultaneously with the warranty deed.

(i) A legal description of a unit submitted to the GCA is sufficient if it sets forth the number of the unit, the name of the condominium, the county or counties in which the condominium is located, and the deed book and page number where the first page of the declaration is recorded. [O.C.G.A. Section 44-3-73].

(j) An examiner should consider the provision of O.C.G.A. Section 44-3-95(a), (b), (c) and (d) when evaluating the applicability and relative position of liens for labor or services performed or materials furnished recorded upon the submitted property as follows:

I. Liens for labor or services performed or for materials furnished in the improvement of property (either before or after it becomes submitted property) recorded upon the submitted property as a whole after the recordation of the declaration are subordinate to the declaration. [O.C.G.A. Section 44-3-95(a)].

II. Liens for labor or services performed, and for materials furnished for the improvement of property (either before or after it becomes submitted property), either performed or used in the original construction of any portion of a condominium, or additional property of an expandable condominium may be recorded against the property as a whole; however, such a lien is valid only as to units which have not been conveyed by the declarant to a person in a bona fide sale and purchase transaction prior to the recording of the lien. Such a lien is inapplicable and unenforceable as to units so conveyed. [O.C.G.A. Section 44-3-95(b)].
III. After the condominium is created, no lien shall arise or be effective against the submitted property as a whole (except as provided in II above). Liens or encumbrances shall arise or be created or effective only against each condominium unit in the same manner and in the same condition as against any other separate parcel of real property. However, labor or services performed or materials furnished for improvement of the common elements, if authorized by the association (subject to other provisions of law), creates a lien against all of the condominium units. Any unit owner may have such a lien removed from his or her condominium unit and released of record by payment of the amount attributable to the unit (based on its liability for common expenses) [O.C.G.A. Section 44-3-95(c) and (d)].

19.3 Condominiums - Apartment Ownership Act

(a) Some condominiums created prior to October 1, 1975 are still governed by the Apartment Ownership Act, Chapter 85-16(b) of the Code of Georgia of 1933 (“AOA”). Where property is submitted to the AOA, it must be ascertained that the declaration and plans meet the requirements of the AOA.

Comment: The AOA in Section 85-1602b requires that a declaration be executed and recorded which contains the following:

a. Description of the land and whether is leased or fee simple;
b. Description of the building (number of stories and basements, number of units, and principal materials);
c. Number of each unit and statement of its location, approximate area, number of rooms, and immediate common area to which it has access;
d. Description of the common areas and facilities, stating to which units their use is reserved;
e. Value of the property and each apartment and the percentage of undivided interests in the common area and facilities appertaining to each apartment;
f. Statement of the purposes for which the building and each unit are intended and restricted;
g. Name of person to receive service of process and the residence or place of business for such person which must be within the city or county in which the building is located;
h. Percentage of votes necessary in order to determine whether to rebuild, repair, restore, or sell the property in the event of damage or destruction of all or a part of the property; and
i. Method for amending the declaration.

Simultaneously with the recording of the declaration, floor plans were required to be recorded showing the layout, location, apartment numbers and dimensions of units, stating the name of the building and bearing a verified statement by an architect or engineer certifying that it is an accurate copy of the plans approved by the city or county; or prior to the first
conveyance of a unit an amendment to the declaration must be filed containing a verified statement of a registered architect or licensed professional engineer certifying that the plans accurately depict the layout, location, apartment numbers and dimensions of the unit, as built. [Code of Georgia of 1933, Section 85-1612b].

(b) In the examination of property subject to the AOA, the examiner should refer to the following provisions as to assessments:

I. A lien for assessments under the AOA does not arise automatically and the recording of a physical lien in the county records is required. AOA condominium liens are superior to all other liens except: (i) liens for ad valorem taxes on the unit; (ii) the lien of any first priority mortgage covering the unit; (iii) rental due under lease of the property to which the declaration is subject. [Code of Georgia of 1933, Section 85-1621b(a)].

II. The AOA provides that a purchaser of a unit is entitled to a statement from the manager or board of directors setting forth the unpaid assessments against the grantor and unit, and the purchaser is not liable for and the unit is not subject to liens for any amounts in excess of those set forth in the statement. [Code of Georgia of 1933, Section 85-1622b].

Comment: Good practice requires that the closing attorney should request and obtain a statement from the association as to all past due assessments owed on the unit in order to insure that the new owner is not subject to liability for unpaid assessments, and to avoid the possibility of a lien being filed by the association during the “gap” period. The owner’s affidavit signed by the seller at closing should contain a statement that all assessments owned to the association have been paid in full.

(c) Legal descriptions of units contained in deeds are required to include a description of the land of the condominium or its post office address, the deed book, page and date of the recording of the declaration, the unit number, the use of the unit and any restrictions on use, and the undivided percentage interest in the common areas appertaining to the unit. [Code of Georgia of 1933, Section 85-1611b].

(d) The following provisions of Section 85-1608b(a) and (b) of the Code of Georgia of 1933 as to liens should be considered in the examination: After the condominium is created, no lien shall arise or be effective against the submitted property as a whole. Liens or encumbrances shall arise or be created or effective only against each condominium unit in the same manner and in the same condition as against any other separate parcel of real property. However, labor or services performed or materials furnished for improvement of the common areas, if authorized by the association, subject to other provisions of law, creates a special lien against all of the condominium units. Any unit owner may have such a lien removed from his or her condominium unit and released of record by payment of the amount attributable to the unit (based on its liability for
common expenses) or by filing a bond.

19.4 Time-Share Estates

(a) Where property has been submitted to the Georgia Time-Share Act, O.C.G.A. Section 44-3-160, et seq., (“TSA”), it must be ascertained that the project instruments for the development in which the property is located do not prohibit a time-share program. [O.C.G.A. Section 44-3-165(a)].

Comment: TSA provides that a time-share estate is an estate in real property with the characteristics of an estate in fee simple at common law or an estate for years, if a leasehold. [O.C.G.A. Section 44-3-163(a)]

(b) The examination of title must ascertain that the project instruments and time-share instruments creating the time-share estates are recorded in the county in which the project is located and contain the information required by O.C.G.A. Section 44-3-166.

Comment: O.C.G.A. Section 44-3-166 require that the project instruments and time-share instruments contain:

- Name of the county in which the property is located;
- The legal description, street address, or other description sufficient to identify the property;
- Identification of time periods by letter, name, number or combination thereof;
- Identification of time-share estates and, where applicable, the method whereby additional time-share estates may be created;
- The formula, fraction, or percentage of the common expenses and any voting rights assigned to each time-share estate and, where applicable, to each unit in a project that is not subject to the time-share program;
- Any restrictions on the use, occupancy, alteration, or alienation of time-share intervals; and
- The ownership interest, if any, in personal property and provisions for care and replacement.

19.5 Property Owners’ Association — Not Subject to Statute

Where title to real estate is affected by a declaration of covenants, conditions, and restrictions, all conveyances which occur after such covenants are of record must meet the requirements of the recorded declaration and bylaws (if recorded), and any liens for assessments recorded by the association must be paid in full and satisfied at closing.

Comment: Good practice requires that, if covenants create a mandatory membership homeowners association, the closing attorney should request and obtain a statement from the homeowners association as to all past due assessments owed on the lot in order to insure that the new owner is not subject to liability for unpaid assessments, and to avoid the possibility of a lien being filed by the association during the “gap” period. The
owners affidavit signed by the seller at closing should contain a statement that all assessments owed to the association have been paid in full.

19.6 Property Owners Associations — Georgia Property Owners’ Association Act

(a) Where property has been submitted to the Georgia Property Owners’ Association Act, O.C.G.A. Section 44-3-220, et seq. (“POA”), it must be ascertained that the declaration or an amendment to the declaration meets the requirements of the POA. The property owners association must be incorporated and the corporate name must include the word or words “homeowners,” “property owners,” or “association,” [O.C.G.A. Section 44-3-227]. In addition, the association of owners must be subject to a recorded declaration of covenants upon property, which covenants are administered by a mandatory membership association. [O.C.G.A. Section 44-3-235(a)].

(b) The following provisions of POA pertaining to assessments should be referred to wherever property is subject to POA:

I. Grantees of Property in the association are jointly and severally liable with the grantor for unpaid assessments levied against the property up to the time of the conveyance; however, a holder of a first or secondary purchase money mortgage of record (other than a previous owner) or any other person who acquires title to a condominium unit as a result of foreclosure of a first or secondary purchase money mortgage (other than a previous owner) is not liable for any assessment chargeable to the unit prior to the acquisition of title. [O.C.G.A. Sections 44-3-225(c) and (d)].

II. A lien for assessments under the POA arises automatically, and the recording of the declaration constitutes record notice of the lien; a physical lien is not required. Association liens are superior to all other liens except: (i) liens for ad valorem taxes on the unit; (ii) the lien of any first priority mortgage covering the unit and of any mortgage filed prior to the recording of the declaration; and (iii) the lien of any secondary purchase money mortgage covering the unit unless the grantee or successor grantee on the mortgage is the seller of the unit. [O.C.G.A. Section 44-3-232(a)].

III. The POA provides that an owner, mortgagor, purchaser under contract, or prospective lender may request a statement from the association or its management agent of all past due assessments, late charges, and interest applicable to a lot. The request must be in writing, delivered to the registered office of the association, and include an address for response. If no response is sent within five business days, the lien is extinguished and no longer effective as to title. The information contained in such a statement is binding on the association. [O.C.G.A. Section 44-3-232(d)].
Comment: The closing attorney must obtain from the association a statement of all assessments owed to the condominium association as of the date of closing must be paid at closing. The owner’s affidavit signed by the seller at closing should contain a statement that all assessments owed to the association are paid in full.

The effective date of POA is July 1, 1994.

CHAPTER 20
MEMORANDUM OF LEASE OR CONTRACT

20.1 In General

Where a memorandum of lease or contract or short form lease of record identifies the parties, the terms of the lease, and the property covered, the title examiner should report this information to his client. The examining attorney is not required to ascertain all pertinent facts and conditions of the lease or contract, unless specifically requested to do so by the client.

Comment: However, as a matter of course, the examiner should examine both the Lessor’s chain and the Lessee’s chain whenever a ground lease creating an estate for years is discovered in the examination of title to the captioned property.

CHAPTER 21
BANKRUPTCY

21.1 Scope of Record Search

The examining attorney is not required to examine the records of the Clerk of the United States Bankruptcy Court for the District in which the real property is located. However, if the examining attorney has notice of any proceeding in bankruptcy, he is required to report to his client the effect the bankruptcy has upon marketability of title.

Comment: The examining attorney should routinely require proof at closing that no bankruptcies are pending which may affect title to the property conveyed, and should also include an exception in his certificate. Such proof may be obtained by the execution of an affidavit executed by the selling party. Further, bankruptcy records are easily accessible to the public through the Federal Courts PACER system. If there is any question, the examining attorney may search the PACER system for any related cases.

21.2 Title Through Bankruptcy Debtor or Bankruptcy Estate

(a) Proper Conveyancing Party

The Bankruptcy Code (11 U.S.C. Section 101, et seq.) is divided into various chapters. The most common bankruptcies that an attorney may encounter are filed under
chapters 7, 11, 12 and 13 of the Bankruptcy Code. A chapter 7 case is generally referred to as a “liquidation bankruptcy” because any non-exempt property owned by the Debtor is liquidated by the Chapter 7 Trustee and the proceeds are used to pay creditors. Chapters 11, 12, and 13 are reorganization cases filed by individuals or other entities in an effort to reorganize their debts and pay creditors all or a portion of their debts over a period of time. The examining attorney should first determine the type of bankruptcy filed in order to ascertain that the proper party has executed the conveyancing document in question. Under Chapter 7 and Chapter 11 (in cases where a Chapter 11 trustee has been appointed), the trustee is the proper conveyancing party unless the Chapter 7 trustee has abandoned his interest in the subject property. In Chapter 7 cases where the trustee has abandoned the property, Chapter 11 cases (where no trustee has been appointed) and Chapters 12 and 13 cases (where a plan has been confirmed that did not include a provision that property re-vests in the debtor only upon entry of discharge), the debtor would be the proper conveyancing party. In a chapter 13 case, if the confirmed plan or order confirming the plan does include a provision that property re-vests in the debtor only upon entry of discharge, the trustee would be the proper conveyancing party (11 U.S.C. § 1327(b)).

NOTE: It is also considered good title practice to have the U.S. Trustee, in the case of a Chapter 11, or the Chapter 12 or 13 trustee consent in writing to the sale.

(b) Chapter 7 - Trustee’s Sale

Where a Chapter 7 trustee has conveyed title to subject property, a marketable title subject to general state rights and remedies may be conveyed if there is: (1) an order authorizing the sale of the property properly filed in the bankruptcy case showing that notice was given to all creditors and an opportunity for a hearing to object to the sale was offered; (2) an order appointing an interim trustee by U.S. Trustee or order showing creditors’ election of trustee; (3) proof showing that subject property was “property of the estate” and not otherwise exempted from the “bankruptcy estate.”

Comment: In most Chapter 7 cases filed in Georgia, there will not be an actual order appointing an interim trustee. The trustee is assigned on the “Notice of Chapter 7 Bankruptcy Case” (Official Form 309A).

To find whether the property was properly listed and disclosed in the bankruptcy case, the examining attorney may look to Schedule A filed by the debtor.

In some Chapter 7 cases it may be possible for the debtor to receive a discharge, but for the bankruptcy estate to remain open as the trustee continues to liquidate assets to which he/she still holds legal title.

Although it is considered good title practice to record all relevant bankruptcy court orders, the marketability of the title in the subject property is not affected if such orders or copies thereof are otherwise available to the examining attorney for a period of seven (7) years from the date of the conveyancing document in question.
(c) Chapter 7 - Property Abandoned by Trustee

Where a trustee has abandoned the debtor’s real property to the debtor because the property was burdensome to the estate or of inconsequential value and benefit to the estate, the debtor may convey it to a third party. A marketable title, subject to general state rights and remedies, may be conveyed by the debtor upon: proof showing that the trustee has abandoned the property after notice and hearing and has entered a notice of an abandonment in compliance with Bankruptcy Code rules and local rules, where applicable.

Comment: Many trustees simply make this abandonment part of the taped record of Section 341, First Meeting of Creditors, or as a part of a docket entry, so it is considered good title practice to formalize the abandonment by written notice which provides creditors and other parties in interest an opportunity to object within a specified time period after the filing of the notice, usually fifteen (15) days.

(d) Chapter 7 – Lien Avoidance

Liens which attached to the property prior to the filing of the Bankruptcy proceeding remain a lien upon the property and must be paid or satisfied or released unless the Bankruptcy Court has specifically entered an order avoiding them.

1. Judicial Liens. Judicial liens may be avoided in certain instances in a chapter 7 case. Specifically, a judicial lien may be avoided if it impairs the debtor’s homestead exemption, i.e. if the lien cuts into any equity protected by the homestead exemption. In order for the avoidance to be effective, there must be an order entered by the Bankruptcy Court avoiding the lien after providing notice to the lienholder and an opportunity for a hearing. The lien may be avoided entirely or in part. As such, the examining attorney must review the order carefully to determine what, if any, amount of the lien remains intact and must be paid at closing.

Comment: Although not required, it is best practice to record the Bankruptcy Court’s Lien Avoidance Order, cross-referencing the original lien to put all parties on notice of the status.

2. Consensual Liens. As a matter of general practice, consensual liens are not avoidable in a chapter 7 case. However, for a short time frame, certain consensual mortgages were avoidable in the Eleventh Circuit. In May 2012, the Eleventh Circuit issued its opinion in the case In re McNeal, 735 F.3d 1263 (11th Cir. 2012) which adopted a minority view and held that a wholly unsecured junior lien was voidable in a chapter 7 case. The McNeal decision was later overturned by the United States Supreme Court in the case of Bank of America, N.A. v. Caulkett, 135 S. Ct. 1995 (June 1, 2015), but many cases were filed and completed during that time frame. Accordingly, from May of 2012 through June of 2015, many wholly unsecured junior mortgages were avoided in chapter 7 cases throughout the 11th Circuit by entry of an order of the Bankruptcy Court providing as such.
Comment: If the examining attorney has any indication that a chapter 7 bankruptcy was filed from 2012-2015 in Georgia, Florida, or Alabama, it would be prudent to check the bankruptcy docket for any orders affecting consensual liens on the property.

(e) Chapter 11 - Plan of Reorganization

Marketability is not otherwise impaired by the fact that a debtor’s plan of reorganization contains provisions in it for the sale of real property provided that such plan is confirmed and it authorizes the transaction being reviewed by the examining attorney. Marketability is also not otherwise impaired where a Chapter 11 debtor sells property prior to the confirmation of a plan of reorganization when procedures specified in the Bankruptcy Code and local rules have been followed, including obtaining an order of sale with the requisite prior notice to creditors and an opportunity for hearing.

Comment: Cases filed under Chapter 11 of the Bankruptcy Code, tend to be more complex than cases filed under other Chapters. Consequently, it is difficult and almost impossible to provide an examining attorney with specific rules that can be used when conveyances involve a Chapter 11 case. Again, the best advice is to look at the bankruptcy docket for any motions or orders involving the affected property. If there are any questions, contact the chapter 11 debtor’s attorney or the Unites States Trustee’s Office.

(f) Chapters 12 and 13

Marketability is not otherwise impaired where a Chapter 12 or 13 debtor has conveyed title to property if: the debtor has obtained a final order authorizing the sale after notice to creditors and the opportunity for hearing. In the event of any objections to the sale, the marketability is also not impaired if the bankruptcy court actually conducted a hearing and issued an order approving the sale over any objections and the ten (10) day time period for filing an appeal has expired.

Comment: In Chapter 12, a trustee will be appointed or in some districts there is a standing Chapter 12 trustee. In Chapter 13 cases in Georgia, there is one or more standing Chapter 13 trustees in each district. It is considered good title practice for conveyances out of either a pending Chapter 12 or 13 estate to include the written consent of the trustee to the sale.

Oftentimes, the final order authorizing the sale of the property dictates the distribution of the closing funds. As such, it is considered good practice to review a copy of the bankruptcy court’s order prior to disbursing funds.

(g) Lien Avoidance – Chapter 13.

As in chapter 7, liens which attached to the property prior to the filing of the Bankruptcy proceeding remain a lien upon the property and must be paid or satisfied or released unless the Bankruptcy Court has specifically entered an order avoiding them.
(1) Judicial Liens. Judicial liens may be avoided in chapter 13 cases in the same manner as in chapter 7 cases. Typically, the chapter 13 debtor will file a plan of reorganization which states that the lien will be avoided and then will also file a motion which requires notice and a hearing before the bankruptcy court will enter its order avoiding the lien. Some districts may allow the avoidance to be completed simply through the chapter 13 plan.

(2) Consensual Liens. In chapter 13 cases, consensual junior, or secondary, liens may still be avoided or “stripped” if the value of the house is less than the outstanding balance of the first or senior lien. In order to strip the junior lien, most courts require, at the very least, that a motion be filed giving notice to creditors. However, some courts permit the debtor to include the lien avoidance in the chapter 13 plan. To finalize the lien stripping, the debtor must successfully complete the chapter 13 plan and receive a discharge. If the chapter 13 case is dismissed for any reason, the lien stripping is not effective.

Comment: Just as in chapter 7 cases, although not required, it is best practice to record the Bankruptcy Court’s Lien Avoidance Order or order of Plan Confirmation, cross-referencing the original lien to put all parties on notice of the status.

(h) Discharges

The bankruptcy proceeding typically “discharges” individual debtors from certain types of debts, the actual effect of which is to render certain debt unenforceable against the debtor personally. A discharge does not eliminate the lien on any property not otherwise avoided during the pendency of the estate and thus the marketability may be affected. A discharge has no effect on an un-avoided lien or co-signer’s liability on the debt.

Comment: The examining attorney should be mindful that the debtor may be discharged from the obligation, but if the final order authorizing a sale does not contain the language “free and clear of all liens,” the lien could remain against the property and affect the marketability of title.

(i) Dismissal

It is possible that a bankruptcy case could be dismissed prior to a discharge of a debtor. When this occurs, the property generally reverts to its pre-filing status and marketability is generally not impaired where a conveyance is taken from the debtor subject to general state rights and remedies.

Comment: The examining attorney should routinely require proof at closing that no bankruptcies are pending which may affect title to the property conveyed.
21.3 Title Through Stay Relief Provisions

(a) Express Order

Marketability is not impaired by the fact that title is derived through the foreclosure of a security instrument if it can be determined that: (1) the court ordered stay relief and authorized foreclosure; (2) the creditor, in conducting the foreclosure, complied with the terms of such order; (3) the stay relief order expressly contained the language that the automatic stay is “vacated,” “terminated,” “annulled,” “modified,” or “lifted.”

Comment: Court ordered stay relief can generally take one of two forms: either there was an express order authorizing the sale or provisions were set forth in a confirmed plan of reorganization which may trigger the lifting of the stay automatically upon the happening or non-happening of an event such as the failure to make scheduled payment.

(b) Plan of Reorganization

Marketability is not impaired by the fact that title is derived through the foreclosure of the security instrument if a confirmed Chapter 11 bankruptcy plan provided that the real property could be foreclosed under certain terms and conditions and the examining attorney can verify that these terms and conditions were satisfied.

Comment: The examining attorney should be aware of the constant evolution of bankruptcy law.

(c) Multiple Filings

The Bankruptcy Code limits the applicability of the automatic stay in situations of multiple filings by the debtor. If the debtor files a second case within one year of a previous dismissal, the automatic stay is limited to 30 days after the filing date of the second case, unless extended by specific order of the Bankruptcy Court. If the debtor files a third case after two prior cases were dismissed within the last year, no automatic stay goes into effect, unless ordered specifically into effect by the Bankruptcy Court. In both instances, unless the Bankruptcy Court has entered an order otherwise, the termination or non-existence of the stay is automatic. Please note that, in either situation, the prior case(s) must have resulted in a dismissal, and not any other type of disposition.

Comment: Although, in cases of multiple filings, the termination of the stay automatically occurs by operation of the Bankruptcy Code, it is wise to seek a “comfort order” from the Bankruptcy Court confirming as such prior to completing any act that could be seen as a violation of the stay, such as a short sale or foreclosure.

Comment: If you are relying on the non-existence of the automatic stay due to prior dismissals in the one year preceding the petition date, it is important to carefully examine the docket, and consult with a bankruptcy attorney if necessary. The operative statute, 11 U.S.C. § 362(c)(3)-(4) provides that the stay is in effect if the current case was refiled following a
dismissal under 11 U.S.C. § 707(b) and is filed under a chapter other than chapter 7.

CHAPTER 22
MINERAL RIGHTS

22.1 In General

The title examiner should carefully review and, where still in effect, disclose the existence of:

1. Instruments that reserve or except mineral interests;
2. Instruments that sever surface and mineral rights;

Where the mineral interest has been completely separated from the remainder of the fee simple estate, it should be excepted from the legal description.

Comment: Fee simple title to land includes ownership of all minerals located thereon. A conveyance of real estate transfers the mineral interest unless rights are reserved or there has already been a severance of the surface and mineral estates.

22.2 Rights of Ingress and Egress

Instruments granting or reserving mineral interests often include rights of ingress and egress and possession of so much of the surface as may be necessary for prospecting, extraction, and removal. Even if such rights are not expressly conveyed, they may be implied as necessary to the use and enjoyment of the estate conveyed and should always be identified and disclosed to the owner of the surface estate.

22.3 Non-Use of Mineral Rights

Mineral interests conveyed or reserved by deed or other instrument are not normally lost by mere non-use, regardless of the period of time, and adverse possession of the surface alone will not bar outstanding claims to minerals. However, O.C.G.A. Section 44-5-168 provides a statutory bar of mineral rights where the mineral owner or such owner’s assigns have neither worked nor attempted to work the mineral rights nor paid taxes due thereon for a period of seven years if a civil action has been filed in accordance with this Code Section and has been successfully concluded in favor of the petitioner.

Comment: The Georgia Mineral Lapse Statute, O.C.G.A. Section 44-5-168, is not an automatic remedy for outstanding mineral interests. A legal proceeding is required. Where a judgment or decree terminating a mineral interest is found, thorough examination of the case is necessary in order to ascertain that all statutory requirements have been satisfied. The statutory bar does not apply to a mineral lease for a specific number of years nor can it affect a lease to a “licensed mining operator.”

71
CHAPTER 23
LAND REGISTRATION PROCEEDINGS

23.1  In General

Where the examining attorney finds marketability of title dependent on a land registration proceeding, he must check the proceeding to see that it strictly complies with the Code provisions. If after careful examination, the examining attorney is satisfied that all such requirements have been complied with, such registration may be relied upon as a root or start for the title search.

Comment: The purpose of the Land Registration Law enacted in 1917, (O.C.G.A. Sections 44-2-40 through 253) (the “Act”), sometimes referred to as the Torrens Act, is to provide a vehicle whereby an owner can judicially establish the marketability of the title to the owner’s land. One unique provision of the original Act is that once registered, all transactions relating to the ownership of the registered land are to be entered upon the “Certificate of Title” by the Clerk of the Superior Court, rather than in the real estate indexes and other dockets maintained by the Clerk. By Georgia Laws 1952, Pages 164, 165, (O.C.G.A. Section 44-2-144) a decree of registration rendered on or after February 15, 1952, shall operate to free the registered land from further registration unless the decree expressly provides that the land shall remain subject to the Act.

Consequently, as to decrees of registration entered prior to February 15, 1952, the examiner must first examine the “Register of Decrees of Title” to determine the beginning link in the chain of title and the “Title Register” to determine all subsequent transactions involving the land. If the decree of registration is subsequent to February 15, 1952 and provides that the land is freed from further registration, the examiner must examine the general real estate indexes and other applicable dockets forward from the date of the decree.

By Georgia Laws 1989, Page 563 (O.C.G.A. Section 44-2-141), effective April 4, 1989, registered land and ownership therein “shall be subject to the same rights, burdens, and incidents as unregistered land ...” and registered land may be dealt with by the owner “in the same manner as if it had not been registered.” The examiner must examine the general real estate indexes and other applicable dockets forward from April 4, 1989 in addition to the Register of Decrees of Title and Title Register as to any registered title which has not been freed from further registration.

As in any judicial proceeding, to establish marketability of title to land, the examiner is cautioned that the interest of a person who was not a party to a land registration proceeding or who did not receive legal notice of such proceeding is not divested, and such fact should be reported.
CHAPTER 24
OPINIONS AND CERTIFICATES OF TITLE

24.1  Opinion as a Duty of Title Attorney

Under the laws of Georgia, one of the functions of an attorney and one of the definitions of the “practice of law” is the rendering of opinions as to the validity or invalidity of titles to real or personal property derived and concluded from the examination of necessary records made, or caused to be made by the attorney. This does not necessitate the title attorney personally examining the record books, but does necessitate the attorney’s responsibility for all record searches authorized by or purchases by said attorney in the fulfillment of said attorney’s title opinion contract with the client. No person under the laws of Georgia, other than an attorney at law, may express, render or issue any legal opinion as to the status of the title to real or personal property.


24.2  Duty to Inform Client of Certificate Exceptions Which Can be Insured Over by Title Insurers

Exceptions in title certificates such as indexing errors of governmental personnel, forgeries, non-record violations of truth-in-lending laws, matters of survey and actual notice of title defects to owners of record, should be brought to the attention of the client in order that the client may make the decision to obtain title insurance in addition to the certificate of title or to waive same.

24.3  Actual Knowledge of Title Defects Which Do Not Appear on Court or Government Records

Any actual knowledge the examining attorney may have of a title defect such as a fence encroachment, occupancy and possession of the property involved, or adverse claims made to the attorney orally or in writing, take precedence over non-record notice, and the title opinion or certificate must reflect these exceptions resulting from actual knowledge of the title attorney.

24.4  Mistakes of Court Record Clerks

The title opinion or certificate should except to errors and omissions of court clerks and court employees and as to matters incorrectly indexed or incorrectly recorded in the public records.

Example: This certificate excepts to errors and omissions of court clerks and court personnel and matters incorrectly indexed or incorrectly recorded in the public records.
24.4 Title Rejection or Turning Down the Title as Not Being Marketable or Insurable

The title opinion which rejects a title or turns one down as being unmarketable or uninsurable should be backed up with citations from the O.C.G.A. or from Georgia case law that pertains to the defect to marketability or insurability. This is essential for the attorney’s own protection. Statements that the title is unmarketable without legal support would be unprofessional.

CHAPTER 25
ENVIRONMENTAL ISSUES

25.1 In General

The title examiner must review the index for state environmental matters related to real property as well as federal environmental liens. The following matters discussed in Sections 25.2 and 25.3 affect the marketability of title.

25.2 The Hazardous Site Response Act

The Hazardous Site Response Act (O.C.G.A. Section 12-8-90 et seq.) requires the Georgia Environmental Protection Division of the Department of Natural Resources to inventory all known or suspected sites where hazardous wastes, hazardous constituents or hazardous substances (“Hazardous Materials”) have been disposed of or released. This inventory is known as the Hazardous Site Inventory. The Georgia Environmental Protection Division is required to annually send a copy of the inventory of sites listed by county to the clerk of each superior court of the state. A copy of the most current inventory is maintained in the room in which the deeds of records of the county are kept.

Comment: O.C.G.A. Section 12-8-97(a) requires the annual filing of the Hazardous Site Inventory to begin July 1, 1994.

The Hazardous Site Response Act requires that the owners of any property listed on the Hazardous Site Inventory that is designated as having a known release and needing corrective action due to the presence of Hazardous Materials provide record notice of this fact. Notice must be provided on the deed, mortgage, deed to secure debt, lease, rental agreement, or other instrument given by the property owner which creates an interest in or grants a use of the property. The owners of property are also required to file a recordable affidavit (pursuant to O.C.G.A. Section 44-2-20) with the Clerk of the Superior Court of each county in which the property or any part of the property is located. This affidavit will include a statement that the property has been listed on the Hazardous Site Inventory that is designated as having a known release and needing corrective action due to the presence of Hazardous Materials.

Comment: Neither the notice nor the affidavit of the property owner has to be filed until any contest under O.C.G.A. Section 12-8-97(f) has been resolved adversely to the
property owner. See O.C.G.A. Section 122-8-97(c).

25.3 Comprehensive Environmental Response, Comprehensive, and Liability Act of 1980

Section 107(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA;” 42 U.S.C. Section 9607) provides that the United States Environmental Protection Agency can file a notice of a lien on all real property belonging to an “owner” or “operator” for all costs and damages for which the “owner” or “operator” is liable to the United States. The notice of the lien is filed in the clerk’s office in the superior court in the county where the property is located and recorded in the same manner as deeds.

CHAPTER 26
SURVEYS

26.1 In General

Surveys, whether recorded or not, are very helpful aids in title examination and every reasonable effort should be made by the examining attorney to obtain copies of unrecorded surveys mentioned in deeds. Frequently, surveys reveal matters existing on the property which are not apparent from an examination of the instruments in the chain of title. For example, surveys may reveal the existence of fences which do not follow boundary lines, the existence of cemeteries, the existence of roadways and easements crossing the property which were not dedicated or deeded by instruments in the chain of title and the location of the improvements on the property or adjoining properties which may create encroachments and give rise to adverse possession claims. In addition to the platted boundary lines, surveys often contain notes and comments by surveyors which are helpful in ascertaining matters of title which may not appear in recorded documents in the chain of title.

Comment: Sometimes notes and comments made by surveyors are ambiguous and the surveyor should be consulted, if possible, to clarify the meaning of any notes or comments. For example, a survey containing the comment “title matters excluded” gives rise to the question as to whether the surveyor has fully revealed all easements and encroachments which may actually exist on the ground and would be observable by the surveyor.

26.2 Surveys Which Meet Minimum State Requirements for Recordation

O.C.G.A. Section 15-6-67 sets forth the statutory requirements for recordation of maps and plats in the State of Georgia. In summary this Code Section deals with the size and quality of maps and plats. For example, the Act requires that maps and plats bear a title or name in the caption, a statement as to the county, city, town, land district, land lot and subdivision in which the property lies, the date of plat preparation, the scale of the plat, the name of the land surveyor and registration number, the reference to a monumented point of beginning and like matters. These standards are helpful in judging
the quality of surveys in general and if surveys being reviewed by an examining attorney do not meet these standards, then it may suggest additional inquiry of the surveyor.

26.3 As-Built Surveys

Surveys which are labeled “as-built” generally purport to show in great detail the location of all improvements located on the surveyed property. A survey which does not bear the designation “as-built” does not necessarily purport to show these matters and would suggest additional inquiry as to the location of improvements which might be located on such property.

Comment: Certain minimum standard requirements have been jointly developed by the American Land Title Association and the American Congress on Surveying and Mapping. If title insurance is being obtained in connection with a title examination and a survey made in connection with the purchase or mortgaging of the property, then these standards should be consulted. Copies of these standards can be obtained from all title insurance companies. Title insurance companies customarily require surveyors to answer questions on a form called “Surveyor’s Inspection Report” in those cases in which the title insurance company is being asked to insure as to matters of survey.

26.4 Composite Surveys

Surveys which are labeled “composite surveys” or “composite plats” or like terminology do not purport to be surveys made in the field. Such surveys are maps prepared by a surveyor based on other surveys and/or deed descriptions for the purpose of showing an assembly of properties. These surveys are extremely helpful to an examining attorney in examining title to multiple contiguous properties, but should not be relied upon as to matters actually existing in the field and on the ground.

CHAPTER 27
MARITAL RIGHTS TO REAL PROPERTY

27.1 In General

The marital relationship creates an equitable interest in both spouses in all property accumulated during the marriage regardless of how it is titled. [Stokes v. Stokes, 246 Ga. 765, 273 S.E.2d 169 (1980)]. Marital property is to be distinguished from separate property, which is defined as that brought into the marriage, or gifted, inherited, bequested or devised. Georgia has no statute which specifically addresses the issue of when rights to marital property vest.

27.2 Third Party Interests

(a) As to third parties, the doctrine of equitable distribution of marital property should be construed as creating no interest or title in property until an order is entered defining such interest or approving a separation agreement which defines such interest or
until a petition for divorce or separate maintenance is filed with a notice of lis pendens, as provided for by Code Section 44-14-610, being filed in the office of the clerk of superior court of the county in which the real property is situated and recorded by the clerk in a book kept by him for that purpose. A husband or wife may alienate real property any time prior to entry of an order as defined above, prior to recordation of a notice of lis pendens, or prior to the filing of a suit for divorce or separate maintenance.

Comment: See O.C.G.A. Section 19-5-7; Goodman v. Goodman, 254 Ga. 703, 334 S.E.2d 179 (1985); Goodman v. Goodman, 253 Ga. 281, 319 S.E.2d 455 (1984). A divorce decree declaring title to be vested in the husband or wife is sufficient to vest title without the need of a deed provided the decree contains a sufficient description of the property. If the decree calls for a deed, but does not contain vesting language, then one must be obtained.

(b) Even absent recordation of a lis pendens, one should obtain both spouses’ signatures on real property transfers which occur during the pendency of a divorce or separate maintenance action.

Comment: Georgia law provides that “pending final determination by the court of the right of either party to alimony, neither party shall make any substantial change in the assets of the parties’ estate except in the course of ordinary business affairs and except for bona fide transfers for value.” See O.C.G.A. Section 19-6-1(e).

CHAPTER 28
REAL PROPERTY FORFEITURE

28.1 “Relation Back”

An examiner’s certificate of title should take exception to any possible future forfeiture of title as a result of any possible prior criminal act under federal or state law by any party in the chain of title.

Comment: Real property which is the “proceed” of certain federal and/or state criminal activity or which is used to “facilitate” certain federal and/or state criminal activity does at the occurrence of this criminal activity become the property of the federal and/or state government under a legal fiction called “relation back.”

This fiction can place the interests of the federal and/or state government prior to the interests of lienholders or transferees of real property interests without the recordation of the government’s interests on the Record. Statutes, case authority and government policy, however, provide a measure of protection to “innocent owners” and/or bona fide purchasers for value.

See: 18 U.S.C. Sections 2253(b) and 2254(g) (sexual exploitation of minors); 18 U.S.C. Sections 981(f) and 982(b)(1) (money laundering/FIRREA violations); 21 U.S.C. Sections 833(c) and 881(h) and O.C.G.A. Section 16-13-49(e)(5) (controlled substance violations); and 18 U.S.C. Sections 1961, 1962 and 1963(l) and O.C.G.A. Section 16-14-7
(racketeer influenced activities and/or corrupt organizations).

The vesting of title under this doctrine is not self-executing. [United States v. A Parcel of Land (92 Buena Vista Avenue), 113 S. Ct. 1126 (1993), relating to civil, not criminal, forfeiture.] The claimant who has failed to record his lien may have “hard sledding” but he is not as a matter of law foreclosed from pursuing his claim. [Hallman v. State, 141 Ga. App. 527, 528, 233 S.E.2d 839 (1977)].

CHAPTER 29
CONVEYANCES BY AND TO TRUSTEES

29.1 Verification of Existence of Trust and Authority of Trustee

When title comes out of a conveyance by a trustee, reference should be made to the trust indenture, in order to verify that the trust is not fully executed or otherwise terminated, and that title therefore continues to reside in the trustee, and has not passed from the trustee to the beneficiary or other party.

Reference must also be made to the trust indenture to verify that the trustee is in fact duly appointed and qualified, and that he/she has the authority to execute the particular instrument in question. The examiner must further ascertain the ability of the named trustee to serve as a trustee under Georgia law.

Generally, such verification as to existence of the trust and authority of the trustee must be made by reference to facts or documents outside the record. It is recommended, therefore, that attorneys make every effort to place such instrument on the record in the future as will aid title examiners in ascertaining the facts.


29.2 Effect of Designation “Trust” and “Trustee”

A deed or other instrument of conveyance must state that title is conveyed to a “party, as trustee,” and not to the “trust” in and of itself, as only a trustee, and not the trust, is authorized to hold legal title. A deed or instrument must state that title is conveyed to a “party, as trustee,” and not to a “party, trustee.”

Comment: “Georgia Trust Act,” O.C.G.A. Sections 53-12-1 et seq. [See in particular: definitions of “Trust” and “Trustee” at Section 53-12-2, “Capacity of Trustee” at Section 53-12-24, and “Creation of Beneficial Interest in Property by Deed” at Section 53-12-51]. See Standard 8.1, supra.

A deed or other instrument of conveyance found in the record and executed after July 1, 2018 in which a trust is named as grantee may be deemed to be a transfer made to
the trustee as though the trustee of such trust had been named as grantee instead of the trust and does not require correction for marketability. Correction of the instrument to properly convey title to the trustee is however recommended, as only a trustee, and not a trust, is authorized to hold legal title. The attorney should not interpret the 2018 amendment to the cited code section as contrary to the standard of conveying title to a “party, as trustee” when preparing a deed or other instrument of conveyance.


29.3 Trust Established In Accordance With Provisions of “Testamentary Additions to Trust Act”

In reviewing marketability of conveyances by trustees, an examining attorney must keep in mind where applicable the provisions of the “Testamentary Additions to Trusts Act” (O.C.G.A. Sections 53-12-70 through -74).

Comment: Under the provisions of this Act, a devise or bequest in a will of a testator dying on or after May 31, 1968, may be made to the trustee or trustees of a trust established or to be established by the testator or by the testator and some other person or persons or by some other person or persons, if the trust is identified in the testator's will and its terms are set forth in a written instrument, other than a will, executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator. The devise or bequest will not be invalid because the trust is amendable, revocable, or both or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator’s will provides otherwise, the property so devised or bequeathed shall not be deemed to be held under a testamentary trust of the testator but shall be administered and disposed of in accordance with the provisions of the instrument or trust setting forth the terms of the trust.

CHAPTER 30
ASSESSMENTS FOR GOVERNMENTAL IMPROVEMENTS AND SERVICES

30.1 Equal Rank With Ad Valorem Tax Liens

Service assessments for governmental improvements (paving, sidewalk, curbing, etc.) or services (water, sanitation, sewer, etc.) have equal rank with ad valorem tax liens and are not extinguished by foreclosure.

30.2 Lien Against Property Served

A supplier of water, gas, sewerage or electricity shall not impose a lien against real property for unpaid charges unless the owner is the person who incurred the charges. These special assessments are chargeable only against the property served or benefited and are not general liens against the owner.

Comment: The first sentence is based upon O.C.G.A. Section 36-60-17, which became effective April 19, 1994. See Clarke v. Mayor and Council of Millen, 187 Ga. 185, 200 S.E. 698 (1938); Brumby v. Harris, 107 Ga. 257, 33 S.E. 49 (1899); Norman v. City of Moultrie, 157 Ga. 388, 121 S.E. 391 (1923).

30.3 Date of Attachment

Subject to specific legislation, assessments for improvements attach from the date of adoption of the ordinance authorizing the improvement.


30.4 Expiration

In the absence of an entry upon the General Execution Docket, the assessments expire seven years after attachment.

Comment: See O.C.G.A. Sections 48-3-21 and -22; City of McRae v. Folsom, supra; Sharpe v. City of Waycross, 185 Ga. 208, 194 S.E. 522 (1937).

CHAPTER 31
FEDERAL TAX LIENS

31.1 In General

Marketability of title is adversely affected by the General Federal Tax Lien, which is discussed in Sections 31.2 through 31.11, the Federal Estate Tax Lien, discussed at Section 31.12(a) and the Federal Gift Tax Lien, discussed at Section 31.12(b).

31.2 Applicability of Federal Tax Lien

The federal tax lien arises under Section 6321 of the Internal Revenue Code (hereinafter, the “Code”). The federal tax lien may be imposed against any “person”: (whether an individual, trust, estate, partnership, association, company or corporation) with respect to unpaid federal taxes.
Comment: When used in this Chapter, “federal tax lien” refers to the “general” federal tax lien imposed with respect to income taxes, employment taxes and various excise taxes. The Code is codified at 26 U.S.C. Section 1 et seq. “Person” is defined in Section 7701(a)(1) of the Code, and includes the categories listed in the above parenthetical. Although a general or limited partnership, as well as a Subchapter S corporation can have no liability for unpaid income taxes, such entities may be liable for failure to pay employee withholding taxes or excise taxes and, consequently, can be subject to federal tax liens.

31.3 Creation and Attachment

The federal tax lien is created by Section 6321, which provides that:

“If any person liable to pay any tax neglects or refused to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be alien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.”

The above Section 6321 language can be broken down into three separate components, as follows: (a) assessment of an unpaid tax liability (I.R.C. Section 6203), (b) notice and demand for payment (I.R.C. Section 6303) and (c) non-payment by the Taxpayer (I.R.C. Section 6321).

The first requirement, “assessment,” is the simple administrative act by the Service of entering in its records that a particular liability is due and payable from a Taxpayer. (I.R.C. Section 6203). The second element, notice and demand, is governed by Section 6303, which requires that the Service must, as soon as practicable within 60 days after an assessment is made, notify each person liable for the unpaid tax of the amount due and make formal demand for payment. Despite the 60-day grace period, notice of an assessment is generally given at the same time as the effectiveness of the assessment. A Form 4340 (Certificate of Assessments and Payments) is typically used by the Service. The third element, non-payment, is addressed by Section 6321 itself, as set forth above. No time period for payment is set forth in the statute.

The lack of a time period for payment is irrelevant in light of section 6322, which provides that the tax lien attaches “at the time the assessment is made.” This date is reflected on both the Certificate of Assessments and Payments (Form 4340) and the Notice of Federal Tax Lien (Form 668(Y)). Because of its capacity to “relate back” to a date prior to notice and demand for payment, the federal tax lien is sometimes referred to as the “secret lien.”

Comment: The term “Service” is used generically in this Chapter to refer to the Internal Revenue Service or the Secretary of Treasury (or his designee). The Code often empowers the Secretary of Treasury or his designee to perform various acts which, as a practical matter, are performed by the Internal Revenue Service.
There are a number of cases which address the sufficiency of notice and demand under Section 6303. In general, courts have been extremely pro-Service with respect to what constitutes sufficient notice and demand for payment.

31.4 Perfection

(a) Notice of Federal Tax Lien. The federal tax lien is choate and valid against the interest of the Taxpayer as soon as the elements discussed above (i.e., assessment, notice/demand and non-payment) have been completed. Pursuant to Section 6323(a), however, the federal tax lien is not valid against a “purchaser, holder of a security interest, mechanic’s lienor or judgment lien creditor” until a Notice of Federal Tax Lien (an “NFTL”) has been filed of record in the appropriate office. The NFTL filing requirement is consistent with the general rule of “first in time, first in right” with respect to competing interests in property. The form which is currently used by the Service is Form 668(Y) (Notice of Federal Tax Lien under Internal Revenue Laws).

Comment: The required elements of the above categories are set forth in Section 6323(h) of the Code and are discussed in Section 31.8, infra.

(b) Place of Filing. With respect to real property, the location for filing the NFTL is governed by state law. Section 6323(f)(1)(A)(i) provides that the state in which real property is located must designate the appropriate location for filing of the NFTL. Federal tax lien filing procedures in Georgia are governed by O.C.G.A. Sections 44-14-570 through 574. Georgia NFTLs are filed with the Clerk of the Superior Court for the county in which the property is located, in either a special lien book or in the general execution docket (O.C.G.A. Section 44-14-571).

(c) Contents of NFTL. Section 6323(f)(3) provides that the Service may prescribe the proper form and content of an NFTL. Such form is deemed to be valid, notwithstanding any other provision of law regarding the required form or content of a notice of lien. Accordingly, a properly completed and recorded Form 668(Y) is effective to perfect the federal tax lien.

The NFTL need not (and does not) identify particular property interests to be attached. With respect to Georgia real property, the filing covers all real property and interests in real property of the Taxpayer located in the county in which the NFTL is filed.

Comment: Litigation has arisen over inaccuracies in the name of the taxpayer as the same appears on the NFTL. Minor discrepancies, such as the failure to include a full name or errors, omissions or substitutions in a name are not fatal. See e.g., U.S. v. Sirico et al., 247 F. Supp. 421 (D.C. N.Y. 1965). The test is whether there is substantial compliance sufficient to give constructive notice. Id. at 422.

31.5 Property To Which Lien Attaches

The lien attaches to “all property and rights to property, whether real or personal,
belonging to (the Taxpayer).” (I.R.C. Section 6321). With respect to real property interests, state law determines whether the Taxpayer has property or property rights to which the lien may attach. Moreover, any property acquired by the Taxpayer after the date of the assessment is immediately attached by the lien, without the need for further action by the Service.


With respect to joint tenancies, the federal tax lien attaches only to the taxpayer’s interest in the property, not to the property itself. With respect to joint tenancies with right of survivorship, the death of the taxpayer/joint tenant extinguished the general federal tax lien.


In Georgia, general partners are jointly and severally liable for all debts and obligations of a general partnership (O.C.G.A. Section 14-8-15, as well as a limited partnership [O.C.G.A. Section 14-9-403(b)]. Accordingly, federal tax liens for the tax liability of a Georgia general or limited partnership attach not only to partnership property, but also to property owned individually by the general partner. To take advantage of the foregoing provisions, partnership NFTL’s generally also list the names of all known general partners.

Comment: The general partner’s liability, however, only extends to liabilities which arose when the general partner was a general partner of the partnership. See Lidberg v. U.S., 375 F. Sup. 631 (D.C. Minn. 1974); In re: Robby’s Pancake House of Florida, Inc., 24 B.R. 989 (Tenn. 1982).

31.6 Duration of NFTL Filing

The NFTL must be refilled during the one-year period ending on the date which is ten years and 30 days after assessment of the tax on any assessment made on or after November 5, 1990. Any lien which had not expired on November 5, 1990 will be effective for ten years and 30 days after the date of assessment [I.R.C. Section 6323(g)(3)]. The last day of the refiling period is specified on the NFTL form.

Form 668(Y) provides on its face that, unless the NFTL is refilled by the required date, the form serves as a Certificate of Release pursuant to Section 6325(a) and the lien is automatically released (but see the preceding paragraph concerning extension of certain liens). The NFTL must be refilled in the place where it was originally filed. (I.R.C. Section 6323(g)(2)(A)). If the Taxpayer has notified the Service of a change of address at least 90 days prior to the actual refiling of the NFTL, the Service must also refile the NFTL in the appropriate place for the taxpayer’s new address [I.R.C. Section 6323(g)(2)(B)].
The federal tax lien may be limited, released, satisfied or subordinated by the following certificates, all of which should be filed in the same county office where the NFTL was initially filed. All such certificates are conclusive as to the matters set forth therein [I.R.C. Section 6325(f)(i)].

(a) **Certificate of Release.** When the tax liability has been satisfied or an appropriate bond has been issued, the Service is required pursuant to Section 6325(a) to issue a Certificate of Release of Lien. The form currently used by the Service is Form 668(Z). In addition, if a NFTL has been erroneously filed, a Certificate of Release of Lien may be obtained by the Taxpayer pursuant to Section 6326(b).

(b) **Certificate of Nonattachment.** When an NFTL identifies the wrong person as the Taxpayer, the incorrectly identified person may seek issuance of a Certificate of Nonattachment pursuant to Section 6325(e). The certificate provides that the lien does not attach to the property of such person.

Comment: The most typical instances are when two people have the same name or when a general partner is being charged for liabilities of a partnership incurred after his withdrawal as general partner.

(c) **Certificate of Discharge.** In certain situations, the Service may elect to release particular property from a federal tax lien, without extinguishing the lien itself. In such situations a Certificate of Discharge is filed pursuant to Section 6325(b). The Service currently uses Form 669-A, Certificate of Discharge of Property from Federal Tax Lien.

(d) **Certificate of Subordination.** In certain situations, the Service may agree to subordinate its federal tax lien on specific property, Section 6325(d) sets forth the limited situations in which the Service may take such action. The forms currently used by the Service for subordination are Forms 669-D, 669-E, and 669-F.

### 31.8 Priority

As discussed above, Section 6323(a) provides that the federal tax lien is not valid against purchasers, holders of security interests, mechanic’s lienholders or judgment lien creditors until the NFTL is properly filed. These four categories of interest must be “perfected” pursuant to applicable Code definitions in order to have priority over the federal tax lien. Applicable Code requirements are as follows:

(a) **Purchaser.** A purchaser is defined as a person “who, for adequate and full consideration in money or money’s worth acquires an interest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers without actual notice.” [I.R.C. Section 6323(h)(6)]. Adequate and full consideration is consideration which bears a reasonable relationship to the true value of the acquired interest. [Treas. Reg. Section 301.6323(h)-1(f)(3)]. An “interest” in property expressly
includes (i) a lease, (ii) a written executory contract to purchase or lease, (iii) an option to purchase or lease and (iv) an option to renew or extend a lease [I.R.C. Section 6323(h)(6)].

(b) Mechanic’s Lienor. Section 6323(h)(2) defines a mechanic’s lien as a lien which arises under local law on real property for services, labor or materials furnished for the construction, improvement or demolition of the property. The mechanic’s lien attaches on the earliest date on which the lien was valid under local law against subsequent purchasers of the property who lack actual notice of the lien, but not before the date on which the services, labor or materials were supplied [I.R.C. Section 6323(h)(2)].

Under Georgia law, a properly and timely filed mechanic’s lien “relates back” to the date on which services were commenced, even if the lien is subsequently filed (See O.C.G.A. Section 44-14-361]. Accordingly, an NFTL which is filed before a mechanic’s lien, but after the effective date of the mechanic’s lien (i.e., the date on which services were commenced or materials were provided) does not prevail over the mechanic’s lien.

(c) Holders of a Security Interest. Section 6323(h)(1) defines a security interest as any interest in property which is acquired by contract for the purpose of securing payment or performance of an obligation or for indemnifying against loss or liability. The definition is broad enough to include a Georgia security deed.

In order to be entitled to priority against a subsequently filed federal tax lien, all of the following events must have occurred prior to the filing of the NFTL: (i) a written contract regarding the security interest must have been executed; (ii) the holder of the security interest must have parted with money or money’s worth, (iii) the property must be in existence and the interest must be protected under local law against a subsequently perfected judgment lien arising out of an unsecured obligation [I.R.C. Section 6323(h)(1); Treas. Reg. Section 301.6323(h)-1(a)(1)].

Accordingly, so long as the secured party has “parted with money or money’s worth,” a properly filed and recorded Georgia security deed will have priority over a federal tax lien evidenced by a subsequently filed NFTL.

(d) Judgment Lien. The regulations define a “judgment lien creditor” as a person who has “obtained a valid judgment in a court of record and of competent jurisdiction, for the recovery of specifically designated property or for a certain sum of money.” The Regulations also require that the judgment lien must meet the following three part test: (1) the identity of the lienholder must be certain; (ii) the identity of the property subject to the lien must be known; and (iii) the demand of the lien must be established. In addition, the lienholder must record the judgment if such action is required for perfection under local law [Treas. Reg. Section 301.6323(h)-1(g)].
31.9 “Semi-Super” Priority

Four types of security interests have priority over previously filed federal tax liens in certain limited circumstances. Two of the four types of security interests can relate to real estate, as follows:

(a) **Real Property Construction or Improvement Financing Agreements.** A “real property construction or improvement financing agreement” is an agreement to make cash disbursements to finance the construction or improvement on real property, or to finance a contract for such work [I.R.C. Section 6323(c)(3)]. In order to qualify, (i) the financing agreement must be a written agreement which was entered into prior to the filing of the NFTL, [I.R.C. Section 6323(c)(1)(B)], and (ii) the security interests claiming semi-super priority must be protected under local law against a judgment lien arising out of an unsecured obligation as of the time of the NFTL filing. [I.R.C. Section 6323(c)(1)(B)]. The property covered by the priority is limited to the property being constructed or improved [I.R.C. Section 6323(c)(3)(B)].

(b) **45-Day Disbursements.** Section 6323 also gives protection to a security interest created by disbursements made within 45 days after the filing of the NFTL in property existing at the time of the NFTL filing. As with the real property improvement exception, (i) the financing agreement must be a written agreement which was entered into prior to the filing of the NFTL [I.R.C. Section 6323(c)(1)(B)] and (ii) the security interest must be protected under local law against a judgment lien arising out of an unsecured obligation as of the time of the NFTL filing [I.R.C. Section 6323(c)(1)(B)].

31.10 Super Priorities

Certain interests are entitled to priority over the federal tax lien regardless of when such interest arises. Of these various “super priority” exceptions, only two are relevant to Georgia real property, as follows:

(a) **Unpaid State Taxes and Assessments.** Section 6323(b)(5) grants priority over perfected federal tax liens to certain real property law liens which, under local law, have priority over senior perfected security interests in the same property. The liens eligible for this super priority status are limited to those which secure (i) tax of a general application based on the value of real estate, (ii) a special assessment on the property to cover the cost of public improvements or (iii) charges for utilities or public services furnished to the property by a governmental instrumentality [I.R.C. Section 6323(b)(6)].

(b) **Residential Property Improvements.** There is a limited super priority exception for mechanic’s liens up to $1,000 relating to work on residential property. To qualify for the exception, (i) the property must be occupied by the owner and must not contain more than four dwelling units, (ii) the lien must arise from the repair or improvement of the property and (iii) the contract price must be less than $1,000 [I.R.C. Section 6323(b)(7)].
31.11 Special Rules Relating to Foreclosure of Real Property Encumbered by Federal Tax Lien

SEE SECTION 17.4 SUPRA FOR PROCEDURE FOR DIVESTING PROPERTY IN FORECLOSURE OF FEDERAL TAX LIEN.

31.12 Special Rules for Estate Tax Lien and Gift Tax Lien

(a) Estate Tax Lien. The estate tax lien is a special lien which secures the payment of federal estate tax obligations and is administered pursuant to Section 6324(a). The estate tax lien attaches at the date of the decedent’s death to all of the gross estate and remains in effect for a period of ten years from the date of death. The estate tax does not require an assessment prior to attachment. The Service need not file a notice of estate tax lien to make the estate tax lien effective against most interests. In a limited number of cases, Section 6324(a) may afford protection to “purchasers” and “holder(s) of a security interest” in the liened property by providing that the lien is divested upon transfer to either such entity, and the lien thereafter attaches to the property of the transferor. In most cases, however, the estate tax lien should be accounted for by a determination of the tax and evidence of final payment, or by a special release of the particular property issued by the Service. The estate tax lien is not valid against mechanic’s liens or the “super priority” liens discussed in Section 31.10, supra.

Comment: The “ambiguous phraseology” utilized in I.R.C. Section 6324(a) purporting to divest the lien as against transferees has never been construed by the courts, and estate property subject to the estate tax lien is still regarded as unmarketable. See Pindar & Hinkel, Georgia Real Estate Law and Procedure, Section 26-90 (5th ed. 1998). (This section was revised effective August 18, 2005 to add the underlined language in the fifth and sixth sentences and to add the Comment.)

(b) Gift Tax Lien. The gift tax lien attaches (to the property transferred) at the time of the gift and exists for a period of ten years, unless the tax is satisfied or becomes unenforceable by the lapse of time. As with the estate tax lien, notice of the lien need not be filed in order to perfect the lien against most interests. The gift tax lien is not valid against mechanic’s liens or the “super priority” liens discussed in Section 31.10, supra. The gift tax lien is subject to divestment upon transfer of the gifted property to a purchaser or the holder of a security interest. The lien, however, then becomes a lien on all of the donee’s property.

CHAPTER 32
COMMERCIAL REAL ESTATE BROKERS’ LIENS

32.1 Examiner’s Exception for Brokers’ Lien for Commercial Property

Absent (i) proof in affidavit form from both the seller and the purchaser identifying all agreements with commercial real estate brokers for management, sale, lease or other licensed services with respect to the subject property, and (ii) receipt of lien waivers from each identified commercial real estate broker, a title examiner should reflect an excepting
Comment: “Commercial real estate” is defined a “…any real estate other than real estate containing one to four residential units; real estate on which no buildings or structures are located and which is not zoned for nor available for commercial, multifamily, or retail use; or real estate classified as agricultural for tax assessment purposes. Commercial real estate shall not include single-family residential units such as condominiums, townhomes, mobile homes, or homes in a subdivision when sold, leased, otherwise conveyed on a unit by unit basis even though these units may be part of a larger building or parcel of real estate containing more than four residential units.” O.C.G.A. Section 44-14-601(3).

32.2 Escrow Funds to Dissolve Lien

A claim for lien filed within one year prior to the date of certification of title for which no lien waiver has been obtained, must be handled by an escrow or other procedure if sufficient proceeds from the instant transaction will be available to transferor, whereupon the lien of the broker shall dissolve, without the need for further lien waivers.

Comment: See O.C.G.A. Section 44-14-604.

CHAPTER 33
RTC TITLE ISSUES

Introductory Comment: This Chapter is applicable only to title issues relating to real property assets of a failed federal savings and loan association (“Failed Association”) in which the Resolution Trust corporation (“RTC”) has been appointed as the receiver or conservator by the Office of Thrift Supervision, U.S. Department of Treasury (“OTS”), by operation of law pursuant to the provisions of the Financial Institutions, Reform, Recovery and Enforcement Act of 1989, enacted August 9, 1989 (“FIERREA”). The appointment of the RTC as conservator or receiver is documented by OTS Orders, which Orders also evidence the transfer of assets, by operation of law, from the Failed Association to RTC, as receiver for the Failed Association, and, in a majority of instances, evidence the creation of a pass-through receivership, whereby a newly-chartered federal association (a “Bridge Association”) is formed by OTS; simultaneously therewith, the OTS will appoint the RTC as conservator for the newly-chartered Bridge Association, into which the assets of the Failed Association are transferred by virtue of a Purchase and Assumption Agreement (“P&A Agreement”). In rare circumstances, certain assets acquired by the Failed Association may not be transferred to the Bridge Association by virtue of the P&A Agreement. In almost all circumstances, the P&A Agreement will not provide a specific itemization of those assets being transferred from the Failed Association to the Bridge Association. The Bridge Association normally will remain in existence until the RTC disposes of some or most of the assets, whereupon the RTC will dissolve the Bridge Association and will appoint RTC as receiver for the Bridge Association. The RTC is required to file OTS Orders in the county deed records only of the location of the principal place of business of the Failed Association and is not required by law to file OTS Orders in the county deed records in which real property assets of the Failed Association are
located. This Chapter is not applicable to title issues arising from failed national banks, or failed state banks, state trust companies, or state savings banks. Inquiry should be made to the governmental agencies having authority over said banks, trust companies, and savings banks, inasmuch as the rules and regulations regarding transfers of title are in many cases in conflict to those rules and regulations applicable to the RTC.

33.1 Chain of Title of Ownership of Real Property Assets of Failed Association

To establish the proper chain of title to real property assets of a Failed Association, all applicable OTS Orders should be recorded in the deed records of the county in which the real property interest is located. It is preferable also to record the P&A Agreement. If either originals or certified copies of the OTS Orders, etc., are not available for recordation; then, in such event, the instrument to be executed by the RTC regarding a real property interest should specifically recite all OTS Orders and the P&A Agreement, if applicable, and copies of all unrecorded Orders and Agreements should be retained by the title agent or closing attorney. It also is preferable to place the specific recitals regarding Orders and Agreements in the instrument even if the Orders, etc., are otherwise properly recorded. The requirements of this standard apply to an instrument evidencing any type of real property interest to be recorded, including without limitation, warranty and quitclaim deeds, deeds under power of sale, transfers and assignments of deeds to secure debt, loan modification agreements, cancellations of deeds to secure debt, etc., as well as foreclosure advertisements.

33.2 Sales of Real Property Interests Held by RTC

RTC policy and practice has evolved from the execution by RTC of only quitclaim deeds in the early years of FIRREA to evidence sales of real property owned by RTC, to the use of limited warranty deeds in standard sales of real estate owned properties. RTC has reserved the right to insist on the use of a quitclaim deed to transfer title on a case-by-case basis. RTC normally will execute only a “bare bones” seller’s affidavit. The RTC’s seller’s affidavit, however, should contain appropriate affirmations that will dissolve, by operation of Georgia law, involuntary liens, such as materialmen’s liens and real estate brokers’ liens; or, in the alternative, independent verification should be made that would establish that no lien rights exist.

33.3 Use of Powers of Attorney by RTC

RTC normally will appoint an individual to act on its behalf as attorney in fact to execute instruments regarding a real property interest, via power of attorney. The power of attorney should either be recorded separately in the county deed records in which the real property interest is located, or a copy of the power of attorney should be affixed to the instrument transferring title itself and be recorded as an exhibit to the instrument. The power of attorney should be reviewed carefully to determine any specific limits or exceptions to the authority granted to the attorney in fact. In rare circumstances, a corporate officer of the RTC will execute an instrument, in which case a power of attorney is not applicable; however, evidence of the appropriate delegation of authority to the
corporate offices so executing the instrument should be obtained.

33.4 Pass-Through Receivership Title Issues

To eliminate a perceived gap in the chain of title in a pass-through receivership created by: (a) a lack of reference to specific assets being transferred from the Failed Association to the Bridge Association, or (b) the instance in which the conveyance or transfer occurs after dissolution of the Bridge Association, either: (a) a release of the interest being transferred should be obtained not only from the Association immediately transferring title, but also from the initial Failed Association; or (b) the applicable OTS Orders should be recorded, which Orders should recite or confirm the transfer of the assets of the Failed Association to the Bridge Association, as supported by the P&A Agreement. The RTC, on a case-by-case basis, will execute joinder quitclaim and/or warranty deeds, joinder releases, and joinder transfers and assignments, or separate release instruments, to release any residual rights possibly retained by any such Associations. Use of the joinder or separate release instruments by the RTC has been a common practice only since late 1992.

33.5 Validity of Foreclosure Conducted by Holder of Superior Interest of Property in which RTC as Receiver of a Failed Association Holds an Interest

To determine the validity of foreclosures of involuntary, non-consensual liens, i.e., tax sales, materialmen’s liens, superior in priority to an interest of RTC, as receiver, or RTC in its corporate capacity, a determination must be made whether required legal notice by the foreclosing lienholder was given to the RTC, and whether the RTC expressly gave its consent to the foreclosure or acquiesced in the request for consent by allowing more than sixty (60) days to pass from the date of receipt of the notice to the date of foreclosure.

A non-judicial foreclosure of a consensual, bona fide deed to secure debt superior in interest to an interest of the RTC in its receivership or corporate capacity shall be assumed valid and shall be assumed to terminate any rights of redemption of the RTC in and to the foreclosed property, without the requirement of providing notice or obtaining consent from the RTC, if the interest being foreclosed is held by the RTC by virtue of a security instrument. If RTC actually holds legal and equitable title to the property being foreclosed, however, consent is deemed given by the RTC only if the foreclosing mortgage holder gives the RTC proper notice of intent to foreclose.

Comment: This standard highlights only a few of the many provisions of Section 219 of FIRREA, as codified at 12 U.S.C. Section 1825(b)(2), as clarified by RTC’s Interim Statement of Policy on Foreclosure Consent and Redemption Rights, effective May 7, 1992, 57 Fed.Reg.19,651. A supplemental statement issued by RTC on June 23, 1992, 47 Fed. Reg. 27,990, set forth the central address for foreclosure notices and requests for consent. In circumstances in which RTC holds an interest, whether as a security interest holder, or as a title holder, to real property which is being foreclosed by a superior holder of either a consensual or non-consensual lien, the applicable provisions of the above-referenced section
of FIRREA, together with the RTC Interim Statement, should be reviewed carefully. The provisions of Section 219 requiring notice and consent are not applicable to situations in which RTC serves as conservator for an Association, but only situations in which RTC either serves in its corporate capacity or as receiver for an Association.

CHAPTER 34
ZONING

34.1 Title Opinion

(a) A title examiner must be careful to disclaim in his/her opinion any coverage as to the applicability or effect of zoning, subdivision, or building codes or regulations, whether state, county or municipal, which govern the use and occupancy of real property, since it is settled in Georgia that such matters do not implicate the locus or quality of title.

Comment: Title insurance companies operating in Georgia are not permitted currently to issue insurance as to such “zoning matters,” broadly conceived. Hence, title opinions should not refer to “zoning matters” as exceptions, just as, properly speaking, “zoning matters” do not constitute “exceptions” to the coverage of title insurance in Georgia.

(b) By reason of the confusing similarity between “title matters” and “zoning matters,” any attorney representing a purchaser or lender in connection with a real estate transaction, including, where applicable, the examining attorney, should point out that notwithstanding the absence of restrictive covenant or easements or other private “title matters” imposing use limitations on property or set-back requirements, such limitations may still exist as a result of public “zoning matters.”

Comment: Even if a survey relied upon by an examiner ostensibly reveals that a building violates a “zoning” set-back line, the examiner may currently ignore the conflict on the theory that “zoning matters” are not title matters, and, besides, the structure may be a “grandfathered” nonconforming use or the beneficiary of an official “variance,” etc. Examiners may continue to certify such titles as marketable provided that the foregoing disclaimer is clearly made.

The complexities of zoning law, including state and local procedural requirements and “standing” limitations on who may challenge substantive and procedural defects in zoning enactments, mean that any effort by the Bar to lower the theoretical barrier between “title matters” and “zoning matters” will open Pandora’s Box. Even so simple a step as requiring a zoning status report on the property from local officials may be very difficult and time-consuming, especially in smaller jurisdictions, and unreliable, even when readily available. Cf. Corey Outdoor Advertising, Inc. v. Atlanta Board of Zoning Adjustment, 254 Ga. 221, 327 S.E.2d 178 (1985). The universal doctrine of “grandfathered” nonconforming uses would assure a predictable number of false “positives.”

One of the best protections may be an express warranty in the purchase contract as to zoning status, coupled with common sense and careful inquiry with local zoning, planning
and building department officials.


Moreover, a general warranty of title in deeds in Georgia, as codified by O.C.G.A. Section 44-5-62, which otherwise encompasses the grantor’s right to convey and the absence of encumbrances, does not extend to “zoning matters.” Barnett v. Decatur, 261 Ga. 205, 403 S.E. 2d 46 (1991), reversing Decatur v. Barnett, 197 Ga. App. 459, 398 S.E.2d 706 (1990). By “zoning matters,” the courts refer not only to traditional zoning regulations, but also subdivision regulations and analogous land use and building restrictions. And neither zoning, subdivision, or building restrictions that theoretically limit future activity on property, nor active and on-going zoning or subdivision violations that prohibit the current use, existence, or conveyance of a parcel of land constitute a title “encumbrance” that triggers a breach of the warranty of title. Id.

By the same token, however, such “zoning matters” do not constitute a title defect requiring written notice under the standard “title examination” paragraph in purchase contracts. Accordingly, where a seller expressly warrants that property will be zoned in a certain fashion, that warranty (Which is equivalent to a guarantee that the property either is appropriately zoned now or will be appropriately zoned by the time of the closing) will support a subsequent rescission of the sale, notwithstanding a failure to list such “zoning matters” as title defect. See Sachs v. Swartz, supra, 233 Ga. at 102-103.

Of course, the presumed knowledge of the contents of the zoning and subdivision regulations has generally involved facial issues, such as the zoning classification of property, e.g., whether it is residential or commercial, rather than more discrete administrative issues, involving application of the finer points of a zoning or subdivision regulation to a particular property. Where a broad issue (like that of the applicable zoning classification) is in dispute, the courts find that, notwithstanding the seller’s representations and assurances as to the zoning classification, the buyer may not justifiably rely thereon because the means of knowledge are readily at hand and equally available to both parties. See, Hill v. Century 21 Max Stanzel Realty, Inc., 187 Ga. App. 754, 371 S.E.2d 217 (1988). But where a seller has some “special knowledge,” which pertains to how the local zoning, subdivision, or building regulations apply to his property, then passive concealment thereof may well constitute actionable fraud. Wiederhold v. Smith, 203 Ga. App. 877, 418 S.E.2d 141 (1992).

In Wiederhold v. Smith, the Court of Appeals found that there was sufficient evidence to support a jury verdict of fraud, where a seller sold a home within a subdivision knowing that the local Public Works Department had placed a hold on the lot because of subdivision problems which necessitated an expenditure of roughly $34,000.00 before a home could be constructed. In short, there is “an exception to the general rule of caveat emptor in cases
involving passive concealment by the seller of defective reality.” 203 Ga. App. 879. As a result, a seller has a duty to disclose regulatory defects here he or she has “special knowledge” not apparent to the buyer and where the buyer is acting under a misapprehension as to the facts which would be important to the buyer and would probably affect his decision to buy—even where the information is located “in a file that is open to the public,” since such regulatory problems are not disclosed by the deed records, and it is “not common for potential buyers of lots to ask to see the files maintained in subdivisions . . . before purchasing property.” Id.

CHAPTER 35
FEDERAL STATUTES WHICH DO NOT AFFECT TITLE

35.1 Americans with Disabilities Act (“ADA”)

There are no peculiar aspects of the ADA (42 U.S.C. Section 12101 et seq.) which affect title. If a judgment is entered against the owner of a property in an ADA suit, the judgment lien will not be entitled to any unusual priority.

35.2 Bank Bribery Act.

There are no peculiar aspects of the Bank Bribery Act (18 U.S.C. Section 215) which affect title.

35.3 Home Mortgage Disclosure Act (“HMDA”)

There are no peculiar aspects of the HMDA (12 U.S.C. Sections 2801 et seq.) which affect title.

35.4 The Real Estate Settlement Procedures Act (“RESPA”)

The closing attorney should be acquainted with RESPA (12 U.S.C. Sections 2601 et seq.) and Regulation X (12 U.S.C. following Section 2617) in order to comply with the disclosure requirements for closing a transaction subject to RESPA. However, there are no peculiar aspects of RESPA which affect title.

CHAPTER 36
GEORGIA STATUTES WHICH DO NOT AFFECT TITLE

36.1 Georgia Residential Mortgage Act (“GRMA”)

There are no peculiar aspects of the GRMA (O.C.G.A. Sections 7-1-1000 through -1020) which affect title.
36.2 Georgia Withholding Tax on Sale or Transfer of Real Property by Nonresidents of Georgia

There are no peculiar aspects of O.C.G.A. Section 48-7-128, which imposes a withholding tax on the sale or transfer of real property by nonresidents of Georgia, which affect title.

CHAPTER 37
CONDEMNATIONS — THE RIGHT OF EMINENT DOMAIN

37.1 In General Right of Eminent Domain — Its Power and Exercise Thereof

Where the examining attorney finds a right of eminent domain proceeding relevant to the examination of title, the examiner should bear in mind the general principles set forth in this Chapter.

“The right of eminent domain is the right of the state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state on account of public exigency and for the public good.” O.C.G.A. Section 22-1-2.

This right is a right of the United States of America and its authorized agencies to exercise (40 U.S.C. Section 257).


Eminent domain statutes of the State of Georgia are to be strictly construed. Botts v. Southeastern Pipeline Co., 190 Ga. 689, 10 S.E.2d 375(1940).

Except in cases of extreme necessity and great urgency, the right of eminent domain cannot be exercised without first providing for just compensation to the owner for the interference with the owner’s exclusive rights. (O.C.G.A. Section 22-1-5).

37.2 Title Examination for Condemnor or Person Exercising Condemnation Right

Title examination, opinion and certificate of title to the condemnor or the entity exercising the right of eminent domain does not differ in theory from contracts of title examination for any purchaser. However, the consequences of failing to report a record owner of any interest in subject property (including owners of leaseholds of record, lien holders and owners of uncanceled judgments) can have extensive remedial consequences due to condemnor’s failure to serve said parties as a result of the title examiner’s negligence.
37.3 The Right of Eminent domain is Statutory in Nature
Involving Statutory Civil Procedure

The right of eminent domain is set forth in Chapter 22 of O.C.G.A. and is constitutionally and legislatively authorized. The title attorney should examine all court condemnation proceeding documents for proper service upon all parties, and look for all procedural requirements of the particular eminent domain proceeding elected to be followed by the condemnor under the Code.

37.4 Rights of Reversion in Condemnee or Successors in Title to Condemnee

Many condemnation proceedings have reversion rights of fee simple title to the land from which same was taken once the condemnor’s use has been abandoned or extinguished. These are set forth in the particular condemnation proceedings or in the deeds from condemnees to condemnors and are usually in the granting and habendum clauses of said deeds.

Some forms of condemnation, namely the original form of condemnation, vested title in the condemnor for only so long as the public use was continued. This method is still Georgia law in O.C.G.A. Section 22-2-85. The Code Section states that upon condemnor’s ceasing to use the property for the purposes of condemnor’s business, the property shall revert to the person from whom taken, his heirs or assigns. There are exceptions to this rule and most condemnor now follow a condemnation method in which they obtain fee simple title to said property exclusive of reversion upon non-use.

Comment: Where a grantor made to a railroad company a warranty deed conveying only an easement or right-of-way, due to conditions of reversion on abandonment in the habendum clause, neither the grantee in a successor railway company deed nor the railway company itself had any title or interest which it could convey after it had abandoned its easement obtained by condemnation. Byrd v. Goodman, 195 Ga. 621, 25 S.E.2d 34 (1943).

37.5 Just Compensation Awarded in the Form of Future Uses

The examining attorney should read the condemnation decrees in detail in that just compensation of money could be low due to contracts for condemnee to have rights for future benefits, such as utility hook up, sewage access, curb cuts or other access from the property remaining in said owner’s possession after condemnation, plus the right in and to retaining walls or property line fencing.

37 Rights Lost to the Property Remaining after Condemnation
Paid for as Consequential Damages

In reading plats of record subsequent to condemnation and condemnation proceedings, the title examiner should be aware of remaining property access rights, new building lines for construction of improvements, limitation of air or mineral rights to remaining property and temporary or permanent construction or maintenance easements,
and flood easements.

37.7 Condemnation of Air Rights by Government Condemnor

Full ownership of real property includes owning not only the land and its improvements and fixtures thereon, but all the appurtenances thereto (easements serving said property) and also extends downward and upward indefinitely. (O.C.G.A. Section 44-1-2).

Upward limits of ownership do not extend above an altitude representing the reasonable possibility of a man’s occupation and dominion and legality of flight over such lands can be the subject of condemnation or right of eminent domain by government authorities. All properties near airports should be carefully examined for the taking of air rights over said properties which would govern the height of any trees or buildings constructed thereon.

37.8 Condemnation of Rights Less Than Fee Simple Title Rights in Addition to Air Rights

Many condemnor have power to condemn temporary construction easements, permanent construction easements, temporary flood easements and permanent flood easements in the taking. Any reference to such easement takings will appear in the court decree or deed from the condemnee, who will have been compensated justly therefor, and such takings will be a future right of the condemnor upon the remaining land of the condemnee.

37.9 Property Exempt from Condemnation or Eminent Domain Laws of Georgia

Georgia law exempts from the exercise of eminent domain by a person operating, constructing or preparing to construct a plant for generating electricity, all cotton mills, factories, or any plant engaged in furnishing electric power to the public. This does not exempt condemnation by governments. (O.C.G.A. Section 22-3-20 and 22-3-22).

Comment: All other properties appear to be subject to condemnation. Municipal property may be condemned by the Federal government.

37.10 Property Conveyed from Condemnor to Private Individuals

Conveyances from condemnors to private parties are based upon corporate resolutions or governing authority resolutions that said property is surplus property as to the use intended by the condemnor and that the use thereof is considered abandoned. This can also be set forth in a quitclaim deed from the condemnor.

The method of discontinuing a county road is prescribed by statute, O.C.G.A. Section 32-7-2.

The governing authority of a county must determine that all or any part of a road
has ceased to be used by the public so as to no longer serve any substantial useful purpose, and a certification must be recorded on the minutes with a plat of the road after notice to property owners located thereon.

The procedure for the disposition of property of a county or a municipality that has been condemned and acquired for public road purposes must follow the procedures set forth by O.C.G.A. Sections 32-7-3 and -4. This procedure requires public notice by advertisement in the newspapers or other county legal publications and must be offered to the owner of the property at the time of the acquisition. If said owner has subsequently sold said property, then the same must be offered to the owner of the abutting land holding title through the owner from whom the condemnor acquired the property.

37.11 Adverse Possession Cannot Be Obtained Against Certain Condemnors

Adverse possession or title by prescription does not run against the state nor any property owned by the state or subsidiaries of the state, whether same is used for governmental or for proprietary purposes.


This has been extended to include a county, a municipal corporation or any public corporation created by the state or the United States as to property held for public purposes.

37.12 Condemnation — Plats Involved

Plats involved in the condemnation proceedings, or referred to in conveyances of record, should be carefully examined in that they alone could show important easements reserved across remaining property and other matters not shown in the general conveyance description.

CHAPTER 38
EASEMENT TITLE ISSUES

Introductory Comment: This Chapter is applicable only to appurtenant easement interests which benefit real property. In many ways, determining the nature and extent of appurtenant easement interests poses a much more difficult problem for closing attorneys and title examiners than does the examination of title to the fee simple interest involved in a conveyance or other real property closing transaction. There are also significant distinctions between residential and commercial properties when easements are involved. In most residential transactions in metropolitan areas of the state, due to subdivision and platting regulations, it is likely that all necessary easements were established by the developer when the property was subdivided. However, this may not be the case with planned commercial developments such as shopping centers, office parks and industrial or warehouse projects, since many such projects are developed over much longer periods of time than is typical with
residential subdivisions, and in many instances the examiner must use special care to insure that easements for shared facilities, such as storm water drainage and retention ponds, have been properly established, and released from any tract financing or other debt encumbrances. In metropolitan and urban areas where land costs are high, commercial shopping centers and similar developments are likely to have shared storm water drainage systems necessitated by governmental regulations that require storm water run off to be managed on site, private easements for water and sewer lines within the boundaries of the overall commercial development, cross access easements to access curb cuts [which tend to be limited, especially in retail shopping centers which are generally located on major thoroughfares under the control of the DOT, which limits access rights to certain designated points] and also grants of easements for “vehicular parking” (which are often found related to shopping center out-parcels, to meet zoning requirements.)

38.1 Nature and Extent of Title Examiner’s Duties with Respect to Appurtenant Easements

The closing attorney should furnish the title examiner a copy of the real estate sales contract, loan commitment, or some other source material containing an adequate legal description of the property interests as to which title is to be examined. The closing attorney and title examiner should work as a team where the closing attorney does not examine title. The examining attorney should, unless otherwise instructed by the client, verify that the property has direct access to a public road, or to a valid access easement allowing ingress and egress to the real property. The examining attorney is not required to verify access for utility services such as gas, electricity, water, sewer or cable television unless specifically requested to do so by the client. If, however, the examiner in the course of examining title becomes aware of the fact that the property in question is served by an easement of which the client may be unaware, the examiner should so advise the client and determine if the client requires certification as to such interest.

Comment: Under many circumstances, the title examiner is likely to find information pertaining to easements in the deed records, which may not otherwise come to the attention of the closing attorney, or client, unless specifically disclosed by the title examiner. Likewise, the closing attorney is more likely than the title examiner to have the benefit of unrecorded plats, appraisals, or other materials in the loan and/or closing package which may disclose that the property is served by appurtenant easements which will not, in the ordinary course of examination, come to the attention of the title examiner. This is due to the means by which easements are created, and the fact that appurtenant easement interests need not necessarily be specifically described in the deed in order to pass with the conveyance. There are four (4) methods by which easements may be created under Georgia law: (i) express grant, (ii) prescription, (iii) implication, and (iv) condemnation.

A. Express Grant. An easement which arises from an express grant is the least troublesome from the standpoint of the title examiner or closing attorney. Express grants of easements include those specifically described in warranty deeds conveying the appurtenant property in fee, recorded grants of easements or easements which are shown on a recorded plat and incorporated by reference.
into the warranty deed. Title to the property described in such easements should be examined, and conveyed, on the same basis as the fee.

B. **Prescription.** Since an easement constitutes an interest in real property, the statute of frauds (O.C.G.A. Section 13-5-30) usually applies (Barton v. Gammell, 143 Ga. App. 291, 238 S.E.2d 445 (1977)); however, an exception to the requirement for a writing exists with regard to parol licenses and easements by prescription or implication. The problem posed for an examiner, and closing attorney, is that since such easements are not specifically described in a grant or writing, the nature and extent of such easements may be unclear, especially to an examining attorney who relies almost exclusively on the record. It is in the nature of an easement by prescription, or parol license, that same do not initially appear of record (although these may be later included in a description after having become valid easements as allowed by law), and it is probably better practice for the closing attorney to incorporate a specific description of such rights into the Deed, once the nature and extent of such easements (derived from a parol license or prescription) are determined. An easement by prescription requires twenty years under O.C.G.A. Section 44-5-163. In Richard Row v. John Doe, 233 Ga. 691, 212 S.E.2d 854 (1975), involving an alleged prescriptive title to maintain a garage that encroached on the property of the Plaintiff in Ejectment, it was held that the Defendant could not claim prescriptive title by adverse possession for twenty years, where the undisputed evidence established that the garage had been in place for no longer than seventeen years. Note that the Plaintiff in Row must have had actual notice of the garage, which did not create an estoppel. Although prescription under color of title only requires seven years, to have color of title the easement must be specifically described in a document of record. (Gilbert v. Reynolds, 233 Ga. 488, 212 S.E.2d 332 [1975]). Even if prescription had commenced, an inchoate easement can not be passed to a grantee (Olsen v. Nobel, 209 Ga. 899 76 S.E.2d 775 [1953]). An inchoate prescriptive (fee) title may be transferred by the possessor to a successor; but inchoate rights to an easement do not pass by deed unless specifically described therein. Therefore an examiner cannot rely simply on the passage of time, without more, in cases where a prescriptive easement is involved.

C. **Implication.** Easements by implication are not favored under Georgia law, and can only arise in favor of those claiming under a common grantor (see Burk v. Tyrell, 212 Ga. 239, 91 S.E.2d 744 [1956] and Farris Construction Company, Inc. v. 3032 Briarcliff Road Associates Ltd., 247 Ga. 578, 277 S.E.2d 673 [1981]). Easements by implication, under Georgia law, can only arise in favor of the Grantee (since easements must be expressly reserved in the grant if they are to be retained by grantor). Easements by implication are not always readily detectable by a title examiner. Where easements are not created by express grant, same pose great dangers for both examiners and closing attorneys. Therefore, due to the fact that there may be nothing of record to indicate the existence of the easement to the examiner, it is important for the examiner to
adequately define the extent and nature of the easement in order to run title, which may require affidavits and will require a current survey.

D. Condemnation. Easements acquired by condemnation are similar to those obtained by express grant in that same are specifically described in a recorded document, only in this instance the “grant” is involuntary. Locating easements acquired by condemnation may be a problem for the examiner if the party acquiring same fails to cause a copy of the decree to be recorded in the deed records as the standard docket search period used by most examiners is seven to ten years. Most easements acquired by condemnation will not be appurtenant easements, as the power of condemnation is largely limited to governmental entities and certain classes of utilities, except that any land owner otherwise lacking access may condemn a private way for access to a public road, in accordance with applicable statutory procedures.

38.2 Merger

One problem encountered when examining title to easements is the doctrine of merger. Unlike ownership of property in fee, special care needs to be taken by the examiner to verify that existing easements which may have merged if the property comes under common ownership after the establishment of same, have been properly re-established if the tract is later divided.

Comment: Wherever a greater and lesser estate meet in the same owner, the lesser estate is merged into the greater (O.C.G.A. Section 44-6-2). It is axiomatic that one cannot have an easement upon his own property, for the lesser estate, represented by the easement, will be merged into the greater fee. In Burk v. Tyrell, 212 Ga. 239, 91 S.E.2d 744 (1956), it was held that unity of possession of both the dominant and servient estates is inconsistent with adverse use, and therefore prescriptive use would be terminated until after the severance of the two estates. Thus, an examiner should use special care where there is an unrecorded easement, parol license, or rights of prescription, to confirm that the property has not come under common ownership. In Muscogee Manufacturing Company v. Eagle & Phenix Mills, 126 Ga. 210, 54 S.E. 1028 (1906), it was held that if two estates in the same property unite in the same person, and it is contended that no merger took place, the person making such contention must allege and prove facts negating the existence of such merger.

38.3 Debt Encumbrances

The examiner should in all cases verify that, when the easement interest was created, any existing security deed on the property over which the easement lies was released, or a consent was obtained from the lender to avoid termination of the easement by a later sale under power.

Comment: A valid foreclosure sale under power in a security deed is equivalent to a judicial sale under decree of a Court of Equity and not only extinguishes the right of redemption, but divests all junior encumbrances on the property and also terminates the

38.4 Effect of Deed Recitals on Easement Rights

Many deeds contain recitals relative to “easements and restrictions of record”. Such “subject to” recitals do not in and of themselves create easements, as these are only limitations on the grantor’s warranty. Valid appurtenant easements existing as of the date of the conveyance are automatically conveyed with the fee simple parcel as appurtenances; however, for the reasons set forth in this title, it is the better practice to specifically describe all easements in the deed whenever possible to avoid problems with identification and also to alert future examiners.

Comment: Recitals in deeds bind only the parties to such conveyances and their privies; and are not evidence for or against anyone not claiming under the said deed (Tift v. Golden Hardware Company, 204 Ga. 654, 51 S.E.2d 435 [1949]). In accord is Muscogee Manufacturing Company v. Eagle & Phenix Mills, 126 Ga. 210, 54 S.E. 1028 (1906) wherein it was held that “a mere grant of property will not create any appurtenances” (Id. at page 227). In Barton v. Gammell, 143 Ga. App. 291, 238 S.E. 2d 445 (1977), it was held that an “easement can be created only by grant, or by implication or prescription...whereas a license may be created by parol, or by an act of the licensor sufficient to show his consent” (Id. at page 293). The Court went on to note that since an easement created by agreement constitutes an interest in land, it required a writing under the Statute of Frauds, and was otherwise subject to the rules governing the construction of deeds.

38.5 Parol Licenses

Parol licenses might also be termed easements by estoppel. The classic example of a parol license arises when an adjoining land owner authorizes his neighbor to construct and pave a driveway on the corner of his property, and then tries to block the neighbor from use of the driveway after said neighbor had expended funds in improving the driveway based on the parol license. However, parol licenses are not favored and are very difficult to prove.

Comment: In Berolzheimer v. Taylor, 230 Ga. 595, 198 S.E.2d 301 (1973), the Court held that a statute making irrevocable parol licenses where the licensee has incurred expense in exercising the license would not apply in the case of a mere implied license. The facts, as developed, showed that the Berolzheimer family had been using the dock in question for over 60 years, had assisted in maintaining the dock, and had even re-built same following its destruction by Hurricane Dora in 1964 at a cost of $1,592.65. The Court ruled that all that activity was not sufficient to establish an interest in the land of Taylor since there was no evidence that a parol license was ever granted, and it was not possible to establish irrevocable property rights in another’s land under an implied license.

38.6 Notice

Notice has no applicability until a valid easement is first established. The issue of
notice only relates to such rights as the adverse party has already acquired. There is no authority for the proposition that notice, in and of itself, creates rights where none are shown to have been established by some method allowed by law.

Comment: If mere notice, without more, established easement rights, then the more egregious the trespass by which the claimed easement was created, the more notice would have to be presumed. But were this the case, all rules by which an easement may be established become meaningless, and title by conquest would be the method of choice.

38.7 Charges Imposed for Use of Easements

If appurtenant easements are found, the examiner should attempt to determine if any formal arrangements have been made for repair of the easement, and if so, if there are established charges and a mechanism for collecting the charges.

Comment: In most cases where an easement is established by a written grant (such as a construction operating and reciprocal easement agreement for a shopping center), the nature, extent and liability for charges for the maintenance of the easement will be addressed therein. However, there are many other circumstances in which easements can exist, where no such guidelines exist for the examiner or the closing attorney. As a general rule under Georgia law, each party must pay to maintain the easement in proportion to such party’s usage. However, this is easier to state than to determine. In any event, the examiner and closing attorney should be alert to these issues and should advise the client if the duty to maintain the easement is unclear.

38.8 Real Estate Taxes on Easements

The examining attorney should verify that real estate taxes have been paid currently through the year in which the easement is created. Once the examining attorney has determined that a valid easement exists burdening adjacent property, it is not necessary to check the status of either taxes, or security deeds, affecting the adjacent property upon which the easement is located, as any such rights would be subject and subordinate to the previously created easement.

38.9 Environmental Issues Relating to Easements

If the examining attorney determines that the property is benefitted or burdened by a retention pond or similar facility, the client should be advised that in circumstances where the pond or similar facility becomes contaminated, the governmental entity seeking to enforce the environmental laws generally presumes that the owner of the land on which the pond or like facility is located is the party primarily responsible, and that the users of the easement are secondarily responsible for the cleanup. The client should be advised of such potential problems.
CHAPTER 39
TITLES INVOLVING JUDICIAL CONFIRMATION OR CONVEYANCE

39.1 Quiet Title Actions

An examiner shall report whenever title has been established or determined pursuant to the State’s Quiet Title Actions: O.C.G.A. Sections 23-3-40-44, et seq., or O.C.G.A. Section 23-3-61, et seq. The examiner shall review the executed and filed Final Order coming out of said case and may rely upon the recitals in said Order without further inquiry. Unless specifically engaged to do so, the certification of the examiner as to the existence of an order pursuant to O.C.G.A. Sections 23-3-40 or 23-3-61 in the chain of title shall not serve as an opinion of the sufficiency of the action to determine title as to all potential parties.

Comment: The statutory proceedings to quiet title (O.C.G.A. Section 23-3-40, et seq., or O.C.G.A. Section 23-3-61) are intended as an efficient means to adjudicate a wide variety of disputes concerning title. These statutory procedures include specific procedural requirements placed upon the parties filing such actions. For purposes of this Title Standard, “Final Order” is intended to refer to the entry of an order ruling upon the report of the special master, in cases where a special master is appointed, and rendering a determination or decree of title, upon which the time for appeal has passed. An order arising out of these proceedings is not binding upon parties who were not properly served with notice. Should an examiner be engaged to do so, care should be given to a review of the record, including any affidavits of descent and special master determination of persons entitled to notice, when rendering any additional opinion as to the effect of the final order. There is no set statute of limitations for said claims. While this should not affect marketability of any judicially established or determined title, the examiner must make their client aware of the law and that all judicially established or determined titles are exposed to this exception. If a client desires further protection, the examiner should consult a title insurance underwriter and recommend the purchase of title insurance.

CHAPTER 40
FDIC TITLE ISSUES

Introductory Comment: This Chapter is applicable only to title issues relating to real property assets (whether real property itself or instruments conveying interests in real property) of a failed bank (“Failed Institution”) for which the Federal Deposit Insurance Corporation (the “FDIC”) has been appointed as Receiver by the Georgia Department of Banking and Finance, or by any other state or federal agency having the requisite appointment power. In most circumstances, the FDIC, in its capacity as Receiver of the Failed Institution, transfers all or a large portion of the assets of the Failed Institution to another bank (the “Assuming Institution”), which transfer is memorialized by a Purchase and Assumption Agreement (the “Purchase Agreement”). A list of Failed Institutions and a copy of the Purchase Agreement associated with each is available on the FDIC website, www.fdic.gov.
40.1 Ownership of Real Property of Failed Institution

With respect to real property owned by a Failed Institution at its time of failure that was previously acquired by the Failed Institution through the foreclosure process, all matters set forth in Chapter 17 of these standards (Foreclosures) should be considered to confirm that the Failed Institution, prior to its failure, properly took title incident to the underlying deed to secure debt and the deed under power that was executed and recorded in connection with the foreclosure sale. It should also be determined by a review of the applicable Superior Court docket whether there is any pending action for the confirmation of the foreclosure sale. If the Failed Institution properly took title to the real property in question prior to its failure, a subsequent Receiver’s Deed conveying title to the Assuming Institution should be of record, and such Receiver’s Deed should contain a recital of the date of and other circumstances surrounding the failure of the Failed Institution and the FDIC’s capacity as Receiver. With a properly executed and recorded Receiver’s Deed into the Assuming Institution, the Assuming Institution is then able to sell and convey the real property as it would any of its other real property.

40.2 Foreclosure of Deeds to Secure Debt Naming a Failed Institution as Grantee

In instances in which the Assuming Institution acquires from the FDIC (as Receiver) deeds to secure debt in which a Failed Institution is the named grantee, and on which the Assuming Institution seeks to foreclose, there should be an assignment of the subject deed to secure debt from the FDIC, in its capacity as Receiver, to the Assuming Institution, which assignment should meet all customary criteria and which should be of record in the county in which the subject property is located. The assignment may be specific to the given deed to secure debt or may be an “omnibus” form of assignment related to all deeds to secure debt held by the Failed Institution for real property in a given county. If the deed to secure debt has been properly assigned by the FDIC to the Assuming Institution, the deed to secure debt is subject to foreclosure by the Assuming Institution pursuant to its terms and pursuant to applicable law.

40.3 Transfer of Real Property by FDIC or Partner Entities

The FDIC website (www.fdic.gov) provides information with respect to structured transactions in which the FDIC has transferred real property or instruments related to real property into various private sector investors (each a “Partnership Entity”). In instances in which the Partnership Entity seeks to foreclose on a deed to secure debt, sell or transfer a deed to secure debt or other instrument related to real property, or sell or transfer real property, it should be determined that the FDIC, in its capacity as Receiver, has properly transferred the deed to secure debt, other instrument or real property to the Partnership Entity, and that such transfer document is properly recorded on the real property records of the county where the property is located. If the FDIC, in its capacity as Receiver, has not transferred the instrument or the real property into a Partnership Entity or other entity, then the FDIC should execute a transfer, assignment or other conveyance document to any third party in its capacity as Receiver for the Failed Institution.
40.4 Use of Powers of Attorney by the FDIC

It is common for the FDIC to appoint as attorneys in fact one or more individuals, often individuals who are employed by the Assuming Institution. This appointment is made through a power of attorney, which should either be recorded separately in the records of the county in which the real property is located, or a copy affixed as an exhibit to the instrument transferring title (whether a transfer and assignment of an instrument or a conveyance of real property). The examiner should consider the purpose of any document that has been executed by the attorney in fact, and should also review the power of attorney and consider any limitations or exceptions to the authority contained therein.

Chapter 41
Title Acquired Through a Court-Appointed Receiver

Introductory comment: The election by lenders and special servicers to work out defaulted loans through the use of a court-appointed receiver to manage, operate, market, and ultimately sell mortgaged real property gained popularity during the recent economic downturn. This chapter is applicable only to those situations in which title to property of a defaulting borrower has been conveyed pursuant to a court ordered receiver’s sale.

An examiner shall report whenever there appears in the chain of title a deed executed by a court-appointed receiver. The examiner shall review the executed and filed Final Order coming out of said case and may rely upon the recitals in said Order without further inquiry. Unless specifically engaged to do so, the certification of the examiner as to the title having been conveyed in reliance on such an order shall not serve as an opinion as to the sufficiency of the action to determine title as to all potential parties.

Comment: It is clear under Georgia law that a court can appoint a receiver to take possession of and manage a property in order to protect the rights of an interested party. (O.C.G.A. Sections 9-8-1 and 9-8-2). It is also clear that the trial court has wide discretion in appointing a receiver and that this discretion will not be disturbed absent manifest abuse. Warner v. Warner, 237 Ga. 462 (1976). What is less clear is whether the receiver actually has the authority to sell the property given that no such explicit statutory or case law authority exists. The existence of such authority can arguably be inferred from the latitude that our courts have given to receivers in carrying out their fiduciary obligations, as well as the language of O.C.G.A. Section 9-8-6: “Unless otherwise provided in the order, liens upon the property held by any parties to the record shall be dissolved by the receiver’s sale and transferred to the funds arising from the sale of the property.” However, given this lack of clarity, an examiner engaged to do so must take caution in reviewing the case file before further certifying as to the status of title. Factors to be considered include: 1) Has the borrower consented to the appointment of the receiver and the sale of the property?; 2) If not, does the order appointing the receiver: a) provide that the borrower and all other defendants have been properly served; b) provide that the borrower is in default under its obligations to the lender; c) establish that the receiver is not related to the plaintiff by blood, marriage, or any employment or ownership interest; d) give the receiver the authority to investigate and evaluate whether the best interest of the parties are served through either a public or private sale; e) if the receiver determines that
the best interest of the parties will be served by a private sale, give the receiver the authority to market the property and negotiate and execute a contract to sell the property; and f) contain an adequate description of the property that is the subject of the receivership?; 3) Given the requirement of O.C.G.A. Section 23-4-35 that sales under a decree in equity are subject to confirmation by the judge, has such a confirmation order been entered and does it provide: a) that the borrower and all defendants have received notice of the motion; b) that the property was marketed in a commercially reasonable manner; c) that the sale is to be made pursuant to a specific contract with all material terms of sale included; d) that a sale pursuant to such contract is in the best interest of the parties and will realize more than a public sale; e) that the receiver is authorized to execute and deliver a deed on behalf of the borrower in accordance with such contract; f) whether the sale is to be free and clear of any other liens and if so, have the lien holders been made a party to the action pursuant to O.C.G.A. Section 9-8-6; and g) specifically direct the manner in which the sales proceeds are to be applied?; and 4) Have all appeal periods as to both of the above referenced orders expired with no appeals having been filed? Given the potential pitfalls that exist with these transactions, the examiner and/or closing attorney should recommend that the client obtain title insurance, and if either are the issuing agent, the policy should be issued only after consultation with the underwriter.

Revised Title Standards
<table>
<thead>
<tr>
<th>NAME</th>
<th>POSITION</th>
<th>TERM EXPIRES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ms. Carol V. Clark</td>
<td>Member</td>
<td>2022</td>
</tr>
<tr>
<td>Mr. Harold T. Daniel, Jr.</td>
<td>Member</td>
<td>2022</td>
</tr>
<tr>
<td>Ms. Laverne Lewis Gaskins</td>
<td>Member</td>
<td>2021</td>
</tr>
<tr>
<td>Hon. Kenneth Bryant Hodges, III</td>
<td>Member</td>
<td>2020</td>
</tr>
<tr>
<td>Ms. Allegra J. Lawrence</td>
<td>Member</td>
<td>2022</td>
</tr>
<tr>
<td>Mr. C. James McCallar, Jr.</td>
<td>Member</td>
<td>2021</td>
</tr>
<tr>
<td>Mrs. Jennifer Campbell Mock</td>
<td>Member</td>
<td>2020</td>
</tr>
<tr>
<td>Mr. Kenneth L. Shigley</td>
<td>Member</td>
<td>2020</td>
</tr>
<tr>
<td>Mr. A. James Elliott</td>
<td>Emory University</td>
<td>2020</td>
</tr>
<tr>
<td>Mr. Buddy M. Mears</td>
<td>John Marshall</td>
<td>2020</td>
</tr>
<tr>
<td>Dean Daisy Hurst Floyd</td>
<td>Mercer University</td>
<td>2020</td>
</tr>
<tr>
<td>Mr. Cassady Vaughn Brewer</td>
<td>Georgia State University</td>
<td>2020</td>
</tr>
<tr>
<td>Ms. Carol Ellis Morgan</td>
<td>University of Georgia</td>
<td>2020</td>
</tr>
<tr>
<td>Hon. John J. Ellington</td>
<td>Liaison</td>
<td>2020</td>
</tr>
<tr>
<td>Mr. Jeffrey Reese Davis</td>
<td>Staff Liaison</td>
<td>2020</td>
</tr>
<tr>
<td>Ms. Michelle E. West</td>
<td>Staff Liaison</td>
<td>2020</td>
</tr>
</tbody>
</table>
GEORGIA MANDATORY CLE FACT SHEET

Every “active” attorney in Georgia must attend 12 “approved” CLE hours of instruction annually, with one of the CLE hours being in the area of legal ethics and one of the CLE hours being in the area of professionalism. Furthermore, any attorney who appears as sole or lead counsel in the Superior or State Courts of Georgia in any contested civil case or in the trial of a criminal case in 1990 or in any subsequent calendar year, must complete for such year a minimum of three hours of continuing legal education activity in the area of trial practice. These trial practice hours are included in, and not in addition to, the 12 hour requirement. ICLE is an “accredited” provider of “approved” CLE instruction.

Excess creditable CLE hours (i.e., over 12) earned in one CY may be carried over into the next succeeding CY. Excess ethics and professionalism credits may be carried over for two years. Excess trial practice hours may be carried over for one year. A portion of your ICLE name tag is your ATTENDANCE CONFIRMATION which indicates the program name, date, amount paid, CLE hours (including ethics, professionalism and trial practice, if any) and should be retained for your personal CLE and tax records. DO NOT SEND THIS CARD TO THE COMMISSION!

ICLE will electronically transmit computerized CLE attendance records directly into the Official State Bar Membership computer records for recording on the attendee’s Bar record. Attendees at ICLE programs need do nothing more as their attendance will be recorded in their Bar record.

Should you need CLE credit in a state other than Georgia, please inquire as to the procedure at the registration desk. ICLE does not guarantee credit in any state other than Georgia. If you have any questions concerning attendance credit at ICLE seminars, please call: 678-529-6688
THE CHIEF JUSTICE’S COMMISSION ON PROFESSIONALISM
(Founded 1989)

A Brief History of the Chief Justice’s Commission on Professionalism

Karlise Y. Grier, Executive Director

The mission of the Chief Justice’s Commission on Professionalism is to support and encourage lawyers to exercise the highest levels of professional integrity in their relationships with their clients, other lawyers, the courts and the public, and to fulfill their obligations to improve the law and legal system and to ensure access to that system.

After a series of meetings of key figures in Georgia’s legal community in 1988, in February of 1989, the Supreme Court of Georgia created the Chief Justice’s Commission on Professionalism (“Commission”), the first entity of this kind in the world created by a high court to address legal professionalism. In March of 1989, the Rules of the State Bar of Georgia were amended to lay out the purpose, members, powers and duties of the Commission. The brainchild of Justice Thomas Marshall and past Emory University President James Laney, they were joined by Justices Charles Weltner and Harold Clarke and then State Bar President A. James Elliott in forming the Commission. The impetus for this entity then and now is to address uncivil approaches to the practice of law, as many believe legal practice is departing from its traditional stance as a high calling – like medicine and the clergy – to a business.

The Commission carefully crafted a statement of professionalism, A Lawyer’s Creed and the Aspirational Statement on Professionalism, guidelines and standards addressing attorneys’ relationships with colleagues, clients, judges, law schools and the public, and retained its first executive director, Hulett “Bucky” Askew. Professionalism continuing legal education was mandated and programming requirements were developed by then assistant and second executive director Sally Evans Lockwood. During the 1990s, after the Commission conducted a series of convocations with the bench and bar to discern professionalism issues from
practitioners’ views, the State Bar instituted new initiatives, such as the Committee on Inclusion in the Profession (f/k/a Women and Minorities in the Profession Committee). Then the Commission sought the concerns of the public in a series of town hall meetings held around Georgia. Two concerns raised in these meetings were: lack of civility and the economic pressures of law practice. As a result, the State Bar of Georgia established the Law Practice Management Program.

Over the years, the Commission has worked with the State Bar to establish other programs that support professionalism ideals, including the Consumer Assistance Program and the Diversity Program. In 1993, under President Paul Kilpatrick, the State Bar’s Committee on Professionalism partnered with the Commission in establishing the first Law School Orientation on Professionalism Program for incoming law students held at every Georgia law school. At one time, this program had been replicated at more than forty U.S. law schools. It engages volunteer practicing attorneys, judges and law professors with law students in small group discussions of hypothetical contemporary professionalism and ethics situations.

In 1997, the Justice Robert Benham Community Service Awards Program was initiated to recognize members of the bench and bar who have combined a professional career with outstanding service to their communities around Georgia. The honorees are recognized for voluntary participation in community organizations, government-sponsored activities, youth programs, religious activities or humanitarian work outside of their professional practice or judicial duties. This annual program is now usually held at the State Bar Headquarters in Atlanta and in the past it has been co-sponsored by the Commission and the State Bar. The program generally attracts several hundred attendees who celebrate Georgia lawyers who are active in the community.

In 2006, veteran attorney and former law professor, Avarita L. Hanson became the third executive director. In addition to providing multiple CLE programs for local bars, government and law offices, she served as Chair of the ABA Consortium on Professionalism Initiatives, a group that informs and vets ideas of persons interested in development of professionalism programs. She authored the chapter on Reputation, in Paul Haskins, Ed., ESSENTIAL QUALITIES OF THE PROFESSIONAL LAWYER, ABA Standing Committee on Professionalism, ABA Center for Professional Responsibility (July 2013) and recently added to the newly-released accompanying Instructor’s Manual (April 2017). Ms. Hanson retired in August 2017 after a distinguished career serving the Commission.

Today, the Commission, which meets three times per year, is under the direction and management of its fourth Executive Director, attorney Karlise Yvette Grier. The Commission continues to support and advise persons locally and nationally who are interested in professionalism programming. The Chief Justice of the Supreme Court of Georgia serves as
the Commission’s chair, and Chief Justice Harold D. Melton currently serves in this capacity. The Commission has twenty-two members representing practicing lawyers, the state appellate and trial courts, the federal district court, all Georgia law schools and the public. (See Appendix A). In addition to the Executive Director, the Commission staff includes Shamilla Jordan (Administrative Specialist). With its chair, members and staff, the Commission is well equipped to fulfill its mission and to inspire and develop programs to address today’s needs of the legal profession and those concerns on the horizon. (See Appendix B).

The Commission works through committees and working groups (Access to Justice, Finance and Personnel, Continuing Legal Education, Social Media/Awareness, Financial Resources, and Benham Awards Selection) in carrying out some of its duties. It also works with other state and national entities, such as the American Bar Association’s Center for Professional Responsibility and its other groups. To keep Georgia Bar members abreast of professionalism activities and issues, the Commission maintains a website at www.cjcpga.org. The Commission also provides content for the Professionalism Page in every issue of the Georgia Bar Journal. In 2018, the Commission engaged in a strategic planning process. As a result of that process, the Commission decided to focus on four priority areas for the next three to five years: 1) ensuring high quality professionalism CLE programming that complies with CJCP guidelines; 2) promoting the understanding and exercise of professionalism and emphasizing its importance to the legal system; 3) promoting meaningful access to the legal system and services; and 4) ensuring that CJCP resources are used effectively, transparently and consistent with the mission.

After 30 years, the measure of effectiveness of the Commission should ultimately rest in the actions, character and demeanor of every Georgia lawyer. Because there is still work to do, the Commission will continue to lead the movement and dialogue on legal professionalism.

Chief Justice’s Commission on Professionalism
104 Marietta Street, N.W. Suite 620
Atlanta, Georgia 30303
(404) 225-5040 (o)
professionalism@cjcpga.org
www.cjcpga.org
THE MEANING OF PROFESSIONALISM

The three ancient learned professions were the law, medicine, and ministry. The word profession comes from the Latin *professus*, meaning to have affirmed publicly. As one legal scholar has explained, “The term evolved to describe occupations that required new entrants to take an oath professing their dedication to the ideals and practices associated with a learned calling.”¹ Many attempts have been made to define a profession in general and lawyer professionalism in particular. The most commonly cited is the definition developed by the late Dean Roscoe Pound of Harvard Law School:

The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service - no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.²

Thinking about professionalism and discussing the values it encompasses can provide guidance in the day-to-day practice of law. Professionalism is a wide umbrella of values encompassing competence, character, civility, commitment to the rule of law, to justice and to the public good. Professionalism calls us to be mindful of the lawyer’s roles as officer of the court, advocate, counselor, negotiator, and problem solver. Professionalism asks us to commit to improvement of the law, the legal system, and access to that system. These are the values that make us a profession enlisted in the service not only of the client but of the public good as well. While none of us achieves perfection in serving these values, it is the consistent aspiration toward them that defines a professional. The Commission encourages thought not only about the lawyer-client relationship central to the practice of law but also about how the legal profession can shape us as people and a society.

¹ DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVERSIVE METHOD 39 (1994)
² ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953)
BACKGROUND ON THE LEGAL PROFESSIONALISM MOVEMENT IN GEORGIA

In 1986, the American Bar Association ruefully reported that despite the fact that lawyers’ observance of the rules of ethics governing their conduct is sharply on the rise, lawyers’ professionalism, by contrast, may well be in steep decline:

[Although] lawyers have tended to take the rules more seriously because of an increased fear of disciplinary prosecutions and malpractice suits, . . . [they] have also tended to look at nothing but the rules; if conduct meets the minimum standard, lawyers tend to ignore exhortations to set their standards at a higher level.3

The ABA’s observation reflects a crucial distinction: while a canon of ethics may cover what is minimally required of lawyers, “professionalism” encompasses what is more broadly expected of them – both by the public and by the best traditions of the legal profession itself.

In response to these challenges, the State Bar of Georgia and the Supreme Court of Georgia embarked upon a long-range project – to raise the professional aspirations of lawyers in the state. Upon taking office in June 1988, then State Bar President A. James Elliott gave Georgia’s professionalism movement momentum when he placed the professionalism project at the top of his agenda. In conjunction with Chief Justice Marshall, President Elliott gathered 120 prominent judges and lawyers from around the state to attend the first Annual Georgia Convocation on Professionalism.

For its part, the Georgia Supreme Court took three important steps to further the professionalism movement in Georgia. First, at the first Convocation, the Supreme Court of Georgia announced and administered to those present a new Georgia attorney’s oath emphasizing the virtue of truthfulness, reviving language dating back to 1729. (See also Appendix C). Second, as a result of the first Convocation, in 1989, the Supreme Court of Georgia took two additional significant steps to confront the concerns and further the aspirations of the profession. First, it created the Chief Justice’s Commission on Professionalism (the “Commission”) and gave it a primary charge of ensuring that the practice of law in this state remains a high calling, enlisted in the service not only of the client, but of the public good as well. This challenging mandate was supplemented by the Court’s second step, that of amending the mandatory continuing legal education (CLE) rule to require all active Georgia

lawyers to complete one hour of Professionalism CLE each year [Rule 8-104 (B)(3) of the Rules and Regulations for the Organization and Government of the State Bar of Georgia and Regulation (4) thereunder].

GENERAL PURPOSE OF CLE PROFESSIONALISM CREDIT

Beginning in 1990, the Supreme Court of Georgia required all active Georgia lawyers to complete one hour of Professionalism CLE each year [Rule 8-104 (B)(3) of the Rules and Regulations for the Organization and Government of the State Bar of Georgia and Regulation (4) thereunder]. The one hour of Professionalism CLE is distinct from and in addition to the required ethics CLE. The general goal of the Professionalism CLE requirement is to create a forum in which lawyers, judges and legal educators can explore the meaning and aspirations of professionalism in contemporary legal practice and reflect upon the fundamental premises of lawyer professionalism – competence, character, civility, commitment to the rule of law, to justice, and to the public good. Building a community among the lawyers of this state is a specific goal of this requirement.

DISTINCTION BETWEEN ETHICS AND PROFESSIONALISM

The Supreme Court has distinguished between ethics and professionalism, to the extent of creating separate one-hour CLE requirements for each. The best explanation of the distinction between ethics and professionalism that is offered by former Chief Justice Harold Clarke of the Supreme Court of Georgia:

“... the idea [is] that ethics is a minimum standard which is required of all lawyers, while professionalism is a higher standard expected of all lawyers.”

Laws and the Rules of Professional Conduct establish minimal standards of consensus impropriety; they do not define the criteria for ethical behavior. In the traditional sense, persons are not “ethical” simply because they act lawfully or even within the bounds of an official code of ethics. People can be dishonest, unprincipled, untrustworthy, unfair, and uncaring without breaking the law or the code. Truly ethical people measure their conduct not by rules but by basic moral principles such as honesty, integrity and fairness.

The term “Ethics” is commonly understood in the CLE context to mean “the law of lawyering” and the rules by which lawyers must abide in order to remain in good standing before the bar. Legal Ethics CLE also includes malpractice avoidance. “Professionalism” harkens back to the traditional meaning of ethics discussed above. The Commission believes that lawyers should remember in counseling clients and determining their own behavior that the letter of the law is only a minimal threshold describing what is legally possible, while professionalism is meant to address the aspirations of the profession and how we as lawyers should behave.
Ethics discussions tend to focus on misconduct -- the negative dimensions of lawyering. **Professionalism discussions have an affirmative dimension -- a focus on conduct that preserves and strengthens the dignity, honor, and integrity of the legal system.**

As former Chief Justice Benham of the Supreme Court of Georgia says, “We should expect more of lawyers than mere compliance with legal and ethical requirements.”

**ISSUES AND TOPICS**

In March of 1990, the Chief Justice’s Commission adopted *A Lawyer’s Creed* (See Appendix D) and an *Aspirational Statement on Professionalism* (See Appendix E). These two documents should serve as the beginning points for professionalism discussions, not because they are to be imposed upon Georgia lawyers or bar associations, but because they serve as words of encouragement, assistance and guidance. These comprehensive statements may be utilized to frame discussions and remind lawyers about the basic tenets of our profession.

Karl N. Llewellyn, jurisprudential scholar who taught at Yale, Columbia, and the University of Chicago Law Schools, often cautioned his students:

> The lawyer is a man of many conflicts. More than anyone else in our society, he must contend with competing claims on his time and loyalty. You must represent your client to the best of your ability, and yet never lose sight of the fact that you are an officer of the court with a special responsibility for the integrity of the legal system. You will often find, brethren and sistern, that those professional duties do not sit easily with one another. You will discover, too, that they get in the way of your other obligations – to your conscience, your God, your family, your partners, your country, and all the other perfectly good claims on your energies and hearts. You will be pulled and tugged in a dozen directions at once. You must learn to handle those conflicts.⁴

The real issue facing lawyers as professionals is developing the capacity for critical and reflective judgment and the ability to “handle those conflicts,” described by Karl Llewellyn. A major goal of Professionalism CLE is to encourage introspection and dialogue about these issues.

⁴ Mary Ann Glendon, *A Nation Under Lawyers* 17 (1994)
APPENDICES

A 2019-2020 COMMISSION MEMBERS

B MISSION STATEMENT

C OATH OF ADMISSION

D A LAWYER’S CREED

E ASPIRATIONAL STATEMENT ON PROFESSIONALISM

F SELECT PROFESSIONALISM PAGE ARTICLES
APPENDIX A

CHIEF JUSTICE’S COMMISSION ON PROFESSIONALISM

Members

The Honorable Harold D. Melton, Chair
Atlanta

Ms. Elizabeth Beskin, Atlanta
Professor Nathan S. Chapman, Athens
Professor Clark D. Cunningham, Atlanta
Mr. William T. Davis, Atlanta
Mr. Gerald M. Edenfield, Statesboro
The Honorable Susan E. Edlein, Atlanta
Ms. Elizabeth L. Fite, Decatur
Ms. Rebecca Grist, Macon
Associate Dean Sheryl Harrison-Mercer, Atlanta
The Honorable Meng H. Lim, Tallapoosa

Advisors

The Honorable Robert Benham, Atlanta
Ms. Jennifer M. Davis, Savannah
Professor Roy M. Sobelson, Atlanta
The Honorable Sarah Hawkins Warren, Atlanta

Staff

Ms. Karlise Y. Grier, Atlanta
Ms. Shamilla Jordan, Atlanta

Names in italics denotes public member/non-lawyer

Karlise Y. Grier
Executive Director

Shamilla Jordan
Administrative Specialist

CHIEF JUSTICE’S COMMISSION ON PROFESSIONALISM
2019-2020
APPENDIX B

MISSION STATEMENT

The mission of the Chief Justice’s Commission on Professionalism is to support and encourage lawyers to exercise the highest levels of professional integrity in their relationships with their clients, other lawyers, the courts, and the public and to fulfill their obligations to improve the law and the legal system and to ensure access to that system.

CALLING TO TASKS

The Commission seeks to foster among lawyers an active awareness of its mission by calling lawyers to the following tasks, in the words of former Chief Justice Harold Clarke:

1. To recognize that the reason for the existence of lawyers is to act as problem solvers performing their service on behalf of the client while adhering at all times to the public interest;

2. To utilize their special training and natural talents in positions of leadership for societal betterment;

3. To adhere to the proposition that a social conscience and devotion to the public interest stand as essential elements of lawyer professionalism.

* * * * * * * * * *
HISTORICAL INFORMATION ABOUT THE COMMISSION’S ROLES IN THE
DEVELOPMENT OF THE CURRENT GEORGIA ATTORNEY OATH

In 1986, Emory University President James T. Laney delivered a lecture on “Moral Authority in the Professions.” While expressing concern about the decline in moral authority of all the professions, he focused on the legal profession because of the respect and confidence in which it has traditionally been held and because it has been viewed as serving the public in unique and important ways. Dr. Laney expressed the fear that the loss of moral authority has as serious a consequence for society at large as it does for the legal profession.

For its part, the Georgia Supreme Court took an important step to further the professionalism movement in Georgia. At the first convocation on professionalism, the Court announced and administered to those present a new Georgia attorney’s oath emphasizing the virtue of truthfulness, reviving language dating back to 1729. Reflecting the idea that the word “profession” derives from a root meaning “to avow publicly,” this new oath of admission to the State Bar of Georgia indicates that whatever other expectations might be made of lawyers, truth-telling is expected, always and everywhere, of every true professional. Since the convocation, the new oath has been administered to thousands of lawyers in circuits all over the state.

Attorney’s Oath

I, ____________, swear that I will truly and honestly, justly, and uprightly demean myself, according to the laws, as an attorney, counselor, and solicitor, and that I will support and defend the Constitution of the United States and the Constitution of the State of Georgia. So help me God.

In 2002, at the request of then-State Bar President George E. Mundy, the Committee on Professionalism was asked to revise the Oath of Admission to make the wording more relevant to the current practice of law, while retaining the original language calling for lawyers to “truly and honestly, justly and uprightly” conduct themselves. The revision was approved by the Georgia Supreme Court in 2002.
APPENDIX C

OATH OF ADMISSION
TO THE STATE BAR OF GEORGIA

“I,___________________, swear that I will truly and honestly, justly and uprightly conduct myself as a member of this learned profession and in accordance with the Georgia Rules of Professional Conduct, as an attorney and counselor and that I will support and defend the Constitution of the United States and the Constitution of the State of Georgia. So help me God.”

As revised by the Supreme Court of Georgia, April 20, 2002
APPENDIX D

A LAWYER’S CREED

To my clients, I offer faithfulness, competence, diligence, and good judgment. I will strive to represent you as I would want to be represented and to be worthy of your trust.

To the opposing parties and their counsel, I offer fairness, integrity, and civility. I will seek reconciliation and, if we fail, I will strive to make our dispute a dignified one.

To the courts, and other tribunals, and to those who assist them, I offer respect, candor, and courtesy. I will strive to do honor to the search for justice.

To my colleagues in the practice of law, I offer concern for your welfare. I will strive to make our association a professional friendship.

To the profession, I offer assistance. I will strive to keep our business a profession and our profession a calling in the spirit of public service.

To the public and our systems of justice, I offer service. I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to seek the common good through the representation of my clients.
APPENDIX E

ASPIRATIONAL STATEMENT ON PROFESSIONALISM

The Court believes there are unfortunate trends of commercialization and loss of professional community in the current practice of law. These trends are manifested in an undue emphasis on the financial rewards of practice, a lack of courtesy and civility among members of our profession, a lack of respect for the judiciary and for our systems of justice, and a lack of regard for others and for the common good. As a community of professionals, we should strive to make the internal rewards of service, craft, and character, and not the external reward of financial gain, the primary rewards of the practice of law. In our practices we should remember that the primary justification for who we are and what we do is the common good we can achieve through the faithful representation of people who desire to resolve their disputes in a peaceful manner and to prevent future disputes. We should remember, and we should help our clients remember, that the way in which our clients resolve their disputes defines part of the character of our society and we should act accordingly.

As professionals, we need aspirational ideals to help bind us together in a professional community. Accordingly, the Court issues the following Aspirational Statement setting forth general and specific aspirational ideals of our profession. This statement is a beginning list of the ideals of our profession. It is primarily illustrative. Our purpose is not to regulate, and certainly not to provide a basis for discipline, but rather to assist the Bar’s efforts to maintain a professionalism that can stand against the negative trends of commercialization and loss of community. It is the Court’s hope that Georgia’s lawyers, judges, and legal educators will use the following aspirational ideals to reexamine the justifications of the practice of law in our society and to consider the implications of those justifications for their conduct. The Court feels that enhancement of professionalism can be best brought about by the cooperative efforts of the organized bar, the courts, and the law schools with each group working independently, but also jointly in that effort.
APPENDIX E

GENERAL ASPIRATIONAL IDEALS

As a lawyer, I will aspire:

(a) To put fidelity to clients and, through clients, to the common good, before selfish interests.

(b) To model for others, and particularly for my clients, the respect due to those we call upon to resolve our disputes and the regard due to all participants in our dispute resolution processes.

(c) To avoid all forms of wrongful discrimination in all of my activities including discrimination on the basis of race, religion, sex, age, handicap, veteran status, or national origin. The social goals of equality and fairness will be personal goals for me.

(d) To preserve and improve the law, the legal system, and other dispute resolution processes as instruments for the common good.

(e) To make the law, the legal system, and other dispute resolution processes available to all.

(f) To practice with a personal commitment to the rules governing our profession and to encourage others to do the same.

(g) To preserve the dignity and the integrity of our profession by my conduct. The dignity and the integrity of our profession is an inheritance that must be maintained by each successive generation of lawyers.

(h) To achieve the excellence of our craft, especially those that permit me to be the moral voice of clients to the public in advocacy while being the moral voice of the public to clients in counseling. Good lawyering should be a moral achievement for both the lawyer and the client.

(i) To practice law not as a business, but as a calling in the spirit of public service.
APPENDIX E

SPECIFIC ASPIRATIONAL IDEALS

As to clients, I will aspire:

(a) To expeditious and economical achievement of all client objectives.

(b) To fully informed client decision-making.
   As a professional, I should:
   (1) Counsel clients about all forms of dispute resolution;
   (2) Counsel clients about the value of cooperation as a means towards the productive resolution of disputes;
   (3) Maintain the sympathetic detachment that permits objective and independent advice to clients;
   (4) Communicate promptly and clearly with clients; and,
   (5) Reach clear agreements with clients concerning the nature of the representation.

(c) To fair and equitable fee agreements.
   As a professional, I should:
   (1) Discuss alternative methods of charging fees with all clients;
   (2) Offer fee arrangements that reflect the true value of the services rendered;
   (3) Reach agreements with clients as early in the relationship as possible;
   (4) Determine the amount of fees by consideration of many factors and not just time spent by the attorney;
   (5) Provide written agreements as to all fee arrangements; and,
   (6) Resolve all fee disputes through the arbitration methods provided by the State Bar of Georgia.

(d) To comply with the obligations of confidentiality and the avoidance of conflicting loyalties in a manner designed to achieve the fidelity to clients that is the purpose of these obligations.

As to opposing parties and their counsel, I will aspire:

(a) To cooperate with opposing counsel in a manner consistent with the competent representation of all parties.
   As a professional, I should:
   (1) Notify opposing counsel in a timely fashion of any cancelled appearance;
APPENDIX E

(2) Grant reasonable requests for extensions or scheduling changes; and,
(3) Consult with opposing counsel in the scheduling of appearances, meetings, and depositions.

(b) To treat opposing counsel in a manner consistent with his or her professional obligations and consistent with the dignity of the search for justice.

As a professional, I should:
(1) Not serve motions or pleadings in such a manner or at such a time as to preclude opportunity for a competent response;
(2) Be courteous and civil in all communications;
(3) Respond promptly to all requests by opposing counsel;
(4) Avoid rudeness and other acts of disrespect in all meetings including depositions and negotiations;
(5) Prepare documents that accurately reflect the agreement of all parties; and,
(6) Clearly identify all changes made in documents submitted by opposing counsel for review.

As to the courts, other tribunals, and to those who assist them, I will aspire:

(a) To represent my clients in a manner consistent with the proper functioning of a fair, efficient, and humane system of justice.

As a professional, I should:
(1) Avoid non-essential litigation and non-essential pleading in litigation;
(2) Explore the possibilities of settlement of all litigated matters;
(3) Seek non-coerced agreement between the parties on procedural and discovery matters;
(4) Avoid all delays not dictated by a competent presentation of a client’s claims;
(5) Prevent misuses of court time by verifying the availability of key participants for scheduled appearances before the court and by being punctual; and,
(6) Advise clients about the obligations of civility, courtesy, fairness, cooperation, and other proper behavior expected of those who use our systems of justice.
APPENDIX E

(b) To model for others the respect due to our courts.

As a professional I should:

(1) Act with complete honesty;
(2) Know court rules and procedures;
(3) Give appropriate deference to court rulings;
(4) Avoid undue familiarity with members of the judiciary;
(5) Avoid unfounded, unsubstantiated, or unjustified public criticism of members of the judiciary;
(6) Show respect by attire and demeanor;
(7) Assist the judiciary in determining the applicable law; and,
(8) Seek to understand the judiciary’s obligations of informed and impartial decision-making.

As to my colleagues in the practice of law, I will aspire:

(a) To recognize and to develop our interdependence;

(b) To respect the needs of others, especially the need to develop as a whole person; and,

(c) To assist my colleagues become better people in the practice of law and to accept their assistance offered to me.

As to our profession, I will aspire:

(a) To improve the practice of law.

As a professional, I should:

(1) Assist in continuing legal education efforts;
(2) Assist in organized bar activities; and,
(3) Assist law schools in the education of our future lawyers.

(b) To protect the public from incompetent or other wrongful lawyering.

As a professional, I should:

(1) Assist in bar admissions activities;
(2) Report violations of ethical regulations by fellow lawyers; and,
(3) Assist in the enforcement of the legal and ethical standards imposed upon all lawyers.
APPENDIX E

As to the public and our systems of justice, I will aspire:

(a) To counsel clients about the moral and social consequences of their conduct.

(b) To consider the effect of my conduct on the image of our systems of justice including the social effect of advertising methods.

As a professional, I should ensure that any advertisement of my services:
(1) is consistent with the dignity of the justice system and a learned profession;
(2) provides a beneficial service to the public by providing accurate information about the availability of legal services;
(3) educates the public about the law and legal system;
(4) provides completely honest and straightforward information about my qualifications, fees, and costs; and,
(5) does not imply that clients’ legal needs can be met only through aggressive tactics.

(c) To provide the pro bono representation that is necessary to make our system of justice available to all.

(d) To support organizations that provide pro bono representation to indigent clients.

(e) To improve our laws and legal system by, for example:

(1) Serving as a public official;
(2) Assisting in the education of the public concerning our laws and legal system;
(3) Commenting publicly upon our laws; and,
(4) Using other appropriate methods of effecting positive change in our laws and legal system.
APPENDIX F

SELECT
PROFESSIONALISM PAGE
ARTICLES
Honoring Georgia’s Lawyers

I sincerely hope the Commission on Professionalism’s work will honor Georgia’s lawyers for what they do each day and will help each lawyer to become consummate professionals while they do the tireless and often thankless work of representing clients.

BY KARLISE Y. GRIER

In June of 2018, I was shaken to the core when I learned of the death of attorney Antonio Mari. I did not personally know Mari, a family law attorney who was murdered by a client’s ex-husband. I had, however, as a former family law attorney of almost 18 years, personally experienced the dynamics that caused his death: enmity, anger, retribution and a myriad of other vitriolic emotions directed at you as a lawyer (by opposing parties or clients) because you are striving to do your job to the best of your ability. I wanted to take a moment in this article to pay tribute to Mari and to honor the thousands of other Georgia lawyers who are just like him, men and women who toil in the trenches every day—putting their clients interests above their own personal well-being—as they strive to provide exemplary service and excellent representation. I also wanted to commend the wonderful professionalism example set by the Bartow County Bar Association, which stepped up in the midst of this horrible tragedy to divide up and take Mari’s cases and to help close down his law practice.¹
According to the Daily Report, Mari was afraid of the pro se opposing party who ultimately killed him. Nevertheless, Mari fulfilled his legal obligations to his client and obtained a final divorce decree for the client less than two hours before his client’s ex-husband shot him to death. This balance of client interests versus personal interests is not always played out as dramatically as in Mari’s case, but it is always there. Do you go to your child’s soccer practice or do you first finish the brief that is due tomorrow? Do you take time to go for a walk or a run or do you take that early morning meeting with a client who can’t take time off from their work as an hourly employee? Do you tell the pro bono client you are meeting with they have to leave your office and reschedule (knowing they most likely won’t) because they reek of cigarette smoke and you have asthma? Do you file a motion to withdraw well in advance of trial or do you take the chance the client will pay you “in installments” as promised, knowing the client really needs a lawyer in this custody battle?

Each day, Georgia lawyers are called upon to make choices, large and small, that force them to balance their personal well-being against the interests of their clients. Striking the “correct” balance is at the heart of what we call professionalism. One of the first quotes I came across when I started as executive director of the Chief Justice’s Commission on Professionalism was from Karl N. Llewellyn, a jurisprudential scholar who taught at Yale, Columbia and the University of Chicago Law Schools. Prof. Llewellyn cautioned his students:

“The lawyer is a [person] of many conflicts. More than anyone else in our society, he [or she] must contend with competing claims on his [or her] time and loyalty. You must represent your client to the best of your ability, and yet never lose sight of the fact that you are an officer of the court with a special responsibility for the integrity of the legal system. You will often find, brethren and sistern, that those professional duties do not sit easily with one another. You will discover, too, that they get in the way of your other obligations—to your conscience, your God, your family, your partners, your country and all the other perfectly good claims on your energies and hearts. You will be pulled and tugged in a dozen directions at once. You must learn to handle those conflicts.”

I hope that, under my stewardship, the Chief Justice’s Commission on Professionalism will honor Georgia’s lawyers by ensuring CLE providers offer outstanding programming regarding professionalism concepts that give lawyers the opportunity to discuss the challenges (and sometimes joys) of practicing law. I look forward to continuing to recognize the amazing community service work of lawyers and judges at the Justice Robert Benham Awards for Community Service. I hope that the Commission’s convocations, such as the 2018 Convocation on Professionalism and the Global Community, will continue to explore cutting-edge issues in the legal profession. I hope the Commission’s work will help to embolden lawyers to stand courageously for the rule of law in our country and to provide guidance to lawyers on how to do so thoughtfully and with integrity. I look forward to the Commission’s continued partnership with the State Bar of Georgia Committee on Professionalism and with Georgia’s law schools as we strive to introduce law students to professionalism concepts during the Law School Orientations on Professionalism.

Too often, I think our profession focuses on the “bad” things for which lawyers may be known. I truly believe most lawyers are good, hard working men and women who want to do the best job they can for their clients in return for fair payment for their work. During my stewardship as executive director of the Commission, it is my goal to focus on and cultivate the good and the goodness in our profession that often happens without notice or comment. I am eager to help us all (myself included) grow to be the best professionals we can be. I sincerely hope the Commission’s work will honor Georgia’s lawyers for what they do each day and will help each lawyer to become consummate professionals while they do the tireless and often thankless work of representing clients.

Karlise Y. Grier
Executive Director
Chief Justice’s Commission on Professionalism
kygrier@cjcpga.org

Endnotes
2. See Id.
3. To learn more about how Georgia defines professionalism, see A Lawyer’s Creed and the Aspirational Statement on Professionalism at: http://cjcpga.org/lawyers-creed/ (last visited August 10, 2018).
The Importance of Lawyers Abandoning the Shame and Stigma of Mental Illness

One tenet of the Chief Justice’s Commission on Professionalism’s “A Lawyer’s Creed” is “To my colleagues in the practice of law, I offer concern for your welfare.” If you are aware of a colleague that may be experiencing difficulties, ask questions and offer to help them contact the Lawyer Assistance Program for help.

BY MICHELLE BARCLAY

January is the month when Robin Nash, my dear friend and lawyer colleague, godfather to my child, officiate for my brother’s marriage and former director of the Barton Center at Emory University, left the world. Positive reminders of him are all around, including a child law and policy fellowship in his name, but January is a tough month.

Robin’s suicide, 12 years ago, was a shock to me. As time passed and I heard stories about Robin from others who knew him and I learned more about suicide, I can see in hindsight the risk looming for him. Today, I think his death was possibly preventable.

In 2006, Robin wrote this essay about himself for Emory’s website

“Robin Nash, age 53, drew his first breath, attended college and law school and now works at Emory University. He loves to travel to places like Southeast Asia and the Middle East but he always returns home to Emory and his hometown of Decatur. Robin majored in Economics and Mathematics. He began his law practice in 1980 in Decatur surviving mostly on court appointed cases for mentally ill patients in commitment hearings.

His practice expanded to working with institutionalized developmentally delayed clients, special education cases, wills and estate litigation and representing banks in the hugely interesting area of commercial real estate closings.

In 1995, he was appointed as a juvenile court judge in DeKalb County. He resigned from the bench effective December 2005. He sold most of his personal belongings, paid off his remaining debts and moved overseas to think and travel. After thinking and traveling for three months, he returned to the active world of Decatur. He was appointed director of the Barton Clinic effective April 15, 2006.”

When Robin came back from traveling, he told his friends—“I can be more impactful here.”—which was and is true. Robin’s impact continues today through the work of young lawyers serving as Robin Nash Fellows and through the lives of the thousands of mothers, fathers, daughters and sons he touched, helping people traumatized by child abuse, neglect, addiction and crime.

He was impactful in part because he had so much empathy for others. He was
well regarded and well loved. He was a person you could count on who did extraordinary things for others—helping a student obtain a TPO in the middle of the night to stop a stalker; quietly helping a refugee family get stable and connected to services; and of course, his consistent care of his friend Vinny. Vinny was a severely disabled adult Robin befriended with whom he had a deep connection. Because he was a lawyer, Robin was able to help Vinny obtain full access to available medical services without being institutionalized.

So why did Robin leave? He lost his battle with mental illness. He masked it well and as a private person, did not share his struggles. His friends had some insight into his struggles but it was always complicated. While a judge, Robin was known for saying things like, “I am a manager of misery” or “I manage the competition not to serve the most vulnerable families and children.” But he also said, “Talk like this is just dark humor which is a useful coping mechanism for an emotionally draining job.”

I know today that a low serotonin level in his body was dangerous for his depression and that the medications he took waxed and waned in effectiveness. I also now know that he had not slept well for days before he acted. We’d had a work meeting the day before he died where he made a long ‘to do’ list. Who makes a long ‘to do’ list when one is contemplating suicide? Plenty of people, I have learned. I saw that ‘to do’ list on his table when I was in his apartment after his death.

What could have helped? Abandoning the shame and stigma of mental illness is a good start. I have been heartened by the social movement campaign, Time to Change, designed to help people speak up about mental illness. A safety plan is a good start. I have been heartened by the shame and stigma of mental illness. A safety plan is a good start. I have been heartened by the shame and stigma of mental illness.

Michelle Barclay, J.D., has more than 20 years experience working in Georgia’s judicial branch. She is currently the division director of Communications, Children, Families, and the Courts within the Judicial Council of Georgia’s Administrative Office of the Courts. Before becoming a lawyer, she was a nurse for 10 years, specializing in ICU and trauma care. Her degrees include a Juris Doctor from Emory University School of Law, a Bachelor of Science in Nursing from Emory University and a Bachelor of Interdisciplinary Studies from Georgia State University. She is also co-founder along with her husband Andrew Barclay of the Barton Child Law and Policy Center at Emory University School of Law. She can be reached at 404-657-9219 or marshall.barclay@georgiacourts.gov.

Endnotes

Counseling for Attorneys
- Depression
- Anxiety/Stress
- Life Transitions
- Career Concerns
- Couples Counseling
- Relationship Conflicts

Michelle and Andy Barclay are so grateful to the Emory University community for the care and guidance that surrounded everyone, especially the students, when Robin died.
Promoting a Professional Culture of Respect and Safety #MeToo

In keeping with our professionalism aspirations, I challenge you to take a proactive, preventative approach to sexual harassment and to start the discussions... about things we as lawyers can do to promote a professional culture of respect and safety to prevent #MeToo.

BY KARLISE Y. GRIER

“There is no doubt that Marley was dead. This must be distinctly understood, or nothing wonderful can come of the story I am going to relate.”—Excerpt from: “A Christmas Carol” by Charles Dickens.

To borrow an idea from an iconic writer: There is no doubt that #MeToo testimonials are real. This must be distinctly understood, or nothing wonderful can come of the ideas I am going to share.

I start with this statement because when I co-presented on behalf of the Chief Justice’s Commission on Professionalism at a two-hour seminar on Ethics, Professionalism and Sexual
Harassment at the University of Georgia (UGA) in March 2018, it was clear to me that men and women, young and old, question some of the testimonials of sexual harassment that have recently come to light. For the purposes of starting a discussion about preventing future #MeToo incidents in the Georgia legal profession, I ask you to assume, arguendo, that sexual harassment does occur and to further assume, arguendo, that it occurs in Georgia among lawyers and judges.1 Our attention and discussion must therefore turn to “How do we prevent it?” We won’t expend needless energy on “Is he telling the truth?” We won’t lament, “Why did she wait so long to come forward?”

First, I want to explain why I believe that sexual harassment in the legal profession is, in part, a professionalism issue. As Georgia lawyers, we have A Lawyer’s Creed and an Aspirational Statement on Professionalism that was approved by the Supreme Court of Georgia in 1990.2 One tenet of A Lawyer’s Creed states: “To my colleagues in the practice of law, I offer concern for your welfare. I will strive to make our association a professional friendship.” Frankly, it is only a concern for the welfare of others that in many cases will prevent sexual harassment in the legal profession because of “gaps” in the law and in our ethics rules. For example, under federal law, sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII applies to employers with 15 or more employees.3 According to a 2016 article on lawyer demographics, three out of four lawyers are working in a law firm that has two to five lawyers working for it.4 In Georgia, there are no state laws similar to Title VII’s statutory scheme.

There is currently nothing in Georgia’s Rules of Professional Conduct that explicitly prohibits sexual harassment of a lawyer by another lawyer.5 Moreover, it is my understanding that generally the Office of the General Counsel will not prosecute a lawyer for alleged lawyer-on-lawyer sexual harassment absent a misdemeanor or felony criminal conviction, involving rape, sexual assault, battery, moral turpitude and other similar criminal behavior.6 Other circumstances in which laws or ethics rules may not apply include sexual harassment of lawyers by clients or sexual harassment that occurs during professional events, such as bar association meetings or continuing education seminars.7

Former Georgia Chief Justice Harold Clarke described the distinction between ethics and professionalism as . . . the idea that ethics is a minimum standard which is required of all lawyers while professionalism is a higher standard expected of all lawyers. Therefore, in the absence of laws and ethical rules to guide our behavior, professionalism aspirations call on Georgia lawyers to consider and implement a professional culture of respect and safety that ensures zero tolerance for behavior that gives rise to #MeToo testimonials.8

practical advice for legal employers to address or to prevent sexual harassment.9 Some of the suggestions included: establishing easy and inexpensive ways to detect sexual harassment, such as asking about it in anonymous employee surveys and/or exit interviews; not waiting for formal complaints before responding to known misconduct; and discussing the existence of sexual harassment openly.10 The federal judiciary’s working group on sexual harassment has many reforms that are currently underway, such as conducting a session on sexual harassment during the ethics training for newly appointed judges; reviewing the confidentiality provisions in several employee/law clerk handbooks to clarify that nothing in the provisions prevents the filing of a complaint; and clarifying the data that the judiciary collects about judicial misconduct complaints to add a category for any complaints filed relating to sexual misconduct.11 For those planning CLE or bar events, the American Bar Association Commission on Women in the Profession cautions lawyers to “be extremely careful about excessive use of alcohol in work/social settings.”12

During our continuing legal education seminar at UGA, one of the presenters, Erica Mason, who serves as president of the Hispanic National Bar Association (HNBA), shared that HNBA has developed a “HNBA Conference Code of Conduct” that states in part: “The HNBA is committed to providing a friendly, safe, supportive and harassment-free environment for all conference attendees and participants. . . . Anyone violating these rules may be sanctioned or expelled from the conference without a registration refund, at the discretion of HNBA Leadership.”13 Mason also shared that the HNBA has signs at all of its conferences that reiterate the policy and that provide clear instructions on how anyone who has been subjected to the harassment may report it. In short, you don’t have to track down a procedure or figure out what to do if you feel you have been harassed.

Overall, some of the takeaways from our sexual harassment seminar at UGA provide a good starting point for discussion about how we as lawyers should aspire to behave. Generally, our group agreed that women and men enjoy appropriate compliments on their new haircut or color, a nice dress or tie, or a general “You look nice today.” Admittedly, however, an employment lawyer might say that even this is not considered best practice.

Many of the seminar participants agreed on some practical tips, however. Think twice about running your fingers through someone’s hair or kissing a person on the cheek. Learn from others’ past mistakes and do not intentionally pat or “flick” someone on the buttocks even if you mean it as a joke and don’t intend for it to be offensive or inappropriate.14 In our professional friendships, we want to leave room for the true fairytale happily ever after endings, like that of Barack and Michelle, who met at work when she was an associate at a law firm and he was a summer associate at the same firm.15 We also need to ensure that our attempts to prevent sexual harassment do not become excuses for failing to mentor attorneys of the opposite sex.

Finally, just because certain behaviors may have been tolerated when you were a young associate, law clerk, etc., does not mean the behavior is tolerated or accepted today. Professionalism demands that we constantly consider and re-evaluate the rules that should govern our behavior in the absence of legal or ethical mandates. Our small group at UGA did not always agree on what was inappropriate conduct or on the best way to handle a situation. We did all agree that the conversation on sexual harassment was valuable and necessary.

So in keeping with our professionalism aspirations, I challenge you to take a proactive, preventative approach to sexual harassment and to start the discussions in your law firm, corporate legal department, court system and/or bar association about things we as lawyers can do to promote a professional culture of respect and safety to prevent #MeToo.

Karlise Y. Grier
Executive Director
Chief Justice’s Commission on Professionalism
kygrier@cjcpga.org

Endnotes
5. The Georgia Code of Judicial Conduct differs from the Georgia Rules of Professional Conduct in that Rule 2.3 (b) of the Code of Judicial Conduct specifically prohibits discrimination by a judge in the performance of his or her judicial duties. See https://
Convocation on Professionalism and the Global Community

The purpose of the Convocation was to model professionalism while discussing a high-conflict issue and to demonstrate the ways in which attorneys have implemented “A Lawyer’s Creed” and the “Aspirational Statement” in their work with the global community.

BY LESLIE E. STEWART

On Nov. 30, 2018, the Chief Justice’s Commission on Professionalism (the Commission) held its Convocation on Professionalism (the Convocation) at Atlanta’s Porsche Experience Center. This year, the Convocation theme was Professionalism and the Global Community, which focused on the professionalism values of competence, civility, character, and commitment to the rule of law and the public good. The purpose of the Convocation was to model professionalism while discussing a high-conflict issue and to demonstrate the ways in which attorneys have implemented “A Lawyer’s Creed” and the “Aspirational Statement” in their work with the global community. The event, which was sponsored by Squire Patton Boggs, Miller & Martin PLLC and Alston & Bird LLP, was well-received by the attendees. The speakers included an array of notables and dignitaries with ties to Georgia, beginning with Supreme Court of Georgia Chief Justice Harold D. Melton, who urged the attendees to demonstrate professionalism through service to their community, a key element of “A Lawyer’s Creed” and the “Aspirational Statement.”
The first panel, "Overview of the Global Community in Georgia," was facilitated by Javier Díaz de León, Consul General of Mexico. Two judges, Hon. Meng H. Lim, Tallapoosa Circuit Superior Court, and Hon. Dax E. Lopez, DeKalb County State Court, spoke movingly about how their judicial careers have been influenced by their experiences of straddling two cultures. Abby Turano, deputy commissioner for International Relations, Georgia Department of Economic Development, explained how and why Georgia welcomes foreign businesses to Georgia.

The second panel, "A View from General Counsels of Companies Doing International Business," was moderated by Shelby S. Guilbert Jr. from King & Spalding. The panelists, including Angus M. Haig, senior vice president and general counsel for Cox Automotive, and Ricardo Nuñez, senior vice president and general counsel for Schweitzer-Mauduit International, described their challenges and how core values affect their roles as international general counsels. Audrey Boone Tillman, executive vice president and general counsel for AFLAC, portrayed the challenges and successes of being a woman of color supervising attorneys in Japan. Joseph Folz, vice president, general counsel and secretary for Porsche Cars North America, shared his experiences working for a German-based company.

The third panel, "The Business Pros and Cons of Developing a Formal Working Relationship with an International Lawyer or Law Firm," was facilitated by Petrina A. McDaniel from Squire Patton Boggs. Tricia "CK" Hoffler, principal at The CK Hoffler Firm, regaled the attendees with her vivid descriptions of being threatened by automatic gunfire as a result of a cultural miscalculation while she represented an unnamed government. Therese Pritchard, from Bryan Cave and Robert Tritt, Dentons US LLP, discussed the necessity of retaining competent local counsel in international cases.

The Convocation’s keynote speaker, Randolph "Randy" Evans, U.S. Ambassador to Luxembourg, described his humble beginnings in Georgia and how the values instilled in him by his family continue to influence the way in which he deals with his professional duties—of treating each person with respect and dignity.

After lunch, the next panel, "What Lawyers Need to Know about Labor Trafficking," focused on the darker side of doing business in the global community. The moderator, Hon. Richard Story, judge, U.S. District Court, Northern District of Georgia, oversaw a lively discussion between Norm Brothers, senior vice president and general counsel for UPS; Susan Coppedge, former U.S. Ambassador-at-Large, the Office to Monitor and Combat Trafficking in Persons, and senior advisor to the Secretary of State (Ret.); and Jay Doyle of Lewis Brisbois Bisgaard & Smith LLP. This panel focused on the way in which government and private business have collaborated to combat the scourge of human trafficking.

The attendees were then treated to a presentation on "An Overview of Professionalism in Immigration Cases" by James McHenry, director of the Executive Office for Immigration Review at the Department of Justice, who unpacked the complex hearing procedures surrounding this timely topic.

The second afternoon panel, "Emerging Issues and Pro Bono Opportunities for Attorneys as a Result of Changes in Immigration Laws," was moderated by Phil Sandick from Alston & Bird. The panelists were Audra Dial from Kilpatrick Townsend & Stockton, Jorge Andres Gavilanes from Kuck Baxter, Monica Khant, executive director of the Georgia Asylum and Immigration Network, and Willis Linton Miller from The Latin American Association. During this panel, the speakers touched on the need for pro bono assistance on these important cases due to an upsurge in work and the consequent burnout on the part of those working full time in this area.

The final panel of the day, "Ethics, Regulatory and Procedural Issues in International Practice," was facilitated by Shelby R. Grubbs, from Miller & Martin. Along with Paula Frederick, general counsel of the State Bar of Georgia and Ben Greer Jr., retired partner at Alston & Bird, the presenters discussed the competing ethical standards that attorneys must negotiate in international work and the necessity of adhering to Georgia standards regardless of cultural or ethical differences.

The Convocation offered a marvelous opportunity for in-person attendees to learn about how the principles of professionalism impact our legal work in the global community. Commission member Hon. Carla McMillian, Court of Appeals of Georgia, tweeted throughout the day at @cjcpga in English and Spanish with the help of Commission member Maria F. Mackay, a Georgia certified interpreter who provided Spanish interpretations of the proceedings for McMillian to tweet. Commission advisor Jennifer Davis and Commission liaison Dee Dee Worley provided invaluable "behind the scenes" staff assistance for the event throughout the day. The Commission staff was grateful for the support of the Commission members and other Convocation contributors and planners who provided invaluable assistance for this immensely successful Convocation. More information about the Convocation and other upcoming Commission events, including the 20th Annual Justice Robert Benham Awards for Community Service, is available on the Commission’s website at www.cjcpga.org.

Leslie E. Stewart is a child welfare attorney and has served as a Supreme Court Fellow on Georgia’s Cold Case project since March 2009 and is also a contractor with the Chief Justice’s Commission on Professionalism.
Follow ICLE on Social Media

facebook.com/iclega

linkedin.com/company/iclega

twitter.com/iclega