

## Title Policies

### Restrictive Covenant In Will Does Not Preclude Property Subdivision

*A purchaser of a 73-acre farm sought to subdivide the property into residential building lots. The executrix of an estate of a former owner of the property brought an action against the purchaser claiming that the subdivision was precluded by a restrictive covenant contained in the will of the former owner which stated that there shall be "no subdividing for building purposes". HELD: Because the will was never recorded with the recorder of deeds office, the purchaser did not have constructive notice of, and therefore acquired title to the property free of, the restrictive covenant. Hunter vs. Snyder, Berks County Court of Common Pleas, Docket No. 05-343 (July 12, 2007).*

On September 18, 1959, Lawrence Machmer ("Machmer") acquired a 73-acre tract of land in Rockland Township, Berks County, Pennsylvania. Machmer died on June 2, 1979, leaving a will ("Machmer Will") that was probated and filed in the Berks County Register of Wills Office. Notably, the Machmer Will was never recorded in the Berks County Recorder of Deeds Office.

Under the Machmer Will, Machmer devised and bequeathed all of his estate to Lorraine Hunter ("Hunter") and her mother, Elva Hunter. The third clause of the Machmer Will provided in pertinent part:

"THIRD . . . should I still be in possession of the . . . farm which I received from my mother, this farm shall be sold to Amish people for farming, and also subject to no subdividing for building purposes".

Following Machmer's death, the entire 73-acre tract was sold at public auction on September 17, 1979. The attorney for Machmer's Estate prepared written "Conditions of Sale" in advance of the public auction which stated that the property would be sold subject to the restriction of "no subdividing for building purposes". Although the "Conditions of Sale" were posted on the land itself, they were never recorded in the Recorder of Deeds Office.

Stephen and Darlene Burkholder (the "Burkholders") purchased the entire 73-acre tract at the public auction. Following the public auction, the attorney for the Machmer's Estate who prepared the "Conditions of Sale" also prepared the deed to the Burkholders. That deed (the "Burkholder Deed") was executed by Hunter, and her mother, Elva Hunter, on November 21, 1979. The Burkholder Deed provides that the conveyance is:

"Subject nevertheless to the restriction that Stephen R. Burkholder and Darlene G. Burkholder, his wife, the Grantees, shall not subdivide said premises for building purposes."

Consequently, whereas the Machmer Will precluded subdivision by anyone, the restriction in the Burkholder Deed on its face only precluded the Burkholders from subdividing the property.

Following their purchase of the property, the Burkholders operated a farm on the property from 1979 until 2002.

On November 1, 2002, the Burkholders

entered into an agreement of sale to sell the property to Leon Snyder ("Snyder"). New Millenium Abstract Company ("Millenium"), the title agency who Snyder retained to perform the title search, issued a "title report" dated February 28, 2003, which did not address the use restriction "for farming and no subdividing for building purposes" in the Machmer Will.

Snyder was unaware of the restriction in the Machmer Will. He was aware of the restriction in the Burkholder Deed but Mrs. Burkholder told him that the restriction in that deed "did not apply to subsequent owners such as [Snyder]".

At settlement, the property was conveyed to Snyder pursuant to a deed dated April 28, 2003. The Snyder deed does not contain any use restriction for the property and does not refer in any way to the Machmer Will. After acquiring the property, Snyder filed an application with Rockland Township to subdivide the property into multiple residential building lots.

On January 7, 2005, Hunter filed a declaratory judgment action against Snyder in the Court of Common Pleas of Berks County, contending that the restrictions in the Machmer Will and the Burkholder Deed precluded subdivision of the property. Following a non-jury trial, the Court ruled in favor of Snyder, rejecting the three arguments raised by Hunter.

First, Hunter argued that the restriction in the Burkholder Deed precluded subdivision of the property. In rejecting the argument, the Court stated that "restrictions on the use of property are not favored in the law and, therefore, are to be strictly construed." Moreover, where the language of the use restriction is unambiguous, a court "must limit its review to the 'four corners' of the document in which it appears". The Court noted that, while the language in the Burkholder Deed obviously prevented the Burkholders from subdividing the property, it does not in any way prohibit their "heirs, successors or assigns", including Snyder, from doing so.

Second, Hunter argued that Snyder had "constructive notice" of the use restriction in the Machmer Will by virtue of the fact that the will was filed in the Register of Wills Office and, therefore, is allegedly "within the chain-of-title" for the property. In rejecting that argument, the Court noted that the Recording Acts, 21 P.S.

\$351 and \$444, require that instruments affecting title to property be recorded in the office of the recorder of deeds. The Court also relied heavily upon the decision of the Pennsylvania Superior Court in the case, *Mid-State Bank and Trust Co. v. Globalnet International, Inc.*, 710 A.2d 1187 (Pa. Super. 1998) wherein the court held that a mortgagee did not have "constructive notice" of a court order entered in a divorce action filed only with the prothonotary's office seven years before the mortgagee extended its mortgage loan.

Based on these and other authorities, the Court held that Snyder did not have "constructive notice" of the restriction in the Machmer Will. The Court noted that the Machmer Will was never recorded with the Recorder of Deeds Office "despite the fact that the Recording Acts, as well as the case law, makes clear that the Machmer Will must have been recorded in that office in order for [Snyder], as a subsequent purchaser, to have been placed on 'constructive notice' of the use restriction in the Machmer Will."

Lastly, Hunter argued that, even if Snyder did not have "constructive notice" of the use restriction in the Machmer Will, Snyder's title agent, Millenium, was nevertheless negligent in failing to review the Machmer Will and to advise Snyder of its existence, and that such negligence should be "imputed" to Snyder. The Court rejected that argument noting that Millenium was an "independent contractor" (as compared to a "servant or "employee") because Snyder did not control the manner in which Millenium performed its work. Because Millenium was an independent contractor, Millenium's alleged negligence in failing to review the Machmer Will may not be "imputed" to Snyder.

Hunter has filed a motion for post-trial relief with the Court which motion remains pending.

This case highlights the importance of recording instruments affecting title with the recorder of deeds office. Merely filing such instruments with other county offices, such as the register of wills and the prothonotary's office, will likely be ineffective to impart "constructive notice" of the contents of the instrument upon subsequent purchasers and mortgagees. ■

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