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1. [\*Mason Family Trust v. Devaney, 146 N.M. 199\*](#)

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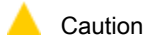
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## Mason Family Trust v. Devaney

Court of Appeals of New Mexico

March 26, 2009, Filed

Docket No. 28,554

### Reporter

146 N.M. 199 \*; 2009-NMCA-048 \*\*; 207 P.3d 1176 \*\*\*, 2009 N.M. App. LEXIS 26 \*\*\*\*

MASON FAMILY TRUST, Plaintiff-Appellant, v. MATT DEVANEY, Defendant-Appellee.

**Subsequent History:** Released for Publication May 12, 2009.

**Prior History:** [\*\*\*\*1] APPEAL FROM THE DISTRICT COURT OF LINCOLN COUNTY. Karen L. Parsons, District Judge.

### Core Terms

rental, short-term, deed restriction, dwelling purposes, residential, commercial purpose, vacation, rented, cabin, summary judgment, subdivision

### Case Summary

#### Procedural Posture

Plaintiff property owner brought an action against defendant neighbor in the District Court of Lincoln County (New Mexico), seeking an injunction preventing the neighbor from renting his cabin on a short-term basis. The owner also sought a writ of mandamus against the defendant village to require the village to enforce certain ordinances. The district court entered summary judgment in favor of the neighbor, and the owner appealed.

### Overview

The neighbor lived in Texas and had purchased his cabin in a subdivision for a vacation home. He lived in the home two weeks of the year and had rented it out for 66 days, using a rental agent to obtain tenants. The deed restrictions for homes in the subdivision prohibited use of the homes for for business or commercial purposes and required that they be used for dwelling purposes only. The court held that while renting the property as a dwelling on a short-term basis may have constituted an economic endeavor, to construe that activity as one forbidden by the language of the deed restrictions was unreasonable and strained. The deed restrictions did not forbid short-term rental for dwelling purposes. In the context of a residential subdivision, a dwelling purpose meant use as a house or abode, with no requirement of permanency or length of stay. Rental for a short-term use as a shelter to live in was significantly different from using the property to conduct a business or commercial enterprise on the premises.

### Outcome

The court affirmed the decision of the district court.

### LexisNexis® Headnotes

## Mason Family Trust v. Devaney

Civil Procedure > Appeals > Appellate Briefs

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

### [HN1](#) [↓] Appeals, Appellate Briefs

A party that fails to present argument or authority to support a contention runs a very substantial risk that the appellate court will not address the contention because the party is deemed to have abandoned the contention.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Real Property Law > Deeds > Construction & Interpretation

Real Property Law > Encumbrances > Restrictive Covenants > Creation of Restrictive Covenants

### [HN2](#) [↓] Standards of Review, De Novo Review

If the facts are undisputed, the question of whether a property use violates deed restrictions is reviewed de novo.

Real Property Law > Deeds > Construction & Interpretation

Real Property Law > Encumbrances > Restrictive Covenants > Creation of Restrictive Covenants

### [HN3](#) [↓] Deeds, Construction & Interpretation

Deed restrictions are to be read reasonably but strictly and, to the extent language is unclear or ambiguous, the issue of enforcement of a restriction will be resolved in

favor of the free enjoyment of the property and against limitations. An appellate court will not construe a deed restriction so as to create an illogical, unnatural, or strained construction. The appellate court will give words in a deed restriction their ordinary and intended meaning.

Real Property Law > Encumbrances > Restrictive Covenants > Subdivisions

### [HN4](#) [↓] Restrictive Covenants, Subdivisions

A "dwelling" is a shelter (as a house) in which people live. To dwell is to remain for a time. A house is a building that serves as living quarters for one or a few families: home. An abode is a temporary stay: sojourn.

**Counsel:** Adam D. Rafkin, P.C., Adam D. Rafkin, Ruidoso, NM, for Appellant.

Richard A. Hawthorne, P.A., Richard A. Hawthorne, Ruidoso, NM, for Appellee.

**Judges:** JONATHAN B. SUTIN, Judge. WE CONCUR: ROBERT E. ROBLES, Judge, TIMOTHY L. GARCIA, Judge.

**Opinion by:** JONATHAN B. SUTIN

## Opinion

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[\*199] [\*\*\*1176] SUTIN, Judge.

[\*\*1] Plaintiff Mason Family Trust (Mason) sought an injunction against Defendant Matt Devaney to prevent Devaney from renting his cabin on a short-term basis. Devaney's property lies within what is considered a residential subdivision, called the White Fir Subdivision, located in an area called the Upper Canyon in Ruidoso, New Mexico. Mason also sought a writ of mandamus against the Village of Ruidoso to require the Village to

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enforce certain ordinances that Mason claimed prohibited Devaney's activity. The mandamus action was stayed as to the Village, pending the outcome of the merits of Mason's claim against Devaney. Specifically, Mason complained that the short-term rental of the property by Devaney violated deed restrictions requiring properties to be used only for dwelling purposes and precluding properties from being used for business or commercial [\*\*\*\*2] purposes. The district court entered summary judgment in Devaney's favor. We affirm and hold that, under the particular circumstances in this case, Devaney's rental of his cabin for dwelling purposes is a permitted use and is not a use for business or commercial purposes.

## BACKGROUND

[\*\*2] Mason's motion for summary judgment asserted the following as undisputed facts. Devaney purchased the property in question burdened with negative reciprocal easements in the form of deed restrictions. These deed restrictions were set forth in the [\*\*\*1177] [\*200] original deeds to properties owned by Mason and Devaney. Devaney was a full-time resident of Texas, and his primary residence was in Fort Worth, Texas. He used the cabin as a personal vacation home and as a short-term rental. He contracted with a property management company to manage the rental of the cabin, and the company advertised the property on the company's Internet website. In the year before the complaint was filed, Devaney had only stayed in the property for fourteen nights and had rented it out sixty-six days, generating \$ 12,625 in gross receipts.

[\*\*3] The original warranty deeds to properties in the

subdivision stated "that said property and the improvements [\*\*\*\*3] thereon shall be used for dwelling purposes only and that no part thereof shall at any time be used for business or commercial purposes[.]" Mason argued in its summary judgment memorandum that the deed restrictions precluded Devaney from using the property as a short-term rental because this rental activity constituted use of the property for business or commercial purposes.

[\*\*4] Devaney responded and filed a counter-motion for summary judgment. Devaney agreed that the facts as set out by Mason were undisputed. Devaney set out further undisputed facts relating to chain of title and reversionary rights. Mason did not dispute these additional facts. Devaney argued that (1) Mason lacked standing, (2) the deed restrictions did not preclude him from using his property as a short-term rental, and (3) the quitclaim deed to Devaney extinguished any right the grantor or its assigns and successors ever had to enforce the deed or to exercise the right of reversion.

[\*\*5] The district court determined, as a matter of law, that Devaney was entitled to judgment in his favor, dismissed Mason's claims with prejudice, and entered judgment to that effect. The court specifically held that Devaney's short-term rental [\*\*\*\*4] of the property did not violate the deed restrictions.<sup>1</sup>

[\*\*6] The only issue on appeal is whether Devaney's short-term rental of his cabin constituted a use of the property for business or commercial purposes, in violation of the deed restrictions. Devaney does not mention his standing argument or his arguments regarding the original grantor's assign's and successor's right of reversion that he raised in his summary judgment

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<sup>1</sup> The court's order appears to have also covered a second cabin in the subdivision owned by Devaney. To the extent the issues presented in the district court and decided by the district

court involved two cabins and not solely one cabin, we will assume that the parties intend this Court's decision to relate to the two cabins.

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motion, and therefore, he has abandoned those arguments. See [Cain v. Champion Window Co. of Albuquerque, LLC, 2007 NMCA 85, P 31, 142 N.M. 209, 164 P.3d 90](#) (stating that the plaintiffs abandoned claims set out in their complaint when they failed to mention the claims on appeal from a summary judgment dismissing all counts of his complaint); see also [State ex rel. Office of State Eng'r v. Lewis, 2007 NMCA 8, P 74, 141 N.M. 1, 150 P.3d 375](#) (filed 2006) [\*\*\*\*5] [HN1](#) ("A party that fails to present argument or authority to support a contention runs a very substantial risk that this Court will not address the contention, . . . because the party is deemed to have abandoned the contention.").

## DISCUSSION

[\*\*7] The question before us is whether, given the facts in this case, Devaney's use of his property violated the deed restrictions. [HN2](#) The facts are undisputed. We review this question de novo. See [Bonito Land & Livestock, Inc. v. Valencia County Bd. of Comm'rs, 1998 NMCA 127, P 5, 125 N.M. 638, 964 P.2d 199](#).

[\*\*8] The parties agree that Devaney rented the property on a [short-term](#) basis when he was not occupying the property himself. He rented the property for many more days than he dwelled there, and Devaney received substantial [rental](#) fees. During the year before the complaint was filed, a property management company advertised and managed the [rental](#) of the cabin.

[\*\*9] [HN3](#) Deed restrictions are to be read reasonably but strictly and, to the extent language is unclear or ambiguous, the issue of enforcement of a restriction will be resolved in favor of the free enjoyment of the property and against limitations. See [Hill v. Cmty. of Damien of Molokai, 1996 NMSC 8, P 6, \[\\*\\*\\*1178\] \[\\*201\] 121 N.M. 353, 911 P.2d 861](#). [\*\*\*\*6] We will not construe a deed restriction so as

to create an illogical, unnatural, or strained construction. See *id.* We will give words in a deed restriction their ordinary and intended meaning. See *id.*

[\*\*10] While Devaney's renting of the property as a dwelling on a [short-term](#) basis may have constituted an economic endeavor on Devaney's part, to construe that activity as one forbidden by the language of the deed restrictions is unreasonable and strained. Strictly and reasonably construed, the deed restrictions do not forbid [short-term rental](#) for dwelling purposes.

[\*\*11] This conclusion is supported by the case of [Yogman v. Parrott, 325 Ore. 358, 937 P.2d 1019, 1020 \(Or. 1997\)](#), which involved a [short-term](#) vacation [rental](#) in a beach-front subdivision. The restrictive wording differs slightly from the present case. The property in *Yogman* was restricted to use "exclusively for residential purposes" and not for "commercial enterprise." *Id.* After analyzing the meanings of "residential," "commercial," and "commercial enterprise," and looking at the context of the restrictive language, the Oregon Supreme Court determined that the language of the restriction was ambiguous. [Id. at 1021-22](#). *Yogman* is similar to the present [\*\*\*\*7] case. Other than limited evidence in *Yogman* that other homes were used as vacation [rentals](#), there was no evidence in *Yogman* of the contracting parties' intent. [Id. at 1022](#). The Oregon court followed the principle of strict construction because the use complained of was not "plainly within the provisions of the covenant." *Id.* (internal quotation marks and citation omitted). In doing so, the court determined that the [short-term](#) vacation [rental](#) of the property was not plainly included within the provisions of the covenant and held in favor of the owners of the vacation property. [Id. at 1023](#).

[\*\*12] We are not persuaded by Mason's reliance on [O'Connor v. Resort Custom Builders, Inc., 459 Mich. 335, 591 N.W. 2d 216 \(Mich. 1999\)](#), in which, concentrating on the concept of "interval ownership," the Michigan

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Supreme Court held that interval ownership did not constitute a residential purpose because it is too temporary and not considered as a residence or permanent home. *Id. at 219-21*. We are also not persuaded by the different circumstances relied on by Mason in *Munson v. Milton, 948 S.W.2d 813 (Tex. App. 1997)*, and *Robins v. Walter, 670 So. 2d 971 (Fla. Dist. Ct. App. 1995)*. In *Munson*, the court determined that [\*\*\*\*8] rentals through a professional rental agent were not a residential use because a "residence generally requires both physical presence and an intention to remain." *948 S.W.2d at 816*. In *Robins*, the court held that a bed and breakfast inn constituted an impermissible commercial enterprise. *670 So. 2d at 974*. In the present case, the property must be used as for "dwelling purposes only." In the context of a residential subdivision, we interpret a dwelling purpose to be use as a house or abode, and once a proper use has been established, we do not attach any requirement of permanency or length of stay.

[\*\*13] Dictionary definitions support the view that the rental here is for dwelling purposes only. [HN4](#) [↑] A "dwelling" is "a shelter (as a house) in which people live." *Merriam-Webster's Collegiate Dictionary* 361 (10th ed. 1996). To "dwell" is "to remain for a time." *Id.* A "house" is "a building that serves as living quarters for one or a few families: home." *Id.* at 562. An "abode" is "a temporary stay; sojourn." *Id.* at 3.

[\*\*14] We think that rental of a house or abode for a short-term use as a shelter to live in is significantly different from using the property to conduct a business or commercial enterprise [\*\*\*\*9] on the premises. *See Munson, 948 S.W.2d at 819* (Duncan, J., dissenting) (stating that "residential purposes . . . does not preclude renting one's home to third parties so long as the third parties use the tract for living purposes" (footnote omitted) (internal quotation marks omitted)); *cf. Hill, 1996*

*NMSC 8, P 11, 121 N.M. 353, 911 P.2d 861* (holding that the operation of group home to be "distinguishable from a use that is commercial--i.e., a boarding house that provides food and lodging only--or is institutional in character"); *Smart v. Carpenter, 2006 NMCA 56, P14, 139 N.M. 524, 134 P.3d 811* (filed 2006) (holding that the owner's use of the premises to repair, park, and store vehicles used in his business constituted a commercial activity).

[\*\*15] If a deed restriction is to preclude a short-term rental to be used for dwelling [\*\*\*1179] [\*202] purposes, the restriction needs to be more specific than the restrictions in the present case. Under our ruling, a deed restriction for dwelling purposes only does not demonstrate an intent to prohibit a short-term rental for dwelling purposes. Nor, in our view, does this commercial or business use restriction preclude the economic aspect of an owner's vacation home which is also partially [\*\*\*\*10] used as a short-term rental for dwelling purposes. We leave for another day and a different factual setting the determination of whether the short-term rental of a residential property falls within the definition of a commercial or business use.

## CONCLUSION

[\*\*16] We hold that, under the particular circumstances in this case, Devaney's short-term rental of his property for dwelling purposes was a permitted use and not for business or commercial purposes. Therefore, the use was not in violation of the deed restrictions. We affirm the district court.

[\*\*17] IT IS SO ORDERED.

JONATHAN B. SUTIN, Judge

Mason Family Trust v. Devaney

**WE CONCUR:**

**ROBERT E. ROBLES, Judge**

**TIMOTHY L. GARCIA, Judge**

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