Real Estate Law Section

Marketable Record Title: A Deed Which Conveys Only the Grantor's 'Right, Title and Interest' Can Be a 'Root of Title'

By Kraettli Q. Epperson

Some title examiners are suggesting that it is the law in Oklahoma that: if a deed expressly states that it is conveying the "right, title and interest" of the grantor, then such deed cannot serve as a "root of title" (sometimes referred to herein as the "root") under the Marketable Record Title Act (MRTA or the act) (the "non-root position").[1] If this non-root position prevails, then the MRTA would be rendered essentially useless, because — *by statute* — *all* statutory form quit claim deeds and statutory form warranty deeds (sometimes referred to herein as "statutory deeds") only convey the "right, title and interest" of the grantor regardless of whether such limiting language is added to the statutory form deed language.[2] Put another way, since most "links" in any record "chain of title" consist of such statutory deeds, if this non-root position prevails, none of these "links" will be treated as the root for anyone's chain of title.

PURPOSE OF THE MRTA

The MRTA has been an incredibly strong tool for over 50 years in Oklahoma, since its adoption in 1963, because it extinguishes all real property claims of interest — both valid and invalid — arising before a conveyance (i.e., deed or decree) known as the root, and this act confers marketable record title on the grantee in such root (and its assignees). The MRTA makes titles safe and easily transferrable, by eliminating not only stray claims, but also originally valid, but old and unused, claims of interest.[3] Such ancient claims are extinguished under the act when the local land records show no activity by the "pre-root" interest claimant asserting an ownership interest, within the 30-year-old period subsequent to the root.[4]

As stated by the Oklahoma Supreme Court in a 1982 case: "*Legal effect is, in some instances, accorded by the Act [MRTA] to the recording of void instruments. This is consistent with the* ***statute's objectives of limiting the necessity of title investigation to records which post-date the root of title and of facilitating land title transactions.***"[5]

Such act creates valid marketable record title automatically, without the intervention of a court; this produces the beneficial effect of promoting the certainty of title while eliminating the expense of litigation and the delay of real estate closings due to requiring curative lawsuits (e.g., probates and quiet title actions).[6] As stated in the most recent 1990 version of the Prefactory Note in the Uniform Laws Commission discussion of the Model Marketable Title Act:

> *The basic idea of the Marketable Title Act is to codify the venerable New England tradition of conducting title searches back not to the original creation of title, but for a reasonable period only. The Model Act is designed to assure a title searcher who has found a chain of title starting with a document at least 30 years old that he need search no further back in the record.*

The period of time established under the act to review the land records under both the Model Marketable Title Act and the Oklahoma version was initially 40 years and was then shortened to 30 years.[7]

This cleansing action, which eliminates ancient "unused" interests, fosters the public policy of maximizing the productivity of land by implementing the axiom of "use it or lose it." This policy is also reflected in the concept of title by prescription (i.e., adverse possession).[8]

ROOT OF TITLE

Under the MRTA, the instrument known as the "root of title" (the root) is described as:

> *(e)* ***"Root of title" means that conveyance or other title transaction in the chain of title*** *of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date thirty (30) years prior to the time when marketability is being determined. The effective date of the "root of title" is the date on which it is recorded.*
>
> *(f) "Title transaction" means any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, mineral deed, lease or reservation, or by trustee's, referee's, guardian's, executor's, administrator's, master in chancery's, sheriff's or marshal's deed, or decree of any court, as well as* ***warranty deed, quitclaim deed,*** *or mortgage.*[9]

It should be noted that this list of "title transactions" which can constitute the root, includes a *"warranty deed, [and] quitclaim deed."* Absent other guidance, this *"warranty deed, [and] quitclaim deed"* presumably means the statutory form warranty deed and statutory form quit claim deed. As noted above, the statutory form warranty deed "shall convey to the grantee, his heirs or assigns, **the whole interest of the grantor** in the premises described," and the statutory form quit claim deed "shall convey all **the right, title and interest of the maker** thereof in and to the premises therein described."[10]

THE NON-ROOT POSITION

There is an ongoing discussion among title examiners in Oklahoma as to whether the addition of the words: "right, title and interest" to the granting language of a quit claim deed or warranty deed changes the fundamental nature of the deed so that it cannot operate as a root for the lands being described.

The reasons the non-root position should be rejected are: 1) the *Reed* case, on which it is based, is not instructive or dispositive, and 2) it would undermine the entire system of marketable record title established by the Legislature through its adoption of the MRTA in 1963 and implemented by title examiners continuously since then.

The *Reed* Case

This non-root position is based principally on the holding of a 1945 Oklahoma Supreme Court case which dealt with a dispute between a grantor and a grantee in a warranty deed. The dispute concerned what portion of the lands described in a warranty deed are covered by the warranty language in the deed, when the granting clause is preceded by language limiting such conveyance to the "right, title and interest" of the grantor.[11]

As stated in the syllabus by the *Reed* court:

> ¶0 1. COVENANTS - *Covenant of warranty where granting clause of deed contained words "all their right, title and interest in and to" preceding description of property.* In the granting clause of a deed the words, "all their right, title and interest in and to," preceding the description of the real property, limits the grant to the present interest of the grantor, and the covenant of warranty refers only to the right, title and interest of the grantor in the premises at the time of the conveyance. *Kimbro v. Harper*, 113 Okla. 46, 238 P. 840, is overruled in so far as it conflicts herewith.

The *Reed* holding should not have any impact on the interpretation of the MRTA because its facts and argument do not affect the implementation of the MRTA, for the following reasons:

1. The *Reed* case turned on a) the actual knowledge of the grantee of the defect in title, b) the record title reflecting such defect, and c) the intent of the two parties. The decision was not really based on the addition of the "right, title and interest" language to the warranty deed. The *Reed* court explains its rationale as follows:

> *¶8 The plaintiff contends that grantors at the time held title to 23/24ths undivided interest in the land described; that the words, 'all their right, title and interest in and to', preceding the legal description of the land conveyed, were qualifying words, which expressly limited the grant to the interest in the land then held by the grantors. The defendant contends that such words do not cut down the interest conveyed to any limited amount, but warrants the*

title to the entire interest in the land covered by the legal description.

¶9 The contention of the defendant is without merit where ***the record shows that the grantor did not have title to the entire interest in the land, and the grantee knew it, and it was not the intention of the parties that the deed should convey more than the grantor had in the land.*** AND

2. There was no discussion of the MRTA in the 1945 *Reed* case, because the MRTA was not even adopted until 1963. Under the MRTA, the nature of marketable record ownership of land is fundamentally changed to be based on a limited 30-year review of record title, instead of a review all the way back to the issuance of the patent from the sovereign. This new procedure for determining the true owners of real property involves extinguishing all pre-root interests and vesting superior title to the holder of title under the root and his/her assigns, against all claimants. This is without regard to whether such pre-root claims would otherwise be valid and senior. In other words, due to the new effect of the MRTA, contrary to the holding in *Reed*, the grantor in the root can *"convey more than the grantor had in the land."*

Even a void instrument (i.e., a void tax deed) which — by its nature — makes no representation of ownership of the whole interest, can be a valid root of title and create marketable record title.[12]

THE UNINTENTED NEGATIVE CONSEQUENCES OF THE NON-ROOT POSITION

If the impact of the non-root position was applied to only those deeds with such "right, title and interest" language **added** to the granting clause, the impact would be limited to excluding such deeds — which are probably few in number — from consideration as a root. Examiners would have to find a root instrument — at least 30 years old — which did not contain such a limitation. Subsequent post-root conveyances, which comprise the required 30-year unbroken and unchallenged chain, could contain such a restriction, since the holder of the title under the unrestricted root instrument would be treated as claiming and conveying a full non-limited interest, and the subsequent grantors would be passing such interest forward.[13]

However, because a statutory form quit claim deed conveys only "all the right, title and interest of the maker," and a statutory form warranty deed only conveys "the whole interest of the grantor" — regardless of whether or not someone adds to the statutory deed form the language limiting its grant to the right, title and interest of the grantor — if such non-root position prevails, then not only will the possibility of a deed being a root be denied to those expressly limited deeds, but the potential to be a root **will also be denied to any statutory form deed.**[14]

Such a negative result would be contrary to both 1) the presumption that all legislative enactments are to be interpreted in a way so as to carry out their stated purpose, and are not treated as a nullity,[15] and 2) the act's stated intent to extinguish old claims.[16]

If the non-root position prevails, this would force a title examination to extend beyond the legislatively-mandated 30-year period, to look for a "conveyance or other title transaction" which is neither an expressly limited deed nor a statutory form deed. Presumably, the only instruments which then could be considered as a possible root would be court proceedings, such as probate and quiet title decrees. This fails to add any benefit to the title examination process because such decrees are already deemed uncontestable after 10 years under the Simplification of Land Titles Act.[17]

CONCLUSION

In the face of 1) the problems identified above with relying on the *Reed* case, 2) the express language of the MRTA, 3) the inherent statutorily-imposed limitation on all statutory form deeds to conveying the "right, title and interest" of the grantor, and 4) the disastrous retrograding impact on the title examination process, the non-root position must be rejected.

1. 16 O.S. §§71-78.

2. 16 O.S. §18: "A quitclaim deed, made in substantial compliance with the provisions of this chapter, shall convey all **the right, title and interest of the maker** thereof in and to the premises therein described."; 16 O.S. §19: "A warranty deed made in substantial compliance with the provisions of this chapter, shall convey to the grantee, his heirs or assigns, **the whole interest of the grantor** in the premises described...".

3. 16 O.S. §73: "*...All such interests, claims or charges, however denominated, whether legal or equitable, present or future, whether such interests, claims or charges are asserted by a person sui juris or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.*

4. 16 O.S. §71: *Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for thirty (30) years or more, shall be deemed to have a marketable record title to such interest as defined in Section 78 of this title, subject only to the matters stated in Section 72 of this title. ...*"

5. *Mobbs v. City of Lehigh*, 1982 OK 149, ¶17.

6. *The Oklahoma Marketable Record Title Act, Tulsa Law Journal (Vol. 9, No. 1, 1973, pg. 74) See Bennett v. Whitehouse*, 690 F. Supp. 955, 962 (U.S.

Dist. Ct. W. Dist. OK. 1988). *Also see Anderson v. Pickering*, 1975 OK CIV APP 42, ¶16. And *see "Anderson v. Pickering and the Marketable Record Title Act*," by H. Henley Blair and Henry Rheinberger 51 *OBJ* 2517 (1980).

7. 16 O.S.§71 (Session Laws 1970, c. 92, §1, eff. July 1, 1972).

8. 60 O.S.§333, and 12 O.S.§93(4).

9. 16 O.S.§78.

10. 16 O.S. §19; 16 O.S. §18; real estate attorneys typically refer to the statutory "quit claim deed" as a "quit claim deed," but they commonly refer to the statutory "warranty deed" as a "**general** warranty deed" to distinguish it from a "**special** warranty deed. A "**special** warranty deed" gives all of the usual present and future warranties found in a **general** warranty deed (i.e., 16 O.S.§19), except that, if such defects or encumbrances arise **before** the grantor/warrantor came into title, they would not be covered. *Whayne v. McBirney* 1945 OK 42, ¶¶0, 14. *See* the Oklahoma Real Estate Commission's standard form UNIFORM CONTRACT OF SALE OF REAL ESTATE: RESIDENTIAL SALE (11-2013) which provides: "Seller agrees to sell and convey by **General** Warranty Deed, and Buyer agrees to accept such deed...".

11. *Reed v. Whitney*, 1945 OK 354

12. *Mobbs v. City of Lehigh*, 1982 OK 149, see ¶1, 15, 16, and ¶17.

13. 16 O.S.§29; the "shelter rule" is explained in *Knowles v. Freeman*, 1982 OK 89, ¶18 and 22.

14. 16 O.S. §§18 & 19; and 16 O.S.§§40 and 41.

15. *Curtis v. Board of Educ. of Sayre Public Schools*, 1995 OK 119, ¶9.

16. 16 O.S.§73.

17. 16 O.S.§61-63, 66.

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of our former partner and colleague

WILLIAM J. HOLLOWAY, JR.

and his distinguished career serving
the cause of justice as the longest sitting judge
on the U.S. Tenth Circuit Court of Appeals

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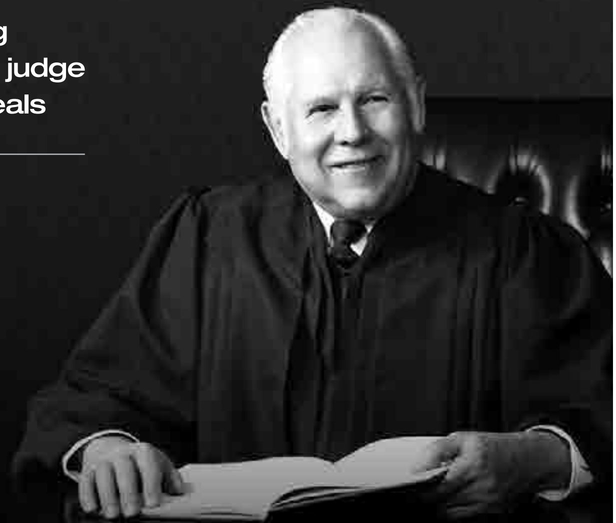

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