

JULY 2002 REAL PROPERTY QUESTION

Able owned Whiteacre in fee simple absolute. Baker owned Blackacre, an adjacent property. In 1999, Able gave Baker a valid deed granting him an easement that gave him the right to cross Whiteacre on an established dirt road in order to reach a public highway. Baker did not record the deed. The dirt road crosses over Whiteacre and extends across Blackacre to Baker's house. Both Baker's house and the dirt road are plainly visible from Whiteacre.

In 2000, Able conveyed Whiteacre to Mary in fee simple absolute by a valid general warranty deed that contained all the typical covenants but did not mention Baker's easement. Mary paid Able \$15,000 for Whiteacre and recorded her deed.

Thereafter, Mary borrowed \$10,000 from Bank and gave Bank a note secured by a deed of trust on Whiteacre naming Bank as beneficiary under the deed of trust. Bank conducted a title search but did not physically inspect Whiteacre. Bank recorded its deed of trust. Mary defaulted on the loan. In 2001, Bank lawfully foreclosed on Whiteacre and had it appraised. The appraiser determined that Whiteacre had a fair market value of \$15,000 without Baker's easement and a fair market value of \$8,000 with Baker's easement. Bank intends to sell Whiteacre and to sue Mary for the difference between the sale price and the loan balance.

The following statute is in force in this jurisdiction:

Every conveyance or grant that is not recorded is void as against any subsequent good faith purchaser or beneficiary under a deed of trust who provides valuable consideration and whose interest is first duly recorded.

1. What interests, if any, does Baker have in Whiteacre? Discuss.

2. What interests, if any, does Bank have in Whiteacre?
Discuss.

3. What claims, if any, may Mary assert against Able?
Discuss.

ANSWER A TO ESSAY QUESTION 2

1. Baker's Interest in Whiteacre

Easement

An easement is an interest in land that grants someone a right to use the land of another. An easement can be created in a number of ways. One way an easement can be created is by express writing. Here, Able gave Baker a valid deed granting the easement for the right to cross Whiteacre to reach the public highway. Therefore, the easement was created at that time.

An easement will be perpetual in duration unless otherwise specified in the instrument creating it. Here, Able did not include any termination date for the easement. Therefore, the easement to Baker was to be perpetual in duration.

There are two types of easements: easements appurtenant and easements in gross. An easement appurtenant is one that involves two adjacent parcels of land where one piece of land is used to benefit the other. The benefited estate is called the dominant estate, while the burdened estate is called the servient estate. Here, Blackacre is the dominant estate and Whiteacre is the servient estate.

An easement, even though perpetual, can be terminated by the parties. A dominant estate can release the servient estate from the easement by writing. The writing would have to meet deed formalities to satisfy a valid release. The easement can also be abandoned. However, it cannot simply be an oral abandonment. The oral abandonment must be coupled with some action by the dominant estate showing that they are abandoning the

easement. The servient estate can also terminate the easement by prescription. Here, none of these actions of termination have occurred. So, at first glance, Baker's easement across Whiteacre should still be in existence.

Recordation

An interest in land can be protected by recordation. At common law, an interest in land was protected by the first in time, first in right doctrine. The problem with the doctrine was that it did not protect bona fide purchasers. Modern law has produced recording systems and recording statutes that spell out the protection afforded to those that record their interests. At common law, since Baker was first in time the easement, then his interest would be protected against subsequent purchasers. But, as we are told, there is a statute in this jurisdiction that controls.

An important concept in recordation is the concept of the bona fide purchaser ("BFP"). BFPs are granted special status in many recordation statutes. A bona fide purchaser is one who purchases for value and without notice of any other interests. There are three types of notice. Actual notice is, of course, characterized by the actual knowledge on the part of the purchaser of the previous interest. Constructive notice is that which comes about by there being a deed or interest recorded in the buyer's direct chain of title. Finally, there is inquiry notice. Inquiry notice comes about whenever an inspection of the property or title records would lead a reasonable purchaser to launch a further inquiry. Here, we are told that Baker did not record his deed granting the easement. Therefore, we know that Mary and Bank could not have had constructive notice of easement. However, we are also told that the easement road leading to Baker's house on Blackacre was plainly visible from Whiteacre. This visibility is enough to put a subsequent purchaser on inquiry notice. Therefore, Mary and Bank are not BFPs.

There are three types of recordation statutes. There is a race statute which will protect the first person to record their deed or interest regardless of their status. There is a notice statute which will protect any bona fide purchaser who records against any subsequent purchaser who is also not a bona fide purchaser. There is also [a] race-notice statute which will protect a bona fide purchaser, but only if he is the first to record. Notice and race-notice statutes give protection only for BFPs; therefore, we know that if the statute in this jurisdiction is a notice or race-notice statute, then Mary and Bank will not be

protected against Baker's easement. Baker's easement, rather, will protected [sic] by the common law rule of first in time, first in right. The statute here a race statute [sic]. It will protect any good faith purchaser for value or beneficiary under a deed of trust as long as they recorded first. Here, we know that Mary was a good faith purchaser for value. We are also told that Mary recorded her deed. Therefore, the statute will protect her interest in Whiteacre and will make Baker's deed void as against Mary.

Necessity

An easement can arise by necessity. Necessity arises when one parcel of land is cut off from any viable road or passageway. If the land is cut off, an easement by necessity will arise across an adjacent piece of land for right of way to the highway or other means of travel. The servient estate has the right to place the easement anywhere on the property as long as it is reasonable. Here, if the voiding of Baker's deed of easement will cut off Blackacre from any public highway, then an easement of necessity will arise and he will still be able to cross Whiteacre. However, the holder of Whiteacre will be able to place the easement wherever they wish as long as it is reasonable.

2. Bank's Interest in Whiteacre

Deed of Trust

A deed of trust acts like a mortgage. The title is held by a trustee until such time as the loan is paid back and then title reverts back to the landowner. Because this acts like a mortgage, courts will treat it like a mortgage and will require the procedures of a mortgage. These procedures will include a judicial proceeding (foreclosure) before a sale of the property to satisfy the loan. The deed of trust will also be a recognized interest in property, as is the mortgage. Therefore, it can be recorded and protected like a mortgage.

BFPs

As stated earlier, we know that a BFP is a purchaser for value that takes without notice of a previous interest. Here, we are told that Bank does not make a physical inspection of Whiteacre before making the loan and taking their interest. If they had done so, as a reasonable party would have, then

they would have seen the dirt road leading to Bakers' house. Therefore, Bank was inquiry notice and is not a BFP.

Shelter Rule

Under the shelter rule, a subsequent purchaser can be sheltered under a BFP's protection. This means that if a jurisdiction has a statutory scheme that only protects BFPs, that there is still a loophole that will allow a non-BFP to get protection. The subsequent purchaser must take in a line descending from the BFP. If the subsequent purchaser takes from BFP, he can use the BFP's protection under the statute for himself. The purpose of the rule is protect [sic] the alienability of the property for the BFP. Here, we know that Mary is not a BFP. We also know that the statutory scheme does not require that one be a BFP. However, if we did have a notice or race-notice statute, then Bank would not be protected under the shelter rule because Mary is not a BFP.

Recordation

As stated above, one who holds an interest in land can protect that interest by recording it pursuant to the recording statutes of its jurisdiction. Here, we know that the recording statute applies to the beneficiary of deeds of trust. Here, Bank was the beneficiary of the deed of trust on Whiteacre. The statute requires valuable consideration be paid for the interest. Here, Bank loaned Mary \$10,000 for its interest in the deed of trust. Bank also recorded its interest. When Bank recorded its interest, it made Baker's deed of easement void as to Bank's interest. Therefore, Bank has an interest superior to Baker's.

Foreclosure

Bank's deed of trust was secured by Mary's interest in Whiteacre. As stated before, the deed of trust acts like a mortgage so it will be treated as such by the courts. This will require a foreclosure proceeding. Once the proceeding has been established, Bank will be able to force the sale of Whiteacre to satisfy its claim. Because Baker's easement will be void as to Mary and Bank, there will be no deficiency against Mary.

3. Mary v. Able

Easement

An easement on a servient estate passes with the servient estate. Therefore, when Whiteacre passed from Able to Mary, Mary took subject to the easement. However, the recordation statute has saved Mary from this.

At common law, a seller of land did not have to disclose anything to the buyer. The buyer took at his own peril under the doctrine of caveat emptor. However, a general warranty deed did require disclosures.

General Warranty Deed

Able passed Whiteacre to Mary on a general warranty deed. A general warranty deed comes along with six covenants of title. There are three present covenants and three future covenants. The present covenants are the covenants of: seisin, right to convey, and against encumbrances. These present covenants are breached, if at all, at the time that title is passed. The future covenants are the covenants of: warranty, quiet enjoyment, and further assurances. The future covenants are breached, if at all, at some later time when another party makes a claim of paramount title.

Covenant Against Encumbrances

The covenant against encumbrances basically says that the title will be free of any encumbrances not previously disclosed by seller. Encumbrances include easements, restrictive covenants, and mortgages, among other things. Here, Able did not disclose the easement held by Baker. This was a breach of the covenant against encumbrances at the moment that title passed. Therefore, Mary can sue for this breach and can collect any damages that she suffered as a result.

ANSWER B TO ESSAY QUESTION 2

Baker's interest in Whiteacre:

Easements:

An easement is a non-possessory interest in land that allows the easement holder to use the property of the true owner. Baker's easement can be described as an easement appurtenant. Whiteacre is the servient estate. Blackacre is the dominant estate. As the holder of the easement appurtenant, Baker can use the road over Whiteacre to travel from Blackacre to the public highway.

Unless they qualify as easements by necessity or by prescription, easements must be in writing to be valid, and must satisfy the statute of frauds. Here, Able granted Baker a valid deed, which will satisfy the writing requirements. Therefore, it appears that Baker has a valid express easement to use the road over Whiteacre for access to the public highway.

Additionally, easements are presumptively perpetual. They are terminated by the terms of the instrument themselves, by express writing, by abandonment, by condemnation of the servient estate, or by merger of the servient and dominant estate. None of those things appear to have occurred here, so Baker's easement has not been terminated.

Failure to record:

Although Baker appears to have a valid easement, his failure to record may affect his rights here. Recording statutes, such as the one in this jurisdiction, are primarily for the purpose of protecting subsequent BFPs. They do not effect the validity of land transfers themselves. Thus, despite his failure to record, Baker had a valid easement when Able conveyed the deed to him, assuming it was properly delivered and accepted.

Mary as a BFP

The next issue is whether Baker's easement fails against a challenge by Mary, because she purchased the dominant estate, Whiteacre, after Baker did not record his deed to the easement. There is a recording statute in this jurisdiction. The recording statute can best be described as a race-notice

statute. This means that in order to be protected under the statute, the subsequent purchaser must take the property without notice and record their deed first. Because Mary recorded her deed, and Baker never recorded his, the race component of the race-notice statute has been satisfied, as Mary recorded first.

The issue then becomes whether or not Mary satisfies the requirement of being a subsequent good faith purchaser, which I will refer to as a BFP for short. A BFP is a purchaser who pays valuable consideration and who takes without notice of the other interest in the property. Mary paid \$15,000, so she did pay consideration.

Notice:

The main issue is whether Mary took without notice.

Subsequent purchasers are not good faith BFPs if they have either actual notice, constructive notice, or inquiry notice. Here, there are no facts that suggest that Mary in fact know about the easement, so we cannot simply conclude that she had actual notice. Constructive notice is the type of notice that comes from recording. Because Baker did not record his deed, Mary did not have constructive notice. Inquiry notice comes from physical inspection of the land. Here, the facts indicate that both Baker's house and the dirt road were plainly visible from Whiteacre. This indicates that upon inspection of Whiteacre, Mary could have discovered the easement and inquired about it before purchasing Whiteacre from Able. Thus, it can be said that Mary did indeed have inquiry notice. As such, Mary fails as a BFP, and cannot defeat Baker's interest in Whiteacre. Therefore, it appears that Baker's easement over Whiteacre is valid.

Bank:

Moreover, the race-notice statute also protects mortgagors, such as the Bank. The bank also satisfies the recording first component of the statute, but did not physically inspect the land before taking its security interest in it. Therefore, the Bank also had inquiry notice, and cannot simply defeat Baker's easement.

Bank's interests in Whiteacre

Bank v. Baker

The race-notice statute in this jurisdiction protects beneficiaries under a deed of trust. The bank is a beneficiary under a deed of trust, and therefore the bank is protected by the recording statute. As discussed above, the Bank satisfies the "race" component of the recording statute, as it recorded the deed of trust and Baker never recorded his easement, therefore the Bank recorded first.

Also as discussed above, the Bank did not inspect the land, but if it had it would have discovered the easement. Therefore, the Bank had inquiry notice of the easement and cannot defeat Baker's interest in Whiteacre.

Bank v. Mary

The Bank lent Mary \$10,000. In exchange, the Bank received a note secured by a deed of trust in Whiteacre. In a title theory jurisdiction, this would have meant that Bank held title to Whiteacre at equity. In a lien theory jurisdiction, this would have meant that Bank simply had a lien on Whiteacre. In any case, when Mary defaulted on the loan, Bank had a right to foreclosure on the property. Mortgage law requires that a valid foreclosure sale takes place, and the facts state that the Bank lawfully foreclosed.

Following foreclosure, the Bank became the owner of Whiteacre. Thus, the Bank owns whatever interest in Whiteacre Mary owned, which means it owns Whiteacre in fee simple absolute, subject to Baker's easement.

The issue then is whether the Bank has a valid claim against Mary for the \$2000 difference between the loan amount and the value the land has been appraised [at] first. Before the Bank can actually bring an action against Mary for the difference, it must sell Whiteacre. Only after it sells Whiteacre on the market can the Bank actually assert a deficiency judgment against Mary. Had the Bank had the property appraised before granting the security interest, the Bank likely would have discovered the easement and would have discovered that the land was not worth \$10,000. For this reason, Mary will argue that the Bank assumed the risk of this deficiency.

Mary's claims against Able

Abel conveyed Whiteacre to Mary in fee simple absolute by a valid general warranty deed that contained all the typical covenants, but did not mention Baker's easement. Although land sale contracts contain implied warranty of marketable title, the land sale contract merges into the deed at closing, therefore Mary's only claims against Able must be based on the deed, and Mary must proceed under the principles of real property law. The issue here is what actions Mary has against Able based on the deed.

Deed covenants:

Warranty deeds contain present and future covenants. The present covenants can only be breached at the time of the conveyance, and are therefore not an issue here. However, the future covenants can be breached later. Here, at a time following the conveyance, Mary took a mortgage out on Whiteacre based on the value of the land without Baker's easement. This occurred after conveyance, and therefore Mary can bring an action against Able under the future covenants. The future covenants are for quiet enjoyment, further assurances and warranty.

These covenants represent guarantees made by Able that Mary owns the land outright, free from encumbrances and from challenges to her ownership interests by third parties. Here, the bank is threatening to sue Mary for the \$2000 deficiency between what she thought she owned and the value of Whiteacre with Baker's easement on it, as with the easement, the value of Whiteacre is insufficient to pay off the \$10,000 mortgage. Mary can sue Able for the \$2000 different [sic] under the future covenants, and she should prevail because Able failed to inform Mary about the easement and the easement was not mentioned in her deed. The facts regarding inquiry notice and Baker's failure to record are irrelevant here, as recording statutes do not affect the validity of the deed conveyances.