NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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May 23, 2018

LETTER OPINION

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Re: *Janet Kruck v. Mark Krisak, et al.*
Case No. CL-2018-1673

Dear Counsel:

This cause comprehends two questions raised by Defendants' Plea in Bar:

1) Wherein the Grantor first transferred the servient plot of land into a trust, thereafter

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granted the Plaintiff an easement which was recorded before the deed conveying the parcel to the Trust, whether the Plaintiff qualifies as a bona fide purchaser for value without notice so as to protect the encumbrance from challenge by Defendants who are successors in interest to the servient land; and 2) Whether the easement conveyed by the Trustee/Beneficiary of the Trust as an individual, after title to the servient parcel was transferred into the Trust, is valid and binding upon successors in interest to the realty. The issues of the validity of the granted easement uncoupled from a transfer of the servient estate and the Trustee/Beneficiary's right to grant an easement under the power to revoke a trust, are posited to be matters of seeming first impression. For the reasons as more fully detailed herein, this Court holds the Plaintiff/Grantee of the mere easement for value without notice of the prior transfer of the servient parcel into the Trust is not protected by the recording statute from challenge to her interest, as the encumbrance is not a transfer of an estate encompassed under the protective umbrella of the statutory scheme. Nevertheless, this Court rules further that the Grantor's deed of an easement to his Plaintiff sister for value after he had transferred the servient parcel into the Trust of which he was sole beneficiary, operated as a partial revocation of the transfer of the estate into the Trust, making the easement valid and binding on successors in interest to such tract of land.

Accordingly, the Defendants' Plea in Bar is denied.

BACKGROUND

This case arises from two easement grants. The first easement was granted on September 30, 1974. This easement was a septic field easement which allowed Plaintiff

to establish and maintain part of a septic system and drain field. Defendants do not dispute the validity of this first easement. The issues herein arise from the second easement.

Austin F. Foster Jr. ("Mr. Foster") granted the first easement to Plaintiff, his sister, when he owned the servient parcel of land. The easement was recorded on June 13, 2006. On April 15, 2006, Mr. Foster conveyed the servient parcel to Austin Foster as Trustee of the Austin Foster Revocable Living Trust. This conveyance was recorded on June 21, 2006. On June 9, 2006, Mr. Foster executed an Amendment to Deed of Easement ("the second easement") in his individual capacity in favor of Plaintiff, which was recorded on June 13, 2006. This new easement allowed for "1) joining the Defendants' driveway for egress and ingress, and 2) 'for the purpose of allowing unfettered use of the land by the Grantee provided in the referenced easement for the septic system drain field[.]'" (Def.'s Mem. at 2-3).

Mr. Foster conveyed the servient parcel in his capacity as Trustee to Edward and LeeAnn Foster on January 31, 2008. The conveyance was recorded on February 4, 2008. The Secretary of Housing and Urban Development conveyed titled of the parcel to Defendants following a foreclosure on November 26, 2012. This transaction was recorded on December 6, 2012.

ARGUMENTS OF THE PARTIES

Defendants' Plea in Bar:

Defendants maintain the second easement was an invalid grant and it was outside the chain of title. They aver Mr. Foster no longer held title when he purported to grant the

Easement Amendment, because "[i]t is well settled that in conveying real property to a trust, legal and equitable title is transferred to the trustee of the trust." (Def.'s Mem. at 4) (citing *Austin v. City of Alexandria*, 265 Va. 89, 95 (2003)). In *Austin*, the settlor conveyed property to himself as trustee under a declaration of trust. Later, he executed a deed in his individual capacity and conveyed the same trust property to himself as trustee for a newly created trust. The court found he did not have legal title to the property to convey it in his individual capacity. Similarly, Defendants contend Mr. Foster conveyed the property to himself as Trustee, which was effective upon delivery. Delivery occurred immediately on April 15, 2006, and he no longer had title as an individual. Therefore, he did not have the power to encumber the parcel with the second easement.

Plaintiff's Response:

Plaintiff counters she is a bona fide purchaser for value, and she recorded her deed before the deed conveying the parcel to the Trust was recorded. Therefore, the second easement is valid. She admits that while it is true that a deed is effective upon delivery, the effectiveness is only between the grantor and grantee. She posits the delivery is not effective to bind a bona fide purchaser for value. Virginia is a race-notice state. According to Virginia Code Section 55-96, a deed of trust is void as to all purchasers for valuable consideration without notice until the deed is recorded. The parties have stipulated for the purpose of this Motion that Plaintiff was an innocent purchaser for value and had no notice of the deed transferring the servient property to the Trust at the time she was granted her easement. Further, Plaintiff suggests the grantor of a revocable trust retains the right to withdraw the property from the trust. Mr. Foster created a revocable

trust and he was the settlor and trustee. Plaintiff states it is evident Mr. Foster decided to revoke a portion of that conveyance and he had the power to do so. As a fallback, Plaintiff maintains that even if use of the area in question is not in conformity with the easement, an easement by prescription has been established.[1] This is pled as an alternative in the Second Amended Complaint.

Defendant's Reply:

Defendants respond Plaintiff cannot avail herself of the protections afforded a buyer in good faith, because she is not a purchaser of legal title to the servient parcel. Defendants argue all the cases Plaintiff cited in her Opposition involve purchasers of legal title to real estate and are therefore inapplicable to the instant action. An easement is not a grant of either legal or equitable title. "Easements are not ownership interests in the servient tract but 'the privilege to use the land of another in a particular manner and for a particular purpose.'" (Def.'s Mem. at 2) (citing *Burdette v. Brush Mountain Estates, LLC*, 278 Va. 286, 292 (2009)). The race to record must be between two competing title holders. Plaintiff's rights to the Defendants' property arise out of an easement grant. Her rights do not arise from a transfer of title. Mr. Foster, Defendants maintain, therefore did not effectively cause a reversion of title to himself individually. In *Austin v. City of Alexandria*, an individual recorded a deed conveying property to himself as trustee for a trust. 265 Va. 89, 94 (2003). The settlor of a trust created a second trust and recorded a second deed in his individual capacity in which he conveyed the same property to the

[1] This Letter Opinion does not address the ancillary question of whether Plaintiff gained an easement by prescription because that claim raised in the Second Amended Complaint is not the object of Defendants' Plea in Bar.

second trust. The Supreme Court held the property remained with the first trust and that the conveyance into the second trust by the settlor in his individual capacity was invalid. It did not matter if Mr. Foster intended to revoke the transfer of the parcel to the Trust. In order to revoke the conveyance and revert title back to himself as an individual, Defendants assert he had to execute a deed. For those reasons, Defendants conclude the grant of the second easement to Plaintiff is invalid.

ANALYSIS

A plea in bar is a defensive pleading which "shortens the litigation by reducing it to a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery." *Tomlin v. McKenzie*, 251 Va. 478, 480 (1996) (citation omitted). A plea in bar does not address the merits of the complaint, but raises a single issue of fact which might constitute an absolute defense to the suit. *Angstadt v. Atlantic Mut. Ins. Co.*, 254 Va. 286, 292 (1997). The moving party carries the burden of proof on that issue of fact. *See Campbell v. Johnson*, 203 Va. 43, 47 (1961). Where no evidence is taken in support of the plea, the trial court, and the appellate court upon review, must rely solely upon the pleadings in resolving the issue presented. *See Weichert Company of Va., Inc. v. First Commercial Bank*, 246 Va. 108, 109 (1993). "When considering the pleadings, 'the facts stated in the plaintiffs' motion for judgment [i.e., the complaint] [are] deemed true.'" *Tomlin*, 251 Va. at 480 (quoting *Glascock v. Laserna*, 247 Va. 108, 109, (1994)).

I. Whether Plaintiff qualifies as a bona fide purchaser for value and without notice thus to secure from challenge the second easement recorded in her favor.

In this case, Mr. Foster granted two easements to Plaintiff. The first easement is undisputed. The second easement, however, is at the center of this Motion. The Supreme Court of Virginia has defined an easement as:

> a privilege to use the land of another in a particular manner and for a particular purpose. It creates a burden on the servient tract and requires that the owner of that land refrain from interfering with the privilege conferred for the benefit of the dominant tract. *Bunn* v. *Offutt*, 216 Va. 681, 684, 222 S.E.2d 522, 525 (1976); *Tardy* v. *Creasy*, 81 Va. 553, 556 (1886). The privilege enjoyed under an easement is not inconsistent with "a general property" in the owner of the servient tract. *Bunn*, 216 Va. at 684, 222 S.E.2d at 525.

Brown v. Haley, 233 Va. 210, 216-217 (1987).[2]

Plaintiff claims she received the easement for value and she did not have timely notice of the conveyance that occurred between Mr. Foster and the Trust he established. She argues the parties have stipulated to those facts, and therefore, she is protected by the recording statute. The parties have stipulated, for purposes of this Motion, that the Plaintiff was a purchaser for value without notice. The stipulation states:

> The Plaintiff, Janet Kruck, received the Amendment to Deed of Easement dated June 9, 2006 (attached to the Defendants' Memorandum in Support of Plea in Bar as Exhibit D thereto), for value.
>
> The Plaintiff received the Amendment to Deed of Easement dated June 9, 2006, without notice of the Deed of Gift dated April 15, 2006 (attached to the Defendants' Memorandum in Support of Plea in Bar as Exhibit C thereto).

[2] The syntax "not inconsistent with 'a general property' in the owner" has historically referred to the following: "The owner in fee of land may impose upon it any burden, however injurious or destructive *not inconsistent with his general right of ownership*, if such burden be not in violation of public policy and does not injuriously affect the rights or property of others." *See* George William Warvelle, *A Practical Treatise on Abstracts and Examinations of Title to Real Property*, § 25 (3rd ed. 1907) (emphasis added).

(Pl.'s Ex. 1). Defendants claim the stipulation does not qualify Plaintiff as a bona fide purchaser because an easement does not transfer title to the land. Their claim is that the recording statute only protects those who receive title.

Virginia Code Section 55-96 reads in part:

> Every (i) such contract in writing, (ii) deed conveying any such estate or term, (iii) deed of gift, or deed of trust, or mortgage conveying real estate or goods and chattels and (iv) such bill of sale, or contract for the sale of goods and chattels, when the possession is allowed to remain with the grantor, *shall be void as to all purchasers for valuable consideration without notice not parties thereto and lien creditors*, until and except from the time it is duly admitted to record in the county or city wherein the property embraced in such contract, deed or bill of sale may be.

Va. Code Ann. § 55-96 (A) (1) (emphasis added). Virginia is a "race-notice" lien jurisdiction. *Cruickshanks v. Pemberton Oaks Townhouse Ass'n*, 512 B.R. 814, 818-819 (2014). "As such, it adheres to a first in time, first in right priority scheme." *Id.*

A plain reading of the statute reveals that a deed of gift or deed of trust "conveying real estate . . . shall be void as to all purchasers for valuable consideration without notice." The statute uses the phrase "conveying real estate" rather than the phrase "conveying an interest in real estate," which makes a drastic difference in the statute's reading and application. Although Title 55 of the Code does not provide a clear cut definition of "bona fide purchaser," the Code does provide a definition in Title 64.1 (Wills and Decedents' Estates). Virginia Code Section 64.1-01 defines a bona fide purchaser as "a purchaser of property for value who has acted in the transaction in good faith." The word "purchaser" is then defined as "one who acquires property by sale, lease, discount, negotiation, mortgage, pledge, or lien or who otherwise deals with property in a voluntary transaction,

other than a gift." *Id.* Again, the statute focuses on the acquisition of property rather than the acquisition of any type of interest in property.

The definition in one part of the Code does not dictate how the word or phrase is applied in a different part of the Code, but it does provide insight how the phrase is most likely intended by the General Assembly to be used throughout the Code as a whole. This is especially true when there is no other definition provided in the Code to the contrary. In further support of the proposition that a bona fide purchaser is one who purchases and receives title to the property they purchase are the annotations to § 55-96. Although not dispositive, the cases all appear to pertain to transfers or conveyances of title, rather than an interest in the land which does not transfer title itself, such as an easement.

The Supreme Court of Virginia provides some guidance in *Shaheen v. County of Mathews*. 265 Va. 462 (2003). In *Shaheen*, the Shaheens purchased a parcel of real estate located in Mathews County. They placed barriers and no trespassing signs on a road leading to a river access landing on their property. The County asked the Court to affirm its fee simple ownership of the landing and road or to affirm the existence of an easement for public use of the road and the landing. Previous land owners had given the County access to the road and landing. This access was recorded in a prior suit, but the order was not indexed in the name of the landowner or properly recorded. The Shaheens argued they were unable to find any instruments in their chain of title that vested in the County a fee simple or easement. The Court found the Shaheens had constructive notice. The Court stated:

> "The main purpose of recordation statutes is to give constructive notice to purchasers and encumbrancers who acquire or seek to acquire some interest or right in property." *Chavis v. Gibbs*, 198 Va. 379, 381, 94 S.E.2d

> 195, 197 (1956). "Where a party purchases an estate which is subject to the right of another, and that right is shown by the chain of title papers, the purchaser is charged with notice of all that the title paper or papers to which they refer may disclose upon complete examination." Id. at 382, 94 S.E.2d at 197 (citing *Effinger v. Hall*, 81 Va. 94, 105 (1885); *Burwell's Adm'rs v. Fauber*, 62 Va. (21 Gratt.) 446, 463 (1871); *Virginia Iron & Coke Co. v. Roberts*, 103 Va. 661, 681, 49 S.E. 984, 986, (1905)); *see also Fox v. Templeton*, 229 Va. 380, 385, 329 S.E.2d 6, 8-9 (1985).

Shaheen v. County of Mathews, 265 Va. 462, 477 (2003).

The Court further noted:

> Stated differently, a purchaser "must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He has no right to shut his eyes or his ears to the inlet of information, and then say he is a bona fide purchaser without notice." *Burwell's Adm'rs*, 62 Va. (21 Gratt.) at 463; quoted in *Chavis*, 198 Va. at 383, 94 S.E.2d at 198. [*478] Only a purchaser without notice can take advantage of a failure to record an instrument. *National Mut. Bldg. & Loan Ass'n v. Blair*, 98 Va. 490, 498, 36 S.E. 513, 515 (1900).

Id. at 477-48. The Court focused its analysis on a purchaser as being one who was purchasing an estate, rather than a purchaser of any type of interest in an estate.

The Court in *Chavis v. Gibbs*, which the *Shaheen* case quotes, stated that the purpose of the recordation statute is to give notice to purchasers and encumbrancers. 198 Va. 379 (1956). An easement is certainly an encumbrance upon land; however, the Court made its statement immediately after citing the exact text of § 55-96, which only refers to purchasers for value and lien creditors, thereby, narrowing who the Court was qualifying as an encumbrancer for purposes of the recording statute. Lastly, recordation is only necessary as to bona fide purchasers and lien creditors without notice. This means that title transfers upon delivery of the deed as between the two parties who are participants to the transaction. *Harman v. Oberderfer*, 74 Va. 497 (1880). As the chart

below illustrates, the conveyance of the parcel to the Trust occurred on April 15, 2006, and was valid as of that point in time. Due to the fact that Plaintiff was not a bona fide purchaser, the recording of the second easement prior to the recording of the conveyance to the Trust does not make a difference as to her status.

Transaction Description	**Transaction Date**	**Date Recorded**
Easement #1	9/30/74	6/13/06
Conveyance of parcel to Trust	**4/15/06**	**6/21/06**
Easement #2	**6/9/06**	**6/13/06**
Fee simple title conveyance to Edward and LeeAnn Foster	1/31/08	2/4/08
Foreclosure conveyance to current owners/Defendants	11/26/12	12/6/12

The easement in favor of Plaintiff is therefore not protected from challenge by the statutory recording scheme and accompanying interpretive precedent.

II. Whether the Grantor, Mr. Foster, partially and with validity, revoked his conveyance of the servient parcel to the Trust, making the second easement binding on successors in interest.

A revocable trust is defined as:

> A trust that may be revoked by the settlor. A revocable trust is an inter vivos trust that persists only for the time the settlor desires it to persist. At the time the trust is created, the settlor reserves the right to terminate the trust, recover the corpus of the trust and any assets it has generated. When a revocable trust specifies the means by which it may be revoked or the conditions under which it may be revoked, revocation is only allowed by such means or under such conditions.

Revocable Trust (Irrevocable Trust), *Wolters Kluwer Bouvier Law Dictionary Desk Edition* (2012). "[W]here the settlor of a revocable trust is also the trustee, a requirement of written notice to the trustee of the settlor's intention to revoke a prior conveyance may be satisfied by the settlor's written execution of instruments conveying the trust property to another party." *Gelber v. Glock*, 293 Va. 497, 507 (2017).

There are two Virginia Supreme Court cases, which provide guidance on determining when a trust has been revoked in a situation where the settlor and trustee are the same person. The first case is *Austin v. City of Alexandria*, a case on which Defendants rely heavily and argue is dispositive. 265 Va. 89 (2003). The second case is *Gelber v. Glock*, a case which Plaintiff cites. 293 Va. 497 (2017).

In *Gelber*, the Court provided the following helpful summary of *Austin*:

> In *Austin*, the settlor executed and recorded a deed in 1993 conveying real property to himself as trustee under a declaration of trust. The pertinent provisions of the declaration of trust named the settlor as the initial trustee, named the settlor as the income beneficiary during his lifetime, provided for discretionary distributions of corpus by the trustee to the settlor, and provided that "by signed instruments delivered to the Trustee," the settlor may withdraw property from the trust "upon giving reasonable notice in writing to the Trustee." *Id.* at 91-92, 574 S.E.2d at 290. In 1999, the settlor executed a deed in his individual capacity conveying the trust property to himself as trustee of a newly created trust.
>
> The successor trustee of the 1993 trust challenged the 1999 deed as ineffective since the property previously had been conveyed by the settlor to himself as trustee of the 1993 trust. With regard to the settlor's compliance with the provisions of the 1993 trust, we reasoned that because the settlor was the trustee of the 1993 trust, written notice of the settlor to himself as trustee was a "non-issue." *Id.* at 96, 574 S.E.2d at 293. Therefore, we accepted the contention that the requirement of notice in writing to the trustee was satisfied by the settlor's "signed instruments" establishing the 1999 trust and conveying the property to the 1999 trust. *Id.*

> Notwithstanding our holding in *Austin* that the written notice requirement of the 1993 trust was satisfied, we further concluded that the settlor failed to comply with the revocation and reversion of title provisions of the 1993 deed. The deed provided that any revocation of the trust agreement shall not be effective as to the property conveyed unless the grantor executed a deed, duly recorded, evidencing the revocation and reversion of title. *See id.* at 96-97, 574 S.E.2d at 293. Because the 1999 deed was not executed by the grantor in his capacity as trustee and contained no reference to the 1993 trust, we held that the 1999 deed failed to satisfy the revocation and reversion title requirements of the recorded 1993 deed. *Id.*

Gelber, 293 Va. at 507-509. In *Austin*, the Court made two very important determinations. First, the Court decided the written notice requirement to revoke the trust was satisfied when the settlor established the 1999 trust and conveyed the property to that new trust. Second, the Court determined the settlor did not take sufficient steps to revoke the title. The requirements for revocation and reversion of the title were set out in the 1993 deed, and because the settlor did not comply with those requirements, there was no revocation of title.

In *Gelber*, the Court made the following important distinction from the *Austin* case:

> Mrs. Gelber was the sole settlor, trustee, and lifetime beneficiary of her trust under the provisions of the 2010 trust agreement. . . . [T]he tangible personal property deed executed by Mrs. Gelber in which she conveyed her personal property to herself as trustee under the 2010 trust agreement contained no provisions requiring a deed evidencing a revocation or reversion of title to the personal property.
>
> In sum, Mrs. Gelber retained control over the property she conveyed to herself as trustee under the terms of the 2010 trust agreement and reserved to herself the power to withdraw property from her trust or revoke her prior conveyance of personal property to the trust upon written notice to herself as trustee. We conclude that Mrs. Gelber's written execution of the bill of sale substantially complied with the provision of the trust agreement requiring a writing signed by her and delivered to herself. Thus, we reject the Executors' contention that the bill of sale failed to transfer title over the

> personal property, as a matter of law, on the ground that Mrs. Gelber signed the bill of sale in her individual capacity.

Id. at 506-509. The Court noted in both cases that the determination as to whether title of the property had been revoked was dependent on the terms of either the deed or the trust agreement in question. In *Austin*, the trust was revoked but the title could not be revoked until the settlor complied with the specific requirements set out in the deed. In *Gelber*, the trust agreement did not contain any provisions requiring the execution of a deed in order to revoke title of the property, and therefore, the trust and title were both revoked when Mr. Gelber signed the bill of sale. Although the *Gelber* case involved personal property rather than real property, the concept of how a trust and title can be revoked remains the same.

In this case, the Court must first look to the Deed of Gift which transferred the property from Mr. Foster as an individual to Mr. Foster as Trustee for the Austin Foster Revocable Living Trust. Unlike in *Austin*, the Deed of Gift makes no mention of any steps that must be taken in order to revoke title. (Def.'s Ex. C). Second, the Plaintiff provided a copy of the Trust agreement during the hearing of this matter. Similarly, that instrument does not specifically call for the settlor to execute a deed to revoke title to the property, in whole or in part, in order then to encumber the property as an individual. That which may be rescinded in whole in the context of the Revocable Trust, may therefore also be revoked in part. *Commissioner v. Estate of Talbott*, 403 F.2d 851, 853 (4th Cir. 1968) (stating that partial revocation is "a species of, although usually something less than, complete revocation.") As such, the execution of the second easement satisfies the written notice requirement, and that action not only revoked the consequent interest in

the property previously conveyed to the Trust, it also revoked title at least in part, thereby allowing Mr. Foster to validly grant the second easement in his individual capacity. (Def.'s Ex. D). For these reasons, the Court cannot therefore sustain the Plea in Bar.

CONCLUSION

This Court has considered two questions in resolution of Defendants' Plea in Bar: 1) Wherein the Grantor first transferred the servient plot of land into a trust, thereafter granted the Plaintiff an easement which was recorded before the deed conveying the parcel to the Trust, whether the Plaintiff qualifies as a bona fide purchaser for value without notice so as to protect the encumbrance from challenge by Defendants who are successors in interest to the servient land; and 2) Whether the easement conveyed by the Trustee/Beneficiary of the Trust as an individual, after title to the servient parcel was transferred into the Trust, is valid and binding upon successors in interest to the realty. The issues of the validity of the granted easement uncoupled from a transfer of the servient estate and the Trustee/Beneficiary's right to grant an easement under the power to revoke a trust, are posited to be matters of seeming first impression. For the reasons as more fully detailed herein, this Court holds the Plaintiff/Grantee of the mere easement for value without notice of the prior transfer of the servient parcel into the Trust is not protected by the recording statute from challenge to her interest, as the encumbrance is not a transfer of an estate encompassed under the protective umbrella of the statutory scheme. Nevertheless, this Court rules further that the Grantor's deed of an easement to his Plaintiff sister for value after he had transferred the servient parcel into the Trust of which he was sole beneficiary, operated as a partial revocation of the transfer of the estate

into the Trust, making the easement valid and binding on successors in interest to such tract of land.

Accordingly, the Defendants' Plea in Bar is denied.

The Court shall enter an order incorporating its ruling herein, and THIS CAUSE CONTINUES.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER