IOWA STATE UNIVERSITY
CALT
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Real Estate Transactions and Notice of Prior Acts Impacting Title

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Overview

A purchaser of real estate must act in "good-faith" and give "valuable consideration"[1] when acquiring a parcel of land. That "good-faith" distinction can be lost if the purchaser does not undertake "due diligence" to make reasonable inquiries to find others that might have an interest in the land. A recent North Dakota Supreme Court Opinion has again brought to light what it takes to be a bona fide purchaser of real estate.

Fact of *Swanson, et al. v. Swanson, et al.*[2]

Here a step-mother, in 1963, deeded a parcel of land to her step-son. The step-son's younger brother, an attorney, prepared the warranty deed. Some months later, the step-son deeded the land, once again, to himself and his attorney brother as joint tenants with right of survivorship. The deed was not recorded. Nearly 36 years later, the older brother died and the younger brother, at the funeral, notified his brother's wife and children that he was the outright owner of the parcel. Despite the younger brother's assertion of ownership, the wife, acting as trustee of her deceased spouse's revocable trust, deeded a life estate in the land to herself and a remainder interest to her four surviving children. The younger brother disputed the deed and the older brother's children asked the county trial court to quiet title to the parcel in their favor.

Trial Court and Appellate Decision

The trial court sided with the children and found that the children and their mother had acted in good faith when they deeded the property to themselves. Thus, title was quieted in favor of the children and their mother.

The younger brother appealed, claiming that the children were not "good-faith purchasers" of the property and did not pay "valuable consideration" when the property was transferred from the trust. His argument was, basically, that they had sufficient actual notice of his claim of an interest in the property. So, the question before the court was whether the children had acted in good faith and really did have actual notice of their uncle's competing interest in the property. In North Dakota, a person who has "actual notice" of circumstances (in this case the dispute in ownership) and does not make a reasonably diligent inquiry into those circumstances is deemed to have "constructive notice." Thus, there is a duty to inquire. Because the children of the older brother did not make that inquiry, the North Dakota Supreme Court determined that they were not "good-faith purchasers." The younger brother's assertion of ownership of

the parcel at the funeral was deemed to be enough notice to put his brother's wife and children "on notice" of his interest in the property.

There were other circumstances that the Court deemed important to the outcome of this case. It was established through testimony that the younger brother acted as his older brother's attorney and managed all of his affairs, including making arrangements with tenants of the property. Further, if the children or their mother had conducted a simple land records search, they would have seen that the younger brother executed a mortgage on the property as a joint tenant in 1969. Also, the children had every opportunity to inquire as to whether their mother remembered her husband executing a deed to himself and his brother in 1963 (a deed she signed, thereby relinquishing any homestead rights in the property).

Dissent. In a strongly-worded dissent, one justice argued that the younger brother's claim of ownership after the step-mom's death was not enough to put the children on notice of his ownership interest. The dissenting judge's rationale was that a simple record search would not have yielded enough information to put the children on notice of their uncle's ownership interest, because the 1963 warranty deed was never found and the older brother's wife had no recollection of it. Thus, the dissenting judge argued that when the brother executed a mortgage on the parcel in 1969, he was a "stranger to the record of title" at that time. The judge cited a North Dakota Title Standard, stating that strangers to the chain of title may be disregarded and ignored. Basically, the dissenting judge found that the younger brother's testimony and evidence lacked credibility and that his dealings with the property were "questionable," at best.

Unanswered Questions

Why was the 1963 deed between the brothers never recorded? Certainly, the younger brother, as an attorney, should have recorded the deed immediately following the transaction between he and his brother, and should have backed up his claim at the funeral by providing a copy of the deed and recording the deed at that time. But, that didn't happen and the court believed, based on the evidence, that the children and their mother were put on notice of the existence of the deed and should have conducted a reasonably diligent search before conveying the property.

Same Result in Iowa?[3]

The *Swanson* case raises the obvious question – would the Iowa courts have reached the same result based on a similar set of facts? To answer that question, it is logical to begin with an examination of the Iowa Recording Statute.[4] That statue is a "notice-type" statute. What that means is that no instrument that impacts real estate is valid against a subsequent buyer who gives value who also took the property without notice of a prior instrument that impacts the property unless that instrument is recorded in the county where the real estate is located. So, recording constitutes constructive notice to the world of the content of the recorded instrument, and prevents a subsequent buyer from becoming a bona fide purchaser, without notice.[5] That would seem to indicate that the outcome of the *Swanson* case would have been different in Iowa. However, Iowa law also charges a subsequent purchaser with any actual knowledge that the buyer may have.[6] In

addition, the Iowa courts have also recognized that a buyer can be bound by "inquiry notice." So, for example, if a buyer has notice of a fact or set of facts that would raise suspicions in a reasonable, similarly situation buyer, the buyer is deemed to be on notice of all additional facts that a reasonable inquiry into that first fact or set of facts could have revealed. For example, if a buyer is interested in a tract of real estate and someone other than the seller is in possession of the tract, the buyer should determine if that possessor is claiming any rights other than possession in the property. If such an inquiry is made, the buyer takes subject to whatever rights the possessor discloses. But, if no inquiry is made, the buyer takes subject to those rights that a reasonable inquiry would have revealed.[7] In addition, if the buyer acquires title via a quitclaim deed, the buyer is treated as being on notice of whatever defects existed in the grantor's title.[8] There are also things that a buyer takes subject to regardless of whether the buyer has actual notice: forged deeds; deeds signed by persons not having legal capacity; conveyances where a spouse failed to relinquish their marital rights in the property; claims by heirs; recorded deeds that haven't been delivered and claims arising under adverse possession.

Iowa law also has a statutory provision that applies specifically to the conveyance of agricultural land and certain agricultural leases - the type of property at issue in *Swanson*. Under this provision,[9] no instrument that impacts real estate is valid against a subsequent buyer who gives value and who takes the property without notice of a prior instrument impacting the property unless the instrument is recorded. The provision applies to all conveyances of agricultural land and agricultural leases of a duration of more than five years (including renewals).[10] The grantee must record the transaction in the county recorder's office in the county where the land is located within 180 days of the conveyance or lease.[11] Failure to record is punishable by a fine of up to $100 per day for each day the statute is violated.[12]

Had the *Swanson* facts arisen in Iowa, it is possible that the same outcome would have resulted. However, the unique Iowa provisions applicable to agricultural land may have been sufficient to result in a different outcome. In addition, it is possible that the Iowa courts would not even had entertained the younger brother's ownership claim. In Iowa, this type of case which is based on a claim arising or existing before January 1, 1980, is not to be heard.[13] This statutory provision was most recently construed by the Iowa Court of Appeals in 2007.[14] In that case, the court granted summary judgment to the "record title holder" in a quiet title action because the plaintiff did not file an affidavit of possession in a timely manner. So, while it is possible that the Iowa courts would reach a similar result as did the *Swanson* court, that result is not assured.

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[1] "Valuable consideration" does not necessarily mean "adequate consideration." But, it does mean that there is no protection for a donee or for a person who pays only nominal consideration. A mortgagee for new value is deemed to be a buyer for value that would be protected (at least in Iowa) by the statutory recording act (except a mortgagee for an antecedent debt).

[2] No. 20090289 (Sup. Ct. N.D., Apr. 12, 2011).

[3] The following discussion is drawn heavily from a portion of what is believed to be a legal seminar outline addressing Iowa Real Estate Law. The author of that outline is unknown, and it is unknown where the material was presented. As soon as that information becomes available, full recognition to the author of that material will be given so that readers may consult the full outline for assistance with real estate transactional issues.

[4] Iowa Code §558.41.

[5] Iowa Code §558.11.

[6] *See, e.g.,* Moser v. Thorp Sales Corporation, 312 N.W.2d 881 (Iowa 1981).

[7] Swab v. Appanoose Country Club, 203 N.W.2d 318 (Iowa 1972).

[8] Even if the buyer dos not obtain title via a quitclaim deed, if there is a quitclaim deed in the chain of title, the buyer is not deemed to have notice of any defects that may exist. See, Winkler v. Miller, 54 Iowa 476 (1880).
[9] Iowa Code §558.44.
[10] Distributions from estates to heirs or devisees are also excepted from the recordation requirement. Id.
[11] Id.
[12] The county recorded must forward a copy of the conveyance or lease required to be recorded to the county attorney. The county attorney can enforce the statute by bringing an action in the county district court.
[13] Iowa Code §614.17.
[14] Clymer v. Shawd, No. 4-745/06-1155, 2007 Iowa App. LEXIS 1080 (Iowa Ct. App. Oct. 12, 2007).