

# THE Oklahoma Bar JOURNAL

Volume 82 ♦ No. 8 ♦ March 12, 2011



## Real Estate and Title Law

### ALSO INSIDE

- Solo and Small Firm Conference
- Legislative Monitoring Committee Report

OBA/CLE PRESENTS

# DISABILITY HEARINGS

# 4 OF A KIND



**OKC:**  
OKLAHOMA BAR CENTER  
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MARCH **31**

### PROGRAM PLANNERS/MODERATORS

MILES L. MITZNER, MITZNER LAW FIRM, PLLC, EDMOND  
JEFFREY S. WOLFE, U.S. ADMINISTRATIVE LAW JUDGE, TULSA

**1**  
APRIL

**TULSA:**  
RENAISSANCE HOTEL  
6808 S. 107TH E. AVE.

<p>REGISTRATION AND CONTINENTAL BREAKFAST</p> <p>8:30 a.m.</p>	<p>OKC PROGRAM PREPARING FOR THE HEARING - TURNING THE ODDS IN YOUR FAVOR MILES MITZNER TULSA PROGRAM MOCK HEARING #1: MENTAL • DAA STEVE TROUTMAN, TROUTMAN &amp; TROUTMAN, TULSA</p> <p>9</p>	<p>BREAK</p> <p>9:50</p>
<p>OKC PROGRAM MOCK HEARING #1: MENTAL • DAA TERRY HART, CHIAF LAW OFFICES, OKLAHOMA CITY TULSA PROGRAM PREPARING FOR THE HEARING - TURNING THE ODDS IN YOUR FAVOR MILES MITZNER</p> <p>10</p>	<p>MOCK HEARING #2 - PHYSICAL IMPAIRMENTS/YOUNGER INDIVIDUAL: TWO OF A KIND OKC PROGRAM HEATHER HAMMOND, WYATT, KINGERY &amp; HALE, ADA TULSA PROGRAM ROGER HALE, WYATT, KINGERY &amp; HALE, ADA</p> <p>10:50</p>	<p>NETWORKING LUNCH (INCLUDED IN REGISTRATION)</p> <p>11:40</p>
<p>MOCK HEARING #3 - MENTAL AND PHYSICAL IMPAIRMENTS: OPPOSING SUITS OKC PROGRAM JIM LINEHAN, LINEHAN LAW FIRM, OKLAHOMA CITY TULSA PROGRAM KATIE WAINWRIGHT, FELLERS SNIDER LAW FIRM, TULSA</p> <p>12:10 p.m.</p>	<p>MOCK HEARING #4 - DECEASED CLAIMANT: WHAT ARE THE ODDS? OKC PROGRAM PHILIP D. RYAN, RYAN BISHOP RYAN, OKLAHOMA CITY TULSA PROGRAM JOHN HARLAN, HARLAN LAW FIRM, SAPULPA</p> <p>1</p>	<p>BREAK</p> <p>1:50</p>
<p>ETHICAL RESPONSIBILITIES - Q&amp;A/RESPONSES TO QUESTIONNAIRES: THE ALJ SHOWS THE DEALERS CARDS (ETHICS) PANEL AND ADMINISTRATIVE LAW JUDGES</p> <p>2</p>	<p>ADJOURN</p> <p>2:50</p>	<p><b>\$150</b> EARLY BIRD <b>\$175</b> STANDARD</p> <p>6MCLE/1ETHICS CREDIT</p>

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C09-1005-035 (07/10)

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**THEME:**  
**REAL ESTATE AND TITLE LAW**  
EDITOR: THOMAS E. KENNEDY

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# Humbly Helping Our Heroes

By Deborah Reheard

Humility is not a word normally associated with the legal profession. As lawyers, we are advocates and adversaries. We work in conflict and turmoil as we attempt to solve the problems of imperfect people ensnared in problematic situations.

Admittedly, it may be difficult to be humble when you are going into battle for your client. I recently learned and witnessed a life lesson about humility — humility is about a lack of arrogance, not a lack of assertiveness or a compromise of values. And I learned that lesson from about 3,500 men and women headed off to fight a real war, not some courtroom battle.

I stood with pride and humility with about 20,000 others recently for the Sooner Sendoff of the 45th Infantry Brigade Combat Team and the 146th Air Support Operations Squadron. Dressed in their fatigues and prepared for their duties in Afghanistan, the brave women and men gathered with their families in an arena usually devoted to sports and entertainment. Ironically, there were not a lot of tears. What I saw mostly were the swelling chests and broad grins of proud parents, the stoic smiles of spouses, and lots of kids running around in t-shirts declaring their war zone-bound parent was their hero.

Just a few days later, I again stood with pride and humility before a much smaller, but equally dedicated, group of Oklahoma lawyers. More than 250 lawyers from across the state filled the overflowing Emerson Hall at the bar center to receive special training so they can be the best lawyer they can be for America's heroes. The lawyers were there as part of the *Oklahoma Lawyers for America's Heroes* program of the Oklahoma Bar Association, which is providing legal advice and assistance to qualified servicemen and women and veterans.

Hundreds of OBA members just like you have volunteered to provide at least 20 hours of free legal service to qualified military members past and present. A conservative estimate of the value of that legal service is already in excess of \$1 million. Armed with a license to practice law and motivated by a desire to serve those who have served our country, these volunteers represent the best our profession has to offer. These volunteers are standing strong to protect our troops and the tenets of our constitutional freedoms.



*At the Sooner Sendoff, Deb Reheard holds 3-year-old Kaleb McNutt, whose father, Sgt. Matthew McNutt, is going off to war. In a chance meeting among the thousands of people at the event, Deb learned Kaleb is related to past OBA President David Petty of Guymon.*

These volunteers know that "Equal Justice For All" is not just a sound bite or mere words etched in marble over a courthouse entrance. "Equal Justice For All" is the promise that created this country and the pledge of those who sustain it.

While our profession is standing in the crosshairs of those who want to limit access to justice and the independence of our courts, we will not be detracted from our mission — not only to seek justice, but to defend it and speak up for it.

Just as no one is left behind on the battlefield, no one — including these heroes — should be left behind in the justice system. The same rights and liberties that we as lawyers fight in the courtrooms and the boardrooms to protect were earned by the blood, sweat, tears — and too often the lives — of everyone who ever fought for this country. Those sacrifices should not be in vain.

Thank you is not enough for these heroes — the heroes on the battlefield *and* the heroes in the legal system. To each of you, I say, "thank you."

President Reheard  
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# EVENTS CALENDAR

## MARCH 2011

- 16 **Oklahoma Council of Administrative Hearing Officials**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212  
**OBA Women in Law Committee Meeting**; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Deborah Bruce (405) 528-8625  
**OETA Festival Volunteer Night**; 5:45 p.m.; OETA Studio, Oklahoma City; Contact: Jeff Kelton (405) 416-7018
- 17 **OBA Bench & Bar Committee Meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Barbara Swinton (405) 713-7109  
**OBA Member Survey Task Force Meeting**; 2 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Brian Hermanson (580) 362-2571
- 18 **OBA Awards Committee Meeting**; 2 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: D. Renée Hildebrandt (405) 713-1423
- 19 **OBA Real Property Law Section Meeting**; 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Scott Byrd (918) 587-3161  
**OBA Young Lawyers Division Committee Meeting**; 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Roy Tucker (918) 684-6276
- 23 **OBA Professionalism Committee Meeting**; 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Patricia Podolec (405) 760-3358
- 24 **OBA Justice Commission Meeting**; 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Drew Edmondson (405) 235-5563  
**OBA Law Office Management and Technology Section Meeting**; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Kent Morlan (918) 582-5544  
**OBA Men Helping Men Support Group**; 5:30 p.m.; The Center for Therapeutic Interventions; Tulsa; RSVP to: Stephanie Alton (405) 840-3033
- 25 **OBA Unauthorized Practice of Law Meeting**; 1:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Bill Grimm (918) 584-1600

**For more events go to [www.okbar.org/calendar](http://www.okbar.org/calendar)**

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THE OKLAHOMA BAR JOURNAL (ISSN 0030-1655) IS PUBLISHED THREE TIMES A MONTH IN JANUARY, FEBRUARY, MARCH, APRIL, MAY, AUGUST, SEPTEMBER, OCTOBER, NOVEMBER AND DECEMBER AND BIMONTHLY IN JUNE AND JULY. BY THE OKLAHOMA BAR ASSOCIATION, 1901 N. LINCOLN BOULEVARD, OKLAHOMA CITY, OKLAHOMA 73105. PERIODICALS POSTAGE PAID AT OKLAHOMA CITY, OK. POSTMASTER: SEND ADDRESS CHANGES TO THE OKLAHOMA BAR ASSOCIATION, P.O. BOX 53036, OKLAHOMA CITY, OK 73152-3036. SUBSCRIPTIONS ARE \$55 PER YEAR EXCEPT FOR LAW STUDENTS REGISTERED WITH THE OKLAHOMA BAR ASSOCIATION, WHO MAY SUBSCRIBE FOR \$25. ACTIVE MEMBER SUBSCRIPTIONS ARE INCLUDED AS A PORTION OF ANNUAL DUES. ANY OPINION EXPRESSED HEREIN IS THAT OF THE AUTHOR AND NOT NECESSARILY THAT OF THE OKLAHOMA BAR ASSOCIATION, OR THE OKLAHOMA BAR JOURNAL BOARD OF EDITORS.





# A Lesson Learned from the 'Robo-Signer' Scrutiny

By Tamara Schiffner Pullin

Last year, the national media scrutinized so-called “robo-signers” employed by big banks to execute affidavits in support of foreclosure actions. The term “robo-signer” denotes an employee who would execute hundreds of affidavits a week, without pausing to read the contents or check any supporting documentation. A “robo-signer” also would execute the affidavits at his desk, sending a stack to the company notary for notarization, without appearing in front of the notary, without taking an oath and without the notary witnessing his signature on each and every affidavit.

The media has reported few instances where the use of a “robo-signer” allegedly resulted in a wrongful foreclosure. It appears that, while the process for signing these affidavits admittedly is questionable, the information in them is accurate, the note and mortgage at issue are in default, and the lender is entitled to a foreclosure judgment. In the latter instance, what is the real harm caused by the questionable practice of “robo-signing”? Is it simply a procedural error that a court could overlook? Does the “robo-signer” have the requisite level of personal knowledge to support the statements made in the affidavit?

Looking through the lens of Oklahoma law, an affidavit signed by a “robo-signer” sitting at a desk in Oklahoma and notarized by an Oklahoma Notary Public very well may be admissible in Oklahoma<sup>1</sup> for a number of reasons (provided, of course, that the information in the affidavit is true and correct).

First and from a technical standpoint, Oklahoma law does not require the affiant to be sworn under oath or sign the document in the notary’s presence. By statute, “an affidavit is a written declaration, under oath” and made “before any person authorized to administer oaths.”<sup>2</sup> Oklahoma caselaw, however, does not require that the affiant raise his right hand and take an oath to tell the truth before signing the affidavit. Rather, a notary’s signature simply affirms that the statements in the affidavit are made by a person attesting the truth of the statements.<sup>3</sup> The “under oath” requirement is satisfied as long as the affiant is shown the affidavit (even if prepared by someone else), proofreads it, and signs it before a notary who attests the signature and affixes the notary seal.<sup>4</sup> The affiant need not even sign the affidavit in front of the notary, as long as the affiant indicates the signature is his.<sup>5</sup>

Second, under Oklahoma law, an affiant’s personal knowledge may be inferred from statements within the affidavit. While affida-

“To follow ‘best practices,’ the affiant should sign the affidavit in front of the notary and should raise a hand and affirm that the contents of the affidavit are true and correct.”

vits must “be made on personal knowledge,”<sup>6</sup> an affidavit need not explicitly state that it is based on personal knowledge or that the affiant is competent to testify, as long as the affidavit appears to be made on personal knowledge through declarations of the affiant’s actions and observations.<sup>7</sup> The Oklahoma Supreme Court has instructed that after submission of an affidavit that “facially appears to be made on personal knowledge, the burden then shift[s] to [the opposing party] to set forth specific facts, which, if true, would show [] that the [affiant] did not have personal knowledge ....”<sup>8</sup> Thus, as long as the affiant’s personal knowledge may be inferred from the face of the affidavit, the burden will shift to the opposing party to prove with specific facts that the affiant lacked personal knowledge to make the affidavit.

Third, Oklahoma law suggests that an affiant may gain the requisite level of personal knowledge by reviewing relevant records.<sup>9</sup> Moreover, an affiant may rely on the work performed by others at their direction in making the affidavit.<sup>10</sup> Thus, there is precedent under Oklahoma law to support the notion that a “robo-signer” who may not have personally calculated the amount of principal and interest owing on the note and mortgage, as reflected in the affidavit, may still have made the affidavit based upon personal knowledge if he relied on a subordinate to perform the calculations.

The recent public scrutiny of “robo-signed” foreclosure affidavits should make attorneys think twice about the affidavits their clients file in support of various motions in Oklahoma state and federal courts. While one *might* be able to craft the argument that “these are still admissible even if executed by a robo-signer,” that’s not a desirable argument to have to make. So, let’s take this robo-signer scrutiny as

a reminder of the proper affidavit procedure, regardless of your practice area. Each affidavit must:

- be made on personal knowledge;
- contain statements of the affiant’s actions and observations from which it is apparent to the court that the affiant had personal knowledge of the matters set out in the affidavit;
- demonstrate the affiant’s competence to testify on the matters set forth in the affidavit;
- set out only facts that would be admissible in evidence;
- attach sworn (“true and correct”) copies of any documents referred to in the affidavit;
- if appropriate, lay the proper foundation for the business records exception the hearsay rule.

To follow “best practices,” the affiant should sign the affidavit in front of the notary and should raise a hand and affirm that the contents of the affidavit are true and correct. The notary should then notarize the affidavit in the presence of the affiant. After all, whatever your practice area, you want to be able to walk into a hearing or closing and know that the affidavits supporting your pleadings or transaction are admissible, accurate and reliable beyond question. Thus, the “robo-signers” remind us of what it takes to make a proper affidavit.

1. Each state has its own laws and requirements for affidavits, so counsel should ensure that an affidavit executed and notarized out of state but filed in Oklahoma fully complies with the laws of the state where executed and notarized.

2. 12 OKLA STAT. §§422, 432.

3. *Bundren v. Car Connection Inc.*, 963 P.2d 634, 636 (Okla. Civ. 1998).

4. *Id.* See also *Blair v. State*, 29 P.2d 998 (Okla. Crim. App. 1933) (noting that the jurat statement at the end of an affidavit is simply evidence that affiant affirms the truth of the information in affidavit).

5. See *First Nat’l Bank of Buffalo v. Devore*, 234 P. 734 (Okla. 1925) (noting in dictum, that the notary need not witness the affiant’s signature even where the affidavit contains the language “subscribed in my presence” because “[t]he essential element was the admission, or declaration, or acknowledgment of [affiant] to the notary that the signatures ... were theirs.”).

6. 12 OKLA STAT. §2056(E) and Rule 13(c) of the Rules for District Courts.

7. *Kennedy v. Builders Warehouse, Inc.*, 208 P.3d 474, 477 n. 2 (Okla. App. 2008); *Smith v. Teel*, 175 P.3d 960, 964 (Okla. Civ. 2007). See also *Roberts v. Cessna Aircraft Co.*, 289 Fed. App. 321, 324 (10th Cir. 2008) (noting “personal knowledge of the affiant ... may be inferred from the context of the affidavit” such that an affidavit’s failure to state that it is made on personal knowledge does not invalidate the affidavit).

8. *Myers v. Missouri Pacific Railroad Co.*, 52 P.3d 1014, 1024 (Okla. 2002) (emphasis in original). See also *Everhome Mortgage Co v. Robey*, 136 P.3d 1066 (Okla. Civ. 2006) (challenge to foreclosure judgment supported by affidavit of officer of mortgage company was not successful because homeowners’ unsupported allegations of payments tendered could not refute the mortgage company’s affidavit); *Federal Land Bank of Wichita v. Northcutt*, 811 P.2d 1368 (Okla. Civ. 1991) (upholding foreclosure judgment supported by banks’ affidavit; finding homeowners’

allegations challenging amount of indebtedness and interest were not supported by admissible evidence).

9. See, e.g., *Castle Capital Corp. v. Arthur Young & Co.*, 686 P.2d 296, ¶ 29 (Okla. Civ. App. 1984) (suggesting that it is acceptable for an affidavit to be "made on personal knowledge gained as a result of [the affiant's] review of [company] files and of documents and deposition testimony" but that an affiant's "knowledge [gained] after examining the pleadings and files" does not equate to personal knowledge).

10. See, e.g., *Maytubby v. State*, 665 P.2d 849 (Okla. Cr. App. 1983) (upholding conviction for welfare fraud; "We cannot say, under the facts and circumstances of the case, that a department supervisor lacks personal knowledge with respect to the accuracy of the overpayment computation simply because she allowed a subordinate to figure the initial computation"); *Green v. State*, 713 P.2d 1032, 1039 (Okla. Cr. App. 1985) (confirming a "supervisor has 'personal knowledge,' ... if the knowledge is acquired from records over which he or she is supervisor").

#### ABOUT THE AUTHOR



Tamara Schiffner Pullin is a trial lawyer in the Oklahoma office of McAfee & Taft. Her practice focuses on complex business litigation, principally in the areas of computer technology, trademark, copyright, antitrust, business fraud, labor and employment litigation and fraudulent transfer matters.

She also represents Native American tribes in administrative matters, such as asserting their rights to federal funding as well as to acquiring land into trust within Indian Country.

### John R. Justice (JRJ) Student Loan Repayment Program for Public Defenders and Prosecutors

The Oklahoma District Attorneys Council (DAC) is pleased to announce that DAC has been designated by the U.S. Department of Justice to award and disburse student loan repayment assistance for qualified attorneys through the John R. Justice (JRJ) Loan Repayment Program.

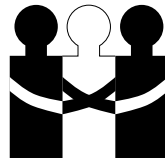
The State of Oklahoma has received a total of \$88,679.00 to be divided among eligible full-time **public defenders and prosecutors** who have outstanding qualifying federal student loans. The purpose of these funds is to provide student loan repayment assistance, thus encouraging attorneys in their states to enter or continue employment as prosecutors and public defenders, and help strengthen state justice systems.

For more information about the JRJ Student Loan Repayment Program and how to apply go to <http://www.ok.gov/dac/>. Scroll down to "Newsroom and Links" and click on the "John R. Justice Student Loan Repayment Program" link. **Applications will be available online by February 21, 2011.** Completed application packets must be submitted to the DAC and post-marked no later than **April 8, 2011.**

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## *Jones v. Purcell Investment LLC* Clarification for Oklahoma Mechanics and Materialmen's Lien Statutes

By Erin L. Means

In *Jones v. Purcell Investments LLC*,<sup>1</sup> the Oklahoma Court of Civil Appeals interpreted and clarified a portion of the statute on pre-lien notice requirements for Mechanics and Materialmen's Liens, contained in 42 O.S. §142.6. While the Court of Civil Appeals' holding in *Jones* addresses only the specific issue of when the 75-day window for sending a pre-lien notice begins to run, the court's discussion on section 142.6 serves to clarify another discrepancy present in the Oklahoma lien statute.

### BACKGROUND

The rules governing Mechanics and Materialmen's Liens (M&M liens) are found in sections 141 through 154 of Title 42 of the Oklahoma statutes. In 2001, the Oklahoma Legislature added section 142.6 to the M&M lien statutes.<sup>2</sup> Titled "Pre-Lien Notice," section 142.6 mandates that a party intending to file an M&M lien pursuant to the lien statutes must first send a notice of their impending lien to certain other parties.<sup>3</sup> Since its addition to the M&M lien statutes, section 142.6 had been neither amended by the Legislature nor interpreted by any court.<sup>4</sup> In *Jones*, the Court of Civil Appeals dealt with a certain provision of the pre-lien notice requirement espoused in section 142.6 for the first time and, in doing so, clarified two important aspects of the statute.

### CLARIFYING THE PRE-LIEN NOTICE REQUIREMENT FOR MECHANICS AND MATERIALMEN'S LIENS

As a matter of first impression,<sup>5</sup> *Jones* examined subsection B of 42 O.S. §142.6, which pro-

vides that a pre-lien notice must be sent to the necessary parties both before a lien statement is filed and "no later than seventy-five (75) days after the date of supply of material, services, labor, or equipment . . ."<sup>6</sup> The question at issue in *Jones* was whether the 75-day period for sending the pre-lien notice begins to run after the first or last date that materials or labor were supplied by the party intending to file the lien.<sup>7</sup> The court's holding was simple: that the 75-day period for sending a pre-lien notice to the required parties begins to run on the last date materials or labor were supplied by the lien claimant.<sup>8</sup>

In its reasoning on the issue, the court, as a means of construing what it found to be ambiguous statutory language contained in section 142.6, examined the legislative intent behind the enactment of section 142.6 and the public policy driving that intent.<sup>9</sup> The court recited that the general purpose of M&M liens is to protect the parties who provide material and labor to the construction, alteration or repair of an improvement on land, to secure

payment of claims, and notify owner and third parties of intent to claim a lien.<sup>10</sup> Further, the court tracked the progression of statutory changes to the requirement that subcontractors claiming a lien send notice to the owner of the land, including statutory changes in 1977, 2000 and finally in 2001, when section 142.6 was enacted.<sup>11</sup>

The court reasoned that to require the 75-day window to begin running on the date when a lien claimant first supplies materials or labor would require every contractor who supplies materials or labor to a project falling under the ambit of the M&M lien statutes to file a pre-lien notice at the inception of his services to protect himself in the event that he does not get paid.<sup>12</sup> Thus, in order to best effectuate the design behind the lien statutes and to align the purpose of section 142.6 with the most practical solution to the question at issue, the court held that the 75-day period should begin to run on the last date of lienable services or materials on the job.<sup>13</sup>

*Jones* also clarified another ambiguity created by the language of section 142.6. Subsection (A)(1) of section 142.6 states that, for purposes of the pre-lien notice requirement, a "claimant" is a person, *other than an original contractor*, that is entitled to or may be entitled to a lien pursuant to section 141 of the M&M lien statutes.<sup>14</sup> Section 141 of the M&M lien statutes deals with the filing of a lien by an original contractor.<sup>15</sup> Thus, the express language of section 142.6(A)(1) contains an apparent contradiction by specifically directing that an original contractor is not defined as a claimant under the statute and, in the same sentence, defining a claimant as a person entitled to a lien under the original contractor lien statute. The conflicting wording of the definition of "claimant" contained in section 142.6 creates the argument that the pre-lien notice requirement does not apply at all to *subcontractors* wishing to file M&M liens. Subcontractors are granted the right to file M&M liens under 42 O.S. §143,<sup>16</sup> which is clearly not mentioned or included in the definition of "claimant" under section 142.6. *Jones* serves to formally acknowledge that subcontractors are subject to the pre-lien

notice requirements of 42 O.S. §142.6 by holding in part that, "both its name and the text of §142.6 establish that a subcontractor's 'pre-lien' notice must be filed before the lien statement."<sup>17</sup> Further confirming that the pre-lien notice statute applies to subcontractors, *Jones* directly stated that the subcontractor involved in its decision was required to provide a pre-lien notice to the property owner under the mandates of §142.6.<sup>18</sup>

## CONCLUSION

In sum, *Jones* provides two very basic clarifications for the pre-lien notice requirement for M&M liens: first, that the 75-day window for sending a pre-lien notice runs from the last date that materials or supplies are provided by the lien claimant and second, that the pre-lien notice requirement in section 142.6 applies specifically to subcontractors.

1. 231 P.3d 706 (Okla. Civ. App. 2009).
2. OKLA STAT TIT. 42, §142.6 (2001).
3. *Id.*
4. *Jones*, 231 P.3d at 707.
5. *Id.*
6. OKLA STAT TIT. 42, §142.6(B).
7. *Jones*, 231 P.3d at 707.
8. *Id.*
9. *Id.* at 709-10.
10. *Id.* at 710.
11. *Id.* at 711-12.
12. *Id.* at 712.
13. *Id.* at 713.
14. OKLA STAT TIT. 42, §142.6(A)(1).
15. OKLA STAT TIT. 42, §141.
16. OKLA STAT TIT. 42, §143.
17. *Jones*, 231 P.3d at 712.
18. *Id.* at 707.

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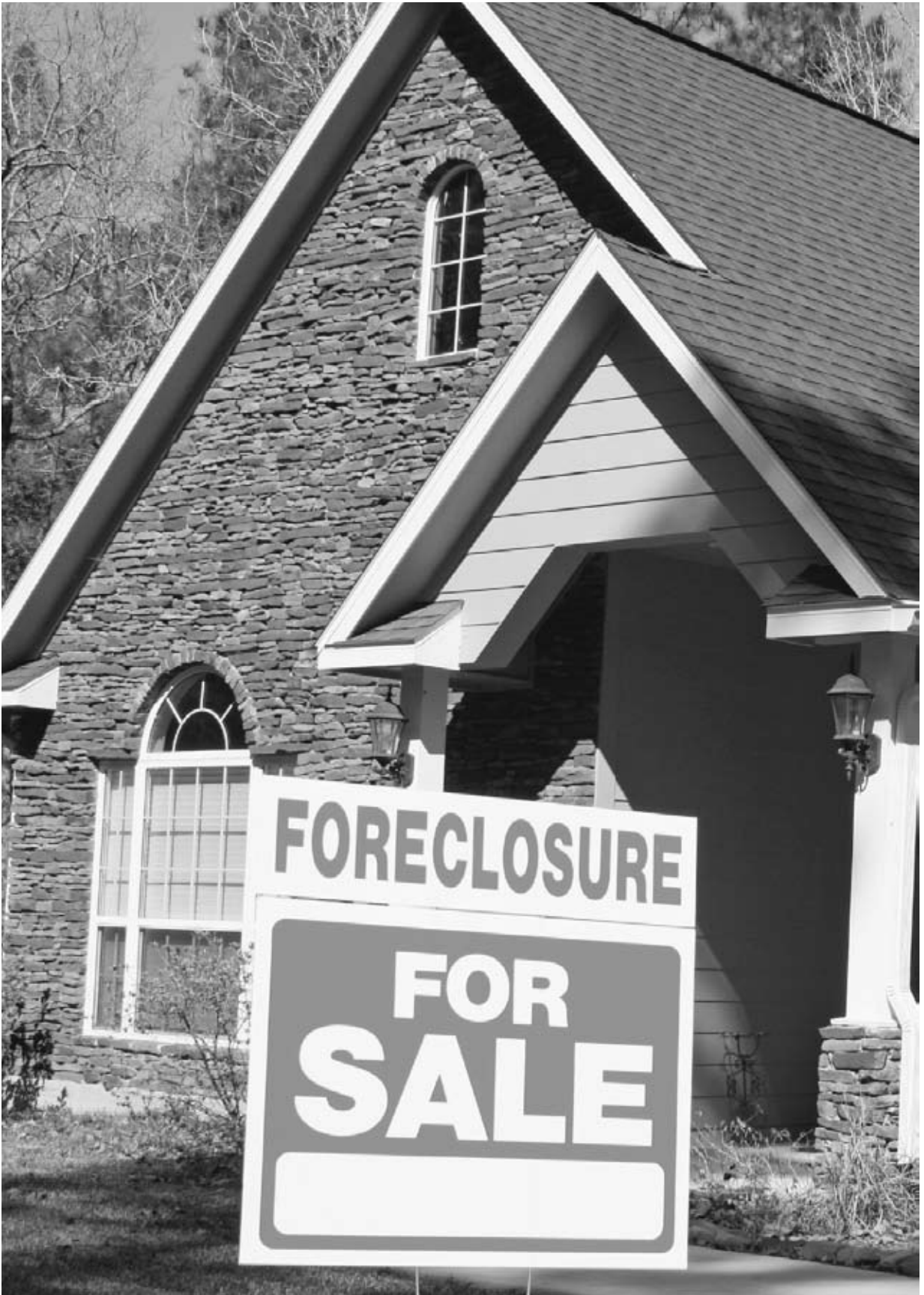


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# Guarantors, Deficiencies and Section 686

By T.P. “Lynn” Howell

*Do not be among those who give pledges, Among those who become guarantors for debts. Proverbs 22:26 (New American Standard Version)*

## BACKGROUND

In 1941, prompted by the Depression,<sup>1</sup> the Oklahoma Legislature revised 12 O.S. §686. Under the new law, if a lender sought a deficiency after a foreclosure sale, a mortgagor became entitled to credit on the judgment against him for the market value of the property or the sale price of the property, whichever was higher. Absent this provision, a borrower would be entitled to credit for only the actual proceeds of the foreclosure sale, as was the case in Oklahoma before the enactment of the 1941 amendments. *See, e.g., Paschal Inv. Co. v. Atwater*, 1935 OK 869, 50 P.2d 357; *Bartlett Mortg. Co. v. Morrison*, 1938 OK 427, 81 P.2d 318. The 1941 law also set a deadline for moving for a deficiency. The application of that law to the obligations of guarantors is the topic of this paper.

The current version of §686 is quoted as a sidebar in this article in its entirety. It dates back to 1893, with the 1941 additions in bold (and some minor 2010 revisions in italics).

## INTERPRETATION OF THE LAW

First, to get the 2010 revisions out of the way, the Legislature mainly replaced the term “deficiency judgment” with the term “post-judgment deficiency order.” This apparently was done to conform with some Oklahoma Supreme Court decisions that have held that there can only be one judgment in a case, so that the term “deficiency judgment” is a misnomer. *FDIC v.*

*Tidwell*, 1991 OK 119, ¶15, 820 P.2d 1338. As the late Justice Opala wrote, a “so-called deficiency judgment . . . is stricto sensu a postjudgment order determining a deficiency on a judgment previously rendered.” *Neil Acquisition LLC. v. Wingrod Inv. Corp.*, 1996 OK 125, n.5, 932 P.2d 1100. So according to that reasoning and the 2010 revisions to §686, instead of moving for a deficiency judgment, from now on a lender will move for a “post-judgment deficiency order.”

The 1941 revisions to 12 O.S. §686 are much more important, and are still being litigated

## 12 O.S. §686

In actions to enforce a mortgage, deed of trust, or other lien or charge, a personal judgment or judgment or judgments shall be rendered for the amount or amounts due as well to the plaintiff as other parties to the action having liens upon the mortgaged premises by mortgage or otherwise, with interest thereon, and for sale of the property charged and the application of the proceeds; or such application may be reserved for the future order of the court, and the court shall tax the costs, attorney's fees and expenses which may accrue in the action, and apportion the same among the parties according to their respective interests, to be collected on the order of sale or sales issued thereon; when the same mortgage embraces separate tracts of land situated in two or more counties, the sheriff of each county shall make sale of the lands situated in the county of which he or she is sheriff. No real estate shall be sold for the payment of any money or the performance of any contract or agreement in writing, in security for which it may have been pledged or assigned, except in pursuance of a judgment of a court of competent jurisdiction ordering such sale. The court may, in the order confirming a sale of land under order of sale on foreclosure or upon execution, award or order the issuance of a writ of assistance by the clerk of the court to the sheriff of the county where the land is situated, to place the purchaser in full possession of such land, and any resistance of the service of such writ of assistance shall constitute an indirect contempt of the process of such court, and if any person who has been removed from any lands by process of law or writ of assistance or who has removed from any lands pursuant to law or adjudication or direction of any court, tribunal or officer, afterwards, without authority of law, returns to settle or reside upon such land, the person shall be guilty of an indirect contempt of court, and may be proceeded against and punished for such contempt. **Notwithstanding the above provisions, no judgment shall be enforced for any residue of the debt remaining unsatisfied as prescribed by this act after the mortgaged property shall have been sold, except as herein provided. Simultaneously with the making of a motion for an order confirming the sale or in any event within ninety (90) days after the date of the sale, the party to whom such residue shall be owing may make a motion in the action for leave to enter a post-judgment deficiency order upon notice to the party against whom such judgment is sought or the attorney who shall have**

today. The question is, who do those revisions protect?

The 1941 additions to 12 O.S. §686 appear to do two things. First, they give certain persons credit for the "fair and reasonable market value" of foreclosed property if a lender seeks a deficiency judgment after the foreclosure. As the statute reads, the protected persons in that situation would be those persons against whom a money judgment already has been entered in the case. They then get credit for the court-determined value of the property, rather than for just its foreclosure sale price.

Could such persons include guarantors? After all, money judgments are often entered against guarantors in foreclosure cases. Lenders naturally take the position that while the borrower himself is entitled to the statutory credit, guarantors are entitled to credit for only the proceeds of the sheriff's sale of the foreclosed property. Guarantors tend to disagree.

The other important part of the 1941 amendments is that the debt is barred if no motion for deficiency judgment is made within 90 days of the Sheriff's Sale. This provision has bitten lenders a number of times over the years. Courts have ruled several times that if a lender misses that deadline, the debt is gone as far as the borrower is concerned. *See, e.g., Haines Pipeline Const. Inc. v. Exline Gas Systems Inc.*, 1996 OK CIV APP 75, 921 P.2d 955. Can guarantors also take advantage of that rule?

The Supreme Court has addressed the application of 12 O.S. §686 to guarantors in three major cases: *Apache Lanes Inc. v. National Educators Life Ins. Co.*, 1974 OK 106, 529 P.2d 984; *Riverside Nat. Bank v. Manolakis*, 1980 OK 72, 613 P.2d 438; and *Founders Bank & Trust Co. v. Upsher*, 1992 OK 35, 830 P.2d 1355. Those cases, as well as some important Court of Civil Appeals cases, have dealt with both aspects of the 1941 amendments, namely the absolute bar rule and the fair market value rule.

In the first of these, *Apache Lanes*, the Supreme Court took the logical position that if the principal debt was gone because the creditor blew the 90-day deadline, there was nothing left for the guaranties to cover.

Generally, a guarantor is not discharged merely because the cause of action against a debtor is barred...And...the majority view is that an action to recover on a contract of guaranty cannot be defended by

showing that the claim against the original debtor has been barred by the statute of limitation...But Section 686 by its express language is more than a statute of limitation. It specifically discharges and extinguishes the debt...If, by failure of the creditor to seek a deficiency judgment as prescribed by Section 686, the debt has been fully discharged and satisfied, what cause of action does the creditor have against a guarantor? We submit none.

1974 OK 106 at ¶¶11-13.

The court then went on to tie in certain provisions of Title 15, which pertain to the obligations of guarantors and sureties, as follows:

Title 15 O.S. §338 exonerates a guarantor where by any act of the creditor, without the consent of the guarantor, the original obligation is altered, impaired or suspended. Section 344 provides that where a debtor's obligation is discharged by operation of law, the guarantor is not exonerated, absent the intervention or omission of the creditor. In this case, it was the failure or omission of the creditor in seeking a deficiency judgment which altered, impaired and led to the discharge of the debtor's obligation.

1974 OK 106 at ¶15.

Thus, the Supreme Court coupled §686 with Oklahoma's guaranty statutes, concluding that if the debt of the mortgagor was extinguished under ¶686, the guarantor also was exonerated under 15 O.S. §§338 and 344.

In *Riverside*, though, six years later, the court seemed to reconsider that position. There, a number of individuals had guaranteed a debtor's note to a bank. The debtor defaulted, and the bank successfully prosecuted a crossclaim against the debtor in a foreclosure action brought by another lender, but did not seek a deficiency judgment in that action. 1980 OK 72 at ¶4. The bank thereafter filed its own lawsuit to collect from the guarantors, but, following *Apache*, the trial court ruled that they were exonerated because the principal debt had been discharged by operation of §686 — the bank had failed to move for a deficiency judgment within 90 days of the foreclosure sale. *Id.* at ¶5.

In an opinion written by Justice Opala, the Supreme Court held that “the protection of

appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date of sale or such nearest earlier date as there shall have been any market value thereof and shall enter a *post-judgment deficiency order*. Such *post-judgment deficiency order* shall be for an amount equal to the sum of the amount owing by the party liable as determined by the order with interest, plus costs and disbursements of the action plus the amount owing on all prior liens and encumbrances with interest, less the market value as determined by the court or the sale price of the property whichever shall be the higher. If no motion for a *post-judgment deficiency order* shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist.

In any action pending at the time this act becomes effective or thereafter commenced, other than an action to foreclose a mortgage, to recover a judgment for any indebtedness secured by a mortgage on real property and which originated simultaneously with such mortgage and which is secured solely by such mortgage, against any person or corporation directly or indirectly or contingently liable therefor, any party against whom a money judgment is demanded, shall be entitled to set off the fair and reasonable market value of the mortgaged property less the amounts owing on prior liens and encumbrances. Provided that nothing in this section shall limit or reduce any *post-judgment deficiency order* in favor of or in behalf of the state for any debts, obligations or taxes due the state, now or hereafter.

§686 applies only to debtors,” *id.* at ¶10, for the following reasons:

Our anti-deficiency statute, §686, addresses itself exclusively to the creditor/debtor relationship. It does not deal with the more complex, tripartite relationship of guarantor/debtor/creditor or with the rights under a guaranty agreement. The obligations in the latter category are regulated by the distinctly unrelated and sepa-

rate provisions of 15 O.S. 1971 §§321-344. Although a creditor's failure to seek a deficiency recovery may impair a guarantor's right to proceed against the principal debtor, it does not follow that a guarantor is automatically discharged in every case. That must, of course, depend on the nature of the guarantor's undertaking.

*Id.* (emphasis added).

Then, turning to those separate provisions of Oklahoma's guaranty statutes in Title 15, Justice Opala observed that the guarantors had agreed that their "liability would not be 'affected or impaired' by any 'failure, neglect or omission' of the bank to protect in any manner, the collection of the indebtedness or the security given therefor." *Id.* at ¶13. The court held that the quoted language deprived the guarantors of any defenses they otherwise may have had under 15 O.S. §344, one of the statutes in Title 15 relied on by the guarantors, so that summary judgment should not have been entered in the guarantors' favor. *Id.*

In ruling as it did, the Supreme Court distinguished its seemingly opposite holding in *Apache*. Justice Opala first noted that "there are some statements in our case law which without a closer examination appear to extend in favor of all guarantors the shield afforded by the anti-deficiency statute's automatic discharge provisions." *Riverside*, 1980 OK 72 at ¶7. Then, after his quoted statement above that §686 protects only debtors, Justice Opala pointed out that the guarantor in *Riverside* had waived his statutory defenses when he agreed that his liability would not be "affected or impaired" by any failure of the lender to protect the collection of the indebtedness or the collateral. In contrast, the guarantors in *Apache* had not waived any defenses, 1980 OK at ¶12, justifying the different holdings in the cases.

In summary, *Riverside* stands for the propositions that 1) §686 does not apply to guarantors and 2) Title 15 does apply to guarantors, but guarantors can waive those Title 15 protections.

These issues arose again in *Founders Bank v. Upsher*, 1992 OK 35; Justice Opala again wrote the opinion. A bank had loaned money to a limited partnership, and the partners had individually guaranteed various percentages of the debt. 1992 OK 35 at ¶2. The bank foreclosed upon certain real property that had been mortgaged to secure the debt, and thereafter some of the guarantors claimed that they should be

given credit on their guaranties for the fair market value of the foreclosed property, rather than for just its proceeds. *Id.* at ¶3. (Irrelevant to 12 O.S. §686, the guarantors also asserted that the value of the property should be applied to reduce the portions of the debt that they had guaranteed, rather than to reduce the non-guaranteed portions. *Id.* at ¶5.)

As in *Riverside*, one of the issues the Supreme Court addressed in *Founders* was whether the guarantors could successfully rely on the statutes in Title 15 that protect guarantors — in that case, 15 O.S. §334. That statute provides that the "obligation of a guarantor must be neither larger in amount nor in other respects more burdensome than that of the principal." *Id.* at ¶14. In perhaps a little bit of a reach, the court held that the statute applied only to an obligation as it existed at the time of the guaranty agreement's execution, so that in determining a deficiency, a guarantor would be entitled to credit for only the mortgaged property's sale proceeds even if the principal's debt would be reduced by the property's fair market value. *Id.*

The decision then addressed whether the guarantors could use 12 O.S. §686 to get credit on their guaranties for the fair market value of the mortgaged property rather than just its proceeds. Attempting to deal with the difficulties posed for their case by the *Riverside* holding, the guarantors contended that since they did not seek a total exoneration based on a lender's failure to seek a deficiency, which had been the situation in *Riverside*, but rather sought only credit for the property's fair market value, *Riverside* did not apply. *Id.* at ¶15 n.31. The court ruled, though, that the "broad waiver"<sup>2</sup> contained in the guaranties "dispose[d] of the setoff issue and dispense[d] with the need to consider whether the anti-deficiency statute, 12 O.S. 1981 §686, avails to protect the guarantors." *Id.* at ¶15.

The result was the same — the guarantors lost. As to 12 O.S. §686, the court saw no need to revisit its decision in *Riverside* that the statute did not protect guarantors, because the guaranties contained provisions whereby the guarantors waived any rights they may have had under that statute. Hence, both holdings in *Riverside* — 1) that 12 O.S. §686 does not help guarantors and 2) that guarantors can waive their special statutory protections — remained untouched.

Using the guidance of *Riverside* and *Founders*, the Oklahoma Court of Civil Appeals has also addressed the question of the protections afforded guarantors by §686. In *INA Life Ins. Co. v. Brandywine Assocs. Ltd.*, 1990 OK CIV APP 86, 800 P.2d 1073, the Oklahoma Court of Civil Appeals relied on *Riverside* for its holding that 12 O.S. §686 “neither inures to the benefit of Guarantors, nor automatically exonerates the Guarantors from their contractual obligation.” 1990 OK CIV APP 86 at ¶13. The court further held that at any rate, the guarantors’ waiver in their guaranties of their right to setoff deprived the guarantors of any §686 defenses that they might otherwise have had. *Id.*

Likewise, in *Local Federal Bank FSB v. JICO Inc.*, 1992 OK CIV APP 146, 842 P.2d 368, the guarantors asked for credit for the fair market value of the mortgaged property pursuant to 12 O.S. §686. *Id.* at ¶1. In their guaranties, however, they had “waive[d] all set-offs and counterclaims.” *Id.* at ¶2 (emphasis added). The court therefore felt no need to address the question of whether §686 protected the guarantors, since they had “expressly waived any right to set-off.” *Id.* at ¶4.

Similarly, in *Haines Pipeline Constr. Inc. v. Exline Gas Systems Inc.*, 1996 OK CIV APP 75, 921 P.2d 955, the Oklahoma Court of Civil Appeals held that the FDIC’s failure to timely request a deficiency judgment against the principal borrower did not exonerate the guarantor under 12 O.S. §686 because every guaranty he signed contained language “waiving any right to be exonerated by the failure of the creditor to pursue remedies against the principal debtor.” *Id.* at ¶17.

Then, just last year, the Supreme Court revisited the issue when it decided the case of *JPMorgan Chase Bank v. Specialty Restaurants Inc.*, 2010 OK 65, \_\_\_ P.3d \_\_\_. In that case, after the bank had received judgment and foreclosed the mortgaged property, the bank moved for a deficiency judgment. Judge Owens of the District Court of Oklahoma County held that the guarantors as well as the borrower were entitled to credit for the fair market value of the

“ Judge Owens of the District Court of Oklahoma County held that the guarantors as well as the borrower were entitled to credit for the fair market value of the mortgaged property. ”

mortgaged property. On appeal, the Court of Civil Appeals affirmed. The bank then successfully petitioned the Supreme Court for *certiorari*. The court published its decision on Sept. 21, 2010, vacating the Court of Civil Appeals decision and reversing the district court. The court relied on the *Founders* and *Riverside* cases discussed above, and held that the guarantors had waived any rights they might have under either §686 or the statutory provisions that protect guarantors.

Hence, the current state of Oklahoma law, based upon *Riverside* and its progeny, is that 12 O.S. §686 does not protect guarantors, but even if it did, a waiver of the right to setoff is enough to relinquish any rights under that statute or the Title 15 provisions that do protect guarantors. This gives lenders quite a bit of guidance on how best to prepare their guaranties.

#### DRAFTING GUARANTIES

A lender should make sure that the form of guaranty it uses contains good waiver language. The key term is a waiver of the right to setoff. Under the cases cited above, a waiver of the right to setoff equates to a waiver of any supposed right to the fair market value of mortgaged property. For instance, in *INA Life v. Brandywine*, 1990 OK CIV APP 86, 800 P.2d 1073, the Oklahoma Court of Civil Appeals held that even if 12 O.S. §686 protected guarantors as well as borrowers, those particular guarantors’ “waiver of the right to setoff” meant that they had waived any purported §686 rights. 1990 OK CIV APP 86 at ¶13.

In summary, Oklahoma appellate courts have consistently held that a waiver of the right to setoff includes a waiver of the right to statutory setoff, which would include 12 O.S. §686 and any other statutes that could give guarantors a right to credit for the court-determined fair market value of a property.

Of course, it cannot hurt if the guaranty is even more explicit. One of the guaranties at issue in the *Specialty Restaurants* case provided as follows (as quoted by the Supreme Court):

**Guarantor waives and agrees not to assert:...(b) the benefit of any statute of limitations affecting Guarantor's liability hereunder or the enforcement hereof;...(e) the benefits of any statutory provision limiting the liability of a surety, including without limitation the provisions of Sections 334, 337, 338 and 344 of Title 15 of the Oklahoma Statutes;...(g) the benefits of any statutory provision limiting the right of the Bank to any foreclosure or trustee's sale of any security for the indebtedness, including without limitation, any right to setoff under Section 686 of Title 12 of the Oklahoma Statutes..."**

2010 OK 65 at ¶ 14 (bold in original). The court then evaluated the efficacy of this language as follows:

The guaranty contract provides that it waives the benefits of "any" statutory provision limiting the liability of a surety, including "without limitation" several specific statutory references. It goes on to utilize the same language in relation to 12 O.S. §686, **the precise provision relating to offsets for the fair and reasonable market value of the mortgaged property.** It is difficult to contemplate how the Bank could have more effectively accomplished evincing the guarantor's right to a setoff for the fair market value of the property.

*Id.* at ¶17 (bold in original). In other words, an explicit waiver of all rights under §686 and all rights under the provisions of Title 15 is hard to beat.

## POSSIBLE ARGUMENTS OF GUARANTORS

### *Dependence of Guarantor's Liability on Principal's.*

One can make a logical argument that because a guaranty is of another's debt, if that other debt is reduced or exonerated, the guarantor's obligation must be also. This has already been litigated in Oklahoma, though.

In opposition, a creditor can cite the rule that a guarantor's liability is "a collateral obligation which is independently and separately enforceable from that of the principal debtor or obligor." *Lum v. Lee Way Motor Freight Inc.*, 1987 OK 112, ¶13, 757 P.2d 810 (emphasis added). Thus, in *Local Federal*, for instance, "the guaranty agreements provide[d] for Guarantors' absolute, unconditional and primary liability to

Bank for all amounts due from [the debtor] to Bank." 1992 OK CIV APP 146 at ¶6 (emphasis added). Nonetheless, the guarantors did not get credit for the \$686 value of the property. *Id.*

And in *Founders*, the court held that because a guarantor's obligation is "not dependent on the continued existence of the principal's debt," 1992 OK 35 at ¶13, a guarantor's liability can become greater than the principal's. *Id.* at ¶14. Thus, the seemingly logical argument probably will not succeed.

### *Restatement*

The *Restatement 3rd of Property* takes the position that both mortgagors and guarantors are entitled to credit for a mortgaged property's fair market value. That was one reason the Court of Civil Appeals affirmed the district court in *Specialty Restaurants*. That concept, though, is simply contrary to Oklahoma law, starting with *Riverside* — "the protection of §686 applies only to debtors." 1980 OK 72 at ¶10.

Moreover, the *Restatement's* position may not be the majority view. See, e.g., *First Security Bank of Idaho v. Gaige*, 765 P.2d 683, 685-86 (Idaho 1988) ("a majority of state courts considering the issue have declined to expand the coverage of the [anti-deficiency] statute to those not covered by the statute"); *Paradise Land & Cattle Co. v. McWilliams Enterprises*, 959 F.2d 1463, 1466 (9th Cir. 1992) (California's purchase money anti-deficiency statute does not protect guarantors); *Security Nat'l Trust v. Moore*, 639 So.2d 373, 377 (La. Ct. App. 1994) (Louisiana's anti-deficiency act "protects the owners of mortgaged property, not accommodation parties without an interest in the encumbered asset"); *Miller & Schroeder Inc. v. Gearman*, 413 N.W.2d 194, 196 (Minn. Ct. App. 1987) (Minnesota's anti-deficiency statute "clearly does not apply to a guarantor"); *First Nat'l Bank & Trust Co. v. Anseth*, 503 N.W.2d 568, 573 (N.D. 1993) (in North Dakota, "a guarantor of another's debt or default is not protected by the anti-deficiency statutes.")

### *Equity*

Certainly a guarantor can argue, perhaps persuasively, that it is not fair for his debt to be more than that of the principal borrower. For instance, in the recent *Specialty* case, 2010 OK 65, the Court of Civil Appeals in its vacated opinion held that the lender would receive an unfair "windfall" if the guarantors were allowed credit for only the sheriff's sale price

of the mortgaged property, rather than its fair market value.

But the Supreme Court has recognized that in fact the opposite is the case:

Lenders frequently confront potential losses upon application of the anti-deficiency statute. This is so because a forced sale seldom brings a property's fair market value. The predictable built-in loss is the difference between the fair market value of the property and the foreclosure sale proceeds. For this reason, lenders often are compelled to protect a loan's soundness by obtaining a guaranty for at least that portion of the indebtedness which would be lost by application of the anti-deficiency proceedings. A blanket rule — one that could never be waived by a guarantor — would deprive lenders of their ability to bargain against loss occasioned as a result of the §686 effect.

*Founders*, 1992 OK 35 at ¶12 n. 23. So although from time to time the fairness argument will succeed at the trial court level, it appears that there is too much precedent for the argument to ever succeed on appeal.

## CONCLUSION

The recent *Specialty Restaurants* case has reinforced prior Oklahoma law that guarantors can waive any right to claim the benefits of 12 O.S. §686. Thus, a lender with a good guaranty form should prevail in litigation on the issue.

1. If "prompt" is the correct word, since the Depression ended at about the time the revisions became effective.

2. The guaranties specifically provided that the lender could credit the amount recovered from the sale of the property, rather than its fair market value, against the debt.

## ABOUT THE AUTHOR



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Allen M. Smallwood, Chairman  
Oklahoma Judicial Nominating Commission





# Oklahoma's Marketable Record Title Act

## An Argument for Its Application to Chains of Title to Severed Minerals after *Rocket Oil and Gas Co. v. Donabar*

By Kraettli Q. Epperson

### LIMITING USE OF THE MRTA TO FEE SIMPLE AND SURFACE INTERESTS

The purpose of this article is to explore the applicability of the 30-year presumption of “marketable record title” arising under the Oklahoma Marketable Record Title Act (“MRTA” or “act”) when examining the chain of title to severed minerals.<sup>1</sup> The application of the MRTA extinguishes title defects and lien claims which occur prior to the root of title. The opportunity to explore this idea has arisen due to the holding in a fairly recent mineral title related opinion rendered by the Oklahoma Court of Civil Appeals in *Rocket Oil and Gas Co. v. Donabar*, 2005 OK CIV APP 111, 127 P.3d 625 (mandate issued Dec. 23, 2005).

The general understanding among examining attorneys and other mineral title professionals has been that when someone is examining title to a fee simple title (which means it includes both surface and mineral interests) or to a surface title only, the examiner may properly rely upon the MRTA to extinguish substantially all of the title gaps, title defects and liens which pre-date the 30-year old “root of title” (aka the “root”). The root can be either a conveyance, including a deed, or a judicial ruling, including a probate decree, quiet title judgment or divorce decree, and its recordation must precede the date of determination of

title (i.e., the date of title examination) by at least 30 years; hence the informal reference to the MRTA as the “30-year Act.” The examiner is given the ability to first identify the root and then to scan the documents recorded prior to the root in sufficient detail to identify and to consider those specific instruments and interests which survive the cleansing effect of the MRTA. Such process can both dramatically speed up the title examination process, by reducing the number of documents requiring detailed study, and can significantly decrease the number of title curative actions required to secure marketable or defensible title.<sup>2</sup>

However, the general understanding and practice in Oklahoma, up to now, has been that once a mineral interest is severed from the fee simple title — by a mineral deed, or other similar title conveyance, or a court proceeding transferring only the mineral interest — the ability no longer exists to utilize the benefits of the MRTA to review the now-separate, but mineral-only, chain of title.

This position — disallowing the use of the MRTA in examining a severed mineral chain of title — is based solely upon the long standing interpretation of certain language found in the MRTA by practitioners. Such interpretation is not based on a court case or attorney general opinion, but solely on the general practice in the mineral and title industries in the state. The MRTA contains 10 Sections (16 O.S. §§71-80), including several provisions — discussed below — which refer directly or indirectly to minerals.

While the defendants in the *Rocket* case did not expressly argue that the MRTA does not apply to severed minerals, the appellate court itself stated (¶21): “*the precise issue to be decided on appeal is whether Plaintiffs have ‘marketable record title’ to the minerals sufficient to extinguish Defendant’s mineral interest.*” Hence, the appellate court is acting as though the MRTA does apply to severed minerals, and, as will be made clear below, the appellate court never deviates from that assumption.

### TITLE EXAMINATION PROCESS USING THE MRTA

A general review of the operation of the act is necessary in order to understand the issues surrounding the critical question as to whether the benefits of the act are available to the title examiner who is considering a severed mineral chain of title.<sup>3</sup>

A quick summary of the usual title examination process, implementing the terms of the act, is as follows:

1) **Abstracting:** A compilation is made of copies of the documents filed of record in the public land records (i.e., county clerk and court clerks’ offices<sup>4</sup>) of the local county where the land is located. It is in the form of either a formal abstract of title or an informal collection of the same documents, including only those conveyances or decrees which constitute constructive notice of the documents’ contents.<sup>5</sup> Such

collection is usually placed in chronological order for the convenience of the review by the examiner, with the earliest instrument at the front.

- 2) **Examination:** The title examiner reviews such documents, with most examiners starting with the first instrument, usually the government patent.<sup>6</sup> The examiner makes notes of the sequence of owners (evidenced through a series of deeds and decrees) and the existence of outstanding/unreleased liens (e.g., mortgages and tax liens) and encumbrances (e.g., easements and use restrictions).
- 3) **Chaining Title:** A review of the owners should disclose a connected (i.e., unbroken) sequence of grantees acquiring title from a grantor who previously received title as a grantee from a prior grantor, going back eventually all the way to the initial conveyance which is from the federal government or an Indian tribe. This is referred to as going all the way back to sovereignty (i.e., getting the title out of the government).
- 4) **Curing Gaps:** If there are any gaps in the sequence of deeds or decrees connecting one grantor to the next grantor, or if a document has a substantive defect making it invalid, such omission or defect is noted and a requirement is made to cure such skip or defect in the chain of title. The usual requirement is either to secure a conveyance from the potential claimant or, if that option proves fruitless, to conduct a lawsuit (e.g., probate decree or quiet title suit based on adverse possession) to establish or to confirm that title is in fact held by the purported owner.
- 5) **Noting Liens/Encumbrances:** In addition, the examiner will note any unreleased or unexpired liens (e.g., mortgages, tax liens, judgment liens, etc.), and any easements, restrictions and leases which encumber the land.
- 6) **Curing Liens/Encumbrances:** Such unreleased claims will be reviewed to determine whether such liens threaten to extinguish (e.g., through a foreclosure sale) the owner’s interest, or to unreasonably limit the proposed buyer’s planned use and possession (e.g., a blanket pipeline easement) and hinder the subsequent reconveyance of the land. If such outstanding claims repre-

sent an unacceptable impediment, then a requirement is made to secure the release or extinguishment of such interest.

7) **Multiple Gaps and Liens/Encumbrances:**

As one can imagine, if such a title review covers an extended period of time, such as 50 to 100 years, there may be many gaps or liens/encumbrances to consider and resolve. Some of the existing gaps and liens/encumbrances may be due to the parties' failure to record signed conveyances or releases, or their making of simple mistakes in drafting, or their failure to take actions such as conducting necessary probates; there also may be nearly insurmountable obstacles to securing a corrective or disclaiming deed, such as the inability to secure the cooperation of claimants who are dead, unresponsive or impossible to find.

8) **Expense and Time to Cure:**

The effort to remedy all of these problems can sometimes be not only time consuming and expensive, but might either require efforts and expenses which exceed the value of the interest at stake, or cause substantial consequential damages due to the delay in proceeding with a planned transaction (e.g., a sale or loan) or a project (e.g., drilling a well or building a subdivision). Clearly, it would be useful if there was an authoritative tool to use to reduce the numbers of defects and liens which require curative action.

9) **MRTA Application:** Under the provisions of this act, the examiner can a) go back in time 30 years from the date of the examination (i.e., the date of determination of the status of title), b) identify the first conveyance or decree which has been recorded for at least 30 years, known thereafter as the "root of title" or the "root", c) briefly scan the documents pre-dating such root to identify those documents which survive the cleansing impact of the act, such as plat restrictions and easements<sup>7</sup> and d) make any requirements

needed to correct or release both the post-root title defects and liens/encumbrances, and any surviving pre-root title defects and liens/encumbrances.

10) **Benefit of MRTA:** The impact of the act is to extinguish many, if not all, pre-root claims, thereby resulting in the elimination of the need to require and undertake numerous curative actions, such as securing corrective deeds, determining heirs

and conducting quiet title lawsuits.<sup>8</sup> So, what is a severed mineral interest and why would the MRTA not apply, making it possible to eliminate the need to make numerous curative requirements in those chains of title dealing solely with a severed mineral chain of title? A fee simple title includes the title to 1) the surface, 2) the space above, and 3) the ground below including minerals.<sup>9</sup> These components of the fee simple title can remain together perpetually, or they can be severed to separate the minerals from the rest of the fee simple.<sup>10</sup> This remaining (non-mineral interest) is sometimes referred to as the "surface" interest or "surface"

estate. Due to the air rights and certain non-mineral constituents of the ground which often remain with the non-mineral interest (e.g., water), it is more accurate to refer to such interest as the "fee simple less the minerals". Technically, the term "surface estate" is ambiguous.<sup>11</sup> However, for convenience, such non-mineral interest shall be referred to herein as the surface interest. Such severance occurs when there is a conveyance such as a mineral deed, or a decree such as a probate decree covering only the minerals.

As will be discussed below, a review of the language of the MRTA discloses a possible ambiguity as to whether the act provides its benefits solely to holders of fee simple and surface interests, and not to owners under separate mineral chains of title.

A contract for the sale of land or an interest therein will usually expressly or by implication require the seller to provide "marketable title" to the buyer.<sup>12</sup>

“ A contract for the sale of land or an interest therein will usually expressly or by implication require the seller to provide ‘marketable title’ to the buyer. ”

When a producer of minerals withholds the proceeds from its sale of minerals from the mineral owner/lessor, state statutes impose a 6 percent per annum penalty for such delay in payment, with the amount of penalty being doubled to 12 percent if the title is in fact “marketable.” The definition of marketable title, which is to be used in dealing with such mineral title, is to be found in the Oklahoma Title Examination Standards.<sup>13</sup>

According to the Oklahoma Title Examination Standards, Section 1.1:

*A marketable title is one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title fairly deducible of record.*

Or, as stated in 16 O.S. §78(a) of the MRTA:

*“Marketable record title” means a title of record as indicated in Section 71 of this title, which operates to extinguish such interests and claims, existing prior to the effective date of the root of title, as are stated in Section 73 of this title.*

So the title examiner has two options: 1), ignore the MRTA; review the record chain of title all the way back to sovereignty; and set up any identified defects and liens/encumbrances (no matter how old) to be corrected (unless extinguished by another curative act), or (2) apply the MRTA (and other applicable curative acts<sup>14</sup>); review all documents in the record chain of title from the current date back to the root; and, thereafter, only review those “pre-root” documents, which are expressly unextinguished by the provisions of the act, back to sovereignty, and set up any identified defects or liens/encumbrances (being reduced in number by the application of the MRTA) with requirements to be cured.<sup>15</sup> The MRTA is powerful in part because it is a statute of repose, rather than a statute of limitation.<sup>16</sup>

### **DOES THE MRTA APPLY TO SEVERED MINERAL CHAINS?**

So, what constitutes a “marketable record title” under the MRTA and, consequently, when does the Act apply? 16 O.S. §71 (referred to above) provides:

*Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for thirty (30) years or more, shall be deemed to have a marketable record title*

*to such interest as defined in Section 78 of this title, subject only to the matters stated in Section 72 of this title. A person shall be deemed to have such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than thirty (30) years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in*

*(a) the person claiming such interest, or*

*(b) some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest; with nothing appearing of record, in either case, purporting to divest such claimant<sup>17</sup> of such purported interest.*

Consequently, the act appears to apply to “any interest in land,” and is not expressly limited to just a fee simple interest (which would require that both surface and mineral interests were currently together) or to a surface interest (i.e., fee simple less minerals), but more widely impacts “any interest in land.”

By statute, the terms land, real estate and premises are synonymous.<sup>18</sup> It has been held by Oklahoma’s Supreme Court that a lessee’s interest arising from a mineral lease is not “real property”, but is an “interest in real property”.<sup>19</sup> While it is appropriate to look outside an act to seek the definition of terms used in the act (e.g., “any interest in land”) or to identify any limitations on its application (e.g., does not cover severed mineral titles), the first step to take is to see whether the act itself provides such direct or implied definitions or limitations.

What is the stated purpose of the act? According to 16 O.S. §80:

*This act shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in Section 1 [§71] of this act, subject only to such limitations as appear in Section 2 [§72] of this act.*

What are the “land title transactions” which are being referred to? Under 16 O.S. § 78(f):

*‘Title transaction’ means any transaction affecting the title to any interest in land, including title by will or descent, title by tax deed, mineral deed, lease or reservation, or by*

*trustee's, referee's, guardian's, executor's, administrator's, master in chancery's, sheriff's or marshal's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.*

So far, our analysis shows that the act is expressly intended to cover “any transaction affecting the title to any interest in land, including title by...mineral deed.”

So why do examiners regularly fail to apply this act to severed mineral titles? There is language in the act which provides at 16 O.S. §72:

***Such marketable record title shall be subject to:***

\*\*\*

***(e) The exceptions stated in Section 76 of this title as to rights of reversioners in leases, as to severed mineral or royalty interests, as to easements and interests in the nature of easements, and rights granted, reserved or excepted by instruments creating such easements or interests, or restrictions or agreements which are part of a subdivision development plan, and as to interests of the United States.***

What does such exceptions language from Section 76 provide in regard to minerals? Part a) from Section 76 provides in pertinent part:

*Sections 71 through 80 of this title shall not be applied... to bar or extinguish any mineral or royalty interest which has been severed from the fee simple title of the land;...*

This language from Section 76 could be applied in the following two completely different ways, in regard to severed mineral titles:

**Option 1: Avoid Re-Combining Separate Surface and Mineral Titles:** Once a fee simple title has had the minerals severed from it, thereafter, a deed or other conveyance from such surface owner to a grantee should include language expressly excluding the minerals. If such later conveyance fails to except out the previously severed minerals, it should not be interpreted under the MRTA to constitute a root as to both the surface and the severed minerals (together); this is because if such incorrect (i.e., overconveyancing) deed was treated as a root for both the surface and the mineral interest (together), the minerals would become owned by the surface owner (or his successors), under the MRTA after 30 years, assuming the mineral owner failed to file some document disputing such error in the interim.<sup>20</sup>

Some version of the MRTA was initially adopted by several states and then a uniform version was created as an amalgamation of such earlier versions. Thereafter, once a Uniform MRTA was created, each state either adopted this uniform version “as is” with no changes, or adopted it in a modified form to accommodate what were perceived as unique local issues.<sup>21</sup>

Oklahoma modified the Uniform MRTA, before enacting it, to protect the mineral industry from the possible forfeiture of mineral interests which would occur under the terms of the unmodified version of the act. This interpretation of Oklahoma’s version of the act, as enacted, to protect against such forfeiture of minerals (i.e., preventing a merger back into the surface title) is logical, due to its express modifications embodied in Section 76 (quoted above).

**Option 2: Avoid Applying Act to Severed Mineral Chains:** The current industry interpretation of the act goes beyond protecting against forfeiture of severed minerals back to the surface owner. The act was expressly adopted in Oklahoma for the purpose of: “*simplifying and facilitating land title transactions*” (§80), where: “‘*Title transaction*’ means any transaction affecting the title to any interest in land, ***including title by...mineral deed...***” (§78(f)) However, the exceptions language of §§72 and 76 (quoted above) causes examiners to summarily conclude that the act does not aid in the independent review of a mineral chain of title which has been previously severed from the fee simple. If the act could be applied to such severed mineral chains, then the examination of such chains would take less time and there would probably be fewer curative requirements. At a minimum, when the mineral lessee would normally make a business-risk decision to waive some or all of such pre-root-related requirements at the leasing or drilling stage, the problems will in fact be extinguished and can be ignored on a legal basis, using the MRTA, reducing concerns when it is time to produce a division order opinion.

In the absence of a court case or attorney general opinion holding otherwise, this conservative interpretation of the MRTA will continue to withhold the act’s benefits to a significant industry in the state.

Are there any cases or attorney general opinions in Oklahoma either supporting or disput-

ing this conservative approach? There have been no attorney general opinions on point, and the reported cases which discuss the MRTA have not, up to this point, considered this particular issue.<sup>22</sup>

### HOLDING IN THE ROCKET CASE

However, in 2005 the Oklahoma Court of Civil Appeals issued an opinion which appears to directly apply the benefits of the MRTA to a severed mineral chain of title.

In *Rocket Oil and Gas Co. v. Donabar*, 2005 OK CIV APP 111, 127 P.3d 625, the appellate court affirmed the trial court's holding that quieted title against a defendant, with both courts relying on a **mineral deed** as the root of title. Such defendant claimed in a lawsuit filed in 2001 to be the holder of a fee simple interest (including both surface and mineral interests) based on a 1971 deed which followed a deed to his predecessor in title covering a fee simple which was first effective in 1924<sup>23</sup>. No other deeds involving the defendant's chain appeared in the records between 1924 and 1971. The plaintiff sought to quiet title against the defendant's claim arising under the 1971 deed, arguing that the defendant's 1971 deed came from a grantor whose claim of interest under the 1924 fee simple deed was already extinguished by the MRTA by 1971. The plaintiff was relying on a 1929 mineral deed as his root of title, to extinguish the defendant's claim under the earlier 1924 deed.<sup>24</sup>

Upon analysis of both versions of the MRTA (i.e., 30-year and 40-year versions), the appellate court looked at several possible roots, and concluded (applying the 40-year version) that the plaintiff's 1929 **mineral deed** was the root of title and that the application of the MRTA fully extinguished in 1969 (i.e., 1929 plus 40 equals 1969) the defendant's claim to a fee simple interest (including the minerals) under a 1924 deed. Such extinguishment was deemed to have occurred before the defendant filed his 1971 deed.<sup>25</sup>

It appears that, with the issuance of the holding in the *Rocket* case, we now have an Oklahoma appellate case on point (at least persuasive, although not precedential in weight<sup>26</sup>), which applies the provisions of the MRTA to extinguish a claim to the mineral portion of a fee simple interest (covering both mineral and surface interests in a 1924 deed) which pre-dates the root of title (i.e., the plaintiffs' 1929 mineral deed) for a competing severed mineral

chain of title. As noted above, the appeals court stated in the *Rocket* case (¶21): "*the precise issue to be decided on appeal is whether Plaintiffs have 'marketable record title' to the minerals sufficient to extinguish Defendant's mineral interest.*"

Consequently, the *Rocket* case gives support to an argument in favor of the application of the MRTA to extinguish pre-root gaps in title or liens/encumbrances relating to a severed mineral chain of title. While we will still need to look for a precedential case on point from the Oklahoma Supreme Court, this holding by the Court of Civil Appeals in the *Rocket* case supports an argument in favor of altering the industry's previous interpretation.

If followed, this new development — leaning towards application of the act to severed mineral title chains — would provide substantial benefits to the mineral industry by speeding up and simplifying the examination process, and eliminating substantial numbers of curative requirements.

*Note: The author expresses appreciation for comments made on a draft of this article by several attorneys including Scott McEachin and others.*

1. 16 O.S. §§71-80

2. As stated by Donald A. Pray in "Title Standards and Marketable Title," 38 OBJ 611 (1967): "According to Professor Lewis Simes of the University of Michigan, the Marketable Title Act is neither a statute of limitations nor a curative act. In his opinion, it is a 'unique enactment of the Legislature.' Instead of interests being cut off because of a claimant's failure to sue, as would be the case if a statute of limitations were involved, the claimant's interest is extinguished because he failed to file a notice. The Marketable Title Act imposes upon an owner a burden of recording which was imposed when the recording acts were first passed. The essence of the Marketable Title Act is simply this. If a person has a record chain of title for 40 years, and no one else has filed a notice of claim to the property during the 40-year period, then all conflicting claims based upon any title transaction prior to the 40-year period are extinguished."

Also, see the articles entitled: "Oil and Gas Title Examination Basic Terms" by Kraettli Q. Epperson (Paper#232), "Marketable Title: What Is It and Why Should Mineral Title Examiners Care?" by Kraettli Q. Epperson (Paper#194), and "'Defensible Title' When Examining Oil and Gas Interests: An Overview of the Law in Oklahoma" by Kraettli Q. Epperson (Paper#222), all available online at [www.eppersonlaw.com](http://www.eppersonlaw.com).

3. It should be noted that the holding in the *Rocket* case expressly decided, for the first time, that the MRTA is constitutional (¶¶ 49-58)

4. 16 O.S. §78(b) (Public records under the MRTA).

5. See the abstracting and notice statutes at 1 O.S. § 21(1) (Contents of abstract); 25 O.S. §§10, 12 (Actual and constructive notice defined); 12 O.S. §181 (Recording property judgment as notice); 16 O.S. §§15, 16 (Recording conveyance as notice to third parties); and 46 O.S. §§6, 7 (Recording mortgage as notice to third parties); and see the articles entitled: "Have Judgment Lien Creditors Become 'Bona Fide Purchasers'?" by Kraettli Q. Epperson, 68 *Oklahoma Bar Journal* 1071 (March 29, 1997), (Paper#106), available online at [www.eppersonlaw.com](http://www.eppersonlaw.com).

6. I prefer to start at the back of the abstract and examine towards the beginning, in order to promptly identify the root and spend less time examining the pre-root documents, because the possible interests arising from many of them are eliminated by the cleansing impact of the MRTA.

7. See *Rocket* ¶16; 16 O.S. §73 provides: "Subject to matters stated in Section 2 hereof, such marketable record title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims or charges whatsoever, the existence of

which depends upon any act, transaction, event or omission that occurred prior to the effective date of the root of title. All such interests, claims or charges, however denominated, whether legal or equitable, present or future, whether such interests, claims or charges are asserted by a person sui juris or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.”; 16 O.S. §72 provides: Such marketable record title shall be subject to: ...

(e) The exceptions stated in Section 76 of this title as to rights of **reversioners in leases**, as to **severed mineral or royalty interests**, as to **easements** and interests in the nature of easements, and rights granted, reserved or excepted by instruments creating such easements or interests, or **restrictions or agreements which are part of a subdivision development plan**, and as to **interests of the United States**.”

8. *Rocket* at ¶19 states: “The 30-year MRTA was summarized by the Court in *Mobbs v. City of Lehigh*, 1982 OK 149, ¶8, 655 P.2d 547, 550, as follows: The act is based upon the principle that when one has clear record title for at least thirty years, all interests recorded prior to this period should be cut off unless preserved by filing a proper notice. To effectuate this principle the Act focuses upon the concepts of ‘root of title’ and ‘marketable record title.’” (Emphasis added; footnotes omitted.)

9. 16 O.S. §29 states: “Every estate in land which shall be granted, conveyed or demised by deed or will shall be deemed an estate in fee simple and of inheritance, unless limited by express words.”; 60 O.S. §64 provides: “The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it.”

10. See the article entitled: “Oil and Gas Title Examination Basic Terms” by Kraettli Q. Epperson (Paper#232), available online at www.eppersonlaw.com.

11. According to the holding in *Blythe v. Hines*, 1977 OK 228: “We conclude that under the facts in this case the grant of the “surface estate” with no reservation of minerals, oil and gas or any previous conveyance affecting any portion of the fee simple title was ambiguous.”

12. According to *Am Jur* 2d: “**An agreement to sell and convey land is in legal effect an agreement to sell a title to the land, and in the absence of any provision in the contract indicating the character of the title provided for, the law implies an undertaking of the part of the vendor to make and convey a good or marketable title to the purchaser.** A contract to sell and convey real estate ordinarily requires a conveyance of the fee simple free and clear of all liens and encumbrances. There is authority that the right to the vendee under an executory contract to a good title is a right given by law rather than one growing out of the agreement of the parties, and that he may insist on having a good title, not because it is stipulated for by the agreement, but on his general right to require it. In this respect, the terms “good title,” “marketable title,” and “perfect title” are regarded as synonymous and indicative of the same character of title. To constitute such a title, its validity must be clear. There can be no reasonable doubt as to any fact or point of law upon which its validity depends. **As is sometimes said, a marketable title must be one which can be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence.**” (emphasis added) (77 *Am Jur* 2d §115 Title of Vendor: Generally; Obligation to furnish good or marketable title).

13. 52 O.S. §570.10 declares: “Marketability of title shall be determined in accordance with the then current title examination standards of the Oklahoma Bar Association.”

14. Such curative statutes include, among others: 16 O.S. §4(D) (absence of marital status cured after 10 years); 16 O.S. § 27a (absence of acknowledgment cured after 5 years); and 16 O.S. §29.1 to 29.6 (Simplification of Land Titles Act: cures defects in various court proceedings and conveyances after 10 years)

15. As stated by Donald A. Pray in “Title Standards and Marketable Title,” 38 *OBJ* 611 (1967), pg. 614, “All other interests prior to the 40-year period are extinguished such as ancient mortgages, titles by adverse possession, interests which are equitable as well as legal and future as well as present. Possibilities of reverter and rights of re-entry will also be extinguished under the act.”

16. See footnote 2 ; also see: *Bennett v. Whitehouse*, 690 F. Supp. 955 (W.D. Okla.1988) (MRTA is constitutional and self-executing); the Oklahoma Supreme Court held in *Mobbs v. City of Lehigh*, 1982 OK 149, 655 P.2d 547 that the Marketable Record Title Act was not a statute of limitations; the court said that, unlike a statute of limitations which barred the remedy, the Marketable Record Title Act had as its target the right itself; see *Allen v. Farmers Union Co-operative Royalty Co.*, 1975 OK 102, 538 P.2d 204, which applies the exceptions expressed in the MRTA’s terms to defeat an attempt by the holder of a severed mineral interest to expand its ownership of oil, gas and other minerals to include metallic ores.

17. 16 O.S. §71 uses the term “purporting to divest such claimant of such purported interest...”; such term reflects the fact that once the

holder of title, holding under the chain flowing from the Root of Title, conveys away his interest to a subsequent grantee, he cannot continue to claim to hold such interest, because such conveyance “divests” the owner of such interest.

18. 16 O.S. §14: “The words “land,” “real estate” and “premises” when used herein or in any instrument relating to real property, are synonyms and shall be deemed to mean the same thing, and unless otherwise qualified, to include lands, tenements and hereditaments; and the word “appurtenances” unless otherwise qualified shall mean all improvements and every right of whatever character pertaining to the premises described.”

19. *First Nat. Bank v. Dunlap*, 1927 OK 67 (Judgment lien does not attach to a lessee’s oil and gas interest which is only an “interest in real estate”).

20. Some states have a lapse statute causing severed undeveloped mineral titles to merge back into the surface title, after the minerals remain undeveloped for a certain period of time. Oklahoma does not have such a statute; however, as explained in the *Rocket* case, at ¶’s 49-58, lapse statutes in general are constitutional, based on a U.S. Supreme Court case (*Texaco, Inc. v. Short*, 454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 738 (1982)), and, by analogy, the Oklahoma MRTA is also constitutional.

21. John F. Hicks, V.9 No.1 *Tulsa Law Journal* 68 (pg. 71-72) stated: “Throughout the twentieth century there have been attempts to solve the problems inherent in the American Conveyancing system. One of the most successful approaches has been through marketable record title legislation. In 1919, Iowa adopted a rudimentary marketable record title act that barred all actions based upon any claim arising or existing prior to January 1, 1900, unless notice of the claim was filed before July 4, 1920. The date of the bar or recording requirement has been advanced periodically. The innovation of the act is that it went beyond the conventional statutes of limitation in applying to claims that were not presently actionable, to future interest as well as present interests, to contingent interests as well as vested interests, and to persons under disabilities as well as those of full capacity. The act was comprehensive in its approach to eliminating defects and stale claims in a title.”

“In 1945, Michigan adopted a prototype of the current Model Marketable Record Title Act. Its features are similar to the Model Act, upon which the Oklahoma Act is based. Lewis Simes and Clarence Taylor of the University of Michigan Law School used the Michigan Act as the basis for a joint project with the Section of Real Property, Probate and Trust Law of the American Bar Association and the University of Michigan Law School, which resulted in the publication of the Model Marketable Record Title Act. The Model Act provides that outstanding interests and defects that are not found within the recent history of the chain of title in question are extinguished as a matter of law. The Model Act is comprehensive in its approach to eliminating stale claims and defects in a title in the same way as is the Iowa Act discussed earlier. A total of fifteen states have now adopted some type of marketable record title legislation. Some of the acts are similar to the original Iowa Act in that they impliedly extinguish old outstanding interests and defects by barring any remedial action on the claims. A majority of states adopting this type of legislation have used the framework found in the Model Act which expressly extinguishes certain outstanding interests and defects. The Oklahoma Act, adopted in 1963 and amended in 1970, is substantially similar to the Model Act.”

22. Such as *Mobbs v. City of Lehigh*, 1982 OK 149, 655 P.2d 547, *supra*; and *Anderson v. Pickering*, 1975 OK CIV APP 42, ¶16, 541 P.2d 1361, holding: “The Merchantable Title Act provides a method through which title may be quieted statutorily. It is not self-executing, nor does it provide a perfect remedy for every instance.” But see: *Bennett v. Whitehouse*, 690 F. Supp. 955 (W.D. Okla.1988) (MRTA is constitutional and self-executing); see footnote 20 re: constitutionality of the MRTA.

23. See *Rocket* ¶’s 39-41; the facts disclosed in the opinion showed that there was a 1922 deed covering the fee simple interest, but that the grantor thereon did not acquire the stated interest until 1924; consequently, through the doctrine of after acquired title the 1922 deed was first effective in 1924; see 16 O.S. §17 (after acquired title); see *Rocket* ¶’s 3-5, 13-18, and 23.

24. The 30-year version of the MRTA was preceded by a 40-year version, which 40-year version was determined to be the applicable version of the act.

25. See footnote 23; the defendants’ 1971 deed could have served as a notice of interest under the MRTA to keep an earlier interest alive (i.e., the 1924 deed), but it would be an effective notice if and only if it had been filed **before the earlier interest (under the 1924 deed), that it is trying to preserve, was already extinguished (in 1969) by the effect of the MRTA**; 16 O.S. §74(a) provides, in part: “Any person claiming an interest in land may preserve and keep effective such interest by filing for record **during the thirty-year period immediately following the effective date of the root of title of the person whose record title**

would otherwise be marketable, a notice in writing, duly verified by oath, setting forth the nature of the claim.”

16 O.S. §72 provides: “Such marketable record title shall be subject to: ... (d) Any interest relating to a title transaction which has been recorded subsequent to the effective date of the root of title from which the unbroken chain of title of record is started; provided, however, that such recording shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of Section 73 of this title.”

26. *National Cowboy Hall of Fame and Western Heritage Center v. State of Oklahoma Ex Rel. The Oklahoma Human Rights Commission*, 1978 OK 76, ¶11, 579 P.2d 1276, 1279.

27. It must be recognized that application of the MRTA to severed minerals will bring some difficult issues for practitioners and the courts to consider. Such issues include 1) whether the MRTA can be of practical use with fragmented mineral titles as found in most Oklahoma titles; 2) whether the MRTA would be applied if the bundle of rights that make up mineral interests is unbundled in some manner; 3) whether the MRTA will be applied to oil and gas leasehold titles; 4) whether the rules of possession and adverse possession of severed minerals and oil and gas leaseholds are compatible with the MRTA and the legislative intent of such act; 5) whether the MRTA can be utilized if the minerals severed go beyond the usual oil, gas and other hydrocarbons and separate chains of title are created for different minerals like coal, gold, silver, uranium, et al.; and 6) whether this new expanded application of the act was the actual intent of the Legislature. Application of the MRTA to severed minerals may require the oil and gas industry to review its business risk approach to at least some title issues.

## ABOUT THE AUTHOR



Kraettli Q. Epperson graduated from OU (B.A., political science, 1971), and from OCU (J.D., 1978). His PLLC is a partner of Mee Mee Hoge & Epperson in Oklahoma City, and he focuses on mineral and real property litigation (arbitration, lien priorities, ownership, restrictions, title insurance and condemnation issues) and commercial real property acquisitions. He teaches Oklahoma Land Titles at OCU School of Law and serves as chair of the OBA Title Examination Standards Committee. ([www.EppersonLaw.com](http://www.EppersonLaw.com))

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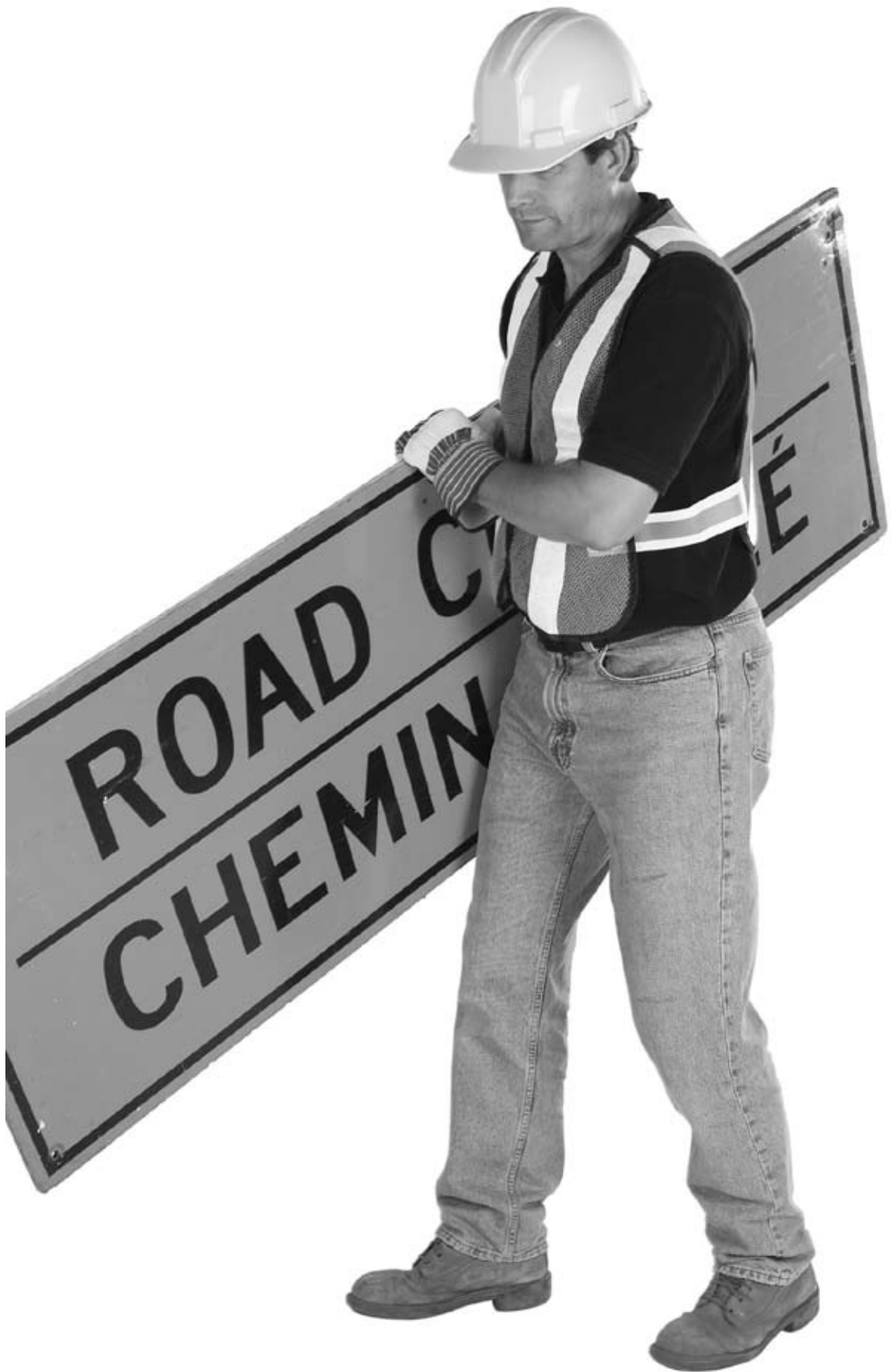
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# A Practitioner's Guide to 'Closing' vs. 'Vacating' Municipal Public Ways and Easements

By Briana J. Ross

**W**hile some attorneys are acquainted with the procedures for closing a public way or easement or vacating or reopening a closed public way or easement, it is safe to say that there are at least twice as many attorneys who are not so acquainted. Although Oklahoma's statutes set forth detailed and concise procedures for these actions, attorneys often fail to complete one or more of the necessary steps. Errors in these types of actions can cause future problems for the property owner whose attorney failed to follow the statutory procedures. This article will examine 1) Oklahoma's statutory procedures to close a public way or easement, 2) Oklahoma's statutory procedures for vacating or reopening a closed public way or easement and 3) the effect on property rights of the municipality, property owners and the public in a closed public way or easement as opposed to a vacated or reopened public way or easement.

### DEFINITION OF A PUBLIC WAY AND EASEMENT

Perhaps the first order of business is to define a "public way" and an "easement." A public way is defined as "a street, avenue, boulevard, alley, lane or thoroughfare open for public use."<sup>1</sup> Note that the definition of a public way does not include public highways, which are governed by the Oklahoma Highway Code of 1968. An easement is defined as "the rights in real property as set forth in Section 49 of Title 60 of the Oklahoma Statutes,"<sup>2</sup> which lists numerous land burdens or servi-

tudes that may attach to other lands as incidents or appurtenances.<sup>3</sup>

### CLOSING PUBLIC WAYS AND EASEMENTS – THE MUNICIPALITY RETAINS THE RIGHT TO REOPEN

When a municipality closes a public way or easement by ordinance, many are left to question what rights, if any, the municipality, the public and the abutting property owners maintain in the closed public way or easement. The term "close" is defined as a "legislative act of the governing body of a municipality discontinuing the public use of a public way or ease-

ment *without affecting title to real property.*"<sup>4</sup> A municipal governing body may close the public use of a public way or easement within the municipality whenever it is deemed necessary or expedient. For example, the municipality may choose to close a public way or easement for development purposes. However, most public ways and easements are closed pursuant to a property owner's application requesting that it be closed. The procedure for closing the public way is established locally by the adoption of an ordinance or resolution setting forth the applicable procedures and, thus, may differ among municipalities.<sup>5</sup>

Oklahoma law requires that all municipalities give written notice of any proposed closing of a public way or easement to any holder of a franchise or others determined by the governing body to have a special right or privilege granted by ordinance or legislative enactment to use the public way or easement at least 30 days prior to the passage of any ordinance providing for the closing of a public way or easement.<sup>6</sup> A "franchise or others determined by the governing body to have a special right or privilege" typically consists of a utility, public service corporation, transmission company and those with rights obtained by private contract.

The closing of a public way or easement, by definition, does not affect title to real property. In other words, the abutting landowners do not gain additional real property rights once the public way or easement is closed. Further, closing of the public way or easement does not affect the right of a franchise or others determined by the governing body to have a special right or privilege in the public way or easement from maintaining, repairing, reconstructing, operating or removing services therein.<sup>7</sup> For example, suppose a municipality closes an alleyway located in the townsite. Easements across the alleyway were previously granted to the telephone company, the cable company, the gas company and the electric company for the purpose of running their underground lines. Upon closure of the alley, these companies do not lose their easement rights. In other words, these easement holders

still have the right to maintain, repair, reconstruct, operate or remove services installed across the alleyway. Further, grantees of a *private* right of way across the closed public way or easement shall continue to maintain their contractual rights unless the owners release those rights in writing.<sup>8</sup>

Closing a public way or easement does not mean that it is permanently closed. Municipalities retain the absolute right to reopen the public way or easement without expense to the municipality.<sup>9</sup> This can be accomplished by ordinance whenever the municipality deems it necessary or upon application and filing of the property owners owning more than one-half in area of the property abutting on the public way or easement previously closed.<sup>10</sup> Any improvements to the closed public way or easement by an abutting property owner can be destroyed at the property owner's expense if the municipality deems it necessary to reopen the public way or easement at a future date.

#### VACATING OR REOPENING A PUBLIC WAY OR EASEMENT

Anytime after the municipality closes the public way or easement, a property owner may commence an action to either vacate (*i.e.*, foreclose) the municipality's right to reopen the closed public way or easement or to have the closed public way or easement reopened. The term "vacate" is defined as "the termination . . . by judicial act of the district court, of private and/or public rights in a public way [or] easement . . . and vesting title in real estate in private ownership."<sup>11</sup> One obvious reason a property owner may desire to vacate a closed public way or easement is found in the definition itself — to vest title in the closed public way or easement in private ownership.

However, a property owner may seek to have the public way or easement reopened for a variety of different reasons that are often determined on a case-by-case basis. An example of a situation where abutting property owners may request the reopening of a closed public way or easement occurs where a previously unused street was closed, but due to recent development in the area, it has become necessary or

“Oklahoma law requires that all municipalities give written notice of any proposed closing of a public way or easement...”

desirable to reopen the street to reduce or redirect traffic congestion.

The owner of any real estate within the corporate limits of the municipality to which a public way or easement has reverted by closing, or may subsequently revert by closing, may commence an action in the district court in the county in which the real estate is located by filing a verified petition. The verified petition must meet three requirements: 1) it must show the passage of an ordinance closing the public way or easement; 2) it must ask for the foreclosure of the absolute right to reopen the public way or easement or ask for its reopening and 3) it must have attached to it a certificate of a bonded abstractor listing the names and mailing addresses of all persons required to be notified of the court action.<sup>12</sup>

Notice of the verified petition must be provided by service of summons to the municipality and to public service corporations, transmission and utility companies or franchise holders having rights in the public way or easement.<sup>13</sup> Notice must be provided by first-class mail to all owners of record of property abutting that portion of the public way or easement sought to be vacated, and other owners of record whose property abuts the public way or easement within 300 feet from that portion of the public way or easement sought to be vacated. The mailing list of property owners must be generated from the current year's tax rolls in the office of the county treasurer.<sup>14</sup> The easiest way to obtain such a list is to provide the legal description of the public way or easement to the local abstract company servicing the county in which the public way or easement is situated and ask for a 300-foot radius report. The abstract company will need the legal description of the public way or easement in order to generate the report. Notice by first-class mail must also be provided to any person, firm or corporation, not otherwise required to be notified, that is known by the petitioner to claim an interest or rights in the public way or easement.<sup>15</sup> Notice by first-class mail must be made at least 30 days before the hearing of the petition and the mailing must include a copy of the petition and a copy of the published notice.<sup>16</sup> The petitioner must also file an affidavit verifying the mailing of the petition and notice. Finally, notice to the public must be given by one publication in a newspaper of general circulation published in the county where the property is located at least 30 days prior to the

.....

## CHECKLIST FOR VACATING OR REOPENING A PUBLIC WAY OR EASEMENT

### 1. Petition (11 O.S. §42-111)

- Must be verified and filed in district court in county where public way or easement is situated
- Must show passage of ordinance closing public way or easement
- Must ask for foreclosure of the absolute right to reopen the public way or easement OR ask for the reopening of the public way or easement
- Must attach certificate of bonded abstractor listing names and mailing addresses of all persons required to be notified as set forth in 11 O.S. §42-112

### 2. Notice (11 O.S. §42-112)

- Municipality (Service of summons)
- Public service corporations, transmission and utility companies or franchise holders having rights in public way or easement (Service of summons)
- Owners of record of property abutting that portion of the public way or easement sought to be vacated (First-class mail) (at least 30 days prior to hearing)
- Other owners of record whose property abuts the public way or easement within 300 feet from that portion of the public way or easement sought to be vacated (First-class mail) (at least 30 days prior to hearing)
- Any person, firm or corporation, not otherwise required to be notified, known to petitioner to claim an interest or rights in the public way or easement (First-class mail) (at least 30 days prior to hearing)
- Affidavit of Mailing
- Public (Published once in newspaper of general circulation in the county where public way or easement is situated – must provide for answer date not less than 20 days after issuance of summons or first publication notice)

### 3. Hearing (42 O.S. §42-113)

### 4. Order Granting Foreclosure (42 O.S. §42-113)

- Vests fee simple title
- .....

hearing and said notice must provide for an answer date not less than 20 days after issuance of the summons or first publication notice.<sup>17</sup>

At the hearing of the petition, the district court will inquire into the merits of the petition and take testimony. Once the district court has determined the issues, it may 1) grant the foreclosure of the right to reopen the public way or easement; 2) grant the request to reopen the public way or easement; 3) deny the petition or 4) make any proper order pursuant to the facts and the law.<sup>18</sup> The district court will not grant the foreclosure of the right to reopen if the municipality has established that it has a present or future reason to reopen or use the public way or easement as a public way or easement.

The order granting foreclosure of the right to reopen the vacated public way or easement, or portion thereof, **shall vest fee simple title** in and to the vacated part or portion thereof which reverted to the real estate.<sup>19</sup> Anytime a public way or easement is vacated, it reverts to the owners of real estate adjacent to it on each side, in proportion to the frontage of the real estate, except in cases where the public way or easement has been taken and appropriated to public use in a different proportion, in which case it reverts to adjacent lots or real estate in proportion to which it was taken from them or dedicated. However, when any vacated public way or easement remains bounded on all sides by public ways, public grounds or public easements, title to the entire tract vacated vests in the municipality, but may then be used by the municipality or a leasehold conveyed by act of the governing body for any lawful purpose, public or private.<sup>20</sup>

Rarely, someone may request to file an action for damages against the parties obtaining a decree of vacation of a public way or easement.

Such an action against the parties obtaining a decree of vacation, their heirs, assigns or successors, may not be maintained unless commenced within 90 days after the decree has been rendered or the decree has become final if an appeal has been taken.<sup>21</sup>

The checklist on the previous page was designed to aid practitioners when commencing an action to vacate or reopen a public way or easement.

1. 11 O.S. §42-101(3).
2. 11 O.S. §42-101(4).
3. 60 O.S. §49.
4. 11 O.S. §42-101(1).
5. 11 O.S. §42-110(A).
6. 11 O.S. §42-110(B).
7. 11 O.S. §42-110(D).
8. 11 O.S. §42-110 (D).
9. 11 O.S. §42-110(C).
10. 11 O.S. §42-110(C)(1).
11. 11 O.S. §42-101(2).
12. 11 O.S. §42-111.
13. 11 O.S. §42-112(1) & (2).
14. 11 O.S. §42-112(3)(a).
15. *Id.*
16. 11 O.S. §42-112(3)(b).
17. *Id.*
18. 11 O.S. §42-113(A).
19. 11 O.S. §42-113(B).
20. 11 O.S. §42-113(C).
21. 11 O.S. §42-114.

#### ABOUT THE AUTHOR



Briana J. Ross is an attorney at Oklahoma REO Closing & Title Services LLC in Tulsa. She received her B.S.B.A. from Oklahoma State University and J.D. from the University of Tulsa College of Law. Her practice focuses on residential and commercial title examination with an emphasis on REO properties. She currently serves as chair-elect of the OBA Real Property Section, a Trustee for the Oklahoma Bar Foundation and a director for the OBA Young Lawyers Division.



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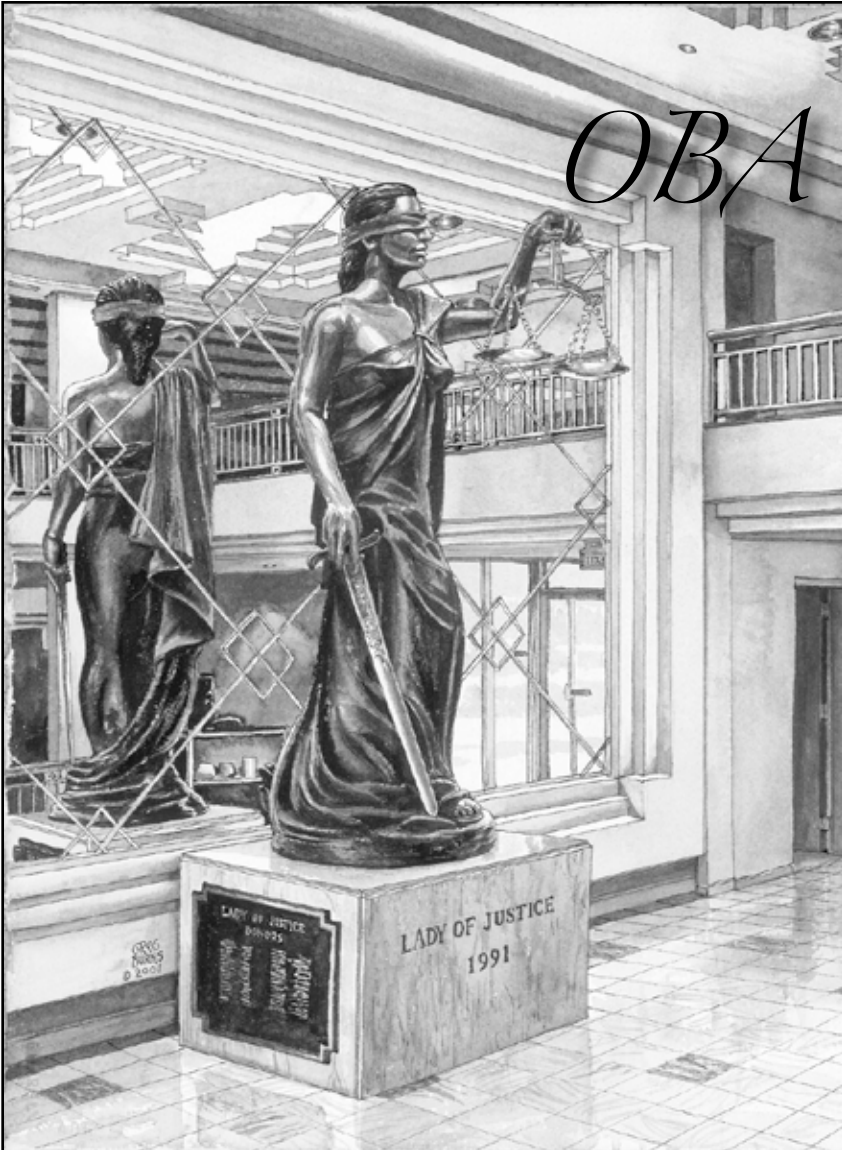
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## Oil and Gas Issues in Real Property

By Richard Gore, Richard Rose and Brady Smith

**I**n Oklahoma, more often than not, real property has at least two owners to each piece of property: the owner of the surface and the owner of the minerals below the surface. The surface estate and the mineral estate are separate property interests, each with their own set of rights and responsibilities. Prior to the Surface Damages Act in 1982, oil and gas operators had the right to use so much of the surface as was reasonably necessary to drill and produce the well without paying any damages unless they used an unreasonable amount of the surface.

Though surface owners were not being paid for the use of their surface and were probably not enjoying having a well on their property, rarely, if ever are they able to stop mineral development. Oklahoma case law has made it very clear that the surface owner generally may not stop oil and gas development on his surface:

Although the two estates may be of equal dignity for some purposes, the surface estate is servient to the dominant mineral estate for purposes of oil and gas development. Ownership of an oil and gas interest carries with it the right to enjoy that interest by entering and making reasonable use of the surface to explore and extract mineral deposits. The right to enter the surface for exploration purposes is in the nature of a property right. Additionally, all property is held subject to the valid exercise of the police power. It has long been recognized that the state, in exercise of its police power, may control the

density of drilling to prevent waste and to protect correlative rights.<sup>1</sup>

In essence, this means that the mineral owner (or the holder of a valid oil and gas lease) can construct roads, lay pipelines, and conduct seismic activity for the purpose of exploring and developing the mineral estate.<sup>2</sup> Also of importance is the principle that “leasehold interests are freely alienable under our law, either in whole or in part .... Divisibility is permissible so long as the servient owner’s estate does not become burdened beyond the terms of the grant.”<sup>3</sup> What this means is that the mineral owner (or lessee of the mineral owner) may assign portions of the leasehold interest — such as the right to conduct seismic or lay pipelines — to an unrelated third party so long as the third party is conducting those operations for the purposes authorized by the lease.<sup>4</sup> While the issues related to the use of the surface by the mineral estate noted above may come up from time to time, the most likely oil

and gas related issue you will encounter involves surface damages.

## THE SURFACE DAMAGES ACT

### *Basics*

Under the Surface Damages Act,<sup>5</sup> before “entering the site with heavy equipment, the operator shall negotiate with the surface owner for the payment of any damages which may be caused by the drilling operation.”<sup>6</sup> The proper measure for determining damages under the act “is the diminution of the fair market value of the surface estate resulting from the drilling operations.”<sup>7</sup> If the parties fail to reach an agreement after negotiations, “or if the operator is not able to contact all parties, the operator shall petition the district court ... for appointment of appraisers to make recommendations to the parties and . . . the court concerning the amount of damages, if any. Once the operator has petitioned for appointment of appraisers, the operator may enter the site to drill.”<sup>8</sup> Once the appraisers make a recommendation to the court, either party may file exceptions to the report and/or demand a jury trial.<sup>9</sup> One major point to highlight here is that “[i]f the party demanding the jury trial does not recover a more favorable verdict than the assessment award of the appraisers, *all court costs including reasonable attorney fees shall be assessed against the party.*”<sup>10</sup> In other words, if the appraisers report sets damages at \$20,000 and the surface owner demands a jury trial, the recovery amount must be at least \$20,000.01 or the surface owner will be stuck with the costs and attorney fees.

### *Applicability of Act*

As noted above, the act refers to operators and surface owners. “Operator” is defined as “a mineral owner or lessee who is engaged in drilling or preparing to drill for oil or gas” and “surface owner” is defined as “the owner or owners of record of the surface of the property on which the drilling operation is to occur.”<sup>11</sup> The definition of “operator” limits the application of the act to operators who are “engaged in drilling or preparing to drill,” and thus does not encompass damages that result from seismic activities.<sup>12</sup> Furthermore, the Oklahoma Court of Civil Appeals held that “the Act clearly and unambiguously requires an operator to negotiate and obtain a signed surface damage agreement with all undivided interest owners/tenants in common of record or in the event an agreement cannot be reached by all

“Once the operator has petitioned for appointment of appraisers, the operator may enter the site to drill.”

parties, to file a petition for appointment of appraisers pursuant to §318.5(A).”<sup>13</sup>

In *YDF Inc. v. Schlumar Inc.*, a surface owner of property located adjacent to the property on which YDF’s oil and gas well was located built a home on this property, which was within 125 feet of YDF’s oil well.<sup>14</sup> Later, YDF informed the landowner that pursuant to 52 OKLA. STAT. §318.10, it was unlawful to construct a habitable structure within 125 feet of an oil well.<sup>15</sup> YDF sought an injunction against completion of the house, and the landowner argued that because the statute was “part of the Surface Damage Act . . . [it] applies only to surface owners and not to adjacent landowners.”<sup>16</sup> The Supreme Court agreed and subsequently held “that [the statute] is . . . part of the . . . Surface Damages Act, and as such, applies only to surface owners and not adjacent landowners.”<sup>17</sup> In so holding, the court reasoned that the landowner “does not now and has never owned the separate tract of land on which the well is located . . . [and] is not the ‘surface owner’ of the land on which the well sits.”<sup>18</sup>

Soon after the decision in *Schlumar*, the attorney general, in an official opinion, stated as follows:

Within days following the court’s decision in *Schlumar*, the Legislature passed, and the Governor signed, legislation recodifying Section 318.10 to Section 320.1.

...

The numeric placement of Section 318.10, at the end of the Oklahoma Surface Damages Act, following Sections 318.2-318.9, was key to the court’s decision that the Legislature intended Section 318.10 to be part of the Oklahoma Surface Damages Act. As a result of finding Section 318.10 was part of the Oklahoma Surface Damages Act, the court held the prohibition on the location of a habitable structure in Section 318.10 applied only to the owners of the

surface lands on which an active oil and gas well was or would be located.

...

It is, therefore, the official Opinion of the Attorney General that:

1. The legislative recodification of the statute previously numbered as 52 O.S.Supp.2003, §318.10 ... to 52 O.S.Supp.2008, §320.1 ... removed the statute from what is commonly referred to as the Oklahoma Surface Damages Act, 52 O.S.2001 & Supp.2008, §§318.2-318.9....

2. Because 52 O.S.Supp.2008, §320.1 is no longer part of the Oklahoma Surface Damages Act, it must be read as an independent statute, prohibiting a habitable structure from being located within 125 feet of an active oil and gas well, or within 50 feet of surface equipment necessary to the operation of an active oil and gas well, absent the written agreement of the surface owner and the operator otherwise. The prohibition of a habitable structure in Section 320.1 applies regardless of whether the structure is located on the surface lands on which the oil and gas well is located, or on adjacent lands.<sup>19</sup>

Based on the attorney general's opinion and the legislative recodification, it appears that 52 OKLA. STAT. §320.1 applies regardless of where the structure is located.

#### *Measure of Damages*

When determining the damages that result from the drilling operations, many factors can come into play. The Oklahoma Court of Civil Appeals has stated that:

"[the] appraisers are ... to determine fair market value of the land where the lease road and well site are located, and to include in this damage assessment all the injury caused to remaining property by the construction or use of the drilling operation on the land which is actually taken. Diminution in value due to the well location and inconvenience suffered as [a] result of the land's use by the operator are recognized as factors affecting the determination of damages."<sup>20</sup>

Factors that may be considered in assessing the damages include, but are not limited to, the following factors:

- The location or site of the drilling operations

- The quality and value of the land used or disturbed by said drilling operations
- Incidental features resulting from said drilling operations which may affect convenient use and further enjoyment
- Inconvenience suffered in actual use of the land by the operator
- Whether the damages, if any, are temporary or permanent in nature
- Changes in physical condition of the tract
- Irregularity of shape and reduction, or denial, of access
- The destruction, if any, of native grasses, and/or growing crops, if any, caused by drilling operations

After approving consideration of the above factors, the Supreme Court went on to note that "[t]hese are not to be considered as individual items of damages, but as they may, in your opinion, affect the fair market value of the tract after the drilling operations in this case. You may also consider any such additional factors which you believe a reasonably prudent buyer would consider before purchasing the property."<sup>22</sup> Another factor that has been considered is fear. In *Western Farmers Elec. Coop. v. Enis*, a case involving an appraisal of property being used for high voltage transmission lines, the court stated that "[a]n expert appraiser's opinion about the impact on value of perceived fear ... is a relevant factor in determining fair market value.... 'In ascertaining [fair market value between willing buyers and sellers,] there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining.'"<sup>23</sup>

In addition to the above, the Oklahoma Court of Civil Appeals has held that "oil and gas equipment left on the landowner's property for an unreasonable length of time after the termination of the lease will become the landowner's property."<sup>24</sup> This means that "the owner of the surface also own[s] an abandoned wellbore on the land."<sup>25</sup> However, if an operator chooses to re-enter an abandoned wellbore pursuant to a valid permit from the Oklahoma Corporation Commission, the surface owner cannot prevent the operator from doing so.<sup>26</sup> Regarding landowner compensation for use of the wellbore, the court held that "landowners' right to compensation for use of the abandoned

wellbore should be determined under the Surface Damages Act” which is the diminution in the fair market value of the surface property resulting from the drilling and maintenance operations. The compensation is not to be determined by reference to the value of the wellbore to the lessee.<sup>27</sup> With reference to the casing, “Oklahoma uses the measure of rental value.”<sup>28</sup>

### Exemptions and Exclusions

The act applies only to “a mineral owner or lessee who is engaged in drilling or preparing to drill for oil or gas;” therefore, any activity regarding such things as pipeline easements, right-of-ways and other activity would not be covered by the act but would instead likely be negotiated between the surface owner and the party seeking access.

### CONCLUSION

Oil and gas operations in Oklahoma are common and help drive our economy. Understanding the rights and obligations of both the operator and surface owner are crucial for our shared existence.

1. *Turley v. Flag-Redfern Oil Co.*, 1989 OK 144, ¶ 13, 782 P.2d 130, 135.
2. See *Hinds v. Phillips Petroleum Co.*, 1979 OK 22, ¶ 3, 591 P.2d 697, 698 (pipeline); *Lierly v. Tidewater Petroleum Corp.*, 2006 OK 47, ¶ 20, 139 P.3d 897, 903 (limited view of the right of ingress and egress). Also note that these rights have been limited by statute. See *Id.* (noting that the Surface Damages Act limits a lessee’s common-law right to access a well at any specific point entry regardless of the wishes of the surface owner by requiring the lessee to engage in negotiations before entering the premises); See also Seismic Exploration Regulation Act, 52 OKLA. STAT. §318.21 *et seq.*
3. *Hinds*, 1979 OK 22 at ¶ 9, 591 P.2d at 699.
4. For instance, A, the lessee of Blackacre, may enter into a contract with B to sell gas from a particular well situated on Blackacre. In so doing, A has effectively transferred its lease-granted right to lay pipelines on the land to B. This is a valid conveyance. See *Id.* at ¶ 8. If, however, A were to grant to B a right to lay pipelines on Blackacre which did not connect to a well situated on such land (or lands spaced therewith), then the surface owners estate would “become burdened beyond the terms of the [lease]” and would thus be invalid absent an agreement from the surface owner. See *Id.* at ¶ 9.
5. 52 OKLA. STAT. §§318.2 – 318.9.
6. 52 OKLA. STAT. §§318.5.
7. *Andress v. Bowlby*, 1989 OK 78, ¶ 6, 773 P.2d 1265, 1267.
8. 52 OKLA. STAT. §318.5.
9. 52 OKLA. STAT. §318.5.
10. 52 OKLA. STAT. §318.5 (F) (emphasis added).
11. 52 OKLA. STAT. §318.2 (2).
12. *Anschutz Corp. v. Sanders*, 1987 OK 11, ¶ 10, 734 P.2d 1290, 1292.
13. *McCrabb v. Chesapeake Energy Corp.*, 2009 OK CIV APP 66, ¶ 16, 216 P.3d 312, 315. This conclusion rests upon the definition of “surface owner” as “the owner or owners of record.” 52 OKLA. STAT. §318.2 (2).
14. *YDF Inc. v. Schlumar Inc.*, 2006 OK 32, ¶ ¶ 1-2, 136 P.3d 656, 658.
15. *Id.*
16. *Schlumar Inc.*, 2006 OK 32, ¶ 3, 136 P.3d at 658.
17. *Schlumar Inc.*, 2006 OK 32, ¶ 5, 136 P.3d at 658.
18. *Schlumar Inc.*, 2006 OK 32, ¶ 10, 136 P.3d at 659.
19. Attorney General Opinion 09-5, 2009 WL 862163.

20. *Chesapeake Operating Inc. v. Loomis*, 2007 OK CIV APP 55, ¶ 17, 164 P.3d 254, 258 (citing *Davis Oil Co. v. Cloud*, 1986 OK 73, ¶ 22, 766 P.2d 1347, 1352).
21. *Davis Oil Company*, 1986 OK 73 at ¶ 17, 766 P.2d at 1352.
22. *Id.*
23. *Western Farmers Elec. Coop. v. Enis*, 1999 OK CIV APP 111, ¶ 12, 993 P.2d 787, 792.
24. *O’Brien Oil LLC v. Norman*, 2010 OK CIV APP 23, ¶ 10, 233 P.3d 413, 416 (citing *Garr-Woolley v. Martin*, 1978 OK CIV APP 11, ¶12, 579 P.2d 206, 208-209).
25. *O’Brien*, 2010 OK CIV APP 23, ¶ 12, 233 P.3d at 417.
26. *O’Brien*, 2010 OK CIV APP 23, ¶ 17, 233 P.3d at 417.
27. *O’Brien*, 2010 OK CIV APP 23, ¶¶ 18, 22, 233 P.3d at 418.
28. *O’Brien*, 2010 OK CIV APP 23, ¶ 23, 233 P.3d at 418. The court further stated that “Oklahoma law clearly measures the value of casing in place as its reasonable rental value, not by its diminished market value as under the [Surface Damages Act].” *O’Brien*, 2010 OK CIV APP 25, ¶ 12, 233 P.3d at 417.

### ABOUT THE AUTHORS




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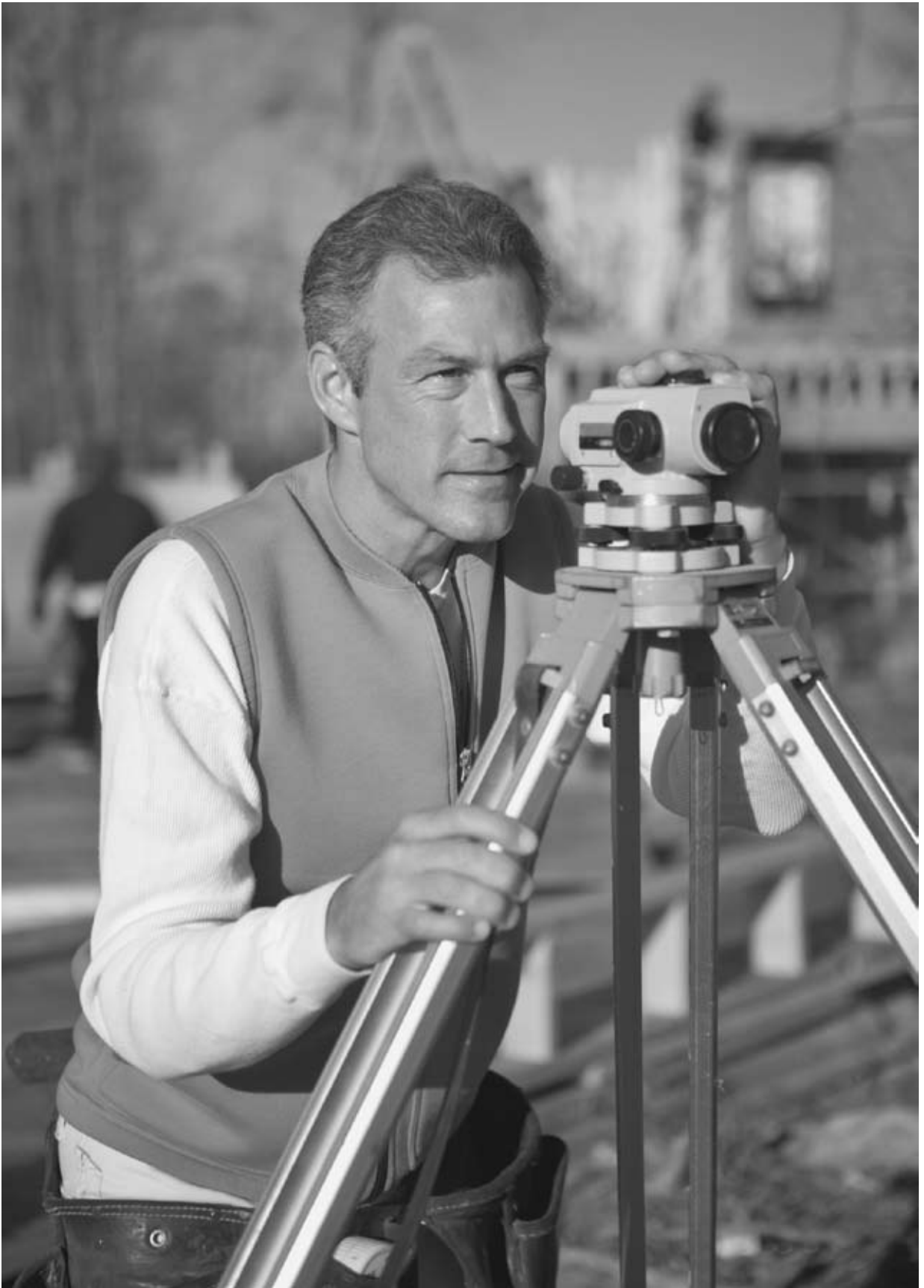


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Hartzog Conger Cason & Neville is pleased to name C. Russell Woody as a Partner. A member of the Firm's litigation and labor and employment practices, he is listed as a 2010 Oklahoma Super Lawyers Rising Star. Russ is a graduate of Casady School in Oklahoma City, Washington and Lee University in Lexington, Virginia, and the Dedman School of Law at Southern Methodist University in Dallas.

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# Real Estate

## and TITLE LAW

### Surveyors and Their Work

By Gabe Bass

**S**urveys frequently play a prominent role in real estate transactions, yet it is often the case that the parties to the transaction (and their advisors) are generally uninformed about the role and responsibilities of land surveyors and the particulars of their work product. This lack of basic knowledge about the profession of land surveying and surveys can lead to confusion and misunderstandings between buyers, sellers, lenders and others involved in a transaction. The result can be disagreements, disappointments and litigation. This article is an overview of the job of the land surveyor from the perspective of the lawyer representing a buyer, seller or lender in a transaction. It is my hope that the reader will develop a more complete understanding of the job of the land surveyor and their work, thus leading to better informed clients and smoother transactions.

A survey of some kind is frequently called for in the terms of a real estate purchase agreement. The requirement for a survey may be motivated by the desire of the buyer or the lender to remove title requirements or exceptions from title insurance coverage. In some cases the buyer may simply want to confirm that the boundaries of the property are consistent with the representations of the seller and that no encumbrances to the property will interfere with the buyer's intended use. Regardless of the reason for the survey or by whom it is requested, the first step in the process is to engage a surveyor to perform the work.

The practice of land surveying in this state is a regulated profession under the cognizance of the Oklahoma State Board of Licensure for Professional Engineers and Land Surveyors. Title 59 O.S. §475.2 defines a professional land surveyor as:

a person who has been duly licensed as a professional land surveyor pursuant to Section 475.1 et seq. of this title and the regulations issued by the [Oklahoma State Board of Licensure for Professional Engineers and Land Surveyors]; and is a person who, by reasons of special knowledge in the technique of measuring land and use of the basic principles of mathematics, the related physical and applied sciences and the relevant requirements of law for adequate evidence and all requisite to surveying of real property, acquired by education and experience, is qualified to engage in the practice of land surveying.

There are currently five distinct paths to becoming a licensed professional land surveyor in Oklahoma. The paths involve differing combinations of formal education, industry experience, and written exams. Regardless of

which path an applicant has taken, they have undergone a long (minimum of eight years of combined education and experience) and arduous path to earn their license. Anyone engaging the services of an Oklahoma licensed professional land surveyor can be assured that they are hiring a learned professional well-versed in their trade.

The Oklahoma State Board of Licensure for Professional Engineers and Land Surveyors maintains a database of licensees on its website [www.ok.gov/pels](http://www.ok.gov/pels). The database is searchable by several parameters, including name, city and license status (i.e., active, inactive or deceased). The database is also searchable by license number, a useful feature as licensees are required to print their license number or certificate of authorization number on monuments they place during their field work. In addition, the board's database contains disciplinary information for each licensee.

Not unlike most lawyers, many surveyors tend to focus on a particular area of practice (e.g., commercial construction surveys, highway construction surveys, rural boundary surveys and even riparian surveys). A few phone calls to surveyors or other real estate professionals will normally enable a lawyer to find a surveyor suited for the project at hand. There are also several national firms that advertise in print and online. These firms will normally bid on a project and then subcontract the work to a local surveyor.

Once a potential surveyor has been identified, it is typical to ask them to submit a proposal or bid for the project. Most surveyors will bid on the project on a "cost not to exceed" basis. The cost of a survey depends on a variety of factors, not the least of which is the exact scope of work being requested. It may come as a surprise to many that surveys are not a one-size-fits-all undertaking. The tasks performed by the surveyor and their resulting work product (i.e., the survey drawing itself) vary widely depending on the scope of work they've been asked to perform. Generally speaking, there are three categories of surveys, from least to most detailed:

- 1) Mortgage inspection reports
- 2) Oklahoma minimum standards surveys
- 3) ALTA/ASCM land title surveys

Mortgage inspection reports are not a land survey requiring a boundary determination or the setting of boundary monuments. A profes-

sional land surveyor may, based upon his or her general knowledge of the land boundaries and monuments in a given area, prepare a mortgage inspection report. These surveys require relatively little time to prepare and are, therefore, inexpensive compared to more detailed surveys. A mortgage inspection report should be prominently labeled as such and constitutes nothing more than a sketch of the property based on the legal description provided to the surveyor and the conditions found by the surveyor at the time he or she visually inspected the property. Mortgage inspection reports are normally done at the request of lenders in residential property transactions to identify obvious encroachments and other gross title defects. What goes into producing a mortgage inspection report is not currently the subject of any standards promulgated by the Oklahoma State Board of Licensure for Professional Engineers and Land Surveyors and practices tend to vary from surveyor to surveyor. That being the case, caution is warranted should one be relying on a mortgage inspection report for any reason.

Excepting the aforementioned mortgage inspection report, every survey performed by an Oklahoma licensed professional land surveyor must comply with a minimum set of standards as prescribed in regulations issued by the Oklahoma State Board of Licensure for Professional Engineers and Land Surveyors. The minimum standards can be found in Title 245:15-13-2 of the Oklahoma Administrative Code.

The minimum standards set forth requirements for surveyors in several areas. The standards dictate the minimum research and investigation that a surveyor must conduct prior to making a survey, including the acquisition and review of the necessary survey data (e.g., record descriptions, deeds, maps, abstracts of title, plats, road records, government survey notes and other available section and boundary line data in the vicinity). In addition, the minimum standards establish a baseline for the technical standards that must be adhered to during the making of a survey, including requirements for what information must appear on the survey drawing (e.g., surveyor's name, seal, signature and license number, the date of the last site visit, designated north arrow and the scale of the drawing). The minimum technical standards are, in effect, the default scope of work for a survey to be performed in Okla-



homa by a licensed professional land surveyor. If a survey is certified as being compliant with the minimum standards, the drawing produced by the surveyor can be relied upon to depict at least the following items:

- 1) Evidence of inconsistencies found by the surveyor, such as overlapping descriptions and conflicting boundary lines or monuments
- 2) All easements, rights-of-way and building lines **drawn or referenced on recorded subdivision plats** on or across the land being surveyed and the width of the rights-of-way of all section lines adjoining or within the surveyed property (the locations of other easements or rights-of-way will not be depicted unless this information is furnished to the surveyor and within the requested scope of work)
- 3) Physical evidence of roadways providing access to or through the property
- 4) The type and size of all monuments either found or set and the relationship of the monuments to the surveyed lines and corners
- 5) The legal description of the land being surveyed, either on the face of the drawing or attached to and referenced on the face of the drawing (the legal description itself must also conform to a set of minimum requirements found in the minimum standards)

While there is no denying the usefulness of the information provided by a survey performed to the minimum standards set forth in the Oklahoma Administrative Code, such a survey may not always fulfill the needs of the parties to a transaction. For this reason, the American Land Title Association and the American Congress of Surveying and Mapping have developed a set of standards identified as the Minimum Standard Detail Requirements for ALTA/ACSM land title surveys. The ALTA/ACSM standards are the result of an effort by members of the American Land Title Association to standardize surveys to include information particular to title insurance matters. While the standards were developed primarily to address the concerns of land title professionals engaged in title examination and the underwriting of title insurance policies, ALTA/ACSM standards have become widely recognized and relied upon by the surveying profession to define the scope of work for a particular project.

“...such a survey may not always fulfill the needs of the parties to a transaction.”

ALTA/ACSM standards augment the Oklahoma minimum standards in certain respects. In other respects the Oklahoma minimum standards may require a surveyor to deviate from the ALTA/ACSM standards. In either case, ALTA/ACSM standards provide that should a conflict exist between standards, the more restrictive requirement shall apply. What follows is a partial listing of items that must appear on an ALTA/ACSM land title survey that would not necessarily appear on a drawing prepared in accordance with the Oklahoma minimum standards:

- 1) The identifying titles of all recorded plats, filed maps, right of way maps, or similar documents which the survey represents, wholly or in part, including the appropriate recording data, filing dates, and map numbers
- 2) For non-platted adjoining land, names and recording data identifying adjoining owners as they appear of record. For platted adjoining land, the recording data of the subdivision plat
- 3) The character of any evidence of possession and the location of such evidence carefully given in relation to both the measured boundary lines and those established by the record
- 4) The location of all buildings upon the plat or parcel as measured perpendicular to the nearest perimeter boundary
- 5) All recorded easements which have been delivered to the surveyor, both those burdening and those benefitting the property surveyed, including recording information
- 6) Observable evidence of easements and servitudes of all kinds, such as those created by roads, rights-of-way, water courses, drains, telephone, telegraph, or electrical lines, water, oil or gas pipelines, etc.

- 7) The character and location of all walls, buildings, fences, and other visible improvements within five feet of each side of the boundary lines
- 8) Ponds, lakes, springs or rivers bordering or running through the premises.

It is plain to see that an ATLA/ASCM land title survey is much more representative of the actual conditions of a tract of property than a survey that complies only with the Oklahoma minimum standards. In addition, the ALTA/ASCM standards include an optional list of survey responsibilities and specifications (the so called Table A) that can be referred to when developing a surveyor's scope of work for a particular project. The complete ALTA/ASCM standards can be downloaded from the American Land Title Association's website [www.alta.org/forms](http://www.alta.org/forms).

Regardless of the type of survey being requested, the requesting party should be prepared to provide the surveyor with, at a minimum: 1) the legal description to be surveyed (as shown on a deed or the commitment for title insurance); 2) a list of any special requirements or certifications desired by the buyer,

seller or lender; and 3) copies of all easements, rights-of-way or other documents of record to be shown on the drawing. The best practice is to also provide a copy of the title commitment, existing title policy or an attorney's title opinion, if available.

*Author's note: Thanks to Damon K. Durham, PLS of Durham Surveying Inc. for his contributions to this article.*

#### ABOUT THE AUTHOR



Gabe Bass is the managing partner of Bass Law with offices in El Reno and Oklahoma City. He is an experienced trial lawyer with a focus on matters involving probate, estates and trusts, oil and gas, real estate, business law, insurance and torts. He also provides transactional guidance to clients in the areas of business formation and organization and contract law. He also holds the rank of major in the U.S. Marine Corps Reserve.

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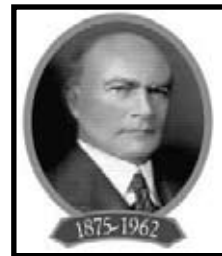
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## LAWYERS HELPING LAWYERS ASSISTANCE PROGRAM





# Transfer-on-Death Deeds in Oklahoma

By Dale L. Astle

A unique and revolutionary change in Oklahoma real property conveyancing law became effective on Nov. 1, 2008, known as the Nontestamentary Transfer of Property Act.<sup>1</sup> This act, for the first time in Oklahoma, authorizes conveyances of real property by way of a deed form which transfers ownership of the property at the time of the death of the owner/grantor. Such deeds are commonly described as “transfer-on-death deeds” or “TOD deeds.” The unique feature of a transfer-on-death deed is the fact that title to the real property described in the deed does not vest in the grantees until the death of the grantor. The obvious intent and purpose of a TOD deed is to effectively convey title to real property to designated grantees in the deed at the moment of the death of the owner/grantor without the necessity of a probate proceeding.

An amendment to the act, effective Nov. 1, 2010,<sup>2</sup> imposes affirmative requirements for acceptance of the conveyance by the grantee(s). The statute provides that the acceptance shall be evidenced by recording an affidavit in the office of the county clerk. The affidavit must be executed by the grantee(s) in the TOD deed and contain information regarding the death of the grantor, the legal description of the property, together with additional information stating whether the grantee was the spouse of the grantor. This statute further requires, in some circumstances, the attachment of an estate tax release and a death certificate for the deceased grantor.

## OVERVIEW

The significant aspects of the Nontestamentary Transfer of Property Act are:

### *Deferred Vesting*

The title to the real property described in the deed shall not vest in the grantees until the death of the grantor.<sup>3</sup> This deferred vesting feature is the most unique aspect of a TOD deed and is the essential core element of a transfer-on-death conveyance document.

Specific problems and potential pitfalls in particular fact scenarios can arise by reason of the deferred vesting aspect of the TOD deed. These problems and pitfalls are discussed in a subsequent portion of this paper.

Title 58, Okla. Stat. §1253 sets out the elements of the deed and the conveyance language required to create a TOD deed.<sup>4</sup> The statute requires that the language and content of a TOD deed be in substantial compliance with the form set out in §1253.

#### *Formality of Execution*

The statute specifically requires execution of the deed before two witnesses who shall sign in affirmation of the action and intent of the executing owner/grantor.<sup>5</sup> The execution format and formality for a TOD deed appears to be similar to that required for execution of a self-proving will or durable power-of-attorney in Oklahoma. It is important to note that, notwithstanding the fact that Title 58, Okla. Stat. §1258 states that a TOD deed is not a testamentary disposition, the precise substantive text, format and formality for a TOD deed, as set out in Title 58, Okla. Stat. §1253, must be followed in order to create an effective transfer-on-death deed.

#### *Revocability of the Transfer*

At any time prior to death of the grantor, the designation of the grantee(s) in the TOD deed can be revoked.<sup>6</sup> The revocation shall be in the form of a recorded, acknowledged instrument by which the grantor revokes the TOD deed grantee designation.

#### *Change of Grantee Designation*

The designation of a grantee or grantees may be changed, at any time prior to the death of the grantor, by a subsequent TOD deed.<sup>7</sup> The subsequent TOD deed revokes all prior grantee designations for the interest in the real property described in the subsequent deed.

Title 58, Okla. Stat. §1254 (A) and (B) specifically state that no notice to or consent by the grantee(s) is required to either revoke the TOD deed or to change the grantee beneficiary in such deed. This provision of the statute underscores the fact that, until the death of the owner/grantor, the grantee or grantees set out in the TOD deed possess no interest in the real property described in such deed.

#### *Not Affected by a Will*

A TOD deed cannot be revoked by the provisions of a will.<sup>8</sup>

A TOD deed may be disclaimed in whole or in part by a grantee. The disclaimer must occur within nine months after the death of the grantor and must be recorded in the office of the county clerk in the county in which the TOD deed is recorded.<sup>9</sup> The statute specifically provides that the right of disclaimer is waived if the grantee exerts dominion over the real estate within the nine-month period. Acts of dominion include, among others, possession of the property, execution of a conveyance, mortgage, lease or easement.

The wording of the disclaimer portion of the statute raises a question of interpretation or construction of the intent of the statute. Specifically, a portion of Title 58, Okla. Stat. §1254(D) states "If a grantee beneficiary exerts dominion over the real estate within the nine-month period, the disclaimer is waived." Based on this provision, it appears that the exertion of dominion by the grantee(s) within the nine months following the death of the grantor would not only preclude the right to disclaim the transfer, but would also rescind any disclaimers executed by the grantee(s) within such nine-month period.

#### *Record Evidence of Grantor's Death*

The statute requires recording of an affidavit to evidence the fact of the death of the grantor.<sup>10</sup> The affidavit shall be executed by the grantee(s) and set out the fact of death of the grantor, the legal description of the property and contain other information specified in the statute.

It should be noted that the requirement for the affidavit and the elements to be set out therein, as outlined in Title 58, Okla. Stat. §1255(A), regarding recorded evidence of the grantor's death are essentially identical to those specified in Title 58, Okla. Stat. §1252(C) regarding recorded evidence of the grantees' acceptance of the conveyance via a TOD deed.

The acceptance affidavit required pursuant to §1252(C) is more fully discussed in a subsequent portion of this paper.

#### *Prior Conveyances and Encumbrances*

The grantee(s) in the TOD deed acquire title subject to all conveyances, contracts, mortgages, assignments or liens made or created by the grantor or to which the grantor was subject during grantor's lifetime.<sup>11</sup>

“A very significant problem may arise in an instance in which a grantor, as a single person, executes and records a TOD deed on homestead property and later marries.”

#### *Death of Grantee*

The transfer in a TOD deed shall lapse in the event the grantee predeceases the grantor in instances in which no alternative grantee was designated in the deed.<sup>12</sup>

#### *Joint Tenancy Ownership*

The statute permits a joint tenancy owner of real property to execute a TOD deed. The title to the real property in the TOD deed will vest in the TOD deed grantee(s) only if the joint tenant grantor was the last to die of all the joint tenants with whom the grantor held title.<sup>13</sup> Execution of a TOD deed by a joint tenant owner will not sever the joint tenancy interest of the TOD deed grantor.<sup>14</sup>

#### *Nontestamentary Disposition*

A TOD deed is not a testamentary disposition and, consequently, is not invalidated by non-conformity with Title 58 and Title 84 of the Oklahoma Statutes.<sup>15</sup>

### **PROBLEMS IN IMPLEMENTATION**

With the elapse of time since the enactment of the transfer-on-death deed legislation, numerous issues and problems have become apparent. These problems include:

#### *Disclaimer*

The disclaimer provisions of the statute set out in Title 58, Okla. Stat. §1254(D) do not impose a time deadline for the recording of the disclaimer in the office of the county clerk, except in instances in which the disclaimer is executed by a legal representative of the disclaiming grantee. The statute requires the execution of the disclaimer within nine months after the death of the grantor; however, the requirement for recording of such disclaimer, except as stated above, is not imposed within

the nine-month timeline for the execution of such disclaimer. This situation creates the potential for uncertainty of title by reason of the possibility that a disclaimer may have been executed after the death of the grantor but such disclaimer remains unrecorded after the elapse of the nine-month period following the death of the owner/grantor.

#### *Spousal Rights*

A very significant problem may arise in an instance in which a grantor, as a single person, executes and records a TOD deed on homestead property and later marries. If the grantor dies while married, the surviving spouse possesses rights in the homestead property which would likely be deemed paramount to the interests acquired by the grantee(s) in the TOD deed.<sup>16</sup> This situation arises due to the fact the title of the grantee(s) vests after the spousal rights of the surviving spouse attach via the occupation of the property as the homestead of the spouse and the fact such spouse was not an executing party on the TOD deed.

#### *Fractional Interests*

As previously discussed, Title 12, Okla. Stat. §1254(B) provides that a subsequently executed TOD deed covering a particular property designating a different grantee essentially revokes the grantee designations on prior TOD deeds on such property.

If multiple TOD deeds conveying fractional interests are executed on separate dates, uncertainty may occur regarding the aggregate total interest conveyed by reason of the provisions of §1254(B). Such uncertainty will occur if the later-executed TOD deeds do not express the intent of the grantor to not revoke the earlier deed or deeds. This problem does not occur if the original TOD deed and the subsequent deed or deeds each convey 100 percent interest in the property.

#### *Joint Tenant Grantees*

As previously discussed, the statute expressly addresses joint tenancy ownership by the grantor in a TOD deed, however, the circumstance of joint tenancy ownership by the grantees on a TOD deed is not covered by the statute. A specific concern exists in instances in which one of the joint tenant grantees in a TOD deed dies prior to the death of the grantor. If such deed lists multiple grantees as joint tenants, the death of one or more of the grantees

prior to the death of the grantor apparently precludes the creation of joint tenancy for the surviving grantees. This is due to the fact that, at the time of the intended vesting of title upon the death of the grantor, the required unities of time, title, interest and possession among all the joint tenants for creation of the joint tenancy estate are not satisfied.<sup>17</sup>

The question which exists in this circumstance is whether the failure to create the joint tenancy estate defeats the transfer entirely or vests title in the surviving grantees as tenants-in-common. Oklahoma case law consistently construes, where appropriate, deed conveyances against the grantor and in favor of the grantee(s).<sup>18</sup> As a result, to avoid a complete failure of title, it is likely that an appellate court decision would determine that, in this situation, the surviving grantees took title to the real property as tenants-in-common.

#### *Acceptance by Grantee(s)*

As discussed above, Title 58, Okla. Stat. §1252(C), effective Nov. 1, 2010, imposes the requirement on the grantee(s) of the TOD deed to record an affidavit to document of record the grantees' acceptance of the conveyance evidenced by the TOD deed. The statute does not state a date by which such acceptance must be recorded following the death of the grantor.

It is interesting to note that §1252(C) does not require the inclusion of any affirmative statement of acceptance of the conveyance by the grantee(s). Although not expressly set out within the statute, it is apparent that the act of recording the affidavit creates an implied acceptance by the grantee(s).

If the grantee does not record either an acceptance pursuant to §1252(C) or a disclaimer pursuant to §1254(D), uncertainty as to the status of title arises. Based on the provisions of §1252(C), the absence of an acceptance by the grantee(s) is essentially a defacto disclaimer until such acceptance is recorded under the statute.

It should be noted that §1252 does not contain a provision which specifies that the exercise of dominion by the grantee(s) over the real estate eliminates the necessity of recording an acceptance affidavit similar to the provision previously discussed set out in §1254(D) regarding waiver of the right to disclaim the transfer. Therefore, the grantee's exercise of dominion over the property is not deemed, under

§1252(C), to be an acceptance of the transfer. Consequently, the recording of an affidavit of acceptance under §1252(C) is mandatory.

#### *Liens against Grantee(s)*

A significant problem exists regarding the attachment of judgment liens or other types of liens against the grantee(s) in a TOD deed in instances in which the grantee(s) either execute a disclaimer under Title 58, Okla. Stat. §1254(D) or fail to record an affidavit of acceptance under Title 58, Okla. Stat. §1252(C). The problem arises due to the fact the Nontestamentary Transfer of Property Act does not expressly address 1) lien attachment against the interest of the grantee(s), or 2) the status of the title to the real property, in instances in which either a disclaimer by the grantee(s) has been executed or the grantee(s) failed to record an acceptance affidavit.

Consequently, in the circumstance set out above, due to the immediate vesting of title upon the death of the TOD deed grantor as provided in Title 58, Okla. Stat. §1252(A) and §1255(A), a title examiner would have little choice but to presume that the lien or liens against the grantee(s) attached to the real property at the time of the death of the grantor in the TOD deed. This scenario creates the untenable situation of liens existing against the real property under circumstances in which the grantee judgment debtor has not accepted title and did not intend to accept title to the real property conveyed by the TOD deed.

#### **CONCLUSION**

The transfer-on-death deed legislation discussed above provides a unique and potentially efficient method of transfer of real property at the time of the death of the owner/grantor. However, specific problems in the practical implementation of this act have been noted as discussed herein.

The purpose of this paper is to provide an overview of the scope and content of the legislation and to point out the potential problems and pitfalls regarding transfer-on-death deeds in Oklahoma. The unintended consequences of failure of title or uncertainty of title by reason of an ineffective or inadequately documented TOD deed are significant.

In some circumstances, a portion or all of the interest of the grantor may unintentionally remain vested in the grantor following the death of such grantor. As a result, a probate



proceeding on the grantor's estate may become necessary which may ultimately cause the title to the real property to become vested in persons or entities inconsistent with the wishes and intent of the TOD deed grantor.<sup>19</sup>

1. Title 58, Okla. Stat. §1251, et. seq.
2. Title 58, Okla. Stat. §1252(C).
3. Title 58, Okla. Stat. §1252(A) and §1255(A).

4. Title 58, Okla. Stat. §1253 sets out the form for the TOD deed. It should be noted that a portion of the required text in §1253 for the deed appears in capital letters. To achieve substantial compliance with the requirements of the statute, this portion of the text should appear in capitalized letters in TOD deeds.

Note — The deed form in §1253 sets out a single blank line in which the name of the owner/grantor is to be inserted. However, it is important to remember that Title 16, Okla. Stat. §4 and standard custom and practice in Oklahoma requires the joinder of the spouse of a married grantor. Consequently, it is essential to include, in the deed, the spouse of a married owner with a recital that such person is the spouse of the owner/grantor.

5. Title 58, Okla. Stat. §1253.
6. Title 58, Okla. Stat. §1254(A).
7. Title 58, Okla. Stat. §1254(B).
8. Title 58, Okla. Stat. §1254(C).
9. Title 58, Okla. Stat. §1254(D).
10. Title 58, Okla. Stat. §1255(A) and §1252(C).

Note — §1255(A) and §1252(C) each specify that the affidavit to be executed and recorded by the grantees must be "notarized." This terminology is vague in that it technically includes any action authorized to be performed by a notary public. Based on the standard practice for drafting an affidavit, the obvious intent of the use of the word "notarized," in reference to an affidavit, is to include a jurat as specified in Title 49, Okla. Stat. §119(3). In addition to the jurat, due to the absence of a provision in the statute authorizing otherwise, an acknowledgment must be included, as required by Title 16, Okla. Stat. §15 and §26.

11. Title 58, Okla. Stat. §1255(B).
12. Title 58, Okla. Stat. §1255(C).

13. Title 58, Okla. Stat. §1256.
14. Title 58, Okla. Stat. §1256.
15. Title 58, Okla. Stat. §1258.
16. Title 58, Okla. Stat. §1255(B), Okla. Const. Art. 12, §2, Title 16, Okla. Stat. §4 and Title 58, Okla. Stat. §311. *Grenard v. McMahan*, 1968 OK 75, 441 P.2d 950 and *Keel v. Jones*, 1966 OK 73, 413 P.2d 549.

Note — In instances in which a deceased owner/grantor in a TOD deed is survived by a spouse who did not sign the deed, title examiners should require a deed from such surviving spouse, joined by the spouse of such person, if married, with recitation of marital status, conveying any and all interest of such surviving spouse in the property to the grantees in the TOD deed or, if applicable, to the named current record owners of the property.

17. *Toma v. Toma*, 2007 OK 52, 163 P.3d, 540, *Clovis v. Clovis*, 1969 OK 170, 460 P.2d 878 and *American National Bank and Trust Company of Shawnee v. McGinnis*, 1977 OK 47, 571 P.2d 1198.

18. *Messner v. Moorehead*, 1990 OK 17, 787 P.2d 1270. *Medicine Lodge Investments LLC v. EAR INC.* 2008 OK CIV APP 107, 197 P.3d 502.

19. 16, Okla. Stat. Ch. 1, App., Title Examination Standard 17.4.

## ABOUT THE AUTHOR



Dale L. Astle is senior executive vice president and general counsel of Guaranty Abstract Company in Tulsa. His primary focus includes commercial real estate transactions and title insurance. He is a member of the Title Examination Standards Committee of the OBA and is a Fellow in the American College of Real Estate Lawyers.

## NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following judicial office:

**Associate District Judge  
First Judicial District  
Beaver County, Oklahoma**

This vacancy is created by the retirement of the Honorable Gerald H. Riffe effective July 1, 2011.

**To be appointed an Associate District Judge, an individual must be a registered voter of the applicable judicial district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, the appointee must have had a minimum of two years experience as a licensed practicing attorney, or as a judge of a court of record, or combination thereof, within the State of Oklahoma.**

Application forms can be obtained online at [www.oscn.net](http://www.oscn.net) by following the link to the Oklahoma Judicial Nominating Commission or by contacting Tammy Reaves, Administrative Office of the Courts, 1915 North Stiles, Suite 305, Oklahoma City, Oklahoma 73105, (405) 521 2450, and should be submitted to the Chairman of the Commission at the same address **no later than 5 p.m., Friday, April 15, 2011. If applications are mailed, they must be postmarked by midnight, April 15, 2011.**

Allen M. Smallwood, Chairman  
Oklahoma Judicial Nominating Commission

# Watchlist Legislation Advances

By *Duchess Bartmess*

As a result of the efforts to quickly review bills and joint resolutions introduced this year at the "Bill Reading Day," a list of bills that may be of interest to OBA members was compiled. The list is not reflective of any OBA position nor does it signify opposition or support of any measure.

The list of bills of interest is lengthy at this time. This list will shorten as measures progress through the legislative session. The first hurdle that all proposed legislation must overcome is to be reported out of the committee it was assigned to in the house of origin by a specified date. That date for both the House and Senate has passed. The Legislative Monitoring Committee (LMC) is now working on both the bills designated to be of interest to the OBA and some of the other more significant measures which made it out of committee.

There are still a number of bills which came out of committee that are on the LMC watch list. All of them cannot be addressed in this article. However, the following are only a few of the measures which are on general order or have been engrossed in the house of origin which may be of interest to the general practitioner.



## CHILDREN AND FAMILY LAW

**HB 1199:** Engrossed, amends Section 109.4 of Title 43, regarding grandparent and former legal guardian visitation rights.

**HB 1603:** Floor Version, Section 112 of Title 43, Military Custody and Visitation Act.

**HB 1606:** Committee Substitute, amends Section 7800 of Title 10, granting custody to mother of a child born out of wedlock.

**HB 1607:** Committee Substitute, amends Section 114 of Title 43, allowing consideration of child preference in visitation rights determination.

**HB 1748:** Committee Substitute, 46-page, nine-section bill regarding modifications to the Oklahoma Adoptions Code, including establishing jurisdiction over adoptions to be governed by the Uniform Child Custody Jurisdiction and

Enforcement Act.

**HB 1749:** Committee Substitute, amending Sections 101 and 107.2 of Title 43, modifying requirements for obtaining divorce based on incompatibility to include educational programs.

**SB 528:** Floor Version, creating the Military Retainer Pay Protection Act, and amending Section 134 of Title 43 regarding retirement or retainer pay.

**SB 815:** Floor Version, with title stricken, amending Section 110 regarding information to be supplied in divorce, separation, or annulment proceedings.

Two bills amending section 118B of Title 43 regarding child support payment computation and information to be supplied:

**SB 652:** Floor Version

**SB 917:** Floor Version

### **PROBATE, GUARDIANSHIP AND TRUSTS**

**SB 521:** Floor Version, amends Sections 1252, 1254 and 1255 of Title 58, regarding vesting of interest to grantee beneficiaries.

**HB 1048:** Floor Version, amends 58 O.S. 2001, Section 946, regarding added procedures for declaration of presumption of death for probate purposes.

**HB 1322:** Floor Version, amends Section 1451 of Title 21, regarding embezzlement of property of an estate.

**HB 1361:** Floor Version, amends (21 O.S. Supp. 2010, Section 1451), removing exception allowing for attachment of certain trust funds.

### **REAL PROPERTY AND LANDLORD AND TENANT**

**HB 2001:** Committee Substitute, amends Section 121 of Title 41, increases amount of damage suffered by tenant before landlord is held liable.

**SB 124:** Floor Version, amending Section 7 of Title 27, prohibiting use of the power of eminent domain for the development of wind farms or wind turbines on private property.

### **TRANSPORTATION AND MOTOR VEHICLES**

**SB 201:** Floor Version, amending Section 14-111 of Title 11, section 863.13A of Title 19, and sec-

tions 1115, 1141.1 and 1143.2 of Title 47, authorizing holding renewal of vehicle registration for payment of fines, assessments or other debts due relating to the vehicle to be registered.

**HB 1316:** Floor Version, amends Section 6-105 of Title 47, suspension or cancellation of permits or intermediate driver for use of cellular phone or other electronic communication device while operating a motor vehicle.

Two bills amending Section 7-606 of Title 47 regarding proof of liability coverage at time of offence of failure to have liability coverage before court is permitted to dismiss charges:

**HB 1027:** Engrossed

**HB 1520:** Floor Version

### **WORKERS' COMPENSATION**

**SB 761:** Floor Version, amends Section 14 of Title 85 regarding medical treatment for injured workers.

**SB 878:** Floor Version, all new language, a 215-page, 99-section bill, with the title stricken, creating a new Workers' Compensation Act.

**HB 2038:** Committee Substitute, amends Section 3.7 of Title 85, by adding eight new reporting requirements to the duties of the administrator.

This list is in no way intended to be a complete list of legislative measures which could be of interest to the general practitioner. It should serve, however, to demonstrate the importance of being aware of pending legislation as it winds its way through the legislative process.

To read a complete version of any bill, go to the Oklahoma Legislature homepage at [www.oklegislature.gov](http://www.oklegislature.gov) or <http://webserver1.lsb.state.ok.us/WebBillStatus/main.html>.

*Ms. Bartmess practices in Oklahoma City and is chairperson of the Legislative Monitoring Committee.*

# Back to Basic Training at 2011 Solo and Small Firm Conference

By Jim Calloway, Director, OBA Management Assistance Program

The 2011 OBA Solo and Small Firm Conference is slated for June 9 -11, 2011.

Boot Camp: Back to Basic Training is our theme for this year's Solo and Small Firm Conference.

This year we will feature numerous "how to" sessions. This format gives lawyers who are familiar with a certain area of practice a chance to brush up on their skills and gives lawyers who may want to expand their practice into a certain area the basics on how to start serving those clients.

So whether it is learning how to handle expungement cases, how to advise clients who are planning a needy relative's admission into a nursing facility or how to obtain records from government agencies, we want you to leave this year's conference with new skills to handle new and different matters.

We will still offer lots of information about law office

technology suited for small law firms. Our guest this year is Tom Mighell. He is chair-elect of the American Bar Association Law Practice Management Section and a past chair of ABA TECH-SHOW. He publishes the legal research blog "Inter Alia," was co-author of *The Lawyer's*

Tom Mighell will be a co-panelist on our opening session, **50 Hot Tips in 50 Minutes**, as well as **How to Do Research on the Internet in 2010, Our Favorite Technology Tools and How Lawyers Use iPads**.

Speaking of iPads, you will not want to leave this conference early as our final presentation **What's Hot and What's Not in Running Your Law Practice** will feature a drawing for several great prizes, including two brand new iPad 2s.

We also have attorney Sarah J. Read as our special guest. She concentrates her Missouri solo practice in the areas of negotiation, mediation, arbitration, legislation, organizations and law practice management. She is also president and founding member of The Communications Center Inc., [www.buildingdialogue.com](http://www.buildingdialogue.com). She is a frequent lecturer on communication, strategic thinking and planning. She

Final session includes a chance to win an iPad 2

*Guide to Collaboration Tools and Technologies* and is co-host of the Kennedy-Mighell Report podcast. He also just finished a book, *The iPad for Lawyers in One Hour*, which will be published by the ABA this spring.

OBA SOLO and SMALL FIRM CONFERENCE  
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[www.okbar.org/solo](http://www.okbar.org/solo)

# Conference Sponsors

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will speak to us on improving lawyer-client communications.

With so many of our citizen soldiers deploying overseas from Oklahoma this year, there will be several sessions at our conference about the special needs of military clients and information will be available about participating in Oklahoma Lawyers for America's Heroes, [www.okbar.org/heroes](http://www.okbar.org/heroes).

We believe that you should consider making your decision on attending early. Those who reserve a hotel room at the last minute may find themselves commuting from our fine overflow hotel in Joplin.

Given the feedback on the beautiful golf course at Downstream Resort, we have added more golf, with an 18-hole outing on Thursday before the conference starts and a quick 9 holes after we complete our educational sessions on Friday.

One goal of our boot camp version of Solo and Small Firm Conference this year is for you to leave knowing "how to" do new things.

So if you have wondered whether it is practical these days for a lawyer to seize property to satisfy a judgment or would like to learn more about a variety of Indian law issues, you do not want to miss this year's OBA Solo and Small Firm conference.

But not all of our "how to" presentations are about developing new skills. OBA Ethics Counsel Travis Pickens has some very interesting presentations this year with **How to Cope When Opposing Counsel Acts Like a Jerk** and **How to Withdraw and/or Close a**

**Case.** These should be interesting and informative sessions.

Running a law practice is also running a small business so everyone should learn something valuable from Norman attorney and Certified Public Accountant Ted Blodgett as he instructs us on **How to Get it Right: Accounting and Tax for Law Firms.**

OBA General Counsel Gina Hendryx will give us an ethics presentation Saturday afternoon called **How To Avoid the Envelope: Trust Accounting the Right Way.**

We are also pleased to welcome Catherine "Cat" Burton for an informative session, titled **How to Talk to a Prosecutor.** She is well qualified to speak on this subject, having served as an Oklahoma County public defender, as a private practitioner, both with her own firm and with the law offices of John W. Coyle III, and currently serving as an assistant district attorney with the Oklahoma County district attorney's office.

Oklahoma City attorney Jon Williford will update us on legislative changes impacting civil trial practice and will also give us an overview of how to prepare a witness.

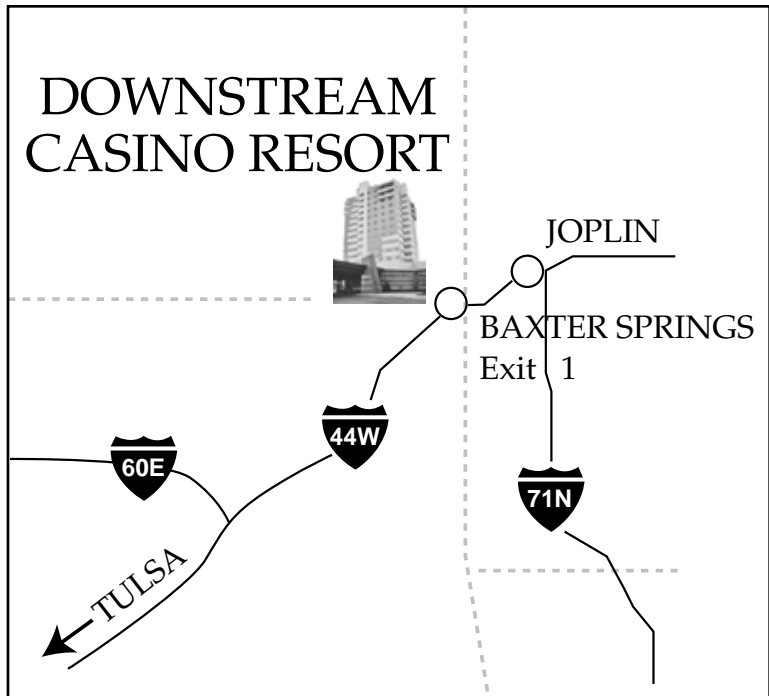
We will have lots of social activities with our family friendly dinner and fun, including a bounce toy for the younger set on Thursday, starting around 6 p.m.

Our daytime children's activities last year, featuring Native American cultural activities, were so well received that we are doing similar activities this year. Friday night will feature a movie for the kids along with a performance by the

outstanding musical group  
New Odyssey.

You can get more information  
and register online for the OBA  
Solo and Small Firm Conference  
at [www.okbar.org/solo](http://www.okbar.org/solo).

Great CLE, great fun, network-  
ing opportunities and a chance  
to win free prizes are just a few  
of the reasons you do not want  
to miss the 2011 OBA Solo and  
Small Firm Conference.



## Friday Night Entertainment

*New Odyssey is our featured entertainment for Friday night at the 2011 OBA Solo and Small Firm Conference. "3 guys, 30 instruments" is their tagline. They are an entertaining band that combines humor, seasoned musical talent and great showmanship. Their instruments range from saxophone, trombone, and baritone to harmonica, flute, guitar and keyboard with a bit of everything in between. They even incorporate accordion and sousaphone into the mix.*

*Band member Michael Jay notes that variety is their style. He says this includes "anything from Beethoven to Bob Seger, contemporary to classical." One Beatles medley uses all 30 instruments.*

*This will be one memorable night for the OBA Solo and Small Firm Conference. Register now so that you do not miss it!*

*You can view videos and learn more about the history of the band at the band's website, [www.newodyssey.net](http://www.newodyssey.net).*



# OBA SOLO and SMALL FIRM CONFERENCE

JUNE 9-11 2011 • DOWNSTREAM RESORT • QUAPAW, OK

## DAY 1 • Friday June 10

**Come  
& Enjoy  
the Fun!**

8:25 a.m.	<b>Welcome</b> Deborah Reheard OBA President			
8:30 - 9:20 a.m.	<b>50 Hot Tips in 50 Minutes</b> Tom Mighell Jim Calloway			
9:20 a.m.	<b>Break</b>			
9:30 - 10:20 a.m.	<b>How to Communicate with Clients 101: The Basics</b> Sarah Read – The Communications Center Inc.			<b>12 Hours CLE Credit – Including Ethics</b>
10:20 a.m.	<b>Break</b>			
10:30 - 11 a.m.	<b>How to Communicate with Clients 201: Avoiding, Mitigating and Resolving Conflict</b> Sarah Read – The Communications Center Inc.			
11:30 a.m. - 12:45 p.m.	<b>LUNCH BUFFET</b> <i>(Included in Seminar Registration Fee)</i>			
	<b>Black Hawk</b>	<b>Sacred Elk</b>	<b>Victor Griffin</b>	<b>Saracen</b>
12:45 - 1:45 p.m.	<b>How to Seize Stuff</b> Joe Miner	<b>How Lawyers Use iPads</b> Tom Mighell Phil Tucker Jim Calloway	<b>How to Talk to a Prosecutor</b> Catherine "Cat" Burton	<b>How to Advise Clients on Medicaid and Nursing Home Eligibility Issues</b> Travis Smith
1:45 p.m.	<b>Break</b>			
2 - 3 p.m.	<b>How to Represent Active Military in Family Law Matters</b> Phil Tucker	<b>Living with Legislative Changes Impacting Civil Trial Practice</b> Jon Williford	<b>How to Handle Expungements</b> Jimmy Bunn	<b>How to Draft a Simple Will</b> Susan Shields

## DAY 2 • Saturday June 11

	<b>Black Hawk</b>	<b>Sacred Elk</b>	<b>Victor Griffin</b>	<b>Saracen</b>		
8:30 - 9:20 a.m.	<b>Packing Heat - Concealed Carry Laws in Oklahoma</b> Jimmy Bunn	<b>How to Cope When Opposing Counsel Acts Like a Jerk</b> Travis Pickens	<b>How to Prepare a Witness</b> Jon Williford	<b>How to Represent Active Military in Consumer Cases</b>		
9:20 a.m.	<b>Break</b>					
9:30 - 10:20 a.m.	<b>How to Do Research on the Internet</b> Tom Mighell	<b>How to Do a Family Law Intake</b>	<b>How to Handle Common Indian Law Situations</b> Janice Purcell moderator	<b>How to Withdraw and/or Close a Case</b> Travis Pickens		
10:20 a.m.	<b>Break</b>					
10:30 - 11:30 a.m.	<b>How to Obtain Records from Government Agencies</b> Roy Tucker	<b>Our Favorite Technology Tools</b> Tom Mighell and Jim Calloway	<b>How to Succeed with Staff</b> Jim Priest	<b>How to Advise Clients on Medicaid and Nursing Home Eligibility Issues</b> (Repeat of Day 1) Travis Smith		
11:30 a.m.	<b>LUNCH</b> <i>(Included in Seminar Registration Fee)</i>					
12:30 - 1:20 p.m.	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 15%; text-align: center;">12:30 - 1:20 p.m.</td> <td style="padding: 5px;"><b>How to Get it Right: Accounting and Tax for Law Firms</b> Ted Blodgett</td> </tr> </table>				12:30 - 1:20 p.m.	<b>How to Get it Right: Accounting and Tax for Law Firms</b> Ted Blodgett
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1:20 p.m.	<b>Break</b>					
1:30 - 2:20 p.m.	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 15%; text-align: center;">1:30 - 2:20 p.m.</td> <td style="padding: 5px;"><b>How to Avoid the Envelope: Trust Accounting the Right Way</b> Gina Hendryx</td> </tr> </table>				1:30 - 2:20 p.m.	<b>How to Avoid the Envelope: Trust Accounting the Right Way</b> Gina Hendryx
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2:30 - 3:30 p.m.	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 15%; text-align: center;">2:30 - 3:30 p.m.</td> <td style="padding: 5px;"><b>What's Hot and What's Not in Running Your Law Practice</b> Jim Calloway and Tom Mighell</td> </tr> </table>				2:30 - 3:30 p.m.	<b>What's Hot and What's Not in Running Your Law Practice</b> Jim Calloway and Tom Mighell
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**2011 SOLO & SMALL FIRM  
CONFERENCE  
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DOWNSTREAM CASINO RESORT, QUAPAW, OK  
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Register online at [www.okbar.org/solo](http://www.okbar.org/solo) or return this form.

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**Registration Fees:** Registration fee includes 12 hours CLE credit, including one hour ethics. Includes all meals: Thursday evening, poolside buffet, breakfast buffet Friday & Saturday, buffet lunch Friday & Saturday, Friday evening buffet.

**Circle One**

Early-Bird Attorney Registration **(on or before May 26, 2011)** \$175

Late Attorney Registration **(May 27, 2011 or after)** \$225

Early-Bird Attorney & Spouse/Guest Registration **(on or before May 26, 2011)** \$275

Late Attorney & Spouse/Guest Registration **(May 27, 2011 or after)** \$325

Spouse/Guest Attendee Name: \_\_\_\_\_

Early-Bird Family Registration **(on or before May 26, 2011)** \$325

Late Family Registration **(May 27, 2011 or after)** \$375

Spouse/Guest/Family Attendee Names: **Please list ages of children.**

Spouse/Guest: \_\_\_\_\_ Family: \_\_\_\_\_ Age: \_\_\_\_\_

Family: \_\_\_\_\_ Age: \_\_\_\_\_ Family: \_\_\_\_\_ Age: \_\_\_\_\_

**Thursday, June 9 - 18 Hole Golf** ( \_\_\_\_\_ of entries @ \$50 each) Total \$: \_\_\_\_\_

**Friday, June 10 - 9 Hole Golf** ( \_\_\_\_\_ of entries @ \$30 each) Total \$: \_\_\_\_\_

**Make check payable to the Oklahoma Bar Association. Mail Meeting Registration Form to:  
CLE REGISTRAR, P.O. Box 53036, Oklahoma City, OK 73152. FAX Meeting Registration Form to (405) 416-7092**

For payment using \_\_\_\_\_ VISA \_\_\_\_\_ Mastercard \_\_\_\_\_ Discover \_\_\_\_\_ AmEx

CC: \_\_\_\_\_

Expiration Date: \_\_\_\_\_ Authorized Signature: \_\_\_\_\_

No discounts. Cancellations will be accepted at anytime on or before May 26, 2011 for a full refund; a \$50 fee will be charged for cancellations made on or after **May 27, 2011. No refunds after June 1, 2011. Call 1-(888) 396-7876 for hotel reservations. Ask for the special OBA rate.**



# OBA Bills Advance to Full Senate

By John Morris Williams

As of the writing of this article all four of the bills placed on the Legislative Agenda by the House of Delegates have progressed through the Senate Rules Committee. The bills will now advance to the full Senate for a vote before moving to the House. Below is a summary of the bills:

**SB 940** relates to judgments. It allows for service of a judgment by means other than mail.

**SB 941** relates to attorney work product. Clarifies who may obtain work product and expressly provides for protection of work product between an attorney and an expert witness and provides for exceptions to the rule. Exceptions are how much the expert is paid, information supplied to expert to form his or her opinion and any assumptions the attorney supplied that help form the basis of the expert opinion.

**SB 942** clarifies when an action can be dismissed by a party. Makes clear that after final pretrial the plaintiff cannot dismiss without agreement of the defendant(s) or the court.

**SB 943** relates to appeals from administrative agencies. Clarifies who is to be named in the appeal, method of service of the appeal on the agency and other parties, allows response by party not named in the appeal and increases from 30 to 60 days the time

for agencies to transmit the record.

Of course, reading the summary of the bills is no substitute for reading the entire text of the legislation. If you are interested in reading the full text of the bills, you may do so by utilizing the Oklahoma Legislature website at [www.oklegislature.gov](http://www.oklegislature.gov). The site has a new look this year but has the same user-friendly search features. In fact, a search feature has been added to the front of the site that makes it even easier to look up a single bill. There is also the tracking feature that can be used to follow multiple bills through the session. It is a good service and worth using if you are interested in watching legislation.

A couple of other pieces of legislation are active in the Senate that relate to the selection of judges. SB 621, which passed the Senate on March 8, provides for Senate confirmation of judges after the governor has made her selection from the list of three from the Judicial Nominating Commission. SJR 36 would eliminate the Judicial Nominating Commission and provides for the Senate to confirm the single nominee selected by the governor. Both of these provisions would require a vote of the people to approve an amendment to the Oklahoma Constitution to be enacted.

As the session progresses, the number of bills begins to reduce significantly. The House and Senate are now

finished with the committee work on bills originating in each of the respective bodies. There are a number bills currently active that relate to specific practice areas. A complete list of the bills the OBA is monitoring can be found at the OBA website at [www.okbar.org](http://www.okbar.org). Scroll down to the Featured Pages box to find the Legislative Monitoring link. Family law, civil liability and workers' compensation issues are among a few of the topics that have received a fair amount of attention early in the session.

Again this year the state budget will be a challenge and may dictate a good part of the publicity relating to the session. However, there are many pieces of legislation that will still be heard and voted on that relate to substantive areas of law. OBA members are encouraged to look at the list of matters we are tracking and let me know if you think there is something important that is not on the list. Also, this year there was a large number of shell bills filled, and it is of some importance to be aware that these bills can be substantially changed in the process to become something totally different than first publicized.



To contact Executive Director Williams, e-mail him at [johnw@okbar.org](mailto:johnw@okbar.org).

# Ethical Considerations in Pro Bono Public Service Representations

By Gina L. Hendryx, OBA General Counsel

By volunteering to provide legal services as an “Oklahoma Lawyer for America’s Heroes,” you are participating in a time-honored tradition of assisting those most worthy with access to legal information and legal representation. Whether you give of your time and talent through short-term limited contact or lengthy advanced representation, there are ethical implications to consider. The following will review basic scope of representation and potential conflict snares to review with any representation.

## SHORT-TERM LIMITED LEGAL SERVICES

Examples of short-term representation include hotlines, counseling clinics, assistance with forms, and advice and counsel only consultations. These types of services are short in duration and usually only involve one or two contacts with the person in need of legal advice. The Oklahoma Rules of Professional Conduct ease the application of the conflict rules to these types of representations.

### Rule 6.5. Nonprofit And Court-Annexed Limited Legal Services Programs

(a) A lawyer who, under the auspices of a program spon-

sored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this rule.

### Comment

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services — such as advice or the completion of legal forms — that will assist persons to address their legal problems without further representation by a law-

yer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer’s representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client’s informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the

circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

This rule permits such short term, limited representations without the rigid requirements of formal conflict checks prior to the giving of advice. You may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. If you are undertaking such a limited scope representation, you should consider the following: 1) confirm with the client that you are providing a limited scope representation such as telephone consult only; 2) obtain enough information to deduce the problem and to identify the client; 3) obtain a limited scope representation agreement if you meet with the client.

Rule 6.5 only absolves the attorney who unwittingly gives legal advice to a potential client wherein a conflict may exist. You may not provide legal services, even on a limited basis, to a potential client wherein you are aware of an existing conflict.

### **CONTINUING REPRESENTATION**

You may be called upon to provide more than a short term, limited representation. If so, you must begin any such review with a systematic check for conflicts. This includes checking for conflicts with any current clients (Rule 1.7), any former clients (Rule 1.9) and any conflict another member of your firm may have with the prospective representation (Rule 1.10). You may continue to limit the scope of the representation, but you continue to be charged with the identification of conflicts.

In a continuing representation, it is recommended that an engagement letter be employed. Considerations should include: 1) address the scope of representation and assistance to be provided; 2) agreement with regard to attorney's fees (whether may be sought from adverse party) and agreement with regard to expenses of representation; 3) confidentiality; 4) termination of the agreement; and 5) any particular issues relevant to the facts of the matter being undertaken. You may use any form of contract that you currently draft for traditional clients. The fee portion should be modified to reflect the pro bono representation and to inform the client of any financial responsibility he/she has in the matter. The client should sign the agreement and be provided a copy of the same.

The primary considerations to pro bono representation center around the need to avoid (when possible) conflicts with other clients and former clients. These rules are relaxed when the volunteer service is of the type that is hindered by access to conflict information. When possible, you should continue to review all representations for any potential conflicts.

Remember pro bono clients are entitled to the same quality legal representation as your for profit clients. You may limit the scope of the representation; however, be sure and reach an understanding of the scope and reduce same to writing. The OBA's ethics counsel and Office of General Counsel are resources for you should you have any questions regarding the undertaking of these pro bono clients.

# January Meeting Summary

*The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Friday, Jan. 14, 2011.*

## **REPORT OF THE PRESIDENT**

President Reheard reported she attended the Lawyers Helping Lawyers Assistance Program Committee meeting and swearing-in ceremonies for Chief Justice Taylor and Justice Doug Combs. She made a presentation to the Muskogee County Bar Association about Oklahoma Lawyers for America's Heroes, spoke at the Garfield County Bar Association giving welcoming remarks and speaking about Law School for Legislators, met with deploying soldiers and their families at the Oklahoma Army National Guard Yellow Ribbon Pre-Deployment Event in Norman and addressed Gold Star Families at a meeting in Norman. She also completed committee appointments for 2011. President Reheard reviewed details for the swearing-in and the luncheon.

## **REPORT OF THE VICE PRESIDENT**

Vice President Strubhar reported she attended the Canadian County holiday party, Oklahoma County holiday party, new Board of Governors orientation, Law School for Legislators and swearing-in ceremony and reception for Justice Doug Combs. She also met with Jane McConnell and Suzanne

Heggy regarding law-related education.

## **REPORT OF THE PRESIDENT-ELECT**

President-Elect Christensen reported she attended the swearing-in ceremonies for Chief Justice Taylor, Justice Combs and Governor Fallin, the Inaugural Ball, Lawyers Helping Lawyers Assistance Program Committee meeting, Military Assistance Task Force meeting and publicity sub-committee meeting, Garfield County Bar Association meeting with President Reheard, Law School for Legislators, three Oklahoma Army National Guard Yellow Ribbon Pre-Deployment Events in Norman with President Reheard, President Reheard's address to the Oklahoma Gold Star Families in Norman and the December Board of Governors meeting. She also appeared before the Supreme Court at their Monday morning conference in December to present the Code of Judicial Conduct and the Rules for the Committee on Judicial Elections.

## **REPORT OF THE EXECUTIVE DIRECTOR**

Executive Director Williams reported that he attended the Thursday evening Board of Governors event, new governor orientation, Military Assistance Task Force

meeting, swearing-in ceremonies of Chief Justice Taylor and Justice Doug Combs, staff holiday party, monthly staff celebration and OBA directors meeting. He also moderated the Law School for Legislators program, met with the Technology Task Force chairperson and with President Reheard and Hyatt Hotel staff for the 2011 Annual Meeting.

## **REPORT OF THE PAST PRESIDENT**

Past President Smallwood reported he has been dealing with issues regarding the judicial nominating process.

## **BOARD MEMBER REPORTS**

**Governor Carter** reported she attended the December board and pre-meeting gathering, Professional Responsibility Tribunal meeting for which she completed a trial panel report for a petition for reinstatement, Tulsa County Bar Association Community Outreach Committee meeting and swearing-in ceremony for Tulsa and Pawnee County district judges. She also delivered donations for the TCBA "Santa Brings a Lawsuit" effort. **Governor Chesnut** reported he attended the December Board of Governors meeting and pre-meeting gathering and has

worked on the OBA Solo and Small Firm Conference Planning Committee meeting. **Governor Dobbs** reported he attended the board's Christmas dinner and December board meeting, and he met with the State Chamber of Commerce and with the Edmond Chamber of Commerce. **Governor Poarch** reported he attended the December Board of Governors meeting and the swearing-in ceremony of Justice Combs. **Governor Shields** reported she attended the swearing-in ceremony for Justice Doug Combs and the December board meeting.

#### **REPORT OF THE SUPREME COURT LIAISON**

Justice Kauger reported meeting with the unified case management company. She asked the OBA to appoint a committee to address uniform court rules, and it was decided the Bench and Bar Committee will be asked to address the issue.

#### **REPORT OF THE GENERAL COUNSEL**

General Counsel Hendryx reported she attended a meeting with Rules of Professional Conduct Committee Chairperson Paul Middleton and a CLE ethics musical program. She also filed briefs on behalf of the OBA in the *Fent v. Henry et. al.* lawsuit. A written status report of the Professional Responsibility Commission and OBA disciplinary matters for December 2010 was

submitted for the board's review. She briefed board members on litigation pending.

#### **OKLAHOMA INDIAN LEGAL SERVICES**

The board approved President Reheard's appointment of Diane Hammons, Tahlequah, for a three-year term expiring 12/31/13, to Oklahoma Indian Legal Services.

#### **AIMS AND OBJECTIVES FOR NEW CIVIL PROCEDURE/EVIDENCE CODE COMMITTEE**

President Reheard said the Evidence Code Committee has not been active, and there is overlap of its activities with the Civil Procedures Committee that is active. At the suggestion of the chairperson, the committees are now combined and new aims and objectives have been written.

#### **AMENDMENT TO RULES CREATING AND CONTROLLING THE OKLAHOMA BAR ASSOCIATION**

President Reheard briefed the board on the issue of a proposed amendment to add a dues waiver for active duty military. Discussion followed, and it was decided to table action until the February meeting.

#### **ABA OVERVIEW**

ABA State Delegate Jimmy Goodman briefed the board via telephone on issues

expected to be discussed at the February ABA mid-year meeting in Atlanta. He shared his phone numbers to allow board members to contact him after the meeting with any questions.

#### **COURT ON THE JUDICIARY – TRIAL DIVISION APPOINTMENT**

The board approved President Reheard's proposal to reappoint Brad Heckenkemper, Tulsa, whose term shall expire Feb. 28, 2013, to the Court on the Judiciary.

#### **COURT ON THE JUDICIARY – APPELLATE DIVISION APPOINTMENT**

The board approved President Reheard's proposal to appoint Betty Outhier Williams, Muskogee, whose term shall expire Feb. 28, 2013, to the Court on the Judiciary.

#### **EXECUTIVE SESSION**

The board voted to go into executive session. The board met and voted to come out of executive session.

#### **JUDICIAL NOMINATING COMMISSION APPOINTMENT**

The board tabled action until the February meeting.

#### **NEXT MEETING**

The Board of Governors met in Tulsa on Feb. 17, 2011, and a summary of those actions will be published after the minutes are approved. The next meeting of the Board of Governors will be April 15, 2011, in Muskogee.

# Planned Giving to Your Oklahoma Bar Foundation

*By Will Farrow, OBF Trustee and Development Committee Chair*

The Oklahoma Bar Foundation Inc. (OBF) is the third oldest state bar foundation in the United States and the OBF membership is comprised of all the members of the Oklahoma Bar Association (OBA). If you are a member of the OBA, you are a member of the OBF. The charitable purposes of the OBF are accomplished through annual grants that advance legal education and promote the administration of justice throughout the state of Oklahoma. The stated mission of the Oklahoma Bar Foundation is: "Lawyers Transforming Lives through the advancement of education, citizenship and justice for all."

Our annual grant recipients include Legal Aid Services, Oklahoma and Tulsa Lawyers for Children programs, Oklahoma Indian Legal Services Low-Income Taxpayer Clinic, Oklahoma High School Mock Trial Competitions, YMCA Youth and Government Programs, Domestic Violence Intervention Services, court grants and statewide legal advocacy work on behalf of children and vulnerable adults, in addition to many other programs furthering legal education and the administration of justice.

The OBF is governed by a 26-member Board of Trustees. A significant portion of the

funding for OBF grants is provided by donor gifts, earnings on investments, rental income, affinity programs sponsored by the OBF and other miscellaneous sources. The remainder of OBF funding is derived from lawyer participation in the Oklahoma Interest on Lawyers Trust Accounts (IOLTA) Program.

**The options in charitable giving to the OBF offer something for everyone.** Tools of giving come in all shapes and sizes, ranging from quick and easy one-step solutions to more complex estate and income tax planning programs. It is always best to seek professional advice before making any charitable gift, but see how easy giving can be and rewarding to you and the OBF to make a planned gift.

**Cash Contributions.** Making a cash contribution, often on an annual basis, certainly is a common choice when it comes to charitable giving. Whether the gift is \$25, \$50, \$100 or \$10,000 in cash, stock or other property, the OBF is grateful for the opportunity to add the money to its endowment and to put the income to good use right away. Current gifts are usually income tax deductible to the donor.

The OBF has a Fellows Program which qualifies the donor for special recognition upon the pledge of \$1,000, payable \$100 annually for 10 years. New lawyers are asked to make a minimum \$25 contribution for the first year and \$50 for the next two years. Of the approximately 16,000 OBA members, less than 10 percent have committed to become Fellows of the OBF. This percentage needs to change where 90 percent or more of the OBA members are OBF Fellows and annual supporters of the OBF.

Many OBF supporters would like to give more money if they could afford it, and also would like the OBF to benefit even after their deaths. What can these donors do? They can leave a legacy by making a "planned gift" in addition to their current contributions. Making a planned gift means arranging *now* for a gift to the OBF following your death.

**POD or TOD designations.** As desirable as it is to have an estate plan that includes at least a will, you can leave a legacy with or without one. Oklahoma law permits you to add a pay on death (POD) designation or a transfer on death (TOD) designation to a bank account or security, or even real estate, naming a

beneficiary to receive the asset following your death. POD and TOD designations are commonly used to pass assets to family members, avoiding probate at death. The OBF can be a beneficiary, too, either the sole beneficiary or one of several. To leave a legacy with a POD or TOD designation on a bank account, for example, all you need to do is go to the bank and fill out a new account ownership and beneficiary designation card.

**Leverage a Life Insurance Policy.** It is easy to call your life insurance company and request a change of beneficiary form. You can name the OBF as beneficiary of all or part of the policy proceeds following your death. A good way to incorporate current giving with income tax benefits is to give the life insurance policy itself to the OBF, as well as naming the OBF as the beneficiary. Your payment of the premium each year will be an annual gift to the OBF, eligible for a current income tax deduction.

**Retirement Plan Beneficiary Designations.** By filling out a change of beneficiary form, you can name the OBF as the beneficiary of your tax-deferred IRA or 401(k) retirement plan. The plan account is still yours to live on following retirement. By naming the OBF as the beneficiary, you are giving the OBF only whatever is left at the time of your death — the money you don't spend during your lifetime. Remember that proceeds from these plans usually are subject to income tax when distributed to individuals, but not when distributed to a charity because a charity is tax-exempt. This is a great way to

maximize a charitable gift because the OBF ends up getting a lot more out of the retirement plan than an individual beneficiary would have received after income taxes.

**Charitable Bequests in your Will or Trust.** Don't forget about the OBF or other charities when you make a will or trust. Work with your estate planning professionals to include a charitable bequest in your will (or revocable living trust if you have one). Your bequest can be an outright gift of money or property, a gift of a percentage of your estate, a gift of the rest of your estate after gifts to your family or a "contingency" gift of your estate to charity *only* if your family doesn't survive you.

**Establish your own Charitable Fund.** Talk to your banker or investment advisor about setting up a special savings or investment account earmarked for charity. A separate account might inspire you to save throughout the year for your annual charitable gifts, which you can make out of the special account. You can also specify, with a TOD designation or a bequest in your will, that the account pass to the OBF following your death, leaving your own special legacy. Your local community foundation might offer a "donor advised fund," which allows you to make a charitable gift to the community foundation and then direct distributions out of that gift to charities of your choice each year.

**Charitable Gift Annuity Programs.** Several area charitable organizations, such as the Oklahoma City Community Foundation and the Tulsa Community Foundation, give

donors the option of creating a charitable gift annuity. This means that the donor transfers to the charity money or property in exchange for the charity's promise to pay the donor a certain fixed amount per year (an annuity) for the rest of the donor's life.

**Charitable Trusts.** Your professional advisors can show you other ways to leave a legacy and keep something for yourself or your family at the same time. With the charitable remainder trust, the donor transfers stocks, cash or other property to a trust. The assets are invested in the trust and produce income for the donor for a fixed period of time or until the donor dies. At that time, the OBF or other charity keeps the remaining assets. A charitable lead trust is the reverse — the OBF receives an income interest for a fixed time period and then the rest goes to the donor's beneficiaries.

**Family Foundations.** For donors with substantial assets and a strong commitment to charitable causes, a private charitable foundation is an option. The donor, with the help of professional advisors, establishes a foundation as a separate entity. The donor and others transfer funds to the foundation. The donor's family, often together with a bank or trust company, manages the foundation. The foundation's income and assets are used to make gifts to charity, sometimes a single charity such as the OBF, but more often several different charities.

**Creative Plans.** Work with your professional advisors to create the perfect planned gift program for you. All of these charitable giving tools, from the simple to the complex, can



be mixed and matched to leave a legacy in a way that fits your own financial and family situation.

The OBF is a recognized charitable organization under Section 501(c)(3) of the Internal Revenue Code and all contributions to the OBF are deductible for estate and income tax purposes to the maximum extent allowed by law. Nancy Norsworthy is the director of the OBF and is available to answer your questions regarding the OBF and its planned giving programs at (405) 416-7070.

- To become a Fellow, the pledge is \$1,000 payable within a 10-year period at \$100 each year; however, some may choose to pay the full amount or in greater increments over a shorter period of time.
- The OBF offers lesser payments for newer Oklahoma Bar Association members:
  - *First-Year Lawyers*: lawyers who pledge to become OBF Fellows on or before Jan. 2, of the year immediately following their admission may pay only \$25 per year for two years, then only \$50 for three years, and then at least \$100 each year thereafter until the \$1,000 pledge is fulfilled.
  - *Within Three Years*: lawyers admitted three years or less at the time of their OBF Fellow pledge may pay only \$50 per year for four years and then at least \$100 each year thereafter until the \$1,000 pledge is fulfilled.
- Sustaining Fellows are those who have completed the initial \$1,000 pledge and continue their \$100 annual contribution to help sustain grant programs.
- Benefactor Fellow is the highest leadership giving level and are those who have completed the initial \$1,000 pledge and pledge to pay at least \$300 annually to help fund important grant programs. Benefactors lead by example.



## FELLOW ENROLLMENT FORM

Attorney       Non-Attorney

Name: \_\_\_\_\_  
(name, as it should appear on your OBF Fellow Plaque) County

Firm or other affiliation: \_\_\_\_\_

Mailing & delivery address: \_\_\_\_\_

City/State/Zip: \_\_\_\_\_

Phone: \_\_\_\_\_

E-Mail Address: \_\_\_\_\_

The Oklahoma Bar Foundation was able to assist 23 different programs or projects during 2010 and 25 in 2009 through the generosity of Oklahoma lawyers – providing free legal assistance for the poor and elderly; safe haven for the abused; protection and legal assistance to children; law-related education programs; other activities that improve the quality of justice for all Oklahomans. The Oklahoma Bar legend of help continues with YOU.

- \_\_\_\_\_ I want to be an OBF Fellow **now** – Bill Me Later!
- \_\_\_\_\_ \$100 enclosed & bill annually
- \_\_\_\_\_ Total amount enclosed, \$1,000
- \_\_\_\_\_ *New Lawyer 1st Year*, \$25 enclosed & bill Annually as stated
- \_\_\_\_\_ *New Lawyer within 3 Years*, \$50 enclosed & bill annually as stated
- \_\_\_\_\_ I want to be recognized at the higher level of **Sustaining Fellow** & will continue my annual gift of at least \$100 –  
(initial pledge should be complete)
- \_\_\_\_\_ I want to be recognized at the highest leadership level of **Benefactor Fellow** & annually contribute at least \$300 – (initial pledge should be complete)

**LAWYERS  
 TRANSFORMING LIVES**

*Through education,  
 citizenship and  
 justice for all.*

*The Oklahoma Bar  
 legend of help continues  
 with YOU!*

Your Signature & Date: \_\_\_\_\_

OBA Bar# \_\_\_\_\_

PLEASE KINDLY MAKE CHECKS PAYABLE TO: Oklahoma Bar Foundation • P O Box 53036  
 • Oklahoma City OK 73152-3036 • (405) 416-7070

**Many thanks for your support & generosity!**

# Our Heroes Deserve Our Help

By M. Joe Crosthwait Jr.

The Oklahoma Bar Association's Oklahoma Lawyers for America's Heroes program deserves every Oklahoma lawyer's commitment. On behalf of OBA President Deborah Reheard, I ask each of you to meaningfully contribute to this opportunity to "give back" to those who serve us so nobly and unselfishly in our armed services.

For just as in the two great world wars, the United States is again immersed in armed conflict on multiple fronts in what might be easily mistaken as not having an existential consequence for the free world. After all, the financial costs aside, the number of our citizens intimately involved in fighting these wars is comparatively small, and our attention to their toil ebbs and flows in the confluence of other seemingly important current events. But make no mistake about it — these are our heroes!

While unbearable as an absolute number, the number of casualties as a percentage of our population is almost infinitesimal — unless, of course, it is you or your husband or wife or son or daughter. It is then beyond our human measure. These are our heroes!

The world wars unquestionably required mobiliza-

tion and the commitment of virtually every American man, woman and child. Maybe even more in many respects, the wars in Korea and Vietnam involved all strata of American society. Now, only one in about every 300 Americans serves in the military. Demographically, in our attention span, fewer and fewer of those now living have ever served in uniform. Many of us don't know anyone who is directly affected by military service. But those who serve and have served are our heroes!

And much to our collective chagrin, the gravity and importance of what our men and women soldier citizens contribute in this dangerous world may be lost in the haze of the American obsession with observing life on a screen and merely keeping score in this spectator sport we call "Earth." But they are our heroes!

## EASY TO IGNORE VITAL STATISTICS

It is too easy to pay less attention to the vital statistics of war when we are not, we think, directly affected. Most of us will from time to time lapse numb to the life altering and too often life-ending experiences of those who, day and night, rain or shine, holidays and weekends, birth-



## FOR THOSE WHO SERVE, WILL YOU SERVE?

Nearly 4,000 Oklahoma armed service members are deploying overseas this month. They will leave behind family, friends and loved ones as they take up arms on behalf of our country. They need legal assistance, and those who need the most help are often the least able to afford it.

Many more lawyers are needed to give pro bono legal services, especially those with experience in family law, estate planning, consumer and credit issues, and disability and benefits issues. Go to [www.okbar.org/heroes](http://www.okbar.org/heroes) to sign up. You'll also find there resource materials to prepare you for your volunteer service.



days and anniversaries, and every single day fight in the hot desert sun and in the icy cold desolate mountains in distant, hostile places, far from their home and loved ones — all in defense of the Great American Dream. The equally essential contributions of those not directly



*Thousands of Oklahoma men and women deploying overseas this month will be putting their lives on the line. Your help is needed to provide legal services so they can focus on their mission.*

in harm's way, but who nonetheless contribute and sacrifice greatly, must not be overlooked. These are all our heroes!

Indeed, the words of Winston Churchill in the Battle of Britain once again ring so true, "Never in the field of human conflict was so much owed by so many to so few." Just as a few brought crucial defense to the British at the dawn of World War I, so do a few defend America at the dawn of this millennium. These relative few are our heroes!

I have lived all of my life (so far) within five miles of the flagpole at Tinker Air Force Base. It was in the mile-long 3001 building that the Douglas Aircraft Co., with the able assistance of the prover-

bial and now symbolic Rosie the Riveter manufactured all of the workhorse C-47 aircraft that were crucial to victory in World War II. When Tinker was a primary Strategic Air Command Base during the Cold War and specifically the Cuban Missile Crisis, I remember, as an eighth grader, that the flagpole was a prime target for a nuclear strike by the Soviet Union. Our warriors stood tall at the brink and aggression was deterred. They are all our heroes.

Growing up so many of my friends were from military families; many of them moving every two or three years to new bases and new assignments. I've had the good fortune of knowing many of our dedicated military personnel

all of my life. I've seen the important missions and accomplishments of our Oklahoma military folks. I am truly amazed at what they do in our behalf. For the past 37 years, I've had an opportunity to represent many folks in our military family. I know for a fact that those who serve us in uniform are the best of the best.

By the way, I never really worried about that flagpole thing. I knew our defenders were too good for that to happen. I'm still not worried. I just want to be sure we are to them what they are to us. Please join me in this important mission of our Oklahoma Bar Association.

*Mr. Crosthwait practices in Midwest City.*

# Access to Justice: The Single Most Compelling Reason for a Legal Profession

By Justice Greg Hobbs

*Colorado Supreme Court Justice Gregory Hobbs delivered the keynote address, "Access to Justice: The Single Most Compelling Reason for a Legal Profession" at the recent Pro Bono Summit held in conjunction with the ABA's National Celebrate Pro Bono Week in late October 2010.*

We lawyers belong to the profession of Thomas Jefferson and Abraham Lincoln. The study of law, Jefferson said, qualifies us to be useful to ourselves, our neighbors and the public.<sup>1</sup>

Holding a law license allows us to earn a living by helping others live in community. In community we employ the rule of law in service to people joined in a perpetual union dedicated to liberty and justice for all.

Lincoln prayed that government of the people by the people and for the people shall not perish from this earth.<sup>2</sup> The lawyer's oath we take personally commits us to publicly practicing this prayer.

## EXERCISING THE FIRST AMENDMENT, A PRAYER FOR RELIEF

We learn in law school by practicing the First Amendment in the classroom, in moot

court competitions, on law review staffs, through internships and clinics, and in other student-teacher activities. In law school, in the profession and in the courts, we assemble and argue with each other the



rights and responsibilities we enjoy and undertake as citizens empowered by a constitution that holds us together as we struggle to resolve the very next conflict.

In conflict we have the opportunity to articulate and apply standards for resolving disagreement. The rule of law

goes case by case from the past to the present to the future.

Lincoln, while running a failing general store, found the inspiration for his law calling at the bottom of a barrel he bought for 50 cents from a man who had no room on his wagon for the random "household goods" discarded within. In sorting through the junk in that barrel, Lincoln discovered a complete edition of *Blackstone's Commentaries* on the common law.<sup>3</sup>

## PRO BONO SERVICE, A CORE VALUE OF THE LEGAL PROFESSION

Jefferson represented mulatto slaves in pro bono freedom suits. "Under the law of nature," he argued in *Howell v. Wade Netherland* (April 1770), "all men are born free."<sup>4</sup> He and his clients lost.

Lincoln took the famous *Almanac* case pro bono. A young man was on trial for murder. Through insightful meticulous research, trial strategy and cross-examination, Lincoln freed his client by impeaching the full moon the prosecution's star witness claimed to have been able to see by.<sup>5</sup>

Jefferson wrote in the *Declaration of Independence* "All men are created equal." After the U.S. Supreme Court's *Dred Scott* decision<sup>6</sup> held that slaves could not be citizens, Lincoln employed the finest polish of his lawyerly skills in writing the *Emancipation Proclamation*. By killing Lincoln, John Wilkes Booth helped to pass the 13th Amendment (abolishing slavery), the 14th Amendment (making any person born in the United States a citizen and guaranteeing due process and equal protection of the law to all persons) and the 15th Amendment (guaranteeing the right of citizens to vote regardless of race, color or prior condition of servitude).

### OUR OATH, NEVER REJECT CAUSE OF THE DEFENSELESS OR OPPRESSED

The lawyer's oath we take on admission to the bar commits us "never to reject for any consideration personal to myself the cause of the defenseless or the oppressed." In fulfilling our oath, we are guided by Colorado Rule of Professional Conduct 6.1. The rule sets forth a voluntary pro bono service goal of 50 hours of pro bono legal services by each licensed attorney. A sub-

stantial majority of these 50 hours should be for indigent persons and/or organizations that serve the indigent.

The Colorado Supreme Court, on the Colorado Judicial Branch webpage, publishes a pro bono recognition list of law firms and in-house counsel groups that make a commitment to achieving this goal each year.<sup>7</sup> In addition, this list shows which of these firms and in-house counsel groups achieved the goal in the prior calendar year, and this list is also published in the monthly *Colorado Lawyer*. Each firm and in-house counsel group totals the pro bono hours of the firm or in-house counsel group for the year, averages the total by the number of attorneys in the firm or group (prorated for part-time attorneys), and informs the court whether the firm or group achieved the goal in the prior calendar year.<sup>8</sup>

Starting in 2011, the Colorado Bar Association and local bar associations are sponsoring pro bono recognition programs throughout the state, in cooperation with the Supreme Court, the Colorado Access to Justice Commission and local Access to Justice committees. These local programs will

honor individual attorneys who achieved the 50-hour goal in the prior calendar year, as well as the firms and in-house counsel groups that appear on the Supreme Court's pro bono recognition list.<sup>9</sup>

*Justice Hobbs is a leader in pro bono development and access to justice issues; the Colorado Supreme Court has established programs to encourage pro bono and limited scope representation by lawyers and provides statewide forms available for use by pro se litigants.*

1. Arthur L. Rizer III, *Lincoln's Counsel* at 69 (American Bar Association).

2. Abraham Lincoln, "The Gettysburg Address."

3. Rizer at 9.

4. *Id.* at 179.

5. *Id.* at 47.

6. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

7. [www.courts.state.co.us](http://www.courts.state.co.us) (scroll down right-hand column on the home page of this web address for the Colorado courts).

8. To make this firm or in-house counsel commitment and report achievement of the goal for the prior calendar year, please e-mail [gregory.hobbs@judicial.state.co.us](mailto:gregory.hobbs@judicial.state.co.us).

9. A recommended pro bono policy for Colorado licensed attorneys and law firms is included in Colorado Rule of Professional Conduct 6.1. The Colorado Supreme Court awards CLE credit for pro bono legal services and mentoring of pro bono attorneys, as set forth in C.R.C.P. 260.8. The Colorado Judicial Branch webpage contains forms attorneys taking cases from legal services providers may file with the courts to obtain waiver of filing fees and costs for indigent clients. Colorado also has an unbundling of legal services rule, C.R.C.P. 11(b), that assists in the provision of pro bono services.



# YLD Keeping Busy in 2011

By Roy D. Tucker, YLD Chairperson

This year has kicked off with a bang, and there will be more to come as we get closer to implementing all of the projects planned for 2011! We also welcome our newest board member for District Nine, Eric Davis. Eric is employed with Legal Aid Services of Lawton and brings with him unbelievable enthusiasm and a servant's heart. He will no doubt be a stellar addition to our board.

## BAR EXAM SURVIVAL KITS ASSEMBLED

As applicants for the February bar exam finished their final reviews, the YLD met in Tulsa to assemble the "Bar Exam Survival Kits." Having been a recipient of one of these kits when I sat for the bar in 2003, I am certainly pleased that the YLD has carried on this tradition. The kits contain chewing gum, pain reliever, antacid, ear plugs, bottled water, pencils and other necessary items that exam takers may have inadvertently forgotten or not realized they needed. YLD volunteers distributed these kits in exam locations in Oklahoma City and Tulsa to very grateful future (hopefully) YLD. The feedback on these kits has always been positive. We have also been fortunate to receive financial assistance from the OBA Family Law Section. Their assistance has allowed us to defray some of the costs of supplies.

## SERVING OUR SENIORS

A training seminar for the Serving Our Seniors (S.O.S.) project is set for Saturday, March 19 at 11 a.m. at the Oklahoma Bar Center in Oklahoma City. Training should last anywhere from 30 minutes to one hour. The first official kickoff of this project

“So if a friend sends you an e-mail with an OBF enrollment form attached, fill it out...”

will occur at the Muskogee Public Library on Saturday, April 23 at 11 a.m. This will be our first official event. Individual directors will afterward be encouraged to establish S.O.S. events in their home districts, including Oklahoma City. A second YLD Board S.O.S. program will occur in Tulsa in September.

S.O.S. Chairs Bryon Will and Amber Peckio Garrett are in the process of creating a listserv of volunteers whom we can notify of upcoming events and solicit volunteers for particular project dates. After the last article and the

OBA E-News, we were fortunate to have received so many volunteers anxious to help us implement this very



Roy D. Tucker  
2011 YLD Chair

worthwhile project. Those interested are encouraged to contact the project chairs at [amberpeckio@yahoo.com](mailto:amberpeckio@yahoo.com) or [bryon@bjwilllaw.com](mailto:bryon@bjwilllaw.com).

## AFFILIATES OUTREACH PROGRAM

The dates for the Affiliates Outreach Program (AOP), South-Central Regional Young Lawyers Conference have been set for Aug. 26-27, 2011, at Downstream Casino Resort in Quapaw, Okla. This conference provides an opportunity to connect with young lawyers across the country, particularly those in the South-Central Region. In addition to Oklahoma, YLD leaders from Kansas, Missouri and Arkansas are participating. The goal of the conference is to provide an avenue

where YLD affiliate leaders can share their experiences with the AOP program registrants and participants, who gain valuable insight on developing, implementing and carrying out successful public and member service programs in their respective state or county bar associations. CLE programming will be provided and numerous social and recreational networking events will be available.

Finally, the YLD, with help from our Oklahoma County YLD affiliates, is assisting the Oklahoma Bar Foundation in recruiting at least 150 new Fellows in 2011. So if a friend sends you an e-mail with an OBF enrollment form attached, fill it out and send it in! We are fortunate to have several YLD members who also serve as Trustees on the OBF, such as Briana Ross and Gabe Bass. They were both instrumental in educating our board about some of the very worthwhile projects the OBF has funded.

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Oklahoma City, OK 73152

# Calendar

## March

- 16 Oklahoma Council of Administrative Hearing Officials;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212
- OBA Women in Law Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Deborah Bruce (405) 528-8625
- OETA Festival Volunteer Night;** 5:45 p.m.; OETA Studio, Oklahoma City; Contact: Jeff Kelton (405) 416-7018
- 17 OBA Bench & Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Barbara Swinton (405) 713-7109
- OBA Member Survey Task Force Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Brian Hermanson (580) 362-2571
- 18 OBA Awards Committee Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: D. Renée Hildebrant (405) 713-1423
- 19 OBA Real Property Law Section Meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Scott Byrd (918) 587-3161
- OBA Young Lawyers Division Committee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Roy Tucker (918) 684-6276
- 23 OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Patricia Podolec (405) 760-3358
- 24 OBA Justice Commission Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Drew Edmondson (405) 235-5563
- OBA Law Office Management and Technology Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Kent Morlan (918) 582-5544
- OBA Men Helping Men Support Group;** 5:30 p.m.; The Center for Therapeutic Interventions; Tulsa; RSVP to: Stephanie Alton (405) 840-3033

- 25 OBA Unauthorized Practice of Law Meeting;** 1:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Bill Grimm (918) 584-1600
- 28 OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: D. Michael O'Neil Jr. (405) 239-2121
- 30 Ruth Bader Ginsburg American Inn of Court;** 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donald Lynn Babb (405) 235-1611

## April

- 1 OBA Strategic Planning Committee Meeting;** 10:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Cathy Christensen (405) 752-5565
- Oklahoma Bar Foundation Committee Meeting;** 12:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070
- 5 OBA Legal Intern Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: H. Terrell Monks (405) 733-8686
- OBA Law-related Education Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Reta Strubhar (405) 354-8890
- 7 OBA Women Helping Women Support Group;** 5:30 p.m.; The Center for Therapeutic Interventions; Tulsa; RSVP to: Stephanie Alton (405) 840-3033
- OBA Men Helping Men Support Group;** 5:30 p.m.; The Oil Center – West Building, 1st Floor Conference Room; Oklahoma City; RSVP to: Stephanie Alton (405) 840-3033
- 8 Association of Black Lawyers Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donna Watson (405) 721-7776
- OBA Family Law Section Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Kimberly Hays (918) 592-2800
- 14 OBA Women Helping Women Support Group;** 5:30 p.m.; The Oil Center – West Building, 10th Floor; Oklahoma City; RSVP to: Stephanie Alton (405) 840-3033





- 19 **OBA Civil Procedure and Evidence Code Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229
- 20 **Oklahoma Council of Administrative Hearing Officials;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212  
**OBA Women in Law Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Deborah Bruce (405) 528-8625
- 21 **New Admittee Swearing In Ceremony;** Supreme Court Courtroom; Contact: Board of Bar Examiners (405) 416-7075  
**OBA Bench & Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Barbara Swinton (405) 713-7109  
**OBA Bar Association Technology Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Gary Clark (405) 744-1601
- 22 **OBA Board of Governors Meeting;** Muskogee, Oklahoma; Contact: John Morris Williams (405) 416-7000
- 23 **OBA Young Lawyers Division Committee Meeting;** Muskogee, Oklahoma; Contact: Roy Tucker (918) 684-6276

- 25 **OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: D. Michael O'Neil Jr. (405) 239-2121
- 27 **OBA Management Assistance Program Opening Your Law Practice;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jim Calloway (405) 416-7051  
**OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Patricia Podolec (405) 760-3358
- 28 **OBA Ask A Lawyer;** OETA Studios, Oklahoma City and Tulsa; Free legal advice 9 a.m. - 9 p.m.; TV show 7- 8 p.m. Contact: Tina Izadi (405) 522-3871  
**OBA Justice Commission Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Drew Edmondson (405) 235-5563  
**OBA Men Helping Men Support Group;** 5:30 p.m.; The Center for Therapeutic Interventions; Tulsa; RSVP to: Stephanie Alton (405) 840-3033

## May

- 4 **OBA Law-related Education State Project Citizen Showcase;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024
- 5 **Oklahoma Bar Foundation Grants and Awards Committee Meeting;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070  
**OBA Men Helping Men Support Group;** 5:30 p.m.; The Oil Center – West Building, 1st Floor Conference Room; Oklahoma City; RSVP to: Stephanie Alton (405) 840-3033  
**OBA Women Helping Women Support Group;** 5:30 p.m.; The Center for Therapeutic Interventions; Tulsa; RSVP to: Stephanie Alton (405) 840-3033
- 6 **OBA Communications Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Mark Hanebutt (405) 948-7725
- 12 **OBA Appellate Practice Section Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Rick Goralewicz (405) 521-1302  
**OBA Women Helping Women Support Group;** 5:30 p.m.; The Oil Center – West Building, 10th Floor; Oklahoma City; RSVP to: Stephanie Alton (405) 840-3033

### The Supreme Court of the State of Oklahoma

You are cordially invited to the ceremony for the swearing-in of

Noma Gurich  
as

Justice of the Supreme Court  
The State of Oklahoma  
Thursday, March 31, 2011  
2 p.m.

Supreme Court Courtroom  
Second Floor  
State Capitol Building

*Reception immediately following  
State Capitol Rotunda  
Courtesy OBA Women in Law Committee*

### Lawyers Meet with Lawmakers



*OBA President Deborah Reheard meets with Oklahoma Sen. Richard Lerblance, (D) Hartshorne, during OBA Day at the Capitol March 8. The goal of the annual event is to give all OBA members the chance to talk with elected officials about the issues they believe are important, especially those impacting the administration of justice.*

### Mock Trial Champion Named

For the fourth consecutive year, Del City's Christian Heritage Academy has earned top honors in the Oklahoma High School Mock Trial Championship. The team earned its fifth win overall, defeating the Clinton High School Gold Team. Christian Heritage Academy will represent Oklahoma in the national competition, to be held in Phoenix in May. The competition was held March 1 in the Bell Courtroom at the OU Law Center in Norman. The two teams argued a case centered around a high school senior who filed a lawsuit against his school and its principal for violating two provisions of the First Amendment. The student was banned from running for office based on the religious content of his platform and campaign speech. The court granted a temporary restraining order stating that the elections cannot take place until the conclusion of a full evidentiary



*Mock Trial powerhouse Christian Heritage Academy celebrates their first-place win in the state championship.*

hearing and a ruling on the merits of a permanent injunction. The annual competition is sponsored by the OBA Young Lawyers Division and the Oklahoma Bar Foundation. Teams are paired with attorney coaches. Christian Heritage Academy's attorney coach is Jennifer Miller, and the attorney coaches for Clinton High School Gold Team are Julie Strong and Judge Jill Weedon.

## Supreme Court Selects School and Teacher of the Year

Broken Arrow's Westwood Elementary second grade teacher Julie Valsaint and Cherokee Elementary School in Muskogee were recognized as the 2011 Supreme Court Teacher and School of the Year. The ceremony was held March 7 in the Supreme Court Courtroom at the State Capitol building.

As Teacher of the Year, Ms. Valsaint received a \$1,000 stipend and a trophy for her excellence in teaching citizenship skills.

As School of the Year, Cherokee Elementary School received a \$1,000 stipend and trophy recognizing the school and students for their achievements.

Cherokee Elementary School is one of the lowest performing schools in Muskogee. It is 80 percent minority and has an equally high number of free/reduced lunch students. Through the vision of school principal Daphne Cotton and the upper grade teachers



*From left are Oklahoma Supreme Court Chief Justice Steven Taylor, Cherokee Elementary School Principal Daphne Cotton, Westwood Elementary School Teacher Julie Valsaint and Vice Chief Justice Tom Colbert. Photo courtesy of: Legislative Service Bureau Photo Division*

— Patty Rice, Samantha Fowler, Kyla Evans and Cordell Carter — the school is witnessing a revival in spirit and has celebrated a 120 point academic performance index score increase over the previous year.

### OBA Member Resignations

The following OBA members have resigned as members of the association and notice is hereby given of such resignations:

N. Vinson Barefoot  
OBA No. 11199  
5601 Avista De  
Sarasota, FL 34243

Clinton R. Batterton  
OBA No. 601  
7018 Leebrad St.  
Springfield, VA 22151

Michael Riley Davis  
OBA No. 2217  
128 Eagleview Circle  
Pottsboro, TX 75076

Dennis Michael Duffy  
OBA No. 13030  
4411 Gates St.  
Raleigh, NC 27609

Erin K. Duffy  
OBA No. 15278  
4411 Gates St.  
Raleigh, NC 27609

Roderick L. Oxford  
OBA No. 6838  
202 E. Houston St., No. 706  
San Antonio, TX 78205

Jessica A. Polley  
OBA No. 7030  
28 Brittany Lane  
Stafford, VA 22554

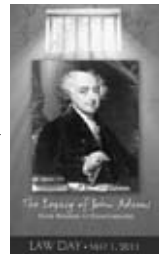
Ronald Cary Potter  
OBA No. 7247  
1239 Wyden Oaks  
Garden Dr.  
Houston, TX 77056

Glen E. Robards Jr.  
OBA No. 7620  
409 N.W. Eubanks St.  
Oklahoma City, OK  
73118-8648

Cheryl Lynn Rogers  
OBA No. 13087  
2143 Melrose Ct., Apt. 124  
Norman, OK 73069-5217

### Law Day Winners Assemble at Capitol

Chief Justice Steven Taylor met with the winners of the annual Law Day art and writing contests in the Supreme Court Courtroom March 9. The winners and their families listened to Justice Taylor's presentation on this year's Law Day theme, "The Legacy of John Adams: Defending the Rights of the Accused." Their winning entries will be featured in the April 16 issue of the bar journal.



### OBA Member Reinstatements

The following member of the OBA suspended for noncompliance with the Rules for Mandatory Continuing Legal Education has complied with the requirements for reinstatement, and notice is hereby given of such reinstatement:

Rebecca K. Tallent  
OBA No. 8834  
3816 N. Tacoma St.  
Oklahoma City, OK  
73112-6344

# Kudos

OBA member and Oklahoma Corporation Commissioner **Dana Murphy** has been elected as chair of the commission, while her fellow OBA member and Commissioner **Jeff Cloud** has been elected vice-chairman. Chair Murphy has served on the commission since January 2009, while Vice Chairman Cloud has served since January 2003.

**Patrice Dills Douglas** has been re-elected to a second term as Edmond's mayor, and will also be the recipient of the 2011 Kate Barnard Award for public service. The award is given to an elected or appointed official by the Oklahoma Commission on the Status of Women. Ms. Douglas ran unopposed for mayor and will begin her second term in May.

# On The Move

**Sanders & Associates PC** announces the addition of **Timothy E. Tipton** and **Eric Tabor** to the firm. Mr. Tipton focuses his practice on personal injury, social security and workers' compensation. He graduated from TU College of Law in 1989. Mr. Tabor's practice will focus

primarily in the areas of workers' compensation and social security. He graduated from the TU College of Law in 2010.

**GableGotwals** recently named **Robert J. Carlson** and **John D. Dale** as shareholders to the firm. Mr. Carlson has nearly 10 years of experience litigating business disputes, including several years arbitrating broker-dealer cases before NASD, NYSE and now FINRA. He holds undergraduate and graduate degrees in economics and a law degree from the University of Tulsa. Prior to his legal career, he was a corporate economist with a Fortune 500 company. Mr. Dale joined GableGotwals in 2003, and his practice includes commercial law, construction law, bankruptcy and creditors' rights, and real estate and land development. He graduated with honors from the TU College of Law in 2003.

Tulsa law firm **Johnson & Jones PC** announces it has elected **Andy Johnson** as its president for 2011. The firm also announces its director of litigation, **Chris Davis**, was appointed to serve as 2011 chairman for the TCBA Litigation Section. Mr. Davis serves as Johnson & Jones PC firm director of litigation.

**Mary J. Steichen** has joined the law firm of **McAfee & Taft**, where she will be a member of the employee benefits/ERISA and executive compensation legal team. Ms. Steichen has more than 25 years experience working with employee

benefits involving all facets of retirement, health and welfare plans, and she has extensive experience representing clients before the IRS and the Department of Labor.

**Michael J. Blaschke**, **Rachel Lawrence Mor**, **Dan M. Peters** and **Randy Sullivan** announce the opening of their new law offices. Mr. Blaschke will continue to focus his practice in all aspects of oil and gas litigation, business and commercial litigation. Ms. Mor's practice includes employment law, RICO, qui tam and civil rights litigation. Mr. Peters' practice is focused primarily on consumer, commercial and business litigation, and pharmaceuticals. Mr. Sullivan's practice concentrates in the areas of medical malpractice, professional liability, personal injury and pharmaceuticals. Mr. Sullivan continues his affiliation with the firm of **Sullivan & Cain PLLC**. The firm is located at the Jamestown Office Park, 3037 N.W. 63rd St., Suite 205, Oklahoma City, 73116; (405) 562-7771; [www.thelawgroupokc.com](http://www.thelawgroupokc.com).

**Minon M. Frye** and **Tiffa Mny A. Huss** of Tulsa have combined practices. **Tulsa Metro Law Center PLLC**, is located at 803 A N. Elm Place, Broken Arrow, 74012; (918) 615-4944; [minon@tulsametrolaw.com](mailto:minon@tulsametrolaw.com); the correct website is [www.tulsametrolaw.com](http://www.tulsametrolaw.com). The firm concentrates in the areas of family law, juvenile law, estate planning, real property and business law.

**David B. Coffin** announces the formation of his law firm, David Coffin PLLC, in Grapevine, Texas. His practice will focus on federal tax and controversy matters. Mr. Coffin has spent over 11 years working as a trial attorney in Dallas for the Department of Justice Tax Division, where he represented the IRS in federal district and bankruptcy courts. Mr. Coffin previously worked in Oklahoma City as an associate with Klingenberg & Associates PC. He may be reached at (817) 410-5709 or dcoffin@davidcoffinlaw.com.

**Don Andrews** of Oklahoma City has taken the oath of office as special judge for Oklahoma County District Court. Judge Andrews most recently worked as an attorney for the firm of Mulinix Ogden Hall Andrews & Ludlam PLLC.

**Homsey, Cooper, Hill & Associates** announces **Joe Carson** has joined the firm as a partner. Mr. Carson's practice is primarily focused on personal injury and litigation. Mr. Carson is a graduate of the OCU School of Law. The firm's name has changed to Homsey, Cooper, Hill & Carson.

The Tulsa law firm of Rogers and Bell announces the addition of **Matthew S. Farris** to the firm. His practice will focus primarily in the areas of probate matters, estate planning and trust administration. Mr. Farris is a 2005 graduate of the TU College of Law.

The Rainey Firm announces that **Keith F. Givens** has returned to the firm, where he practiced from 1997-1999. Mr. Givens will continue his civil litigation practice which includes personal injury, wrongful death, property damage, insurance and commercial disputes. He will also continue serving as a mediator and arbitrator. He can be reached at (405) 235-1356 or kgivens@raineyfirm.com.

## At The Podium

**Kevin Kuhn** recently spoke at an American College of Trial Lawyers CLE seminar in Colorado. His presentation titled "Voi Dire" included examples from the more than 70 jury trials he has tried. Mr.

Kuhn is a trial lawyer with Denver-based Wheeler Trigg O'Donnell LLP.

Oklahoma City attorney **Chris Paul** of McAfee & Taft will speak on the topic of "Compliance, Civil and Criminal Penalties" on March 14 at the NACE International Corrosion 2011 Conference in Houston.

*Compiled by Ashley Schovanec.*

How to place an announcement: If you are an OBA member and you've moved, become a partner, hired an associate, taken on a partner, received a promotion or an award or given a talk or speech with statewide or national stature, we'd like to hear from you. Information selected for publication is printed at no cost, subject to editing and printed as space permits. Submit news items (e-mail strongly preferred) in writing to:

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**Articles for the April 16 issue must be received by April 2.**

**F**ormer Oklahoma Supreme Court Chief Justice **Don Barnes** of Yukon died March 3. He was born Dec. 25, 1924. He was a native of Tulsa and graduated from Tulsa Central High School in 1942. **He served three years in the U.S. Navy during World War II.** He attended the University of Oklahoma where he received his law degree in 1949. He served 30 years as a judge beginning in 1954 when he was elected superior court judge in Okmulgee. He was appointed to the high court by then-Gov. David Hall in 1972 and served until January 1985 when he retired as chief justice. Following his retirement, he served as of counsel with the law firm of Stack and Barnes, retiring from private practice in 1992. He then served as an active retired judge, as director of the Oklahoma Supreme Court Settlement Conference and as an arbitrator. He was a member of the Phi Alpha Delta legal fraternity. Among many civic activities, he was a Mason, Rotarian, president of United Fund for Okmulgee and Okmulgee Recreation Council president. He served on the Spanish Cove Retirement Village board of directors and the OU Alumni Association board of directors. He recently began serving as a marshal at Oak Tree Country Club while pursuing his love of golf. Memorial contributions may be made to the Orpha and Maurice H. Merrill Professorship at the University of Oklahoma College of Law.

**Thomas Frederick Collins**, known as T. Fred Collins, of Ardmore died Feb. 19,

2011. He was born on Oct. 26, 1923, in El Reno. He earned a B.S. in business and a J.D. at the University of Oklahoma. **He served in the U.S. Navy as business manager for the Naval Flight Cadets Recreation House on the campus and was instrumental in activating fraternities on campus following World War II.**

Mr. Collins practiced law for more than 62 years in Ardmore. He formed a partnership in practice with his son in 1982 and they remained partners until his death. In his early days of practice, he was an assistant county attorney of Carter County and city attorney for the City of Ardmore. Mr. Collins was a member of the Ardmore Rotary Club, the Ardmore Masonic Lodge and was a Paul Harris Fellow. He was also a member of the First Christian Church (Disciples of Christ) for more than 60 years and served his community as a leader for several organizations. Memorial contributions may be made to First Christian Church or the donor's choice.

**J**oseph F. Glass of Tulsa died Feb. 20, 2011. He was born in Tulsa Feb. 25, 1929. **He joined the U.S. Navy for four years during the Korean Conflict, serving on the USS Roosevelt.** After his military service, he earned his undergraduate and law degrees from the University of Oklahoma. He worked in Tulsa for several firms. Mr. Glass was a member of the ABA and the American College of Trial Lawyers. He also served on the executive board of the International Association of

Insurance Council. After retirement, he served on the Indian Nations Council Boy Scouts and the Tulsa Philharmonic Orchestra. He was a charter member of the Summit Club and Philcrest Hills Tennis Club. He and his wife were members of the Gilcrease and Philbrook Museums and the Philbrook Masters Society. Memorial contributions may be made to Saint Simeon's Foundation or Saint Francis Hospice.

**R** Burl Harris of Ada died Dec. 10, 2010. He was born May 1, 1926, in Wister. He graduated from Wister High School in 1944. **During World War II, he served in the U.S. Navy in the Pacific and Atlantic theatres from 1944 until 1946 during World War II, later serving during the Korean Conflict from 1950 to 1952.** He graduated from East Central College in 1949, and following his military service went on to earn his J.D. from the OU College of Law in 1955. He practiced law in Ada and served as Ada city attorney for several years. He was a member and past president of the Pontotoc County Bar Association, and served on the OBA MCLE Commission. He was active in Rotary, Dale Carnegie, numerous civic boards and the First United Methodist Church. Memorial contributions may be made to the ECU Foundation of East Central University.

**H**azel Howard LeVally of Ardmore died Feb. 26, 2011. She was born May 4, 1920, in the Ringling-Claypool area of Jefferson County. She graduated from Ringling

High School in 1937, serving as valedictorian. She earned a B.A. at the University of Oklahoma in 1942 and taught math for several years at Wilson High School. She then returned to OU to earn her J.D. in 1948. She practiced law in Healdton for many years before retiring in 1974. She was a member of the First United Methodist Church and earned an honorary membership with the Boy Scouts of America for her devotion and work with them.

**Ted L. Ryals** of Moore died Feb. 23, 2011. He was born on Aug. 12, 1948, in Oklahoma City, graduating from U.S. Grant High School. He was a

graduate of OCU, Northwestern University and the OU College of Law. His professional career was spent engaging in the private practice of law. He was also a minister of music for New Hope Christian Church.

**Stephen Gayle Solomon** of Oklahoma City died Feb. 9, 2011. He was born on Aug. 29, 1948, in Oklahoma City. He graduated from Harding High School and the University of Oklahoma. He earned his J.D. at the OCU School of Law in 1977, beginning a 34 year career in law. He launched the firm of Solomon and Collins in 2006. He was a member of the Oklahoma

Land Title Association and the ABA as well as Oklahoma City Chamber of Commerce, Downtown OKC Rotary Club, Commercial Real Estate Council and Oklahoma Metro Area Realtor's Association. He was a 14-year member of the Charter National Bank board of directors and was a member of the Oklahoma City Golf and Country Club, United Methodist Church of Nichols Hills and Sequoyah Outing Club in northeast Oklahoma. Memorial contributions can be made to the Jimmy Everest Center for Cancer and Blood Disorders in Children or to Casady School.

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# Reading the Next Case

By Rex Travis

I waste a lot of time. One of the ways in which I used to waste time (before the advent of computer research) was to read the next case in the casebook, which usually didn't have anything to do with what I was researching. I would be researching some legal question of legitimate interest to me when something in the next case in the book would catch my eye. The next thing I knew, I had read that case, and maybe some other cases too.

I think I will miss that failing on my part, now that we use computers which don't display the next case in the book. Sometimes those side trips can be interesting.

For example, I was researching a fairly important tort or insurance issue, in which I had a legitimate interest. My research took me to Volume 234 of the *Pacific Reporter*, containing cases from the mid 1920s. I found myself reading 234 Pac. 787, *Davis v. State*.

Dr. Davis, whose office was at 115 1/2 West Grand (a street in Oklahoma City now known as Sheridan - the location is now in the middle of the Myri-



ad Convention Center), was convicted of murder and sentenced to life imprisonment. The conviction was the result of an abortion gone bad.

The facts of the case recite that, in February 1920, a woman named Mary Sudik and her husband, Ernest, lived on a truck farm (a vegetable farm) some miles southeast of Oklahoma City. She found herself pregnant, not a happy development for her.

A defense witness testified that the witness encountered (two days before the alleged abortion), east of the White Swan Laundry, in the north part of Oklahoma City, a

woman who said her name was Sudik. She was "a little, dark woman who looked like a foreigner." The woman who said she was Sudik told the witness that she had taken "Chichester pills and a quart of turpentine" to induce an abortion because she would "rather die than have another child and bring it into the world to starve like we do."

The trial court rejected that testimony — despite Dr. Davis' argument that he had not performed the abortion that killed Mary Sudik but rather that she had come to him after a failed attempt at a self-induced abortion and

he had attempted, unsuccessfully, to save her. The Criminal Court of Appeals (as the criminal appeals court was then known, perhaps appropriately) found the evidence "so vague, uncertain and remote" that it was not an abuse of discretion to exclude it. Dr. Davis' conviction and life sentence were affirmed. The Criminal Court of Appeals observed that Dr. Davis "was a professional criminal abortionist, of the most reprehensible type."

Mary Sudik died Feb. 12, 1923, at her home on the truck farm, after attempting to avoid bringing into the world another child "to starve like we do." History tells us the discovery well for the incredibly rich south Oklahoma City oilfield blew in Dec. 4, 1928. It was located near what is now Southeast 59th and Bryant street, near where Crossroads Mall is now. It sprayed oil as far south as Moore and was named the "Wild Mary Sudik Number 1" well. At the time, wells and the leases they sat on bore the names of the landowners on whose land the well was located.

*Mr. Travis practices in Oklahoma City.*

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A close-up portrait of Brent Kimball, a man with dark hair, wearing a dark suit, white shirt, and blue patterned tie. He is looking slightly to the left of the camera with a subtle smile.

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