

PROPERTY PRACTICE QUESTIONS

ANSWER 17A

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Caveat: The outline of the answer below provides guidance regarding the main issues which you should address in your answer. The answer is *not* designed to be a model answer.

Mark v. Neil (Validity of the Real Covenant)

➤ **Classification**

- If this is a valid real covenant, it would be a negative real covenant because it prohibits certain use of the land
 - Cutting the shrubbery below the height of 8 feet
- Mark and Neil's land is in Texas, therefore for the covenant to be enforceable, Texas elements for a valid covenant must be satisfied
 - ***Enforceable promise***
 - The facts tell us nothing about whether the promise between Mark and Kelly was enforceable. Assuming that it was enforceable, we will continue with the analysis.
 - ***Intent to run with the land***
 - The original parties (Mark and Kelly) intended for the covenant to run with the land
 - ***Evidence of intent***
 - ***In Esse (in existence) requirement***
 - The shrubbery was in existence at the time of the covenant
 - ***Words that show that the original parties intended for the covenant to run with the land***

- E.g. “this covenant will bind my heirs and assigns;” “this covenant is to run with the land.” Note that in Texas it is no longer necessary to use the words “assigns,” but still preferable to do so. This covenant contains the words “heirs and assigns” and thus we have clear evidence of intent.
- ***Promise must touch and concern the land***
 - ***Benefit must touch and concern the land***
 - Lot A owner’s obligation to keep his shrubbery at the height of at least 8 feet provided wind protection to the owner of lot B. This in turn, increased the property value of lot B and also the use and enjoyment of lot B by its owner.
 - ***Burden must touch and concern the land***
 - Lot A owner’s obligation to keep his shrubbery at the height of at least 8 feet eliminated his beautiful view of the land and thus decreased the property value of lot A. It also decreased lot A owner’s use and enjoyment of his land.
- ***Privity***
 - Unlike some other jurisdictions, in Texas mere vertical privity between the original parties to the covenant is not enough. Privity between the parties must be:
 - *Mutual privity* (mutual interest in the same land, e.g., landlord/tenant or cotenants)
 - OR
 - *Horizontal Privity/Privity of estate* (e.g. buyer/seller; grantor/grantee)
 - In this case the original parties to the covenant were buyer/seller and thus they have the required privity of estate.

Mark v. Neil (Equitable Servitude)

- Even if all the elements of a valid covenant are not considered satisfied, it is possible that the court could enforce as an equitable servitude.
- *Notice* can substitute for the privity requirement
- **Arguments to prove that Neil had notice**
 - The tall shrubbery was there when Neil bought the place
 - Neil should have know that there was a covenant, because otherwise a reasonable previous owner of the lot would have surely cut down the shrubbery to have the view of the lake.
- **Arguments to prove that Neil did not have notice**
 - There are many reasons why the previous land owner could have wanted to have tall shrubbery; she may not have wanted to see her neighbor.
 - Mere fact that there was tall shrubbery on the property is not sufficient to give notice. It not like an affirmative real covenant where there would be more obvious sighs of possible obligations.
- **Conclusion**
 - It will qualify as an equitable servitude if the courts find that there was sufficient notice of the existence of the covenant.
 - Thus if the courts find that there was insufficient notice of the existence of the covenant, it will not qualify as an equitable servitude and will not be enforceable against the successors in title to the land.
 - If it is not enforceable against the successors in title to the land, Neil can cut the shrubbery and enjoy the view of the lake.