

A woman owned a tract of land in fee simple. By warranty deed, she conveyed the land in fee simple to her brother for a recited consideration of "\$10 and other valuable consideration." The deed was promptly and properly recorded.

One week later, the woman and her brother executed a written document that stated that the conveyance of the land was for the purpose of establishing a trust for the benefit of the woman's grandson. The brother expressly accepted the trust and signed the document with the woman. This written agreement was not authenticated to be eligible for recordation and there never was an attempt to record it. The brother entered into possession of the land and distributed the net income from the land to the grandson at appropriate intervals.

Five years later, the brother conveyed the land in fee simple to an investor by warranty deed. The investor paid the fair market value of the land, had no knowledge of the written agreement between the woman and the brother, and entered into possession of the land. The grandson made demand upon the investor for distribution of income at the next usual time the brother would have distributed. The investor refused.

The grandson brought an appropriate action against the investor for a decree requiring her to perform the trust the brother had theretofore recognized.

Which party is likely to prevail?

- A. The grandson, because a successor in title to the trustee takes title subject to the grantor's trust.
- B. The grandson, because equitable interests are not subject to the recording act.
- C. The investor, because, as a bona fide purchaser, she took free of the trust encumbering the brother's title.
- D. The investor, because no trust was ever created since the woman had no title at the time of the purported creation.

Explanation:

Types of recording acts

Type	Effect	Statutory language
Race	Interest holder who records first will prevail	"First record"
Notice	Subsequent BFP without notice of earlier property interest will prevail	"Without notice," "In good faith"
Race-Notice	Subsequent BFP (1) without notice of earlier property interest (2) who records first will prevail	"Without notice, who shall first record"

BFP = Bona fide purchaser.

Many interests affecting property can be recorded, including trusts affecting land. When different persons own such interests, **recording acts** are used to evaluate priority of competing interests. Under most recording acts, a subsequent property interest has priority over an earlier interest if the subsequent interest-holder was a **bona fide purchaser** (BFP)—ie, a person who (1) **paid value** and (2) **lacked notice** of the prior interest. There are three types of notice:

Actual – when a buyer has direct knowledge of a prior interest

Constructive (ie, record) – when a document showing a prior interest was properly recorded in the land records and appears in the buyer's chain of title *and*

Inquiry – when a buyer knows, or should know, of circumstances that would prompt a reasonable person to investigate (eg, visible use of the property by someone other than the seller).

Here, the investor had no knowledge of the prior trust agreement when she purchased the land from the brother (no actual notice), and the brother's possession of the land gave her no reason to investigate further (no inquiry notice). And since the trust agreement was never recorded, the investor did not have constructive notice of the trust. Therefore, the investor was a BFP and took the land free of the trust.

(Choice A) A successor in title to a trustee does not necessarily take title subject to the trust. And here, since the investor (successor in title) had no notice of the trust when she purchased the land from the brother (trustee), she is not bound by the trust.

(Choice B) Equitable interests affecting property (eg, the grandson's trust) can be recorded and, when they are, give constructive notice to subsequent purchasers.

(Choice D) Although the woman no longer had title to the land when the trust was created, the brother did. Therefore, the trust was valid and enforceable against the brother. But it is

not enforceable against the investor—a BFP who lacked notice of the trust when she purchased the land.

Educational objective:

Most recording acts protect bona fide purchasers who lacked notice—actual (direct knowledge), constructive (prior recording in chain of title), or inquiry (circumstances warrant investigation)—of a prior competing property interest.

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