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Easements: From Acquisition to Termination

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I - PRIVATE EASEMENTS

Easements are often broken down or clarified in a variety of ways. The following explanation is a helpful introduction:

Basically, an easement is the right to use the property of another. Easements come in two types: gross easements and appurtenant easements. A gross easement is a right over use of your property held by a specific individual. Appurtenant easements are a right over use of your property for the benefit of adjoining lands. Gross easements give a right over use of your property to those adjoining lands no matter who owns them.

A right of way is an easement that allows another person to travel or pass through your land. The most common form of right of way easement is a road or path through your land. The right of way easement road is meant to benefit a particular person or another parcel of land not owned by you. Right of way easements extend reasonable use for travel through others' lands to holders of the easements.

Easements fall into two categories, affirmative and negative. An affirmative easement is the most common and allows its holder to do something on another individual's land, such as cross over it. Negative easements prevent something from occurring on a person's land. For example, a negative easement on your land could prevent you from building a high structure that obstructs the view from a building on another's land.

The Restatement defines an easement as follows:

"An easement is an interest in land in the possession of another which:

- a. entitles *the owner* of such interest to a limited use or enjoyment of the land in which the interest exists;
- b. entitles him to protection as against third persons from interference in such use or enjoyment;
- c. is not subject to the will of the possessor of the land;
- d. is not a normal incident of the possession of any land possessed by the owner of the interest; and
- e. is capable of creation by conveyance."¹

¹ 2 Restatement of the Law of Property. Section 450 (1944)

An easement, including a right of way, is typically granted by one landowner to another landowner. Generally, easements are granted by will, by deed or by a contract. However, an easement can also be granted by adverse possession, which is known as a prescriptive easement. In real estate, "adverse possession" is often called "squatting." A prescriptive easement is gained by one person's open, notorious, continuous and adverse or hostile use of the land of another.

Easements only grant non-possessory rights to use others' lands; they don't grant any ownership rights to them. Right of way easements, for example, don't allow their holders to sell the land of another individual's over which they have the right to travel. Easements can also be terminated through explicit expiration, such as a right of way granted for a period of 25 years. However, an easement on a deed generally remains with the land in perpetuity.

TEXAS CASE LAW - EASEMENTS

Texas case law has defined what an easement is: a non-possessory interest in another's property that authorizes the holder to use that property for a particular purpose. *Killiam Ranch Props., Ltd. v. Webb Cty.*, 376 S.W.3d 146, 155 (Tex.App.-San Antonio 2012, pet. denied) (citing *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 700 (Tex. 2002)). An easement does not convey the property itself. *Lakeside Launches, Inc. v. Austin Yacht Club, Inc.*, 750 S.W.2d 868, 871 (Tex. App.-Austin 1988, writ denied). Except in specific instances, the grant of the easement is to be in writing. *Holden v. Weidenfeller*, 929 S.W.3d 124, 131 (Tex.App.-San Antonio 1996, writ denied); *Machala v. Weems*, 56 S.W.3d 748, 757 (Tex. App.-Texarkana 2001, no pet.).

EASEMENT BY ESTOPPEL

The equitable exception to the "in writing" requirement is in easements by estoppel. *McClung v. Ayers*, 352 S.W.3d 723, 727 (Tex. App-Texarkana 2011, no pet.); *Cleaver v. Cundiff*, 203 S.W.3d 373, 375 (Tex. App.-Eastland 2006, no pet.).

As noted in *Holden*² and recently reaffirmed in *Robinson v. Riddick*, March 30, 2016 decision, 2016 WL 1238166 (Tex. Appeals- San Antonio), there are three requirements to prove an easement by estoppel: 1) there was a representation communicated, either by word or action, to the one claiming the easement; 2) the easement holder believed the communication; and 3) the easement holder relied on the communication to his detriment. "In order to create an easement by estoppel, something must be said or done by the owner of the servient estate at the time of the grant of the dominant estate that

² *Holden* at 131.

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