NAVIGATING CONNECTICUT'S MARKETABLE RECORD TITLE ACT: A ROADMAP FOR THE PRACTITIONER

BY JONATHAN M. STARBLE*

The Marketable Record Title Act (the "MRTA") has been an integral part of Connecticut property law for 40 years. The existence of the MRTA helps to facilitate real estate transactions by providing purchasers, attorneys, title insurers, and lenders with a level of certainty regarding the status of land titles. Yet despite its importance to the real estate community, the statutory scheme of the MRTA is often misunderstood. The state's Supreme Court and Appellate Court have addressed the MRTA on only a few occasions, and the resulting decisions have not provided much guidance.

This article dissects the MRTA and provides a roadmap for practitioners who seek to use the MRTA in connection with the examination and litigation of competing land titles. Section I discusses the background and scope of the MRTA. Section II explores the structure of the MRTA and provides a step-by-step analytical model for examining the process by which competing property interests are resolved under the MRTA. Sections III and IV discuss two specific analytical issues under the MRTA, both of which have resulted in unusual and important judicial interpretations. In particular, Section III addresses the "specific identification" exception to the MRTA, and Section IV addresses the ability of an appurtenant dominant servitude holder to use the MRTA as an affirmative tool to extinguish an adverse servient interest.

I. BACKGROUND AND SCOPE OF THE MRTA

Connecticut is one of 19 states to have enacted some form of marketable record title act.[1] Iowa became the first state to

* Of the Hartford Bar. The author thanks Nicholas Mindicino for his invaluable research and input.

[1] California (CAL. CIV. CODE § 880.020 et seq. (2007)); Connecticut (CONN. GEN. STAT. § 47-33b et seq. (2007)); Florida (FLA. STAT. ANN. § 712.01-10 et seq. (2007)); Illinois (735 ILL. COMP. STAT. ANN. 5/13-118 et seq. (2007)); Indiana (IND. CODE ANN. § 32-20-1-1 et seq. (2007)); Iowa (IOWA CODE ANN.§ 614.17 (2007)); Kansas (KAN. STAT. ANNO. § 58-3401 et seq. (2007)); Michigan (MICH. COMP. LAWS § 565.101 et seq. (2007)); Minnesota (MINN. STAT. ANN. § 541.023 (2007));

do so by enacting a simple version in 1919.[2] The first modern act was developed in 1945, when Michigan adopted legislation that would become a prototype for other states.[3] In 1960, the Michigan law was adapted into a model act (the "Model Act"), which appeared in a treatise written by Lewis M. Simes and Clarence B. Taylor.[4] The Model Act then became the basis for Connecticut's MRTA, which was proposed by the bar and enacted into law in 1967.[5] The enactment of the MRTA was for the stated purposes of "reducing the time and cost of title searching, … removing the risks of ancient defects, … and … reducing the need for quiet title actions."[6] The text of the MRTA describes its purpose as "simplifying and facilitating land title transactions by allowing persons to rely on a record chain of title."[7]

The MRTA is distinctly limited in scope. Despite its ostensibly broad purpose, the MRTA is not designed to be a comprehensive system for determining the priority or validity of various competing title claims. Since colonial times, the primary mechanism for accomplishing any such determination has been Connecticut's "recording statute," which is codified in its present form at § 47-10(a) of the Connecticut General Statutes.[8] Under this statute, priorities between competing land titles are determined based on the date of the

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STAT. ANN. § 541.023 (2007)); Nebraska (NEB. REV. STAT. § 76-288 et seq. (2007)); North Carolina (N.C. GEN. STAT. § 47B et seq. (2007)); North Dakota (N.D. CENT. CODE § 47-19.1-01 et seq. (2007)); Ohio (OHIO REV. CODE ANN. § 5301.47 et seq. (2007)); Oklahoma (OKLA. STAT. TIT. 16, § 71 et seq. (2007)); Rhode Island (R.I. GEN. LAWS § 34-13.1-1 et seq. (2007)); South Dakota (S.D. CODIFIED LAWS § 43-30-1 et seq. (2007)); Utah (UTAH CODE ANN. § 57-9-1 et seq. (2007)); Vermont (VT. STAT. ANN. TIT. 27, § 601 et seq. (2006)); and Wyoming (WYO. STAT. ANN. § 34-10-101 et seq. (2007)).

[2] Walter E. Barnett, *Marketable Title Acts – Panacea or Pandemonium?,* 53 CORNELL L. REV. 45, 46-47 (1967).

[3] *See* Barnett, *supra*, at 47.

[4] SIMES & TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION (1960). The treatise was prepared for the Real Property, Probate and Trust Law section of the American Bar Association and for the University of Michigan Law School.

[5] 1967 Conn. Acts 553.

[6] 12 H.R. Proc., Pt. 10, 1967 Sess., p. 4575 (Comments of Rep. McCarthy).

[7] CONN. GEN. STAT. § 47-33k.

[8] Section 47-10(a) reads in its entirety as follows: "No conveyance shall be effectual to hold any land against any other person but the grantor and his heirs, unless recorded on the records of the town in which the land lies. When a conveyance is executed by a power of attorney, the power of attorney shall be recorded with the deed, unless it has already been recorded in the records of the town in which the land lies and reference to the power of attorney is made in the deed."

conveyance of the property interest, with the caveat that no conveyance is valid against a third party unless the conveyance is recorded in the land records within a reasonable time after execution.[9] The recording statute is subject to the principle that "a grantor cannot effectively convey a greater title than he possesses."[10] Thus, the recording statute does not give validity to an otherwise invalid conveyance merely because it is promptly recorded in the land records. In addition, the system of recordation set forth in section 47-10(a) has long been subject to common-law and statutory principles by which certain land titles may vest despite the absence of any conveyance and/or recordable instrument. These principles include, for example,[11] adverse possession,[12] prescription,[13] implication,[14] descent and devise,[15] and lien.[16]

Prior to 1967, a Connecticut court seeking to quiet title to any property interest undertook an analysis of the parties' chains of title as far back as necessary to resolve the dispute. In all cases, the objective was to determine the true title rights of the parties based on the history of the subject property from the beginning of time until the date of trial. The adoption of the MRTA did not abolish this long-standing system for resolving the majority of title disputes, nor did it create a sur-

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[9] Farmers & Mechanics Savings Bank v. Garofalo, 219 Conn. 810, 816-17, 595 A.2d 341 (1991).

[10] Stankiewicz v. Miami Beach Assn., 191 Conn. 165, 170, 464 A.2d 26 (1983).

[11] This list is not meant to be exhaustive.

[12] CONN. GEN. STAT. § 52-575 (vesting of possessory interests based on a period of continuous possession).

[13] CONN. GEN. STAT. § 47-37 (vesting of nonposessory interests based on a period of continuous use).

[14] Rischall v. Bauchmann, 132 Conn. 637, 642-43, 46 A.2d 898 (1946)(vesting of appurtenant easement rights based on use in effect at the time of parcel severance); Leonard v. Bailwitz, 148 Conn. 8, 11, 166 A.2d 451 (1960) (vesting of easement rights based on necessity at the time of parcel severance); *see* Jonathan M. Starble, *Dis-Unity of Title in Connecticut: A Tale of Supreme Confusion Over Easement Law*, 75 CONN. BAR. J. 61, 65-67 (2001).

[15] Pigeon v. Hatheway, 156 Conn. 175, 175 (1968)(vesting of title in heirs or devisees immediately upon death).

[16] Connecticut law recognizes various types of monetary encumbrances that are created without an actual "conveyance." Each of these types of liens has its own specific rules regarding vesting, recordation, and priority. A few examples are as follows: CONN. GEN. STAT. § 12-171 *et seq.* (municipal tax lien); § 20-325a (broker's lien); § 47-258 (assessment lien for common interest community expenses); § 49-33 *et seq.* (mechanic's lien), § 49-92a (purchaser's lien); and § 52-380a *et seq.* (judgment lien).

rogate method for determining true title.[17] Rather, the MRTA created a mechanism that could be invoked by the putative owner of a recorded title interest for the purpose of limiting a court's review of historical title in certain situations.

Under the MRTA, a party with an unbroken chain of title of at least 40 years can establish legal title and extinguish certain competing interests, despite the otherwise invalid nature of the party's own interest or the otherwise valid nature of the competing interest. The MRTA is not merely an evidentiary rule, nor is it intended as an aid in determining true title. Indeed, whereas an analysis of true title involves a full chronological examination of historical title, an analysis of marketable record title is based on a *reverse* chronological examination of historical title that is arbitrarily limited as to time. Therefore, the results of a marketable-record-title analysis and a true-title analysis will differ in some cases and be identical in others. In the event of inconsistent results, however, the MRTA will always prevail, provided that the party invoking the MRTA is able to satisfy the statutory criteria.

An analysis under the MRTA is conceptually binary in nature. It first requires a determination of whether the party invoking the MRTA has "marketable record title," which consists of an unbroken chain of title of at least 40 years. If this first element is established, the next question is whether one of several exceptions applies. If no such exception applies, the party invoking the MRTA may extinguish all other interests. If, however, the party is unable to prove both that marketable record title exists and that no exception applies, then the MRTA becomes irrelevant to the title analysis, and the search for true title resumes. As discussed below, it is the second part of the analysis – the application of the statutory exceptions – that is the most common cause of confusion and controversy.

II. MRTA: The Basic Route

Whenever a title dispute arises, the first inquiry is whether one of the disputing parties is able to claim marketable record

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[17] The term "true title" is used in this article to describe valid legal title based on the recording statute as modified by all non-MRTA statutory provisions and common-law principles. In other words, the term refers to the results of a title analysis in the absence of the MRTA.

title that might extinguish a competing interest under the MRTA and therefore preclude any examination of true title. Under the MRTA, this inquiry requires an eleven-step analysis that is shown in the diagram labeled "MRTA Roadmap," which appears as the Appendix to this article. The map, which is in flowchart form, assumes a title dispute in which Party A seeks to extinguish an interest held by Party B. The following is a discussion of each step.

Step 1. Does A have an unbroken chain of record title to the interest for at least 40 years?

Under § 47-33c, "[a]ny person having the legal capacity to own land in this state, who has an unbroken chain of title to any interest in land for forty years or more, shall be deemed to have a marketable record title to that interest," subject only to the statutory exceptions discussed below. In order to have an "unbroken chain of title," a person's title must rely on a "title transaction,"[18] or series of title transactions, going back at least 40 years, with "nothing appearing of record … purporting to divest the claimant of the purported interest."[19] For the purpose of determining whether a person possesses statutory marketable record title, the MRTA assigns technical meaning to some otherwise common real estate terms and concepts. This creates the potential for confusion in at least four principal areas. Accordingly, the following words of caution should be given to anyone who endeavors to traverse the MRTA:

First, the use of the term "marketable record title" in the MRTA is not intended to create any standards for determining if a purchaser under a land contract is legally obligated to accept title.[20] In some situations, a seller might be able to satisfy the conditions of § 47-33c, but the title might still be subject to an encumbrance that renders title otherwise "unmarketable" from a commercial standpoint. Similarly, a

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[18] "Title transaction" includes "any transaction affecting title to any interest in land, including, but not limited to, title by will or descent, by public sale, by trustee's, referee's, guardian's, executor's, administrator's, conservator's or committee deed, by warranty or quitclaim deed, by mortgage or by decree of any court." CONN. GEN. STAT. § 47-33b(f).

[19] CONN. GEN. STAT. § 47-33c.

[20] SIMES & TAYLOR, *supra* note 4, at 11.

seller might *not* be able to satisfy section 47-33c, due to the mere recency of the interest's creation, but the interest might otherwise be undisputed and therefore legally marketable to a buyer.[21]

Second, the term "chain of title" in the MRTA pertains to a very narrow concept. In the context of a title dispute not involving the MRTA, the term "chain of title" usually refers to the entire series of transactions from which a party claims title. Each competing party has a chain of title, and the chains are traced back as far as necessary for the purpose of resolving the dispute. Under the MRTA, however, the term refers only to the most recent portion of a chain of title, going back only as far as the last recorded title transaction prior to the 40-year period preceding the time of examination. Once such a title transaction is found, the chain stops for purposes of the MRTA, and no prior conveyances within the chain are relevant to the statutory analysis. Also, under the MRTA, the use of the term "chain of title" refers only to the party who is claiming an extinguishment of an adverse interest (Party A in the Roadmap). The term has no relevance to the chain of ownership of the party claiming the adverse interest (Party B).

Third, whereas the term "root of title" is often used to describe a common historical link between the titles of two adverse claimants, the use of the term in the MRTA implies no such link, nor does it denote the creation of a new interest, the severance of a parcel, or any connection at all between competing titles. The root, for purposes of the MRTA, is simply the last recorded title transaction prior to the 40-year period preceding the time of examination, as discussed

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[21] For instance, a seller's title might be based on a recently recorded judgment of adverse possession in an action to quiet title under Connecticut General Statutes § 47-31. Prior to such judgment, the seller would have had no record title whatsoever. After the expiration of the appeal period, however, the judgment would vest undisputed title that would be considered marketable to a buyer under any commercial standards. The standard for determining whether a buyer may reject a title as "unmarketable" is whether there is "reasonable doubt, in law or in fact," as to the seller's title, such that the apparent defect in title "present[s] a real and substantial probability of litigation or loss." Frank Towers Corp. v. Laviana, 140 Conn. 45, 52-53 (1953); *see also* Connecticut Bar Association, Connecticut Standards of Title, Standard 3.2, cmt. 2; Standard 3.8, cmt. 1 (rev. 2005)(distinquishing between marketability for purposes of a real estate sales contract and marketable record title under the MRTA).

above.[22] As with the use of the term "chain of title," the term "root" within the MRTA refers only to the party seeking to extinguish an adverse interest (Party A). In its original form, the MRTA was identical to the Model Act in that it described the root as a document that "purports to create [an] interest in land."[23] On its face, this language was ambiguous as to whether a deed that merely transfers a previously created interest would be sufficient to qualify as a root.[24] In order to clarify this issue, the General Assembly passed an amendment in 1978 that allows a document to qualify as a root if it "contains language sufficient to transfer the interest."[25] Therefore, in order to establish marketable record title to a single subdivision lot, for example, a party is not required to go all the way back to the creation of the individual lot from a larger parcel. Rather, an unbroken 40-year chain of successive transfers of the lot is sufficient to establish a root, regardless of the age of the subdivision.

Fourth, and perhaps most important, the MRTA provides for the determination of marketable record title as of any given point in time, not just the date of trial or the date of a conveyance. Section 47-33c calculates the 40-year period from "the time the marketability is to be determined." There is no further explanation of this phrase in the MRTA, nor have there been any reported Connecticut decisions construing the matter. Presumably, however, the General Assembly intended to make the provision both retroactive and self-effectuating, in light of the stated goals of "removing the risks of ancient defects" and "reducing the need for quiet title actions."[26] It is entirely possible that a person could prove marketable record title within his or her own chain even

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[22] Section 47-33b(e) of the Connecticut General Statutes provides as follows: "'Root of title' means that conveyance or other title transaction in the chain of title of a person, purporting to create or containing language sufficient to transfer 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 forty 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."

[23] P.A. 67-553; SIMES & TAYLOR, *supra* note 4, at 7; Model Act at § 1.

[24] 21 H.R. Proc., Pt. 5, 1978 Sess., p. 2051 (Comments of Rep. Abate).

[25] P.A. 78-105.

[26] 12 H.R. Proc., Pt. 10, 1967 Sess., p. 4575 (Comments of Rep. McCarthy).

though the person does not have marketable record title at the time of trial, or at the time of commencement of litigation, or even at the time the person acquired title. Thus, there is nothing in the MRTA that prohibits an unlimited look-back for the purposes of determining marketable record title and extinguishing adverse interests as of any given date.[27]

Subject to all the foregoing caveats, the task in Step 1 of the MRTA Roadmap is to determine if A has an unbroken chain of record title of at least 40 years. If, after an examination of A's chain of title, it is determined that the property interest at issue does not satisfy the elements of section 47-33c, then A does not have marketable record title to the interest, and the MRTA therefore does not apply as either a sword or a shield. This does not have any bearing on whether A will ultimately succeed in a dispute over "true title," nor is it relevant to whether B may be able to establish its own marketable record title to an adverse interest. It does mean, however, that A cannot extinguish B's interest using the MRTA.

Step 2: Does A's chain of record title contain a document that creates the adverse interest?

After determining that Party A is able to prove marketable record title under § 47-33c, the next step is to examine whether the title is subject to any competing interest based on the exceptions to extinguishment identified in § 47-33d. The first thing to do is examine A's own chain of title. Under § 47-33d(1), the title is subject to certain interests that "are created by or arise out of" the documents that form A's chain of title. Under the Model Act and the original version of Connecticut's MRTA, this exception referred to interests "inherent in" the chain of title.[28] According to the official comment to the Model Act, this language was intended to create a broad exception for any "defects or interests which are *recognized in* that same chain of title."[29] In 1978, the General Assembly changed the language of § 47-33d(1) from

[27] *See* Barnett, *supra* note 2, at 53 (observing that "although the acts refer to 'the time when marketability is being determined,' no 'purchase' or other transaction affecting the land need occur to trigger the extinguishment of old defects and interests.")

[28] P.A. 67-553 (Reg. Sess.); SIMES & TAYLOR, *supra* note 4 at 7; Model Act at § 2(a).

[29] SIMES & TAYLOR, *supra* note 4, at 11-12 (emphasis added).

"inherent in" to "created by or arising out of,"[30] thereby clarifying that the exception applies not only to interests that are *created* in A's chain, but also to those that are *referenced* in the chain.[31] Thus, any interest that is created by virtue of a document in A's chain creates an exception to A's otherwise marketable record title.

Step 3: Does A's chain of record title contain a reference to the adverse interest?

Even if A's chain of title does not contain any document that actually *creates* B's claimed interest, the chain might still contain a document that *references* the adverse interest. Such a reference would satisfy the "arising out of" provision of section 47-33d(1). But unlike a document creating the interest in A's chain, a mere reference to an adverse interest does not automatically qualify for an exception. Under section 47-33d(1), "a general reference" to an adverse interest "created prior to the root of title" is not sufficient to preserve such an interest, "unless specific identification is made … of a recorded title transaction which creates the … interest."

The wording of this exception-within-an-exception is taken almost verbatim from the Model Act, and it raises an interesting question. On its face, the provision suggests that a reference that describes an adverse interest in *general* terms may qualify for the exception, provided that the general reference also contains a *specific* identification of a recorded title transaction that created the adverse interest.[32] When speaking of a title transaction, the concept of "specific identification" is not particularly difficult to interpret with reference to ordinary modern conveyancing practices. It would

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[30] P.A. 78-105.

[31] It is questionable whether the phrase "arising out of" is any less vague than the phrase "inherent in." Nevertheless, replacing "inherent in" with two disjunctive alternatives, one of which does not require the "creation" of an interest, can only be construed as clarifying that the excepted interest must merely be referenced in A's chain, not created in it. Further evidence of this intent is that this amendment was enacted in connection with the amendment to § 47-33b(e), discussed in Step 1 above, which intended to accomplish the same result with respect to the definition of a "root of title." In addition, if "arising out of" did not include "references," then the "general reference" provisions of § 47-33d(1), discussed in Step 3 below, would not make sense.

[32] *See* Barnett, *supra* note 2, at 68.

typically include a citation to the volume and page of the land records and/or a recitation of a conveyance date along with the name of the grantor and grantee. The more difficult problem, however, is trying to determine when a reference is "general" enough that it must be accompanied by a "specific identification" in order to qualify for the exception under § 47-33d(1). The "generality" of a reference could pertain to the source of the interest's creation, the physical location of the interest, or perhaps other indicators. It is also possible that a reference might be considered "general" based merely on the absence of a "specific identification" of a recorded title transaction. Although such a dichotomous construction of the statute's wording would render the "general reference" language meaningless, it appears that the Connecticut Supreme Court has in fact adopted such an interpretation. This is discussed in more detail in Section III below.

Nevertheless, for purposes of Step 3 of the analysis, two things are clear from the plain language of the statute. First, if A's chain contains a reference to an adverse interest that was created *after* A's root, such an interest is automatically excepted from A's marketable record title, regardless of whether the reference is general or whether the interest was created in A's chain. Second, if the adverse interest was created *prior* to A's root, and the reference is deemed "general," then anything less than the specific identification of a recorded title transaction will result in A's extinguishment of the interest.

Step 4: Did the holder of the adverse interest (or a predecessor) file a statutory notice of claim within 40 years after A's root of title?

Section 47-33f(a) provides as follows:

> Any person claiming an interest of any kind in land may preserve and keep effective that interest by recording, during the forty-year period immediately following the effective date of the root of title of the person whose record title would otherwise be marketable, a notice in writing, duly verified by oath, setting forth the nature of the claim.[33]

Section 47-33d(2) provides that the recording of such a

[33] Section 47-33g of the General Statutes sets forth the required form and content of such a notice.

notice operates as an exception to marketable record title. Therefore, if B or B's predecessor records a notice of interest within 40 years after A's root, then the MRTA does not extinguish B's interest. Step 4 consists of a rudimentary review of A's chain of title to determine if B or B's predecessor has filed a notice that is timely under § 47-33f(a) and complies with the form and content requirements of § 47-33g.

At the time the Model Act was created, much consideration was given to the retroactive extinguishment of property interests, from both a public-policy perspective and a constitutional perspective. The early acts prior to 1960 were generally found to be constitutional, provided that any person with an interest subject to extinguishment be given a reasonable period of time after the enactment of the legislation to file a notice preserving any interest that may have otherwise been extinguished prior to enactment.[34] The Model Act provided a two-year period for such recording.[35] Similarly, Connecticut's MRTA provides that any interest that might otherwise have been extinguished prior to July 1, 1971 could have been preserved by the filing of a notice on or before July 1, 1971.[36]

Step 5: Is the adverse interest a possessory interest, and if so, has the current holder of the interest been in possession for the last 40 years, during which time there has been no recorded title transaction in the holder's chain of title with respect to the adverse interest?

Section 47-33f(b) of the Connecticut General Statures provides as follows:

> If the same record owner of any possessory interest in land has been in possession of that land continuously for a period of forty years or more, during which period no title transaction with respect to the interest appears of record in his chain of title and no notice has been recorded by him or on his behalf as provided in subsection (a) of this section,[37] and the possession continues to the time when marketability is being

[34] SIMES & TAYLOR, *supra* note 4, at 271-72.

[35] SIMES & TAYLOR, *supra* note 4, at 10, 272; Model Act at § 10.

[36] CONN. GEN. STAT. § 47-33l; *see* Mizla v. Depalo, 183 Conn. 59, 62; 438 A.2d 820 (1981). The original version of this statute allowed until January 1, 1970, to file the notice. In 1969, however, the General Assembly amended the statute to extend the period an additional eighteen months, until July 1, 1971. P.A. 69-509, § 5.

[37] See Step 4 above.

> determined, that period of possession shall be deemed equivalent to the recording of the notice immediately preceding the termination of the forty-year period described in subsection (a) of this section.

The drafters of the Model Act created this exception in order to limit the ability of a "wild deed" holder from establishing marketable record title against a party who holds both true record title and physical possession.[38] The exception, however, is quite limited in its application. The comments to the Model Act provide the following explanation:

> This is a situation which is very unlikely to arise, since there must be no title transaction in the chain of title of the possessory owner of record during a period of at least forty years, and the possessory owner must have been in possession during that entire period and must still be in possession. But if such a situation should arise, it would seem to be unfair to deprive [the possessor] of his title against [a party attempting to extinguish the possessor's title] (who may have been a grantee under a wild deed)[39] merely because [the possessor] failed to file a notice of claim.[40]

Step 6: Is the adverse interest based on a period of adverse possession or use arising in whole or in part after A's root of title?

Under §§ 47-37 and 52-575 of the Connecticut General Statutes, an unrecorded property interest may be acquired based on fifteen years of uninterrupted adverse possession or use.[41] Under § 47-33d(3), if B claims a right of adverse possession or prescription against A, and any portion of the period of possession or use occurred after A's root, then A cannot

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[38] SIMES & TAYLOR, *supra* note 4, at 352-53.

[39] This parenthetical appears in the original.

[40] SIMES & TAYLOR, *supra* note 4, at 14.

[41] Section 47-37 provides in its entirety as follows:

No person may acquire a right-of-way or any other easement from, in, upon or over the land of another, by the adverse use or enjoyment thereof, unless the use has been continued uninterrupted for fifteen years.

Section 52-575 provides in relevant part as follows:

No person shall make entry into any lands or tenements but within fifteen years next after his right or title to the same first descends or accrues or within fifteen years next after such person or persons have been ousted from possession of such land or tenements; and every person, not entering as aforesaid, and his heirs, shall be utterly disabled to make such entry afterwards; and no such entry shall be sufficient, unless within such fifteen-year period,

use the MRTA to extinguish B's interest.[42]

Step 7: Does the adverse interest arise out of a title transaction that was recorded subsequent to A's root of title?

Section 47-33d(4) contains an exception for any adverse interest "arising out of a title transaction which has been recorded subsequent to the effective date of the root of title." Unlike § 47-33d(1),[43] this exception does not require that the adverse interest be evidenced in A's chain of title, only that the interest "arise out of" a recorded transaction that occurs after A's root. As with § 47-33d(1), the term "arising out of" is undefined, but it is probably broad enough to include any interests referenced in B's chain of title at any time subsequent to the date of A's root.[44] The one express caveat to this exception in § 47-33d(4) is that the recording of an interest in B's chain of title "shall not revive or give validity to any interest which has been extinguished prior to the time of the recording by the operation of" the MRTA. Therefore, if an interest is extinguished in any other step of the analysis, the interest cannot be revived by the filing of any document in B's chain of title.

Step 8: Is the party claiming the adverse interest a lessor or successor lessor seeking the right to possession following the expiration of a lease?

Under section 47-33h, the MRTA "shall not be applied to bar any lessor or successor of the lessor as a reversioner of

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any person or persons claiming ownership of such lands and tenements and the right of entry and possession thereof against any person or persons who are in actual possession of such lands or tenements, gives notice in writing to the person or persons in possession of the land or tenements of the intention of the person giving the notice to dispute the right of possession of the person or persons to whom such notice is given and to prevent the other party or parties from acquiring such right, and the notice being served and recorded as provided in sections 47-39 and 47-40 shall be deemed an interruption of the use and possession and shall prevent the acquiring of a right thereto by the continuance of the use and possession for any length of time thereafter, provided an action is commenced thereupon within one year next after the recording of such notice.

[42] In light of this broad exception, it is difficult to envision a situation in which the limited exception contained in Step 5 above (40 years of continuous record ownership and possession) would become necessary.

[43] See Steps 2 and 3 above.

[44] Accordingly, there is substantial overlap between the exception contained in § 47-33d(4) and the exception contained in § 47-33d(1).

the right to possession on the expiration of any lease."[45] Although this provision might reasonably be interpreted as a narrow exception that protects landlords against holdover possessory claims of long-term tenants, the drafters of the Model Act apparently intended to establish a much broader principle. As stated in the comments to the Model Act:

> The exception of the interest of a lessor is explainable on the ground that such person is unlikely to know anything about hostile claims with respect to his title, and therefore may not file the necessary notice to protect his interest. The same exception need not be made as to a lessee, since he is in possession and has as much opportunity to protect his interest as the owner of a present fee simple.[46]

The comments suggest that this ostensibly benign exception was actually intended to prevent *any* party from acquiring marketable record title to any interest that interferes with a right of possession immediately following a lease term. Therefore, it appears that the mere act of leasing one's property creates significant protection against extinguishment of an interest under the MRTA.[47]

Step 9: Is the adverse interest an easement (or an "interest in the nature of an easement") that is evidenced by a "physical facility"?

Section 47-33h(1) provides an exception for any "easement or interest in the nature of an easement" if "the existence of such easement or interest is evidenced by the location beneath, upon or above any part of the land described in such instrument of any pipe, valve, road, wire, cable, conduit, duct, sewer, track, hole, tower or other physical facility and whether or not the existence of such facility is observable." This is an extremely broad exception that appears to have been underutilized in Connecticut easement litigation. Under the statutory definition, practically any easement that has been used at some point in time – even one that may have been abandoned – is likely to be evidenced by something that

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[45] The quoted language from the Connecticut statute was taken verbatim from Section 6 of the Model Act.

[46] SIMES & TAYLOR, *supra* note 4, at 15.

[47] Of course, this is not to suggest that a lessor is somehow insulated against third-party claims of adverse possession or prescription.

meets the broad definition of "physical facility." It is unclear whether the evidence must exist at "the time the marketability is to be determined"[48]; or whether, in the alternative, it is sufficient for such evidence to exist at any time during the 40-year period prior to such determination. It is also unclear what type of interest might qualify as an interest "in the nature of" an easement, but the phrase would seem to include any type of interest that can be linked to a physical facility. Such an interest could take various forms, such as a license, profit, covenant, restriction, or lease, for example.

In the absence of a physical facility, Party A may proceed to the next step of the MRTA analysis. As with all the steps in the analysis, if Party B can satisfy the exception, it does not necessarily follow that B will be able to prove the validity of the claimed interest. It only means that B will have an opportunity to establish true title to the easement based on any of the established legal theories regarding easement creation.[49]

Step 10: Is the adverse interest claimed by a government, public service company, or natural gas company?

Section 47-33h(1) provides an exception for "any interest of the United States, of this state or any political subdivision thereof, of any public service company … or of any natural gas company." Although this exception is awkwardly placed within a subsection relating to easements, it apparently applies to any type of property interest held by the listed types of entities.

Step 11: Is the adverse interest a conservation restriction held by a land trust or nonprofit organization?

Section 47-33h(2) provides an exception for any "conservation restriction … that is held by a land trust or nonprofit organization." This exception was added to the MRTA in 2001.[50]

As shown on the Roadmap, Step 11 is the final step in the analysis of whether a property interest is extinguishable

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[48] CONN. GEN. STAT. § 47-33c.

[49] *See* Starble, *supra* note 14, at 63-68 (discussing traditional theories of easement creation under Connecticut law).

[50] P.A. 01-118.

under the MRTA. If Party A can answer "yes" in Step 1 and "no" in all subsequent steps, then the MRTA extinguishes B's interest, thereby cementing A's interest and precluding any inquiry into the true title of either party's claims. If, however, B answers "no" in Step 1 or "yes" in any of the subsequent steps, then the MRTA does not extinguish B's interest and the search for true title is resumed, based on the recording statute as modified by the common law and all non-MRTA statutory provisions.

III. Extinguishing Dominant Interests With a Servient Chain: The "Specific Identification" Issue

One classic law-school fact pattern usually involves an unscrupulous property owner who surreptitiously makes multiple sales of the same parcel (usually Whiteacre or Blackacre) to innocent purchasers. The thief then disappears, leaving the court to determine which of the purchasers has priority. A less cynical and more realistic variation of this scenario involves an innocent misunderstanding that results in an inadvertent multiple conveyance, thereby leading to the creation and perpetuation of two independent chains of fee title. The MRTA, like the Model Act before it, makes only a limited attempt to address these types of problems.[51] In fact, under the fact patterns described above, it would not be unusual for a marketable-record-title analysis to establish title in the *second* purchaser of the property, a result that is contrary to the recording statutes and the common law of every jurisdiction.[52] When the Model Act was proposed, however, the authors apparently surmised that the public need not worry about this scenario, because it would be quite uncommon to have two competing chains of fee title.[53]

Connecticut's experience in litigating title disputes under the MRTA tends to support the hypothesis of Simes and Taylor. A review of court decisions reveals that the most common MRTA dispute has not been between parties who claim title to the same property interest (e.g., fee simple), but

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[51] See Step 5 above.
[52] *See* Barnett, *supra* note 2, at 52-60.
[53] Simes & Taylor, *supra* note 4, at 352-53.

rather between parties who claim title to two *different* types of property interests – namely, fee simple on the one hand and a servitude (such as an easement or other nonpossessory interest) on the other hand. Ordinarily, the party invoking the MRTA will be the holder of the fee interest in the putative servient estate, and the party attempting to prove an exception will be the holder or beneficiary of the servitude. If the servitude is appurtenant, the party defending against the MRTA will also be the fee owner of a dominant estate. As shown in the Roadmap, the MRTA is structured in a manner that easily lends itself to this type of scenario.

Where the holder of a putative servient estate has sought to use the MRTA to extinguish a putative dominant interest, the focus of dispute has often been the "specific identification" exception of section 47-33d(1), which is discussed in Step 3 of the Roadmap. In recent years, this exception has been addressed twice by the Supreme Court and twice by the Appellate Court. The resulting decisions have produced an independent body of analysis that warrants particular attention.

Despite the MRTA's apparently bifurcated process for determining when a reference is "general" enough to require a "specific identification" to a "recorded title transaction,"[54] the Supreme Court has clearly construed the MRTA to mean that no reference in an instrument may qualify for the exception under section 47-33d(1) unless the reference contains a citation to the volume and page of the title transaction that created the purported interest.[55] In *Coughlin v. Anderson,* the easement at issue was described in detail as to location, purpose, and scope.[56] Therefore, under a plain reading of section 47-33d(1), it would seem that the reference was not a "general" one that would require specific identification of a recorded title transaction. Indeed, the interest was described in sufficient detail in the servient chain so as to provide

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[54] *See* pages 386-388, *infra*.

[55] Coughlin v. Anderson, 270 Conn. 487, 507, 853 A.2d 460 (2004); *see also* Mannweiler v. LaFlamme, 65 Conn. App. 26, 33-34, 781 A.2d 497 (2001) (finding that reference to date, volume, and page of deeds satisfied the requirements of the exception).

[56] 270 Conn. at 491 n.3.

notice to anyone taking title to the servient estate. Nevertheless, the Supreme Court held that a failure to provide the volume and page of the source of the interest rendered the reference "general."[57] This interpretation renders the two-part structure of section 47-33d(1) meaningless, because no interest could possibly satisfy the second part without having already satisfied the first part.[58] With *Coughlin*, however, the Supreme Court has now construed this exception as providing a bright-line rule for references to easements in the servient chain: Where the purported interest is created by a deed prior to the servient root of title, the volume and page of the deed must be referenced in the post-root chain, otherwise the exception in section 47-33d(1) can not be satisfied.

In 2006, the Supreme Court addressed the issue of how the "specific identification" requirement of section 47-33d(1) applies to easements that are created not by a deed but by a map. In *McBurney v. Cirillo*,[59] the Court was faced with a purported implied easement that was created by a map. In that case, a deed in the servient chain referred to the map by title. Since maps are not required to be recorded by volume or page,[60] the Court held that a reference to the title of a recorded map (i.e., the name of the map) is a sufficiently specific identification to preserve pre-root interests created by the map.[61]

The fact pattern addressed in *McBurney* – namely, a post-root reference to a pre-root interest created by a map – should not be confused with the situation in which the post-root ref-

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[57] 270 Conn. at 507.

[58] The *Coughlin* interpretation also fails to recognize the reasonable expectations of parties who drafted deeds long before the MRTA was contemplated. A pre-MRTA conveyancing attorney who took care to describe an easement by reference to its specific location, purpose, and scope (and perhaps even as to its original grantor and grantee) could not possibly have anticipated that the easement would retroactively disappear merely because of the failure to cite the volume and page of the easement's original source. Similarly, it is unlikely that any easement holder could have predicted the *Coughlin* interpretation in time to file a statutory notice. (See Step 4 of the MRTA Roadmap.)

[59] 276 Conn. 782, 889 A.2d 759 (2006).

[60] CONN. GEN. STAT. § 7-32.

[61] 276 Conn. at 809-811.

erence is itself contained in a map. In *Johnson v. Sourignamath*,[62] the party claiming a right-of-way over the servient estate relied on a map in the servient chain that referred to "the ordinary right of way for passing and re-passing … that has always been used."[63] Following *Coughlin*, the Appellate Court held that such a reference was insufficient to preserve the claimed interest.[64] Although *McBurney* was decided later, the holding in *Johnson* remains applicable, except to the extent that a map within the servient chain refers to a pre-root interest that was also created by a map. Based on *McBurney*, such a reference could in fact preserve the interest, provided that the post-root map refers to the title of the pre-root map.

The MRTA's specific identification rule creates an interesting opportunity for manipulation in connection with real estate transactions, especially in light of *Coughlin*. In the absence of the MRTA, a buyer taking title to a fee interest by warranty deed would typically seek deed language that provides the narrowest possible carve-out from the fee being conveyed. Accordingly, if the buyer were to have knowledge of a particular servitude that encumbers the fee, he or she would intuitively favor deed language that specifically references the origin of the servitude being excepted from the warranty. Under the MRTA, however, the inclusion of such a specific reference would result in the preservation of an adverse interest that might otherwise be extinguished by the passage of time. Therefore, depending on the age and significance of the adverse interest, a buyer cognizant of the MRTA might choose to accept a *broader* exception in the warranty deed, such as "all matters of record," in an attempt to extinguish a servitude. The downside, of course, would be that the seller's warranty would be significantly weakened. Nevertheless, after weighing the advantages and disadvantages, the buyer might choose vagueness over specificity, especially if a title insurer is willing to provide a narrower

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[62] 90 Conn. App. 388, 877 A.2d 891 (2005).
[63] 90 Conn. App. at 392.
[64] 90 Conn. App. at 396-400.

exclusion than the one contained in the deed. Furthermore, in light of *Coughlin*, the buyer could easily craft deed language that provides a specific carve-out for the adverse interest – such as the location, purpose, scope, and even date of creation – but still does not satisfy the "specific identification" requirement because no volume and page is cited. In such a situation, the buyer would indeed have the best of both worlds: a strong warranty from the seller, and an opportunity to extinguish a pesky and/or disputed encumbrance. It is interesting that the specific exceptions of the MRTA do not preclude an owner who has actual record notice of an adverse title interest at the time of purchase from effectively extinguishing the interest during his ownership of the property.[65]

IV. Extinguishing Servient Interests With a Dominant Chain: The Road Less Traveled

Under the plain language of the MRTA, a party may use the act to establish marketable record title to "*any* interest" in real property,[66] including a nonpossessory interest such as a servitude. Thus, although the MRTA is usually invoked by a servient owner attempting to extinguish a servitude, the MRTA is equally available to the putative dominant owner in the classic dominant-servient title dispute. For instance, if Party A claims an easement interest, such as a right-of-way, over land owned by his neighbor, Party B, then A may be able to establish marketable record title to the easement interest and therefore extinguish B's right to contest the easement. In theory, it seems that A would have a better chance at successfully utilizing the MRTA for extinguishment than would B. This is because the broad exceptions to extinguishment – such as the "physical facility" exception and the "adverse use" exception – have the primary effect of preserving non-

[65] This is because the 40-year period under the MRTA is fluid in nature and is not linked to any title transaction except the statutory root. *See supra* text at notes 22-25.

[66] Conn. Gen. Stat. § 47-33c; *see* Barnett, *supra* note 2, at 63-64; Connecticut Bar Association, Connecticut Standards of Title, Standard 3.3, cmt. 3 (rev. 2005) ("Any kind of an estate in land comes within the protection of the Act. Its purpose is not only to clear fee simple title but to make any interest in land more readily marketable.").

possessory interests against extinguishment by the holders of possessory interests.

Despite the apparent validity of extinguishing a servient interest with a dominant chain of title, this manner of invoking the MRTA raises some interesting issues that are best explained with reference to the case of *Il Giardino v. Belle Haven Land Co*.[67] In that case, the plaintiff claimed an easement over the private roadways of a nearby beach association. Although the plaintiff's land was never part of the beach association and therefore never part of the original dominant estate, a lot owner within the association had granted the plaintiff's predecessor an express recorded easement over the roadways. At the time of the grant in 1901, the grantor of the interest clearly did not possess the legal authority to create an easement over the association roads for the benefit of land outside of the association. As recognized by the Supreme Court in its decision, the general rule is that an "[a]ppurtenant easement cannot be used to serve [a] nondominant estate,"[68] and "an appurtenant benefit may not be severed and transferred separately from all or part of the benefited property,"[69] absent a grant from the servient landowner.[70]

In light of the above, the *Il Giardino* Court concluded that the plaintiff did not possess true title to any easement rights over the defendant's land. The Court thereupon addressed the plaintiff's claim that in the absence of true title, the plaintiff nevertheless possessed marketable record title sufficient to extinguish the defendant's claim to the contrary. In this regard, the plaintiff was able to demonstrate well over 40 years of successive conveyances in which the putative easement over the defendant's land was conveyed as an appurtenance to the plaintiff's unbroken chain of fee title. Yet

[67] 254 Conn. 502, 757 A.2d 1103 (2000).

[68] 254 Conn. at 513 (quoting 1 Restatement (Third), Property, Servitudes § 4.11, comment (b), at 620 (2000)).

[69] 254 Conn. 515 (quoting 2 Restatement (Third), supra, § 5.6, at 46).

[70] The Supreme Court recognized a limited exception to this rule in *Carbone v. Vigliotti,* 222 Conn. 216, 610 A.2d 565 (1992). The evolution and scope of the *Carbone* exception are discussed in detail in Jonathan M. Starble, *Dis-Unity of Title in Connecticut: A Tale of Supreme Confusion Over Easement Law,* 75 CONN. BAR. J. 61, 65-67 (2001).

despite the apparent applicability of the MRTA, the Court rejected the plaintiff's claim based on the following rationale:

> The plaintiff impermissibly attempts to use the act affirmatively to *create* a property interest that did not otherwise exist. We have never applied the act so as to create an easement that otherwise did not exist, or to preclude a party involved in a quiet title action from claiming that the party asserting the interest or its predecessor in title never held the asserted interest. …[T]he act, subject to certain exceptions, functions to extinguish those property interests *that once existed,* and would still exist but for the absence from the land records in the affected property's chain of title of a notice specifically reciting the claimed interest.[71]

The above quotation from *Il Giardino* reflects an interpretation of the MRTA that is both incorrect and internally inconsistent. Without a doubt, the function of the MRTA – and the Model Act upon which it is based – is to extinguish once-valid property rights. And in so doing, the MRTA necessarily *creates* rights in the party who is doing the extinguishing. Contrary to the Court's assertion, the clear purpose of the MRTA is indeed "to preclude a party involved in a quiet title action from claiming that the party asserting the interest or its predecessor in title never held the asserted interest." Taken literally, the Court's holding in *Il Giardino* means that actual record title trumps marketable record title in *all* cases, thereby rendering the MRTA completely ineffective except as a means to extinguish non-record, non-prescriptive rights. While such a significant curtailment of the MRTA certainly has the virtue of promoting the exploration of true title, it should nonetheless come as quite a shock to title insurers and lenders that they can no longer rely on a 40-year title search, even as a way of insuring against pre-root recorded interests that might not appear in *any* post-root chain of title.

Despite the apparent breadth of the *Il Giardino* holding, it is worth reiterating that the MRTA was raised in that case in a somewhat unusual way. Rather than being invoked by a servient fee owner attempting to extinguish a dominant servitude interest, the MRTA was used as a sword by the dominant

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[71] 254 Conn. at 538 (Emphasis in original).

estate owner. Faced with this procedural posture, the Court was either unable or unwilling to entertain an MRTA chain-of-title analysis from the perspective of a party claiming a dominant interest. Accordingly, the Court analyzed the servitude only as a potentially *extinguishable* interest, as opposed to a potentially *extinguishing* interest. Against this background, one can plausibly interpret the *Il Giardino* holding as being limited to claimed *servitude* interests for which the claimant has an unbroken chain of title to the dominant estate but cannot prove that the servitude contains a valid historical link to the applicable servient chain. Another reasonable interpretation is that a person claiming a servitude can *never* invoke the MRTA as a sword, even if the person's chain of title does indeed contain a valid link to the servient chain. Regardless of the interpretation of *Il Giardino*, the Court's decision in that case seems to disregard the fact that the MRTA allows a party to establish marketable record title to "*any* interest" in real property.

On the other hand, analyzing the chain of title to an appurtenant servitude right is not without complication. Under section 47-36l of the Connecticut General Statutes, "[i]n any conveyance of real property all rights, privileges and appurtenances belonging or appertaining to the granted or released estate are included in the conveyance, unless expressly stated otherwise in the conveyance and it is unnecessary to enumerate or mention them either generally or specifically."[72] Accordingly, when a servitude right is conveyed as an appurtenance to a fee interest, there is no requirement that the recorded instrument mention the servitude at all. Under the MRTA, a party seeking to establish a root of title for purposes of trying to extinguish adverse claims need only identify a "conveyance or title transaction … containing language sufficient to transfer the interest claimed by such person."[73] Thus, since *no* language is required to effect the legal conveyance of a servitude, that necessarily means that a party claiming a servitude can establish marketable record title under the MRTA without having any reference to the servi-

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[72] This section is not part of the MRTA.
[73] CONN. GEN. STAT. § 47-33b(e).

tude in his or her chain of title at any time after the actual creation of the servitude. In such a situation, the party claiming the benefit of the servitude might be able to use the MRTA to extinguish an adverse interest, even though the party's interest might otherwise be subject to extinguishment by virtue of the failure to have a "specific identification" subsequent to the servient root.[74] This could easily result in a logical paradox in which both the servient fee holder and the dominant servitude holder are independently able to prove all the elements of the MRTA necessary to affirmatively extinguish the adverse interest but are unable to prove an exception as a *defense* to extinguishment.

Again, however, *Il Giardino* raises serious doubt about whether a party claiming a dominant appurtenant interest can ever invoke the MRTA affirmatively. In *Johnson v. Sourignamath*,[75] the trial court did in fact conclude that the beneficiary of an easement could successfully establish marketable record title sufficient to extinguish an adverse servient claim.[76] The Appellate Court reversed, concluding that the easement itself had been extinguished under the MRTA.[77] The court also held, based on *Il Giardino*, that the trial court had improperly "applied the provisions of the [MRTA] from the perspective of the plaintiffs' chain of title [i.e., the dominant chain] rather than that of the defendant."[78]

Under *Il Giardino* and *Johnson*, a person who holds true title to a dominant non-fee interest apparently faces the significant risk of having his or her interest extinguished by the servient chain, while at the same time being deprived of any possibility of establishing his or her own marketable record title to the interest. Further clouding the issue is a truly perplexing passage from *Irving v. Firehouse Associates, LLC*,[79]

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[74] Of course, in light of § 47-36l, one could also argue that a dominant servitude interest can "arise out of" a title transaction merely by virtue of the transfer of the fee to the dominant parcel, thereby satisfying the exception contained in § 47-33d(4) (see Step #7 of the Roadmap) without any "reference" in any instrument subsequent to the creation of the servitude.

[75] 90 Conn. App. 388, 877 A.2d 891 (2005).

[76] *Id*. at 401.

[77] *See* discussion above at pages 388-390.

[78] 90 Conn. App. 388.

[79] 95 Conn. App. 713, 898 A.2d 270 (2006).

a 2006 decision of the Appellate Court. In *Irving*, the Appellate Court held that a right-of-way had not been extinguished by the MRTA. The primary basis of the holding was the following cursory analysis of the MRTA: "The act does not extinguish benefits appurtenant to the dominant estate; it extinguishes burdens appurtenant to the servient estate."[80] This sentence is neither explained nor explainable. Indeed, there is no possible way to extinguish an appurtenant servient burden without also extinguishing the corresponding appurtenant dominant benefit, and vice versa. As in *Il Giardino* and *Johnson*, the MRTA analysis in *Irving* suggests a fundamental misunderstanding of the correlation between dominant and servient interests, thereby resulting in a significant limitation on the applicability of the MRTA. These three decisions suggest that perhaps the basic roadmap of the MRTA has been altered in ways that may not become clear until future cases are decided.

V. CONCLUSION

As the MRTA turns 40 years old, it remains an important and enigmatic focal point of Connecticut real property law. Those who use the MRTA as a means of analyzing competing title interests should take great care to understand the statutory scheme as well as the recent judicial interpretations that have shaped the MRTA and thereby formed the battlegrounds for future title disputes.

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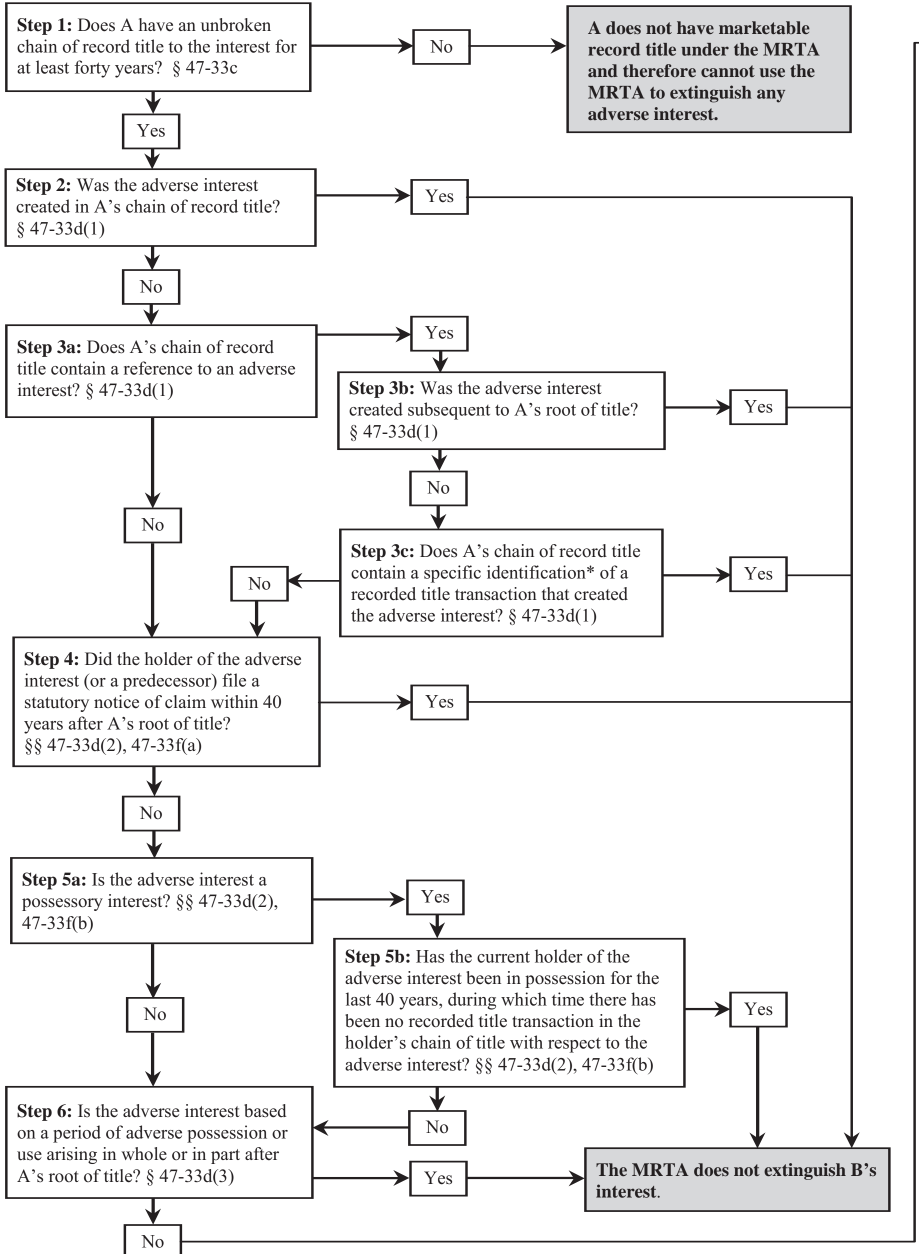
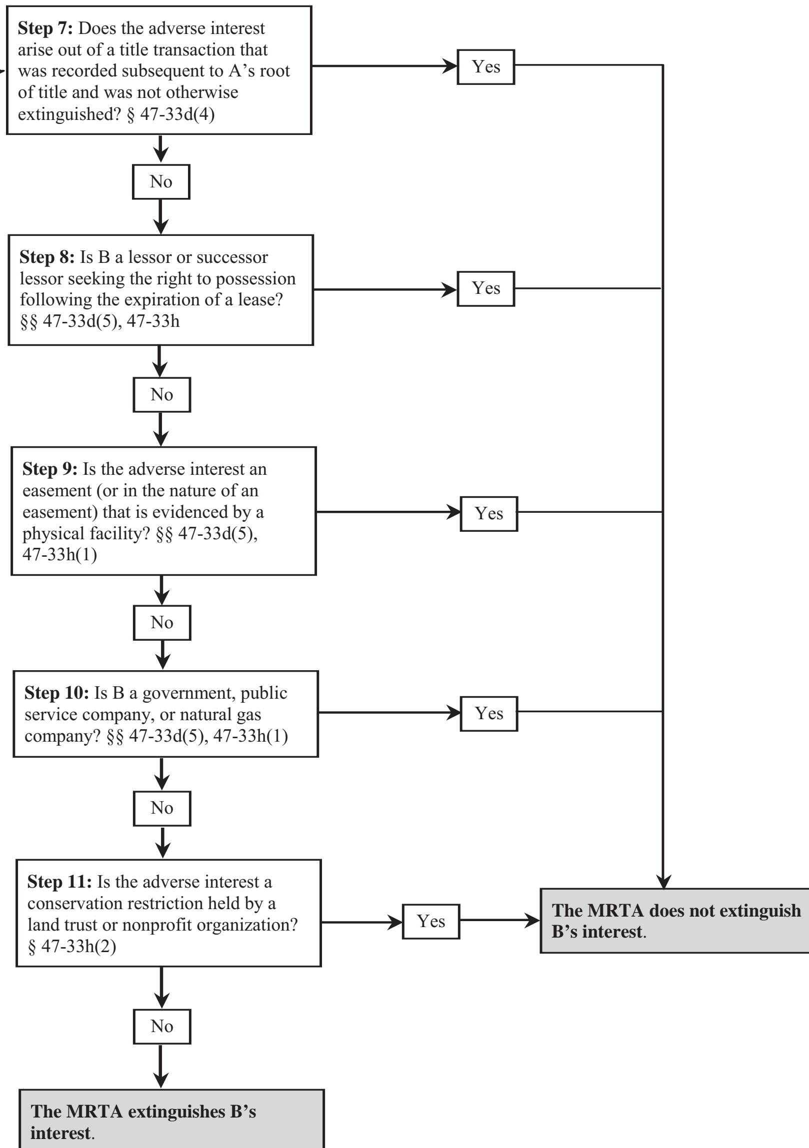
[80] 95 Conn. App. at 726.

MRTA Roadmap: Does A's Property Interest Extinguish B's Adverse Interest?





*For the purpose of determining when a "reference" requires a "specific identification" in Step 3, this roadmap incorporates the holding of *Coughlin v. Anderson*, which interprets C.G.S § 47-33d(1). As discussed in Section III of the preceding Article, the author questions the correctness of this aspect of the *Coughlin* holding.