

RIGHTS-OF-WAY & PRESCRIPTIVE RIGHTS

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Questions or Comments?

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1 ☐ **DISCLAIMER**

I Am Not Your Attorney.

This seminar is not intended to provide you with legal advice. Seek legal advice from an attorney who is familiar with your particular situation and the facts in your particular case. The example contract clauses contained herein (if any) are intended as examples only and should be reviewed and modified by competent legal counsel to reflect variations in applicable state and local law specific to your circumstances.

2 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Intent is Paramount

"It is a fundamental precept of property law that courts should construe instruments so as to give effect to the intent of the parties. Initially, the court should seek to ascertain the intention of the parties by looking to the entire instrument. The court should be careful to try to give meaning to every clause and provision of the instrument."

GREAVES v. McGEE, 492 So.2d 307, Supreme Court of Alabama (1986)

3 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Intent is Paramount

"Second, the court should look to the factual situation and the circumstances existing at the time the instrument was created. Finally, the court may look to the subsequent acts of the parties to determine the correct construction of the instrument."

GREAVES v. McGEE, 492 So.2d 307, Supreme Court of Alabama (1986)

4 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Intent is Paramount

"A grant is to be construed in favor of the grantee, a fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended."

NORTHWEST REALTY v. JACOBS, 273 N.W.2d 141, Supreme Court of South Dakota (1978)

5 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Intent is Paramount

"This language is not so explicit as it well might be, but we are to bear in mind in this controversy that if there is any doubt or uncertainty about its meaning or about the extent of the rights reserved to plaintiff's grantors as against this defendant, such doubts and uncertainties are to be resolved in favor of the defendant."

Mitchell v. Reid, 85 N.E. 65 (N.Y.App.1908).

6 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Right-of-Way v. Fee

"Where the term 'right of way' is used in a deed it usually indicates that only an easement or a right of passage is being conveyed or reserved. In such a case the instrument should be construed as conveying an easement unless the instrument, considered as a whole, indicates that the parties intended the passage of fee title."

NORTHWEST REALTY v. JACOBS, 273 N.W.2d 141, Supreme Court of South Dakota (1978)

7 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Right-of-Way v. Fee

"If construction of the instrument as a whole leaves the intention of the parties in doubt, consideration must be given to the situation and circumstances of the parties at the time of the execution of the deed in order to determine what was within their contemplation at that time."

NORTHWEST REALTY v. JACOBS, 273 N.W.2d 141, Supreme Court of South Dakota (1978)

8 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Right-of-Way v. Fee

"The resolution of the problem of determining whether a deed intended to convey a fee simple title or an easement involves the consideration of the following factors:

- (1) the amount of consideration;
- (2) the particularity of the description of the property conveyed;
- (3) the extent of the limitation upon the use of the property;

NORTHWEST REALTY v. JACOBS, 273 N.W.2d 141, Supreme Court of South Dakota (1978)

9 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Right-of-Way v. Fee

- (4) the type of interest which best serves the manifested purpose of the parties;
- (5) the peculiarities of wording used in the conveyance document;
- (6) to whom the property was assessed and who paid the taxes on the property; and
- (7) how the parties to the conveyance, or the heirs or assigns, have treated the property."

NORTHWEST REALTY v. JACOBS, 273 N.W.2d 141, Supreme Court of South Dakota (1978)

10 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Right of Way and Easement Synonymous

- Unless there is clear intent to the contrary, the terms right-of-way and easement are synonymous. HOWEVER, it is true that a right-of-way can be taken in fee.

11 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Easements Appurtenant

"An appurtenant easement is an incorporeal right generally created for the purpose of benefiting the owner of the dominant estate (land to which the easement is attached) as the possessor of such estate; it runs with the land, is incapable of existence separate and apart from the dominant tenement, and is inheritable."

BURCKY v. KNOWLES, 413 A.2d 585, Supreme Court of New Hampshire (1980)

12 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Easements In Gross

"An easement in gross is also an incorporeal, non-possessory right to the use of another's land, but it is a mere personal interest."

BURCKY v. KNOWLES, 413 A.2d 585, Supreme Court of New Hampshire (1980)

13 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Appurtenant v. In Gross

"The primary distinction between an easement in gross and an easement appurtenant is that in the latter there is, and in the former there is not, a dominant estate to which the easement is attached."

NELSON v. JOHNSON, 679 P.2d 662, Supreme Court of Idaho (1984)

14 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Appurtenant v. In Gross

"An easement in gross is merely a personal interest in the land of another; whereas an easement appurtenant is an interest which is annexed to the possession of the dominant tenement and passes with it. In case of doubt, the weight of authority holds that the easement should be presumed appurtenant."

NELSON v. JOHNSON, 679 P.2d 662, Supreme Court of Idaho (1984)

15 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Appurtenant v. In Gross

"According to the traditional general rule, an easement in gross is merely a personal interest in the real estate of another, and it cannot be transferred by assignment, inheritance, or otherwise. However, in the circumstances of this case, the general rule is either inapplicable or subject to an exception."

CRANE v. CRANE, 683 P.2d 1062, Supreme Court of Utah (1984)

16 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Appurtenant v. In Gross

"An easement in gross that is not transferable is often referred to as 'a noncommercial easement in gross'.... Modern cases generally state that easements in gross are transferable when they are commercial in character. This idea apparently began with cases involving easements in gross for railroads, telephone, telegraph and electric power lines, pipelines, and ditches. Easements of that type have been held transferable almost without exception from early times.

CRANE v. CRANE, 683 P.2d 1062, Supreme Court of Utah (1984)

17 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Ambiguity is the Key

"In only two cases is a court justified in placing itself in the situation of the parties at the time of the conveyance and taking into consideration all the facts and surrounding circumstances to determine their intentions:

(1) where the extent and reasonable use of the easement is at issue;

(2) where the language used is ambiguous."

BURCKY v. KNOWLES, 413 A.2d 585, Supreme Court of New Hampshire (1980)

18 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Ambiguity is the Key

"*Real Property Law § 240 (3)* provides in pertinent part that '[e]very instrument creating [or] transferring ... an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law.'"

Modrzynski v. Wolfer, 234 A.D.2d 901 (N.Y.App.Div.1996).

19 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Ambiguity is the Key

"The 'intent' at issue is the objective intent of the parties manifested by the language of the deed; unless the deed is ambiguous, evidence of unexpressed, subjective intentions of the parties is irrelevant. It is only when language used in a conveyance is susceptible of more than one interpretation that the courts will look into surrounding circumstances."

Modrzynski v. Wolfer, 234 A.D.2d 901 (N.Y.App.Div.1996).

20 ☐ **JEFF'S BLACK LETTER LAW ON EASEMENTS**

Ambiguity is the Key

"The interpretation of such a deed is a mixed question of fact and law. It is a factual

question to determine the intent of the parties.”

Ray v. King County, 86 P.3d 183 (Wash.App.2004).

21 ☐ **THE LAW OF EASEMENTS**

Easement Defined

The Restatement of Property § 450 (1944) defines an easement as follows:

- An easement is an interest in land in the possession of another which:
- entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists;
- entitles him to protection as against third persons from interference in such use or enjoyment;
- is not subject to the will of the possessor of the land;
- is not a normal incident of the possession of any land possessed by the owner of the interest; and
- is capable of creation by conveyance.

22 ☐ **THE LAW OF EASEMENTS**

Easement Defined

- The essence of an easement is that it creates a non-possessory right to enter and use land in possession of another and obligates the possessor not to interfere with the use authorized by the easement.

23 ☐ **THE LAW OF EASEMENTS**

Possessory Interest in Land

- The owner of a possessory interest has a present or potential right to the possession of the real property. The most familiar example of a present possessory interest in real property is the fee simple estate.

24 ☐ **THE LAW OF EASEMENTS**

Non-Possessory Interest in Land

- In contrast, the owner of a non-possessory interest has certain rights in the real property possessed by another. In other words, the owner in possession of an estate gives up certain rights to his land, or a portion of his land, when he grants an easement.

25 ☐ **THE LAW OF EASEMENTS**

Servitudes

- Some of the non-possessory rights that are available under real property law, such as easements, are called “servitudes.” The land owned by another, or possessed by one party, is considered to “serve” the other party with the non-possessory interest in the land.

26 ☐ **THE LAW OF EASEMENTS**

Servient Estate

- As a result of this relationship between the interest of the owner in possession and

the owner of the non-possessory interest, the land subject to the easement (burdened by the easement) is called the "servient estate."

27 ☐ **THE LAW OF EASEMENTS**

Dominant Estate

- The land benefited by the easement, if any, is called the "dominant estate." The possessor of the dominant estate is entitled to the use and benefits authorized by the grant of easement. In such a case, the easement is said to be "appurtenant to" the dominant estate.

28 ☐ **THE LAW OF EASEMENTS**

EXAMPLE:

Alice owns Blackacre and Ben owns Whiteacre. Alice grants Ben an easement that permits Ben to use a road across Blackacre to get to Whiteacre. Whiteacre is the dominant estate; Blackacre is the servient estate. Blackacre is burdened by the easement; Whiteacre is benefited. The easement is appurtenant to Whiteacre.

29 ☐ **THE LAW OF EASEMENTS**

Affirmative and Negative Easements

- Easements are classified as either "affirmative" or "negative." The holder of an affirmative easement has the right to do things which, were it not for the easement, he would not be permitted to do.

30 ☐ **THE LAW OF EASEMENTS**

Affirmative and Negative Easements

- The holder of a negative easement may, by virtue of the easement, prevent the possessor of the land burdened by the easement from performing acts upon the land that he would otherwise have the legal right to perform.

31 ☐ **THE LAW OF EASEMENTS**

Affirmative and Negative Easements

- A negative easement does not allow the owner of the easement to do anything on the land of the servient estate.
- It merely prevents the owner of the servient estate from doing what is not allowed pursuant to the easement agreement.

32 ☐ **THE LAW OF EASEMENTS**

EXAMPLE: (Affirmative Easement)

Carl owns Blackacre and Whiteacre. Carl grants Blackacre to Jim, reserving for himself the right to use the road that crosses Blackacre in order to have access to Whiteacre. Carl has reserved an affirmative easement.

33 ☐ **THE LAW OF EASEMENTS**

EXAMPLE: (Negative Easement)

Joan owns a house on Whiteacre and is afraid that Jack, who owns the adjoining parcel, Blackacre, will build a structure on Blackacre that will block Joan's view of the

ocean. Joan pays Jack \$5,000 for an easement agreement by which Jack agrees not to build any structure on Blackacre that is more than two stories high. Joan is the owner of a negative easement that prevents Jack from using Blackacre in a certain way. Joan does not have any other rights under the easement to do anything on Jack's land, Blackacre.

34 ☐ **THE LAW OF EASEMENTS**

Solar Easements

As used in this act:

(1) "Solar easement" means a right, whether or not stated in the form of restriction, easement, covenant, or conditions in any deed, will, or other instrument executed by or on behalf of any owner of land or solar skyspace for the purpose of ensuring adequate exposure of a solar energy system as defined herein.

§ 57-13-1. Definitions, Utah Code.

35 ☐ **THE LAW OF EASEMENTS**

Solar Easements

As used in this act:

(4) "Solar skyspace" means the space between a solar energy collector and the sun which must remain unobstructed such that on any given clear day of the year, not more than 10% of the collectable insolation shall be blocked.

§ 57-13-1. Definitions, Utah Code.

36 ☐ **THE LAW OF EASEMENTS**

Solar Easements

(1) Any property owner may grant a solar easement in the same manner and with the same effect as a conveyance of an interest in real property. The easements shall be created in writing and shall be filed, duly recorded and indexed in the office of the recorder of the county in which the easement is granted. Such easements shall run with the land or lands benefited and burdened and shall constitute a perpetual easement, except that a solar easement may terminate upon the conditions stated herein.

§ 57-13-2. Creation of solar easement, Utah Code.

37 ☐ **THE LAW OF EASEMENTS**

Appurtenant Easements

- Easements are further classified as "appurtenant" easements or easements "in gross."
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38 ☐ **THE LAW OF EASEMENTS**

Appurtenant Easements

- These terms help to describe the situation relative to the dominant estate, not the servient estate.

39 ☐ **THE LAW OF EASEMENTS**

Appurtenant Easements

- An appurtenant easement attaches to, or benefits a particular parcel of land.
- The benefited parcel is the dominant estate.

40 ☐ **THE LAW OF EASEMENTS**

Appurtenant Easements

- When the dominant estate is transferred, any easement appurtenant to it automatically passes with the estate.

41 ☐ **THE LAW OF EASEMENTS**

Appurtenant Easements:

- Similarly, an appurtenant easement cannot be conveyed without transferring the dominant estate to which it is attached.

42 ☐ **BROWN v. VOSS**

Washington Supreme Court
715 P.2d 514
March 6, 1986

43 ☐ **ZEH v. KARKER**

Supreme Court of New York
Appellate Division, Third Department
43 A.D.2d 881
January 31, 1974

44 ☐ **THE LAW OF EASEMENTS**

Appurtenant Easements

- In many cases, deeds of conveyance do not describe easements as either appurtenant or in gross.
- Good drafting, however, should include a recitation that the easement being conveyed is either appurtenant or in gross.

45 ☐ **THE LAW OF EASEMENTS**

Appurtenant Easements:

- If left to interpretation, courts will construe the nature of the easement from the surrounding circumstance at the time of the conveyance, or from the subsequent acts of the parties.

46 ☐ **THE LAW OF EASEMENTS**

Appurtenant Easements

- Most easements are intended to be appurtenant, absent evidence to the contrary.

47 ☐ **THE LAW OF EASEMENTS**

Easements in Gross

- Easement in gross does not belong to any person by virtue his ownership of any land or estate.

48 ☐ **THE LAW OF EASEMENTS**

Easements in Gross

- In some cases they are personal to the easement owner and generally die or are extinguished with the death of the easement owner.
- In the commercial context, they can survive the original grantee and they can be sold or transferred if the original grant so provides; or in some cases, if the original grant is silent on this issue.

49 ☐ **THE LAW OF EASEMENTS**

Easements in Gross

- English common law does not recognize easements in gross, in America; however, they are relatively common.

50 ☐ **THE LAW OF EASEMENTS**

EXAMPLE:

Kurt owns Blackacre and grants an easement across Blackacre to a railroad company. The railroad company does not own any land in the area. Since the easement is not appurtenant to any parcel, it is an easement in gross. In addition, as long as the railroad company remains in existence, the easement will remain in force, unless the terms of the grant dictate otherwise.

51 ☐ **THE LAW OF EASEMENTS**

EXAMPLE:

Bill owns Blackacre, which has a lake and fishing dock. Bill grants an easement to Becky to cross Blackacre and fish from the dock by the lake. The grant of the easement specifies that the easement is to be an easement in gross and not appurtenant. Even though Becky owns an adjoining parcel, Whiteacre, the grant is not an appurtenant easement.

52 ☐ **THE LAW OF EASEMENTS**

EXAMPLE:

Becky conveys Whiteacre to Fred. Fred attempts to fish from the dock on Blackacre. The easement did not pass to Fred in that it is an easement in gross. The outcome would probably have been different if the drafter had not specified the type of easement conveyed. In such a case, the strong presumption would be that an appurtenant easement was conveyed.

53 ☐ **THOMSON v. WADE**

New York Court of Appeals

509 N.E.2d 309

May 28, 1987

54 ☐ **THE LAW OF EASEMENTS**

Stranger to the Deed

"The most common type of easement is one that is expressly created between two

parties in a land transaction or conveyance by an express grant or an express reservation. Although there are no specific requirements for the creation of an express easement, Utah courts generally look to the intent of the parties to an agreement purportedly transferring real property to determine whether the document sufficiently describes the interest granted in a manner sufficient to construe the instruments as a conveyance of an interest in land."

Potter v. Chadaz, 977 P.2d 533 (Utah App. 1999).

55 ☐ **THE LAW OF EASEMENTS**

Stranger to the Deed

"Words that clearly show intention to grant an easement are sufficient, provided the language is certain and definite in its term. Some degree of definiteness in the scope or extent of an interest is essential to its recognition as a property interest."

Potter v. Chadaz, 977 P.2d 533 (Utah App. 1999).

56 ☐ **THE LAW OF EASEMENTS**

Stranger to the Deed

"When an interest is definite and precise in its extent it is more readily recognized as an entity which can be the subject matter of a conveyance than when it is indefinite. In order that privileges of use may be recognized as easements there must be some degree of definiteness in the privileged use."

Potter v. Chadaz, 977 P.2d 533 (Utah App. 1999).

57 ☐ **THE LAW OF EASEMENTS**

Stranger to the Deed

"In this case, the first transaction expressly reserving a right-of-way in the disputed land was the October 24, 1990, Warranty Deed executed by Heritage, Inc., conveying 1.58 acres from Heritage, Inc. to Villatek. This document purported to reserve a right-of-way for Chadaz by stating the conveyance of the land was 'Subject To A Right-Of-Way Over The East 66 Feet Of Said Property, For The Purpose Of A Proposed Road.'"

Potter v. Chadaz, 977 P.2d 533 (Utah App. 1999).

58 ☐ **THE LAW OF EASEMENTS**

Stranger to the Deed

"This conveyance from Heritage, Inc. to Villatek fails to meet the requirements of an express easement. Although it appears the parties intended to create an express easement, the language in the deed is not sufficiently detailed. In fact, it does not specify the boundaries of the easement or its exact location. This vague language does not constitute a definite and ascertainable description of the property."

Potter v. Chadaz, 977 P.2d 533 (Utah App. 1999).

59 ☐ **THE LAW OF EASEMENTS**

Stranger to the Deed

"However, even if we were to assume that this language were sufficient to create an express easement, Utah law prohibits parties from expressly creating an easement in a

land transaction for the benefit of a third party who is not involved in the transaction—i.e. a ‘stranger to the deed.’”

Potter v. Chadaz, 977 P.2d 533 (Utah App. 1999).

60 ☐ **RAY v. KING COUNTY**

Washington Court of Appeals

83 P.3d 183

March 15, 2004

61 ☐

62 ☐

63 ☐

64 ☐ **Ray’s Deed as a Successor to Hilchkanum**

That portion of Government Lot 3, Section 6, Township 24 North, Range 6 East, W.M., in King County, Washington, described as follows:

Beginning on the shore of Lake Sammamish at the northwest corner of a tract of land conveyed to W.C. Dahl by Henry M. Johnson by deed dated October 6, 1931, and recorded in Volume 1588 of Deeds, page 137, under King County Recording No. 2808278, records of King County, Washington; thence running southerly along the shore line of Lake Sammamish, a distance of 300 feet to the true point of beginning; ...

65 ☐ **Ray’s Deed as a Successor to Hilchkanum**

... thence southerly along said shoreline of Lake Sammamish, a distance of 125 feet; thence east to the westerly right of way of East Lake Sammamish Place S.E. (formerly Redmond Issaquah Road); thence northerly along said right of way to a point due east of the true point of beginning; thence due west to the true point of beginning; EXCEPT the Northern Pacific Railway Company’s right of way.

66 ☐ **THE LAW OF EASEMENTS**

EXPRESS EASEMENTS

Express Easements

- Easements created either by grant or by reservation must comply with the usual formalities for the creation or transfer of an interest in real property.

67 ☐ **THE LAW OF EASEMENTS**

EXPRESS EASEMENTS

Express Easements

- Ordinarily, they must be in writing and signed by the grantor of the easement, or of the estate from which the reservation is carved.

68 ☐ **THE LAW OF EASEMENTS**

EXPRESS EASEMENTS

Express Easements

- An easement displaying these characteristics is referred to as an “express easement.”

69 ☐ **THE LAW OF EASEMENTS**

EXPRESS EASEMENTS

Express Easements

- Express easements are also created when a subdivision plat, properly filed and recorded, creates lots within blocks, road rights-of-way, building setback lines, and various easements for utilities, drainage, and the like.

70 ☐ **Platted Right-of-Way**

71 ☐ **THE LAW OF EASEMENTS**

EXPRESS EASEMENTS

Interpretation and Extent

- Once it is determined that an easement was in fact created, questions arise regarding the scope of the easement, and the rights and obligations of both the easement holder and the owner of the servient estate.

72 ☐ **THE LAW OF EASEMENTS**

EXPRESS EASEMENTS

Interpretation and Extent

- As we saw with our example of easements in gross, the language of the granting easement is extremely important in determining the affect that the easement has on both the servient and dominant estates.

73 ☐ **THE LAW OF EASEMENTS**

EXPRESS EASEMENTS

Interpretation and Extent

- Where such factors as the type of easement created (appurtenant or in gross), the width or length of the easement, whether the location is fixed relative to the property in question or blanket in nature, or where the easement is restricted to certain uses, the courts will (and surveyors should) give effect to such factors.

74 ☐ **THE LAW OF EASEMENTS**

EXPRESS EASEMENTS

Interpretation and Extent

- If the grant of easement does not spell out the factors that establish the type of easement created, or fix the location of the easement, or restrict the use of the easement, as with other deeds of conveyances, the courts will leave the written document of conveyance and look to the circumstances surrounding the creation of the easement and to the subsequent acts of the parties involved.

75 ☐ **THE LAW OF EASEMENTS**

EXPRESS EASEMENTS

Interpretation and Extent

- Unless it can be shown that the parties, especially the grantor, intended otherwise, the beneficiary of the easement grant is entitled to make any use of the easement

that is reasonably necessary for the convenient enjoyment of the easement for its intended purpose.

76 ☐ **THE LAW OF EASEMENTS**
EXPRESS EASEMENTS

EXAMPLE:

Johnny owns Blackacre and divides Blackacre into two parcels, Little Blackacre and Little Whiteacre. The division cuts Little Whiteacre off from access to the highway. In order to make Little Whiteacre marketable, Johnny offers a 30-foot wide easement across Little Blackacre to Robert when he sells Robert Little Whiteacre. The grant of easement does not specify the rights conveyed under the easement. What rights in the easement will Robert have?

77 ☐ **THE LAW OF EASEMENTS**
EXPRESS EASEMENTS

EXAMPLE ANSWER:

The courts will generally interpret the easement as a grant to Robert for ingress and egress, and for the installation of utilities necessary for Robert to live on Little Whiteacre. This will especially be true if, subsequent to the grant, Robert does in fact install a road and utilities, and Johnny accepts and tolerates these modifications.

78 ☐ **THE LAW OF EASEMENTS**
EXPRESS EASEMENTS

Intent of the Parties

- In determining the intent of the parties concerning the scope of the easement in question, the courts have considered the following factors, among others:

79 ☐ **THE LAW OF EASEMENTS**
EXPRESS EASEMENTS

Intent of the Parties:

- Whether the easement is granted or reserved.

80 ☐ **THE LAW OF EASEMENTS**
EXPRESS EASEMENTS

Intent of the Parties

- Easements that are reserved are interpreted more restrictively since ambiguities in the deed are generally construed against the grantor.
- Grants of easements can be construed either against the grantor or the grantee.

81 ☐ **THE LAW OF EASEMENTS**
EXPRESS EASEMENTS

Intent of the Parties

- The amount of consideration, if any, that the original beneficiary of the easement gave for the easement.

82 ☐ **THE LAW OF EASEMENTS**

EXPRESS EASEMENTS

Intent of the Parties

- The payment of a nominal sum (or a sum below market value) for the easement rights suggests an interpretation that favors the purchaser of the easement.

83 ☐ **THE LAW OF EASEMENTS**
EXPRESS EASEMENTS

Intent of the Parties

- Similarly, if a question arises as to whether an easement was conveyed or whether fees was conveyed, evidence showing that the amount paid was substantially equivalent to price of a fee conveyance may suggest that the parties intended to convey a fee, rather than an easement.

84 ☐ **THE LAW OF EASEMENTS**
EXPRESS EASEMENTS

Example:

Billy owns White Acre which at the time of the grant in question was worth \$10,000 per acre. He grants a "Right-of-Way" to the County for a road consisting of 5 acres. The county pays \$250 for this right-of-way. All other things being equal, what does this suggest was conveyed, fee simple or an easement?

85 ☐ **THE LAW OF EASEMENTS**
EXPRESS EASEMENTS

Intent of the Parties:

- Prior use of the land on which the easement is now located may suggest that a continuation of that use was contemplated by the parties.

86 ☐ **THE LAW OF EASEMENTS**
EXPRESS EASEMENTS

Example:

Abel owns Lots 1 and 2, adjoining lots. He has a house on Lot 1 that he lives in. Abel runs a sewer line across Lot 2 to serve Lot 1. Abel also uses a road across Lot 1 to access Lot 2. Abel decides to build a new house on Lot 2 and sell Lot 1. He sells Lot 1 to Cain, reserving no easements to himself for the benefit of Lot 2 and granting no easements to Cain benefiting Lot 1. Can Cain use the sewer line and can Abel use the road?

87 ☐ **THE LAW OF EASEMENTS**
EXPRESS EASEMENTS

Example Answer:

Because of the prior use of the land, the courts will generally imply an easement to the sewer benefiting Lot 1 and burdening Lot 2. Same situation with the road. It will be implied that Lot 2 will have the benefit of the road, especially if there is no other access to Lot 2.

88 ☐ **THE LAW OF EASEMENTS**

EXPRESS EASEMENTS

Intent of the Parties

- The subsequent acts of the parties may suggest the intent of the parties.

89 ☐ **THE LAW OF EASEMENTS**
EXPRESS EASEMENTS

EXAMPLE:

Betty Sue owns Whiteacre and Blackacre, adjoining estates. She sells Blackacre to Bobby Joe. Bobby Joe then builds a road across Whiteacre for access. She then has the power company come out and install poles and power lines along side the road. Bobby Joe then installs sewer and water lines on the other side of the road from the power lines. Betty Sue never objects. Does Bobby Joe have an easement? If so, how much?

90 ☐ **THE LAW OF EASEMENTS**
EXPRESS EASEMENTS

EXAMPLE:

Betty Sue and Bobby Joe have a falling out because Bobby Joe had an affair with Betty Sue's ex-boyfriend. Betty Sue now wants to cut off Bobby Joe's access because, Betty Sue "never granted an easement." What's the probable outcome?

91 ☐ **THE LAW OF EASEMENTS**
EXPRESS EASEMENTS

Blanket (or "Floating") Easements

- When the instrument creating the easement fails to fix the length, width, and location of the easement, but merely establishes a "right-of-way" over a particular area, strip, or parcel of ground, the easement is generally construed to extend over only so much of that area as is reasonably necessary to effect the purpose of the easement.

92 ☐ **THE LAW OF EASEMENTS**
EXPRESS EASEMENTS

EXAMPLE:

Bradley owns Blackacre and builds his dream cabin on the lake. Bradley, however, has no utilities servicing Blackacre. Bradley contacts the power company to provide power to his cabin. The power company requires Bradley to convey a "blanket easement" over Blackacre before they will bring power lines to the cabin. Bradley conveys the easement, which does not fix the length, width, or location of the easement. Where is the easement, how long is it and what is the width?

93 ☐ **THE LAW OF EASEMENTS**
EXPRESS EASEMENTS

EXAMPLE ANSWER:

In such a case, the courts will fix the location based on the installed power poles and power lines, for the extent of those facilities, and will grant a width sufficient for the installation, maintenance and repair of those facilities. Extrinsic evidence will be used

to determine all of these factors. Generally, extrinsic evidence is the same evidence gathered by the land surveyor during the course of a survey.

94 ☐ **THE LAW OF EASEMENTS**

Running with the Land

- Running with the land means that the covenant or servitude will pass along with the ownership of the land, be it a servient or dominant estate.
-

95 ☐ **THE LAW OF EASEMENTS**

Running with the Land

- A covenant or easement is said to “run with the land” when either the liability to perform or the right to take advantage of the covenant or easement passes to the assignee of the covenant or the grantee of the estate.

96 ☐ **THE LAW OF EASEMENTS**

Running with the Land

“A covenant that ‘runs with the land’ binds successive owners of the burdened or benefited land. The rights and duties of a personal covenant, by contrast, terminate when a covenanting party conveys the property to a subsequent owner.”

Stern v. Metro. Water Dist., 274 P.3d 935 (Utah 2012)

97 ☐ **THE LAW OF EASEMENTS**

Running with the Land

“In many cases, courts assume that parties intend a covenant to run with the land if the covenant touches and concerns the land in a manner that inherently benefits present and future owners of the benefited land. ... For a covenant to touch and concern the land, the burdens and benefits it creates must directly relate to the land itself.”

Stern v. Metro. Water Dist., 274 P.3d 935 (Utah 2012)

98 ☐ **THE LAW OF EASEMENTS**

Running with the Land

“Running covenants must be of such character that their performance or nonperformance will so affect the use, value, or enjoyment of the land itself that it must be regarded as an integral part of the property.”

Stern v. Metro. Water Dist., 274 P.3d 935 (Utah 2012)

99 ☐ **THE LAW OF EASEMENTS**

MISCELLANEOUS CONSIDERATIONS

Location Problems

- Location problems are encountered with easements as they are with boundaries. The same principles apply. “What the easement is, is a question of law and “where” it’s located is a question of fact.”

100 ☐ **COREY v. FORT DODGE**

IOWA SUPREME COURT
92 N.W. 704
DECEMBER, 1902

101 ☐ ***In Re***

Peoples Natural Gas

THE SUPREME COURT OF PENNSYLVANIA
60 A.2d 391
April 22, 1960

102 ☐ **THE LAW OF EASEMENTS
NON-EXPRESS EASEMENTS**

Non-Express Easements

- Non-express easements can be thought of as informal easements and may arise through implication from prior use, implication from a map showing streets or other areas of common use (recorded and unrecorded plats), necessity, or prescription.

103 ☐ **THE LAW OF EASEMENTS
NON-EXPRESS EASEMENTS**

Non-Express Easements

- Both implied easements and easements by necessity originate under circumstances in which land under common ownership is divided into separately owned parts by means of a conveyance.

104 ☐ **THE LAW OF EASEMENTS
NON-EXPRESS EASEMENTS**

Non-Express Easements

- A prescriptive easement arises under adverse circumstances, where the easement owner adversely utilizes a portion of a servient estate for a prescribed period of time.

105 ☐ **THE LAW OF EASEMENTS
NON-EXPRESS EASEMENTS**

Non-Express Easements

- Several factors may be considered in determining whether an easement should be implied including:

106 ☐ **THE LAW OF EASEMENTS
NON-EXPRESS EASEMENTS**

Non-Express Easements

1. The terms of the conveyance,
2. The consideration paid,
3. Whether the claim is made against a simultaneous conveyee,

4. The extent of necessity of the easement,
5. Whether reciprocal benefits result to the conveyor and the conveyee,
6. The manner in which the land was used prior to its conveyance, and the subsequent actions taken by the parties involved,

107 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Non-Express Easements

7. The extent to which the manner of prior use was or might have been known to the parties,
8. The result that would best meet the reasonable expectations of land owners and purchasers, and arrive at results that are fair to all parties,
9. The ability of parties to act to avoid confusion,
10. Public policy considerations such as the avoidance of economic waste and the promotion of full utilization of land,
11. The size, shape, and location of the land in question, and
12. Whether the claimant is the conveyor or the conveyee.

108 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Implication

- To determine whether an implied easement exists, emphasis is placed on the use of the claimed dominant and servient parcels prior to severance of the common ownership.

109 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Implication

- An owner can use part of his land for the benefit and service of another part, thereby giving rise to a "quasi-easement," a "quasi-servient" estate, and a "quasi-dominant" estate.

110 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Implication

- When the common owner of two parcels conveys the quasi-dominant estate, the grantee may claim an implied easement by grant in the quasi-servient estate under the proper circumstances.

111 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Implication

- An easement is implied if, at the time of the severance, the parties had reasonable grounds to expect that the conveyance would not terminate the right to continue the prior use.

112 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Implication

"There are four elements necessary to constitute an easement by implication: (1) unity of title followed by severance; (2) at the time of severance the servitude was apparent, obvious, and visible; (3) the easement is reasonably necessary to enjoy the dominant estate; and (4) use of the easement was continuous rather than sporadic."

Potter v. Chadaz, 977 P.2d 533 (Utah App. 1999).

113 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

EXAMPLE:

Billy owns Blackacre along with an easement for ingress, egress and utilities across Whiteacre. Billy subsequently buys Whiteacre and re-names his estate Happyacres, because he really hated the former owner of Whiteacre due to a boundary dispute problem several years earlier, and now his nemesis is gone. Billy is getting up in years and decides to move to a condo in Florida. He sells Blackacre to Frances and Whiteacre to Barbara. Frances and Barbara hate each because Frances had an affair with Barbara's husband back in 1979. Both husbands are dead now, but the pain lives on. The grant to Frances contains no express conveyance of an easement across Whiteacre. Was an implied easement conveyed?

114 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Necessity

- Easements by necessity are sometimes considered to be a subcategory of implied easements.

115 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Necessity

- Easement by necessity derives its name from the fact that the existence of an easement is necessary for the reasonable use and enjoyment of the dominant parcel.

116 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Necessity

The requirements for finding the easement by necessity are:

- An original unity of ownership of the claimed dominant and servient estates, and
- The existence of the necessity at the time of severance.

117 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Necessity

- Courts will look to the distant past in search of the required unity of ownership. In some cases, they will simply assume that there was unity of ownership at some time in the past.

118 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Necessity

- Unlike the general implied easements, however, the use of the dominant and servient parcels prior to severance of the common ownership is unimportant in establishing an easement by necessity.

119 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Necessity

- Most courts try to justify easements by necessity as giving effect to the intention of the parties. After all, no one would intentionally retain a landlocked parcel of land.

120 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Necessity

- Such intent will be implied unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights.

121 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Necessity

"An easement by necessity arises when there is a conveyance of part of a tract of land which is so situated that either the part conveyed or the part retained is surrounded with no access to a road to the outer world."

Potter v. Chadaz, 977 P.2d 533 (Utah App. 1999).

122 ☐ **SIMONE v. HEIDELBERG**

New York Court of Appeals

9 N.Y.3d 177

November 15, 2007

123 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Necessity

- When a person conveys property that has no means of access except over land retained by the grantor or in the possession of a stranger, the grantee's need for a right-of-way easement is deemed to be absolute.

124 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Necessity

- Most states have now codified remedies for easements by necessity due to public policy considerations.

125 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

EXAMPLE:

Fred is a large landowner. Over the years, Fred and his heirs sell off bits and pieces of Fred's large estate until there is one remaining 40-acre tract that, due to the piecemeal division and selling of the land, remains vacant and landlocked. Fred's heirs not knowing that they actually have 40-acres left in the estate, lose the land for non-payment for taxes. Barney buys the 40-acre tract from the County for taxes and sues for access across Farmer Browns pasture, which is the nearest connection to a public right-of-way. Farmer Brown objects. Who wins?

126 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

EXAMPLE:

Barney wins, probably under a state statute allowing for easement by necessity. If not, the courts will grant Barney access under the doctrine of necessity.

127 ☐ **H & F LAND v. PANAMA CITY AIRPORT**

Florida Supreme Court
 736 So.2d 1167
 July 10, 1999

128 ☐ **BLANTON v. CITY OF PINELLAS PARK**

Florida Supreme Court
 887 So.2d 1224
 October 21, 2004

129 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

- There is considerable diversity in the cases involving the acquisition of an easement by prescription. It is very much state law specific.

130 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

- One common element in the cases seems to be that the burden of proof is heightened for the party claiming an adverse use. Clear and convincing evidence is generally required.

131 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

- One of the problems is over the presence or absence of a presumption that the use is under a claim of right adverse to the owner of the servient estate.

132 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

- The presumption rest on whether or not the owner of the servient estate had constructive notice of the open, continuous, notorious, and adverse (adverse to the servient estate's interests) use of the easement for the prescriptive period.

133 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

- Some courts have held that from a showing of constructive notice to the servient estate owner, the presumption arises that the use is under a claim of right adverse to that owner.

134 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

- Other courts have suggested that the presumption does not arise when the easement is over unenclosed or unimproved land.

135 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

- Still other courts have held that there must be specific and direct evidence of an adverse claim of right, and in its absence, the presumption is that the use was permissive.

136 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription:

- A permissive use is not an adverse use and thereby, no claim of a prescriptive easement will stand.

137 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription:

- Some states have required that a claimant not only establish that the use of the claimed prescriptive easement was continuous, uninterrupted, and adverse to the servient estate holder, but also that the use was known and acquiesced to by the owner.

138 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

- Other states have no such requirement. The use and enjoyment that will give rise to an easement by prescription are exactly the same as that for adverse possession, the knowledge and acquiescence of the owner notwithstanding.

139 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

- And still other states have simply set an outside limit to all claims to the contrary, after a long enough period of time has elapsed.

140 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

- And finally, some states make a distinction between prescriptive rights acquired by the state and prescriptive rights acquired by private individuals. The states use is always adverse but the private persons may not and adverse use will have to be proven by clear and convincing evidence.

141 ☐ **HANKS v. SPANN**

Alabama Court of Appeals
2009 Ala.Civ.App. LEXIS 458
August 21, 2009

142 ☐ **Easement by Prescription
and Public Use**

143 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

"A public road may be established by common law dedication, statutory proceeding, or by prescription. An open, defined roadway, through reclaimed land, in continuous use by the public as a highway without let or hindrance for a period of twenty years becomes a public road by prescription."

Osborn v. Champion International, 892 S.2d 882 (Ala.2004).

144 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

"When such circumstances are shown, a presumption of dedication or other appropriation to a public use arises. The burden is then on the landowner to show the user was permissive only, in recognition of his title and right to reclaim the possession."

Osborn v. Champion International, 892 S.2d 882 (Ala.2004).

145 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

"To establish a prescriptive easement,[1] a claimant must show adverse, exclusive, and uninterrupted use of another's real property for twenty years. Where an easement is claimed on land that is unimproved or otherwise in a general state of nature, there is a legal presumption that the claimant's use is by the owner's permission. This presumption, first referenced by this Court in 1865, has been termed the *"woodlands exception,"* and, to date, has been applied only in cases involving easements."

Breeding v. Koste, 115 A.3d 106 (Md.App.2015).

146 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

"Both adverse possession and prescriptive easements are based on *adverse use of another's real property for twenty years*; while a prescriptive easement results in a nonpossessory interest, adverse possession results in the user obtaining title. ... The burden of proving title by adverse possession is on the claimant."

Breeding v. Koste, 115 A.3d 106 (Md.App.2015).

147 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

"The *'hostility'* essential to acquisition of title by adverse possession *does not necessarily import enmity or ill will*, but rather that the claimant's possession be unaccompanied by any recognition, express or inferable from the circumstances, of the real owner's right to the land."

Breeding v. Koste, 115 A.3d 106 (Md.App.2015).

148 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

"In contrast to adverse possession, a prescriptive easement does not result in a claimant obtaining title to real property, but rather *results in a claimant obtaining a nonpossessory interest in real property—generally, a right of way over another's property.*"

Breeding v. Koste, 115 A.3d 106 (Md.App.2015).

149 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

"When a person has used a right of way openly, continuously, and without explanation *for twenty years, it is fair to presume adverse use.* In such a case, the *burden then shifts* to the landowner to show that the use was permissive. The burden, however, will not shift if the use appears to have been by permission."

Breeding v. Koste, 115 A.3d 106 (Md.App.2015).

150 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

"In a situation where 'use begins adversely,' the servient owner's mere failure to protest is not permission but acquiescence. To establish permission, failure to protest must be combined with other indications of permission. But a presumption of adversity will not arise if the use appears to have been by permission, i.e., where any appearance of permission permeates the record. ... The creation of an easement by prescription is not favored by the law."

Rupli v. South Mountain Heritage, 33 A.3d 1055 (Md.App.2011).

151 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

"The 'woodlands exception' has been described in the context of rights of way or prescriptive easements. Generally speaking, the 'woodlands exception' provides that, when an easement is claimed on land that is unimproved or in a general state of nature, there is a legal presumption that the use is by permission of the owner."

Breeding v. Koste, 115 A.3d 106 (Md.App.2015).

152 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

"This Court first recognized the "woodlands exception" in an 1865 case, *Day v. Allender*. In *Day*, a case involving dedication of a road to public use, we observed that, in one case on which the claimant relied, the jury had been instructed 'that the *mere use* of a *road* over unenclosed *woodland* could not confer a right of way as a neighborhood road or private path, unless the use was shown to be adverse.' In *Day* we stated:

Breeding v. Koste, 115 A.3d 106 (Md.App.2015).

153 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

"As the presumption of a right of way arises from the exercise of a privilege adverse to the right of property and acquiescence in the exercise of that privilege, a distinction must therefore be observed between a claim of a way through enclosed and cultivated land, and of a way over unenclosed land.

Breeding v. Koste, 115 A.3d 106 (Md.App.2015).

154 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

"In the former case, the mere use is an invasion of property and a trespass; and

acquiescence or submission to the exercise of a privilege under circumstances which make it actionable may justify the inference of a legal right in the person who exercises the privilege.”

Breeding v. Koste, 115 A.3d 106 (Md.App.2015).

155 ☐ **THE LAW OF EASEMENTS**
NON-EXPRESS EASEMENTS

Easement by Prescription

“After a thorough review of case law involving adverse possession and prescriptive easements, we hold that the ‘woodlands exception,’ previously applied only to prescriptive easements, also applies to adverse possession where the land at issue is unimproved or otherwise in a general state of nature.”

Breeding v. Koste, 115 A.3d 106 (Md.App.2015).

156 ☐ **THE LAW OF EASEMENTS**
SUCCESSION & TERMINATION

Transferability

- The first step in determining whether an easement may be transferred is to ascertain whether the easement is appurtenant or in gross.

157 ☐ **THE LAW OF EASEMENTS**
SUCCESSION & TERMINATION

Transferability

- If it is an easement in gross, then it must be determined if it was personal or commercial in nature.
- If easement appurtenant, the inquiry focuses on the dominant estate.

158 ☐ **THE LAW OF EASEMENTS**
SUCCESSION & TERMINATION

Transferability

- In ascertaining the intent of the parties, there is a presumption that the parties intended an easement to be appurtenant, especially if the grantee owns land adjoining the servient estate.

159 ☐ **THE LAW OF EASEMENTS**
SUCCESSION & TERMINATION

Succession of Appurtenant Easements

- The rules regarding succession of an appurtenant easement depend on whether the dominant or servient estate is transferred.

160 ☐ **THE LAW OF EASEMENTS**
SUCCESSION & TERMINATION

Succession of Appurtenant Easements:

- In either case, the expressed words of the deed creating the instrument are always given effect.

161 ☐ **THE LAW OF EASEMENTS**
SUCCESSION & TERMINATION

Succession of Appurtenant Easements:

- In the absence of an express provision in the deed stating otherwise, an appurtenant easement is presumed transferred with the dominant estate.

162 ☐ **THE LAW OF EASEMENTS**
SUCCESSION & TERMINATION

Succession of Appurtenant Easements

- The benefit of the easement 'runs with the land' unless the terms of the transfer or the terms of the creation of the easement preclude the benefit from running.

163 ☐ **THE LAW OF EASEMENTS**
SUCCESSION & TERMINATION

Succession of Appurtenant Easements

- This is true whether the successor entered into possession pursuant to an express conveyance, adverse possession, prescriptive right, or intestate transfer, and whether a possession is rightful or wrongful.

164 ☐ **THE LAW OF EASEMENTS**
SUCCESSION & TERMINATION

Succession of Appurtenant Easements:

- If the servient estate is transferred, the burden of the easement runs with the land so as to be enforceable against the successors of the servient estate if the original parties intended that it run and if the successor to the servient estate had notice of the easement.

165 ☐ **THE LAW OF EASEMENTS**
SUCCESSION & TERMINATION

Succession of Appurtenant Easements:

- Parties almost always 'intend' the burden of an easement to run.

166 ☐ **THE LAW OF EASEMENTS**
SUCCESSION & TERMINATION

Succession of Appurtenant Easements

- If the successor to the servient estate purchases the servient estate without notice of the easement, under most modern recording statutes the easement will be extinguished and the new owner of the servient estate will not be subject to the burden of the easement.

167 ☐ **THE LAW OF EASEMENTS**
SUCCESSION & TERMINATION

Succession of Appurtenant Easements

- If the easement is recorded, the successor has constructive notice of the easement, implied by law, whether or not the successor is actually aware of the easement.

168 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

Succession of Appurtenant Easements

- If the easement was not recorded, the burden of the easement may still run with the land if the purchaser has notice of the easement.

169 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

Succession of Appurtenant Easements

- If the purchaser has knowledge of the easement, no matter how it was derived he or she is subject to the burden of the easement.

170 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

Succession of Appurtenant Easements

- Any purchaser with knowledge or notice of the easement takes subject to the easement.

171 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

Succession of Appurtenant Easements

- In most jurisdictions a successor who is not a purchaser for value is subject to the easement regardless of whether the successor (who is not a purchaser) has notice of the easement.

172 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

Succession of Appurtenant Easements

- When the purchaser of the property is held to have had actual notice of the existence of the easement, due to the fact that it was open and notorious, the land surveyor's failure to depict the open and notorious easement on the map of survey will open him up to liability.

173 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

EXAMPLE:

Surveyor Sam is hired by Purchaser Paul to conduct a pre-closing boundary survey of Blackacre. Paul knows enough about real estate to know that he needs a survey and a title search to reveal hidden problems with the property. Sam conducts a survey of Blackacre and ignores a field road that cuts diagonally through the middle of Blackacre. The title report comes back with no recorded easements or other encumbrances upon Blackacre. Paul closes on Blackacre paying \$50,000 per acre, for two acres. Paul takes possession of Blackacre and proceeds to build his \$2.5 million dream home only to find out that Farmer Brown has been using the field road for 50-years to haul cattle, manure, and farm equipment to and from the "North-40." Paul

immediately files suit against the previous owner, the realtor, and title company for \$2.75 million in damages, because Blackacre isn't worth \$0.02 per acre, in Paul's mind. The previous owner, realtor, and title company all claim "actual knowledge" on Paul's part. Who's left to sue?

174 ☐ **JEFFERSON COUNTY
v. MOSLEY**

Alabama Supreme Court
226 So.2d 652
August 21, 1969

175 ☐ **THE LAW OF EASEMENTS
SUCCESSION & TERMINATION**

Succession of Easement in Gross

- An personal easement in gross will not pass when the owner of the easement sells his or her land.
- A commercial easement in gross, may.

176 ☐ **THE LAW OF EASEMENTS
SUCCESSION & TERMINATION**

Succession of Easement in Gross

- For the benefit of the easement in gross to pass to a successor of the grantee, the easement must be assigned.
- However, not all easements in gross are assignable.

177 ☐ **THE LAW OF EASEMENTS
SUCCESSION & TERMINATION**

Succession of Easement in Gross

- If the granting instrument contains an expressed provision as to the assignability of the easement, it will be given effect.

178 ☐ **THE LAW OF EASEMENTS
SUCCESSION & TERMINATION**

Succession of Easement in Gross

- If the instrument is silent as to assignability, the courts will attempt to ascertain the intent of the parties.

179 ☐ **THE LAW OF EASEMENTS
SUCCESSION & TERMINATION**

Succession of Easement in Gross

- Intent may be ascertained from the actions of the parties subsequent to the transaction.

180 ☐ **THE LAW OF EASEMENTS
SUCCESSION & TERMINATION**

Succession of Easement in Gross

- If the subsequent use of the easement was primarily for commercial use, it may be deemed assignable.

181 ☐ **THE LAW OF EASEMENTS
SUCCESSION & TERMINATION**

Succession of Easement in Gross

- If the subsequent use of the easement was primarily personal in nature, it may be deemed non-assignable.

182 ☐ **THE LAW OF EASEMENTS
SUCCESSION & TERMINATION**

Succession of Easement in Gross

- Once the easement in gross is determined to be assignable, to transfer the easement there must be a valid assignment of the easement.

183 ☐ **THE LAW OF EASEMENTS
SUCCESSION & TERMINATION**

Succession of Easement in Gross

- Although, by definition, the benefit of easement in gross does not attach to the land of the easement holder, the burden of an easement in gross does attach to the land of the servient estate.

184 ☐ **THE LAW OF EASEMENTS
SUCCESSION & TERMINATION**

Succession of Easement in Gross

- The burden of an assignable easement in gross runs with the land of the servient estate in the same way as would the burden of an appurtenant easement.

185 ☐ **THE LAW OF EASEMENTS
SUCCESSION & TERMINATION**

EXAMPLE:

Ben, the owner of Blackacre, grants an easement in gross to Chuck to remove coal from Blackacre. Chuck begins digging operations and hauling of coal from Blackacre. Chuck sells his coal mining operation to Tim. Chuck also assigns his easement rights to Tim relative to Blackacre. Is the assignment valid?

186 ☐ **THE LAW OF EASEMENTS
SUCCESSION & TERMINATION**

EXAMPLE:

Absent language in the grant to the contrary, easements in gross of a commercial character are presumed to be assignable.

187 ☐ **THE LAW OF EASEMENTS
SUCCESSION & TERMINATION**

EXAMPLE:

Ben, the owner of Blackacre grants an easement in gross to Chuck to draw water from

the well on Blackacre. Chuck lives in an apartment and does not own any land in the vicinity of Blackacre, but he loves the taste of the water from the well on Blackacre. Chuck tells Brenda about the water and gives her samples, which she thoroughly enjoys. Chuck is transferred to a new city, but before he leaves he assigns his easement to Brenda. Was this a valid transfer?

188 ☐ **THE LAW OF EASEMENTS**
SUCCESSION & TERMINATION

EXAMPLE:

Probably not. Generally speaking, a non-commercial easement in gross is not assignable.

189 ☐ **THE LAW OF EASEMENTS**
SUCCESSION & TERMINATION

Termination and Extinguishment

- An express easement can terminate in accordance with the terms of its creation, or through extinguishment as the result of subsequent events.

190 ☐ **THE LAW OF EASEMENTS**
SUCCESSION & TERMINATION

Termination and Extinguishment

- An owner may terminate his easement by releasing it in a formal written instrument that meets the requirements necessary to create an easement.

191 ☐ **THE LAW OF EASEMENTS**
SUCCESSION & TERMINATION

Termination and Extinguishment

- Abandonment results when the easement owner, intending to relinquish his easement rights, engages in sufficiently unequivocal conduct manifesting his intent to abandon.

192 ☐ **THE LAW OF EASEMENTS**
SUCCESSION & TERMINATION

Termination and Extinguishment

- Non-use alone, however, no matter how long continued, is seldom sufficient to extinguish an easement.

193 ☐ **THE LAW OF EASEMENTS**
SUCCESSION & TERMINATION

Termination and Extinguishment

"Although an easement may be abandoned, such claims are not easily won. A party asserting that an easement has been abandoned must show by clear and convincing evidence that the owner intended to abandon the property right."

Stern v. Metro. Water Dist., 274 P.3d 935 (Utah 2012)

194 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

Termination and Extinguishment

"Moreover, where an easement is created by express grant, mere non-use of the easement is insufficient to demonstrate intent to abandon. There must be additional clear and convincing evidence that the owner intended to make no further use of the property."

Stern v. Metro. Water Dist., 274 P.3d 935 (Utah 2012)

195 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

Termination and Extinguishment

- Courts are more willing, however, to find abandonment of an easement than of other interest in land, since extinguishment of easements clears up titles and encourages full use of the servient estate.

196 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

Termination and Extinguishment

- The easement owner can terminate his easement by improper exercise of his rights.

197 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

Termination and Extinguishment

- Generally, misuse or overuse of an easement, alone, is not sufficient to extinguish it.

198 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

Termination and Extinguishment

"The claim for exceeding the scope of an easement is not abandonment, but trespass. Abandonment claims require evidence not of misuse, but of non-use. Merely showing that the owner's use is possibly beyond the scope of an easement does not show intent to permanently discontinue using the property."

Stern v. Metro. Water Dist., 274 P.3d 935 (Utah 2012).

199 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

EXAMPLE:

Joan owns Blackacre and grants an easement over an old dirt road across Blackacre to Billy, the owner of Whiteacre. A developer buys the land behind Billy and promises to pave Billy's access road if Billy will grant permission to use the easement as a rear access to the development. Billy agrees. As soon as the road is paved, hundreds of construction vehicles travel the road on a daily basis. Joan sues to have the easement terminated. Does Joan win?

200 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

EXAMPLE:

Under these circumstances, probably so. Joan wins.

201 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

Adverse Use/Reverse Prescription

- The servient owner can also extinguish an easement by making adverse use of the burdened parcel for the same period of time necessary to acquire an easement by prescription.

202 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

Adverse Use/Reverse Prescription

- Since the servient owner's use of the burdened portion of his estate is not necessarily adverse to the easement holder's rights, only conduct which is incompatible with the authorized right of use will start the prescriptive period running in favor of the servient owner.

203 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

Doctrine of Merger

- Under certain circumstances, conduct of both the easement owner and the owner of the servient estate together will work to extinguish an easement period.

204 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

Doctrine of Merger

- When the easement holder acquires ownership of the servient estate, the easement holder gains rights of use greater than those held pursuant to his easement period.

205 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

Doctrine of Merger

- The very definition of an easement, "a right in land in possession of another," makes extinguishment under these circumstances appropriate.

206 ☐ **THE LAW OF EASEMENTS**

SUCCESSION & TERMINATION

EXAMPLE:

Billy owns Blackacre along with an easement for ingress, egress and utilities across Whiteacre. Billy subsequently buys Whiteacre and re-names his estate Happyacres, because he really hated the former owner of Whiteacre due to a boundary dispute problem several years earlier, and now his nemesis is gone. The easement across Whiteacre is extinguished because it has served its purpose and is no longer necessary.

207 ☐ **THE LAW OF EASEMENTS**

MISCELLANEOUS CONSIDERATIONS

Miscellaneous Considerations

- Generally speaking, once an easement is established, by whatever means, issues of relocation, increase in use, and maintenance and repair are all the same.

208 ☐ **THE LAW OF EASEMENTS**

MISCELLANEOUS CONSIDERATIONS

Relocation

- In the majority of jurisdictions in the United States, neither the owner of the dominant estate nor the owner of the servient estate may unilaterally relocate an easement once it has been fixed.

209 ☐ **THE LAW OF EASEMENTS**

MISCELLANEOUS CONSIDERATIONS

Relocation

- In a small, but growing, number of jurisdictions the servient estate is permitted to relocate an easement, provided that the relocated easement affords the dominant estate benefits that are substantially similar to those that the dominant estate enjoyed under the original easement.

210 ☐ **THE LAW OF EASEMENTS**

MISCELLANEOUS CONSIDERATIONS

EXAMPLE:

Able grants an easement for ingress, egress and utilities across Blackacre to Rodney, the owner of Whiteacre. Unfortunately, the easement as fixed and established runs through the middle of Blackacre making it less economically valuable. Able wants to relocate the easement. Can he do it?

211 ☐ **THE LAW OF EASEMENTS**

MISCELLANEOUS CONSIDERATIONS

EXAMPLE:

Generally, he will be able to do so as long as he does not interfere with Rodney's easement rights or unduly burden Rodney. Therefore, Able will have to bear the cost of relocation.

212 ☐ **THE LAW OF EASEMENTS**

MISCELLANEOUS CONSIDERATIONS

Increase in Use

- In the absence of express language to the contrary, the grantor and grantee of an easement are assumed to have contemplated a normal increase in the intensity of use of the easement over the years.

213 ☐ **THE LAW OF EASEMENTS**

MISCELLANEOUS CONSIDERATIONS

Increase in Use

- The owner of an appurtenant easement cannot use the easement, nor allow its use, for the service of land which was not part of the dominant estate at the time the easement was created.

214 ☐ **THE LAW OF EASEMENTS**

MISCELLANEOUS CONSIDERATIONS

"The law favors changes and improvements for the benefit of the dominant estate so long as the manifest intent of the parties does not disallow the changes and the burden to the servient tenement is not increased."

Stern v. Metropolitan Water District, 274 P.3d 935 (Utah 2012).

215 ☐ **THE LAW OF EASEMENTS**

MISCELLANEOUS CONSIDERATIONS

"A change in the manner, frequency, and intensity of use of the easement within the physical boundaries of the existing easement is permitted without the consent of the other party, so long as the change is not so substantial as to cause unreasonable damage to the servient estate or unreasonably interfere with its enjoyment."

Stern v. Metropolitan Water District, 274 P.3d 935 (Utah 2012).

216 ☐ **THE LAW OF EASEMENTS**

MISCELLANEOUS CONSIDERATIONS

"Courts presume that easements may be expanded to permit 'technological innovations' so long as the use is reasonably foreseeable at the time of establishment of the easement."

Stern v. Metropolitan Water District, 274 P.3d 935 (Utah 2012).

217 ☐ **THE LAW OF EASEMENTS**

MISCELLANEOUS CONSIDERATIONS

"Where a deed or decree creates a property right for a canal but is silent as to whether the canal must be open or may be enclosed, the property owner may therefore enclose the canal and install necessary improved structures without exceeding the scope of the property right, so long as (1) the improvements are performed reasonably, and (2) they do not materially alter the burden on the servient estate or on the land benefited by a restrictive covenant."

Stern v. Metropolitan Water District, 274 P.3d 935 (Utah 2012).

218 ☐ **THE LAW OF EASEMENTS**

MISCELLANEOUS CONSIDERATIONS

EXAMPLE:

Cain grants a 50-foot wide easement across Blackacre to Abel, the owner of Whiteacre. At the time of the conveyance both Blackacre and Whiteacre are rural residential property. Over the years the city moved to the country and Blackacre, which fronts a very busy highway, is re-zoned commercial. Seeing his opportunity to cash-in, Abel has Whiteacre re-zoned to high density residential, contemplating an apartment complex on the property. The new owner of Blackacre objects to the installation of

paved road and utilities on the easement, and the high traffic volume created by the apartments on Whiteacre. Can the new owner of Blackacre stop this increase in use of the easement?

219 ☐ **THE LAW OF EASEMENTS**

MISCELLANEOUS CONSIDERATIONS

EXAMPLE:

Under the described circumstance, probably not. Both properties have undergone substantial changes over the years and to allow one owner to take advantage of these changes and other not, would be inequitable.

220 ☐ **THE LAW OF EASEMENTS**

MISCELLANEOUS CONSIDERATIONS

Maintenance and Repair

- In the absence of express language to the contrary, the easement owner is assumed to have the maintenance and repair obligations relative to the easement and its uses.

221 ☐ **THE LAW OF EASEMENTS**

MISCELLANEOUS CONSIDERATIONS

Maintenance and Repair

- The owner of the servient estate has no such obligations.
- His main duty consists of refraining from interfering with the easement owner's enjoyment of his rights.

222 ☐ **THE LAW OF EASEMENTS**

MISCELLANEOUS CONSIDERATIONS

Maintenance and Repair

- However, since the easement owner is not entitled to exclusive possession of the burdened portion of the servient estate, the servient owner can use his property in whatever manner he chooses, so long as he does not hinder the use and enjoyment of the easement.

223 ☐ **THE LAW OF EASEMENTS**

MISCELLANEOUS CONSIDERATIONS

Maintenance and Repair

- Therefore, the servient owner is not barred from making necessary repairs, and has the right to make repairs or perform maintenance task within the easement, so long as he does not inhibit the use and enjoyment of the easement by the easement owner.