



Erie County Bar Association

Title Standards Manual

adopted

December 16, 2005

as amended

April 19, 2007

Introduction

The Title Standards Report to which the within paragraph is the Introduction represents the product of an extended period of research, analysis, and discussion by the membership of the subcommittee. The purpose of the report is to publish the consensus of a number of experienced real estate conveyancers in Erie County upon common title issues so that the standard of practice in Erie County may be documented. Each practitioner must, of course, form her/his opinion as to the state of each title based upon that practitioner's research and analysis. However given that the practice of the locality is a factor in determining the marketability and insurability of title, it is the hope and expectation of the subcommittee that the report will be a useful tool to the County's real estate attorneys. Comments on this initial report are welcomed and supplements are anticipated.

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1.3 Entities Other Than Individuals

1.3.1 Business Corporation and Limited Liability Companies

A. Business Corporation

1. General Power- A corporation has the power to acquire, own, sell, convey, mortgage, etc., real property. 15 Pa.C.S. §1502 (4)..(5).
2. Bylaws - The bylaws may contain any provisions for managing the business and regulating the affairs of the corporation not inconsistent with law or the articles. 15 Pa.C.S. § 1504. However, the corporation bylaws do not affect dealings with third parties unless they have actual knowledge thereof. 15 Pa.C.S. §1505.
3. Form of execution of instruments- Notwithstanding any form of execution provided in the articles or bylaws, any note, mortgage, evidence of indebtedness, contract or other document when signed (1) by one or more officers or agents having actual or apparent authority to sign, or (2) signed by the president or vice president and secretary or assistant secretary or treasurer or assistant treasurer is properly executed for and in behalf of the corporation. 15 Pa.C.S. § 1506.
4. Foreign corporations -- Substantially the same provisions apply to foreign corporations, whether qualified or non-qualified, including the form of execution of instruments or other documents affecting real property in Pennsylvania. 15 Pa.C.S. §§ 4142, 4143, 4146.

B. Limited Liability Companies

1. Owned by members rather than shareholders, and governed by a Certificate of Organization rather than Articles of Incorporation; by an operating agreement rather than bylaws; and generally by one or more managers rather than directors. 15 Pa.C.S. §§ 8901 et seq.
2. Generally, when an LLC is not governed by managers, the members are deemed general partners in applying the provisions of the General Partnership Act; but when governance is by managers, the managers have the authority of general partners under that Act and members are deemed to be limited partners. 15 Pa.C.S. § 8904.

3. In general, the operating agreement may contain any provision for the regulation of the internal affairs of the LLC adopted by the member. 15 Pa.C.S. § 8916.
4. Real property is acquired, held and conveyed in the name of the LLC, and a member has no interest in specific property of the company. 15 Pa.C.S. § 8923.

1.3.2 Municipal Corporations School Districts

A. Municipal Corporations and School Districts.

1. These organizations in Pennsylvania are purely creatures of statute and have several possible classes for each which depend upon size, location, or other factors. Accordingly, the controlling statute in each case must be closely examined to determine conveyance requirements.

1.3.3 Non-Profit Corporations and Unincorporated Associations

A. Nonprofit corporations (terminology not a distinction from “corporation not-for-profit”)

1. Using substantially the same language as the Business Corporation Law of 1988, the Nonprofit Corporation Law of 1988 by separately stated provisions applies the same above principles to nonprofit corporations. See 15 Pa.C.S. §§ 5502, 5505, 5506.
2. However, a nonprofit corporation other than an industrial development corporation with articles providing otherwise, cannot sell, mortgage, lease away, or otherwise dispose of its real property unless authorized by a vote of 2/3 of the members in office of the board of directors; but when the board consists of 21 or more directors, a majority in office may authorize the transaction. No court approval is required, nor is a membership vote necessary unless required in the bylaws. 15 Pa.C.S. § 5546.
3. Foreign nonprofit corporations-- Substantially the same provisions apply to foreign nonprofit corporations, whether qualified or nonqualified. 15 Pa.C.S. §§ 6142, 6143.

B. Unincorporated Associations.

1. With the exception of churches and religious societies, an unincorporated association cannot hold or convey title to real estate in its own name. Such title is treated as being held by all members from time to time of the association, and is held as joint tenants. Ladner on Conveyancing, § 3.10.
2. A conveyance to an ecclesiastical corporation, bishop, ecclesiastic or other person for the use of a church or religious society in its worship or for use as a parsonage, auditorium, school, etc., whether or not in trust for such use, is held subject to the control and disposition of the authorities of the organization in accord with its and/or its denominational rules, regulations, and requirements. 10 P.S. § 81.
3. Conveyances by unincorporated associations must be authorized by the Orphans' Court Division pursuant to the Revised Price Act as codified at 20 P.S. 8301 and following.

1.3.4 Partnerships

A. Partnerships

1. An estate in real property may be acquired in partnership name and, if so acquired, can be conveyed only in the partnership name. 15 Pa.C.S.A. § 8313.
2. Every partner is the agent of the partnership for purposes of its business, and 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 unless the partner in fact has no authority to act in the matter and the third party knows that. 15 Pa.C.S.A. §8321(a).
3. An act of a partner not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners. 15 Pa.C.S.A. § 8321(b).
4. When real property is in the partnership name, any partner may convey title by a conveyance executed in the partnership name, but the partnership may recover the property unless the partnership is bound under 15 Pa.C.S.A. §8321(a) unless the property has been reconveyed to a b.f.p. (without knowledge the partner has exceeded his authority). 15 Pa.C.S.A. § 8322(a)
5. Where title is in the name of one or more partners, but not all, and the record does not disclose the interest of the partnership, those partners may convey title, but the partnership may recover the property if the

partnership is not bound (15 Pa.C.S.A. § 8321(a) unless the purchaser or one claiming under him is a b.f.p. without knowledge. 15 Pa.C.S.A. §8322©. Where title is in the names of all partners, a conveyance by all of them passes title. 15 Pa.C.S.A. § 8322(e).

6. The right of a partner in specific partnership property is not subject to dower, curtesy or allowances to surviving spouse, heirs or next of kin. 15 Pa.C.S.A. § 8342 (b)(5).
7. In an electing partnership (one making a statutory election (under Chapter 87) to have centralized management by 1/3 or fewer of its partners), the authority of a partner not a manager as agent of the partnership is limited to that of an employee. 15 Pa.C.S.A. § 8701.

1.4 “Judicial” Sales

1.4.1 Sheriff’s Deed.

A. Required Notices Prior to Commencement of Residential Mortgage Foreclosure.

Act 6 of 1974, 41 P.S. §403 (effective March 31, 1974) which applies to mortgages of \$50,000.00 or less in original principal amount and a residential dwelling of four or fewer units and Act 91 of 1983, 35 P.S. §1680.401©) (effective December 23, 1983), which applies to mortgages of owner occupied residential dwellings of any amount, require notices upon the mortgagors prior to the commencement of the foreclosure action. The failure to give the requisite notices, which now may be combined (since 1992, 35 Pa. C.S.A. §1680.403[c]) is a jurisdictional defect (592 A2d 47; 407 Pa. Super 140; 615 A2d 339) so that the giving of requisite notices should be alleged in the Complaint and/or be the subject matter of affidavit in the action. Documentation of actual receipt of the pre-filing notices is not required. See First Federal v. Van Why 29 D&C 3rd (1983); Central Savings and Loan v. Reckart 15 D&C 4th 105 (1992). The terms of the mortgage may also impose notice requirements and/or opportunities to cure and should be reviewed.

B. Service of The Complaint.

Service of the Complaint pursuant to Pa. R.C.P. Rules 410 and 400 et. seq. should be evidenced on the record. The Sheriff's return of service usually constitutes the record.

C. Required Notice Prior to Entry of Judgment.

With certain exceptions, Pa. R.C.P. Rule 237.1 (effective February 1, 1980) requires that a ten day notice be given prior to the entry of judgment with certain exceptions. One of the long standing exceptions were mortgage foreclosure actions for which Act No. 6 or Act No. 91 notices were required. That exception was removed July 1, 1999, so that thereafter the ten day notice was required.

D. Effect of Sale.

A sheriff's sale divests all judgments (prior and subsequent) to the judgment upon which execution was issued, except prior mortgages*, real estate taxes, and municipal claims. 42 Pa. C.S.A. §8152. Divestiture is, however, dependent upon compliance with Pa. R.C.P. Rule 3129 which requires that lien holders be given notice. (Menonite Board of Missions v. Adams, 462 U.S. 791 (1983)). The effect of a failure to give notice is not explicit in the Rules or Statute but in the parallel case of a tax claim bureau sale, the overall sale was not voided but the lien of the unnoticed creditor was not discharged. See 96 Pa. Cmwlth 452, 507, A2d 1294 (1986) and 10 Pa. D+C 2d 686 (1957). Obviously, if the creditor who was not notified fails to revive its lien against the purchaser within the requisite general five year period (42 Pa. C.S.A. §5526[1]) the lien would be lost in any event. See Pa. R.C.P. §3026 and 12 P.S. §879 now repealed but still in effect under the somewhat curious rules of JARA. Federal liens, including contractual liens such as mortgages, are not divested even if junior to the judgment if the United States is not named as a party to the action upon which the execution is issued, although there is a special alternate procedure for Internal Revenue Service liens only. See also the discussion at Section 2.3.1.

E. Limitation of Actions.

An action to set aside a judicial sale of property must be brought within six months (of the delivery of the Sheriff's Deed). 42 Pa. C.S.A. §5522(b)(5).

Prior to the 1982 act, the period of limitations was six years. While the statute may be relied upon as curing minor defects, the statute should not be relied upon if there is a defect which renders the underlying judgment void. (i.e. no evidence of service) Obviously if a purchaser has been in possession for twenty-one years (absent a problem with minority or incapacity) even a fundamental defect may be cured.

* However, the mortgage is divested if there is a prior judgment of record before it.

F. Historical Commentary.

For many years the “standard” mortgage foreclosure and other collection actions were effected by confessing judgment upon the bond or note (accompanying the mortgage) and thereafter issuing a writ of execution upon the judgment as entered. Generally the initial notice to the defendant was posting the writ of execution on the premises. Pennsylvania practice in this regard was attacked in the federal court. Swarb v. Lennox, 405 U.S. 191 (1972) excepted application of the procedure to persons whose income was less than \$10,000.00 after November 1, 1970. Subsequently the Pennsylvania Supreme Court in Luskey v Steffrom, Inc., 461 Pa. 305, 1975, held that notice by posting and advertisement only was a denial of due process. The decision is applicable to Sheriff Sales after April 17, 1975. Act 6 of 1974 created a Statutory Action to Conform Confessed Judgment which was designed to allow execution upon residential real estate from a confessed judgment after an intervening legal action which afforded the mortgagor the protection of Act No. 6. Act No. 91 of 1983 requires notice before judgment can be confessed. The utilization of confessed judgment in consumer credit transactions has been abolished since July 1, 1996. (Pa. R.C.P. Rule 2950)

Therefore, an execution upon a confessed judgment subsequent to November 1, 1970, must be carefully reviewed to determine that the action did not represent a “consumer debt” and/or an action to foreclose a mortgage subject to Act No. 6 and/or Act No. 91 or the Swarb v. Lennox decision. Execution upon a confessed judgment may still be had in a commercial context. However, any such execution must be carefully reviewed for compliance with the case law and procedural rules applicable at the time.

G. Conclusion.

The Sheriff's ability to convey is dependent upon a valid judgment and execution and compliance with procedural rules. At a minimum, the abstractor should review the docket entries and if the docket does not evidence compliance with above, then the papers in the proceedings should be examined and copied as necessary.

1.4.2 U. S. Marshal's Deed

Commentary.

The United States Marshal is, of course, the federal counterpart to the County Sheriff. The Marshal's ability to sell real estate is derived from the underlying legal proceeding upon which the writ of execution has been issued.

A. Required Notices Prior to Commencement of Residential Mortgage Foreclosure.

Federal regulations may require notices for various types of loans. If so, compliance with federal requirements should be alleged in the complaint. United States v. Spears, 859 F.2nd 284 (CA3, 1988) held that U.S. Fm.H.A. need not comply with Act 91 or Act 6 for Pennsylvania foreclosures when the foreclosure is in federal court. A similar result was reached for HUD programs. Housing and Urban Development Ayers v. Philadelphia Housing Authority, 908 F.2d 1184 (CA3, 1990). See also Philadelphia Housing Authority v. Barbour, 592 A.2d 47, 405 Pa. Super 140, 1991, See 598 2d 284.

B. Required Service.

F. R. C. P. Rule 4 and following prescribe the requisite service.

C. Required Notice Prior to Entry of Judgment.

F. R. C. P. Rule 55 (b) permits entry of judgment upon request of the plaintiff upon the basis of an affidavit of the plaintiff if the defendant has been defaulted for failure to appear and in all other cases by order of the

court upon motion. When service has been made pursuant to prior court order, default judgment should be secured by court order.

D. Effect of Sale.

F. R. C. P. Rule 69 provides that the procedure on execution shall be in accordance with the practice and procedure of the state in which the District Court is held “. . . except that any statute of the United States governs to the extent it is applicable . . .” 28 U.S.C. §3001 et seq. Federal Debt Collection Procedure Act applies to collections by the United States and provides at §3203 (g) (1) (A) (IV). “The United States Marshal shall serve written notice of public sale by personal delivery, or certified or registered mail to each person whom the marshal has reasonable cause to believe, after a title search is conducted by the United States, has an interest in property under execution, including lien holders, co-owners, and tenants, at least 25 days before the day of sale, to the last known address of each such person.”

This procedure effectively satisfies P.R.C.P. 3129 and Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983).

In other words, notice to junior lienholders is required. Assuming compliance, the sale would be effective the same as if conducted in state court.

E. Limitation of Actions.

F. Conclusion.

The Marshal’s ability to convey is dependent upon a valid judgment and execution and compliance with procedural rules. At a minimum, the abstractor shall review docket entries and returns of service.

1.4.3 Bankruptcy Trustee

A. Property of Bankruptcy Estate.

When a bankruptcy is filed, whether by voluntary or involuntary petition, a bankruptcy “proceeding” is commenced under a particular chapter of the United States Bankruptcy Code. At that time a “bankruptcy estate” is created. All property in which the estate has an interest, wherever located

and by whomever held, constitutes property of the estate as defined by Section 541 of the Bankruptcy Code, 11 U.S.C. § 541. In some instances the property of the estate is subject to a claim of exemption which cannot be finally determined until, at the earliest, thirty (30) days following the date of the first scheduled Creditors' Meeting held pursuant to 11 U.S.C. § 341.

The concept of "property of the bankruptcy estate" is fundamental to a trustee's administration of a bankruptcy estate and to the rights of creditors affected by a bankruptcy filing. Property of the estate, not otherwise exempt, is usually subject to administration solely by a trustee.

B. Trustee Appointment.

In a Chapter 7 (liquidation) and Chapter 13 (individual debt reorganization) a trustee is immediately appointed upon the filing of the case. In a Chapter 11 (reorganization), so long as the debtor remains in possession of the property of the estate, typically *no* trustee is appointed. Under certain circumstances a Trustee may be appointed in a Chapter 11 proceeding.

To the extent a trustee has been appointed in a bankruptcy proceeding, typically the trustee is responsible for the administration of the estate just as is the case with the administration of a decedent's estate where a personal representative has been appointed to act on behalf of identified beneficiaries. As such, any deed transferring real estate constituting "property of the estate" usually can only be transferred in the name of the trustee in his or her representative capacity for the bankruptcy estate.

C. Recording.

For purposes of the chain of title it is imperative for the deed to be properly docketed and referenced in the Recorder of Deeds Office. As such, the debtors' names (in which title was originally vested) must appear in the grantor clause, along with that of the Chapter 7 or Chapter 11 trustee, in such a manner so as to insure appropriate recording in the Recorder's Office. Even though the Chapter 13 trustee administers "property of the estate", since the debtors remain in possession of the property, typically the debtors, not the trustee, sign the deed approved in the Chapter 13 proceeding. Therefore there is no need to also identify the Chapter 13 trustee in the grantor clause.

Before any transfer of property can take place a court order must be obtained in the applicable bankruptcy court permitting sale of property pursuant to 11 U.S.C. § 363 which is the statutory authority allowing for sale of property in a bankruptcy proceeding. In order to facilitate notice of the court-ordered authority to transfer property when a bankruptcy is pending, a certified copy of the bankruptcy court order should be appended as an exhibit to the deed to demonstrate “of record” in the Recorder of Deeds Office that the transfer was sanctioned by the appropriate bankruptcy court.

D. Deed Content.

In order to further accommodate the record title in the Recorder’s Office for the benefit of any subsequent purchaser in ascertaining the appropriate authority for the transfer of the property out of the bankruptcy estate, the “Individual Fiduciary Deed” (used by the trustee in transferring property) should contain numerous recitals concerning the identification of the specific bankruptcy case including the date and court where filed, the source of the authority of the trustee to act on behalf of the estate, specific reference to and identification of the court order authorizing the sale of the specific real estate identified and the representation that the property is being sold “free and divested of liens.” In those cases in which the debtor-in-possession or Chapter 13 debtor is transferring title, similar recitals (except as to the existence of a trustee) should be placed in the body of the deed.

The above referenced procedure applies in those cases in which, after notice and hearing, a trustee (or debtor-in-possession or Chapter 13 debtor, depending on the case) conveys property of the estate to a specific buyer pursuant to 11 U.S.C. § 363 following a private or public sale before the bankruptcy court. In some instances where the property is sold at public auction without the benefit of a preceding private offer, two orders of the bankruptcy court will be required giving rise to the trustee’s (or the debtor-in-possession or Chapter 13 debtor, depending on the case) authority to transfer the real estate. The first order authorizes the trustee to sell the specific property by public auction. The second order will identify the ultimate purchaser at the time of the public auction. As noted above, the authority of the trustee to transfer title, should also be referenced in the body of the deed through inclusion of appropriate recitals.

Typically the bankruptcy deed will be a special warranty deed. In the rare case the transfer will be by way of quit claim deed. In no instances is the deed by general warranty deed.

E. Practice Note.

The bankruptcy court order authorizing the sale of property references the specific liens and encumbrances transferred from the property subject to sale to the proceeds of the sale. It is necessary that notice of this event be filed not just in the Recorder of Deeds Office (as an attachment to the deed), but also with the Prothonotary. Most often more than just a mortgage is divested by the bankruptcy court order authorizing a sale. Other liens such as judgments, tax liens and other specified encumbrances are also divested. Therefore it is important for purposes of clearing the title that a filing also be made in the Prothonotary's Office so the docket there can also be cleared. The Prothonotary will accept a "Praeceptum to Avoid Liens" (or some similar document) which directs the Prothonotary to note on the respective docket that certain liens and encumbrances have been divested by virtue of the applicable court order. A certified copy of the bankruptcy court order is appended to the Praeceptum as further evidence and authority for this action. This filing is a useful tool for clearing defects to title that may exist in the Prothonotary's Office only and remain "of record" but for the filing of this specific document.

1.4.4 Tax Claim Bureau

The Tax Claim Bureau's statutory authority to conduct tax sales is set forth in the Real Estate Tax Sale Law, 72 P.S. § 5860.101, *et seq.* (the "Act").

There are several types of tax sales under the Act: upset (§ 601), judicial or the so-called "free and clear sale" (§ 610), private (§ 613), and repository (§ 627). As a matter of statutory law under the Act and due process requirements, the required notices to the owner must be given for a tax sale to be valid. In order to discharge liens in a judicial sale, the lienholders must be given notice of the sale.

The practical problem with tax sales is verifying the required notices were sent and/or received. This is virtually impossible because of the possibility of return receipt cards being signed in the owner's name by another party,

the wrong property being posted, wrong addresses, etc. None of this can be conclusively determined from reviewing the Bureau's file.

As a consequence, the Bar has rightfully been very cautious in accepting tax sale deeds without a quit claim deed from the prior owner or a final quiet title or other decree against the prior owner. More recently, the Bar has relied upon the statute of limitations concerning tax sales. The Commonwealth Court in the case of Scovern v. County of Northumberland, 664 A2d 1073 (1995) held that a 21-year statute of limitations applies to tax sales. However, 42 Pa.C.S. § 5527, providing for a 6-year statute of limitations has been held applicable to an upset tax sale (see Poffenberger v. Goldstein, 776 A.2d 1037, 1041, 1042 (Pa. Cmwlth. 2001)) and the 6-month statute of limitations in 42 Pa.C.S. § 5522(b)(5) applies to judicial tax sales.

It is suggested that we continue a cautious approach to tax sales requiring either the passage of 21 years from the tax sale, a quit claim deed from the prior owner, or a final decree in a quiet title or other action against a prior owner.

1.4.5 Treasurer's Sale.

The law regarding treasurer's sales is very similar to upset tax sales. The statute is found at 72 P.S. §§ 5971a - 5971z. It is believed that the last treasurer's sale in Erie County took place in the 1970's. Hence, these sales would fall within the statute of limitations rule outlined above regarding Tax Claim Bureau sales and title based upon such a sale should be deemed acceptable.

1.4.6 Master - Reserved

2. MORTGAGES

2.1 Spousal Joinder for Marital Property

Sale or Mortgage by Married Individual:

The general position of title insurers is that a spouse who is not on title need not execute nor join in a deed of conveyance in good faith for valuable

consideration or in a mortgage, except during the window of opportunity for equitable distribution provided by a pending divorce.

Local Position:

In the event that either (1) the title search discloses a pending divorce **or** (2) the Seller/Borrower indicates in the Owner's Affidavit that the Seller/Borrower is, in fact, a party to a pending divorce (in any jurisdiction) then joinder of the non-title holding spouse shall be required in the deed or mortgage or a deed/quit claim deed from the non-title holding spouse to the title holding spouse.

In all other circumstances, the joinder of the non-title-holding spouse in a deed or mortgage **or** a deed/quit claim deed from the non-title holding spouse to the title holding spouse shall not be required.

Lender Requirements:

As attorneys we are occasionally required by the lender to furnish to the lender some form of spousal rights' waiver in circumstances where the title insurer does not require the joinder of a non-title holding spouse. This is a matter between lender and borrower and not a title matter.

Application:

This standard shall apply to all transactions occurring on or after July 18, 1978.

2.2 Open Mortgage From Predecessor In Title

A mortgage not properly satisfied or released of record is a cloud on title. Payment can be presumed if no payment has been made for 20 years on account of either principal and interest, but the mortgage remains a lien. Under the Act of May 23, 1949, a 50-year statute of limitations was thought to be invoked, but that statute was held unconstitutional in Girard Trust Co. v. Pennsylvania Railroad Co., 71 D.&C. 533 (1950), Aff'd 364 Pa. 576, 73 A.2d 371 (1950).

It appears that the title examiner has but three alternatives; (1) require satisfaction of the mortgage if it appears that it has, in fact, been paid, (2) require a quiet title action to obtain satisfaction of the mortgage by court order; or (3) where the mortgage is ancient and insubstantial, list the lien as an exception on the lawyer's Certificate of Title and obtain title insurance for the same. If the mortgage holder is non-responsive to a request for satisfaction, it is suggested that one call to his attention that failure to satisfy a paid mortgage within 60 days of notice, may subject the lender to paying to the borrower a sum equal to the entire mortgage debt! See, Mortgage Satisfaction Act, 21 P.S. § 721-1.

2.3 Effect of Foreclosure

2.3.1 Mortgage Foreclosed Upon

A Sheriff Sale will divest the lien of the mortgage foreclosed upon, and the general common-law rule is that a judicial sale of real property divests all prior and subsequent liens on the property, except this will not affect the lien of a mortgage if it is prior to all other liens on the same property, except other mortgages, ground rents, purchase money due the Commonwealth, taxes, municipal claims and assessments, not at the date of the mortgage duly entered as a lien, or taxes, municipal claims and assessments whose lien, though afterwards accruing, has by law priority given it. 42 Pa.C.S.A. § 8152.

- A. A good analysis of the problem is set forth in Public Federal Savings & Loan Association v. Neumann. 483 A.2d 505 (Pa.Super. 1984). This was a sheriff sale on a judgment with a prior mortgage, but ahead of that mortgage were two other judgments, which had been paid in full, but were unsatisfied of record. The bidder at the sale asserted the mortgage was discharged. The court pointed out a sheriff sale discharges all liens not satisfied of record, excepting the lien of a mortgage, if the mortgage is prior to all other liens on the property (42 Pa.C.S.A. § 8152), (and see City of McKeesport v. Delmar Leasing Com., 656 A.2d 180 (Pa.Cmwlth. 1995). If the judgments have been satisfied, the mortgage would have been preserved, but it was actually divested, as were the two judgments, by the sheriff sale.

(Unfortunately, the parties had agreed that the sale was subject to the mortgage, so the bidder had to pay it off.)

Note that condominium assessments are not included among the exceptions. See 68 Pa.C.S.A. § 3315, so foreclosure upon a junior lien could discharge a "first" mortgage on a condominium if there's an unpaid assessment due before the mortgage was recorded!

- B. This non-divestiture of a prior mortgage does not apply to mortgages upon unseated lands or sales of unseated lands for taxes ("seated lands" is defined as "land that is occupied, cultivated, improved, reclaimed, farmed, or used as a place of residence. Residence without cultivation, or cultivation without residence, or both together, impart to land the character of being seated." *Black's Law Dictionary, Fifth Edition*. Unseated land is a designation applied to uncultivated or "wild" land subject to taxation. As soon as it is occupied with intent of permanent use (which occupation commences at the moment of entry for the purpose of clearing the land), it becomes and remains ~ land. *LADNER on Conveyancing in Pennsylvania*, § 12.27. Hence, mortgages on unseated lands are still unprotected from discharge by any judicial sale.

But watch out for federal tax liens! In United States of America v. Peterson, 204 F .Supp. 683 (E.D.Pa. 1962), the court refused to be bound by Pennsylvania law and held that "(though this) result may shock real estate lawyers and title searchers a senior federal tax lien is not divested by mortgage foreclosure". This is restated in Berlin v. United States of America, 535 F .Supp. 298 (E.D.N.Y.1982).

A caveat however:

1. In checking the title where a mortgage has been foreclosed, be certain that there is compliance with Rule 3129.1, which requires notice of sale to (inter alia) "every other person who has any record lien on that property". Failure to give notice will nullify the intended divestment of the lien in question.
2. Right of Redemption. The IRS has a right to redeem the property within 120 days of the foreclosure sale in the case of a federal tax lien. Where a sale of real estate is made to satisfy a

lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. 28 U.S.C.S. § 2410. No right of redemption arises from the issuance of insurance under the National Housing Act (12 USC 1701k) or the to be supplied Act (38 USC). See U.S. v. Warford 791 F2d 1519. No right of redemption arises from the issuance of insurance under the National Housing Act (12 USC 170k) or the Veteran’s Housing Act (38 USC 3702). See U.S. v. Warford, 791 F2d 1519.

3. In foreclosure proceedings, the existence of a federal tax lien requires the joinder of the United States of America as a defendant to effect divestment.
4. A sheriff sale does not divest municipal liens, except to the extent that the proceeds realized are sufficient for their payment 53 Pa.C.S.A. § 7281.

2.3.2 Prior Mortgage - Reserved

2.3.3 Subordinate Mortgage – Reserved

2.3.4 Subordinate Federal Mortgage

A federal mortgage or lien which is subordinate to the mortgage or lien foreclosed upon, under Pennsylvania law, will be discharged so long as the creditor complies with the statutory requirements for the discharge of the federal lien (i.n., joinder of the United States of America as defendant, proper notice, and seeking a judicial sale.) However, the one-year right of redemption (which is only 120 days in the case of federal tax liens) will not be defeated.

3. LIENS ON REAL ESTATE

3.1. Lien Defined: A Charge, hold, claim or encumbrance upon the property of another as security for some debt or charge.

3.2 Classification of Liens

- A. In Personam Judgments: Encumber all real property of the judgment debtor in the county in which the lien is filed. Include certain tax liens, judgments from lawsuits, and confessed judgments (pursuant to amendments to Pa.R.C.P. 2950, effective 7/1/96, confessions of judgment in consumer credit transactions were abolished)
 - B. In Rem Liens: Attach only to a specific piece of property and include mortgages, real estate tax liens, municipal liens, mechanic's liens, and judgments in mortgage foreclosure actions
-

3.3 Mortgages

- A. Generally, all mortgages must be recorded within 6 months from execution to be effective against third parties (21 Pa.C.S.A. §621).
- B. Purchase Money (42 Pa.C.S.A. §8141):
 - 1. Given to seller (automatic) or to the lender at the time of purchase (if the mortgage so states). The lien becomes effective from the date of delivery if it is recorded within 10 days. The mortgage to the seller and the purchase money mortgage to the lender are co-equal, irrespective of the order of recording, unless one states that it is subordinate.
- C. Advance Money: Given to secure future advances (lines of credit, construction mortgages). Under common law, each advance was a lien from the date of advance unless the lender was obligated to make all advances, in which case the lien relates back to the date of recording.

Open end mortgages (42 Pa.C.S.A. §8143) must be identified as an open end mortgage and state that it secures future advances. Lien is from the time that the mortgage is left for recording. Mortgagor may unilaterally record the document limiting the lien to then outstanding balance, which some lenders define as an event of default.

- D. Industrial Plant Doctrine: Covers manufacturing or industrial plants. Encumbers real estate as well as all machinery, even after installation, that is necessary for the plant's operation as a going concern.

3.4 Judgments

- A. Obtained by verdict or confession
- B. Duration: Must commence revival within 5 years or lose property versus third party creditors and purchasers (42 Pa.C.S.A. §5526(1)). Revival must be reduced to judgement within succeeding five years.
- C. Sale subject to judgment: creditor may revive v. purchaser, known as terre tenant, at any time within 5 years after recording of deed. Commonwealth of PA Department of Public Welfare v. Andrews, 338 Pa. Super. 211, 487A.2d 929, 931, n.1 (1985)
- D. Revival after 5 years: effective v. debtor, but lose priority
- E. Do not constitute liens against after-acquired property (must revive)
- F. Tenancy by entirety: Generally, judgment against one spouse does not constitute lien against property held as tenants by entirety. However, if tenancy is severed by death or divorce, lien relates back to original entry date (so be careful in refinancings).

Note: United States v. Craft 122 S.Ct. 1414 (2002) held that an IRS tax lien extended to the share of a spouse in a tenancy by the entirety. See also Napotnik v. Equibank 679 F2d 316 (3rd Cir). As a result a federal lien must be considered to attach to the interest of a spouse even if the other spouse is not a defendant.

3.5 Federal Debt Procedures Act of 1990

- A. Covers all judgments in favor of U.S.A. and its agencies, except federal tax liens
 - B. Duration of lien: 20 years (for all judgments filed no more than 10 years prior to enactment)
-

3.6 Arbitration Awards: Pursuant to Pa.R.C.P. 1307(b), arbitration award constitutes lien against real estate during pendency of appeal

3.7 Support Orders

- A. Act 58 of 1997, as amended (23 Pa.C.S.A. §4352(d)) provides that overdue support obligations constitute automatic, unfiled lien against all real property of obligor in county where support obligation is of record.
 - B. Act requires availability of means of public notification and ability of Domestic Relations Section to determine amount of arrears (search at www.pa-childsupport.com).
 - C. Who do you check? Any person in chain of title who has owned other than tenancy by entireties since 1/1/98 and owners in refinance and buyers, whether title held by entireties or not.
-

3.8 Deficiency Judgments: Amendments to Pa.R.C.P. 3277, effective 1/1/97, allow creditor to obtain deficiency judgment subsequent to mortgage foreclosure action (previously, had to sue on note).

3.9 Tax and Municipal Liens

- A. Real Estate Taxes (53 Pa.C.S.A. §7101 et seq; 72 P.S. §5860.101 et seq.). Generally a first lien from date millage is set. Tax collectors make return of delinquent taxes to Tax Claim Bureau by 4/30 of each year and claims are entered on docket by 6/30 of each year. Practice

pointer: must check with both tax collector and Tax Claim Bureau and, prior to 6/30, double check on whether collector or Bureau has last year's delinquents.

- B. Municipal Liens (53 Pa.C.S.A. §7101 et seq.). In rem liens. Priority: Junior only to real estate and Pa. taxes. Construction projects: Lien arises at completion and is valid for 6 months without filing. Usage: Arise at assessment and valid for 3 years without filing. Filing: Upon filing, lien has duration of 20 years (as of 1/1/83, for liens filed on or after 1/1/78).

Note: The Locality Index for the applicable municipality which is not available online or on the computer monitors must be searched based on address in addition to the alphabetical judgment index by defendant.

- C. Corporate Taxes: Generally, "settled taxes" are a first lien without filing on corporation's real property from date of settlement. Includes corporate stock, franchise, and income taxes. Can get lien certificate from Dept. of Revenue regarding settled taxes.

Bulk sales: Applies where corporation, employer, or person or entity with sales at retail is selling 50% or more of its real estate holdings. Purchase appears to be personally and eternally liable for any (not just settled) unpaid tax obligations of seller corporation (possibly including capital gain on sales). Can, in theory, obtain Clearance Certificate from Department of Revenue, but takes 9 months or more to procure. Solutions: Accountant's Certification of Payment, indemnity, escrows. Statutory references: 72 P.S. §1403(a), §7240, §7321.1; 43 P.S. §788.3; 69 P.S. §529.

- D. Inheritance and Estate Taxes

Pa. Inheritance Tax (72.P.S. §9101 et seq.) - Attaches at date of death. Valid without filing, for 20 years and 9 months against third parties (forever against heirs). Lien is in amount of all taxes owed, not just those attributable to real property in question. Can get certificate of Release of Lien from Department of Revenue where tax paid on value of particular property without diminution for deductions (72 P.S. §9175 (c)). See also 72 P.S. 9170 which allows a sale by a fiduciary

to be made free of the lien if a bond as required by the probate code has been filed or is not required.

Federal Estate Taxes (26 U.S.C. §6321 et seq.). General Lien attaches upon assessment, perfected upon filing. Duration: 10 years, 30 days. Special Lien attaches at death. No assessment or filing required. Duration: 10 years from date of death.

E. Other Commonwealth of Pennsylvania Tax Liens

1. Applies to Pennsylvania taxes for which a Notice of Lien must be filed, such as unemployment compensation, sales and use taxes, and personal income taxes. Lien from date of filing with Prothonotary (43 P.S. §788.1 and 72 P.S. §7242).
2. Although liens filed by Department of Revenue (e.g., sales and use and personal income taxes) previously had to be revived every 5 years, 1994 amendments to the Fiscal Code now provide that all tax liens required to be filed by Department of Revenue shall retain their priority without necessity of revival (72 P.S. §1404.1). Not specifically stated in legislation, but appear to now constitute liens against after-acquired property.
3. Other liens, such as unemployment compensation, must still be revived every five years. However, pursuant to 43 P.S. Section 788.1, unemployment compensation liens attach to after-acquired property (so, search all parties in chain and purchaser for preceding 5 years).

F. Federal Tax Liens (26 U.S.C. §6321). Usually for income taxes. Valid against after-acquired property. Duration: 10 years, 30 days from date of assessment. Perfected against third parties by filing of Notice of Federal Tax Lien. Per United States v. Craft, decided April 27, 2002, now constitute liens against half interest of one spouse where property held by entireties. Not divested by Judicial Sale unless U.S.A. joined as defendant, and even if joined, U.S.A. has 120 day right of redemption.

G. Claims of Department of Public Welfare for Nursing Home Assistance. Estate recover provisions effective 8/15/94 (62 Pa.C.S. §1412). Limited to probate estate. Covers Medical Assistance

received after age 55. Really a claim against estate, not a lien. 1995 amendments absolve a bona fide purchase for value from liability.

3.10 Mechanic's Liens (49 Pa.C.S.A. §1101 et seq.)

Covers Contractors and Subcontractors who furnish labor, materials, or superintendence for construction project (includes supplier to contractors). Perfected by filing claim within 4 months of completion of your work (subcontractors must give owner notice of intent to claim 30 days prior to filing). Priority: Lien relates back to date of commencement of construction (on "construction or erection"), but only from time of filing on "alteration or repair." Prevention: File lien waiver executed by contractor prior to commencement of work. Duration: Action to obtain judgment must be commenced within 2 years from filing and claim must be reduced to judgment within 5 years from date of filing or claim is lost.

3.11 Commercial Broker's Liens (68 Pa.C.S.A. §1051). Applies only to commercial sales. Notice and filing requirements similar to mechanics' liens.

3.12 Condominium and Planned Community Assessments and Judgment Liens. Assessments constitute liens without filing from date assessed. Get Resale Certificate from Condominium Association to avoid purchaser liability. Judgment lien against the condominium or planned community association now constitutes a pro-rate lien against each unit.

3.13 Priority and Divestiture. Priority (42. PA.C.S.A. §8141). Purchase money mortgages from time of delivery if recorded within 10 days. Other mortgages from time left for record. Verdicts for specific sum of money, from time recorded by the Court. Adverse judgments, from time rendered. Amicable judgments, from time instrument on which entered is left for entry. Writs which when issued and indexed create liens against real property, from time issued. Other instruments which when entered or filed and indexed create liens against real property, from time left for entry or filing.

Divestiture by Judicial Sale: Pursuant to 42 Pa.C.S.A. §8152, lien of mortgage not divested if prior to all other liens except (a) other mortgages, (b) taxes, municipal claims and assessments not at the date of the mortgage entered as a lien, and (c) taxes, municipal claims and assessments whose lien though afterwards accruing is given priority by law. Sale on prior mortgage or judgment divests.

General, judicial sale on any lien divests all judgments, prior or subsequent. Taxes and municipal claims and liens generally not divested unless proceeds of judicial sale are sufficient to pay. Federal tax liens divested only if government joined in foreclosure or notified in execution under confessed judgment (26 U.S.C. §7425). Notice to lienholders - Pa.R.C.P. 3129 requires notice be given by Sheriff to all lienholders whose liens may be affected by sale.

4. “CLEAN AND GREEN”

72. P.S. §5490.1 and following, “Pennsylvania Farmland and Forest Land Assessment Act of 1974” provides tax relief for farmers and wood lot owners. In the event that a subsequent conveyance or subdivision constitutes a breach of the requirements of the Act, a tax rollback, which includes interest, may result and will bind the interest of the owner of both parcels, new and residue. Preferential assessments are recorded in the Recorder of Deeds and appear on the assessment cards and tax bills for a parcel. Notice of certain types of conveyances must be given to the County Assessor in advance of sale. For any rural parcel, other than a building lot under ten acres not involving subdivisions from a larger parcel, title examination should include a determination of whether or not the land in question has received a preferential assessment, and if so, the title certificate and/or title insurance should reflect that assessment. Purchasers should be advised of the act’s, provisions, and the necessity of submitting an application after acquisition for continuity. The creation of rural subdivisions also require a Clean and Green determination prior to subdivision.

Act 235 of 2004 amended the Clean and Green act to largely eliminate the preferential tax treatment for the “farmstead land” (i.e., the portion of the property upon which the residence and supporting structures are located) of properties enrolled under either the forest reserve or agricultural reserve

classifications. The practical effect of this amendment is to make enrollment far less attractive for properties not actively engaged in agriculture, such as so-called “mini-estates.”

5. LEVIED AND RETURNED TAXES.

Levied taxes are current taxes payable to the tax collector. Returned taxes are those returned taxes by the local tax collector to the Erie County Tax Claim Bureau for collection after the period for payment has expired. Like all real estate taxes, returned taxes are a priority lien upon the real estate against which the taxes were levied without separate filing with the Prothonotary or other office. 72 P.S. §5860.301. Lists of parcels upon which taxes have been returned are prepared by the Tax Claim Bureau periodically and are available in the Prothonotary’s Office for review. Review of same is accepted as sound basis for determining if returned taxes are outstanding. Some practitioners secure a certification from the Tax Claim Bureau as to delinquent taxes at a nominal cost (\$2.00) instead of relying on the list. 72 P.S. §5568. Generally, the status of current taxes is determined by inquiry of the appropriate tax collector or securing the current year’s receipts.

6. DIVORCE/MARITAL SETTLEMENT AGREEMENT

6.1 Pre-Marital - (NOTE: Amended later by 2.1)

Before 1978, any conveyance by a married person had to be joined in by their spouse in order to be a proper conveyance. Up until 1978, a spouse had rights in a deceased spouse’s real estate, even real estate conveyed by the deceased spouse during their lifetime. However, effective June 18, 1978, 20 Pa. C.S. Sec. 2105 decreed that the intestate share provided for by 20 Pa. C.S. is in lieu of and full satisfaction of Dower and Curtesy rights. Effective April 2, 1980, joinder of a spouse was again required due to the passage of the Divorce Code including the concept of equitable distribution of property discussed above. After 1980, the following rules apply:

Where a party owned property prior to marriage in their own name, and it remains in their own name, and the parties are currently married, the practice in Erie County is to require the joinder of the spouse in any sale of

such property. The theory is that under the Divorce Code, a spouse, in the context of a divorce, has a claim against all “marital property.” One defined item of “marital property” is the increase in value of property owned prior to marriage. Thus, if the property increased in value during the marriage, the non-owning spouse does have a claim against that increased value, but query whether that claim applies directly to the particular item of property or creates a lien.

23 Pa. C.S. 3501 defines “marital property” as “all property acquired by either party during the marriage, including the increase in value, prior to the date of final separation, of any non-marital property acquired pursuant to paragraphs (1) and (3), except: (1) property acquired prior to marriage or property acquired in exchange for property acquired prior to marriage. . . . (3) property acquired by gift, except between spouses, bequest, devise or descent.” In other words, the increase in value of premarital assets and of property acquired during the marriage by gift, are marital property. But there is an exception to the exception and that is in paragraph 5 which states, “property which a party has sold, granted, conveyed or otherwise disposed of in good faith and for value prior to the date of final separation.” It could easily be argued that where a party to a marriage wishes to sell real property and they can demonstrate by way of appraisals that the sales price approximates the value of the real property, the requirements of paragraph 5 would be met and there is not the need to obtain the joinder of the spouse. However, as above, the practice in Erie County has always been to obtain the joinder of the spouse, and that is a more careful practice.

6.2 **Post-Marital** *(Note: Amended later by 2.1)*

Paragraph (b) of 23 Pa. C.S. Sec. 3501 states “Presumption . . . all real or personal property acquired by either party during the marriage is presumed to be marital property regardless of whether title is held individually or by the parties in some form of co-ownership . . . the presumption of marital property is overcome by a showing that the property was acquired by a method listed in Subsection A. Since most of the exceptions contained in Subsection A could not be verified as a matter of record, reasonable practice requires that all real property acquired during the marriage can be sold only by joinder of the spouse.”

6.3 Court Decree

Court Decree Where parties have been divorced, unless the court, by order, has specifically retained jurisdiction over all of the assets of the parties, then counsel for the buyer can rely on title to the property in determining which of the spouses need to sign the deed. In other words, if the parties are divorced, the court has not retained jurisdiction on the property and it is titled solely to wife, but the property was acquired either before or during marriage, the fact that title is in her name alone is sufficient to show that only she needs to sign the deed. However, if the court has retained jurisdiction over the property, then all of the above rules apply and the buyer's lawyer should treat the property as though the parties were not yet divorced.

7. OIL AND GAS INTEREST - Reserved

7.1 Duration

7.2 Spending

7.3 Assignment of Royalties

7.4 Included rights-of-way

8. EASEMENTS AND RIGHTS-OF-WAY- Reserved

8.1 Location

8.2 Incorporated in out sales

9. EVIDENCE OF RECORD - Reserved

9.1 Deed Recital

9.2 Statutory Affidavit 21 P.S. 451

10. RESTRICTION - Reserved

10. Communication to Buyer

11. DISCLOSURES OF ADVERSE ENVIRONMENTAL CONDITIONS

11.1 Solid Waste Management Act

Pennsylvania’s Solid Waste Management Act, No. 97 of 1980, 35 P.S. §§6018.101 *et seq.*, requires that the grantor in every deed for conveyance of real property on which “hazardous waste is presently being disposed, or has ever been disposed by the grantor or to the grantor’s actual knowledge shall include in the property description section of such deed an acknowledgment of such hazardous waste disposal” 35 P.S. §6018.405. The acknowledgment must include, to the extent the information is available, the surface area size and exact location of the disposed waste and a description of the types of hazardous waste contained therein. *Id.* The amended property description must then be made part of the deed for all future conveyances or transfers of the affected property. *Id.* The terms “disposal” and “hazardous waste” are broadly defined in 35 P.S. §6018.103, and the Pennsylvania Environmental Quality Board is charged with the duty of identifying and listing particular hazardous wastes that are subject to the provisions of the Solid Waste Management Act. 35 P.S. §6018.402.

Nothing in the Solid Waste Management Act requires a grantor of property to affirmatively disavow having any knowledge of hazardous waste disposal on the subject property. To the contrary, as noted above, the grantor is required to disclose the disposal of hazardous waste only if he or she is disposing it, has disposed of it, or has actual knowledge of such disposal.

An accepted practice has developed in Erie County to include in deeds an affirmative disavowal by the grantor of any knowledge of hazardous waste disposal on the property described therein. The better practice would be to eliminate the accepted practice, follow the requirement of the Solid Waste Management Act, and include in the deed an acknowledgment of hazardous waste disposal when the grantor is presently disposing of it, has ever disposed of it, or has actual knowledge of its disposal on the property.

Note: The position of the author of this section that elimination of the customary disavowal of hazardous waste disposal is the better practice does not represent the position of the subcommittee. The membership was divided on the issue.

11.2 Hazardous Sites Cleanup Act

Like the Solid Waste Management Act, Pennsylvania's Hazardous Sites Cleanup Act, No. 108 of 1988, 35 P.S. §§6020.101, *et seq.*, requires that the grantor in every deed for conveyance of real property on which "a hazardous substance is either presently being disposed or has ever been disposed by the grantor or to the grantor's actual knowledge, shall include in the property description section of the deed an acknowledgment of the hazardous substance disposal." 35 P.S. §6020.512(b). The acknowledgment must include the surface area size and exact location of the disposed substances and a description of the types of hazardous substances contained therein. *Id.* The amended property description must then be made part of the deed for all future conveyances or transfers of the affected property. *Id.* In addition, if the Department of Environmental Resources has undertaken any response with respect to the hazardous substance disposal, a description of such response, as well as notice of any decision by the Department to remove the site from its cleanup sites priority list (promulgated pursuant to 35 P.S. §6020.502) must be made part of the deed. *Id.*

In addition to the disclosure requirement noted above, the Hazardous Sites Cleanup Act prohibits using property at which hazardous substances remain after the completion of a response action in a manner that would disturb or be inconsistent with the response action implemented. 35 P.S. §6020.512(a). The Department of Environmental Resources has authority to issue an order precluding or requiring cessation of activity at a facility

which the Department finds would disturb or be inconsistent with the response action implemented. *Id.* The Department shall require the recorder of deeds to record such an order in a manner that will assure its disclosure in the ordinary course of a title search of the subject property. Such an order, when recorded, shall be binding upon subsequent purchasers. *Id.*

The terms “disposal” and “hazardous substances” are broadly defined in 35 P.S. §6020.103. It should be noted that the definition of hazardous substances under the Hazardous Sites Cleanup Act includes hazardous waste, as defined in the Solid Waste Management Act, plus other substances defined or designated as hazardous substances under the Federal Superfund Act, as well as other substances. *Id.* Practitioners should be aware that the Hazardous Sites Cleanup Act definition of “hazardous substances” encompasses a broader range of substances that could be hazardous than those that fall within the definition of “hazardous waste” in the Solid Waste Management Act.

As with the Solid Waste Management Act disclosure requirement discussed in (A) above, there is no affirmative duty under the Hazardous Sites Cleanup Act to disavow having any knowledge of hazardous substances disposal on the subject property. To the contrary, the grantor is required to disclose the disposal of a hazardous substance if he or she is presently disposing of it, has disposed of it, or has actual knowledge of such disposal. The practice should be to follow the requirements of the Hazardous Sites Cleanup Act and include in the deed an acknowledgment of hazardous substance disposal only when the grantor is presently disposing of it, has ever disposed of it, or has actual knowledge of its disposal on the property.

Practitioners should advise clients who are sellers of real estate of the obligations to make the environmental disclosures required by the Solid Waste Management Act and/or the Hazardous Sites Cleanup Act, since failing to make such disclosures when required constitutes a violation of those acts.

12. DESCRIPTION ADEQUACY - Reserved

13. DURATION OF SEARCH - Reserved