

A man and his neighbor owned homes on adjacent lots in a subdivision. The subdivision's recorded restrictions did not prohibit detached storage sheds, and several homeowners in the subdivision had placed such sheds in their backyards. Because the man and the neighbor thought the sheds were unsightly, they both agreed in writing not to place detached storage sheds in their respective yards. Their agreement was drafted in recordable form and stated that it was enforceable by and against all assignees, heirs, and successors. The agreement was promptly recorded.

Three years later, the neighbor gave his home to his daughter. Shortly after moving into the home, the daughter learned of the restriction. She informed the man that she planned to put a detached storage shed in her backyard, claiming that the restriction was not enforceable against her.

Does the man have the right to enjoin the neighbor's daughter from placing a detached storage shed in her yard?

- A. No, because several homeowners in the subdivision have storage sheds in their yards.
- B. No, because there was no horizontal privity between the man and the neighbor.
- C. Yes, because the neighbor conveyed the home to the daughter by gift rather than by sale.
- D. Yes, because the restriction is binding on the daughter as a successor.

Explanation:

Elements of real covenants & equitable servitudes

Real covenants

(enforceable by money damages)

For *burden* to run

Writing

Intent to run

Touch & concern

Horizontal & vertical

privity

Notice

For *benefit* to run

Writing

Intent to run

Touch & concern

Limited vertical

privity

No notice required

Equitable servitudes

(enforceable by equitable relief)

Express

Writing

Intent to run

Touch &

concern

Notice

Implied

Intent to create common scheme

Restrictive servitude

Notice

An **equitable servitude** is a covenant to do (ie, affirmative covenant) or not do (ie, negative or restrictive covenant) something on land that is **enforceable in equity** against the promising parties and their successors in interest. An **express equitable servitude** requires the following elements:

Writing – the covenant is expressed in a writing that satisfies the statute of frauds (eg, the agreement between the man and the neighbor)

Intent to run – the promising parties intended for the promise to run to (ie, bind) their successors in interest (eg, the agreement says "enforceable by and against all assignees, heirs, and successors")

Touch and concern – the covenant relates to the use, enjoyment, or occupation of both the **dominant and servient** estates (eg, prohibits placing detached storage sheds in both yards)

Notice – the owner of the servient (ie, burdened) estate has actual, record, or inquiry **notice** of the covenant (eg, the daughter has record notice because the agreement was recorded)

Therefore, the agreement between the man and the neighbor constitutes a valid equitable servitude, and the man is entitled to enjoin the daughter (neighbor's successor in interest) from placing a detached storage shed in her yard.

(Choice A) The other homeowners—unlike the daughter—are free to place storage sheds in their yards because they are not successors in interest bound by the servitude created by the man and the neighbor.

(Choice B) **Privity** is required to create a real covenant that is enforceable by money damages, but it is not required to create an equitable servitude that is enforceable by equitable relief (eg, injunction—as seen here).

(Choice C) The fact that the neighbor conveyed the home to the daughter by gift rather than by sale has no effect on the outcome of this dispute.

Educational objective:

There are four elements that must be present to create an express equitable servitude: (1) the covenant must be in writing, (2) the promising parties must intend for the covenant to run to successors in interest, (3) it must touch and concern the land, and (4) the servient-estate owner must have notice of the covenant.

References

Restatement (Third) of Property: Servitudes § 5.1 (Am. Law Inst. 2000) (automatic passage of the burden and benefit with appurtenant land).

Restatement of Property § 539 (Am. Law Inst. 1944) (elements of equitable servitudes).

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