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Easements

I. Introduction

§6.1 Simply put, an *easement* is an interest in real estate that gives one person the right to use another's land for a specified purpose. *Eyde v State*, 82 Mich App 531, 267 NW2d 442 (1978). The focus is on use rather than ownership, and an easement does not displace the general possession of the landowner but instead entitles the holder of the easement to occupy the burdened property only to the extent necessary to fully enjoy the rights conferred by the easement. *Morrill v Mackman*, 24 Mich 279 (1872); *Schadewald v Brulé*, 225 Mich App 26, 570 NW2d 788 (1997).

Easements are common in Michigan real estate transactions. *Bowen v Buck & Fur Hunting Club*, 217 Mich App 191, 550 NW2d 850 (1996). They are necessary to most developments. Water, sewer, electric, communications, and gas utilities are usually placed within easements. In addition, easements are often granted between neighbors and appear of record with respect to most parcels of Michigan real estate. Easements involve complex legal principles; they cannot be treated lightly.

Because the simple definition set forth above and others like it that are commonly used do not adequately convey the complexity of the concept, a broader definition is necessary. In *Nicholls v Healy*, 20 Mich App 393, 174 NW2d 43 (1969), *appeal after remand,* 37 Mich App 348, 194 NW2d 727 (1971), the Michigan Court of Appeals said that an easement is an incorporeal hereditament that is a liberty, privilege, or advantage without profit that the owner of one parcel of land may have in lands of another or a right that one proprietor has to some profit, benefit, or beneficial use out of, in, or over the estate of another proprietor.[1] "Once granted, an easement cannot be modified by either party or unilaterally. The owner of an easement cannot materially increase the burden of it on the servient estate or impose thereon a new and additional burden." *Schadewald,* 225 Mich App at 36 (citations omitted).

Perhaps the best definition of *easement* as used in real estate law is found in Restatement of Property §450:

> An easement is an interest in land in 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.

See generally Weaver, *Easements are Nuisances,* 25 Real Prop Prob & Tr J 103 (1990).

II. Easements Distinguished from Other Interests

A. Licenses

§6.2 Easements must be distinguished from their very close non–real estate counterpart, *licenses,* which also involve the use of one person's land by another for a specified purpose. A license grants permission to do something on the land of the licensor without granting any permanent interest in the realty. *McCastle v Scanlon*, 337 Mich 122, 59 NW2d 114 (1953); *McClintic-Marshall Co v Ford Motor Co*, 254 Mich 305, 236 NW 792 (1931). Licenses are revocable at the will of the licensor, even if supported by consideration and even if the licensee spends money in reliance upon the license. *McCastle.* The key to the distinction between easements and licenses, then, is that an easement constitutes an interest in real estate, but a license does not.[2] *Forge v Smith*, 458 Mich 198, 580 NW2d 876 (1998). *Compare Epworth League Training Assembly v Olney*, 136 Mich 50, 98 NW 860 (1904) (privileges granted in contract that, if license, would have been revoked by conveyance held to be permanent easement in view of their nature), *with Ladd v Teichman*, 359 Mich 587, 103 NW2d 338 (1960) (broker entitled to commission for sale of easement since easement is real property right that constitutes "parcel" of land). Thus, creating a license does not require the formality that is necessary to create an interest in real estate. *Evans v Holloway Sand & Gravel, Inc*, 106 Mich App 70, 308 NW2d 440 (1981). In addition, the statute of frauds, although applicable to easements, does not apply to licenses. *Forge.* Licenses may be written or oral and may be created with or without consideration. *Morrill v Mackman*, 24 Mich 279 (1872). In *Morrill,* the court said:

> A license is a permission to do some act or series of acts on the land of the licensor without having any permanent interest in it: [3 *Kent's Commentaries,* p. 452; *Cook v Stearns*, 11 Mass 533, 538 (1814); *Woodbury v Parshley*, 7 NH 237 (1834); *Prince v Case*, 10 Conn 37 (1935); *Wolfe v Frost*, 4 Sandf Ch 72, 91 (NY Ch)]. It is founded on personal confidence, and therefore not assignable: 3 Kent, 452; *Brown on Stat. of Frauds,* § 22. It may be given in writing or by parol; it may be with or without consideration; but in either case it is subject to revocation, though constituting a protection to the party acting under it until the revocation takes place. Where nothing beyond a mere license is contemplated, and no interest in the land is proposed to be created, the statute of frauds has no application, and the observance of no formality is important. But there may also be a license where the understanding of the parties has in view a privilege of a less precarious nature. Where something beyond a mere temporary use of the land is promised; where the promise apparently is not founded on personal confidence, but has reference to the ownership and occupancy of other lands, and is made to facilitate the use of those lands in a particular manner and for an indefinite period, and where the right to revoke at any time would be inconsistent with the evident purpose of the permission; wherever, in short, the purpose has been to give an interest in the land, there may be a license but there will also be something

> more than a license, if the proper formalities for the conveyance of the proposed interest have been observed. What that interest shall be called in the law may depend upon the character of the possession, occupancy or use, the promisee is to have, the time it is to continue, and perhaps upon the mode in which the compensation, if any, is to be made therefor. It may be an easement or it may be a lease hold interest; or if the proper grant or demise has not been executed for the creation of either of these, the permission to make use of the land may still constitute a protection to the party relying upon it, until withdrawn.

24 Mich at 282–283.

A license may be created when the kind of interest that would normally be the subject of an easement is granted but the formal requirements for the creation of an easement are not met. *McCastle.* In *Troff v Boeve*, 354 Mich 593, 595, 93 NW2d 311 (1958), the Michigan Supreme Court held that when a preliminary agreement for the sale of real estate provided that the "'[d]riveway on north [was] to be used as long as available,'" only a license was created, despite the plaintiff's claim of an easement, principally because of the statute of frauds and the apparently permissive impact of the words used. *See Zemon v Netzorg*, 247 Mich 563, 226 NW 242 (1929) (driveway established by neighboring property owners is license); *Nowlin Lumber Co v Wilson*, 119 Mich 406, 78 NW 338 (1899) (permission granted by letter to construct logging roadway is license). *See generally* MCL 566.106 (statute of frauds).[3] *But see Hunter v Slater*, 331 Mich 1, 49 NW2d 33 (1951) (court of equity imposed permanent license from intention of parties, lack of formal requisites notwithstanding).

Common examples of licenses include baseball or theater tickets and parking rights.

In the words of the Michigan Supreme Court, "an 'irrevocable license' by estoppel cannot be created in Michigan on the basis of an oral promise because recognizing such a conveyance would violate the statute of frauds." *Kitchen v Kitchen*, 465 Mich 654, 658, 641 NW2d 245 (2002). In *Kitchen,* the court considered a dispute between two brothers, Robert and William, who had been equal owners of a large potato farm. Robert owned and resided on a parcel of property bounded on three sides by the farm. The farm operation planted the northern section of Robert's parcel and crossed it with an arm of the farm's irrigation system. Following a dispute between the brothers, William purchased Robert's interest in the potato farm. The purchase agreement did not address the use of Robert's property. Following the buyout, Robert decided that he did not wish the farm to use his land and prevented it from planting crops and using the irrigation system there. The farm asserted that an oral promise Robert had made concerning the use of the northern section of his parcel gave rise to an irrevocable license by estoppel. Specifically, the plaintiffs' complaint alleged that Robert orally represented that the irrigation system could cross his land in perpetuity. The supreme court concluded that the plaintiffs' claim for an irrevocable license based on an alleged oral promise must fail because it was barred by MCL 566.106. Distinguishing oral and written licenses, which are terminable at will by the grantor and hence valid (since these licenses, because of their revocability, do not create an interest in lands), the court noted that an irrevocable license would constitute an "interest in lands" that may not be granted orally in compliance with the statute of frauds, as it would involve a permanent right to use the property. Stating that Michigan does not permit an interest

in land to transfer only on the basis of estoppel, the court also rejected the plaintiffs' estoppel-based claim that, under Restatement of Property §519(4), a licensee who makes expenditures in reliance on representations about the license's duration may continue to use the license to realize the value of the expenditures. The court also said:

> We reaffirm that a license may be granted orally, but hold that the oral license is necessarily revocable at the will of the licensor without regard for any promised duration. Neither a written "license" that evidences a promised duration nor the oral conveyance of an intended permanent interest in land is an "irrevocable license." Instead, the grantor of such an intended interest, in effect, orally conveys an easement. Although one can grant an express, irrevocable easement, it must be evidenced by a writing manifesting a clear intent to create an interest in the land.

465 Mich at 661 (citations omitted).[4]

A document granting a public electric utility the right to erect and maintain utility poles across a designated piece of property in perpetuity is an easement across the property rather than a license to use the property. *Mumaugh v Diamond Lake Area Cable TV Co*, 183 Mich App 597, 456 NW2d 425 (1990).

MCL 600.2944 allows a court to grant a limited license for an adjoining owner or lessee to enter a neighbor's property to make improvements or repairs to the owned or leased property that could not reasonably be made by the owner or lessee without such entry.

Because licenses are personal property, they may not be sold or transferred. *Sweeney v Hillsdale County Bd of Rd Comm'rs*, 293 Mich 624, 292 NW 506 (1940). Licenses are revocable at the will of the licensor, even if supported by consideration and even if the licensee spends money in reliance on the license. *McCastle; Marshall v Heselschwerdt*, 304 Mich 664, 8 NW2d 871 (1943); *Nowlin Lumber Co.* A license coupled with an interest, however, is not revocable at will.

> While licenses are generally revocable at will, a license coupled with an interest is not. However, a license coupled with an interest is a privilege "incidental to the ownership of an interest in a chattel personal located on the land with respect to which the license exists." This privilege is distinguished from licenses incidental to an interest in land. In order to be irrevocable, the latter license must constitute an easement appurtenant.

Forge, 458 Mich at 210–211 (citing *Marshall;* Restatement of Property §513; and *Powers v Harlow*, 53 Mich 507, 513, 514, 19 NW 257 (1884)).

When the licensor conveys property over which a license has been granted, the license is automatically terminated. *Fletcher Oil Co v Bay City*, 346 Mich 411, 78 NW2d 205 (1956). When such a license is revoked, however, the continued use of the property by the former licensee could ripen into a prescriptive easement. See §6.11–§6.18.

B. Tenancies and Leases

§6.3 According to the Michigan Supreme Court, an easement must also be distinguished from a tenancy. In the words of Justice Cooley:

> An easement is the right which one proprietor has to some profit, benefit or lawful use, out of, or over, the estate of another proprietor: [*Ritger v Parker*, 62 Mass 145 (1851)]; *Washb. on Easements, 4.* It does not displace the general possession by the owner of the land, but the person entitled to the easement has a qualified possession only, so far as may be needful for its enjoyment: *Washb. on Easements, 8.* But there may also be a tenancy in respect to the lands flowed, or to the right to flow. A tenancy exists where one has let real estate to another, to hold of him as landlord. When duly created and the tenant put in possession, he is owner of an estate for the time being, and has all the usual rights and remedies of an owner to defend his possession. But a tenancy does not necessarily imply a right to complete and exclusive possession; it may, on the other hand, be created with implied or express reservation of a right to possession on the part of the landlord, for all purposes not inconsistent with the privileges granted to the tenant. One who on the land of another, puts in a single crop on shares, is held not to be a lessee: [*Hare v Celey*], Cro. Eliz., §143. But this does not seem to be because his possession is not exclusive; but because, it being for the interest of the owner of the land that they should be tenants in common of the growing crop, their contract will be presumed to have contemplated that relation. See [*Bishop v Doty*, 1 Vt 37 (1827); *Bradish v Schenck*, 8 Johns 151, 1811 NY LEXIS 96 (1811); *De Mott v Hagerman*, 8 Cow 220, 1828 NY LEXIS 293 (1828)]. And in the leading case, while it is held that there is no tenancy if the agreement is for a single crop, it is said it will be "otherwise if it be for two or three crops:" *Hare v. Celey,* Cro. Eliz., §143. Though doubtless the owner of the land might, in that case equally as in the other, retain the general possession, while the cultivator would have the qualified possession essential for his purposes. In any case, the intent of the parties, as gathered from their contract, would be the governing consideration in determining the nature of the relation between them, and the proposed duration of that relation would be one of the most important circumstances to be considered in arriving at that intent.

Morrill v Mackman, 24 Mich 279, 284–285 (1872).

In *United Coin Meter Co v Gibson*, 109 Mich App 652, 655–656, 311 NW2d 442 (1981), the court distinguished a license from a lease, holding:

> A license is a permission to do some act or series of acts on the land of the licensor without having any permanent interest in the land … . A lease, on the other hand, gives the tenant possession of the property leased and exclusive use or occupation of it for all purposes not prohibited by the terms of the lease.

Accord Macke Laundry Serv Co v Overgaard, 173 Mich App 250, 433 NW2d 813 (1988) (also noting that valid lease must contain parties' names, adequate description of premises, amount of rent, and length of term).

III. Types of Easements

§6.4 There are two types of easements: easements appurtenant and easements in gross. An *easement appurtenant* serves or benefits one parcel of land by passing over or burdening another. An easement appurtenant is incident to and necessarily connected with the use or enjoyment of the benefited parcel, and it passes with the benefited property when the property is transferred. *See McClintic-Marshall Co v Ford Motor Co*, 254 Mich 305, 236 NW 792 (1931). *See generally* Michigan Land Title Standards 5th 14.1. See §6.25. An easement appurtenant is incapable of existence separate and apart from the particular land to which it is annexed. *Schadewald v*

Brulé, 225 Mich App 26, 570 NW2d 788 (1997). The land served or benefited by an easement appurtenant is called the dominant tenement. The land burdened by an easement appurtenant is called the servient tenement. *Rusk v Grande*, 332 Mich 665, 52 NW2d 548 (1952); *Hasselbring v Koepke*, 263 Mich 466, 248 NW 869 (1933); *Schadewald.*

An *easement in gross* is granted for the benefit of a particular person. An easement in gross is personal, most commonly arises in connection with utility companies and railroads, and may not be transferred except by a utility or railroad. *Johnston v Michigan Consol Gas Co*, 337 Mich 572, 60 NW2d 464 (1953) (citing Restatement of Property §489); *Stockdale v Yerden*, 220 Mich 444, 190 NW 225 (1922). *See generally* Michigan Land Title Standards 5th 14.2.

Although the courts of some states do not recognize easements in gross,[5] Michigan courts do. In *Smith v Dennedy*, 224 Mich 378, 381, 194 NW 998 (1923), the court described and contrasted easements in gross and easements appurtenant:

> "An easement appurtenant is defined as an incorporeal right, which, as the term implies, is attached to and belongs to some greater or superior right; something annexed to another thing more worthy, which passes as incident to it. Easements appurtenant inhere in the land, concern the premises, and are necessary to the enjoyment thereof. They are incapable of existence separate and apart from the particular messuage or land to which they are annexed, there being nothing for them to act upon. They are in the nature of covenants running with the land, attach to the land, to which they are appurtenant, and pass by a deed of conveyance … ."
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> "Under the rule that there can be no easement without a distinct dominant tenement, it is said that there can, in strictness, be no such thing as an easement in gross. But there is a class of rights which one may have in another's land without their being exercised in connection with the occupancy of other lands, and they are therefore called rights or easement in gross, and in such cases the burden rests upon one piece of land in favor of a person or an individual; the principal distinction between an easement proper, that is an easement appurtenant, and a right in gross is found in the fact that in the first there is and in the second there is not a dominant tenement … ."

(Quoting 19 CJ *Easements* §§4, 5 (1920)). Michigan law does, however, favor easements appurtenant over easements in gross, and "[a]n easement will never be presumed to be a mere personal right where it can fairly be construed to be appurtenant to some other estate." *Von Meding v Strahl*, 319 Mich 598, 610, 30 NW2d 363 (1948); *accord Todd v Nobach*, 368 Mich 544, 118 NW2d 402 (1962). Courts look at surrounding circumstances if an easement is not expressly appurtenant or in gross; if the easement in question relates in some way to a particular parcel of property, it is nearly always deemed appurtenant. *Myers v Spencer*, 318 Mich 155, 27 NW2d 672 (1947); *Smith.*

IV. Creation of Easements

A. Generally

§6.5 An easement may be created either by a grant or another conveyance or by operation of law. *Forge v Smith*, 458 Mich 198, 580 NW2d 876 (1998) (citing *Troff v Boeve*, 354 Mich 593, 93 NW2d 311 (1958)). The court in *Forge* noted that "[i]n order to create an express easement, there must be language in the writing mani-

festing a clear intent to create a servitude. Any ambiguities are resolved in favor of the use of the land free of easements." 458 Mich at 205 (footnotes omitted); *see also Myers v Spencer*, 318 Mich 155, 27 NW2d 672 (1947). *See generally Michigan State Highway Comm'n v Canvasser Bros Bldg Co*, 61 Mich App 176, 232 NW2d 351 (1975).

Because an easement is an interest in real estate, it falls within the statute of frauds, and if created by a grant or conveyance, the grant or conveyance must be in writing.[6] *Myers*; *Burling v Leiter*, 272 Mich 448, 262 NW 388 (1935). Language in the grant must manifest a clear intent to create a servitude. *Ditmore v Michalik*, 244 Mich App 569, 582, 625 NW2d 462 (2001). An easement may not be created by an oral promise; and in Michigan, an easement may not rest on estoppel. *Kitchen v Kitchen*, 465 Mich 654, 641 NW2d 245 (2002). See §6.20. If the grant or conveyance is not in writing, a license will probably be created. *Cf. Morrill v Mackman*, 24 Mich 279 (1872). See generally §6.2 and §6.6. However, part performance may remove an oral easement agreement from the statute of frauds. *Kent Furniture Mfg Co v Long*, 111 Mich 383, 69 NW 657 (1897).

B. By Written Instrument

1. Express Grant or Reservation; Mortgage

§6.6 An easement may be created by a number of written instruments. *See generally* Michigan Land Title Standards 5th 14.6. In an express grant, for example, which is similar to a deed, the grantor creates an easement across an identified tract of real estate for the benefit of another tract of real estate or, in the case of an easement in gross, for the benefit of a particular person. Such a grant should be prepared just as carefully as a deed and be in recordable form and recorded to protect the interests of the owners of both the dominant and servient tenements. *Cf. Harr v Coolbaugh*, 337 Mich 158, 59 NW2d 132 (1953); *Haab v Moorman*, 332 Mich 126, 50 NW2d 856 (1952); *Hodgeson v Genesee County Drain Comm'r*, 52 Mich App 411, 217 NW2d 395 (1974). If a grant is not recorded, a subsequent bona fide purchaser takes subject to the easement only if it is visible. *Murphy Chair Co v American Radiator Co*, 172 Mich 14, 137 NW 791 (1912).

An easement may be created by an express reservation in another document of conveyance. For example, at the time a parcel of property is conveyed by its owner, the owner may reserve an easement over it for himself or herself or for the benefit of other property he or she owns. *See generally* Michigan Land Title Standards 5th 14.7. In *Chapdelaine v Sochocki*, 247 Mich App 167, 635 NW2d 339 (2001), a property owner sold the front portion of his property but retained ownership of the back portion. The selling property owner had inserted a provision in the purchase agreement requiring, as a condition of the sale, an access easement to the retained back parcel. However, no reservation was incorporated into the warranty deed conveying the front parcel. The court concluded that the easement language in the purchase agreement "was sufficient evidence of the intent of the parties to create plaintiff's right to an easement over defendants' property." *Id.* at 170.

In *Forge v Smith*, 458 Mich 198, 580 NW2d 876 (1998), the supreme court considered whether a claimed express easement failed as a matter of law to satisfy the requirements of the statute of frauds. The defendants in the case included a brother