NEWSLETTER OF THE REAL PROPERTY SECTION OF THE MISSISSIPPI BAR

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RECAP OF SIGNIFICANT 2021 LEGISLATION

The following bills became effective on July 1, 2021.

HB 1156 enacted the Revised Mississippi Law on Notarial Acts, which is codified at Miss. Code Ann. Sections 25-34-1 to -57. It repealed and replaced the former chapter governing notaries. One change that HB 1156 makes is to provide that a form of acknowledgment that is permitted in the jurisdiction in which the notarial act was performed meets the requirements of Mississippi law. Section 25-34-31(4)(b). The editor's reading of this part of the statute is that if a notary licensed in Wyoming (to pick another state at random) executes a form of acknowledgment that is sufficient under Wyoming law, then that form of acknowledgment is sufficient under Mississippi law. The editor is not a fan of this provision because how does a Mississippi attorney know if a form of acknowledgment executed in Wyoming is sufficient under Wyoming law? Isn't this a question of Wyoming law? HB 1156 authorizes new short forms of acknowledgments in addition to the existing long forms (Section 89-3-7(2)(a) & (b)) and provides a form of jurat (a verification of a statement on oath or affirmation, like an affidavit)(Section 89-3-7(2)(c). HB 1156 also makes changes to the statute authorizing scrivener affidavits, Section 89-5-8, to authorize the filing of an affidavit of non-homestead, require that the legal description be attached to the affidavit, and provide penalties for perjury.

HB 2638 amended Section 89-3-1 to provide a method for recording electronic documents in counties that are not set up for electronic recording. This amendment became necessary as a result of the Revised Mississippi Law on Notarial Acts, which authorizes notaries to perform in-person electronic notarizations of documents signed electronically. An attorney can print out the

electronic document and attach a certificate in the form set out in the statute to the printed-out copy stating that it is a true and correct copy of the electronic document. The attorney's certificate then must be notarized. The attorney must confirm that the electronic document contains a verifiable signature, has not been tampered with, and must personally print or supervise the printing of the electronic document. The original notarized certificate of the attorney with the tangible copy of the electronic document attached then can be filed in the land records.

HB 354 amended Section 21-23-7 by adding a new subsection (14) that provides that for violations of municipal ordinances relating to real property, a municipal judge has the authority to order an owner to remedy violations within a reasonable time, and to authorize the municipality the option to remedy the violation itself if the owner does not remedy the violation. If the municipality remedies the violation, the municipal judge can give a judgment against the owner for the municipality's costs in remedying the violation.

HB 953 enacted new statutes that put new requirements on managing agents and boards of homeowners' associations. Among other requirements, the board of a homeowners' association has to review the associations bank statements and check registers at every regularly scheduled meeting and maintain fidelity bond coverage for all officers and directors, and for the association's managing agent. These statutes have been codified as Sections 79-11-751 to -759. HB 953 was enacted with the noble goal of protecting homeowners from the alleged embezzlement that took place by a managing agent in the Jackson area recently, but the editor's understanding from attorneys that represent homeowners associations is that the restrictions in the bill go too far and is causing problems for boards and their homeowners. These statutes may be amended in the 2022 legislative session.

Mississippi Title Insurance Act

The Land Title Association of Mississippi has determined not to pursue adoption of the Mississippi Land Title Act at this time because of a lack of unanimity in the title community regarding the Act.

RECENT CASES

COVID and Public Sales

Osby v. Janes, 323 So. 3d 1084 (Miss. 2021). Eleven cotenants owned land in DeSoto County. One cotenant, Osby, negotiated a contract to sell the land to Janes, but he could not get the consent of all of his other cotenants to the sale. So Osby filed an action to partition the property. The Chancery Court set the sale date for April 9, 2020. On April 1, 2020, Governor Reeves issued a shelter-in-place order due to COVID. At the sale on April 9, ten people attended the sale and twenty-nine bids were made. Janes was the high bidder and purchased the property for approximately 43% of the price for which Osby had contracted to sell the land to Janes. Osby and other cotenants filed motions with the Chancery Court to reject the sale. The cotenants argued, among other issues, that the sale was unfair because COVID prevented some bidders from

attending the sale. The Chancery Court denied the motions and confirmed the sale. On appeal by the cotenants, the Mississippi Supreme Court, in a unanimous decision by Chief Justice Randolph, affirmed. Justice Randolph wrote that, "Despite the pandemic, not one person petitioned the court to delay the partition sale date once the sale date was set."

Note 1: To be clear, this case does not stand for the proposition that if one of the cotenants had filed a motion with the Chancery Court to delay the sale because of the pandemic, the Chancery Court should have granted the motion. The only concrete takeaway is that such a motion would have to be filed before the sale.

Note 2: Partition sales are rare, but the same rationale about COVID deterring potential bidders arguably could apply to any judicial sale, including non-judicial foreclosure sales of real estate. The *Osby* case should cut off any claims based on past lockdowns unless the owner filed a motion to delay the sale prior to the sale. But what about future lockdowns? Mississippi statutes dictate the time, place and terms of the sale, within some parameters. You couldn't do a non-judicial foreclosure sale in Mississippi via Zoom. Sales of personal property under the Uniform Commercial Code, on the other hand, can be done virtually to avoid any COVID risk.

Note 3: What about deficiencies following foreclosure sales made during the lock-down? The current state of Mississippi law, as the editor understands it, is that a lender is only entitled to a deficiency if the foreclosure sale is "commercially reasonable." Arguably an involuntary sale, by its nature, is not commercially reasonable, but that horse has left the barn. Is there a valid argument that it is not commercially reasonable to have an in-person non-judicial foreclosure sale during a pandemic because potential purchasers are discouraged from attending because of the COVID risk? If a person of reasonable prudence would avoid restaurants and movie theaters during a pandemic, would such a person have qualms about attending a non-judicial foreclosure sale? Does the fact that judicial sales typically are conducted outside, on the courthouse steps, make a difference?

Note 4: The editor does not pretend to be knowledgeable about transmission of COVID, but it seems that the riskiest part of a non-judicial foreclosure sale is the trustee reading the notice of sale aloud. Is there a legal requirement to read the entire notice of sale aloud, or is this just custom? What about reading lengthy descriptions? The editor has seen legal descriptions of golf courses and pipelines in deeds of trust that are more than ten pages long. Assuming that the entire description is accurately printed in the notice of sale that is published and posted, is the trustee required to read the legal description at the sale?

Arbitrary for Board to Rely on Licensing Statute to Deny Use

Board of Supervisors of Hancock County v. Razz Halili Trust, 320 So. 3d 490 (Miss. 2021). The Razz Halili Trust d/b/a Prestige Oysters ("Trust") purchased land on the Mississippi Gulf Coast in Hancock County for the purpose of unloading oysters from its boats and loading the oysters on to trucks for delivery. The Trust applied to the Hancock County Planning and Zoning Commission for site plan approval to construct its improvements. The land was located in the C-4 District, which permits marinas. The zoning ordinance defined a marina as a "boat basin, harbor or dock,

with facilities for berthing and servicing boats, including bait and fishing tackle shop and eating establishments." The ordinance prohibited "processing uses" in the C-4 District. No concerns were raised about the Trust's proposed use at the hearing before the Planning and Zoning Commission, and the Commission voted to recommend approval of the Trust's application to the Hancock County Board of Supervisors. At the Board of Supervisors meeting, however, the supervisors discussed whether the proposed use of loading and unloading of oysters was "processing." The term "processing" was not defined in the zoning ordinance. A Mississippi licensing statute defines a "seafood processor" as any person who "engaged in the canning, processing, freezing, drying or shipping of oysters, fish, saltwater crabs, or saltwater shrimp." (emphasis added) Based in part on this definition in the licensing statute, the supervisors decided that the Trust's proposed use was "processing" and voted to deny the Trust's application. The Trust appealed the Board of Supervisors' decision to the Hancock County Circuit Court. The Circuit Court held that nothing in the record supported the conclusion that the property would be used for seafood processing, and that no substantial evidence existed to support the Board's decision. The Circuit Court reversed and rendered a decision in favor of the Trust.

On appeal by the Board, the Mississippi Supreme Court, *en banc*, affirmed, in four separate opinions. The standard on appeal in a zoning case is that the Board's decision must be affirmed unless it was clearly arbitrary and capricious or without a substantial evidentiary base. Justice Chamberlin wrote the plurality opinion in which Justices Beam and Ishee joined. Justice Chamberlin wrote that the Board should have relied on the definition of "marina" in the Zoning Ordinance, that it was arbitrary and capricious for the Board to rely on the definition of seafood processing in a state licensing statute which was irrelevant to the issue before the Board, and that no substantial evidence existed that the Trust's proposed use constituted "processing." Justice Kitchens concurred with Justice Chamberlin's opinion in part and in the result, and Justice King joined Justice Kitchens' opinion. Justice Coleman dissented in a separate opinion joined by Justice Griffis and in which Justices Kitchens and King joined in part. In his dissent Justice Coleman wrote that the Board's decision was justified, or at least not arbitrary and capricious, because the definition of "marina" did not preclude commercial offloading of seafood. Justice Maxwell dissented in a separate opinion joined by Justice Randolph and in which Justice Coleman joined in part. Justice Maxwell wrote in his dissent that the Court should have given more weight to the Board's interpretation of its own ordinance, and that in the absence of any definition in the zoning ordinance of what constitutes "processing", the Board's decision was not arbitrary or capricious.

Note 1: That there are four separate opinions shows that this was a close case and that a multitude of opinions exist on the Court about basic zoning issues. The editor thought that the Board's reasoning was sufficient to meet the extremely low "not arbitrary and capricious" standard that governs zoning appeals and was surprised at the result.

Note 2: In addition to the "arbitrary and capricious" issue, the issue in this case that caught the editor's attention is the discussion about whether courts should continue to give deference to the interpretation by local boards of their own ordinances. Historically the Mississippi courts have given great weight to how local boards interpret their ordinances. In *King v. Mississippi Military Department*, 245 So. 3d 404 (Miss. 2018), the Mississippi Supreme Court stated that it would cease to give deference to executive branch agencies when interpreting statutes. In his dissent in this zoning case, Justice Coleman stated that the rationale against giving deference to the executive

branch stated in *King* was equally applicable to the interpretation by local boards of their ordinances. Justice Griffis joined Justice Coleman's decision, and Justices Kitchens and King concurred with Justice Coleman on this point. So now there are four justices who are in favor of no longer giving deference to local officials' interpretation of their own ordinances. This discussion, plus the holding that the Board's decision did not meet the "arbitrary and capricious" standard, suggests that the Mississippi Supreme Court may be giving enhanced scrutiny to future zoning and land use appeals from municipalities and counties.

Note 3: The root problem in this case was that the Trust's proposed use not expressly addressed in the zoning ordinance, either as a permitted use or as a prohibited use. One circumstance when this issue arises is when the requested use is a new technology that was not contemplated at the time that the zoning ordinance was drafted, like solar farms or other alternative energy technologies. In this circumstance, the options are trying to shoe-horn the requested use into one of the existing permitted uses, amending the text of the zoning ordinance to address the requested use, or in some circumstances, depending on the zoning ordinance, filing an application for a conditional use permit. In this case the owner argued that unloading and loading oysters is like operating a marina and is not processing, which launched a battle of definitions. Words defined in the course of the lower court's opinion and the opinions of the justices, and the sources cited for the definitions, include "marina" (zoning ordinance), "processing" (Dictionary.com), "seafood processing" (seafood processing licensing statute) "arbitrary" (Mississippi case), "capricious" (defined twice, both Mississippi cases) "substantial evidence" (Mississippi case), "fish processing" (Encyclopedia Britannica), "food processing" (Dictionary.com), "process" (Dictionary.com and Random House Webster's Unabridged Dictionary), and "whim" (Black's Law Dictionary).

Adverse Possession and Tacking under Void Deed of Trust

Crotwell v. T&W Homes Etc, LLC, 318 So. 3d 1117 (Miss. 2021). In 1973, Lum conveyed forty-acres to Crotwell by warranty deed and reserved a life estate. On June 8, 1998, Lum purported to convey one acre of the forty-acre tract to Prestage. Lum died on June 29, 1998. Prestage executed a deed of trust covering the one-acre tract in 2006 that eventually was assigned to Wells Fargo. Prestage built and occupied a house on the property. Prestage defaulted on the loan, and on August 10, 2011, the substituted trustee on behalf of Wells Fargo foreclosed on the deed of trust. T&W Homes ("T&W") was the high bidder at the sale and the trustee executed a trustee's deed to T&W. After the foreclosure sale Prestage abandoned the one-acre property. Crotwell brought an action to confirm her title to the one-acre parcel in December 2011. Crotwell argued that Lum had only retained a life estate in the 1973 deed and did not retain any interest in the fee to convey to Prestage, and that any rights that Prestage had in the one-acre parcel expired at Lum's death in 1998, before Prestage executed the deed of trust. On interlocutory appeal, the Mississippi Supreme Court held that Lum only retained a life estate, affirmed the Chancery Court, and remanded the case for further proceedings. *T&W Homes Etc, LLC v. Crotwell*, 235 So. 3d 66 (Miss. 2017).

On remand, T&W argued that it had acquired title to the one-acre parcel by adverse possession, since Prestage had acquired title by adverse possession and T&W's ownership since the foreclosure could be tacked on to Prestage's ownership. Crotwell argued that the foreclosure sale was void since Prestage did not have any title and that T&W, as the purchaser at the foreclosure

sale but not the beneficiary of the deed of trust, did not have privity with Prestage and so could not tack its time of possession to Prestage's time of possession for adverse possession purposes. On the day before the hearing on the adverse possession issue, in October 2018, Prestage granted to T&W a quitclaim deed to the one-acre parcel. The Chancery Court held that Prestage had obtained title to the one-acre parcel by adverse possession, and even if the foreclosure was void, T&W had obtained title to the one-acre parcel by virtue of the deed from Prestage.

On appeal by Crotwell, the Mississippi Supreme Court, in a unanimous decision by Justice Kitchens, affirmed. The Court agreed with Crotwell that the deed of trust was void because Prestage did not have title to the one-acre tract when he executed the deed of trust in 2006, and that T&W, as the purchaser at the sale of a void deed of trust obtained no title. But the Court held that Prestage had obtained title by adverse possession beginning from the time that Lum died in 1998 until Prestage abandoned the property in 2011. Crotwell argued that Prestage subsequently lost title when he abandoned the property. The Court wrote that once Prestage had obtained title by adverse possession, title could be divested only by a conveyance or adverse possession by another party; "abandonment is not effective to divest the title to real estate."

Note 1: In reading this case, it helps to remember that there are two adverse possession questions. The first is whether Prestage obtained title by adverse possession, and the second is whether the purchaser at the foreclosure sale, T&W, was able to tack its period of ownership to the Prestage's period of possession.

Note 2: If one who has no title grants a deed of trust, and the grantor subsequently obtains title, shouldn't the beneficiary of the deed of trust get the benefit of that title through the doctrine of after-acquired title? Or does the fact that the deed of trust was void from the start because the grantor had zero title mean that the deed of trust cannot be resurrected if the grantor subsequently obtains title? Does it make a difference whether the deed of trust expressly states that it covers any after-acquired title?

Note 3: A question that the case does not resolve is whether the time of possession of a purchaser at a foreclosure sale is tacked on to the grantor's time of adverse possession. Crotwell argued that no tacking should be allowed because tacking requires privity of estate, and no privity exists between a grantor of a deed of trust and a purchaser at the foreclosure sale who is not the beneficiary. In this case the court held that T&W obtained title by virtue of the 2018 deed from Prestage, not through adverse possession, which made it unnecessary to decide this question.

Note 4: While a fee simple title cannot be lost by abandonment, it is possible for an easement to be abandoned. In Mississippi one seeking to assert that an easement has been abandoned must prove an actual intent to abandon or that there has been protracted non-use of the easement for an extended period of time, which creates a presumption of abandonment. *See Bivens v. Mobley*, 724 So. 2d 458, 461 (Miss. Ct. App. 1998); *R&S Development, Inc. v. Wilson*, 534 So. 2d 1008, 1010 (Miss. 1988). The editor has not researched this question, but he speculates that the rule for leases would be the same as the rule for a fee title, and that a leasehold estate could not be lost through abandonment, since a fee and lease are both estates in land, and an easement is not.

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