

The 2018 Changes to the Marketable Record Title Act

By Phil Savich

In the last few days of 2018, then governor Rick Snyder signed into law 2018 PA 572,¹ which amended the Marketable Record Title Act (MRTA).² The amendment was an attempt to clarify how interests in real estate, such as private deed restrictions, can be preserved and when they are extinguished. Other troublesome issues in the act, as some commentators have pointed out, were not addressed.³ The Michigan Land Title Association actively supported 2018 PA 572.⁴

Private deed restrictions can range from limiting the use of real estate for residential purposes to forbidding the sale of alcoholic beverages. Restrictions can be viewed as the cold, dead hand of the past attempting to control the present, thwarting the goals of purchasers and governmental zoning and land-use departments, or they can be viewed as a valuable tool in preserving the nature and character of neighborhoods and maintaining property values.

The main impediment to using the act has been its ambiguity in dealing with “general references.” An example of a general reference is a statement in a deed or other document that the transaction is “subject to easements and restrictions of record.” To understand the limitations of the MRTA regarding general references, it is necessary to review the act before its 2018 amendment.

The 1945 act

In 1945, Michigan created what is considered the first true marketable title act—the MRTA.⁵ The MRTA was to be construed so that a person dealing with a record title owner could rely on a title search of a particular length. Toward that end, the MRTA introduced the concept of a so-called 40-year chain of title.

A chain of title is a chronological list of title transactions with respect to a parcel of real estate going back to a United States patent or other authoritative source of title, and then forward to the current owner.⁶ In 1945, a complete title search covered no more than 108 years while today it can be as many as 182 years. Even with computerized indexes, compiling and

At a Glance

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reviewing a complete chain of title can be an expensive and time-consuming endeavor.

After enactment of the MRTA, subject to some exclusions, a title search need only go back to a transaction greater than 40 years old.⁷ If the chain of title is unbroken, the owner has marketable title and owns the land free of interests predating the 40-year search period. Holders of interests predating the 40-year period can preserve their interest by recording a claim of interest at least once every 40 years. MCL 565.101 provides support for this rule:

Any person, that has the legal capacity to own land in this state, that has an unbroken chain of title of record to any interest in land for 20 years for mineral interests and 40 years for other interests, is at the end of the applicable period considered to have a marketable record title to that interest, subject only to claims to that interest and defects of title as are not extinguished or barred by application of this act and subject also to any interests and defects as are inherent in the provisions and limitations contained in the muniments of which the chain of record title is formed[.] (Emphasis added.)

To paraphrase, if a person has a 40-year unbroken chain of title, he or she owns the land free and clear of prior interests unless an interest is exempted from the act or in the person's 40-year chain of title. MCL 565.102(1) defines an “unbroken chain of title” as having a deed to the current owner or series of deeds to the current owner going back over 40 years, with nothing in the record “purporting to divest” the owner of their interest.

If the owner has an unbroken chain of title as defined in MCL 565.102(1), the owner takes title to the property under MCL 565.103(1) according to the following terms:

...free and clear of any and all interests, claims, and charges the existence of which depends in whole or in part on any act, transaction, event, or omission that occurred before the...40-year period...and all such interests, claims, and charges are void and of no effect at law or in equity.

Finally, MCL 565.103 provided a method to enable a person to assure the continuation of restrictions. The need for this is illustrated by this example:

The owner of a fast-food restaurant also owns an adjoining parcel. When the owner sells the adjoining parcel, she puts a restriction in the deed that no fast-food restaurant may be operated on the premises. When her purchaser sells, he does not put any restriction in his deed, since he was not operating a fast-food restaurant and has no reason to include such a restriction. Should 40 years go by, the MRTA would extinguish the restriction. However, the original owner, or a subsequent owner of the land benefited by the restriction, may preserve the restriction by recording a notice to preserve every 40 years under Section 3 of the act. The content of the notice is prescribed by Section 5 of the act.


Real estate ownership, then, is subject to those items stated in the 40-year chain of title and interests preserved by the recording of a claim of interest, unless the interest was otherwise excepted from the MRTA.

The problem with the act: The general reference argument

There is a school of thought that language such as “subject to easements and restrictions of record,” when expressed in a deed within the 40-year period, incorporates by reference restrictions and other matters expressed in deeds outside the 40-year period. Commentators have argued that this school of thought is contrary to the intent and spirit of the MRTA.⁸ Nevertheless, that school of thought is recognized, though not approved, in Comment B to Land Title Standard 1.6: “The Committee expresses no opinion as to whether a general reference, such as ‘restrictions of record’ or ‘restrictions and easements of record, if any’ is effective to preserve the interests.”⁹ If such an incorporation by reference exists, it would make the MRTA worthless, because nearly all deeds recite that the grant is “subject to easements and restrictions of record.” No restrictions would ever expire, except fortuitously. There are two sources for the general reference theory.

The muniment theory

MCL 565.101 provides that when marketable title is established, the owner takes title, subject only to items excepted

A photograph of a white signpost with a red-bordered sign that reads "HOUSE FOR SALE" in red capital letters. The signpost is in the foreground, and a house is visible in the background, slightly out of focus. The background is bright and sunny.

from the act and further subject to “*interests and defects as are inherent in the provisions and limitations contained in the muniments of which the chain of record title is formed and that are recorded within...the 40-year period...*” (Emphasis added.) The muniments are the deeds or other title documents in the chain of title. A restriction created within the 40-year period would continue to be effective against the current owner. But would a general reference to “restrictions of record” serve to republish or incorporate by reference restrictions predating the 40-year period? The language of the MRTA says no.

The MRTA has no language allowing a deed to incorporate a prior document by reference. It does, however, have language forbidding incorporation by reference. A current owner is only subject to those interests inherent in the chain of title predating the 40-year period. If marketable title exists, MCL 565.103(1) voids “any and all interests, claims and charges *the existence of which depends in whole or in part on any act, transaction, event, or omission*” predating the 40-year period (emphasis added). MCL 565.106 goes further in stating the legislative purpose of the act is to extinguish all claims that “*arise[] out of or depend[]*” on something predating the 40-year period (emphasis added).¹⁰ Thus, the act extinguishes interests outside of the 40-year period as well as interests within the 40-year period that rely on a document outside that period.

The divestment theory

The divestment theory is based on restrictions constituting a divestment, so that the owner never has marketable title. To have marketable title, the owner’s unbroken chain of title must extend back at least 40 years. To have an unbroken chain of title, there must be no instrument in the chain that “purports to divest” the owner of an interest within those 40 years.¹¹ Neither “purport” nor “divest” are defined in the MRTA, nor are they explained in court decisions. A divestment could be something that entirely negates the ownership of the current owner, or it could mean that one or more of the “bundle of sticks” often used to describe real estate ownership are being denied to the owner.

A restriction within the 40-year period would apply to the owner as both a muniment of title and a divestment. But could a general reference to “easements and restrictions of record” be viewed as language that *purports* to divest the owner of an interest? The dictionary definition of “purport” (to present, especially deliberately, the appearance of being; profess or claim, often falsely)¹² is not particularly helpful. But, if the inclusion of the phrase “subject to easements and restrictions of record” contained in a document within the 40-year period “purports to divest” the owner, then the restrictions outside the 40-year period apply. The owner would not have marketable title and the language in sections 3 and 6, which void interests that depend on or arise out of instruments predating

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the 40-year period, would not apply because that language is applicable only if there is marketable title.

The 2018 amendment

The 2018 amendment to the MRTA was intended to address the divestment theory. The amendment accepts the notion that an interest within the 40-year period can incorporate a divestment by reference. However, for an incorporation by reference to be valid and constitute a divestment within the 40-year period, the document within the 40-year period must refer to the document predating that period with the specific recording information of that document. After the 2018 amendment, a Subsection 2 was added to Section 2 of the MRTA (which defines an unbroken chain of title as having no divestment):

- (2) For purposes of this section, except as to mineral interests,¹³ a conveyance or other title transaction in the chain of title purports to divest an interest in the property *only if it creates the divestment or if it specifically refers by liber and page or other county-assigned unique identifying number to a previously recorded conveyance or other title transaction that created the divestment.*¹⁴ (Emphasis added.)

To illustrate the effect of the amendment on a chain of title:

1960 deed from A to B. The deed contains a residential restriction.

1970 deed from B to C. The deed recites that it is subject to restrictions and further recites the book and page where the deed from A to B is recorded.

2000 deed from C to D. No recitals.

2015 deed from D to E. No recitals.

The amendment allows the incorporation of a divestment by reference in the 1970 deed and gives the title examiner the exact location of the divesting document. A complete title search is unnecessary. On the other hand, if the 1970 deed from B to C had stated “subject to restrictions of record” without referring to the recording information of the 1960 deed, the 1970 deed would be the end of the 40-year search. E would have marketable title and take his or her interest free of the residential restriction in the 1960 deed.

2018 PA 572 also changed the information needed to record a notice to preserve an interest under Sections 3 and 5 of the MRTA. A notice to preserve (which must be recorded at least every 40 years to preserve an interest), if based on a recorded instrument, must state the recording information for that prior instrument. Failure to do so “renders the recording ineffective and the claim unrecorded.”¹⁵ A two-year grace period was created to give the owners of interests in property time to comply with the recording information requirement. The grace period expires March 29, 2021.¹⁶

Conclusion

2018 PA 572 was a limited amendment for a limited purpose. It does not address all the problems with the MRTA. It did not address condominiums, which did not exist at the time the MRTA was originally passed in the legislature. It did not address the proper claimant for the purpose of recording preservation notices when there is no subdivision association. It did not address whether preservation notices are even within a parcel's regular chain of title. All these issues (and more) existed before enactment of 2018 PA 572. Their resolution will have to await stakeholders bringing their concerns to the legislature. ■

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ENDNOTES

1. Senate Legislative Analysis, SB 671 (February 4, 2019) available at <<https://www.legislature.mi.gov/documents/2017-2018/billanalysis/Senate/pdf/2017-SFA-0671-N.pdf>> [<https://perma.cc/Y2U4-GYZ5>]. All websites cited in this article were accessed December 18, 2019.
2. 1945 PA 200 and its statutory provisions, MCL 565.101 *et seq.*
3. Bartley, *Public Act 572 Amends Marketable Record Title Act Creating a Clash of Titans with Michigan Recording Act*, 46 Mich Real Prop L Rev 8 (2019).
4. Hirzel, *Amendment to the Marketable Record Title Act Puts Michigan Restrictive Covenants at Risk*, Mich Community Ass'n Law Blog (January 4, 2019) <<https://micondolaw.com/2019/01/04/amendment-to-the-marketable-record-title-act-puts-michigan-restrictive-covenants-at-risk/>> [<https://perma.cc/3H7P-RHNC>].
5. Barnett, *Marketable Title Acts—Panacea or Pandemonium*, 53 Cornell L Rev 45, 47 (1967), available at <<http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3624&context=clr>> [<https://perma.cc/ZQB6-F9GZ>].
6. See Cameron, *Michigan Real Property Law (3rd Ed)* (Ann Arbor: ICLE, 2005), § 11.29, p 404.
7. In reality, a search might have to go back 41 or 50 years to find a deed that precedes the 40-year period. For the sake of simplicity, this article refers to the look-back period as the “40-year period.”
8. Stone Jr. & Moseng, *The 40-Year Marketable Title Act: Restrictions of Record Redux*, 19 Mich Real Prop L Rev 17 (1992), available at <<http://higherlogicdownload.s3.amazonaws.com/MICHBAR/a3e3ec65-50c1-474fa532-30197d2d7171/UploadedImages/pdf/newsletter/Vol.19No.1Spring1992.pdf>> [<https://perma.cc/D7M3-46HW>].
9. *Michigan Land Title Standards (6th Ed)* (Lansing: SBM, 2018), § 1.6, available at <<https://higherlogicdownload.s3.amazonaws.com/MICHBAR/44611bbd-6711-42cd-b769-2e5d4860ad2a/UploadedImages/pdf/LTS.pdf>> [<https://perma.cc/XU42-YVUV>].
10. MCL 565.102(1)
11. *Id.*
12. “purport,” Dictionary.com (2012) <www.dictionary.com/browse/purport?s=https://www.dictionary.com/browse/purport?s=t>
13. Mineral interests were excepted from Subsection 2(2) of 2018 PA 572 and the language added to Subsection 5(1) due to mineral industry concerns.
14. MCL 565.102(2).
15. MCL 565.105(1).
16. MCL 565.103(1). See also *Texaco, Inc v Short*, 454 US 516; 102 S Ct 781; 70 L Ed 2d 738 (1982) (two-year grace period to record preservation notices under the Indiana Dormant Minerals Act).