PROOF OF TITLE--MARKETABLE TITLE ACT.[1]

The (*state number*) issue reads:

"Does the plaintiff[2] have marketable record title to (*identify land*)?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, three things:[3]

First, that the plaintiff (and *his* predecessor(s)-in-title) [has] [have] been vested with an estate in (*identify land*) which has been of public record for at least 30 years at the time this action was started. (A "vested interest" is a present ownership that includes

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[1]N.C.G.S. §47B-2. A marketable record title is "free and clear of all rights, estates, interests, claims or charges whatsoever" that are created prior to the 30 year period. N.C.G.S. §47B-2(c). All such adverse claims are deemed to be "null and void." *Id.* There are, however, statutory exceptions to the purging power of the Marketable Title Act. These exceptions are detailed in N.C.G.S. §47B-3. In the event there is a fact issue involving the applicability of one of these exceptions, the jury should be given a separate instruction. The burden of proof as to the applicability of these defenses is on the defendant. *Brothers v. Howard*, 57 N.C. App. 689, 691, 292 S.E.2d 139, 140-41 (1982).

[2]While "plaintiff" is used in the issue, it is just as likely as not that the party interposing the Marketable Title Act in the case will be a defendant. This instruction must be modified accordingly.

[3]*Beam v. Kerlee*, 120 N.C. App. 203, 461 S.E.2d 911 (1995). *See also Kirkman v. Wilson*, 98 N.C. App. 242, 390 S.E.2d 698 (1990), *vac'd on other grounds*, 309 N.C. 309, 401 S.E.2d 359 (1991) (remanding to trial court because appellate court improperly ruled on a merely theoretical issue in an advisory capacity); *Town of Winton v. Scott*, 80 N.C. App. 409, 342 S.E.2d 560 (1986); *Harris v. Walden*, 70 N.C. App. 616, 320 S.E.2d 435 (1984), *rev'd on other grounds*, 314 N.C. 284, 333 S.E.2d 254 (1985); *Heath v. Turner*, 58 N.C. App. 708, 294 S.E.2d 392 (1982) (applying Real Property Marketable Title Act), *rev'd on other grounds*, 309 N.C. 483, 308 S.E.2d 244 (1983); *Brothers, supra*.

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the right to transfer that same ownership to some other person. An "estate" means an ownership interest in real property.)

Second, that the public record shows a title transaction that is at least 30 years old at the time this action was brought through which [the plaintiff] [a predecessor-in-title to the plaintiff] became vested with title to (*identify land*). (A "title transaction" means any transaction affecting title to any interest in real property, including a [warranty deed] [quitclaim deed] [mortgage] [title by will] [title by descent] [tax deed] [trustee's deed] [referee's deed] [commissioner's deed] [guardian's deed] [executor's deed] [administrator's deed] [sheriff's deed] [contract] [lease] [reservation] [judgment] [order of court] [(*state other transaction*)].)[4] (Each link in the chain of conveyances from (*name the alleged first link in the plaintiff's chain*) to the plaintiff must be valid to pass title.

[*Use in connection with deeds*: Members of the jury, to convey valid title, a deed must meet certain requirements. [The parties have agreed] [The Court has already ruled] that many of these requirements are met by (*identify deed at issue*). However, [the parties have not agreed] [the Court has not already ruled] that (*state number of requirements listed below which remain for decision by the jury*) of these requirements [has] [have] been met. Whether [this] [these]

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[4]N.C.G.S. §47B-8(2) (listing definitions).

PROOF OF TITLE--MARKETABLE TITLE ACT. (Continued).

(*state number to be decided*) requirement(s) [is] [are] met by (*identify deed at issue*) is for you to decide. These include whether (*here select as appropriate*):

[the (*identify deed at issue*) names the grantor[5]]

[the (*identify deed at issue*) identifies a then-existing grantee[6]]

[the (*identify deed at issue*) has operative words of conveyance.[7] It is not necessary that the grantor actually use such words as "convey" or "grant" as long as the words used by the grantor show his intent to transfer his interest.[8]]

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[5]*Estis v. Jackson*, 111 N.C. 145, 16 S.E. 7 (1892). *C.f. Yates v. Dixie Ins. Co.*, 173 N.C. 473, 92 S.E. 356 (1917) (determining that where the names of the grantors are absent, but the name of the grantee is properly present, the deed is not invalid if the grantors are otherwise designated, the grantors sign the document, and other certification formalities are met).

[6]*Neal v. Nelson*, 117 N.C. 393, 23 S.E. 428 (1895). *See also Morton v. Thornton*, 259 N.C. 697, 699, 131 S.E.2d 378, 380 (1963); *Campbell v. Everhart*, 139 N.C. 503, 52 S.E. 201 (1905). This statement of the law may require elaboration in certain cases, particularly where the deed is to a dead grantee "or his heirs" or to the "heirs" of a living person. Hetrick and McLaughlin, *Webster's Real Estate Law in North Carolina* (4th Ed) §§10-28, 29. In addition, unborn infants are considered "then-existing" if they are *in esse*.

[7]*New Home Bldg. Supply Co. v. Nations*, 259 N.C. 681, 131 S.E.2d 425 (1963); *Pope v. Burgess*, 230 N.C. 323, 53 S.E.2d 159 (1949).

[8]*New Home Bldg. Supply Co.*, 259 N.C. at 683, 131 S.E.2d at 423. *Waller v. Brown*, 197 N.C. 508, 149 S.E. 687 (1929); *Cobb v. Hines*, 44 N.C. 343 (1853); *Armfield v. Walker*, 27 N.C. 580 (1845).

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[the (*identify deed at issue*) adequately identifies the land conveyed.[9] A description is adequate if it is sufficiently definite to identify the land being conveyed or refers to something by which the land may be identified with certainty.[10] A description is not adequate if it leaves the identity of the land in a state of absolute uncertainty and fails to refer to something by which it might be identified with certainty.[11]]

[the (*identify deed at issue*) was properly signed by the grantor

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[9]A deed seeking to convey an interest in land "is void unless it contains a description of the land sufficient to identify it or refers to something extrinsic by which land may be identified with certainty." *Overton v. Boyce*, 289 N.C. 291, 293, 221 S.E.2d 347, 348 (1976). An adequate description must allow the court to fit the description to the property conveyed by the deed without the aid of parol evidence that adds to, enlarges or changes the description. *Foreman v. Sholl*, 113 N.C. App. 282, 286, 489 S.E.2d 169, 173 (1994). An inadequate description fails to allow the Court to determine that the description is "sufficient to serve as a guide to the ascertainment of the location of the land." *Maurice v. Hatterasman Motel Corp.*, 38 N.C. App. 588, 590, 248 S.E.2d 430, 432 (1978). However, a latent ambiguity does not necessarily void the deed. If the Court determines that the "essential element" of a "description identifying" the land is present but ambiguous, (for example, a description such as "the old Fletcher Homestead" is latently ambiguous), then parol evidence may be admitted to fit the description to the land. *Foreman*, 113 N.C. App. at 286, 489 S.E.2d at 173.

[10]*Overton v. Boyce*, 289 N.C. at 293, 221 S.E.2d at 348.

[11]*Kidd v. Early*, 289 N.C. 343, 353, 222 S.E.2d 392, 400 (1976); *Holloman v. Davis*, 238 N.C. 386, 78 S.E.2d 143 (1953). Parol evidence may be used to establish that the land at issue is the same as the land in the description. N.C.G.S. §8-39 (identifying land with parol evidence).

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(or *his* authorized agent).[12] (A signature may consist of a mark or a symbol made by the grantor with the intent that it constitute a signing of the deed.[13]) (A mark or symbol put on a deed by someone other than the grantor is nonetheless the grantor's signature if *he* adopts it as *his* signature.[14])]

[*Note Well: Use only for deeds executed prior to June 17, 1999:*[15] the (*identify deed*) was properly sealed.[16] (A deed is sealed when the signature of the grantor is accompanied by a mark, impression or words which indicate that he adopts his signature as his seal. The word

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[12]*Devereux v. McMahon*, 108 N.C. 134, 12 S.E. 902 (1891). *See also New Hanover Rent-A-Car, Inc. v. Martinez*, 136 N.C. App. 642, 645, 525 S.E.2d 487, 491 (2000) ("it is not essential that the signatures should be placed at the end of the deed ... where the law requires signing only").

[13]*Sellers v. Sellers*, 98 N.C. 13, 3 S.E. 917 (1887).

[14]*Devereux*, 108 N.C. at 136, 12 S.E. at 903.

[15]**Effective June 17, 1999, the seal requirement for deeds was eliminated. N.C.G.S. §39-6.5.** *See* N.C.G.S. § 47-43.1 (eliminating requirement that powers of attorney empowering the attorney-in-fact to convey real estate be under seal); § 47-18.3 (eliminating attestation and corporate seal requirement for corporate conveyances).

[16]*Williams v. North Carolina State Bd. of Educ.*, 284 N.C. 588, 201 S.E.2d 889 (1974). A recital of the seal in the instrument creates a rebuttable presumption that the seal was affixed to the original deed even though it is absent from the recorded deed. *Id.* Note, however, that there are numerous statutes which "cure" seal deficiencies (e.g., N.C.G.S. §§45-20.1, 47-51, 47-53, 47-53.1, 47-71.1, 47-108.5 and 47-108.11), and no seals were required on deeds during the March 7, 1879 to March 5, 1881 interval.

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"seal" beside (or near) the grantor's name is sufficient.[17])]

[the (*identify deed at issue*) was properly acknowledged by the grantor before an official authorized by law to take such acknowledgments[18] (probated and recorded).[19]]

[the (*identify deed*) was validly delivered[20] to [the grantee] [someone on the grantee's behalf].

[*Use where the plaintiff relies on a presumption of valid delivery*: You may find, though you are not compelled to do so, that a valid delivery has occurred if (*identify deed*) [is in the

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[17]*Williams v. Turner*, 208 N.C. 202, 179 S.E. 806 (1935). *See Mobile Oil Corp. v. Wolfe*, 297 N.C. 36, 252 S.E.2d 809 (1979).

[18]Acknowledgment is not a prerequisite to the validity of a conveyance; however, a proper acknowledgment is a prerequisite to a valid registration. N.C.G.S. §47-1. Registration is necessary to protect the grantee from third party purchases for value and lien creditors. *Bowden v. Bowden*, 264 N.C. 296, 141 S.E.2d 621 (1965). It is also permissible for an attesting witness to appear before an officer authorized to take acknowledgments and to acknowledge under oath that the grantor signed the deed in his presence or acknowledged to him the execution thereof. N.C.G.S. §§47-12; 47-13.

[19]The probate of a deed by the Clerk of Superior Court (prior to October 1, 1967) or the Register of Deeds (after October 1, 1967) is not a prerequisite to the validity of a conveyance. It is, however, a prerequisite to registration, *Woodlief v. Woodlief*, 192 N.C. 634, 135 S.E. 612 (1926), and registration is a prerequisite to protection from the claims of third party purchasers for value and lien creditors. N.C.G.S. §47-18. Note that, as with acknowledgments, there are many curative statutes for deficient or defective probates. *See* N.C.G.S. §§47-47 through §47-108.16.

[20]*Williams*, 284 N.C. at 593, 201 S.E.2d at 892.

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possession of the grantee][21] [has been probated and recorded in the public registry].[22]]

[*Use where the plaintiff relies on proof of grantor's intent to deliver, and a physical transfer*: A valid delivery requires two things.[23] First, the grantor must intend to transfer the deed beyond his possession and beyond his legal control. Second, the grantor must actually physically transfer the deed from his possession with the intent that it shall pass to [the grantee] [someone on the grantee's behalf].[24]]]

[the (*identify deed at issue*) was accepted by the grantee in a legally adequate manner.

[*Use where the plaintiff relies on a presumption of legal acceptance*: You may find, though you are not compelled to do so, that the grantee accepted the deed [if the conveyance was

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[21]Valid delivery may be presumed from the fact the deed is in the possession of the grantee. *Tarlton v. Griggs*, 131 N.C. 216, 42 S.E. 591 (1902). *See also Branch Banking and Trust Co. v. Creasy*, 301 N.C. 44, 54, 269 S.E.2d 117, 123 (1980).

[22]Valid delivery may be presumed from the fact the deed has been duly probated and recorded. *Williams*, 284 N.C. at 592-93, 201 S.E.2d at 892-93.

[23]*Vinson v. Smith*, 259 N.C. 95, 130 S.E.2d 45 (1963); *Jones v. Saunders*, 254 N.C. 644, 119 S.E.2d 789 (1961); *Elliot v. Goss*, 250 N.C. 185, 108 S.E.2d 475 (1959).

[24]Valid delivery may be presumed from the fact the deed is in the possession of the grantee or the fact the deed is recorded. *See Tarlton v. Griggs*, 131 N.C. 216, 221, 42 S.E. 591, 592 (1902); *see also Elliott v. Goss*, 250 N.C. 185, 188, 108 S.E.2d 475, 479 (1959). Both presumptions are rebuttable. *See Ballard v. Ballard*, 230 N.C. 629, 632, 55 S.E.2d 316, 319 (1949).

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beneficial to him[25] (even though the grantee [had no knowledge of the conveyance][26] [was an infant][27] [lacked mental capacity to understand what *he* was receiving][28] [*name other disability*])] [the deed has been probated and recorded in the public registry][29] [the deed is found in the possession of the grantee][30].]

[*Use where the plaintiff relies on proof of actual acceptance*: A grantee's acceptance may be [express] [implied from the circumstances]. [Acceptance is express when, by word or conduct, the grantee assents to the conveyance for his benefit.] [Acceptance is implied where a reasonable person, under the same or similar circumstances, would conclude that the grantee accepted the deed].[31]]]

[(*state other criteria at issue and supported by the evidence*)].]

[*Use in connection with wills*: Members of the jury, to pass valid title, a will must meet certain requirements. The Court has already found that some of these requirements have been met. You must

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[25]*Ballard*, 230 N.C. at 632, 55 S.E.2d at 318.

[26]*Id.*

[27]*Buchanan v. Clark*, 164 N.C. 56, 80 S.E. 424 (1913).

[28]Hetrick and McLaughlin, *Webster's Real Estate Law in North Carolina* (4th Ed), §10-58 at 365, n. 287.

[29]*Frank v. Heiner*, 117 N.C. 79, 23 S.E. 42 (1895).

[30]*Whitman v. Shingleton*, 108 N.C. 193, 12 S.E. 1027 (1891).

[31]See Hetrick and McLaughlin, *Webster's Real Estate Law in North Carolina* (4th Ed) at 366.

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decide, by the greater weight of the evidence, whether the remaining requirements have been met. These include whether (*here select as appropriate*):

[the will is legally sufficient.[32] For a will to be legally sufficient, the plaintiff must prove, by the greater weight of the evidence, (*state number*) things: (*Here read, as appropriate, the elements of* N.C.P.I.--Civil 860.05 (Attested Written Will) or N.C.P.I.--Civil 860.10 (Holographic Will).]

[the testator was competent.[33] For the testator to be legally competent, the plaintiff must prove, by the greater weight of the evidence, (*state number*) things: (*Here read, as appropriate, the elements of* N.C.P.I. 860.15 (Wills--Testamentary Capacity).]

[the will was properly probated and recorded[34]]

[(*state other criteria at issue and supported by the evidence*)].]

[*Use in connection with transfers by inheritance*: Members of the jury, to pass valid title, a transfer by inheritance must meet certain requirements. The Court has already found that some of these requirements have been met. You must decide, by the greater weight of

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[32]For the requirements of a legally sufficient will, see N.C.G.S. §31-3.3 (attested written will), §31-11.6 (self-proving will), and §31-3.4 (holographic will).

[33]Most of the issues that arise with respect to the competency of the testator involve his age. Under N.C.G.S. §31-1, a single person must be eighteen years of age to make a valid will.

[34]N.C.G.S. §31-29.

PROOF OF TITLE--MARKETABLE TITLE ACT. (Continued).

the evidence, whether the remaining requirements have been met. These include whether (*here select as appropriate*):

(*State requirements at issue for transfers by inheritance and supported by the evidence*).]

[*Use in connection with other types of transfers*: Members of the jury, to pass valid title, a (*describe other transfer*) must meet certain requirements. The Court has already found that some of these requirements have been met. You must decide, by the greater weight of the evidence, whether the remaining requirements have been met. These include whether:

(*State requirements at issue for any other method of passing title supported by the evidence.*)[35]]

The (*describe property*) must be included in each link in the chain of title starting with the (*name the alleged first link in the plaintiff's chain*) and ending with the [deed] [will] [transfer by inheritance] [(*describe other conveyance)*] to the plaintiff.[36])

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[35]*E.g.*, title by judgment or decree, by adverse possession or by operation of law (bankruptcy, forfeiture, etc.). If the basis for title is adverse possession, see N.C.P.I.--Civil 820.00 (Adverse Possession -- Holding for Statutory Period), 820.10 (Adverse Possession -- Color of Title) and 820.16 (Adverse Possession by Cotenant Claiming Constructive Ouster).

[36]*West Virginia Pulp & Paper Co. v. Richmond Cedar Works*, 239 N.C. 627, 80 S.E.2d 665 (1954). *See also Taylor v. Johnston*, 289 N.C. 690, 698, 224 S.E.2d 567, 572 (1976).

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And Third, nothing appears in the public record to divest the plaintiff (one of the plaintiff's predecessors-in-title) of that estate in (*identify land*). To be divested, the plaintiff (one of the plaintiff's predecessors) must have been vested with title and subsequently lost title to (*identify land*), whether voluntarily or involuntarily.

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the plaintiff has marketable record title to (*identify land*), then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.