A Step-by-Step Guide to Understanding Easements

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Creating And Drafting Easements With Success

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CREATING AND DRAFTING EASEMENTS WITH SUCCESS

Introduction:

There is nothing easy about easements. The law of easements has its own vocabulary, and knowing these terms provides a necessary foundation for understanding the various legal issues. Therefore, before diving into any legal analysis, we will review some key easement terms:

Easement: A legal interest or right which one party has over the land of another.

Affirmative Easement: An easement that allows the holder to do certain things on the land of another.

Negative Easement: An easement that allows the holder to prevent the owner from doing certain things on his own land.

Easement Appurtenant: An easement that benefits land owned by another and runs with said land.

Easement In Gross: An easement that benefits an individual.

Prescriptive Easement: An easement acquired through continuous, open, and adverse use over a statutory period of time.

Easement By Necessity: An easement that is necessary for access to the dominant estate after it has been created out of the servient estate.

Easement By Implication: An easement that is necessary for the reasonable enjoyment of the dominant estate after it has been created out of the servient estate.

Dominant Tenement (also known as Dominant Estate): Land that is benefited by an easement.

Servient Tenement (also known as Servient Estate): Land that is burdened by an easement.

License: A revocable right to use the property of another.

Profit: The right to take something from the land of another, such as timber, minerals, or gravel.

There are several ways by which easement rights arise. For example, easements can be acquired: 1) by an express grant; 2) by prescription; 3) by necessity; 4) by implication; and 5) by condemnation. A prescriptive easement arises if someone uses a portion of another's property without his or her permission for a statutory period of time. An easement by necessity arises when a property is landlocked and the easement over the servient estate is necessary because the dominant estate is not accessible by any other means. An easement by implication does not need to be necessary for access, but arises when an existing, open, and continuous use of one parcel is necessary for the reasonable enjoyment of the other parcel. In the case of both an easement by necessity and an easement by implication, the property benefited by the easement must have been divided from the property burdened by the easement. An easement by condemnation arises when it is taken by the government or an entity with condemnation authority that has exercised its right under eminent domain.

While a prescriptive easement, an easement by necessity, an easement by implication, and an easement by condemnation can be acquired without a written grant, an easement by express grant requires a written conveyance. Often an attorney will be asked to draft an easement into a deed or instrument that will be recorded in the applicable registry of deeds. The registry of deeds is the appropriate place for recording an interest in real property. 33 M.R.S.A. § 201 (stating that interests in real property are to be "recorded in the registry of deeds within the county where the land lies").

The Statute of Frauds requires contracts involving interests in real property to be in writing in order to be enforced by the courts. 33 M.R.S.A. § 51. Therefore, an easement by express grant should be in writing. Jolovitz v. City of Waterville, 2003 WL 22100663, (Me. Super. Aug. 26, 2003) (the court refused to maintain an action to enforce a restrictive easement against the city where the easement was not in writing). There are some exceptions to the Statute of Frauds regarding easements, including easements by necessity and easements by implication. However, with very limited exceptions, Maine courts will require that any express easement be in writing. See Fitzpatrick v. Rowell, 2004 WL 3196901 (Me Super. Nov. 18, 2004). Additional requirements are imposed under the Maine Short Form Deeds Act. See 33 M.R.S.A. § 772 et seq.

In the case of a deed or other instrument, the drafter may be asked to convey or reserve an easement. For example, Mr. A, who owns property in Maine, is transferring an abutting parcel to Mrs. B. Mr. A may convey to Mrs. B an easement over his own property for the benefit of Mrs. B's new parcel. Or, on the other hand, Mr. A may reserve an easement over Mrs. B's new parcel for the benefit of his own property.

In drafting an easement, one must keep in mind that Maine law recognizes two types of easements: appurtenant easements and easements in gross. Appurtenant easements benefit a dominant estate and therefore run with the land. Because appurtenant easements run with the land, they are passed with ownership of the property. In contrast, easements in gross are a personal interest in land that give a particular party the right to use another's land. Easements in gross are not tied to ownership of the land and generally are not assignable.[1]

In Maine, the intent of the parties will govern whether an easement is appurtenant or in gross. See Drew v. Gildersleeve, 2004 WL 2186336, *1-*2 (Me. Super. Aug. 20, 2004) (finding that the parties clearly intended to create an appurtenant easement despite vague language in the deed because the easement was necessary to access the back portion of the defendant's property that would otherwise be inaccessible). When the intent of the parties is unclear, courts have shown a preference for appurtenant easements. ALC Development Corp. v. Walker, 2002 ME 11, ¶17, 787 A.2d 770, 775 ("Easements are presumed to be appurtenant if there is a dominant tenement and there is nothing to show that the parties intended the easement to be personal."); Stickney v. City of Saco, 2001 ME 69, ¶ 33, 770 A.2d 592, 605 ("The traditional rules of construction for grants of reservations of easements required that, whenever possible, an easement be fairly construed to be appurtenant to the land of the person for whose use the easement is created.").

Drafting Easements:

Clear drafting of easements helps to prevent future disputes, which can be costly for all involved. With a few exceptions, it is almost always preferable to use precise

[1] An easement in gross is assignable when the parties clearly intend for it to be assignable. O'Donovan v. McIntosh v. Huggins, 1999 ME 71, 728 A.2d 681.

language that clearly explains the location, dimensions, type, purpose, and parties to the easement. The case law demonstrates that Maine courts have a preference for determining that easements are appurtenant to land. Therefore, if one is intending to convey an easement in gross, it is particularly important to draft the easement using clear language.

An example of an easement in gross:

> "Mr. A grants to Mrs. B an easement in gross, in common with others, five (5) feet in width, for pedestrian access only, not including vehicular access or utilities, over the easterly side of the driveway located on Mr. A's property in Camden, Maine, as depicted on the Plan attached as *Exhibit A*. The purpose of this easement in gross is to provide pedestrian access from the public way to the low watermark of Megunticook Lake, as it may exist from time to time. The easement is exclusive to Mrs. B and is neither transferable nor assignable."

This easement clearly states the following information: 1) *the parties*: Mr. A conveys to Mrs. B; 2) *the type of easement*: non-transferable easement in gross; 3) *the dimensions*: five feet in width; 4) *the location*: from the public way to the low watermark of the lake, as depicted on attached plan; and 5) *the purpose*: for pedestrian access only.

Utilities are another place where parties must be careful. In the past, an easement "for all purposes" could include utilities. Ware v. Public Service Co. of N.H., 412 A.2d 84 (Me. 1980) (the Court held that a grant of the right to use a road "for all purposes" included the right to install utilities);[2] Guild v. Hinman, 1997 ME 120, ¶6, 695 A.2d 1190, 1192-93 (citations omitted) (the Court held that the original parties did not contemplate that the easement would allow for utility services relating to residential use because the historical use of the land was for agricultural purposes and timber harvesting). However, these cases are no longer applicable because the Maine legislature passed a statute that requires utility rights to be expressly granted. 33 M.R.S.A. § 458.[3] Therefore, when drafting an easement, it is essential to specify whether the dominant tenement has the right to install utilities. Additionally, consider specifying what types of

[2] Fine Line, Inc. v. Blake, 677 A.2d 1061, 1064 (Me.,1996) ("We did not, however, hold [in Ware v. Public Service Co of N.H.] that the right to install utilities should be an implied use of a right of way absent circumstances surrounding the grant supporting that conclusion.").

[3] This statute applies to easements established on or after January 1, 1990.

utilities, including electrical, telephone, and/or other aboveground or belowground utility lines.

Also, when drafting an easement, consider whether exercising the easement rights will result in wear and tear or other damage to the servient tenement. If damage may occur, the easement should specify which party has the obligation to maintain and repair the easement area. Liability is another consideration that the drafter may want to address. When representing the holder of the servient estate, I will usually seek an indemnity for injuries or damages that arise from use of the easement.

Relocation rights may also need to be addressed. Unless expressly set forth in the instrument granting the easement, neither party may unilaterally relocate the location of the easement. Davis v. Bruk, 411 A.2d 660, 664 (Me. 1980) ("[As] a general rule, the location of an easement, when once established, cannot be changed or the easement relocated without the mutual consent of the owners of the dominant and servient estates."). When representing the servient tenement, I almost always recommend that the client consider retaining the right to relocate the easement burdening his or her property. I would recommend this even if the total cost of the relocation must be borne by the servient estate. This relocation right may be the difference in being able to develop all or a portion of the property burdened by the easement in the future. For example, if Mr. A granted an easement for access over his property to Mrs. B, Mr. A should retain the right to relocate the easement area so long as Mrs. B's access is not detrimentally affected. This will allow Mr. A to develop his property in the future and move the easement area as necessary.

In addition to repair and maintenance obligations, the parties should try to specify what is permissible with regards to improvements. If the parties are not clear on the scope of future improvements, the servient tenement may be in for some surprises down the road. For example, unless authorized in the granting instrument, the holder of an easement generally cannot pave an unpaved road. See Parmley v. Bernard, 2002 WL 1974067 (Me.Super. June 7, 2002). The ability to make future improvements will affect the scope of the easement. "The use of an easement 'may vary from time to time with what is necessary to constitute full enjoyment of the premises' and an express easement may accommodate modern developments. Any changes in use, however, must be

consistent with the purpose for which the easement was originally granted." Guild v. Hinman, 1997 ME 120, ¶6, 695 A.2d 1190, 1192-93; See Crispin v. Town of Scarborough, 1999 ME 112, 736 A.2d 241 (the Court concluded that "the language of the dedication unambiguously anticipated some future development of the servient property" and the conduct of the parties demonstrated that the nature of that future development included large-scale commercial use such as Maine Life Care); Lindsey Greene Condominium Ass'n v. Sansoucie, 2006 WL 2002049 (Me. Super. Ct. July 5, 2006) (the Court found that current use of right of way for access to a popular tavern/cantina was within the scope of the original grant of easement rights; property was used for lower impact commercial use – rental of seasonal cabins – at the time of grant).

While Maine courts will not permit an overburdening of an easement through a substantial change in the nature of its use (e.g., from single family residential to large scale commercial), the courts will protect a grantee's rights to a reasonable expansion of use so long as it is qualitatively of the same nature (e.g., small scale commercial to large scale commercial). In Ware, the Court stated:

> While the use cannot be enlarged beyond the scope intended by the parties as manifested by the natural meaning of the stated terms of the grant, yet, deeds will not be so narrowly construed as to prevent the beneficial use by the grantee of what is granted, in the manner and for the purposes fairly indicated by the easement grant as interpreted under all the circumstances existing at the time of the execution of the deed.

412 A.2d at 86; Rankin v. Jewett, 2006 WL 2959664 at *4 ("[T]he court finds that although the present use of the easement may constitute something of an increase over its past use, the magnitude of that increase – and the absence of a qualitative change in that use – is not sufficient to create an unreasonable burden on the Rankins' property."). Because an easement may outlast the original drafters, the parties (and the servient estate holder in particular) should make sure that the intent of the easement is clear. For example, an easement for access given to accommodate a small bed and breakfast should specify that it is limited to a certain number of guests/invitees. This will protect the servient estate holder if 50 years later the bed and breakfast wants to become a 60 room hotel.

When drafting an easement, it is helpful to think of the potential disputes that may arise in the future, and if the parties find themselves in litigation, how these disputes likely will be viewed by a court. Under Maine law, the intent of the original parties controls the interpretation of an instrument granting an interest in real property. Belanger v. Belanger, 2005 WL 2727097, *2 (Me. Super. Ct. 2005) ("When interpreting a deed, the Court first looks for 'the controlling intent of the parties on the face of the deed.'") (citation omitted). When a granting instrument clearly defines the property interest that is conveyed, Maine courts presume that the document represents the intention of the parties. See Green v. Lawrence, 2005 ME 90, ¶ 7, 877 A.2d 1079, 1082 ("if 'the language of a deed is unambiguous, it will guide interpretation of the parties' intent.'"); Historic Maine Props. v. Chaplin, 2005 WL 2723439, *2 (Me. Super. Ct. May 18, 2005) ("If there is no ambiguity, the words of the deed alone determine the parties' intent."). When a granting instrument is ambiguous, however, courts will look to extrinsic evidence to determine the intent of the parties at the time the instrument was executed. See Lloyd v. Benson, 2006 ME 129, ¶ 8, 910 A.2d 1048, 1051; McGeechan v. Sherwood, 2000 ME 188, ¶ 24, 760 A.2d 1068, 1075; Saltonstall v. Cumming, 538 A.2d 289, 290 (Me.1988) (When "the purposes of an express easement are not specifically provided, they are to be determined by the presumed intent of the parties at the time the grant is made. The parties' presumed intent must be determined 'in light of the circumstances surrounding and leading to the execution of the deed.'"). Again, it is best to use clear and precise language as it can be difficult or impossible to determine the intent of the original parties decades or centuries later.

Clear drafting has numerous benefits. First, it greatly reduces the likelihood of a dispute arising. Second, if a dispute should arise, it makes it less likely that the court will have to rely on extrinsic evidence, which may be difficult and costly to obtain. Therefore, parties can save themselves, and their heirs and assigns, significant time, cost, and heartburn by having a professional draft easements using technical and unambiguous language.

Drafting Exercises:

Take a few minutes to practice your drafting skills by identifying some of the problems with the following grants and reservations of easements. After you have made a list of some of the major problems, take a stab at redrafting the easements so that they include the critical information that will enable the parties to avoid a dispute down the road:

1) Mr. A, his heirs, successors, and assigns may park cars on the northerly portion of Lot 2 adjacent to Mr. A's driveway.

2) Mrs. B reserves an easement for all purposes, including utilities, across Lot 1.

3) Company A reserves the right to cross and recross the land herein conveyed for the purpose of hauling timber and all other purposes related thereto.

4) Together with an easement fifty (50) feet in width for utility lines and accompanying supports.

Next, pretend a client has come to you with the issue below. What would you want to address in drafting an easement for the client?

Client is going to purchase 1,000 acres of forestland for timber harvesting operations. The client needs to cross Mr. and Mrs. Smith's property in order to access the 1,000 acres from the public road. They are willing to pay $10,000 for easement rights over the Smith parcel.

Termination Of Existing Easement

Submitted by Charles M. Katz-Leavy

TERMINATION OF EXISTING EASEMENT

Easements can be terminated in numerous ways, as the Supreme Judicial Court of Maine has noted:

> An easement can be extinguished in five ways: (1) by expiration; (2) by an act of the dominant owner (either by release or abandonment); (3) by the act of the servient owner (by prescription or conveyance to a bona fide purchaser without notice); (4) by conduct of both parties (merger or estoppel); or (5) by eminent domain, mortgage, foreclosure, or tax sale.

Stickney, 2001 ME 69, 770 A.2d at 607 (citing Great Cove Boat Club v. Bureau of Public Lands, 672 A.2d 91, 94 (Me.1996)). Despite the language above, a conveyance to a bona fide purchaser without notice does not terminate an easement in Maine. In Maine, an appurtenant easement runs with the land and will continue even if a transferring instrument fails to specifically include it. Because property can be burdened by an easement even if the deed into the current owner failed to recite it, a thorough title search should always be performed prior to the purchase of any rights in real property.

In addition to the methods outlined by the Supreme Judicial Court, other authors have listed additional means of terminating easements. The following is a summary of the most common methods for easement termination in Maine.

1. Expiration

An easement may terminate based on the occurrence of an event. As discussed in the section on drafting easements, an easement by express grant is conveyed via a written document and may contain terms and conditions such as maintenance obligations. Additionally, the drafter may include a specific event that will trigger the termination of the easement. For example, the easement may specify that non-use or misuse will cause a termination. Additionally, the instrument may state that the easement will terminate upon a date certain.

2. Release

When an easement is terminated by release, the dominant estate grants a release of its easement rights to the servient estate. A termination by release requires a written document and is only effective if all of the dominant estate holders join in the release. Therefore, careful title work is required to determine all of the interest holders. When drafting a termination of easement rights, an attorney should be careful to clearly describe

the properties involved, the rights that are being released, and all of the parties to the agreement.

3. Abandonment

Easement rights can be lost if they are abandoned. However, non-use alone is insufficient to constitute abandonment. Instead, non-use must be coupled with affirmative acts manifesting intent to relinquish the easement rights. Rutland v. Mullen, 2002 ME 98, ¶ 10, 798 A.2d 1104, 1109 ("An implied private easement is not abandoned by mere nonuse. Rather, acts adverse to the dominant estate must 'indicate an intention that [the easement] shall never be used [for its intended purpose].'") (citing Bartlett v. City of Bangor, 67 Me. 460, 466 (1878)); Canadian National Railway v. Sprague, 609 A.2d 1175, 1179 ("To prove abandonment a party must show 1) a history of nonuse coupled with an act or omission evincing a clear intent to abandon, or 2) adverse possession by the servient estate.").

Unopposed acts by the servient estate to block the dominant estate's use of the easement, coupled with non-use of the easement by the dominant estate, can be used to establish that the easement is terminated. For example, if the servient estate puts up a fence or locked gate that prevents the dominant estate from using the easement area, and the dominant estate does not use the easement area for many years, a court may find that the easement has been extinguished due to abandonment. In short, the dominant estate is estopped from denying abandonment of the easement because of its nonuse coupled with the affirmative acts of the servient estate.

4. Paper Streets

Parties will often have private easement rights in paper streets. A paper street is a way that appears on paper – usually a subdivision plan – but has never been constructed or used. Additionally, a paper street is a way that has been offered for dedication to a town or city but never accepted by the municipality. Easement rights in a paper street will terminate if a municipality does not accept an offer of dedication within twenty (20) years. 23 M.R.S.A. § 3031. Additionally, easement rights in a paper street will terminate if the paper street "is not constructed within 20 years from the date of recording of the plan, and if the private rights created by the recording of the plan are not constructed and utilized as private rights within that 20-year period." 23 M.R.S.A. § 3031. Finally, a

paper street shown on a subdivision plan recorded in the registry of deeds prior to September 29, 1987 is deemed to have been vacated on the later of 15 years after the date of the recording of the subdivision plan or September 29, 1997." 23 M.R.S.A. § 3032.

5. Vacation

A municipality also can terminate private easement rights in a paper street that has been offered for dedication by vacating its interests in the paper street prior to the expiration of the twenty (20) year period. 23 M.R.S.A. § 3032. In order to vacate its interest, the municipality must follow the procedure outlined in 23 M.R.S.A. § 3027.

6. Merger

"Unity of title to the dominant and servient estate, of course, extinguishes an easement." LeMay v. Anderson, 397 A.2d 984, 988 n.3 (Me. 1979). Because a fee owner cannot have an easement over his own land in Maine, an easement is extinguished when the dominant and servient estates come under common ownership. In order for merger to extinguish the easement, the ownership of both parcels must be exactly the same. Therefore, if John Doe individually owns 100% of Parcel A and acquires Parcel B as tenants in common with his brother James Doe, the easement is not terminated.

One mechanism for property owners to avoid extinguishing an easement is to hold title to the two properties under different names. For example, assume the owner of Parcel A has an appurtenant easement over Parcel B. If Jane Doe owns title to Parcel A and acquires Parcel B in her own name, the easement is extinguished by merger. However, if Jane Doe creates Doe, LLC and the LLC takes title to Parcel B, then the easement is not extinguished. Additionally, when the dominant estate and the servient estate are mortgaged to different lenders, or if one of the estates is not mortgaged, the easement is not extinguished when the parcels come under common ownership.

7. Termination of Necessity

When an easement by necessity exists, the end of the necessity terminates the easement. LeMay, 397 A.2d at 989 ("The recognized rule in Maine with respect to ways of necessity is that termination of the necessity extinguishes the easement."). The following scenario illustrates this point:

> John Doe owns Parcel A. Mr. Doe divides out ten acres from Parcel A and sells it to his friend Billy Bean ("Parcel B"). Parcel B does not abut a public road and its only legal access is over Parcel A. Therefore, Billy

> Bean has an easement by necessity over Parcel A. Five years later, Mr. Bean purchases easement rights for access over Parcel C, which lies in between Parcel B and the public way. Because Mr. Bean now can access the public way over Parcel C, his easement by necessity over Parcel A is extinguished.

In order for the easement to terminate, the new access must be legal. Therefore, the fact that Mr. Bean previously could have accessed the public road by illegally crossing Parcel C would not have been sufficient. Only when Mr. Bean acquired legal access over Parcel C did the easement over Parcel A terminate. Unlike easements by necessity, easements by implication do not terminate when the dominant estate gains alternative access.

8. Eminent Domain

The government can take an easement over private property using its powers of eminent domain. Additionally, a governmental taking of a property that is burdened by an easement can terminate the easement. See U.S. v. Certain Land in City of Augusta, Kennebec County, State of Me., 220 F.Supp. 696, 700 -701 (D.C.Me. 1963) (holding that "the extinguishment of an equitable servitude under the power of eminent domain is the taking of private property for public use for which compensation must be paid"); Great Cove Boat Club, 672 A.2d at 94.

9. Foreclosure of Prior Liens

If an easement is granted over mortgaged property, the mortgage lien is senior to the easement encumbrance. As a result, a subsequent foreclosure of the mortgage will wipe out the easement burdening the property. The foreclosing party must join the holder of any public utility easements as a party in interest. 14 M.R.S.A. § 6321.

10. Destruction of the Servient Tenement

The complete destruction of the servient estate will terminate an easement because nothing remains upon which the easement can operate. The Supreme Judicial Court of Maine acknowledged this in Bonney v. Greenwood:

> It is among the essential qualities of every easement that there are two distinct tenements or estates – the dominant, to which the right belongs, and the servient, upon which the obligation is imposed. Hence an easement, properly so called, or right appurtenant to one tenement to the enjoyment of some privilege in neighboring land, may survive the destruction of a part of the servient estate, when there is anything remaining upon which the dominant estate may operate.

96 Me. 335, 52 A, 786, 789.

11. Death of a Party

As discussed in the section on drafting easements, an easement in gross is an easement that benefits a particular party rather than other land. Additionally, easements in gross usually are not assignable. Therefore, in the case of an easement in gross, the death of the dominant party will terminate the easement. This scenario may be applicable where the dominant estate is an individual. However, often an easement in gross is held by a corporation such as a power company or telephone company, and these easements generally will last much longer than a lifetime.

Suggested Reading

There are numerous sources that provide additional information on easements in Maine. The following are some of the first places to look:

- Hermansen, Knud E. & Donald R. Richards, Maine Roads and Easements. Augusta, ME: Maine State Bar Association, 2003.
- Cowan, Caspar F., Maine Real Estate Law and Practice, 2d. Vol. 1, Maine Practice Series) Egan, MN: Thomson West, 2007.
- Creteau, Paul C., Principles of Real Estate Law, rev. Charles R. Oestreicher, Portland, ME: Castle Pub., 1977.
- Restatement (third) of the Law, Property: Servitudes, St. Paul, MN: American Law Institute, 2000.