

BOUNDARIES AND EASEMENTS

IDENTIFYING, LOCATING, AND CLASSIFYING EASEMENTS

Aaron M. Barton
Branscomb | PLLC
abarton@branscombpc.com
(210) 598-5400

I. What Is, and Is Not an Easement: Bonus – Texas Law on Easements

- *This Is an Easement*
 - A liberty, privilege, or advantage without profit granted to a person, either personally or by virtue of the person's ownership of a specified parcel of land, to use another parcel of land for a limited purpose. *See, e.g., Kothman v. Rothwell*, 280 S.W.3d 877 (Tex. App.—Amarillo 2009, no pet.). In layman's terms, the right to use one piece of land for a particular, defined purpose, usually providing some type of benefit to the holder of the easement based upon the purpose of the easement.
 - Can be a permanent right to use the land or a temporary right to use the land dependent on the intent of the parties and the grant creating the easement.
 - Express Easement - *an interest in land* to which the statute of frauds and the statute of conveyances apply, meaning the grant of an express easement should be drawn and executed with the same formalities as a deed to real estate. *See Hubert v. Davis*, 170 S.W.3d 706 (Tex. App.—Tyler 2005, no pet.). Once drafted, it should be recorded to provide notice to third parties of the existence of the easement, especially if the easement is not "visible and apparent." This refers to constructive notice versus actual notice of the easement burdening a particular tract of land. Because it is an interest in land, it "runs with land" unless terminated and is binding on purchasers of the land with notice of the easement(s).

- Implied Easement - *may* arise if a landowner uses one portion of their land for the benefit of another portion and then sells one of the two portions. The general rule on implied easements is that when a landowner conveys part of his or her property, the landowner impliedly conveys all *apparent or visible* easements on the part of the retained property *that the landowner used* for the benefit of, and that are reasonably necessary for the use of, the conveyed property. *See, e.g., Scown v. Neie*, 225 S.W.3d 303 (Tex. App.—El Paso 2006, pet. denied).
- *Generally* creates two estates: a dominant estate (benefitted tract of land) and a servient estate (burdened tract of land) – but exceptions apply.
- Can be *negative* (creates a restriction as to how the servient estate may be used and such restriction benefits the dominant estate) or *affirmative* (the owner of the dominant estate has the right to use the servient estate or to do some act on that property that would otherwise be illegal).
- At common law, easements are limited to six purposes: air, light, right of way, support, water, and fences. *See Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196 (Tex. 1962). However, when created in writing, other uses are permissible. *See id.*
- Statutory easements have been created by the Texas Legislature as well. They are the following: public beach easements (granting the public the right to use state-owned beaches and privately owned beach property along the Gulf of Mexico), statutory conservation easements (imposes negative burdens on land to protect natural resources, enhance and maintain air and water quality, and preserve archeological aspects of real property, amongst other protections), and agricultural conservation easements (designed to conserve water quality and quantity, conserve native wildlife and plant species by protecting habitat, conserving large tracts for open-space land that is threatened with fragmentation and development, amongst other protections). *See* Tex. Nat. Res. Code Ann. § 61.001 et seq. (Texas Open Beaches Act); Tex. Nat. Res. Code Ann. §

183.001 et seq. (Texas Uniform Conservation Easement Act); Tex. Parks & Wild. Code Ann. § 84.001 et seq. (Texas Farm and Ranch Lands Conservation Program).

- Other purposes for easements include easements for utilities (electrical, telephone, etc.), pipelines (both oil and gas and water), railroads, temporary construction of improvements, and common areas (condo and homeowner's associations), amongst other permissible uses. Reminder that these uses require a writing, and will not be inferred by common law. *See Drye*, 364 S.W.2d at 196.
- *This Is Not an Easement*
 - A conveyance of *title* to a particular piece of property. *See Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653 (Tex. 2007). A grant of an easement does not grant ownership or possession of a tract of real property (or portion thereof) to the holder of the easement. It is a nonpossessory interest in the land for a limited use that can only be revoked or terminated by its own terms or by operation of law. You might own an easement on land, but you do not own that land or the portion of the land burdened by the easement. *See id.*
 - A grant of a right to participate in the profits from the servient estate a/k/a a *profit a prendre*. *Hubert*, 170 S.W.3d at 706. The holder of an easement over a tract of land in which royalties from oil and gas are paid, or timber is removed, or crops are farmed, etc., has no claim to the profits derived from the removal of the items and has no right to remove such items from the real property.
 - A license. *See Samuelson v. Alvarado*, 847 S.W.2d 319 (Tex. App.—El Paso 1993, no writ). A license is a personal privilege or authority given or retained to do some act on land that the holder does not own and does not lease for the purpose. Unlike an easement, a license is not an estate or interest in land. *See id.* A license is simply permission to do something on someone else's land, and is usually revocable at any time and does not run with the land. *See id.*

- A lease. A lease is an agreement by which a property owner transfers the *possessory interest* in land to another. The crux of the agreement is the creation of a leasehold estate, with the possessory interest held by the lessee as a property right. The lessor, in turn, gives up the right to possess, use, and occupy the property made the subject of the lease. *See, e.g., Vallejo v. Pioneer Oil Co.*, 744 S.W.2d 12 (Tex. 1988). The key distinguishing factor distinguishing a lease and an easement is the possessory right granted by the lease.
- A trespass. A trespass occurs when there is 1) entry; 2) onto property of another; 3) without the owner's consent or authorization. *See, e.g., Barnes v. Mathis*, 353 S.W.3d 760 (Tex. 2011). The distinguishing factor between a trespass and an easement is the lack of consent or authorization from the owner to the entry upon the owner's property. *See id.*

II. Distinctions between Types of Easements

- Easement In Gross
 - An easement that benefits the holder *without regard to whether the holder owns an adjoining or nearby parcel* is called an easement in gross because it does not belong to any particular parcel of land. *See Drye*, 364 S.W.2d at 196. In other words, the holder of the easement obtains the right to use another's land even if not specifically to benefit *land* that the holder owns. Or, if it does benefit the holder's land, it could be land owned by the holder many miles away. But, the main point is that the benefit is to *the holder*, rather than a specific tract of land.
 - The land burdened by the easement is called the servient tenement (or servient estate), but there is no dominant tenement. *See id.* This is one of the exceptions to an easement creating two estates.
 - Most notable examples: railroad, pipeline, and utility easements.
 - Courts do not favor finding easements in gross if there is any ambiguity as to the type of easement being created, i.e. in gross

versus appurtenant, because traditionally easements are meant to benefit adjoining properties and govern the use of the adjoining properties by the landowners rather than focus on *who* owns the easement. *See Ginther v. Bammel*, 336 S.W.2d 759 (Tex. Civ. App.—Waco 1960, no writ).

- Generally, an easement in gross is *not assignable*, unless there is an express assignment provision in the writing creating the easement. *See, e.g., Southtex 66 Pipeline Co., Ltd. v. Spoor*, 238 S.W.3d 538 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). Exception: statutory conservation easements are assignable easements in gross.
- Easement Appurtenant
 - An easement in which the benefits are for *a specific parcel*, irrespective of the identity of the owner, is an easement appurtenant. *Machala v. Weems*, 56 S.W.3d 748 (Tex. App.—Texarkana 2001, no pet.). The parcel owned by the grantor of the easement is the servient estate, and the parcel benefitted by the easement is the dominant estate. *See id.* The easement “belongs” to the dominant estate, and by extension, the owner of the land that constitutes the dominant estate. *See id.*
 - A grantee of an easement appurtenant *may not use the easement to benefit property other than the dominant estate*. *Bickler v. Bickler*, 403 S.W.2d 354 (Tex. 1966). In other words, a right-of-way easement across one tract of land (the servient estate) to another tract of land (the dominant estate) cannot be diverted or expanded to access a separate tract of land owned by the person who is granted an easement.
 - An easement appurtenant cannot be separated from the owner’s rights in the property; it passes with the property and must be reserved in any conveyance of the property if the owner wishes to reserve the easement from the conveyance of the property. *Holmstrom v. Lee*, 26 S.W.3d 526 (Tex. App.—Austin 2000, no pet.).

- Prescriptive Easement
 - An easement may be acquired by prescription if, during the whole of a 10-year period, the use of the easement is 1) open and notorious, 2) adverse, 3) under hostile claim of right, 4) exclusive, and 5) uninterrupted and continuous for the 10-year period. *See, e.g., Allen v. Allen*, 280 S.W.3d 366 (Tex. App.—Amarillo 2008, pet. denied).
 - The difference between a prescriptive easement and an easement in gross or easement appurtenant is that it is not an easement that is agreed to by the parties, but one that arises by operation of law. Indeed, *the lack of an agreement to the use of the easement* is what makes the prescriptive easement.

III. Creating Easements

- Express Creation
 - Must be in writing and signed by the grantor or an agent of the grantor who has been authorized in writing, such as by a power of attorney or some other instrument. Tex. Prop. Code Ann. § 5.021. The instrument creating the easement must contain the names of the grantor and grantee and a description of the servient estate sufficient for identification. *See id.; Hubert*, 170 S.W.3d at 710.
 - Must contain words of conveyance and must be delivered to and accepted by the grantee of the easement. Tex. Prop. Code Ann. § 5.021.
 - Should be recorded to provide notice to the world that the easement exists and burdens the servient estate.
- By Implication
 - An implied easement (also called an implied easement appurtenant) may arise if a landowner uses one portion of land for the benefit of another portion and then sells one of the two portions.

- The general rule on implied easements is that when a landowner conveys part of his or her property, the landowner impliedly conveys all apparent or visible easements on the part of the retained property that the landowner used for the benefit of, and that are reasonably necessary for the use of, the conveyed property. *See Scown*, 225 S.W.3d at 307.
- Elements: 1) Unity of ownership at the time of severance of the tracts; 2) Apparent use of the easement before severance of the tracts; 3) Continuous use of the easement prior to severance so as to indicate owner's intent that the easement would continue after the grant; and 4) Necessity of the easement to the use and enjoyment of the dominant estate. *See id.* at 308.
- Will require a trip to the courthouse and a judgment from a court because each of the elements above have to be proved by the party claiming the easement, and they must be shown to have been met at the time of the severance of the estates.
- By Reference to a Map
 - An implied easement may be created in the streets delineated on a subdivision map or plat when there is a sale of the lots by reference to the map. Conveyance of land by reference to a map that shows abutting roads or streets conveys to the purchaser a private implied easement in the roads or streets shown on the plat. *See Chappell Hill Bank v. Smith*, 257 S.W.3d 320 (Tex. App.—Houston [14th Dist.] 2008, no pet.).
 - One who acquires the easement has a right to insist that the roads or streets shown on the plat be kept open and to make reasonable use of them even if the plat has not been recorded and the roads or streets have not been dedicated to public use. *See Horne v. Ross*, 777 S.W.2d 755 (Tex. App.—San Antonio 1989, no writ).
- By Necessity

- An easement by necessity may be recognized when a grantor conveys part of a parcel of land while retaining the remaining acreage, *if there is no other access to the land*. The easement of necessity arises between the grantor and the grantee through either an implied grant or an implied reservation. *Sorrell v. Gengo*, 49 S.W.3d 627 (Tex. App.—Beaumont 2001), no pet.).
- An easement by necessity arises from a presumption that when a grantor conveys property that is *completely surrounded by other property belonging either to the grantor or to the grantor and other persons*, the grantor intended to grant a roadway to the grantee to enable the grantee to have full enjoyment of the conveyed property, and the failure to grant a roadway was *an oversight*, which will be implied in the grant. *See Machala*, 56 S.W.3d at 755.
- Elements: 1) Unity of ownership of the estates as a single tract; 2) the roadway is a necessity, not just a convenience; and 3) the necessity existed at the time of the severance of the two estates.
- Easements by necessity are exceptions to the rule that easements must be created in writing. *Drye*, 364 S.W.2d at 203. The right to select the easement location belongs originally to the owner of the servient estate. If the servient owner fails to select the location at the time the dominant estate is created, the dominant estate owner may locate the easement of necessity with due regard for the convenience of the parties. Once established, the location cannot be changed without the consent of both parties.
- If the easement location is disputed, be prepared to go to court because the location might have to be established by testimony and proven by the party seeking to establish the easement.
- When the necessity ceases to exist, generally so will the easement. An easement by necessity is temporary because its existence is dependent on the necessity that created it. *See State v. Beeson*, 232 S.W.3d 265 (Tex. App.—Eastland 2007, pet. abated).
- By Prescription

- An easement may be acquired by prescription if, during the whole of a 10-year period, the use of the easement is 1) open and notorious, 2) adverse, 3) under hostile claim of right, 4) exclusive, and 5) uninterrupted and continuous for the 10-year period. *See, e.g., Allen v. Allen*, 280 S.W.3d 366 (Tex. App.—Amarillo 2008, pet. denied).
- This is essentially the creation of an easement by adverse possession, where someone is using the easement in such a way as to notify the true owner that the claimant is asserting a hostile claim to the easement through their use of the easement. *Machala*, 56 S.W.3d at 758-60. Attempting to exclude the owner of the property from using the easement would be an example of a hostile claim of an exclusive right to use the easement sufficient to establish an easement by use, or prescription.
- The public can also acquire easements by prescription if the five elements are met, such as a public beach easement where the public has used land to access public beaches or turning a private road into a public road by use. The governmental authority, e.g. county can file suit to establish the easement in favor of the public.
- By Estoppel
 - An easement may be created by estoppel if a landowner makes representations concerning easement rights to the land at issue and another person acts on those representations to his or her detriment. *See Drye*, 364 S.W.2d at 209-10. This is basically the creation of an easement to prevent a fraud against an innocent party who relied on representations concerning easement rights that induced them to enter into an agreement they otherwise would not have but for the representations and belief they would be entitled to an easement right of some kind.
 - Fact specific to each case because the representations made are the key factors the courts must consider to determine whether to establish and/or create an equitable easement.

- Elements: 1) A representation communicated, either by word or action, to the promisee; 2) The communication was believed; and 3) The promisee relied on the communication. *See Allen*, 280 S.W.3d at 381.
- This is also a “judge-created” easement.
- By Dedication
 - An easement can be created by express or implied dedication to the public. Implied easements by dedication to the public are disfavored because it amounts to an appropriation of private land for public use.
 - Elements of Express Dedication: 1) The person who makes the dedication must have the ability to do so, that is, must have fee simple title to the dedicated property; 2) The dedication must serve a public purpose; 3) The owner must make either an express or an implied offer; and 4) The offer must be accepted. *Wilderness Cove, Ltd. v. Cold Spring Granite Co.*, 62 S.W.3d 844, 850 (Tex. App.—Austin 2001, no pet.).
 - Elements of Implied Dedication: Same four elements required for an Express Dedication, plus; 5) The owner’s acts must induce the belief that the owner intended to dedicate the easement; and 6) The public must have relied on the landowner’s acts. *Machala*, 56 S.W.3d at 757.

IV. Maintaining Easements

- An *easement owner* may generally repair, maintain, and improve the easement to an extent reasonably calculated to promote the purposes for which it was created. This right of maintenance and repair flows from the general principle that every easement carries with it the right to do whatever is *reasonably necessary* for full enjoyment of the rights inherent in the easement. *See, e.g., Lamar County Elec. Co-op v. Bryant*, 770 S.W.2d 921, (Tex. App.—Texarkana 1989, no writ). Note the “reasonableness” requirement. Maintenance and repair of the easement must be reasonable in relation to the use permitted by the easement.

- Minus a written agreement to the contrary, *the holder* of the easement is the party tasked with maintaining and repairing the easement. There is no obligation on the servient estate owner to maintain or repair an easement unless they agree to do so.
- If negotiating an easement agreement, maintenance and repair of the easement are key areas of concern that the parties should consider. Generally, there is little incentive for the servient estate to maintain and repair the easement, other than for appearances of the property. But, if the servient estate derives a benefit of some kind from the existence of the easement, there might be reason to share in the maintenance and repair costs.

V. Terminating Easements

- Abandonment
 - An easement may be terminated by abandonment. *Chappell Hill Bank*, 257 S.W.3d at 329-31.
 - The essential element of abandonment is the *intent to abandon* the use of the easement, and requires a *definite act* demonstrating the intent to abandon the easement. Nonuse of the easement and/or the passage of time is not enough minus a showing of intent to abandon. *See id.*
- Cessation of Purpose: An easement that has been granted for a particular purpose terminates as soon as that purpose 1) ceases to exist, 2) is abandoned, or 3) is rendered impossible to accomplish. *See Adams v. Rowles*, 228 S.W.2d 849 (Tex. 1950).
- Cessation of Necessity: Applies only to easements created by necessity. If created by grant, the necessity of the easement is irrelevant. *See Pena v. Salinas*, 734 S.W.2d 400 (Tex. App.—San Antonio 1987, writ ref. n.r.e.).
- Adverse Possession: Private easements can be extinguished by adverse possession, that is, possession that is 1) adverse, 2) open and notorious, 3) peaceable, 4) hostile to the rights of other claimants, and 5) continuous for

a period of 10 years. *See Robinson Water Co. v. Seay*, 545 S.W.2d 253, 259–260 (Tex. Civ. App.—Waco 1976, no writ).

- **Merger:** If the owner of a dominant estate acquires title to the servient estate, the two estates merge, and the easement is extinguished by operation of law. *Cecola v. Ruley*, 12 S.W.3d 848 (Tex. App.—Texarkana 2000, no pet.).
- **Condition Subsequent:** If an easement is created subject to a condition subsequent, the occurrence of that condition renders the easement terminable. However, *termination of the easement is not automatic*. The grantor must reenter the land or take some affirmative action to terminate the easement. This is true even if the instrument creating the easement contains a clause stating that the grantee’s right will automatically revert to the grantor if the condition subsequent is breached. *Saunders v. Alamo Soil Conservation Dist.*, 545 S.W.2d 249 (Tex. Civ. App.—San Antonio 1976, writ ref. n.r.e.).
- **By Its Own Terms:** Express easements and/or temporary easements might contain a timeframe, e.g. three years, within the grant. Once the passage of the time stated passes, the easement will terminate. This is not common without some other requirement stated in the grant, such as “non-use for a period of one year,” which is similar to and likely falls within the condition subsequent termination.

VI. Obstruction of Easements and Remedies to Address Obstruction(s)

- **Obstruction or interference with easement rights is a common occurrence.** Typically, you might see someone fencing off an access point, or attempting to prevent the use of an easement by some other means, threats, etc. What is the holder of an easement to do in such a situation?
- **Injunction**
 - The owner of an easement has the right to an injunction to prevent interference with or obstruction of the easement. *See, e.g., City of Mission v. Popplewell*, 294 S.W.2d 712 (Tex. 1956).

- Equitable remedy that commands the interfering party to cease the interference and allow the holder of the easement to exercise the rights granted in relation to the easement. It might also be an affirmative injunction that requires action on the part of the obstructing party to remove obstructions, repair the easement, clear the easement, etc.
 - This is usually the most commonly sought remedy, because the holder of the easement wants to just be able to exercise their rights in relation to the easement. The grant of the easement and the use allowed is the real value to the holder.
- Damages
 - An action for damages may be maintained if the obstructing party has interfered with the easement, causing actual damages to the easement owner. *See Hall v. Robbins*, 790 S.W.2d 417 (Tex. App.—Houston [14th Dist.] 1990, no writ).
 - Punitive damages may be awarded if the act causing the damage was done *intentionally in violation of the rights of the plaintiff*. *See Gerstner v. Wilhelm*, 584 S.W.2d 955 (Tex. Civ. App.—Austin 1979, writ dism'd). Punitive damages are awarded to “teach a lesson” and dissuade future obstruction if/when it appears evident to the court that damages alone would not be sufficient to prevent similar conduct in the future.
 - Damages are not sought as often as a remedy for the reason that calculating damages to the easement might be difficult or minimal, and again, the real value is in the right to use the easement.