

CHAPTER III

EXECUTION, ACKNOWLEDGMENT AND RECORDING OF CONVEYANCES



STANDARD 3.1

OMISSION OF DATE FROM CONVEYANCE

STANDARD: THE OMISSION OF THE DATE OF EXECUTION OR THE DATE OF ACKNOWLEDGMENT DOES NOT INVALIDATE AN OTHERWISE VALID CONVEYANCE.

Problem: Martha Davis executed a deed describing Blackacre. The deed lacked a date of execution and a date of acknowledgment. Is the deed valid?

Answer: Yes.

Authorities: MCL 565.603 and 565.604. *Munroe v Eastman*, 31 Mich 283 (1875).

STANDARD 3.2

EXECUTION AND DELIVERY OF INSTRUMENT ON LEGAL HOLIDAY OR SUNDAY

STANDARD: AN INSTRUMENT AFFECTING REAL PROPERTY MAY BE VALIDLY EXECUTED OR DELIVERED ON A LEGAL HOLIDAY AND, SINCE JUNE 23, 1974, ON A SUNDAY.

Problem A: On Thanksgiving Day, Martha Davis executed and delivered a land contract describing Blackacre. Is the land contract valid?

Answer: Yes.

Problem B: On Labor Day, Martha Davis executed and delivered a deed describing Blackacre to John Doe. Is the deed valid?

Answer: Yes.

Problem C: Same facts as in Problem B, except that the deed was executed on Sunday, December 8, 1974. Is the deed valid?

Answer: Yes.

Authorities: Problems A and B: MCL 435.101.

Problem C: 1974 P.A. 171, repealing former MCL 435.11, 435.12 and 435.13.

STANDARD 3.3

DEED PURPORTING TO CORRECT PREVIOUS DEED

STANDARD: A GRANTOR WHO HAS CONVEYED REAL PROPERTY BY AN EFFECTIVE, UNAMBIGUOUS INSTRUMENT CANNOT, BY EXECUTING A SUBSEQUENT INSTRUMENT, MAKE A SUBSTANTIAL CHANGE IN THE NAME OF THE GRANTEE, DECREASE THE AREA OF THE REAL PROPERTY OR THE EXTENT OF THE ESTATE GRANTED, IMPOSE A CONDITION OR LIMITATION UPON THE INTEREST GRANTED, OR OTHERWISE DEROGATE FROM THE FIRST CONVEYANCE, EVEN THOUGH THE SUBSEQUENT INSTRUMENT PURPORTS TO CORRECT OR MODIFY THE FORMER.

Problem A: George Davis, a single man, who owned the north half of Section 35, deeded the northeast quarter of Section 35 to Henry Parker. Davis later conveyed the northwest quarter of Section 35 to Parker, by a deed containing a recital that it was executed to correct the erroneous description in the previous deed. Davis then executed a deed of the northeast quarter of Section 35 to William Cox. Did Cox acquire marketable title to the northeast quarter of Section 35?

Answer: No. The later deed from Davis to Parker did not divest Parker of his previously acquired title to the northeast quarter.

Problem B: George Davis deeded Blackacre to Jane Doe and Ruth Roe as tenants in common. Later, Davis deeded Blackacre to Jane Doe and Ruth Roe, “as joint tenants with right of survivorship.” Jane Doe then deeded an undivided one-half interest in Blackacre to Simon Grant. Did Grant acquire marketable title to an undivided one-half interest in Blackacre notwithstanding Davis’s later deed?

Answer: Yes. Jane Doe had acquired an undivided one-half interest through Davis’s first deed.

Authorities: *Stead v Grosfield*, 67 Mich 289, 34 NW 871 (1887) and *Akers v Baril*, 300 Mich 619, 2 NW2d 791 (1942).

Comment A: The Committee recognizes that there are circumstances under which a later “corrective” deed, not inconsistent with the prior instrument and intended to clarify some ambiguity contained in the deed, may be effective.

Comment B: An inconsistent subsequent deed may operate to create a cloud upon the title acquired under a prior deed.

Note: See, Standard 23.1.

STANDARD 3.4

FAILURE TO STATE MARITAL STATUS OF MALE GRANTOR

STANDARD: AN INSTRUMENT OF CONVEYANCE WHICH FAILS TO STATE THE MARITAL STATUS OF A MALE GRANTOR, IF RECORDED FOR AT LEAST 10 YEARS, CONSTITUTES CONSTRUCTIVE NOTICE OF THE CONVEYANCE.

Problem: John Doe conveyed Blackacre by a deed which failed to state his marital status. The deed was recorded in 1990. In 2001, is the deed constructive notice of the conveyance?

Answer: Yes.

Authority: MCL 565.221.

Comment: Although an instrument of conveyance lacking a statement of the marital status of a male grantor is not entitled to be recorded, the recording may constitute constructive notice of the interest conveyed before the expiration of 10 years. MCL 565.604. *Aultman v Pettys*, 59 Mich 482 (1886).

STANDARD 3.5

DEED EXECUTED IN MICHIGAN HAVING FEWER THAN TWO WITNESSES

STANDARD: A DEED EXECUTED IN MICHIGAN HAVING FEWER THAN TWO WITNESSES WAS NOT ENTITLED TO BE RECORDED BEFORE MARCH 4, 2002; HOWEVER, IF RECORDED FOR AT LEAST 10 YEARS, THE DEED WILL CONSTITUTE CONSTRUCTIVE NOTICE OF THE CONVEYANCE. A DEED EXECUTED IN MICHIGAN WITHOUT WITNESSES IS ENTITLED TO BE RECORDED ON OR AFTER MARCH 4, 2002.

Problem A: Blackacre was conveyed by deed executed in Michigan without witnesses and recorded on April 1, 1992. On June 21, 2002, is the deed constructive notice of the conveyance?

Answer: Yes.

Problem B: Same facts as in Problem A, except that the deed was recorded on March 4, 2002. On June 1, 2002, is the deed constructive notice of the conveyance?

Answer: Yes

Authorities: Generally: MCL 565.201(4) and 565.604. *Healey v Worth*, 35 Mich 166 (1846).

Problem A: *Brown v McCormick*, 28 Mich 215 (1873).

Problem B: 2002 P.A. 19, amending MCL 565.201(1); and 2002 P.A. 23, amending MCL 565.8 and 565.47.

Comment A: A deed not witnessed will convey title as between the parties. *Fulton v Priddy*, 123 Mich 298, 82 NW 65 (1900).

Comment B: 2002 P.A. 19 and 2002 P.A. 23, both effective March 4, 2002, eliminated any witnessing requirement for the recording of an instrument affecting Michigan real property. See Standard 3.9 as to instruments executed outside of Michigan.

Note: The Committee expresses no opinion with respect to the effect, if any, of 2002 P.A. 23 on a deed with fewer than two witnesses and recorded less than 10 years before March 4, 2002.

STANDARD 3.6

ABSENCE OF FEDERAL DOCUMENTARY STAMPS FROM DEED EXECUTED BEFORE JANUARY 1, 1968

STANDARD: THE ABSENCE OF FEDERAL DOCUMENTARY STAMPS FROM A DEED EXECUTED BEFORE JANUARY 1, 1968 DOES NOT AFFECT MARKETABILITY OF TITLE OR PREVENT THE DEED FROM BEING ENTITLED TO BE RECORDED.

Problem: Blackacre was conveyed by a deed executed in 1967 which recited the consideration to be \$10,000. No federal documentary stamps were affixed to the deed. Is the deed entitled to be recorded?

Answer: Yes.

Authorities: 26 USC 4361. Treas Reg §§43.4361-1, 43.4361-2 and 43.4361-3.

Comment: No statute or reported case in Michigan has required the affixing of federal documentary stamps for valid delivery or recording, and the attorney general has opined that “the affixing of such stamps is no responsibility of the Register as far as recording is concerned.” OAG 1944-1975, No O-2923, p 151 (December 19, 1944).

The tax imposed by 26 USC 4361, payment of which was evidenced by attaching federal documentary stamps, does not apply on or after January 1, 1968.

STANDARD 3.7

ABSENCE OF MICHIGAN DOCUMENTARY STAMPS ON RECORDED INSTRUMENT

STANDARD: THE VALIDITY AS TO NOTICE OF A RECORDED INSTRUMENT IS NOT AFFECTED BY THE ABSENCE OF DOCUMENTARY STAMPS EVIDENCING PAYMENT OF THE MICHIGAN STATE OR COUNTY TRANSFER TAX OR THE ABSENCE OF A STATEMENT OF THE REASON THE INSTRUMENT IS EXEMPT FROM TRANSFER TAX.

Problem A: A deed stating a consideration of \$5,000 was recorded in 1998. No documentary stamps evidencing payment of the Michigan state or county transfer tax were affixed. Is the recorded deed valid as to notice?

Answer: Yes.

Problem B: A deed stating a consideration of “less than \$100” was recorded in 1998. The deed did not contain a statement as to the basis for exemption from payment of Michigan state or county transfer tax. Is the recorded deed valid as to notice?

Answer: Yes.

Authorities: MCL 207.511 and 207.533.

STANDARD 3.8

APPLICABILITY OF MICHIGAN RECORDING REQUIREMENTS TO CONVEYANCE OR MORTGAGE EXECUTED OR ACKNOWLEDGED OUTSIDE OF MICHIGAN

STANDARD: A CONVEYANCE OR MORTGAGE OF MICHIGAN REAL PROPERTY, ALTHOUGH EXECUTED OR ACKNOWLEDGED OUTSIDE OF MICHIGAN, IS SUBJECT TO ALL MICHIGAN RECORDING REQUIREMENTS EXCEPT THOSE MADE INAPPLICABLE BY LAW.

Problem A: George Davis mortgaged Blackacre, a parcel of real property in Michigan, by a mortgage executed and acknowledged in another state in conformity with the laws of that state. The marital status of George Davis is not stated in the mortgage. Is the mortgage entitled to be recorded?

Answer: No. The statute requiring that the marital status of a male grantor and mortgagor be stated applies to instruments executed or acknowledged both within and outside of Michigan.

Problem B: Martha Davis, describing herself as the survivor of George Davis, deceased, conveyed Blackacre, a parcel of real property in Michigan, by a deed executed and acknowledged in another state in conformity with the laws of that state. No certified copy of the death certificate or other recordable proof of George Davis's death was attached to the deed or previously recorded. Is the deed entitled to be recorded?

Answer: No.

Problem C: George Davis, a single man, conveyed Blackacre, a parcel of real property in Michigan, by a deed executed and acknowledged in another state in conformity with the laws of that state. While Davis's marital status is stated in the deed, the address of the grantee is not stated, the name of the notary public is not typed or printed on the instrument, and the first page of the instrument does not contain at least a two-and-one-half-inch top margin. Is the deed entitled to be recorded?

Answer: Yes. The statute which imposes these and certain other recording requirements is expressly made inapplicable to instruments executed or acknowledged outside of Michigan.

Problem D: Same facts as in Problem C, except that the deed is dated May 1, 1997 and purports to evidence more than one recordable event. Is the deed entitled to be recorded?

Answer: No. The statute prohibiting the register of deeds from recording an instrument executed after April 1, 1997 if the instrument purports to evidence more than one recordable event applies to instruments executed or acknowledged both within and outside of Michigan.

Authorities: Problem A: MCL 565.221.

Problem B: MCL 565.48.

Problem C: MCL 565.201, 565.201a and 565.203.

Problem D: MCL 565.201(3).

Comment A: The Attorney General has opined that the statute requiring the marital status of male grantors and mortgagors to be stated in an instrument of conveyance does not apply to a male grantor or mortgagor acting in a representative capacity whose wife holds no interest in the real property conveyed or mortgaged. OAG 1915, p. 166 (September 22, 1915).

Comment B: MCL 565.202 permits certain recording deficiencies to be cured by the recording of an affidavit complying with that provision concurrently with the recording of the instrument containing the recording deficiencies.

Notes: See Standard 3.4 regarding the absence of a statement of the marital status of a male grantor. See Standard 6.13 for the requirements for recording a conveyance by a survivor. See Standard 3.9 regarding requirements for the witnessing of a deed executed outside Michigan.

STANDARD 3.9

WITNESSING OF DEED EXECUTED OUTSIDE OF MICHIGAN

STANDARD: A DEED EXECUTED OUTSIDE OF MICHIGAN HAVING FEWER THAN TWO WITNESSES WAS ENTITLED TO BE RECORDED IN MICHIGAN BEFORE MARCH 4, 2002 IF THE DEED COMPLIED WITH THE WITNESSING REQUIREMENTS OF THE LAW OF THE STATE, TERRITORY, DISTRICT OR COUNTRY IN WHICH IT WAS EXECUTED. A DEED EXECUTED OUTSIDE OF MICHIGAN WITHOUT WITNESSES IS ENTITLED TO BE RECORDED IN MICHIGAN ON OR AFTER MARCH 4, 2002.

Problem A: Michigan real property was conveyed by a deed executed on July 10, 2001 in a jurisdiction in which witnesses were not required. The deed was not witnessed but otherwise complied with Michigan recording requirements and was presented for recording on March 1, 2002. Was the deed entitled to be recorded?

Answer: Yes.

Problem B: Michigan real property was conveyed by a deed executed on March 4, 2002 in a foreign jurisdiction. At the time the deed was executed and when it was presented for recording in Michigan, the foreign jurisdiction required that signatures on deeds be witnessed. The deed was not witnessed but otherwise complied with Michigan recording requirements and was presented for recording on March 14, 2002. Was the deed entitled to be recorded?

Answer: Yes.

Authorities: MCL 565.8, 565.9, 565.11 and 565.201.

Comment: 2002 P.A. 19 and 2002 P.A. 23, both effective March 4, 2002, eliminated any witnessing requirement for the recording of an instrument affecting Michigan real property, regardless of where it was executed. See Standard 3.5 as to instruments executed in Michigan.

STANDARD 3.10

ACKNOWLEDGMENT OF INSTRUMENT EXECUTED IN UNITED STATES OUTSIDE OF MICHIGAN

STANDARD: A CONVEYANCE OF MICHIGAN REAL PROPERTY, ACKNOWLEDGED BEFORE A PERSON AUTHORIZED BY THE LAW OF ANOTHER STATE, TERRITORY OR DISTRICT OF THE UNITED STATES TO PERFORM THE ACKNOWLEDGMENT, IS RECORDABLE IN MICHIGAN IF A CERTIFICATE OF AUTHORITY OR THE SEAL OF OFFICE OF THE PERSON IS ATTACHED TO THE CONVEYANCE.

Problem A: John Doe conveyed Blackacre, a parcel of real property in Michigan, by a deed acknowledged before a Minnesota county auditor, who had authority to perform the acknowledgment, as evidenced by a certificate of a clerk of a court of record attached to the deed. Is the deed entitled to be recorded?

Answer: Yes.

Problem B: John Doe conveyed Blackacre, a parcel of real property in Michigan, by a deed acknowledged before an Illinois notary public. The notary public's seal of office was affixed to the deed. Is the deed entitled to be recorded?

Answer: Yes.

Authorities: MCL 565.9 and 565.10.

Comment: MCL 565.9 provides that acknowledgments may be performed in another state, territory or district of the United States before "any judge of a court of record, notary public, justice of the peace, master in chancery or other officer appointed by the laws of such state, territory or district to take the acknowledgment of deeds, or before any commissioner appointed by the governor of the state for such purpose." (The office of commissioner of deeds was abolished by 1943 P.A. 15.) MCL 565.10 provides that, except for a commissioner of deeds, the officer performing the acknowledgment is to affix his or her seal of office. If the officer is a justice of the peace, or has no seal, then the

deed may be authenticated by an attached certificate of the clerk or other authorized certifying officer of a court of record of the county or district, or the secretary of state of the state or territory.

Because MCL 565.9 and 565.10 are still in effect, an instrument may be acknowledged according to their terms, notwithstanding the simpler procedures authorized by the Uniform Recognition of Acknowledgments Act. See, Standard 3.11.

MCL 565.252 authorized acknowledgments in any other state, territory or district of the United States by any lawfully authorized person. An acknowledgment performed by a notary public could be authenticated by the notarial seal; an acknowledgment performed by any other officer was required to be authenticated by the certificate of a clerk of a court of record in the county in which the officer resided or performed the acknowledgment or the certificate of the secretary of state of the state or territory. MCL 565.252 was repealed, effective March 20, 1970, by the Uniform Recognition of Acknowledgments Act, MCL 565.270.

The Uniform Recognition of Acknowledgments Act has no validating provisions and does not affect notarial acts performed before its effective date, March 20, 1970. MCL 565.268.

STANDARD 3.11

ACKNOWLEDGMENT OF INSTRUMENT WITHIN UNITED STATES AND OUTSIDE OF MICHIGAN ON OR AFTER MARCH 20, 1970

STANDARD: ON OR AFTER MARCH 20, 1970, THE EFFECTIVE DATE OF THE UNIFORM RECOGNITION OF ACKNOWLEDGMENTS ACT, AN INSTRUMENT AFFECTING MICHIGAN REAL PROPERTY MAY BE ACKNOWLEDGED WITHIN THE UNITED STATES AND OUTSIDE OF MICHIGAN:

- (A) BEFORE A NOTARY PUBLIC AUTHORIZED TO PERFORM NOTARIAL ACTS IN THE PLACE WHERE THE ACKNOWLEDGMENT IS TAKEN, OR A JUDGE, CLERK OR DEPUTY CLERK OF ANY COURT OF RECORD IN SUCH PLACE. IN SUCH A CASE, THE SIGNATURE, TITLE, AND SERIAL NUMBER, IF ANY, OF THE PERSON PERFORMING THE ACKNOWLEDGMENT ARE SUFFICIENT PROOF OF AUTHORITY TO PERFORM THE ACT; OR**

- (B) BEFORE ANY OTHER PERSON AUTHORIZED TO PERFORM NOTARIAL ACTS IN THE PLACE WHERE THE ACKNOWLEDGMENT IS TAKEN. IN SUCH A CASE, THE AUTHORITY OF THE PERSON PERFORMING THE ACKNOWLEDGMENT MUST BE EVIDENCED BY THE CERTIFICATE OF THE CLERK OF A COURT OF RECORD IN THE PLACE WHERE THE ACKNOWLEDGMENT OCCURS AS TO THE OFFICIAL CHARACTER OF THE PERSON PERFORMING THE ACKNOWLEDGMENT AND HIS OR HER AUTHORITY TO DO SO; OR**

- (C) IF PERFORMED FOR A MEMBER OF THE ARMED FORCES, A MERCHANT SEAMAN, A PERSON SERVING WITH OR ACCOMPANYING THE ARMED FORCES OR A DEPENDENT OF THE PERSON, BEFORE A COMMISSIONED OFFICER IN ACTIVE SERVICE WITH THE ARMED FORCES OF THE UNITED STATES OR**

ANY OTHER PERSON AUTHORIZED BY REGULATION OF THE ARMED FORCES TO PERFORM NOTARIAL ACTS. IN SUCH A CASE, THE SIGNATURE, RANK OR TITLE, AND SERIAL NUMBER, IF ANY, OF THE PERSON PERFORMING THE ACKNOWLEDGMENT ARE SUFFICIENT PROOF OF AUTHORITY TO PERFORM THE ACT.

Problem A: Blackacre was conveyed in 1998 by a deed acknowledged before a Florida notary public. No notarial seal or other authentication was attached to the deed. Is the deed entitled to be recorded?

Answer: Yes.

Problem B: Blackacre was conveyed by a deed executed in 2000 and acknowledged before the mayor of Gulfport, Mississippi, who under Mississippi law was authorized to perform acknowledgments. Attached to the deed was a certificate of the clerk of a court of record in Gulfport, Mississippi certifying the official capacity of the mayor and the mayor's authority to perform acknowledgments. Is the deed entitled to be recorded?

Answer: Yes.

Authorities: MCL 565.262 and 565.263.

STANDARD 3.12

ACKNOWLEDGMENT OF INSTRUMENT EXECUTED IN FOREIGN COUNTRY BEFORE MARCH 20, 1970

STANDARD: AN INSTRUMENT AFFECTING MICHIGAN REAL PROPERTY, EXECUTED IN A FOREIGN COUNTRY BEFORE MARCH 20, 1970, IS ENTITLED TO BE RECORDED IN MICHIGAN ONLY IF THE INSTRUMENT WAS ACKNOWLEDGED BEFORE ONE OF THE OFFICERS AUTHORIZED BY MICHIGAN STATUTE TO PERFORM ACKNOWLEDGMENTS AND IF THE AUTHORITY OF THE PERSON PERFORMING THE ACKNOWLEDGMENT IS EVIDENCED IN THE MANNER PRESCRIBED BY THE STATUTE.

Problem: Blackacre was conveyed by a deed executed in 1969 in a foreign country. The deed was acknowledged before an officer authorized by Michigan statute to perform acknowledgments in foreign countries and his or her authority to do so was evidenced in the manner prescribed by the statute. Is the deed entitled to be recorded?

Answer: Yes.

Authorities: MCL 565.11. Also, MCL 565.251a and 565.256 (both repealed, effective March 20, 1970, by 1969 P.A. 57, being MCL 565.270).

Comment: Before March 20, 1970, the effective date of 1969 P.A. 57, the Uniform Recognition of Acknowledgments Act (MCL 565.261 through 565.270), an instrument affecting Michigan real property could be acknowledged in a foreign country only before (a) a notary public, (b) certain specified officers in the United States diplomatic and consular service (MCL 565.11 and 565.256), or (c) with respect to persons serving in or with the armed forces of the United States or civilian employees and their dependents, a commissioned officer in the armed forces (MCL 565.251a; see, Standard 3.14).

Acknowledgments performed by a notary public were required to be authenticated by his or her seal. Those performed by a diplomatic or consular officer could be verified by the officer's certificate (MCL 565.11) or his or her seal (MCL 565.256).

As set forth in the Authorities, MCL 565.251a and 565.256 have been repealed. Because MCL 565.11 is still in effect, an instrument may be acknowledged and authenticated pursuant to that statute, notwithstanding the simplified procedures authorized by the Uniform Recognition of Acknowledgments Act. See, Standard 3.13.

The Uniform Recognition of Acknowledgments Act has no validating provision and does not affect notarial acts performed before its effective date, March 20, 1970. MCL 565.268.

STANDARD 3.13

ACKNOWLEDGMENT OF INSTRUMENT EXECUTED IN FOREIGN COUNTRY ON OR AFTER MARCH 20, 1970

STANDARD: AN INSTRUMENT AFFECTING MICHIGAN REAL PROPERTY, EXECUTED IN A FOREIGN COUNTRY ON OR AFTER MARCH 20, 1970 BEFORE A PERSON AUTHORIZED BY THE LAW OF THE FOREIGN COUNTRY TO PERFORM NOTARIAL ACTS IN THE PLACE WHERE THE ACKNOWLEDGMENT IS PERFORMED, IS ENTITLED TO BE RECORDED IN MICHIGAN IF:

- (A) A FOREIGN SERVICE OFFICER OF THE UNITED STATES RESIDENT IN THE FOREIGN COUNTRY WHERE THE ACKNOWLEDGMENT IS PERFORMED, OR A DIPLOMATIC OR CONSULAR OFFICER OF THE FOREIGN COUNTRY RESIDENT IN THE UNITED STATES, CERTIFIES THAT THE PERSON PERFORMING THE ACKNOWLEDGMENT WAS AUTHORIZED TO DO SO;
- (B) THE OFFICIAL SEAL OF THE PERSON PERFORMING THE ACKNOWLEDGMENT IS AFFIXED TO THE INSTRUMENT; OR
- (C) THE TITLE AND INDICATION OF AUTHORITY TO PERFORM ACKNOWLEDGMENTS APPEARS EITHER IN A DIGEST OF FOREIGN LAW OR IN A LIST CUSTOMARILY USED AS A SOURCE OF THE INFORMATION.

Problem A: Blackacre was conveyed by a deed executed in 1998 and acknowledged in a foreign country before a person authorized to perform notarial acts in the place where the acknowledgment was performed, and whose official seal was affixed to the deed. Is the deed entitled to be recorded?

Answer: Yes.

Problem B: Same facts as in Problem A, except that instead of an official seal there was affixed to the instrument a statement of a consular officer

of the foreign country resident in the United States certifying that the person performing the acknowledgment was authorized to do so. Is the deed entitled to be recorded?

Answer: Yes.

Problem C: Blackacre was conveyed by a deed executed in 1996 and acknowledged in Belfast, Northern Ireland before a Commissioner for Oaths. Martindale-Hubbell International Law Digest (1996), NI-1 Northern Ireland Law Digest, states that “Acknowledgment of any instrument may be made in Northern Ireland before a Commissioner for Oaths.” Is the deed entitled to be recorded?

Answer: Yes.

Authorities: MCL 565.262 and 565.263.

Comment: 1969 P.A. 57, the Uniform Recognition of Acknowledgments Act (MCL 565.261 through 565.270), which became effective March 20, 1970, simplified previously existing requirements as to acknowledgment and authentication of instruments in foreign countries. See, Standard 3.12. Under the Act, acknowledgments may be taken in a foreign country by a notary public authorized to perform notarial acts in the place where the acknowledgment is performed, a judge, clerk or deputy clerk of any court of record in such place, an officer of the United States foreign service, a consular officer or any other person authorized by regulation of the U. S. State Department to perform notarial acts there. In addition, a commissioned officer in active service with the armed forces of the United States or any other person authorized by regulations of the armed forces to perform notarial acts may perform acknowledgments for members of the armed forces, merchant seamen, persons serving with or accompanying the armed forces, and their dependents. MCL 565.262. See, Standard 3.14. With respect to acknowledgments performed by notaries public, judges, clerks, deputy clerks, foreign service officers, consular officers, commissioned officers, and persons authorized by regulation of the U. S. State Department or the armed forces to perform notarial acts, the signature, rank or title, and serial number, if any, of the person are sufficient proof of authority to perform the act. The signature and title are *prima facie* evidence that the person performing the acknowledgment had the designated title and that the signature was genuine. MCL 565.263.

STANDARD 3.14

ACKNOWLEDGMENT OF INSTRUMENT BEFORE COMMISSIONED OFFICER

STANDARD: AN INSTRUMENT AFFECTING MICHIGAN REAL PROPERTY, EXECUTED BY A MEMBER OF THE UNITED STATES ARMED FORCES, A MERCHANT SEAMAN, OR A PERSON SERVING WITH OR ACCOMPANYING THE ARMED FORCES, OR THEIR DEPENDENTS, IS RECORDABLE IN MICHIGAN IF ACKNOWLEDGED OUTSIDE OF MICHIGAN BEFORE A COMMISSIONED OFFICER IN ACTIVE SERVICE WITH THE ARMED FORCES. ON OR AFTER MARCH 20, 1970, THE OFFICER'S SIGNATURE, RANK OR TITLE, AND SERIAL NUMBER, IF ANY, ARE SUFFICIENT PROOF OF THE OFFICER'S AUTHORITY.

Problem: George Davis, a single man and a member of the United States armed forces, conveyed Michigan real property by a deed executed in 1998. The deed was acknowledged in Alabama before a major in the United States Army, whose rank and serial number are set forth in the deed. Is the deed entitled to be recorded?

Answer: Yes.

Authorities: MCL 565.262 and 565.263

Comment: The Uniform Recognition of Acknowledgements Act, (MCL 565.261 through 565.270), authorizes the performing of acknowledgments outside of Michigan by commissioned officers in active service with the armed forces, and by any other person authorized by regulation of the armed forces to do so, for members of the armed forces, merchant seamen, or any other person serving with or accompanying the armed forces, and their dependents. MCL 565.262. The signature, rank or title, and serial number, if any, of the person performing the acknowledgment are sufficient proof of his or her authority to do so, and *prima facie* evidence that he or she was a person with the designated title and that the signature was genuine. MCL 565.263.

The Uniform Recognition of Acknowledgments Act pertains only to acknowledgments performed outside of Michigan. There is no statutory authority for a commissioned officer in the armed forces to perform an acknowledgment in Michigan of an instrument affecting Michigan real property.

STANDARD 3.15

DELAY IN RECORDING DEED

STANDARD: DELAY IN RECORDING A DEED WILL NOT AFFECT THE MARKETABILITY OF THE TITLE ACQUIRED BY THE GRANTEE EXCEPT IF THERE ARE INTERVENING RIGHTS OF A THIRD PARTY.

Problem A: Jane Doe, the owner of Blackacre, conveyed Blackacre to Simon Grant by a deed which was not recorded until 12 years after its execution and acknowledgment. No third party rights are involved. Did Grant acquire marketable title to Blackacre?

Answer: Yes. Delivery is presumed from the recording of the deed. As between the parties, the deed is valid upon delivery without recording.

Problem B: Same facts as in Problem A, except that Doe executed a mortgage of Blackacre six months after executing the deed to Grant. The mortgage was recorded. Did Grant acquire marketable title to Blackacre free of the mortgage?

Answer: No.

Authorities: MCL 600.2109 and 600.2110. MRE 803(14). *Wilt v Culver*, 38 Mich 189 (1878); *Sinclair v Slawson*, 44 Mich 123, 6 NW 207 (1880); *Patrick v Howard*, 47 Mich 40, 10 NW 71 (1881); *Sprunger v Ensley*, 211 Mich 103, 178 NW 714 (1920).

Comment: As between the parties, the presumption of delivery afforded by the recording of the deed may be rebutted by competent evidence. *Clarke v Detroit & Security Trust Co*, 257 Mich 416, 241 NW 217 (1932).

STANDARD 3.16

INSTRUMENT OF CONVEYANCE PURSUANT TO DURABLE POWER OF ATTORNEY

STANDARD: AN INSTRUMENT OF CONVEYANCE, EXECUTED PURSUANT TO A POWER OF ATTORNEY STATING THE INTENT OF THE PRINCIPAL THAT THE AUTHORITY CONFERRED IS EXERCISABLE NOTWITHSTANDING SUBSEQUENT DISABILITY OR INCAPACITY OF THE PRINCIPAL, IS EFFECTIVE NOTWITHSTANDING LATER DISABILITY OR INCAPACITY OF THE PRINCIPAL.

Problem A: John Doe executed a deed to Mary Roe describing Blackacre, pursuant to a power of attorney granted to him by Jane Doe, the owner of Blackacre. The power of attorney was signed by Jane Doe and was recorded. It contained language stating the intent of Jane Doe that the authority given to the attorney in fact was exercisable notwithstanding Jane Doe's later disability or incapacity. At the time the deed was given, Jane Doe was under disability, and both John Doe and Mary Roe were aware of the disability. Did Mary Roe acquire marketable title to Blackacre?

Answer: Yes.

Problem B: Same facts as in Problem A, except that before the execution of the deed, but after the execution of the power of attorney, Jane Doe was determined to be incompetent, and a conservator of her estate was appointed and qualified. Did Mary Roe acquire marketable title to Blackacre?

Answer: Yes. Neither the incompetence of Jane Doe nor the appointment of a conservator for her estate automatically revoked the power of attorney. The conservator, however, had the same power Jane Doe had, if the conservator had not been appointed, to revoke the power of attorney.

Problem C: Same facts as in Problem A, except that the power of attorney did not contain language stating the intent of Jane Doe to confer upon the attorney in fact a power exercisable notwithstanding her later

disability or incapacity. Did Mary Roe acquire marketable title to Blackacre?

Answer: No. However, if John Doe and Mary Roe had acted in good faith under the power of attorney without actual knowledge of the disability or incapacity of Jane Doe, the action would have been binding upon Jane Doe, her heirs, devisees and personal representatives.

Comment: Between December 23, 1976 and June 30, 1979, a power of attorney not affected by disability was known as a durable power of attorney and was governed by MCL 556.151 *et seq.* Effective July 1, 1979, MCL 556.151 *et seq.* was repealed by MCL 700.993, under which the former durable power of attorney became known as a power of attorney not affected by disability. Effective April 1, 2000, MCL 700.993 was repealed by MCL 700.8102 and MCL 700.5501 was enacted, defining a durable power of attorney as a power not affected by the principal's subsequent disability or incapacity. The death of a principal who has executed a power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the principal's death, acts in good faith under the power. The disability or incapacity of a principal who has previously executed a power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the principal's disability or incapacity, acts in good faith under the power. MCL 700.5504.

Authorities: MCL 700.5501, 700.5502 and 700.5504.

STANDARD 3.17

POWER OF ATTORNEY FOR CONVEYANCE OF INTEREST IN REAL PROPERTY STRICTLY CONSTRUED

STANDARD: AN INTEREST IN REAL PROPERTY MAY BE CONVEYED OR ENCUMBERED BY AN INSTRUMENT EXECUTED PURSUANT TO A POWER OF ATTORNEY ONLY IF THE POWER OF ATTORNEY SPECIFICALLY AUTHORIZES THE ATTORNEY IN FACT TO CONVEY OR ENCUMBER THE INTEREST ON BEHALF OF THE PRINCIPAL.

Problem A: John Doe executed a mortgage describing Blackacre and given in favor of Richard Roe. The mortgage included a statement that it was given pursuant to a power of attorney granted to John Doe by Mary Smith, the owner of Blackacre. The power of attorney contained language authorizing John Doe to sell and convey all real property owned by Mary Smith, specifically including Blackacre. The power of attorney did not refer, however, to the mortgaging of real property. Is Blackacre subject to the mortgage executed by John Doe?

Answer: No.

Problem B: John Doe gave a power of attorney to Richard Roe granting him the power to sell and convey all real property owned by John Doe. After execution of the power of attorney, John Doe acquired title to Blackacre. Richard Roe subsequently executed a deed describing Blackacre given in favor of James Smith pursuant to the power of attorney. Did Smith acquire marketable title to Blackacre?

Answer: No. The power of attorney did not grant power to the attorney in fact to sell and convey real property acquired by John Doe after he executed the power of attorney.

Problem C: John Doe gave a power of attorney to Richard Roe, granting him the power to sell and convey all real property owned by John Doe and “to perform all acts necessary to effectuate the sale and conveyance.” John Doe was the owner of Blackacre. Richard Roe negotiated a sale

of Blackacre but could not attend the closing of the sale. Roe gave a power of attorney to James Smith authorizing Smith to execute the deed of Blackacre on behalf of John Doe. Smith executed the deed and it was recorded. Did the deed convey marketable title to Blackacre?

Answer: No. The authority to sell and convey Blackacre given by John Doe to Richard Roe was neither delegable nor assignable. James Smith had no authority to execute a deed of Blackacre.

Authorities: Problem A: *Jeffrey v Hursch*, 49 Mich 31, 12 NW 898 (1882); *Long v City of Monroe*, 265 Mich 425, 251 NW 582 (1933).

Problem B: *Penfold v Warner*, 96 Mich 179, 55 NW 680 (1893).

Problem C: *Menenberg v Carl R. Sams Realty Co*, 337 Mich 143, 59 NW2d 125 (1953).

STANDARD 3.18

UNRECORDED CONVEYANCE VOID AGAINST SUBSEQUENT PURCHASER FOR VALUE AND WITHOUT KNOWLEDGE

STANDARD: A CONVEYANCE OF REAL PROPERTY IS VOID AS AGAINST THE GRANTEE IN A SUBSEQUENT RECORDED CONVEYANCE GIVEN FOR A VALUABLE CONSIDERATION, IF THE SUBSEQUENT GRANTEE HAS NO KNOWLEDGE OF THE PRIOR CONVEYANCE AND THE PRIOR CONVEYANCE IS NOT RECORDED OR IS RECORDED AFTER THE RECORDING OF THE SUBSEQUENT CONVEYANCE.

Problem A: George Davis conveyed Blackacre by deed to Simon Grant in 1990. The deed was not then recorded and Grant did not enter into possession. Later, Davis conveyed Blackacre to Mary Smith for valuable consideration by a deed recorded in 1992. Smith had no knowledge of the deed from Davis to Grant. The deed from Davis to Grant was recorded in 1994. Did Smith acquire marketable title to Blackacre?

Answer: Yes.

Authorities: MCL 565.25 and 565.29. *Attwood v Bearss*, 47 Mich 72, 10 NW 112 (1881); *Michigan National Bank v Morren*, 194 Mich App 407, 487 NW2d 784 (1992); *First of America Bank–West Michigan v Alt*, 848 F Supp 1343 (WD Mich 1993).

Comment: The Michigan Recording Act is a race-notice statute: the first interest-holder of record takes priority unless that person has notice of a prior unrecorded interest. Notice on the part of a subsequent grantee includes both imputed and actual knowledge of a prior unrecorded interest. Imputed knowledge, sometimes called inquiry notice or constructive notice, has been defined as having such knowledge as would cause a reasonable person to make further inquiry as to a prior interest. The subsequent grantee is then presumed to have notice of those facts which would have been discovered if the grantee had exercised ordinary diligence. *Lakeside Associates v Toski Sands*, 131 Mich App 292, 346 NW2d 92 (1983).

