The Oklahoma Marketable Record Title Act: An Argument That This 30-Year Curative Act Can Extinguish Co-Tenancies

By Kraettli Q. Epperson

Oklahoma has an extremely powerful title curative tool — the 30-year Marketable Record Title Act (MRTA or the act).[1] To understand both the purpose and the operation of the MRTA, a title examiner must first realize that any person who desires to give the world notice of their claim of interest to a tract of real property situated in Oklahoma must record the conveyance to them in the local county land records.[2] After this initial recording, if a third party records a conveyance, such as a deed, purporting to convey to some other person the real property interest held by the initial grantee, then the act requires the initial grantee to record some additional conveyance (such as a deed, mortgage, probate decree or statutory notice of claim) within 30 years of the recording of the conveyance by the third party which succeeds his own initially recorded conveyance, or he will lose such initially recorded interest to the subsequent claimant.[3] Consequently, the MRTA could also be known as the Re-recording Act.

While Oklahoma title examiners regularly rely upon the curative aspects of the MRTA, they are divided on whether or not the MRTA is intended to be used to extinguish the interests of a co-tenant whose claim arises before the root of title and which is therefore subject to being extinguished after 30 years by the root instrument. Co-tenancies comprise tenancies in common, joint tenancies and tenancies by the entirety.[4] For instance, if a deceased husband devises real property equally to his wife and his two children, and, thereafter, the wife deeds the entire interest to one of her two children and records the deed, does such over conveyance ripen into marketable title in the grantee for the entire interest after 30 years (absent a recording by the other child)?

During recent discussions of this issue, both sides have looked for Oklahoma cases concerning the application of the MRTA to co-tenancies. While there are many reported cases on the relations between co-tenants, such as the inability of proving adverse possession in the absence of an action amounting to an ouster, there appears to be no Oklahoma appellate

case ruling directly on the application of the MRTA to co-tenancies. Apparently, until there is an Oklahoma Supreme Court decision on point, this issue will continue to generate disagreement. This article is intended to put forth an argument supporting the use of the MRTA in this instance.

A usual motto for beginning the analysis of almost any legal issue is "read the statute." It is often true that we think we know what the statute or constitutional provision says, but our recollection is often distorted by wishful thinking compounded by inaccurate memories, and, consequently, such memories are often faulty. A review of the current issue in light of the purpose of the act and its specific provisions should make the answer to this question about co-tenancies rise to the surface of the sometimes murky lake of title examination.

The short answer presented by this author in this article is: "of course co-tenancies are extinguished," or, put another way, "why not?" since neither a co-tenancy interest nor a co-tenant is expressly excluded from the broad coverage of the act.

This conclusion results from a review of a) the exhaustive list of the types of interests that are extinguished, including legal or equitable, present or future, and the categories of interest holders who are affected, including "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,"[5] and b) the limited list of the interests and their holders who are expressly excepted from such extinguishment.[6]

As will be explored further below, title examiners need to constantly remind themselves they are looking for marketable *record* title and that rights of parties in possession are not evidenced on the record (unless and until such claimant files some claim or notice of a lawsuit on the record). Such possessory claims are expressly outside the effect of the MRTA and are consequently outside the scope of the examiner's opinion.[7]

LEGISLATIVE INTENT

To fully explore this co-tenancy question, it is helpful to be aware of the reason given by the Oklahoma Legislature for the adoption of the MRTA.

Section 80 of the MRTA states:

> This act shall be *liberally construed* to effect the *legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title as described in Section 1 of this act,* subject only to such limitations as appear in Section 2 of this act. [Note: Section 2 is 16 O.S. §72, which is discussed below.] (emphasis added)

Also, as explained in one Florida Court of Appeals case:

> There has been growing recognition that a worthy and important public purpose is the s*implification of the land title examination and enhancement of the marketability of land titles*. Ever-lengthening chains of title have threatened to make the system of determining land ownership break down from its own weight, with increasing delay, expensive quiet title suits and, more importantly, the uncertainty of marketability. An increasing number of states have enacted marketable title statutes within the past fifty years, and their constitutionality has been upheld.[8] (emphasis added)

And as stated similarly in another Florida Supreme Court case:

> As we answer the questions which concern statutory construction of the Marketable Record Title Act we keep in mind the legislative intent that the Act be liberally construed to effectuate its purpose. That purpose, expressed within the Act, is to *simplify and facilitate land title transactions*. It does so in two ways. First, it gives to a person marketable title when public records disclose a title transaction, of record for at least thirty years, which purports to create the estate either in that person or in someone else from whom the estate has passed to that person. Second, subject to six exceptions, it extinguishes all interests in the estate which predate the "root of title."[9] (emphasis added)

As noted above, the MRTA extinguishes a comprehensive list of interests, which would clearly include any kind of interest which might be held by a co-tenant.[10] In addition, because the list of exceptions to the cleansing effect of the act does not expressly remove a co-tenancy interest (as such) from the act's effect, it is a necessary conclusion that the act does not — simply because an interest is a co-

tenancy — exempt such interest from extinguishment.[11]

The primary arguments advanced to challenge the extinguishment of co-tenancies are: 1) it isn't fair and 2) one co-tenant cannot adversely possess against another co-tenant.

FAIRNESS AND CONSTITUTIONALITY

The first issue concerning fairness can be dealt with quickly. The challenger seems to expect curative acts to be fair. The complainer is expressing personal and professional distaste for the idea that a record title holder will lose his interest if he fails to follow the legislative directive to re-record some instrument or a claim concerning his real property within a specified period of time (*i.e.*, three decades).[12] This concern shows the complainer is either unaware of, or disagrees with, the public policy behind the intentional cleansing effect of this act (discussed above), or behind any curative act for that matter. This legislative action of eliminating a prior valid claim, which is now stale, is, as explained below, constitutional.

The Oklahoma attorney general, in 1967, shortly after the adoption of the MRTA in 1963, declared this curative act was constitutional.[13]

In addition, the legality of the MRTA has been tested in an Oklahoma federal district court which considered whether 1) the act is constitutional, 2) advance notice to the losing party is required and 3) the act is self-executing (*i.e.*, does it need a court decree before it is effective).

In *Bennett v. Whitehouse*,[14] these questions were all raised and answered. This case involved a challenge to a void tax deed which was being offered as a root of title under the MRTA. The court upheld the title established by the MRTA in reliance on the void tax deed as the root, and specifically stated two principles:

1) Relying primarily on *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) [holding the Indiana Mineral Lapse Act constitutional], this Court holds that the Oklahoma Marketable Record Title Act does not deprive the Beals heirs of property without due process of law.

2) The lack of specific notice prior to the lapse of the thirty-year period does not render ineffective the self-executing feature of the Act [MRTA].

The federal court in *Bennett* also agreed with the holding by the Oklahoma Supreme Court in *Mobbs v. City of Lehigh* by holding "even a void tax deed may constitute a valid root of title within the meaning of the act."[15] The court in *Mobbs*,[16] had expressly held, "Although the tax deed initiating Mobbs' chain of title was doubtless void, it does nevertheless form an effective root of title."

Some concern about the self-executing nature of the MRTA was aroused by the holding in *Anderson v. Pickering*.[17] In the *Anderson* case a buyer sought an order for specific performance requiring the seller to quiet the title to two of 17 tracts to establish merchantable title (meaning marketable title), so the seller could convey marketable title to the buyer, as required by the purchase contract. The court rejected the seller's assertion that the subject title had already been cured by the application of the MRTA. However, the outstanding defect in title was never specified by the Court of Appeals. Therefore, it is impossible to know from the face of the decision in *Anderson* whether the defect was one that was ever intended to be remedied by the provisions of the MRTA. However, the *Bennett* court explains "The cases cited by the Beals deal with 12 O.S. §93 [statutes of limitation for the recovery of real property, *i.e.*, adverse possession], rather than with the Marketable Record Title Act, and thus are not applicable."[18]

Also, according to the article titled "*Anderson v. Pickering* and the Marketable Record Title Act," by H. Henley Blair and Henry Rheinberger,[19] "The examiner stated, however, that the Andersons could successfully claim title to both tracts by adverse possession." The article explains the seller did file, but did not complete, the requested adverse possession quiet title lawsuit, and, subsequently, the buyer (who, according to the Court of Appeals opinion, "took possession at that time and proceeded to develop the land" with improvements on the property) filed the subject lawsuit against the seller for specific performance. The seller asserted the subject title was already marketable, but the buyer and, more importantly, the court, disagreed.

The court held that in the absence of the completion of the pending adverse possession quiet title action initiated by the seller to make the title marketable, the title was not yet marketable. The buyer could not be forced to accept such defective title by the seller simply

declaring that, in the seller's opinion, it was marketable. In other words, the seller is not allowed to pronounce the title is marketable based on the seller's belief that the seller will win the incomplete quiet title lawsuit for adverse possession. Consequently, this holding by the Court of Appeals in *Anderson* was not necessarily a declaration that the MRTA itself was not self-executing by its basic nature, but it should be interpreted as holding that a self-serving assertion — an assertion without adequate supporting facts in the record title — does not, by itself, make the title marketable.

The Oklahoma Title Examination Standards (OK TES), which have been declared persuasive by the Oklahoma Supreme Court (*i.e.*, equivalent to an Oklahoma Court of Appeals opinion) by *Knowles v. Freeman*,[20] clearly require all title examiners to treat any legislative curative act as constitutional, including specifically the MRTA.[21] In addition, OK TES §30.1 (1999), which specifically concerns the MRTA, stated:

> The Marketable Record Title Act is remedial in character and should be relied upon as a cure or remedy for such imperfections of title as fall within its scope.

In other words, the individual title examiner does not have the discretion to selectively pick and choose which legislative acts seem fair or constitutional to them.

"The MRTA expressly recognizes and incorporates in its provisions the old adage that 'possession is nine-tenths of the law.'"

ADVERSE POSSESSION

The answer to the second challenge, concerning adverse possession, is that this act only claims to deal with record title, meaning title as disclosed in the instruments (*e.g.*, deeds, mortgages and decrees) filed in the county land records, pursuant to the state's recording acts [primarily 16 O.S. §§15 and 16] and the MRTA itself [§78(b)].

The MRTA expressly recognizes and incorporates in its provisions the old adage that "possession is nine-tenths of the law." Two separate provisions of the act expressly make a person's claim of interest through possession unaffected by the act if it is based on certain types of continuing possession that fit certain strict parameters.[22] However, in order for anyone dealing with the record title to ever have notice of the claim being made based by such possessors, such claimants must, at some point, assert and establish such claims of possession in a court of law, to confirm the existence of the facts supporting such interest. Such decrees must then be recorded to give constructive notice.[23]

It should be noted that the Legislature enacted as later amendments to the MRTA certain protections for parties who appear to hold record title and who are in possession of a tract of land, but who are facing the extinguishment of their title due to the action of a stranger-to-title filing a stray instrument (aka a wild deed or stray deed) which might ripen, under the MRTA, into a root of title after being of record for 30 years (if unchallenged). The true owner is given, under the express provisions of the act, the ability to preserve their interest. The enactment in 1995 of the amendments to 16 O.S. §76(b) allows the real record owner to file an affidavit of possession to rebut the apparent root.

However, when determining marketable record title under the MRTA, rights arising due to possession are irrelevant because the act does not rely upon adverse possession (which is based on the 15-year statute of limitation[24]) as a necessary component for its application and effectiveness. The act has been declared to be a statute of repose and not a statute of limitation; thereby extinguishing the right.[25] Due to the inability of a title examiner to ascertain, based solely on the record, who is in possession, most surface and mineral title examiners expressly restrict their title examination to only those instruments which are of record. They achieve this goal by including in their opinions an exception or advisory comment excluding rights of parties in possession. In addition, oil and gas title examiners regularly call for an affidavit of possession in their requirements. Title examiners are not expected or even allowed to speculate or rely on matters outside the record.[26]

While it is true that co-tenants have a heightened burden to meet to establish adverse possession against a fellow co-tenant, this burden is irrelevant when dealing with determining

marketable record title under the MRTA for several reasons.

First, as previously mentioned, the act is a statute of repose which extinguishes the right and does not rely on the statute of limitations concept known as adverse possession (or prescriptive title) to extinguish pre-root interests.[27]

Second, both the Model Title Examination Standards and the Oklahoma Title Examination Title Standards, that explain how to implement the MRTA, have, since their inception in the 1960s, included an official comment expressly reflecting 1) co-tenancies are extinguished by the act and 2) such interests cannot be revived by the filing of a claim outside the 30-year window.

> The applicable Model Title Examination Standard 4.10 provides:
>
> 2) Suppose a tract of land was conveyed to A, B, and C as tenants in common, the deed being recorded in 1900. Then in 1905, A and B conveyed the entire tract in fee simple to D and the deed was at once recorded. In 1935 D conveyed to E in fee simple, and the deed was at once recorded. Nothing further appearing of record, E had a marketable record title to the entire tract in 1945. This extinguished C's undivided one-third interest. In a sense, we could say that C has a marketable record title to an undivided one-third of the land. But this is subject to the conveyances of 1905 and 1935, the effect of which is to extinguish C's title. Suppose the same facts, but assume also that in 1946 C conveyed his one-third interest to X in fee simple the deed being at once recorded. This does not help him any. His interest, being extinguished in 1945, is not revived by this conveyance; and the effect of the recorded conveyance to him is 'no more than that of a "wild" deed'.

Even more applicable here, is OK TES §30.9 which provides essentially the same example:

> 2) Suppose a tract of land was conveyed to "A," "B" and "C" as tenants in common, the deed being recorded in 1960. Then in 1965, "A" and "B" conveyed the entire tract in fee simple to "D" and the deed was at once recorded. In 1985, "D" conveyed to "E" in fee simple, and the deed was at once recorded. No mention of "C's" interest was made in either the 1965 or 1985 deeds. Nothing further appearing of record, "E" had a marketable record title to the entire tract in 1995. This extinguished "C's" undivided one-third (1/3) interest.
>
> 3) Suppose the same facts, but assume also that in 1996, "C" conveyed "C's" one-third (1/3) interest to "X" in fee simple, the deed being at once recorded. This does not help "C" any. "C's" interest, having been extinguished in 1995, is not revived by this conveyance.

Such examples show 1) the MRTA has always been intended to extinguish co-tenancies and 2) such co-tenancy interest cannot be revived after the passage of the required 30 years by the filing of a claim by a losing co-tenant.

Third, it is true — but irrelevant — that it is explained in early Oklahoma appellate cases that "the occupation by one co-tenant is prima facie an occupation by all."[28]

Such Oklahoma cases make it clear that a co-tenant who is seeking to assert title by adverse possession against other co-tenants must take additional actions beyond the usual elements of adverse possession (*i.e.*, actual, open, hostile, notorious, continuous and exclusive), sufficient to amount to an ouster of the other co-tenants. This extra effort is required to overcome the prima facie assumption that such occupation by one co-tenant is for the benefit of all co-tenants.

This additional element (ouster) has been characterized as 1) the "denial or repudiation of his co-tenant's rights,"[29] or 2) "one co-tenant may not hold adversely to the other co-tenant until notice of such holding is brought home,"[30] or 3) "The statute of limitations does not begin to run in favor of one co-tenant of land in possession, against another co-tenant thereof until actual ouster by the former or some other act or acts on his part amounting to a total denial of the right of the latter, and until notice or knowledge of the act or acts relied on as an ouster is brought home to him."[31]

However, at least one Oklahoma case which discusses such ouster requirement also makes it clear that if a co-tenant enters into possession and records a conveyance of the entire interest, such possession and recording is notice of an adverse claim to the other co-tenants.[32] Consequently, the recorded title transaction which serves as the root of title under the MRTA can also serve as the deed whereby a co-tenant ousts their co-tenants.

By way of example, concerning the concept that one co-tenant holds possession for all, a Florida appeals court opinion concluded their version of the MRTA extinguished pre-root remainder interests when the life tenant deeded the land to a third party and gave up possession.[33] In other words, when a party who allegedly holds constructive possession for other co-owners gives up such possession and provides a conveyance of the entire interest (*i.e.*, simply conveying Blackacre, rather than some portion thereof) the new grantee who goes into possession is not converted into a co-tenant holding such possession for the benefit of the other co-tenants. This rule means the new grantee does not provide constructive possession for a co-owner whose interest is being cut off by the root.

Fourth, some examiners focus on the provision of the act which makes the title under examination subject to any claims or defects visible on the face of the muniments of title forming the chain of title. They argue a review of the pre-root muniments of title creating or recognizing the co-tenancy interest discloses the root (which describes and therefore conveys the entire interest) is defective and subject to the pre-root co-tenancy interests. In a general sense, it is true that a muniment of title is simply any title transaction. However, in the context of the MRTA, the only muniments which are of concern to the title examiner are the root instrument itself and the instruments recorded *after* the root, not before.

In order to understand the relevant muniments do not include any pre-root instruments, let us start with explaining how a title examiner identifies the particular conveyance or other title transaction (conveyance) which serves as the root of title.

According to 16 O.S. Section 78(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*.[34] (emphasis added)

16 O.S. Section 78(f) provides:

> *"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. (emphasis added)

Even a void conveyance of record affects the title.[35]

What does it mean when the statute says the root needs to be a conveyance which "purports to create such interest?"

The word purports is not expressly defined in the MRTA. However, according to *Black's Law Dictionary* (5th ed., abridged): "Purport, verb. To convey, imply, or profess outwardly, to have the appearance of being, intending, claiming, etc."

In addition, the instrument expressly provided in §78(e) of the MRTA for "purporting to create such interest" is a "conveyance or other title transaction." According to §78(f) a "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." (emphasis added)

16 O.S. §29 provides: "Every estate in land which shall be granted, conveyed or demised by deed or will shall be deemed an estate in fee simple and of inheritance, unless limited by express words."

In other words, when Smith executes and delivers a deed to Jones describing Blackacre (whether a quit claim deed, a mineral deed or a probate decree) then, regardless of whether Smith held valid or marketable title to Blackacre, such conveyance "purports to create such interest" meaning a fee simple interest.

Now let's turn to the specific section found in the MRTA discussing muniments of title.

16 O.S. §72 states:

> *Such marketable record title shall be subject to:*
>
> *a) All interests and defects which are inherent in the muniments of which such chain of record title is formed; provided, however, that a general reference in such muniments, or any of them, to interests created prior to the root of*

title shall not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such interest. (emphasis added)

This sentence makes it clear that a post-root instrument is not adequate to preserve a pre-root claim, if the post-root instrument includes only a general reference to such pre-root claim. The post-root instrument will preserve a pre-root claim only if a "specific identification be made therein of a recorded title transaction which creates such interest."

The term chain of title is discussed in 16 O.S. §71 and consists of either a single conveyance or other title transaction which is at least 30 years old, or a series of conveyances or other title transactions culminating in the most recent grantee, in such 30-year chain, being the holder of marketable title.

More specifically, §71 provides:

> 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. A person shall be deemed to have such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than thirty (30) years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in
>
> a) the person claiming such interest, or
>
> b) some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest; with nothing appearing of record, in either case, purporting to divest such claimant of such purported interest.

Therefore, the exception from the cleansing effect of the MRTA, which exception includes "All interests or defects which are *inherent in the muniments of which such chain of title is formed*," is expressly limited to those interests which are specifically identified (not just vaguely noted by a general reference) in those chain-of-title instruments which make up the series of conveyances or other title transactions that compose and reside *within* the 30-year chain of title. Such muniments must be filed after the filing of the root of title, in order to be *in* the chain of title, and *not before* the filing of such root. For instance, only an express reference (such as a specifically identified remainder interest) in an instrument which composes a link in the 30-year chain of title can act to preserve a pre-root claim.

As explained in *Black's Law Dictionary* (5th ed., abridged), muniments of title mean: "The records of title transactions in the chain of title of a person purporting to create the interest in land claimed by such person and upon which he relies as a basis for the marketability of his title, commencing with the root of title and including all subsequent transactions."

As discussed in a Florida appellate case:

> The terms "defects inherent in the muniments of title" do not refer to defects or failures in the transmission of title, as the plaintiff's argument suggests, but refer to defects in the make up or constitution of the deed or other muniments of title on which such transmission depends. *To accept the plaintiff's proposition would virtually nullify the act because it would preserve from extinction all claims arising out of defective deeds — no matter how far antecedent to the root of title.* We accept as sound the view of Professor Barnett who wrote with respect to the exemption now under consideration….
>
> *The provision means only those links subsequent to and including the root of title itself,* ***
>
> Barnett, "Marketable Title Acts - Panacea or Pandemonium," 53 *Cornell L.Q.* 45, 67 (1967). The factual allegations of the complaint demonstrate no defect in the make-up or constitution of the deeds previously identified as roots of title or in the subsequent muniments of title. The exemption, therefore, is inapplicable here."[36] (emphasis added)

Some proponents of excluding co-tenancy interests from the cleansing impact of the MRTA offer the case of *Allen v. Farmers Union Co-operative Royalty Co.*[37] and assert (erroneously) that it is dispositive. However, in that case the court concluded that the muniment of title which was being offered as the root (*i.e.*, a deed from Farmer to Flagg) expressly made it

clear that it did not convey and, therefore, did not include title to the hard minerals.[38]

The reason given by the court — that the hard minerals were not conveyed to Flagg — was that, while the legal description in the root deed from Farmer to Flagg listed "oil, gas, coal, iron and other minerals," the same root deed included language which *expressly* limited the interest being conveyed by 1) specifically identifying the prior deed to the grantor Farmer (listing date, and book and page of recording for the Spears-to-Farmer pre-root deed) as Farmer's source of title and 2) limiting this conveyance (Farmer-to-Flagg) to the interest covered in the earlier Spears-to-Farmer pre-root deed which only covered "oil, gas and other minerals and mineral royalty."[39] In other words, the root deed (Farmer-to-Flagg) was controlled by the language of the pre-root deed (Spears-to-Farmer), which granting language in the pre-root deed omitted the reference to "coal, iron," and, consequently, the pre-root Spears-to-Farmer deed was held by the *Allen* court to be limited by the rule of *ejusdem generis* to omit "coal, iron." Therefore, the second deed which was the root (Farmer-to-Flagg) was also held to only cover the usual "oil, gas and other minerals produced as a component or constituent thereof, whether hydrocarbon or non-hydrocarbon, and does not convey any other mineral or the right to produce any other mineral including copper, silver, gold or any other types of metallic ores or metallic minerals."[40]

"Co-tenants can never adversely possess title against other co-tenants because possession by one co-tenant is possession by all..."

In other words, there was never any mention in the *Allen* case that there was a co-tenancy, as to the hard minerals "coal, iron."

CONCLUSION

The argument asserting the MRTA does not extinguish pre-root co-tenants' claims is based on two false premises:

1) Pre-root co-tenants' claims cannot be extinguished because it would not be fair or would be unconstitutional. Fairness was not the public policy being implemented through this act. Instead the stated legislative purpose expressed in §80 of the act was "simplifying and facilitating land title transactions by allowing persons to rely on a [30-year] record chain of title as described in Section 1 of this act." Extinguishing pre-root claims, including co-tenants' claims, accomplishes this public purpose. The act, which demands periodic re-recording (every 30 years), has been declared to be constitutional.

2) Co-tenants can never adversely possess title against other co-tenants because possession by one co-tenant is possession by all, and because any new grantee automatically becomes a co-tenant with any prior co-tenants. Adverse possession depends on the passage of the 15-year statute of limitations. However, the MRTA is a statute of repose rather than a statute of limitations; it does not rely on adverse possession. In addition, the MRTA expressly preserves rights of parties in possession who meet certain strict conditions.

In summary, co-tenants' interests can be extinguished by the MRTA, just as anyone else's stale interest can be eliminated. This result will "effect the Legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title..."[41]

As noted in the introduction to this article, until there is an Oklahoma Supreme Court decision resolving this question, it appears that title examiners will continue to disagree on this issue. This article is presented to explain why the MRTA should be interpreted to allow co-tenancy interests to be extinguished.

1. 16 O.S. §§71–80 (adopted in 1963).

2. 25 O.S. §12 (constructive notice definition); 16 O.S. §§15 and 16 (recording act for conveyances); 46 O.S. §7 (recording act for mortgages); 16 O.S. §31 (recording for real property judgments and decrees).

3. 16 O.S. §§71, 74 & 75 (title transaction or claim may be re-recorded every 30 years; otherwise, the claim may be lost).

4. 60 O.S. §74.

5. 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.

6. 16 O.S. §§72 and 76 exclude 1) preserved interests expressly referred to and identified in the 30-year chain of title; 2) holders through adverse possession occurring in part or in whole after the root; 3) the instruments in the 30-year chain and 4) lessors' reversionary interests, severed mineral or royalty interests, easements, subdivision restrictions and interests of the United States.

7. OK TES 1.1 provides: "A marketable title is one free from apparent defects, grave doubts and litigious uncertainty, and consists of both legal and equitable title fairly deducible of record."

8. *Wilson v. Kelley*, 226 So.2d 123, 126 (Fla. Dist. Ct. App. 1969).

9. *ITT Rayonier, Inc. v. Wadsworth*, 346 So.2d 1004, 1008–09 (Fla. 1977).

10. The pre-root interests which are extinguished are specified in 16 O.S. §73, which provides: Subject to matters stated in Section 2 [§72] hereof, such marketable record title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims or charges whatsoever, the existence of which depends upon any act, transaction, event or omission that occurred prior to the effective date of the root of title. 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.

11. The types of interests which are excluded from extinguishment are specified in 16 O.S. §72, which are listed above.

12. In lieu of an instrument, such as a deed, mortgage or decree, all that 16 O.S. §74 requires is the filing of a "notice in writing, duly verified by oath, setting forth the nature of the claim" within the 30-year period after the last recorded instrument.

13. Op. No. 67-444, 1967 OK AG 444.

14. 690 F. Supp. 955 (W.D. Okla. 1988).

15. *Bennett*, 690 F. Supp. at 959.

16. 1982 OK 149, ¶25, 655 P.2d 547, 553.

17. 1975 OK CIV APP 42, 541 P.2d 1361.

18. *Bennett*, 690 F. Supp. at 958.

19. 51 *Okla. B.J.* 2517 (1980) (criticizing the *Anderson* decision and supporting the *Bennett* court).

20. 1982 OK 89, ¶16, 649 P.2d 532, 535.

21. 16 O.S. app. §1.4 (1999): Statutes enacted for the purpose of curing irregularities or defects in titles are valid and effective from the effective date of each statute; and in particular a)Every statute is presumed to be valid and constitutional and binding on all parties as of the effective date of each statute. This presumption continues until there is a judicial determination to the contrary. 16 *C.J.S. Constitutional Law* §99; *Tate v. Logan*, 1961 OK 136, ¶17, 362 P.2d 670, 674; *Swanda v. Swanda*, 1952 OK 268, ¶¶12, 16, 248 P.2d 575, 577. b) Curative statutes that complete imperfect transactions, and statutes of limitation and adverse possession that bar stale demands or ancient rights, are also presumed to be constitutional. 53 *C.J.S. Limitation of Actions* §2; *Shanks v. Sullivan*, 1949 OK 194, ¶5, 210 P.2d 361, 362. c) The presumption of constitutionality extends to and includes the Simplification of Land Titles Act, the Marketable Record Title Act, the Limitations on Power of Foreclosure Act and legislation of like purpose. 16 O.S. §§61-63, 66, 71-80; 46 O.S. §301; Op. No. 67-444, 1967 OK AG 444, reprinted in 39 *Okla. B.J.* 593 (1968); Lewis M. Simes, "The Improvement of Conveyancing: Recent Developments," 34 *Okla. B.J.* 2357 (1963).

22. 16 O.S. §§72(c) and 74(b).

23. 58 O.S. §§31, 703 and 711.

24. 12 O.S. §93(4); 60 O.S. §333 (prescriptive title).

25. *Mobbs v. City of Lehigh*, 1982 OK 149; 655 P2d 547; 16 O.S. app. §30.1 caveat: The Oklahoma Supreme Court held in *Mobbs v. City of Lehigh*, 655 P.2d 547, 551 (Okla. 1982) that the Marketable Record Title Act was not a statute of limitations. The court said that, unlike a statute of limitations which barred the remedy, the Marketable Record Title Act had, as its target, the right itself.

26. However, if a recorded instrument sufficiently identifies and incorporates an unrecorded instrument, the examiner should take exception to the rights dealt with in such instrument, and require such instrument to be reviewed. *See Walker v. Builddirect.com Technologies, Inc.*, 2015 OK 30, 349 P.3d 549.

27. Also note that even if a deed constituted an over conveyance, such as conveying a fee instead of a surface-only interest, the recording of such deed starts the running of a 5-year statute of limitation to reform such deed for mutual mistake. *Pangaea v. Ryland*, 2010 OK CIV APP 66, 239 P.3d 160.

28. *Howard v. Manning*, 1920 OK 292, ¶10, 192 P. 358, 361.

29. *Pan Mut. Royalties v. Williams*, 1961 OK 165, ¶9, 365 P.2d 138, 140 (quoting *Preston v. Preston*, 1949 OK 59, ¶21, 207 P.2d 313, 318).

30. *Pan Mut. Royalties*, 1961 OK 165, ¶8, 365 P.2d at 140.

31. *Westheimer v. Neustadt*, 1961 OK 121, ¶10, 362 P.2d 110, 111.

32. *Moore v. Slade*, 1944 OK 184, ¶10, 147 P.2d 1006, 1008: If a person enters into the possession of real property under a conveyance purporting to be of the entirety, co-tenants of the grantor must regard such possession as adverse to them from the time they have actual notice thereof, or from the time when, as prudent men reasonably attentive to their own business, they ought to have known that the co-tenant in possession was asserting an exclusive right to the land. *Tatum v. Jones*, 1971 OK 147, ¶9, 491 P.2d 283, 285: A co-tenant and his successors acquired the interest of their co-tenants by adverse possession in *Beaver v. Wilson supra*. However, in addition to leasing the land, collecting rents, fencing the property, paying taxes, and exercising exclusive possession and control, two predecessors of the co-tenant claiming title by adverse possession had executed warranty deeds purporting to convey the entire tract. Execution and recordation of these deeds together with the other acts of ownership were held to be enough to give co-tenants residing in the neighborhood notice of repudiation of their title.

33. *ITT Rayonier, Inc. v. Wadsworth*, 346 So.2d 1004, 1011 (Fla. 1977): Section 712.03(3) provides that the rights of any person in possession of the lands are not extinguished or affected by the Marketable Record Title Act, so long as such person is in possession. The children argue that possession under a life estate is possession in recognition of the whole fee, so it is in effect possession for the vested remaindermen, as well as for the life tenants. They present no firm authority for their "constructive" possession theory. Even were we to accept it, it has no application here. Subsection (3) applies only so long "as the person remains in possession." Lotta, through whom the children had constructive possession under the theory, gave up her possession to the property after she and Lewis deeded the property to Rayonier.

34. Marketable Title, pursuant to the MRTA, is defined under 16 O.S. §71 as follows: 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. A person shall be deemed to have such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than thirty (30) years at the time the marketability is to be determined, which said conveyance or other title transaction purports to create such interest, either in a) the person claiming such interest, or b) some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest; with nothing appearing of record, in either case, purporting to divest such claimant of such purported interest.

35. *ITT Rayonier, Inc. v. Wadsworth*, 346 So.2d 1004, 1010 (Fla. 1977) (quoting *Marshall v. Hollywood, Inc.*, 224 So.2d 743, 749 (Fla. Dist. Ct. App. 1969): "The word 'affecting' as it is used in the second sentence of Section 712.02 in the clause 'affecting the title to the land' does not carry the narrow meaning of 'changing or altering.' The word is used in the broader sense meaning 'concerning' or 'producing an effect upon.' In this broad sense, even a void instrument of record 'affects' land titles by casting a cloud or a doubt thereon. *Clements v. Henderson*, 1915, 70 Fla. 260, 70 So. 439; *Brown v. Solary*, 1896, 37 Fla. 102, 19 So. 161." Also, *see Mobbs v. City of Lehigh*, 1982 OK 149, 655 P.2d 547, where a void tax deed was treated as a valid root of title.

36. *Marshall v. Hollywood, Inc.*, 224 So.2d 743, 752 (Fla. Dist. Ct. App. 1969).

37. 1975 OK 102, 538 P.2d 204.

38. *Allen*, 1975 OK 102, ¶19, 538 P.2d at 208.

39. *Id.* at ¶7, 538 P.2d at 206.

40. *Id.* ¶¶15–16, 539 P.2d at 207–08.

41. §80.

ABOUT THE AUTHOR

Kraettli Q. Epperson is a partner with Mee Mee Hoge & Epperson in Oklahoma City. He focuses on oil and gas and real property matters (expert, mediation, title exam and lawsuits). He chairs the OBA Real Property Law Section's Title Examination Standards Committee, teaches Oklahoma land titles at OCU School of Law and edits West's Oklahoma Real Estate Forms. His website is www.EppersonLaw.com.