

NEWSLETTER OF THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR

DECEMBER 2017

2017-2018 REAL PROPERTY SECTION OFFICERS

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CHAIR'S MESSAGE

I am happy to be serving as the Chairman of the Real Property Section this year. I intend to continue as we have done before with very few changes.

The board of the Section held a meeting on August 24, 2017 and we agreed to increase our scholarship to a University of Mississippi student and a Mississippi College student by \$250.00 and that will make it \$1,000.00 each. Also we agreed to increase our donation to the Mississippi Volunteer Lawyers project by \$250.00, which will make our contribution \$500.00 for this year.

We also discussed several legislative ideas for the upcoming session and I request that you contact your legislative friends and ask them to support them.

First is a small amendment to Mississippi Code Ann. §89-5-24, which is the *Document Formatting Standards* statute. We approved requesting an addition to the statute which would read as follows:

Paragraph (2)

(f) Mortgages and deeds of trust shall also list the loan amount and final maturity date. However this requirement shall be phased in as lenders update their software and will not cause the instrument to be refused for recording. But one year after the effective date the non-conforming document fee will apply.

This amendment would save the chancery clerk and lawyers checking titles a lot of time.

also agreed to support the *Marketable Record Title Act* that was introduced last year and a modification to the statutes relative to the ownership of mobile homes. So if you have an opportunity to speak to your legislative friends about those, please do so.

Also I want to thank Rod Clement for continuing to donate his time and energy to prepare this newsletter. If any of you have any questions or suggestions, please contact me. J. Lane Greenlee, Greenlee Law Firm, Inc., P. O. Box 430, Winona, MS 38967. Telephone 662-283-1354. Email: Lane@greenleelawfirm.com.

TAX CHANGES

The new federal Tax Cuts and Jobs Act should have a positive effect on real estate investment and development. The new act retained the federal new markets, historic and low-income tax credits, and like-kind exchanges for real estate under Section 1031. Lower tax rates for pass-through entities and deductions for taxes on REIT dividends should encourage investment. In addition, the new act allows investors selling investment property to defer, and under some circumstances reduce, tax on capital gains if the proceeds of the sale are invested in “qualified opportunity zones.” Each state can nominate opportunity zones within the state. An “opportunity zone” is a “low-income community” under the New Market Tax Act or a tract contiguous to a low-income community. The deadline for states to nominate opportunity zones is March 22, 2018.

In Mississippi, first-time homebuyers who established First-Time Home Buyer Savings Accounts can start deducting amounts contributed to and interest earned from the account from gross income for state income tax purposes beginning on January 1, 2018, up to \$2,500 for individuals and \$5,000 for couples.

CASES

Mississippi law regarding enforceability of restrictive covenants has been rapidly developing over the last few years. This issue features two noteworthy cases about the enforceability of restrictive covenants, one involving a covenant against logging in a residential subdivision, and the other involving a maintenance easement around a lake. The third case involves an unsuccessful attempt to sever a joint tenancy by will.

Covenants Against Cutting Trees

Robertson v. Catalanotto, 205 So. 3d 666 (Miss. 2016). When a developer of land in Forrest County sold undeveloped tracts within the development, he put restrictive covenants in the deeds that provided, among other things, that no trees shall be removed for any commercial use, that cutting of trees was limited to clearing for construction, and that any cutting had to be done under good forest management practices. The restrictive covenants also provided that they ran with the land until January 1, 1990, and that after that date the restrictive covenants could be amended by unanimous consent of the owners within the development. The restrictive covenants did not address attorneys fees for enforcement of the covenants. The Catalanottos and Robertsons each

purchased tracts within the development. The deed to the Robertsons, which was not from the original developer, did not make reference to the restrictive covenants. In 2011 the Robertsons began commercial logging operations on the property. The Catalanottos contacted the Robertsons and asked them to comply with the covenants and cease logging operations. The Robertsons nevertheless continued their logging operations. The Catalanottos filed a complaint for an injunction and restraining order in the Chancery Court of Forrest County, Mississippi. The Catalanottos also requested costs for missing work and attorneys fees. The Robertsons argued that the restrictive covenants did not apply to them since the covenants were not contained in the deed into them, that the restrictive covenants expired in 1990 since a majority of the owners no longer wanted the restrictive covenants to apply, and that their logging was “good forest management practices”, as permitted by the covenants. The chancellor found that since the restrictive covenants ran with the land, the restrictive covenants were binding on the Robertsons regardless of whether the deed into the Robertsons made reference to the covenants; that the restrictive covenants remained in force after 1990 because the covenants required unanimous consent of the owners to amend, and the Catalanottos wanted the covenants to continue; and that the restrictive covenants prohibited any removal of trees for commercial use. The chancellor granted the injunction against the Robertsons, but did not give the Catalanottos any attorney fees or costs. The Robertsons appealed the chancellor’s holding that the restrictive covenants applied to their property, and the Catalanottos appealed the portion of the chancellor’s order that they were not entitled to damages and attorneys fees. The Mississippi Court of Appeals, in a decision by Justice Carlton, affirmed. Appellate review of a ruling regarding restrictive covenants is limited to abuse of discretion. The chancellor interpreted the restrictive covenants to mean that the owners could amend the restrictive covenants after January 1, 1990, not that the covenants expired in 1990. The chancellor interpreted the exception for good forest management techniques to refer only to trees being cut for construction, and not to permit commercial logging. The Court of Appeals found that substantial and credible evidence existed in the record to support the chancellor’s findings on these points. The Court of Appeals also affirmed the chancellor’s finding that the Catalanottos were not entitled to damage or attorneys fees. In the absence of a contractual provision or statute authorizing attorneys fees, trial court can only award attorneys fees when punitive damages were appropriate. Since the restrictive covenants did not authorize an award of attorneys fees, and the chancellor determined that punitive damages against the Robertsons were not appropriate, the chancellor did not abuse her discretion in failing to award attorneys fees to the Catalanottos.

Note 1: The inability to recover attorneys fees is a disincentive to bringing an action to enforce covenants by individuals. Given the cost of litigation, not many individuals are going to be in a position to write a check for the legal costs of such litigation. A homeowners association is in a better position to bring such an action since the cost of the litigation can be spread among all of the owners (or at least those homeowners who pay their assessments.) In the next case an HOA brought an action to enforce the subdivision covenants and was able to collect attorneys fees.

Note 2: This case illustrates once again how deadly a provision requiring unanimous consent of all of the owners can be. It’s hard to get all of the owners in any development to agree on anything. The logistics of determining who all of the owners are, contacting all of the owners, explaining the situation to them, and documenting their consent is daunting. The requirement for unanimous

consent became a problem after Hurricane Katrina destroyed condominiums on the Coast, and the condominium governing documents required that all of the condominium owners had to consent to dissolve the condominium.

Ability of Owner of Servient Estate to Build Fence Across
Easement is Subject to HOA's Right to Approve Fences

Berlin v. Livingston Property Owners Association, Miss. Court of Appeals No. 2015-CA-01512-COA, 2017 WL 1493742 (April 25, 2017) *cert. denied*. 229 So. 3d 714 (Miss. 2017). The Berlins purchased a lot in Livingston, a subdivision in Madison County, which was adjacent to a lake. The lots in Livingston are subject to restrictive covenants filed in the Chancery Clerk's office. The restrictive covenants provide, among other things, that the homeowners' association established by the covenants, the Livingston Property Owners Association ("LPOA"), has a twenty-foot easement from the lake's edge into each lot for lake maintenance. The covenants also provided that no fences may be erected in the subdivision unless the Architectural Review Committee ("ARC") of the LPOA approved the plans for the fence. If the ARC denied approval of a proposed fence, the covenants provided that the ARC would give the owner written notice specifying the reasons for disapproval. Paul Berlin submitted to the ARC plans for a fence that followed the sides of the Berlins' lot across the maintenance easement and into the lake. The fence had gates on both sides of the easement. The ARC voted not to approve Berlin's proposed fence. The president of the ARC, Ward, met with Berlin and suggested that Berlin enclose the fence just short of the maintenance easement. Ward also told Berlin that Berlin could appeal the ARC's decision to the board of directors of the LPOA. Berlin said he was not going to appeal and intended to build the fence as planned without the ARC's or LPOA's approval. An attorney for the LPOA wrote Berlin a few days later, confirmed that the ARC had disapproved Berlin's proposed fence, and warned Berlin that if he proceeded to build the fence without the ARC's approval, the LPOA would seek injunctive relief and attorneys fees. Berlin nevertheless built the fence as he planned without the LPOA's approval. The LPOA filed an action in the Chancery Court of Madison County asking the court to order the Berlins to remove the portion of the fence erected on the maintenance easement. At trial, the president of the ARC and the developer of the subdivision testified that the LPOA and its contractors used the easement to maintain the lake by spraying for weed control and to monitor for nutria and beavers. Contractors rode four-wheelers across the easement with large tanks of weed killer. Fences prevented the contractors from doing this work, even if the fences had gates. In addition, the Berlins had three dogs inside the gate. The chancellor held that Berlin had violated the covenants and ordered Berlin to remove the portion of the fence that encroached on the easement within sixty days. The chancellor also awarded the LPOA attorneys fees of \$17,485. The Berlins appealed. The Mississippi Court of Appeals, in a unanimous opinion by Justice Wilson, affirmed. Berlin argued that the LPOA was not entitled to an injunction because the ARC never gave Berlins a written notice specifying the reasons for the ARC's disapproval of Berlin's plans, as required by the covenants. The LPOA argued that its president had verbally informed Berlin of the reasons for the disapproval, and that it would have been pointless to provide a written list of reasons after Berlin had told the president of the ARC that he intended to build the fence regardless of the ARC's decision. Justice Wilson wrote that the purpose of the requirement of a

statement specifying reasons was to provide a basis for the submission by the owner of modified plans or further discussion, and that the LPOA had substantially complied with the covenants by promptly informing Berlin of the reason for the ARC's decision. The Berlins also argued that they were entitled to construct a fence across the easement under the general rule that the owner of the servient estate of an easement may build a fence across an easement if the fence does not unreasonably interfere with the use of the easement by the owner of the dominant estate. The chancery court found that the Berlins' fence did interfere with the LPOA's current use of the maintenance easement, and the Court of Appeals found that this was not clearly erroneous. Finally, the Berlins argued that the chancellor erred in awarding attorneys fees to the LPOA without conducting a hearing on the reasonableness of the fees. The chancellor relied on affidavits from the parties and did not hold a hearing on this issue. Justice Wilson wrote that while "a chancellor generally should provide some on-the-record analysis of the attorneys fees, it was not reversible error, and the award of attorneys fees could be upheld as long as the amount was not unreasonable." In regard to the reasonableness of the fees, the Court of Appeals noted that the case had gone on for over four years, and that the amount of attorneys fees sought by the LPOA was approximately half of the amount sought by the Berlins in their request for attorneys fees. If the Berlins' fee request was "even in the ballpark of "reasonable,"" then the fees sought by the LPOA could not be unreasonable. Moreover, the Berlins did not articulate any reason why the LPOA's attorneys fees were unreasonable. The Court of Appeals affirmed the award of the attorneys fees.

Note 1: It is interesting that the Court of Appeals found that the HOA's substantial compliance with its obligation to give notice was sufficient. The Mississippi courts have written repeatedly that restrictive covenants should be strictly construed against the party seeking enforcement.

Note 2: On the issue of whether the Berlins, as owners of the servient estate over which the LPOA's maintenance easement ran, could build a fence across the easement, the Berlins relied primarily on *Gaw v. Seldon*, 85 So. 3d 312 (Miss. Ct. App. 2012). Gaw owned a forty-foot easement over Seldon's property for access to Gaw's land in Marshall County. Gaw's land was undeveloped. Seldon constructed two brick columns at the entrance to Seldon's property. These columns encroached nine and one-half feet on to Gaw's easement. Gaw filed a complaint in the Chancery Court of Marshall County against Seldon alleging that the encroachment constituted a trespass and asking the court to order Seldon to remove the columns. Gaw testified at trial that while the columns currently did not interfere with his ability to use the easement for access to his property, he planned to build a house and a barn on his property one day, and the columns might prevent construction equipment from traveling across the easement. The chancellor held that Seldon's columns could remain in the easement until the columns interfered with Gaw's use of the easement. On appeal by Gaw, the Mississippi Court of Appeals affirmed. The Court of Appeals quoted from prior cases, "The owner of the soil retains full dominion over his land subject merely to the right of way. He may make any use of his land which does not interfere with a reasonable use of the way." 85 S0. 3d at 316 (quoting from *Feld v. Young Men's Hebrew Ass'n*, 44 So. 2d 538, 540 (Miss. 1950)).

Note 3: Preparing a claim for attorneys fees is an art, not a science. In this case, an experienced real estate attorney represented the LPOA in this matter for five years, including depositions, and

claimed only \$17,485 as attorneys fees and costs. The editor speculates that the LPOA's attorney much more time than this amount on this case. On the other hand, the Chancery Court and the Court of Appeals found that his fees were reasonable without the need for a hearing, which is worth a lot.

Joint Tenancy Not Severed by Will

Erhardt v. Donelson, 221 So. 3d 393 (Miss. Ct. App. 2017). In 1998 Robert Erhardt and his wife Julia purchased a home as joint tenants with right of survivorship. In 2000 Robert executed a will that provided that, upon his death, his interest in the home went to Julia in trust, and at her death, to Robert's heirs. Robert died in 2007. In Robert's estate proceeding in 2009, the chancery court held that title to the home passed to Julia by virtue of the joint tenancy and that the provision in Robert's will to the contrary was inapplicable. Julia died in 2015. Her will, executed in 2008, provided that upon her death her interest in the home would pass to her heirs. At Julia's death, the home was sold and the proceeds were delivered to Julia's executors. Robert's sons filed a claim in Julia's estate in 2015 asserting that they were entitled to fifty percent of the proceeds of the sale pursuant to Robert's will. The executors contested the brothers' claim. At a hearing, the chancellor held that title to the home passed to Julia at the time of Robert's death by virtue of the joint tenancy. On appeal by Robert's sons, the Mississippi Court of Appeals, in an opinion by Justice Westbrook, affirmed. It is well-settled that one joint tenant cannot unilaterally terminate a joint tenancy by will. The brothers argued that in this case the joint tenancy was severed because Julia did not object to the provision in Robert's will regarding the house going to Robert's heirs at her death. The court noted that Julia never honored that provision in Robert's will. The fact that she executed a will in 2008 leaving her interest in the home to her heirs shows that she did not agree that the provision in Robert's will was effective. The brothers also argued that Julia and Robert had executed reciprocal wills. When there are reciprocal wills between joint tenants, the surviving spouse cannot revoke his will after the other joint tenant's death. The brothers were trying to prove that Julia executed a reciprocal will at the same time as Robert executed his will and with the same provisions, and that Julia therefore was estopped to change her will after Robert's death. The brothers attempted to have an attorney enter evidence about the existence of a reciprocal will executed by Julia at the trial, but Julia's executors objected on the basis of attorney-client privilege. The brothers asserted that the chancellor's decision to not allow the attorney to present this evidence was an error. Justice Westbrook wrote that this argument failed because the brothers could produce no solid proof of the existence of a reciprocal will signed by Julia. The only evidence was handwritten notes alluding to a reciprocal will executed by Julia. The Court of Appeals found that the chancellor did not err in excluding this evidence.

Note: The doctrine of reciprocal wills (a/k/a joint wills, a/k/a mutual wills) that cannot be revoked was new to the editor. The leading case on reciprocal wills in Mississippi is *Alvarez v. Coleman*, 642 So. 2d 361 (Miss. 1994), which was asserted by Robert's sons. In *Alvarez*, a husband and wife owned land as tenants by the entirety. They executed wills with identical provisions that upon deaths all of the testator's property would go to a family trust. After the wife's death, the husband sought to revoke the trust. In an action brought by the beneficiaries of the trust, the Mississippi Supreme Court held that the wills, taken together with the trust agreement, were

reciprocal wills. Reciprocal wills are “those in which each of two or more testators make a testamentary disposition in favor of the other or others, under a similar plan.” The doctrine of reciprocal wills is based on principles of contract and estoppel. The *Alvarez* court held that the husband therefore could not revoke his will after the wife’s death. The *Erhardt* court distinguished *Alvarez* on the basis that no solid evidence existed that Julia had executed a reciprocal will.

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