

Identifying, Classifying, and Locating Private Easements

What IS an Easement?

An easement is “a right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with the general property in the owner.”¹ It is an interest in land owned and possessed by another, permitting its limited use or enjoyment without actual occupancy. The use involved is almost invariably an incidental or indirect utilization of the land, such as installation of power lines or pipes as conduits of gas, water, or electricity, or ingress and egress to and from other land for pedestrians or vehicles, rather than productive uses of the land such as cultivation, mining, manufacturing, commerce, or residence.²

An easement is a right of use and not an interest in land.³ Ownership of soil and the right to an easement are independent; the grantee of an easement is not the owner or

¹ *Hollomon v. Board of Ed. of Stewart County*, 168 Ga. 359 (1929). “An easement has been defined to be ‘a privilege without profit which the owner of one neighboring tenement has of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer or not to do something on his own land for the advantage of the dominant owner.’ ”

Continuance of a nuisance. The court held it was fraud for the former and present petroleum pipeline easement holders not to remove the contamination which had leaked into the owner's property more than three decades earlier and continued to spread into the soil and groundwater. O.C.G.A. § 41-1-5; *Hoffman v. Atlanta Gas Light Co.*, 206 Ga. App. 727 (1992).

Easement is interest in land. An easement constitutes a property interest in the land subject to the easement. *Stephens County Soil & Water Conservation Dist. v. Wright Bros. Const. Co., Inc.*, 215 Ga. App. 352 (1994).

¹ Ga. Real Estate Law & Procedure § 8:1 (7th ed.)

² 1 Ga. Real Estate Law & Procedure § 8:1 (7th ed.)

³ *Brown v. Tomlinson*, 246 Ga. 513 (1980).

occupant of the estate over which the right extends, but rather the right to the fee and the right to an easement in the same realty are independent of each other, and may well coexist even when vested in different persons.⁴ Thus, the grant of an easement in a stairway from the first to third floors of a building did not divest the building owner of its fee interest in the building.⁵

How is an Easement Different Than Simply “Owning Property”?

An easement is a non-possessory interest. Rights which are more than a mere easement and include the rents and profits of the land, are known as “profits a prendre,” the most common example being hunting and fishing privileges. Where the so-called “easement” is not connected with occupancy of another tract of land, it would seem not to be a true easement at all, but may fall into the category of an easement in gross or may be a mere license. An easement is classified as an incorporeal interest because it carries with it no appreciable degree of dominion over the land itself.

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⁴ *Southern Ry. Co. v. Wages*, 203 Ga. 502 (1948); *Stewart Cty. v. Holloway*, 69 Ga. App. 344 (1943).

⁵ *Folk v. Meyerhardt Lodge No. 314 F. & A.M.*, 218 Ga. 248 (1962).

⁶ *Meinhardt v. Christianson*, 289 Ga. App. 238 (2008); 2 Ga. Jur. Property § 21:1

Easements v. Restrictive Covenants

“Restrictive covenant” relates to burden or servitude upon land, while “easement” relates more to benefit conferred upon dominant tenement. “Restrictive covenant” may or may not run with the land and generally sets limits upon use of subject property.⁷

Servient Tenements v. Dominant Tenements

An easement generally involves two different pieces of land: one that serves and one that benefits. The land used by or “serving” the grantee of the easement is known as the servient tenement; the land served by or benefiting from the easement is known as the dominant tenement.⁸

Easements In Gross v. Easements Appurtenant

An easement in gross is a personal right in the land of another, while an easement appurtenant is an incorporeal right which is attached to and belongs to some greater or superior right.⁹ In determining whether a right granted is appurtenant or in gross, courts must consider the terms of the grant, the nature of the right, and the surrounding circumstances, giving effect as far as possible to the legally ascertained intention of the parties, but favoring always the construction of the grant as of an easement appurtenant rather than of a right in gross.

⁷ *Brown v. Dep't. of Transp.*, 195 Ga.App. 262 (1990)

⁸ Black's Law Dictionary

⁹ *Stovall v. Coggins Granite Co.*, 116 Ga. 376 (1902); 5 Rest. of Law, § 694.

An appurtenant easement cannot exist as such without a dominant tenement,¹⁰ and follows changes of ownership in the latter like a fixture or accessory. The creation of an easement appurtenant requires that the grantee of the easement own the dominant estate, the land benefitted by the easement. This principle is known as “unity of title.” Without unity of title, no easement appurtenant can be created.¹¹

A right to pass over land which is not given for the purpose of ingress or egress to and from other land is known as an easement in gross. Common examples of such an easement, in which there is no dominant tenement, are roadways, railroad rights-of-way, and utility lines. Advertising rights may constitute an easement in gross, but more commonly take the form of leasing or space rental.

Continuing Easements

A continuing easement is one that is self-perpetuating, independent of human intervention, such as the flow of a stream.¹²

Easements Running with the Land

Former tenant had an easement running with the land allowing it to maintain pylon sign on landlord's property, where landlord's predecessor granted tenant a license

¹⁰ *Olsen v. Noble*, 209 Ga. 899, 905 (1953); *G.W. Featherston Min. Co. v. Young*, 118 Ga. 564 (1903).

¹¹ *Yaali, Ltd. v. Barnes & Noble, Inc.*, 269 Ga. 695 (1998)

¹² 2 Ga. Jur. Property § 21:1; *Brown v. Tomlinson*, 246 Ga. 513 (1980).

to maintain the sign, tenant expended approximately \$34,000 to purchase the sign, and sign was in continuous use until landlord tore it down.¹³

Origination of Easements

Easements may originate in one of several modes, such as express grant, prescription, implication, and condemnation. Thus, where a deed, after describing a tract of land, further conveys a right of ingress and egress over adjoining lands of the grantor, it creates an express easement. If the deed describes land as bounded by an alley, an easement in the alley is created by implication although not expressly set forth. If a landowner repeatedly crosses adjoining land going to and from his property over a required period of years, he may acquire a prescriptive easement over the adjoining land. If some public authority or utility company needs to run a road, transmission line, or pipe over private property, it may acquire an easement by condemnation proceedings which involve compensation for the rights taken.¹⁴

Prescriptive Easements

Prescriptive easements – as opposed to express or written easements – may be acquired by use for a period of either seven years or twenty years, depending on the type of use.¹⁵ A private way, such as a path, driveway, etc. is acquired by seven years' use: “Whenever a private way has been in constant and uninterrupted use for seven or more

¹³ O.C.G.A. § 44-9-4; *Aquanaut Diving and Eng'g, Inc. v. Guitar Ctr. Stores, Inc.*, 324 Ga. App. 570 (2013).

¹⁴ 1 Ga. Real Estate Law & Procedure § 8:8 (7th ed.)

¹⁵ 1 Ga. Real Estate Law & Procedure § 8:10 (7th ed.)

years and no legal steps have been taken to abolish it, it shall not be lawful for anyone to interfere with that private way.”¹⁶

Prescriptive easements that are not private ways, such as party walls, a flowage easements, a utility lines, or public roads, must be used for twenty years before they are “acquired”: “Possession of real property in conformance with the requirements of Code Section 44-5-161 for a period of 20 years shall confer good title by prescription to the property against everyone except the state and those persons laboring under the disabilities stated in Code Section 44-5-170.”¹⁷

One cannot acquire prescriptive easements against the following:

- state or political subdivisions¹⁸
- minors during their minority¹⁹
- prisoners during their confinement²⁰
- mentally ill or intellectually disabled persons during the periods of their illness or disability²¹
- unrepresented estates during their first five years²²
- remaindermen during the life estate²³
- as a grantor against his grantee.²⁴

¹⁶ O.C.G.A. § 44-9-54.

¹⁷ O.C.G.A. § 44-5-163.

¹⁸ *Glaze v. Western and Atlantic R. Co.*, 67 Ga. 761 (1881).

¹⁹ O.C.G.A. § 44-5-170.

²⁰ O.C.G.A. § 44-5-170.

²¹ O.C.G.A. § 44-5-170.

²² O.C.G.A. § 44-6-173

²³ *Satterfield v. Tate*, 132 Ga. 256, 265 (1909); 1 Ga. Real Estate Law & Procedure § 8:13 (7th ed.)

²⁴ *Sweat v. Arline*, 186 Ga. 460 (1938).

Termination of Easements

“An easement may be lost by abandonment or forfeited by nonuse if the abandonment or nonuse continues for a term sufficient to raise the presumption of release or abandonment.”²⁵ Where an easement of way has been acquired by grant, it may be extinguished by evidence of nonuse, coupled with clear, unequivocal, and decisive evidence of the intent to abandon the easement.²⁶

Obstructions of Easements

Probate Court Remedy

“In the event the owner or owners of land over which a private way may pass or any other person obstructs, closes up, or otherwise renders the private way unfit for use, the party or parties injured by the obstructions or other interference may petition the judge of the probate court in the county where the private way has been in use to remove the obstructions; and, upon the petition being filed, the judge shall issue a rule nisi directed to the party or parties complained against calling upon the offending parties to show cause why the obstructions should not be removed and the free use of said private way reestablished. The rule shall be served by the sheriff or his deputy at least three days before the day set for the hearing; and when the day arrives the judge shall proceed to hear evidence as to the obstructions or other interference. If it appears that the private way has been in continuous, uninterrupted use for seven years or more and no steps were taken to prevent the enjoyment of the same, the judge shall grant an order directing the

²⁵ O.C.G.A. § 44-9-6.

²⁶ See, *Hardigree v. Hardigree*, 244 Ga. 830(2) (1979); see also, *Tietjen v. Meldrim*, 169 Ga. 678 (1930) (abandonment may be shown by the dominant estate owner’s unequivocal acts which must be inconsistent with the continued existence of the easement).

party or parties so obstructing or otherwise interfering with the right of way to remove the obstructions or other interference within 48 hours; and, if the party or parties fail to remove the obstructions, the judge shall issue a warrant commanding the sheriff to remove the obstructions immediately.”²⁷

Case Study:

Davis v. Overall, 301 Ga. App. 4 (2009)

Plaintiff Davis and his family members had a family cemetery on some property owned by another party. The property was eventually sold to Defendant Overall. When Plaintiff contacted Defendant about accessing the family cemetery, Overall forbade Davis and his family members from coming onto the property to visit or maintain the cemetery. Overall eventually placed debris and junk adjacent to and partially upon the cemetery. Plaintiff Davis sued Defendant overall for nuisance, trespass, and to establish a permanent easement for ingress/egress (easement in gross, here).

When a family burial plot is established, it creates an easement against the fee, and while the naked legal title will pass, it passes subject to the easement created. The easement and rights created thereunder survive until the plot is abandoned either by the person establishing the plot or his heirs, or by removal of the bodies by the person granted statutory authority.

²⁷ O.C.G.A. § 44-9-59(a)

Overburdening of Easements

Case Study:

Faulkner v. Georgia Power Co., 243 Ga. 649, 649 (1979)

Residents of Redding Road in DeKalb County, sued Georgia Power Company to enjoin the construction and electrification of a high-voltage transmission line within the right-of-way of Redding Road, and for a declaratory judgment that the proposed line is an additional servitude and is thus a taking of their property insofar as they own the underlying fee in Redding Road. Georgia Power Company built a 230,000-volt transmission line along and over the location of an existing 20,000-volt transmission line. The new line would require larger poles. Plaintiffs contended that the new line would create an additional servitude upon the property and they damages for inverse condemnation, nuisance and trespass.

The Plaintiffs contend that the easement for the right-of-way of Redding Road is impliedly limited to the sole benefit of the abutting landowners, and that the new transmission line was for the benefit of Georgia Power Company and other, distant customers, as contrasted with the preexisting distribution line for Redding Road residents.

The trial court granted summary judgment to Georgia Power Company, and its decision was affirmed on appeal. The easement was not exclusive to the adjoining property owners and could be expanded.