

## EASEMENTS AND ENFORCEMENT

In California, land may be originally owned by one owner who decides to sell a portion of the land to another person, and records an easement for ingress and egress to the retained parcel that crosses the property that is sold. Later, the owner of the land on which the easement is located may decide to bar the other owner from using the easement, or place obstructions on the easement. Depending on the circumstances, the owner of the easement may file a legal action including causes of action for nuisance and injunctive relief, and obtain a judgment for a permanent injunction against interference with the easement, compensatory damages, and even punitive damages if malice is proved by clear and convincing evidence.

An easement is an incorporeal interest in the land of another that gives its owner the right to use another's property. The land to which the easement attaches is called the dominant tenement; the land to which the burden or servitude is imposed is called the servient tenement. (Civil Code § 803)

Easements are classified as appurtenant or in gross (also known as "incidents"). (Civil Code § 801) The basic effect of the distinction arises when the owner of an easement conveys his property. The conveyance of the dominant tenement transfers all appurtenant easements to the grantee, even though the easements are not specifically mentioned in the deed. (Civil Code §§ 1084, 1104 (transfer "passes all easements attached thereto"))

An easement in gross, unlike an appurtenant easement, is merely a personal right to use the land of another. It does not pass with the dominant tenement when it is sold.

Generally, the determination of whether an easement is appurtenant or in gross is made by reference to the instrument creating it. However, often the instrument itself may be deficient because it fails to specify whether the easement is in gross or appurtenant, and it may fail to identify a dominant tenement.

Moreover, the character of the easement as appurtenant or in gross are not necessarily determined by the nature of the rights granted because easements for right of way ("ingress and egress") may be either appurtenant or in gross.

When a court is called upon to determine whether an easement is appurtenant or in gross, it applies the general rules relating to the interpretation of deeds. In most cases, "Grants are to be interpreted in like manner with contracts in general." (Civil Code § 1066.)

In interpreting incomplete or ambiguous deeds, courts may consider extrinsic evidence of the circumstances under which the deed was made. When the deed does not expressly declare an easement to be appurtenant, or when the language of the deed is ambiguous, and it does not clearly appear whether an easement was intended to be in gross or appurtenant to land, evidence is admissible to determine the nature of the easement and to establish a dominant tenement.

In considering extrinsic evidence of the nature of an easement, courts may consider the type of rights conveyed and the relationship between the easement and other real property owned by the recipient of the easement. Where a roadway easement provides access to a particular parcel of real property, a court may infer the easement is appurtenant to that parcel.

Courts also employ two rules in reviewing easement claims. The first rule, of statutory origin, is that “a reservation in any grant, . . . is to be interpreted in favor of the grantor.” (Civil Code § 1069.) The second rule, of judicial origin, is that an easement will not be interpreted as being in gross if it may fairly be interpreted as being appurtenant.

When the language of a deed is ambiguous, and it does not clearly appear whether the easement was intended to be in gross or appurtenant to land, it is never construed as personal when it may fairly be construed as appurtenant. If it does not clearly appear from the deed that the parties intended the easement to be of a particular character, the trial court could properly find the easement to be appurtenant. Such a finding is supported by section 1069's directive that reservations in grants are to be construed in favor of the grantor.

If the easement is appurtenant to the dominant parcel, successors in interest are entitled to enforce the easement. Conveyance of the dominant tenement transfers all appurtenant easements to the grantee, even though the easements are not specifically mentioned in the deeds. Thus, omission of any mention of the easement in the deed to a successor in interest to the dominant parcel is inconsequential.

There is no authority holding that a recorded easement for ingress and egress must actually touch the parcel to which it is appurtenant. An easement for ingress and egress reserved in a deed may be appurtenant to a parcel it does not touch.

Each successive owner of the dominant tenement is entitled to enforce the easement.

When a person interferes with the use of an easement he deprives the easement's owner of a valuable property right and the owner is entitled to compensatory damages. The interference is a private nuisance and the party whose rights have been impeded can recover damages as measured in the case of a private nuisance. The interference can also be enjoined by the owner of the easement as a harassment.

The damages are measured in the same manner as those for a nuisance, and can include diminution of the property's value, and for annoyance and discomfort flowing from loss of use. The damages may be unliquidated and not readily subject to precise calculation, and the amount thereof is necessarily left to the subjective discretion of the trier of fact. If the plaintiff is wrongfully deprived of use of the easement for a period of time, the award may include damages calculated by a specified dollar amount per day. If malice is shown by clear and convincing evidence, exemplary (punitive) damages can be recovered.

Code of Civil Procedure § 731 provides that an action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a

nuisance, as defined in Civil Code § 3479, and the nuisance may be enjoined or abated as well as damages recovered therefor. Section 3479 defines nuisance as anything that is injurious to health, including, but not limited to, an "obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property". An encroachment is the nuisance if it is an obstruction to the free use of the easement by the owner of the dominant tenement.

The action may also include a cause of action for harassment. Harassment is defined as a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person and that serves no legitimate purpose. The course of conduct must be that which would cause a reasonable person to suffer substantial emotional distress, and the defendant must actually cause substantial emotional distress to the plaintiff. (Code of Civil Procedure § 527.6(b)(3).) The prevailing party may be awarded attorney's fees, so this cause of action should be carefully considered because it may result in an award of attorney's fees against an unsuccessful claimant.

Code of Civil Procedure § 526 provides that an injunction may be granted to remove the encroachment when it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually, when pecuniary compensation would not afford adequate relief, or where it would be extremely difficult to ascertain the amount of compensation that would afford adequate relief. Injunction is a remedy for the tort of nuisance. An action to abate a nuisance is an action in equity that is tried by the judge, not a jury.

A preliminary injunction may be granted at any time before a judgment with a verified complaint that shows satisfactorily that sufficient grounds exist therefor. (Code of Civil Procedure § 526)

It is proper to record a notice of pendency of action, commonly called a lis pendens, on a servient tenement in an action concerning an easement. A lis pendens is a recorded document giving constructive notice that an action has been filed affecting title or right to possession of the real property described in the notice. Claimant means a party to an action who asserts a real property claim and records the notice of the pendency of the action. A real property claim means the cause or causes of action in a pleading which would, if meritorious, affect (a) title to, or the right to possession of, specific real property or (b) the use of an easement identified in the pleading, other than an easement obtained pursuant to statute by any regulated public utility. A lis pendens may be recorded in an action to establish an easement, to enforce the claimant's rights under an easement, or that affects the use of an easement.

#### LESSONS:

1. Determine if the easement is appurtenant or in gross, and if appurtenant, it passes with the transfer of ownership of the dominant and servient tenements, even if it is not mentioned in the deeds.

2. Easements appurtenant to the servient tenement should appear in the preliminary title report for the sale of the servient tenement, and the report should always be carefully read to obtain a complete understanding of the issues with the title, including easements.

3. Interference with an easement is a nuisance, and it can be permanently enjoined, and result in a judgment for compensatory damages and punitive damages.