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===== Start of Answer 2 (1272 words) =====

1. Ben v. Polly

The issue is the likely outcome of Ben's action against Polly seeking declaratory relief.

Easement Formation

An easement is the right to use another's land. Easements are property rights and subject to the Statute of Frauds. The Statute of Frauds requires a writing for agreements dealing with the disposition of land. Easements may be granted expressly or created by implication, necessity, or prescription. Easements always have a servient estate (the estate burdened by the easement) and usually, but not always, have a dominant estate (the estate benefited by the easement).

Here, Al granted Ben an easement expressly when he deeded an easement for a road along the north side of his farm to Ben in 1990. The facts do not describe what was written in the deed, so I will assume the deed was validly granted and satisfied the Statute of Frauds. At the time of the grant, Al held the servient estate and Ben held the dominant estate.

Successors in Interest

In order for an easement to burden a successor in interest, the original party must intend for the easement to burden successors in interest, the successor in interest must have notice of the easement, and there must be privity between the grantor of the easement and the successor in interest. Notice can be given by actual notice, inquiry notice, or constructive notice. Constructive notice is accomplished when a deed is properly recorded. Inquiry notice can occur when the successor of interest inspects a property what she sees gives her notice of the easement. Originally under common law, both horizontal and vertical privity were required. Horizontal privity is privity between the original grantor of the easement and original recipient of easement. Vertical privity is privity between the original grantor or recipient of the easement and the successor in interest. Modernly, only vertical privity between the holders of the servient estate is required.

Here, Ben was granted an express easement for a road along the north side of Al's farm and immediately graded and paved a road on the easement. Both Al and Ben used the road on a daily basis. It seems likely that Al intended for the easement to burden successors in interest because of his daily use of the road and because there are no facts indicating he intended to terminate the easement upon deeding his farm to his daughter Carol. There is vertical privity between Ben and Carol (holders of the servient estate) because Ben deeded the farm to

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Carol. However, there are no facts indicating that Carol had notice of Ben's easement, as discussed below.

Wild Deed

A deed recorded outside of the chain-of-title is a wild deed and does not give constructive notice to a successor in interest.

Here, Carol recorded her deed to the farm in 2009. Ben recorded his deed to the easement in 2011. Because Ben did not record his deed before Carol, his deed falls outside of the chain-of-title. This prevented both Carol and Polly from having constructive notice of Ben's easement because it was recorded after Polly recorded title to the farm. The facts do not demonstrate whether Carol had actual notice or inquiry notice of Ben's easement; however, the facts state that Polly observed Ben traveling on the road along the north side of the farm, but said nothing. Despite the fact that Polly saw Ben on the road (inquiry notice), his easement does not burden Polly unless Carol had notice of the easement (or falls into one of the below exceptions). This is because there cannot be vertical privity between Carol and Polly unless Carol had notice of the easement.

Therefore, Ben's deed is a wild deed and did not give Carol notice of the easement.

Easement by Estoppel

An easement by estoppel can be asserted when a party detrimentally relies on another person's promise of an easement and takes some action pursuant to that promise.

Here, Ben cannot assert an easement by estoppel because he had a valid, express easement that fell outside of the chain of title. Although he spent resources grading and paving the road, he needed to record the easement.

Easement by Necessity

An easement by necessity is granted if a party has strict necessity and has no other option than using the easement without great expense. Strict necessity will be found where, for example, a party must cross another's land to access his own property.

The facts do not indicate whether Ben has strict necessity. If Ben cannot access his property other than using the road on Polly's property, he can claim strict necessity and will be able to assert easement by necessity.

Easement by Implication

An easement by implication is an implied easement.

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There are no facts indicating that Ben held an easement by implication, because he had an express grant.

Easement by Prescription

An easement is created when the easement holder's use of the easement is open and notorious, continuous, hostile and adverse, and for the statutory period.

Here, Ben cannot claim an easement by prescription because his use was not hostile and adverse. Al expressly granted Ben an easement and Ben had permission to create and use the road.

Conclusion

Therefore, it seems likely that Ben will not be able to assert a valid easement against Polly because Carol did not have notice of Ben's easement, unless he is able to claim an easement by necessity.

2. Polly v. Carol

A. Breach of Contract Claim

A written contract for the sale of land merges into the deed upon execution and delivery of the warranty deed. A buyer must then sue on the deed instead of the written contract.

Here, Carol signed a written contract to sell the farm to Polly for \$100,000 in 2012 and included the language "Seller shall covenant against encumbrances with no exceptions." This contract merged into the warranty deed signed and delivered in 2014. Because the contract terms merged into the warranty deed, Polly will not be able to sue Carol for breach of the written contract.

Thus, Polly will not succeed on a claim of breach of contract against Carol.

B. Breach of Warranty Deed Covenant Claim

A general warranty deed contains three present covenants and three future covenants. The present covenants can only be breached as of the time of closing and include the covenant of seisin (seller possesses the property and has the right to sell it), the covenant against encumbrances, and the covenant of the right to convey (seller has proper title to the property being sold). The future covenants include, among one other, the covenant of further assurances and the covenant of quiet enjoyment. A special warranty deed has fewer covenants and a quit-claim deed sells a property "as-is" without any express covenants.

Here, the facts indicate that Carol's deed to Polly contained a covenant against all encumbrances except for Water Co.'s easement and had no other title

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covenants. This is a special warranty deed. Polly will not have claims against Carol for the Water Co. easement because it was excepted in the warranty deed and she accepted the deed. She will also not have any claims against Ben's easement unless the court finds that it is a valid easement.

Note: If there was privity, intent, and notice for the easement to burden Carol and the easement therefore properly burdened Carol, then Polly would have had inquiry notice of Ben's easement because she saw him using the road and would be also burdened. Accordingly, she would then be able to assert a breach of warranty claim against Carol who did not except Ben's easement in the warranty deed.

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