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## MICHIGAN LAND TITLE STANDARDS – Supplement No. 6 to 6<sup>th</sup> Edition (May 2019)

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- 1 “Preface to...” to end of Table of Contents (05-18)
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(through Supplement No. 6, May, 2019) (05-19)

**INDEX OF STANDARDS INCLUDED IN**

**SUPPLEMENT No. 6**

**MICHIGAN LAND TITLE STANDARDS**

**SIXTH EDITION**

Standard	1.1
Standard	1.2
Standard	8.3
Standard	14.10
Standard	16.14
Standard	16.46

**SUPPLEMENT No. 6**

**MICHIGAN LAND TITLE STANDARDS**

**SIXTH EDITION**

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of the State Bar of Michigan

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# **PREFACE TO MICHIGAN LAND TITLE STANDARDS**

## **SIXTH EDITION (through Supplement No. 6)**

The Sixth Edition of Michigan Land Title Standards (including Supplement No. 1, Supplement No. 2, Supplement No. 3, Supplement No. 4, Supplement No. 5 and Supplement No. 6) has been prepared by the Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan and published by the Real Property Law Section.

First published in the 1950s, the Michigan Land Title Standards is a series of selected statements of the law of land titles, as supported by applicable statutes and case law. Each Standard is a concise statement of a principle of law, accompanied by problems which illustrate the proper application of the principle. Each Standard includes specific references to the statutes and cases which provide the legal authority for the principle addressed. Some of the Standards include explanatory comments by the Committee.

The Committee has taken care to include only those principles of land title law which are clearly supported by the law of Michigan or, where applicable, by the law of the United States, and for which there are supporting statutes or published cases which are definitive in their effect or holding. Points of law that are subject to dispute or uncertainty, or as to which there are conflicting opinions, have not been included in the Standards, even if a particular interpretation may be commonly accepted in practice. The Standards are not intended as a treatise on land title law, but rather consist of selected statements of legal principles to guide lawyers on the legal effect of land title instruments.

The Standards have played a significant role in promoting the certainty and continuity of Michigan's principles of real property law, the importance of which was noted in a decision of our Supreme Court:<sup>1</sup>

[I]f there is any realm within which the values served by stare decisis -- stability, predictability, and continuity -- must be most certainly maintained, it must be within the realm of property law. For this reason, "[t]his Court has previously declared that stare decisis is to be strictly observed where past decisions establish 'rules of property' that induce extensive reliance."

\* \* \* \*

The justification for this rule is not to be found in rigid fidelity to precedent, but conscience. . . . Judicial "rules of property" create value, and the passage of time induces a belief in their stability that generates

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<sup>1</sup> 2000 *Baum Family Trust v Babel*, 488 Mich 136, 172; 793 NW2d 633 (2010), citing *Bott v Natural Resources Comm*, 415 Mich 45, 77-78; 327 NW2d 838 (1982).

commitments of human energy and capital.

During the more than 60 years since their initial publication, the Standards have come to be regarded as an authoritative reference on the law of land titles and other aspects of real property law as developed and interpreted in Michigan. Trial and appellate courts have frequently cited the Standards in support of the legal principles relied upon in decisions in real property cases. Indeed, the Michigan Land Title Standards are generally regarded as among the most complete and authoritative of all the state land title standards in the United States.

The Committee has been ably guided by the following Chairpersons: Ralph W. Aigler (1953-54), James H. Hudnut (1954-55), Ralph Jossman (1955-59), Cyrus M. Poppen (1959-61), Ray L. Potter (1961-63), Clarence W. Videan (1963-64), Reuben M. Waterman (1964-65), F. Norman Higgs (1965-66), T. Gerald McShane (1966-69), Frank L. Charbonneau (1969-71), James W. Draper (1971-74), Myron Winegarden (1974-76), Andrew Cooke (1976-78), Paul A. Ward (1978-80), John R. Baker (1980-83), Carl A. Hasselwander (1983-85), Janet L. Kinzinger (1985-88), Thomas C. Simpson (1988-90), Gerard K. Knorr (1990-91), Russell A. McNair, Jr. (1991-92), Anne H. Hiemstra (1992-93), C. Robert Wartell (1993-95), James R. Brown (1995-98), Dennis W. Hagerty (1998-2001), James E. Reed (2001-04), Robert D. Mollhagen (2004-07), Russell E. Prins (2007-10), James M. Marquardt (2010-13), Brian J. Page (2013-15), Catharine B. LaMont (2015 -17), Lawrence M. Dudek (2017-19) and C. Kim Shierk (2019-2020).

The Committee continuously reviews and revises the Standards and prepares new Standards to include new subject matter and authorities and to reflect changes in the law. New and revised Standards are published in periodic supplements. The Committee welcomes comments and suggestions from all interested members of the Bar.

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Lansing, Michigan  
May, 2019

**2019 - 2020**  
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## STANDARD 1.1

### EFFECT OF THE MARKETABLE RECORD TITLE ACT

#### STANDARD: THE MARKETABLE RECORD TITLE ACT REMEDIES TITLE DEFECTS WITHIN ITS SCOPE.

**Authorities:** MCL 565.101 through 565.109. *Rush v Sterner*, 143 Mich App 672, 373 NW2d 183 (1985); *Strong v Detroit & Mackinac Ry Co*, 167 Mich App 562, 423 NW2d 266 (1988).

**Comment A:** The stated legislative purpose of the Marketable Record Title Act, MCL 565.101, *et seq.* (the “Act”), is to simplify and facilitate land title transactions by providing a statutory basis for establishing marketable record title to an interest in land with reference to a period of at least 40 years (at least 20 years for mineral interests as defined in MCL 565.101a). The effect of the Act is to extinguish by operation of law an interest in land whose existence depends upon any act, transaction, event or omission preceding the 40-year period (or the 20-year period for mineral interests as defined in MCL 565.101a), subject to specified exceptions and limitations. MCL 565.101a defines a mineral interest as an interest in minerals (other than an interest in oil, gas, sand, gravel, limestone, clay, or marl) owned by a person other than the surface owner.

However:

(i) before March 29, 2019 (the effective date of 2018 PA 572), an interest in land could be preserved under the Act by the recording during the 40-year period (or during the 20-year period for mineral interests as defined in MCL 565.101a) of a notice, verified by oath, setting forth the nature of the interest claimed and containing an accurate and full description of all the land affected by the notice;

(ii) a mineral interest as defined in MCL 565.101a could be preserved by the recording within three years after December 22, 1997, of a notice, verified by oath, setting forth the nature of the interest claimed and containing an accurate and full description of all the land affected by the notice; and



(iii) on and after March 29, 2019, an interest in land may be preserved under the Act by the recording during the 40-year period (or during the 20-year period for mineral interests as defined in MCL 565.101a) of a notice, verified by oath, setting forth the nature of the interest claimed and containing an accurate and full description of all the land affected by the notice and conforming to the requirements in Section 5 of the Act, as amended by 2018 PA 572, specifying the form and content of the notice, including stating the liber and page or other county-assigned unique identifying number of the recorded instrument the claim is founded on (except that a notice of a mineral interest as defined in MCL 565.101a is not required to state the liber and page or other county-assigned unique identifying number of the recorded instrument the claim is founded on).

**Comment B:** As discussed in Standards 1.2 and 1.3, marketable record title to an interest in land requires that there is nothing of record within the applicable period purporting to divest that interest. 2018 PA 572 amended Section 2 of the Act to limit the conveyances or other title transactions in the chain of record title (including, with certain exceptions, a notice to preserve an interest) that can effectively purport to divest an interest in land (other than a mineral interest as defined in MCL 565.101a) to those that either (i) create the divestment, or (ii) specifically refer by liber and page or other county-assigned unique identifying number to a previously recorded conveyance or other title transaction that created the divestment. MCL 565.102(2).

**Comment C:** Because the change in Section 2 of the Act may adversely affect previously recorded interests, 2018 PA 572 also amended the Act to provide that an interest in land may be preserved by the recording within two years after March 29, 2019, of a notice, verified by oath, setting forth the nature of the interest claimed, containing an accurate and full description of all the land affected by the notice, and conforming to the requirements for the form and content of the notice, including (except in the case of a mineral interest as defined in MCL 565.101a) the liber and page or other county-assigned unique identifying number of the recorded instrument the claim is founded on. MCL 565.103(1) and 565.105(1).

**Comment D:** The title resulting from application of the Act's remedial provisions is marketable record title. MCL 565.103. Marketable

record title under the Act may not be equivalent, however, to a marketable title at common law or to a commercially marketable or merchantable title, as those terms are generally used. One may have a marketable record title under the Act, which is still properly subject to objection.

**Note:** See Standard 15.4 with respect to certain severed oil and gas interests.

**Caveat:** With reference to the 1997 amendments to the Act that granted a grace period for preserving mineral interests as defined in MCL 565.101a, the Michigan Attorney General opined that the grace period applied only to the recording of notices to preserve an interest that had not been previously barred or extinguished under the terms of the Act. OAG 2004, No. 7148 (January 26, 2004).

## STANDARD 1.2

### ELEMENTS OF MARKETABLE RECORD TITLE

**STANDARD: A PERSON HAS MARKETABLE RECORD TITLE TO AN INTEREST IN LAND IF:**

**(A) THERE IS AN UNBROKEN CHAIN OF RECORD TITLE TO THAT INTEREST FOR AT LEAST 40 YEARS (AT LEAST 20 YEARS FOR MINERAL INTERESTS AS DEFINED IN MCL 565.101a); AND**

**(B) THERE IS NO ONE IN HOSTILE POSSESSION OF THE LAND.**

**Authorities:** MCL 565.101, 565.101a and 565.103. *Cook v Grand River Hydroelectric Power Co*, 131 Mich App 821, 346 NW2d 881 (1984); *Rush v Sterner*, 143 Mich App 672, 373 NW2d 183 (1985); *Strong v Detroit & Mackinac Ry Co*, 167 Mich App 562, 423 NW2d 266 (1988).

**Comment:** The required period of an unbroken chain of record title is 20 years with respect to a mineral interest, which is defined in MCL 565.101a as an interest in minerals (other than an interest in oil, gas, sand, gravel, limestone, clay, or marl) owned by a person other than the surface owner.

## STANDARD 8.3

### CONVEYANCE FROM TRUSTEE UNDER EXPRESS TRUST EVIDENCED BY CERTIFICATE OF TRUST

**STANDARD:** A CONVEYANCE FROM A TRUSTEE APPOINTED UNDER A TRUST WHOSE NECESSARY TERMS ARE EXPRESSED IN THE INSTRUMENT CREATING THE TRUSTEE'S ESTATE PROVIDES THE GRANTEE THE PROTECTION OF A SUBSEQUENT PURCHASER IN GOOD FAITH UNDER MCL 565.29 IF A CERTIFICATE OF TRUST COMPLYING WITH MCL 700.7913 (A) IS OF PUBLIC RECORD, (B) ESTABLISHES OR EVIDENCES THE EXISTENCE OF A VALID TRUST AND (C) CONTAINS VALID AUTHORITY FOR THE CONVEYANCE.

**Problem A:** Blackacre was deeded to "Richard Roe as trustee to collect rents and pay to James Smith for his life." No such trust instrument or certificate of trust was recorded. Roe, as trustee, deeded Blackacre to Simon Grant. Does Grant have the protection provided to a subsequent purchaser in good faith under MCL 565.29?

**Answer:** No.

**Problem B:** Blackacre was owned by Richard Roe as trustee under a trust agreement conferring upon the trustee the express power to sell and convey any real property constituting part of the trust corpus. A certificate of trust complying with the requirements of MCL 700.7913 was recorded. Roe, as trustee, deeded Blackacre to Simon Grant. Does Grant have the protection provided to a subsequent purchaser in good faith under MCL 565.29?

**Answer:** Yes.

**Problem C:** Blackacre was deeded to Richard Roe as trustee under a valid recorded trust. The trust agreement conferred power of sale only with the consent of a majority of the beneficiaries. Roe, as trustee, deeded Blackacre to Simon Grant, but a majority of the beneficiaries did not join therein or otherwise evidence their

consent of record. Does Grant have the protection provided to a subsequent purchaser in good faith under MCL 565.29?

**Answer:** No.

**Authorities:** Generally: MCL 555.11 through 555.23; 1991 PA 133, as amended, being MCL 565.431, 565.434 and 565.435; MCL 700.7103; 2018 PA 491, being MCL 700.7913; MCL 565.29.

Problem C: *Palmer v Williams*, 24 Mich 328 (1872).

**Comment A:** The Michigan Trust Code (MCL 700.7101 *et seq.*) became effective on April 1, 2010. Section 7913 (MCL 700.7913) prescribes the contents and execution of a certificate of trust. The provisions of MCL 700.7913 and MCL 565.432-433 (now repealed) were similar but not exactly the same. Both statutes provided protection to parties that rely in good faith on the provisions in a certificate of trust.

A significant difference between the two statutes relates to the execution of a certificate of trust. MCL 700.7913 provides that a “certificate of trust may be signed or otherwise authenticated by the settlor, any trustee, or an attorney for the settlor or trustee.” MCL 565.433 states that a “certificate of trust existence and authority shall be executed by the settlor or grantor; an attorney for the settlor, grantor, or trustee; or an officer of a banking institution or an attorney if then acting as a trustee.” Under MCL 565.433 a successor trustee would not be a proper person to sign a certificate of trust unless the trustee is one of the persons identified therein.

2018 PA 492 repealed MCL 565.432, 565.433 and 565.436 and amended 565.431, 565.434 and 565.435. Also, 2018 PA 491 amended MCL 700.7913. MCL 565.431, 565.434 and 565.435 permit the recording of a certificate of trust in accordance with the provisions of MCL 700.7913. MCL 700.7913(2) provides that “A certificate of trust may be signed or otherwise authenticated by the settlor, any trustee, or an attorney for the settlor or trustee.”

The Committee expresses no opinion as to whether a grantee in a deed from a successor trustee who executed and recorded a trust certificate of existence and authority under MCL 565.432 and MCL 565.433 (now repealed) has the protection provided to a

subsequent purchaser in good faith under MCL 565.29.

**Comment B:** In light of 1991 PA 133, 2018 PA 492 and 2018 PA 491 and the longstanding practice of accepting a recorded trust instrument and all amendments evidencing the authority of a trustee to convey title to real property, the recording of a trust instrument and all amendments as an alternative to recording a certificate of trust would provide the same protection afforded to a subsequent purchaser in good faith under MCL 565.29.

**Caveat:** This Standard addresses the requirements for establishing the protection provided to a subsequent purchaser in good faith under MCL 565.29 in connection with deeds by trustees where the trust terms are sufficiently expressed of record to constitute notice of the existence of the trust. It does not apply to deeds from so-called naked trustees or other grantors where the trust is not fully expressed. See, Standard 8.2.

## STANDARD 14.10

### CREATION OF EASEMENT BY PRESCRIPTION

**STANDARD:** AN EASEMENT IS CREATED BY PRESCRIPTION IF, FOR A PERIOD OF FIFTEEN YEARS, A CLAIMANT'S USE OF THE LAND OF ANOTHER HAS BEEN:

**(A) ACTUAL;**

**(B) CONTINUOUS;**

**(C) OPEN;**

**(D) NOTORIOUS;**

**(E) HOSTILE; AND**

**(F) UNINTERRUPTED.**

**Authorities:** MCL 600.5801(4). *Marlette Auto Wash, LLC v Van Dyke SC Properties, LLC*, 501 Mich 192; 912 NW2d 161 (2018).

**Comment A:** If a claimant's otherwise qualifying period of use is less than 15 years, the claimant may tack the qualifying periods of use of its predecessors in interest to satisfy the 15-year statutory period if there is privity of estate. *Marlette, supra*, at 203; *Stewart v Hunt*, 303 Mich 161; 5 NW2d 737 (1942).

**Comment B:** The opinion in *Marlette, supra*, at 203-204, concluded that if a prescriptive easement vests with the claimant's predecessors in interest, the easement is appurtenant and transfers to subsequent owners in the property's chain of title without the need for the subsequent owner to establish privity of estate.

**Comment C:** Unlike adverse possession, prescription does not require that the use be exclusive. *Marlette, supra*, at 202.

**Comment D:** The Committee expresses no opinion as to what specific acts may constitute each of the elements set forth in (A) through (F) above.

## STANDARD 16.14

### LEGAL PROCEEDINGS THAT BAR FORECLOSURE BY ADVERTISEMENT

**STANDARD:** FORECLOSURE BY ADVERTISEMENT IS BARRED IF LEGAL PROCEEDINGS ARE PENDING IN WHICH JUDGMENT ON THE MORTGAGE DEBT MAY BE RENDERED OR IF A JUDGMENT HAS BEEN RENDERED AND EXECUTION HAS NOT BEEN RETURNED UNSATISFIED IN WHOLE OR IN PART.

**Problem A:** A mortgage given by Robert Brown to Edward Lane was in default. Brown died and his estate was probated. At the hearing on claims, Lane's claim for the mortgage debt was allowed, but it was never paid. Lane later foreclosed the mortgage by advertisement. Was the foreclosure valid?

**Answer:** Yes. The filing of a claim against the estate of a mortgagor is not a "suit or proceeding at law" within the meaning of the statute setting forth the prerequisites for foreclosure of mortgages by advertisement.

**Problem B:** A mortgage given by Robert Brown to Edward Lane was in default. Lane sued to collect the mortgage debt and obtained a judgment for the amount owing on the debt. Execution on the judgment was returned unsatisfied. Lane later foreclosed the mortgage by advertisement. Was the foreclosure valid?

**Answer:** Yes. After execution on the judgment was returned unsatisfied, the mortgagee was entitled to foreclose by advertisement.

**Problem C:** Same facts as in Problem B, except that while the suit was pending Lane foreclosed his mortgage by advertisement. Was the foreclosure valid?

**Answer:** No. Until the suit is discontinued or, if judgment is rendered, execution upon the judgment is returned unsatisfied, in whole or in part, foreclosure of the mortgage by advertisement is barred.

**Authorities:** Generally: MCL 600.3204(1)(b).  
Problem A: *Larzelere v Starkweather*, 38 Mich 96 (1878).



- Comment A:** In construing a predecessor statute to MCL 600.3204(1)(b), the Supreme Court has stated that the object of the statute "is to prevent proceedings, at the same time to prosecute the personal liability of the mortgagor and pursue the land." *Lee v Clary*, 38 Mich 223, 227 (1878).
- Comment B:** In *United States v Leslie*, 421 F2d 763 (CA 6, 1970), the court held that a suit against a guarantor of the mortgage debt pursuant to a guaranty which is not conditioned on the mortgagee proceeding against the mortgagor or the property is not an action or proceeding to recover the mortgage debt, and a suit against the guarantor may proceed while foreclosure by advertisement is pending. See also, *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 818 NW2d 460 (2012).
- Comment C:** An action or proceeding brought by a mortgagee for the appointment of a receiver is not an action or proceeding to recover a debt and does not bar foreclosure by advertisement. MCL 600.3204(1)(b) and 554.1035(f).

## STANDARD 16.46

### AFFIDAVIT PURPORTING TO SET ASIDE FORECLOSURE SALE BY ADVERTISEMENT

**STANDARD: A MORTGAGEE CANNOT UNILATERALLY SET ASIDE A MORTGAGE FORECLOSURE SALE BY ADVERTISEMENT AND REINSTATE THE MORTGAGE BY RECORDING AN AFFIDAVIT TO THAT EFFECT.**

**Problem:** Robert Brown mortgaged Blackacre to Edward Lane. Lane foreclosed the mortgage by advertisement in 2010. Lane purchased Blackacre at the sale, and the redemption period expired in 2011. In 2012, Lane executed and recorded an affidavit referring to MCL 565.451a and declaring the foreclosure sale void and the mortgage reinstated. Did Lane's affidavit set aside the sale and reinstate the mortgage?

**Answer:** No.

**Authority:** *Wilmington Savings Fund Society v Clare*, 323 Mich App 678 (2018).

**Comment:** MCL 565.451a permits the recording of an affidavit stating facts relating to certain matters that may affect title to real property, including "any condition or event which may terminate an estate or interest in real property." MCL 565.451a(b). *Wilmington, supra*, held that an affidavit purporting to set aside a mortgage foreclosure sale and reinstate the mortgage was ineffective, because it did not provide notice of an existing condition, but instead created the condition.

# MICHIGAN LAND TITLE STANDARDS

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