

A businesswoman owned two adjoining tracts of land, one that was improved with a commercial rental building and another that was vacant and abutted a river.

Twenty years ago, the businesswoman conveyed the vacant tract to a grantee by a warranty deed that the businesswoman signed but the grantee did not. The deed contained a covenant by the grantee as owner of the vacant tract that neither he nor his heirs or assigns would "erect any building" on the vacant tract, in order to preserve the view of the river from the commercial building on the improved tract. The grantee intended to use the vacant tract as a nature preserve. The grantee promptly and properly recorded the deed.

Last year, the businesswoman conveyed the improved tract to a businessman. A month later, the grantee died, devising all of his property, including the vacant land, to his cousin.

Six weeks ago, the cousin began construction of a building on the vacant tract. The businessman objected and sued to enjoin construction of the building.

Who is likely to prevail?

- A. The businessman, because the commercial building was constructed before the cousin began his construction project.
- B. The businessman, because the cousin is bound by the covenant made by the grantee.
- C. The cousin, because an equitable servitude does not survive the death of the promisor.
- D. The cousin, because the grantee did not sign the deed.

Explanation:

Elements of real covenants & equitable servitudes

Real covenants

(enforceable by money damages)

Equitable servitudes

(enforceable by equitable relief)

For *burden* to run

For *benefit* to run

Express

Implied

Writing

Writing

Writing

Intent to create common scheme

Intent to run

Intent to run

Intent to run

Touch & concern

Touch & concern

Touch &

Restrictive servitude

Horizontal & vertical

Limited vertical

concern

Notice

privity

privity

Notice

Notice

No notice required

An **equitable servitude** is a covenant (ie, promise) to do or not do something on land, enforceable by an action for equitable relief against the parties who made the promise and their successors in interest. An **express** equitable servitude requires:

Writing – the covenant is expressed in a writing that satisfies the statute of frauds (eg, the deed from the businesswoman to the grantee)

Intent to run – the promising parties intended for the covenant to run to (ie, bind) their successors in interest (eg, the deed says "heirs or assigns")

Touch and concern – the covenant relates to the use, enjoyment, or occupation of both the **dominant and servient** estates (eg, prohibits building on one tract to preserve the view on the other) *and*

Notice – the owner of the servient (ie, burdened) estate has actual, record, or inquiry **notice** of the covenant (eg, the cousin has record notice because the grantee's deed was properly recorded).

Therefore, the cousin is bound by the covenant made by the grantee, and the businessman will prevail in his action to enjoin construction of the building on the vacant tract.

(Choice A) The fact that the commercial building was constructed before the cousin began his construction project has no effect on the outcome of this case.

(Choice C) An equitable servitude *does* survive the death of the promisor because the parties intend to bind their successors in interest.

(Choice D) A **valid deed** need only be signed by the *grantor* (here, the businesswoman), so it does not matter that the *grantee* did not sign the deed.

Educational objective:

To create an express equitable servitude, (1) the covenant must be in writing, (2) the promising parties must intend for it to run with the land, (3) it must touch and concern the land, and (4) the owner of the servient estate must have had notice of the covenant.

References

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

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