

## QUESTION 2

Al owned a farm.

In 1990, Al deeded an easement for a road along the north side of the farm to his neighbor Ben. Ben immediately graded and paved a road on the easement, but did not record the deed at that time. Al and Ben both used the road on a daily basis. The easement decreased the fair market value of the farm by \$5,000.

In 2009, Al deeded the farm to his daughter Carol and she recorded the deed.

In 2011, Ben recorded his deed to the easement.

In 2012, Carol executed a written contract to sell the farm to Polly for \$100,000. The contract stated in part: "Seller shall covenant against encumbrances with no exceptions." During an inspection of the farm, Polly had observed Ben traveling on the road along the north side of the farm, but said nothing.

In 2013, Carol deeded an easement for water lines along the south side of the farm to Water Co., the local municipal water company. The water lines provided water service to local properties, including the farm. Water Co. then recorded the deed. The easement increased the fair market value of the farm by \$10,000.

In 2014, after long delay, Carol executed and delivered to Polly a warranty deed for the farm and Polly paid Carol \$100,000. The deed contains a covenant against all encumbrances except for the easement to Water Co. and no other title covenants. Polly recorded the deed.

In 2015, Polly blocked Ben's use of the road and objected to Water Co.'s construction of the water lines.

Ben has commenced an action against Polly seeking declaratory relief that the farm is burdened by his easement. Polly in turn has commenced an action against Carol seeking damages for breach of contract and breach of the covenant under the warranty deed.

1. What is the likely outcome of Ben's action? Discuss.
2. What is the likely outcome of Polly's:
  - a. Claim of breach of contract? Discuss.
  - and
  - b. Claim of breach of the covenant under the warranty deed? Discuss.

## QUESTION 2: SELECTED ANSWER A

### QUESTION ONE

At issue is the outcome of Ben's (B) action against Polly (P) for blocking the access to the road that he received an easement from Al (A) to use.

#### Express Easement

An easement is the right to enter onto someone's land and use a portion of that land for a specific purpose. Easements may be granted expressly to an individual by deed. An express easement by deed must meet the deed formalities to be valid, including a valid writing, and other statute of frauds requirements. Moreover easements are deemed to be perpetual in nature unless otherwise indicated. Here in 1990, A deeded an easement to B for using a road along the north side of his farm. There are no facts indicating whether or not the deed itself meets the formalities of a valid writing; however it can be presumed here because there are no facts to the contrary. Therefore given that A created an easement by deed, that expressly named the easement in the deed, an express easement was likely created for B's use. Thus in 1990, after A's valid deed, B obtained an express easement to use the road on the farm.

#### Reasonable Use/Scope

An easement must usually be used reasonably within the scope of the granting instrument if an express easement. This typically allows the holder of the easement to improve the land where the easement lies and to enter on to it to repair it. Here after A granted B the easement, B immediately graded and paved the road for his use. These actions are likely valid given that B was entering onto the property to pave a road. It would be implied that the holder of this easement for use of a road could enter onto land to improve the land, grade it and maintain the road. Therefore it would appear that B has been validly using the easement and comporting with its ramifications.

## Termination

The next issue is whether B's easement could be said to have terminated in any way after P took title to the land it was on. Termination of an easement may occur where the easement is abandoned, where the granting instrument states a specific condition to occur, or where the properties that the easement lies on and the adjacent property holder are merged. Typically easements are perpetual in nature unless stated otherwise. Here A granted the easement to B by deed. There was nothing in the deed that stated any kind of condition as to whether the easement could terminate. Therefore no conditions have occurred. Moreover there was no abandonment of the easement as B has used the road ever since he was granted it. Finally no merger occurred under these facts as B still maintains his own property and the property that the easement lies on is separately owned by P now. Thus the easement did not terminate.

## Transfer of Land - Notice

Generally when land that is burdened by the easement, the servient estate, transfers title the easement runs with the land. Thus even though A transferred the land to Carol (C) and then C transferred the land to P, each time the transfer occurred the easement would automatically run with the land. However a subsequent bona fide purchaser may attempt to argue that they lacked notice of the easement. If a subsequent bona fide purchaser can do so and state that they did not have notice of the easement then they can typically defeat an easement holder's title. The goal is to show that the subsequent bona fide purchaser did not have notice of the easement on the land. Thus P must show she did not have notice; this is done through a recording act.

## Recording Act

Under the common law, title in land was measured by first in time, first in right. However under modern recording acts, people who record their interest in land can preserve their title by putting the world on notice of that interest in the land. There are jurisdictional splits as to what type of recording statute is used and there are three main ones: race, race-notice, and notice. Race recording statutes are used only in a minority of jurisdictions. Therefore notice and race-notice jurisdictions are typically the most

commonly used. Here in order to use a recording statute, P would have to show that she was a SBP and that she met the requirements of each recording statute.

### Subsequent Bona Fide Purchaser (SBP)

In order to actually argue that one did not have notice to the easement, they must be a SBP. Typically a SBP is someone who took title to land subsequently to the current holder of the land and they did so for value. Here P paid for title to the farm in which B's easement lies. Moreover B's interest was received in 1990 and P's interest was received in 2014, so she was subsequent.

Thus P is a SBP who could seek to use a recording statute to take superior title in land and invalidate B's easement.

### Notice and Race-Notice Jurisdictions

In a notice jurisdiction and a race-notice jurisdiction, the SBP must show that at the time that they took title to the land they did not have a notice of the competing interest. There are three kinds of notice: inquiry, actual and constructive. Inquiry notice occurs where the SBP is charged with looking at the property to examine it, and if they had examined it they may have found the competing interest. Actual notice occurs where the SBP is actually aware of the interest and recording notice occurs where the competing interest was recorded so that the SBP was on constructive notice via the recording. Here P actually saw the road that B had built on the property and she saw that B was using it. Therefore P likely had actual notice since she physically saw someone driving on the land. Moreover B recorded his deed in 2011 and P did not record until 2014. Thus she would be on constructive notice as well. At a very minimum P should have asked C who B was and what he was doing. Therefore notice would most likely be charged to P.

Thus P as a SBP cannot argue that she took title to the land without notice of the competing interest.

### Race Jurisdiction

In a race jurisdiction, the person who records first wins and that is why it is not

used in many jurisdictions because it often results in unfair outcomes. Here B recorded in 2011 and P recorded in 2014. Thus under a race jurisdiction B would win as well.

### Conclusion

In total, P cannot use a recording act to argue that she as a SBP should take title without B's interest. She had notice of B's usage of the land and moreover she did not record first. Thus the common law rule applies of first in time and first in right and B's interest is superior. P would lose to B's claim as B's easement would automatically run with the land.

### Shelter Rule

Under the shelter rule, a SBP may be able to step into the shoes of a previous grantee and argue that the previous grantee could have validly used a recording in order to defeat a previous claim. The shelter rule may be used despite the fact that a SBP may have had actual knowledge. Here P could argue that C was a SBP under a recording act and therefore P could step into C's shoes to invalidate B's claim.

### C as SBP

A SBP must typically pay value for title to the land and take subsequently to the competing interest. Here B got his easement in 1990 and C took title in 2009. Therefore C was subsequent. But it is not clear that C paid for the land. Her father was A and he just deeded her the land. If she did not pay value for the land then she was a mere donee and not a valid SBP. Any value is enough; typically only a "mere peppercorn" would suffice; but if someone did not actually give value then they are not a SBP. Thus if C was not a SBP then she could not use a recording act. As such it is unlikely that the shelter rule could be used here.

### Recording Claim

Under a race notice and a notice jurisdiction it is likely that C would be charged with inquiry notice. Since B built and paved a road on the farm, that would have went from his farm to C's farm, any inspection of the farm that C was to take title to would

charge with her inquiry notice. She would have seen the road and been charged with asking what it was. Moreover given B's usage of the road, she likely would have seen him, especially if this was her father's farm before it was hers. Thus under a race and race-notice jurisdiction it is unlikely that C would prevail since she likely took title with notice.

Under a race recording statute C would probably prevail however, since she did record before B did, as she recorded in 2011 and B recorded in 2014.

### Conclusion - Shelter Rule

In total, P cannot likely use the shelter rule here to step into C's shoes because C was probably not a SBP. Moreover under a notice and race-notice recording statute she would not win since she probably would be charged with notice of B's claim. However she may win under a race recording statute if she was a SBP because she recorded first.

### Overall Conclusion

In conclusion, B's claim against P would likely be valid. B can establish that he had a valid express easement and that it automatically ran with the land when it was transferred from A to C and then to P. Moreover P cannot argue she did not have notice of the easement nor can she use a recording statute. Moreover she cannot use the shelter rule here either since C was not likely a SBP.

## QUESTION TWO

At issue is the likely outcome of P's lawsuit against C.

### **Part A**

At issue is P's claim for breach of contract. When parties convey land it is a two-step process: first the parties enter into a contract for the sale of land and then there is a period of escrow. Following escrow, closing occurs. At closing is where the actual deed is delivered and at that point the deal is finished. P's first claim arises under the

land sale contract.

### Land Sale contract - Marketable Title

A contract for the sale of land is required to be in a valid writing satisfying the statute of frauds. Here on 2012, P and C executed a written contract to sell the farm to P for \$100,000. The contract stated that the seller "shall covenant against encumbrances with no exceptions". This express provision essentially was stating that the land would not be sold with any encumbrances on it. An encumbrance is something that includes easements. In every contract for the sale of land there is the doctrine of marketable title however. This means that upon closing, the land would not have any defects of title in it, including easements. Therefore even though the contract stated that the land would not be sold with any encumbrances on it, this would be implied in the contract. Here at closing the land had an easement on it with the water company as well as B's easement as argued above. Thus at closing two easements existed on the land.

The problem however is that at closing, under the merger doctrine, the land contract merges into the deed and cannot be used to provide relief to a buyer.

### Merger

Under the merger doctrine, the contract is said to merge into the deed and the buyer may not use the contract to recover for defects on the property. Here at closing the land sale contract that C and P entered into would be said to merge into the deed. Thus even though the contract was breached at closing, there could be no relief afforded under the terms of the contract. As such, P cannot make a breach of contract claim here.

### Conclusion

In total, P's breach of contract claim would fail because the merger doctrine merged the contract into the deed and it can no longer afford relief to P.

## **Part B**

The next issue then is the buyer's ability to recover under the warranty that was contained within the deed. Deeds contain covenants in them that allow for recovery to a buyer. Whether the buyer can recover depends on the type of deed and covenant contained in a deed.

### Type of Deed

There are three kinds of deed: general warranty deeds, special warranty deeds, and quitclaim deeds. Quitclaim deeds do not provide any relief under a covenant. General warranty deeds provide relief under several different kinds of covenants. Here the deed that was given to P contained the covenant that stated there would be no encumbrances on the property, except the easement to Water Co. (W). Thus we must examine that covenant.

### Covenant Against Encumbrances

The covenant against encumbrances states that at closing, there will be no encumbrances on property. This is breached immediately at closing and is considered a present covenant on the property. Here at the time of closing there were two easements contained within the property. Since both were on the property, they are both subject to the covenant against encumbrances.

### B's Easement

As stated above B has a valid easement on the farm that P bought. Thus this easement will exist on the property and therefore at closing the deed covenant against encumbrances was breached. As such P has a valid cause of action against C for breaching this covenant with respects to B's easement. It does not matter that P saw B's using the road at the time of contract formation; notice is not material for purposes of the covenants. C specifically included a covenant against encumbrances in her deed. Therefore the presence of this one breached that covenant.

## W's Easement

As explained above, an easement can be created by express deed. Here in 2013, C deeded an easement to W for water lines along the property. This was during the escrow period. Given that an express easement was likely created via deed to W, W had an easement on the property at closing. The covenant however specifically disclaimed liability for W's easement. Given that C specifically disclaimed the easement in her covenant, and P accepted closing at that time, P likely waived any argument she has that C breached this covenant.

Insofar as this was a present covenant the statute of limitations for it began to run at the time of closing. Therefore P should have raised any objection to this encumbrance at the time that it existed. However P went through with closing, specifically accepting the deed that contained a waiver with W's easement on it. Therefore P cannot likely recover for W's easement under the covenant in the deed.

P can attempt to argue for fraud or some other kind of defense to C's actions here but it is unlikely that such an argument would prevail. It does seem unfair that C would include in the contract a provision stating that there would be no encumbrances in the title, yet during escrow she actually put another on her property. But C specifically included a waiver of this encumbrance in the warranty in her deed. Therefore P would be charged with reading the warranty and seeing such waiver. If P did not like the waiver she should have raised the issue during closing and not accepted the deed as is. Therefore P likely waived any argument against W's easement given her acceptance of the deed with the waiver on it.

## Remedies

Typically the remedy for a defect in title to land such as occurred here with B's easement is the difference of the value of the land with the easement on it and the value of the land without the easement on it. Here the difference in value of the land would be \$5,000 as the facts indicate that the farm is worth \$5,000 less with B's easement on it. Thus P can likely recover \$5,000 from C for B's easement in violation of the covenant in her deed.

However P cannot recover the \$10,000 that W's encumbrance decreases the

value of the land by since the covenant would not extend to that encumbrance as P likely waived it as stated above.

### Conclusion

In total, P can recover under the covenant in the warranty deed for B's easement only and she would likely get only \$5,000.

### Overall Conclusion

P's cause of action against C for breach of contract would fail under the merger doctrine. Yet P can recover under her deed against C for B's easement on the property, but not W's easement.

## QUESTION 2: SELECTED ANSWER B

### 1. Ben v. Polly

#### **Easements**

An easement is a right in land granted to a third party. Easement may be created expressly or impliedly. Implied easements may be created by prescription, by prior use, or by necessity. Easements can additionally be classified as appurtenant or in gross. Easements in gross have no dominant estate and are personal in nature and are generally non-transferable.

Appurtenant easements are those which burden one estate (servient estate) while also benefiting another estate (the dominant estate). Appurtenant easements run with the land to subsequent takers who take with notice of the easement. Notice can be actual, constructive, or inquiry. Actual notice arises when the subsequent taker is actually aware of the easement. Constructive notice arises when the easement has been properly recorded. When an easement has been properly recorded, takers are put on constructive notice of the existence of the easement whether or not they were actually aware of the easement. Lastly, inquiry notice arises when based on the facts or circumstances of the property a reasonable person would have inquired about the existence of any easements or interests in land.

#### **Express Easement**

An express easement must be in writing.

Here, in 1990, Al deeded an easement for a road along the north side of his farm to his neighbor Ben. The facts indicate that Al deeded the easement to Ben thus satisfying the writing requirement and establishing an express easement. Further, the easement will be classified as an appurtenant easement because Al and Ben are neighbors and therefore the easement concerns the land and benefits Ben's land by allowing an access road, while burdening Ben's land by granting access to a third party.

Additionally, the facts indicate that the easement decreased the fair market value of Al's land by \$5,000 which further shows that the easement burdened the farm (the servient estate) thus establishing an easement appurtenant. Because the easement granted to Ben was an easement appurtenant, it will run with the land to successive takers who take with notice of the land.

### **Priority**

Here, because Al deeded the property to Carol who recorded her deed prior to Ben's recording of his easement, it must be determined who has priority. There are three methods of recording statutes in the different jurisdictions: race, race-notice, and notice. If the recording statute applied in the jurisdiction does not apply, the courts will resort to the common law principles of first in time to determine priority. Under the shelter rule, a subsequent purchaser in land may take shelter and be protected under a recording statute, if a previous transferee of land would have otherwise been protected by a recording statute.

### Race

Under a race notice jurisdiction, priority goes to the first to record. Here, Carol recorded her deed in 2009 and Ben did not record his deed until 2011. Therefore, between Ben and Carol, in a race jurisdiction, Carol would have priority over Ben. Polly would then be able to use the shelter rule, if it applies, to be protected by Carol's priority under the recording statute and thus Polly would have superior title to Ben. However, if the shelter rule does not apply between Polly and Ben, because Ben recorded his deed in 2011 and Polly did not record her deed until 2014, Ben would take priority and Polly would be burdened by the easement.

### Notice

Under a notice recording statute, priority is given to subsequent bona fide purchasers who took property without notice. Notice may be actual, constructive, or inquiry. Actual notice arises when the taker actually knew of the interest. An individual is deemed to have constructive notice when a look into the grantor-grantee index would have put

them on notice of the interest. Lastly, inquiry notice arises when the facts or circumstances would have led a reasonable person to inquire about other interests in the land.

Under a notice statute, Polly would have priority over Ben if she could establish that she took the property without notice of Ben's interest. Ben, however, will successfully argue that Polly had notice of his easement both under constructive notice and under inquiry notice. Because Ben recorded his easement in 2011, had Polly looked at the grantor-grantee index for the parcel of land, she would've seen Ben's easements. Further, because Polly had observed Ben traveling on the road, she likely was put on inquiry notice to inquire into Paul's right to be on the land at issue. Further, because Al deeded the farm to Carol and there is no evidence that she paid any value for the farm, she is not a bona fide purchaser protected by the recording statute and Polly could not use the shelter rule in a notice jurisdiction.

### Race-Notice

Under a race-notice recording statute, priority is given to the first bona fide purchaser to record without notice. Here, Carol recorded her deed in 2009, Paul subsequently recorded his deed in 2011, and Polly lastly recorded her deed in 2014. Because Carol likely is not a bona fide purchaser since she did not pay value for the farm, priority would go to the next bona fide purchaser who records without notice. However, because Carol has recorded her interest, Polly will argue that Ben was put on notice of the conveyance to Carol. However, because Ben received the deed in 1990 there was likely no requirement for him to look into the grantor-grantee index after he received the easement. However, if so, he will be deemed to have been put on notice. Further, Polly cannot claim priority over Ben because, as discussed above, she also took with notice to the property; thus in a race-notice jurisdiction, the priority will resort to common law rules of first in time and Ben will have priority over Polly.

Therefore, it will likely be determined in any of the three jurisdictions that Ben had priority over Polly and thus Ben will be successful in his action against Polly.

### Easement by Prescription

Alternatively, Ben can claim that he acquired an easement by prescription. An easement by prescription requires the holder to take actually, openly, and continuously use the land in a manner hostile to the true owner, for the statutory period. At common law the statutory period for adverse possession was 20 years. Thus, Ben will argue that because he used the land continuously and openly from 1990 to present day, he has acquired an easement by prescription. However, because Ben used the road with permission by AI, his use will not be hostile and he will not succeed on such a claim.

### 2a. Polly v. Carol (Breach of Contract)

Here, Polly has commenced an action against Carol seeking damages for breach of contract based on the clause in Carol and Polly's written contract stating that "Seller shall covenant against encumbrances with no exceptions." Polly's claim for such a breach may lie wither in the concept of marketable title or a breach of an express condition of the contract.

Implied in any sale of land is a warranty that at closing the seller will convey marketable title. Marketable title warrants that there are no encumbrances on the property which are defined as any interest in a third party that diminishes the value or use of the land but is consistent with a granting of a fee interest in the property. While a seller must convey marketable title at closing, once a deed to the property is delivered and accepted the land sale contract merges with the deed and any rights to sue under the contract are extinguished and the buyer may only sue upon the deed.

Here, Polly has commenced an action against Carol seeking damages for the breach of the clause in the contract covenanting against encumbrances. Polly's claim may arise out of a claim that title was not marketable based on the easement to Ben or the easement to Water Co., or breach of the specific covenant in the agreement. While the easements to Ben and Water Co. are encumbrances which would warrant a breach of the contract or of marketable title, provided that Polly was unaware of them at the time

of signing, because the facts indicate that in 2014 Carol executed and delivered to Polly a warranty deed which Polly accepted, the land sale contract has merged with the deed and Polly can no longer sue on the contract and must sue on the deed. Polly may, however, have a claim under the deed which is discussed below.

## **2b. Polly v. Carol (Breach of Covenant Under the Warranty Deed)**

### **Type of Deed**

Upon the transfer of land, the seller may execute and deliver to the buyer one of the following three types of deeds: general warranty deed, a special warranty deed, or a quitclaim deed. The parties' rights under the deed depend on the type of deed granted to the seller. A quitclaim deed contains no covenants or promises to the buyer and is essentially an "as is" deed leaving the buyer with no rights to sue the seller. Alternatively, warranty deeds may include all or any of the six covenants of title including: the covenant of seisin, the right to convey, the covenant against encumbrances, general warranty, further assurances, and quiet enjoyment. Warranty deeds can be classified as either general warranty deeds or special warranty deeds. General warranty deeds are the most protective deed and warrant that neither the seller, or anyone in the chain of title, has breached the covenants included in the deed. Alternatively, a special warranty deed only warrants that the seller has not breached the covenants of title.

Here, Polly is commencing an action for breach of the covenant under the warranty deed. The facts indicate that the deed was a warranty deed containing only the covenant against encumbrances. Because the covenant was included in the deed, Polly may properly sue Carol for breach of the warranty.

### **Covenant Against Encumbrances**

The covenant against encumbrances in a deed warrants that there are no unknown encumbrances on the property. Under title, encumbrances are defined as any right in a third party that diminishes the value or interferes with the use and enjoyment of the

land. Such encumbrances include mortgages, liens, easements, and covenants. Here, Polly is suing for breach of the covenant against encumbrances. There are two possible easements on the property which may be the subject of her claim, the easement to Water Co. and the easement to Ben. Because the deed expressly warrants against any encumbrances other than the easement to Water Co., Polly cannot successfully claim a breach of the covenant in relation to that covenant because it was expressly excluded in the deed. However, Polly may be able to assert a breach based on the encumbrance to Ben. The determination of whether Ben's easement is valid is discussed above and, provided it is valid, Carol will likely argue that Polly was put on notice of such easement based on inquiry notice because the facts indicate that she had observed Ben traveling on the road along the north side, but said nothing. Polly will argue that those circumstances alone did not give rise to suspicion that he claimed an interest in the property; however, considering she was aware of his passing over the land, it is reasonable to assume that a buyer would have inquired into the circumstances. Further, Carol will argue that even if she did not have inquiry notice of Ben's interest, she would have constructive interest of Ben's interest because he recorded his deed in the easement in 2011 before Carol and Polly had entered into the land sale contract. Therefore, while Polly can properly claim a breach of the covenant based on the warranty deed received by Carol, provided it is valid, it will likely be determined that she had sufficient notice of the easement.