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# The Massachusetts Focus

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## Title Standard Spotlight

REBA Title Standard No. 71:
Evidence of Death of Deceased Joint Owners and Life Tenants

**– Ward P. Graham**
New England Division Counsel

### Introduction

We've all had the situation arise in which title to the real estate with which we are concerned is derived from a survivorship tenancy (joint tenancy, tenancy by the entirety or a life estate) where one of the tenants has apparently died but there is no death certificate filed at the Registry of Deeds. While the Real Estate Bar Association (in its former guise as the Massachusetts Conveyancers Association) adopted Practice Standard No. 10 (Conveyances After Death: Recording of Documents) in 1984 requiring that death certificates be recorded in every instance in which title derives from a deceased "joint owner," unfortunately, not all conveyancers or estate attorneys have followed the practice standard over the years so we still run into missing death certificate situations with annoying frequency.[1]

In order to cure such a situation, the first approach, of course, is to obtain and record a death certificate for the deceased tenant. However, it is becoming more and more difficult to obtain death certificates because of bureaucratic restrictions and inefficiencies, privacy concerns taken to the extreme and the mobility of our society contributing to increasing numbers of persons owning real estate in Massachusetts but dying in other states or countries. It is not uncommon for there to be nothing on record to tell us in what jurisdiction the decedent died and, even if we can figure it out, it is frequently a difficult if not monumental task to obtain the death certificate, especially if the death occurred in a foreign country.

Fortunately, in some cases, there is other evidence of the death of the deceased tenant on record or otherwise available to be put on record. The most common one is the recital of the person's death in the deed from the survivor or an heir, devisee or fiduciary of the survivor. There also may be a domestic or foreign probate for the deceased tenant that was required because of other assets of the decedent. There may also be inheritance or estate tax releases recorded for the decedent's interest in the property. These forms of evidence, under certain circumstances, should be sufficient to establish the death of the tenant with whom we are concerned but neither the practice standard nor any title standard had accommodated for these alternative forms of evidence of death until the adoption of REBA Title Standard No. 71 at the recent REBA Annual Meeting on November 14, 2005.

### REBA Title Standard No. 71: Evidence of Death of Deceased Joint Owners and Life Tenants

Consistent with 21-year-old Practice Standard No. 10, Title Standard No. 71 begins with providing that:

[1] Practice Standard No. 10 deals with recording of documents in support of several common situations involving the conveyance of property after the death of a title holder, one or more of which every conveyancer is likely to see fairly regularly.

> A title derived from surviving joint owner(s), or from remainderpersons after the death of life tenant(s) or from an executor, administrator, guardian, conservator, heir(s) or devisee(s) of such survivor(s) or remainderperson(s) (collectively, "Survivors"), is not defective by reason of any uncertainty as to the death of the deceased joint owner or life tenant if evidence of the death is established by:
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> (a) a death certificate recorded at the Registry of Deeds in the district where the property is located or a death certificate filed with or noted in the docket of a probate or other proceeding in the Probate Court in the county where the real property is located.

Note that the title standard not only provides for the recording at the Registry of Deeds of a death certificate, but expands upon Practice Standard No. 10 by authorizing reliance on a death certificate filed in a local probate or other proceeding (if there is one) relative to the decedent in question. It also allows for reliance if the filing of the death certificate is noted in the docket of the proceeding even if the actual death certificate cannot be found in the file. This is based on the dual recognition that, generally, no probate since 1987 should be allowed without a certified copy of a death certificate accompanying the petition[2] and that, for certain probate courts (some more notorious than others), it is not uncommon to be unable to locate entire files let alone certain documents that should be in the files.

### Reliance on Documents other than Death Certificates

The next portion of new Title Standard No. 71 provides for reliance on documents which were deemed by the Title Standards Committee, the Board of REBA and the voting membership[3] to be sufficiently reliable evidence of death, either inherently or by passage of time, to provide a suitable substitute for a death certificate. That portion of the title standard provides for reliance upon

> (b) the recording at the Registry of Deeds in the district where the property is located of
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> (1) a certified copy of an allowed petition for a domestic or foreign probate or administration of the decedent's estate, or a certificate of appointment in such matter, which in either case recites the decedent's date of death, provided that recording of such petition in the Registry of Deeds shall not be necessary if such petition is filed in the same county where the property is located; or
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> (2) a Massachusetts Inheritance Tax Lien Release ("L-8") relative to the decedent's interest in the property; or
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> (3) a Massachusetts Certificate of Release of Estate Tax Lien ("M-792") relative to the decedent's interest in the property, provided, however, that the M-792 has been recorded for more than 20 years; or
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> (4) a deed for the real property from such Survivors that contains a recital that the decedent has died, even if no date or place of death is recited, provided, however, that such deed has been recorded for more than 20 years.

As to sub-paragraph (b) (1), reliance upon allowed probate petitions (or the equivalent in other jurisdictions, whatever they may be called) not only if (as with paragraph (a)) a death certificate cannot be found in the file but also if, in the case of a domestic probate prior to 1987 or a foreign probate, there is no death certificate filed or noted in the docket.

Sub-paragraph (b) (2) allows for reliance on the old form L-8 Inheritance Tax Releases from DOR, which, like the modern Estate Tax Release form M-792s, recited a date of death for the decedent. However, as the Inheritance Tax system was abolished as of January 1, 1976, with the transition in Massachusetts to the Estate Tax system, pretty much all L-8s will have been of record for well more than 20 years and most will be of record for more than 30 years. Although there is a residual possibility of an inheritance tax being imposed after January 1, 1976, on a future interest derived from a pre-1976 decedent, it is so rare that it was deemed unnecessary to even address that situation in the title standard.

As for the much more familiar M-792 addressed in sub-paragraph (3), while it also recites the date of death of the decedent, it was not deemed to be sufficiently reliable in and of itself unless of record for a sufficient period of time so as to negate any likelihood of it being used as a fraud device. Of concern in that regard was the discovery upon researching the Massachusetts Estate Tax Instructions booklet and the Estate Tax Regulations[4] as well as contacting the Estate Tax Bureau, that a death certificate does not need to be filed with an Estate Tax Return, although, as a practical matter, many people do file one. Consequently, it was felt that an appreciable period of time should elapse before an M-792 could be relied upon as sufficient evidence of death without more. Consistent with reliance on the recital in a deed, to be discussed next, and the classic statute of limitations for real property actions, 20 years was chosen.

[2] See G.L.c. 192, §1, as amended by St. 1987, c. 99, approved June 1, 1987.

[3] The title standard passed unanimously at the annual meeting.

[4] See 830 CMR 65C.1.1 (5) (b), *et seq*.

It is also quite common to encounter older deeds in a chain of title in which there is a recital of the death of a former tenant by the entirety (probably the most common), joint owner or life tenant. In many instances, the date of death is omitted and it is rare that a place of death is recited. Because Practice Standard No. 10 has been in place for some 21 years now, it has been at least less frequent that we have seen deeds recorded without any other evidence of the death of the decedent, although it does still happen more than it should and, hence, the need for the title standard. Consequently, the majority of the deeds falling into that category were recorded before Practice Standard No. 10 was adopted. Again, consistent with the 20-year statute of limitations involving real estate matters (the common exceptions to such statute of limitations notwithstanding), a deed reciting the former tenant's death, even if without a mention of the date or place of the death, was deemed sufficiently reliable without any further evidence if the deed containing the recital has been of record for more than 20 years. While not specifically stated in the title standard, this assumes, of course, that the chain of title for the subject real estate doesn't reveal any notices of Lis Pendens or other notices of actions or challenges to the honesty or accuracy of the recital.

### Title Standard Comments and Caveats

As with most title standards, there are a couple of clarifying comments and cautionary caveats. The first comment refers to REBA Practice Standard No. 10 to emphasize that, notwithstanding the title standard, it is still the proper practice to record a death certificate for deceased joint owners and life tenants, unless, of course, there is a probate for that person in the same district where the property is located. The second comment clarifies that the term "joint owners" as used in the title standard includes both joint tenants and tenants by the entirety.

As for the caveats, it is always important to keep in mind that it may not be the case that the Land Court or its Registry Districts will follow a REBA title standard. In this case, the issue of filing a death certificate for a deceased joint owner or life tenant of registered land will be governed, at least for the time being, by the more restrictive requirements of Land Court Guideline No. 14 (May 1, 2000). The Land Court guidelines are currently undergoing revision, so it will be necessary to review the final revision when it is promulgated to see if the guideline regarding this issue is loosened up to any degree.

The second caveat points out that which may be obvious but sometimes the obvious needs to be said nonetheless. In this case, the obvious is that, "[w]hile M-792s or L-8s are considered sufficiently reliable evidence of death under the circumstances discussed in [the] title standard, an Estate Tax Affidavit pursuant to G.L.c. 65C, § 14(a) is not." We heartily thank the DOR and the legislature for allowing us to rely on what is usually a quite self-serving affidavit for relieving real estate purchased by a good faith purchaser from the estate tax lien, but such an affidavit is much too easy a tool to commit fraud if we were to rely on it as evidence of death without any of the documents referred to in the title standard to back it up.

### Conclusion

As with many title standards, Title Standard No. 71 may not address all the possible forms of evidence of death you may find of record in examining a title involving a deceased joint owner or life tenant, but it will provide guidance with respect to the forms of evidence you are more likely to find if a death certificate is not recorded or reasonably available to obtain and record. If you do run into a situation not precisely covered by the title standard, as always, please do not hesitate to call one of your Stewart Title underwriters to discuss your situation.

## Stewart Spotlight

**Lynne Murphy Breen**

This month's Stewart Spotlight features Massachusetts Underwriting and Claims Counsel, Lynne Murphy Breen. Lynne joined Stewart Title in August of this year, coming to us from CATIC. Lynne resides, together with her husband, in North Reading, Massachusetts.

Prior to her professional experience in the title insurance industry, she was a partner with the law firm of Murphy & Markella. Lynne is involved with professional organizations such as the Real Estate Bar Association, has served on their technology committee, and is also a frequent lecturer for Massachusetts Continuing Legal Education ("MCLE"), as well as the co-author of "Title Insurance Basics," MCLE 2005.

We are very proud to be able to continue to provide high-level support to our agents through the experience and professionalism of our legal department, and you will find Lynne to be a stellar addition to that team.

## Quarterly Questions and Answers

**– Lynne Murphy Breen**
Underwriting Counsel

**Question:** What if both parties agree that they want to sell or refinance the property while a divorce between them is pending?

**Answer:** A sale or refinance transaction that is agreed to by both parties in writing is permissible pursuant to Supplemental Probate Court Rule 411. Automatic Restraining Order (Rule 411). Please note that Rule 411 prohibits:

(1) Selling, transferring, encumbering, concealing, assigning, removing or in any way disposing of any property, real or personal, belonging to or acquired by either party, except: (a) as required for reasonable expenses of living; (b) in the ordinary and usual course of business; (c) in the ordinary and usual course of investing; (d) for payment of reasonable attorney's fees and costs in connection with the action; (e) **by written agreement of both parties**; or (f) by Order of the Court. (Emphasis added.)

Since a prudent conveyancer would be looking for evidence of such a written agreement, it makes sense to *memorialize* a reference to an *agreement*. In a sale transaction, the agreement can be memorialized within the deed itself. My colleague, Richard Urban, Esq., has drafted language which may be used to memorialize such an agreement. The language is as follows:

In a deed from *both* spouses:

"The above Grantors, being the same parties in a _____ filed with _____County Probate Court, Docket No._____, have mutually agreed with each other to sell the within described property to the within named Grantees pursuant to the terms stated herein."

In a deed from *one* spouse:

If the property is being sold, and the record owner is only one of the divorcing spouses, the agreement needs to be obtained from the non-record owner spouse. The non-record owner spouse may join in the execution of the deed and the deed should contain a statement such as:

"_____and_____ are married. They are the named parties to a _____ proceeding filed with _____County Probate Court as Docket No._____. The execution of this deed also acknowledges the mutual agreement of the parties to sell the property described herein."

If the property is being *refinanced*, *both* parties need to sign the mortgage. A separate written agreement should be signed by the parties as well, and a reference to the agreement can be memorialized in the Exhibit A.

**Question:** During a divorce proceeding, is the tenancy by the entirety severed upon the entry of the *decree nisi*?

**Answer:** No. A *decree nisi* does *not* terminate the relation of husband and wife between parties to the divorce proceeding. *Ross v. Ross*, 385 Mass. 30, 430 N.E.2d 813 (1982). Where the decree has not yet become absolute, the surviving spouse is entitled to statutory rights in the estate of the deceased spouse. See *Rollins v. Gould*, 244 Mass. 270, 137 N.E. 815 (1923) and *Diggs v. Diggs*, 291 Mass. 399, 196 N.E. 858 (1935). It should be noted that the decision in *Diggs* was superseded by statute and rule as stated in *Karp v. Amendola*, 28 Mass.App.Ct. 929, 549 N.E.2d 549 (1990), but only with respect to the question of entering a *decree absolute nunc pro tunc* upon an affirmative petition by one of the parties to do so.

**Question:** As a result of a divorce, can the titleholders still possess title in the property as tenants by the entirety?

**Answer:** A divorce *will* sever a tenancy by the entirety, thereby causing it to become a tenancy in common. *Bernatavicius v. Bernatavicius*, 259 Mass. 486, 156 N.E. 685 (1927). The reasons for this are that (i) a tenancy by the entirety can exist *only* between *married* persons, and (ii) a joint tenancy can be created only with the use of language to that effect. That leaves, in such a case, the only remaining tenancy, namely a tenancy in common.

Moreover, a divorce will not disturb a joint tenancy when created by *appropriate* words, because a joint tenancy is *not* dependent upon the marital status of the parties.

The question, of course, remains whether a deed to married persons as joint tenants would be converted into a tenancy by the entirety. Before 1973 this would have been the case. See *Franz v. Franz*, 308 Mass. 262, 32 N.E.2d 205 (1941), which established that prior to 1885, a deed to husband and wife without the recitation of any tenancy would create a tenancy by the entirety. But since the passage of Chapter 210 of the Acts of 1973 (amending G.L.c. 184, §7), a deed to two married person as joint tenants will create a joint tenancy and *not* a tenancy by the entirety, and any subsequent divorce will not affect the theretofore established joint tenancy.

**Question:** Is there any special considerations relative to the election of tenancy and divorce for same-sex spouses?

**Answer:** No. Pursuant to *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003), the laws of tenancy and divorce are applied exactly the same way to same-sex spouses.

**Question**: What is the effect of a marriage or divorce on a previously executed will?

**Answer:** A marriage (or remarriage) to an individual other than the spouse they divorced, will revoke a previously

executed and existing will unless "it appears from the will" by specific language that the marriage was contemplated. Such language will amend the executed will so as to create and allow a beneficiary in the testator's spouse. Lacking such a provision or language within the then existing will, the now effectively revoked will deems the decedent to have died intestate. See G.L.c. 191, §9. Simply, these events allow for the testator's spouse to either receive a gift by directive of the will itself or a claim under the law as the surviving spouse of a decedent who had died intestate.

In situations involving divorce, a will made under the provisions of the Uniform Statutory Will Act (G.L.c. 191B) is *not* revoked in its entirety as a result of a divorce subsequent to execution. While a divorce or annulment does not revoke a will in its entirety, and grant(s) and gift(s) to the former spouse are deemed void. In such cases, G.L.c. 191, §9 provides that "[p]roperty prevented from passing to the former spouse because of revocation by divorce shall pass as if a former spouse had failed to survive the decedent, and other provisions conferring a power or office on the former spouse shall be interpreted as if the spouse had failed to survive the decedent." The statute notes, however, that if a will is revoked solely by reason of the operation of the statute (as opposed to another act by the testator), the provisions as to the former spouse shall be revived if the testator and the former spouse thereafter remarry each other.

If you would like to submit a question, send an email to me at lmbreen@stewart.com.

## When Did They Change *That* Law? (The Sequel)

**– Gary F. Casaly**
Special Counsel

### Divorce

Continuing on with my discussion in the last newsletter, another law — or really a rule of court — that has changed or been modified in the past few years has to do with conveyances by spouses during the pendency of a divorce. This is Rule 411. Lynne Murphy Breen's article in this issue of *The Massachusetts Focus* goes into detail on this rule, but what I'm focusing on here is the *change* that the rule has made to this area of the law.

Rule 411 puts in place an "automatic restraining order" that prohibits a party in a pending divorce from selling, transferring, encumbering, concealing, assigning, removing or in any way disposing of real or personal property unless both parties have agreed otherwise or the court has modified the restraining order accordingly. There are exceptions that put transfers beyond the scope of the restraining order (e.g., business transfers and those necessary for reasonable expenses for living), but Lynne speaks to those issues in more detail in "Quarterly Questions and Answers" in this newsletter. The point that I want to make is that the rule is not entirely new, but is really a change to an existing tenet previously announced by the court.

It is provided under G.L.c. 109A, §9 that if a conveyance is fraudulent a creditor may, as against any person *except a purchaser for fair consideration without knowledge of the fraud*, have the transaction set aside. Fair consideration is defined as being given when property is received in good faith to secure a debt (e.g., a mortgage) in an amount not disproportionately small compared with the value of the property. G.L.c 109A, §3. (A purchaser who has given less than fair consideration may, nonetheless, retain the property as security provided there is no actual fraudulent intent. See G.L.c. 109A, §9(2).) A mortgagee who falls within the parameters of the statute would be protected by its provisions. One that falls outside its ambit would not (and would not be covered under the policy either because of the creditors' rights exclusion).

In *Yacobian v. Yacobian* 24 Mass.App.Ct. 946, 508 N.E.2d 1389 (1987) the court said that "[a] spouse in circumstances where divorce proceedings are 'imminent' may qualify as a creditor under c. 109A and may complain of conveyances designed to frustrate the right to alimony or assignment of property. * * * Marriage, alone, however, does not make a spouse a potential creditor under G.L.c. 109A, and divorce proceedings do not subject all transfers made during marriage to retrospective scrutiny under that statute." So, even before the adoption of Rule 411, there was some significant impact of a divorce upon one spouse's ability to transfer property. The rule added some more "teeth" to the effect of a transfer and imposed an additional element of a restraining order.

### Subdivisions

Another law that was changed — or a least in court dicta seems to have been changed — has to do with approval of a subdivision plan. The subdivision control law, G.L.c. 41, 81L, defines an applicant who submits a subdivision plan as "an owner" of the property being subdivided, but this has been interpreted to mean all the owners. In *Kuklinska v. Planning Board of Wakefield*, 357 Mass. 123 (1970), the court said that where part of the land shown on a subdivision plan was owned by someone other than the applicant, the planning board's approval of the plan ought to be annulled and rescinded, where the local regulations of that board followed the statutory definition.

This "all ownership" rule raises an issue not only when the applicant does not own all the property shown on the subdivision plan, but also when the *access* to the subdivided property is by way of an easement over another person's land. Where the access route is included within the subdivided property, and therefore the fee title to that land is vested in another, the "all ownership" rule is

broken, and denial of approval of the plan is warranted.[1] This was the situation in *Silva v. Planning Board of Somerset*, 34 Mass.App.Ct. (1993) where a subdivision approval was being challenged by a party who claimed that the subdivision should not have been granted because he owned a portion of the street included within the subdivision by reason of being an abutter to that street. (See G.L.c. 183, § 58.) The lower court had ruled that the abutter's interest in the street did not prevent the approval of the subdivision plan. The Appeals Court reversed (essentially holding that the abutter's interest was sufficient to derail the subdivision), but the court made this interesting comment in its decision:

> Claiming ownership in part of the proposed street shown on the subdivision plan, the plaintiff contends that the board's approval of the subdivision was a nullity because he was not listed as a record owner of the premises on the plan and did not join in the application for approval of the subdivision. The board's regulations required the subdivider to be the owner or his agent (see Somerset planning board Rules and Regulations Governing the Subdivision of Land, II A, definition of "subdivider" [1974]) and the plan to identify the record owners of the site (Somerset planning board regulation, III B 2.b). Noncompliance with similar regulations has been determined to be a justification for invalidating a planning board's approval of a subdivision plan. *Kuklinska v. Planning Bd. of Wakefield*, 357 Mass. 123, 129 (1970). *Batchelder v. Planning Bd. of Yarmouth*, 31 Mass. App. Ct. 104, 106 – 107 (1991). A planning board may, however, waive strict compliance with its regulations, provided such waiver "is in the public interest and not inconsistent with the intent and purpose of the subdivision control law." G. L. c. 41, §81R, as appearing in St. 1953, c. 674, § 7. *Hahn v. Planning Bd. of Stoughton*, 24 Mass. App. Ct. 553, 556 (1987). In *Batchelder*, we held, however, that the planning board could not waive its regulation requiring the record owner to be the applicant for plan approval because the waiver would undermine a means of achieving a principal objective of the Subdivision Control Law — securing from the owner of record a covenant in order to ensure installation of adequate municipal services. *Batchelder v. Planning Bd. of Yarmouth*, 31 Mass. App. Ct. at 108 – 109. However, in this case, unlike the *Batchelder* case, where the abutter challenged the applicant's title to the entire locus, the plaintiff claims an interest only in the proposed street. Even if the plaintiff owns a fee simple interest in the proposed street, at the very least the Cabrals as grantees of land abutting the proposed street would have an easement in the way and the right to make reasonable improvements in the way without the consent of the plaintiff. *Murphy v. Mart Realty of Brockton*, Inc., 348 Mass. 675, 677 – 679 (1965). *LeBlanc v. Board of Appeals of Danvers*, 32 Mass. App. Ct. 760, 764 n.7 (1992). Whether in these circumstances the planning board could waive compliance with this regulation is an issue that we need not address, because there is nothing in the record which indicates that the planning board's approval of the plan was based on a conscious waiver of this regulation or upon its rejection of the plaintiff's claim of an ownership interest in the proposed street. See *Meyer v. Planning Bd. of Westport*, 29 Mass. App. Ct. 167, 169 – 172 (1990).

What the court is saying here is that where the developer "would have an easement in the way and the right to make reasonable improvements in the way without the consent of the [party owning the fee]" he would have control over the road and the planning board could reasonably *waive* its regulation as to the "all ownership" rule in those limited circumstances. This does not mean that the planning board *must* approve the plan; it means that the planning board has the authority to waive the "all ownership" rule, if it is so inclined.[2] The holding in *Silva* seems to have changed — or at least clarified — the law announced in *Batchelder* as to the "all ownership" rule and the ability of the planning board to waive it, at least when the issue involves the question of access over another person's property by way of a valid easement.

### Homesteads

When it comes to the release of a homestead, particularly in connection with a mortgage, the law here changed some time ago, but there seems to be near-universal confusion as to what the law now requires (or does not require). Where

[1] The opposite situation should be distinguished. In *Hahn v. Planning Board of Stoughton*, 24 Mass.App.Ct. 553 (1987) the applicant owned the land shown on the subdivision plan, but there was an easement that traversed the property. When the easement holder challenged the subdivision approval, claiming that the applicant was not the "owner" because of the existing servitude, the court said, "Contrary to the plaintiff's contention, the [applicant] is a proper applicant even if the easement [that traverses the property] is in full force. G.L.c. 41, § 81L defines a subdivision applicant as an 'owner or his agent' * * * The board's regulations define the 'owner' as the individual or individuals 'holding title . . . as shown by the record' in the appropriate registry of deeds. The [applicant] is the record title holder and therefore, may apply for subdivision approval. See and compare *Kuklinska v. Planning Board of Wakefield*, 357 Mass. 123 (1970)."

[2] In *Silva* the court said "we need not address [the question], because there is nothing in the record which indicates that the planning board's approval of the plan was based on a conscious waiver of this regulation . . . ."

there is a homestead the execution of a mortgage "containing a release [of the homestead]" will result in the homestead being subordinated to the mortgage, but kept in place as to the rest of the world. The case of *Atlantic Savings Bank v. Metropolitan Bank and Trust Company*, 9 Mass.App.Ct. 286, 400 N.E.2d 1290 (1980) sheds light on the matter. In *Atlantic Savings Bank*, Mr. and Mrs. McHardy, after having granted a first mortgage to Atlantic Savings Bank, made a joint[3] declaration of homestead on their property in 1976. Thereafter, they granted a mortgage to Metropolitan Bank and Trust Company. Although the second mortgage was executed by both parties, it did not contain a "release" of the homestead, or more accurately it did not contain words that stated that the homestead was being released. After a foreclosure by Atlantic Savings Bank there was a surplus. The question was whether the excess funds generated by the foreclosure sale should be payable to the McHardys, based on the fact that they still held a homestead which had priority over the mortgage of Metropolitan Bank and Trust Company, or whether that bank was entitled to the surplus based on some theory that the homestead had been effectively released with respect to the second mortgage.

When the second mortgage was executed the provisions of the homestead statute were as follows:

> §6. Property which is subject to a mortgage executed before an estate of homestead was acquired therein, or executed afterward and containing a release thereof, shall be subject to an estate of homestead, except as against the mortgage (sic)[4] and those claiming under him, in the same manner as if there were no such mortgage.
>
> §7. No conveyance of property in which an estate of homestead exists, and no release or waiver of such estate, shall convey the part so held and exempted, or defeat the right of the owner or of his wife[5] and children to a homestead therein, unless such conveyance is by a deed signed by the wife, she being competent so to act, or unless such right is released as provided in chapter two hundred and nine; but a deed duly executed without such signature or release shall be valid to pass, according to its terms, any title or interest in the property beyond the estate of homestead.

The McHardys had taken the position in *Atlantic Savings Bank* that the homestead had not been effectively released in the mortgage to Metropolitan Bank & Trust Company because the instrument did not contain words of "release" with respect to the homestead.

The court said this:

> The argument overlooks the features of the mortgage, as well as the provisions of [§7] . . . which defined the term "release" in [§6]. [S]ection [7] expressly provided that the spouse's signature on a deed was sufficient to release her rights [in a homestead]. * * * The word "deed" as used in §7 includes a mortgage. [Citations omitted].
>
> In our opinion, this expedited method for release changed the preexisting case law (relied upon by the defendants) which held, based on outmoded concepts of coverture, that in order to bar a wife's right of homestead not only was the wife required to join with her husband in the conveyance by executing the instrument, but also the conveyance, so executed, must have contained apt words expressly releasing her homestead right.[6]

Although the dispute in the case revolved around the *form* that a release of the right of homestead should take, the decision clearly focused on and required the spouse's signature on the mortgage in order to release that right.

Section 6 of the statute is the same today as it was at the time of the decision in *Atlantic Savings Bank* (except for a minor corrective change). Section 7 now reads as follows:

> An estate of homestead created under section two may be terminated during the lifetime of the owner by either of the following methods:—

[3] Although the court intimated that a joint declaration would result in no homestead being created, it indicated that it was not necessary to decide the issue inasmuch as it concluded that the homestead, if it existed, had been effectively released. In any event, under the statute being construed the wife could not declare a homestead, such right being exclusively held by the husband under the law in effect at the time. Moreover, the question was ultimately answered in a *Dwyer v. Cempellin,* 424 Mass. 26, 673 N.E.2d 863 (1996), wherein the Supreme Judicial Court ruled that the first to sign a joint declaration of homestead would be considered to be the declarant.

[4] This typographical error was corrected by Section 165 of Chapter 557 of the Acts of 1986, which replaced the word "mortgage" with "mortgagee." The court in *Atlantic Savings Bank* interpreted the language as it was obviously intended to read, quoting the section as containing the latter term.

[5] The statute under consideration in *Atlantic Savings Bank* provided that only the husband could declare a homestead and that it was, therefore, necessary for the wife to join in the release. Under today's version of the legislation either spouse — but still only one — can declare a homestead.

[6] The court also noted in this particular case that since the wife had joined in the mortgage in the granting clause "[her] execution of the mortgage, taken together with its covenants (especially the covenants pertaining to seisin and freedom from encumbrances), was sufficient to release her interest in the homestead without the need for specific words of release."

> (1) a deed conveying the property in which an estate of homestead exists, signed by the owner and the owner's spouse, if any, which does not specifically reserve said right of homestead; or by
>
> (2) a release of the estate of homestead, duly signed, sealed and acknowledged by the owner and the owner's spouse, if any, and recorded with the registry of deeds for the county or district in which the property is located.

Although the provisions of the present Section 7 are somewhat different than those in effect at the time of the decision in *Atlantic Savings Bank*, it is clear that the effect is the same — requiring the spouse to join in the mortgage to effectively release the estate of homestead — especially in view of the language in the decision that "the provisions of [§7] . . . define[] the term 'release' as used in [§6]." As in the prior version of Section 7 the word "release" is used — and also appears in Section 6 — so there is no doubt that such a release must satisfy the requirements of *Atlantic Savings Bank*, namely that the signature of both spouses, and not simply the signature or release of the spouse who owns the property, must appear on the instrument.

Although §6 has been in place for nearly 150 years it is rarely cited and some conveyancers ignore it and require an outright release of the homestead under §7, with the subsequent execution of a mortgage followed by a new homestead declaration to address that which §6 already provides for. This course, however, would seem to be fraught with trouble. It essentially eliminates the protection against general creditors that was in place on account of the original homestead[7] and allows the claims of those creditors to flood in and take a priority position, not over the mortgage, but over the householder's interest. Because such a course of action is not necessary in order for the mortgagee to protect itself, its use would seem to subject the party requiring it to liability.

And, although the "spouse's signature alone" rule with regard to the release of a homestead has been law for more than a quarter century, some conveyancers are apparently unaware of this change and feel that the absence of words of release where the spouse has nonetheless signed creates an issue.

[7] Under G.L.c. 188, §1, there is no protection afforded by the homestead with respect to a debt contracted for prior to the acquisition of the homestead. Upon the release of the old homestead all debts then in existence will, by definition, be debts contracted for before the acquisition of the new homestead and will, therefore, have a priority position over the householder's interest.

## Manager's Corner

**– Thomas M. Flynn**
Vice President and
New England Division Manager

### New England Mortgage Company Settles with HUD, FDIC on Kickback Case

The Department of Housing and Urban Development and the Federal Deposit Insurance Corporation announced a $150,000 settlement with one of the largest mortgage companies in New England for RESPA violations. HUD and FDIC found that 1-800-East-West Mortgage Co. solicited and received tickets from closing attorneys, appraisers, and title companies to Boston Red Sox and New England Patriots events as well as music concerts and restaurant gift certificates, in exchange for the referral of business.

East-West agreed to pay $150,000 to the U.S. Treasury, to stop accepting kickbacks from settlement service providers, and to cooperate with the agencies' ongoing investigation of the closing attorneys, appraisers, title companies and other settlement service providers who provided kickbacks to East-West.

### Home Sales Peak in Third Quarter- 2005

Total state existing-home sales set a record in the third quarter of 2005 according to the National Association of Realtors (NAR). NAR's quarterly report on total existing-home sales, which includes single family and condos, shows that the national seasonally adjusted rate was 7.24 million units in the third quarter, up 6.5% from 6.80 million units in the third quarter of 2004.

The Northeast saw a third quarter existing-home sales rate of 1.20 million units, up 6.9% from the previous year. Massachusetts experienced the strongest increase in the region with sales activity 11.2% above a year ago.

### Update on House Bill 904

As I am sure you are all aware, the above referenced House Bill has been proposed and, if passed, would allow non-lawyers to conduct residential and commercial real estate closings. Stewart Title recently hosted a teleconference along with members of The Real Estate Bar Association's (REBA) Residential Conveyancing Committee to alert real estate lawyers and consumers to the threat posed by H 904. We are also planning on sponsoring a seminar relative to this matter in the first quarter of this year, once more detailed information is announced as to the status of this proposed bill.

In a related matter, the Association of New England Title Agents (ANETA) recently opened its doors in Boston; this trade association is aimed at educating its members and advocating for fair legislation.

## "Stewart Summaries"

Seminars focusing on recent changes
in statute law and on new cases

Further information on presentation dates
will be provided soon
and will be available on our website:
http://www.stewartma.com.

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| | | |
|---|---|---|
| **Management** | Thomas M. Flynn - Boston<br>Michael J. Agen, Esq. - Springfield | tflynn@stewart.com<br>magen@stewart.com |
| **Sales** | Esther Grady<br>Debra Abelowitz, Esq.<br>Julie Sutera<br>Nancy Gill<br>Nancy M. Brady - Springfield | egrady@stewart.com<br>dabelowi@stewart.com<br>jsutera@stewart.com<br>ngill@stewart.com<br>nbrady@stewart.com |
| **Legal**<br>(Direct FAX: 617-737-8247) | Ward P. Graham, Esq.<br>Richard Urban, Esq.<br>Gary F. Casaly, Esq.<br>Lynne Murphy Breen, Esq.<br>Marie L. Franco, Esq.<br>Donald Brown | wgraham@stewart.com<br>rurban@stewart.com<br>gcasaly@stewart.com<br>lmbreen@stewart.com<br>mfranco@stewart.com<br>dobrown@stewart.com |
| **Administrative** | Virginia Wynne<br>Jennifer Kohler<br>Joanne Blair<br>Andrew Graham<br>Linda Champigny - Springfield | vwynne@stewart.com<br>jkohler@stewart.com<br>jblair@stewart.com<br>agraham@stewart.com<br>lchampig@stewart.com |