

**Property, Servitudes/Easements- pp. 667- 677**  
**November 2, 2006**  
**Crusto's Socratic Dialogue**

**1. Please provide an Analytical Overview of the Topic.**

There are two types of land use restrictions, the one is public or zoning and the other is private or servitudes. Servitudes are private agreements between real property owners, usually involving two or more parcels of land, for the purpose to increase the total value of all the parcels involved. Often, landowners desired that these arrangements or agreements be not merely contracts between themselves but that the arrangements bind on and be enforceable against successors (subsequent owners) of the two or more parcels. For example, if A and B might have agreed for a nominal sum (\$10) paid by A to B to allow A a license to cross B's land to get to a public highway. But if A wanted to permanently increase her land by acquiring a permanent easement of right of way across B's land (a non-possessory interest) then A might have negotiated for a right of way in which A paid B a greater sum (\$200). If an easement were created, A (and those to whom A sold her land to a subsequent owner) would have the permanent right to cross B's land (and a right of way over the land when B sold to a subsequent owner). Or a real estate developer might create a subdivision of land in which the new owners are restricted to residential use only. **Most importantly, the majority servitudes are created in writing, pursuant to the Statute of Frauds, by deed and for valuable consideration, but as we will see many are created in other ways. In addition, easements may be in fee simple (perpetual duration), for life, or for a term of years.**

**2. What are various types of servitudes?**

There are five types of servitudes. 1. There are profits, which are the fruits of land, such as the right to remove sand and gravel, pick apples, cut timber, capture wild game, fish, or to mine minerals (oil, gas, and coal). (See example #2, p. 677, but please note that there is both a profit, to remove something attached, and a license, to enter the land.) 2. There are licenses, which are a temporary permission to use or to enter property. (Mere licenses work as contractual interest while a license coupled with an interest is a quasi-easement and is treated as a property interest. 3. There are easements, which are the easement owner's right of way to go onto or usually across an adjacent land owner's property. (See an affirmative easement, example #1, p. 677, although an easement is usually a continuing right to cross another's land such as a right of way. And see a negative easement, example #3, p. 677.) Then there are two types of covenants. 4. There are real covenants, which are certain land use restrictions that were enforceable in the law courts in very limited circumstances (See examples #1, 4, and 5, p. 677 depending on several factors including the remedy sought.) And 5. equitable servitudes, which are a broad group of land use restrictions that are the most used today. (See examples #1, 4, and 5, p. 677 depending on several factors

including the remedy sought.) **While the law today sometimes confuses these various types, they are very distinct and you are required to know each of them, their history, and their elements specifically.**

### **3. What is rationale behind servitudes?**

It represents society's utilization (and the law's regulation) of enclosures, fenced fields, and away from commons, open land use.

### **4. Which are easements? And what types are there?**

Easements are non-possessory interests in land in which one person (in gross) or estate (appurtenant) (dominant estate) has a right over another person's estate (servient estate). Often the properties affected by an easement are two in number and are often adjacent (neighboring or next to one another), although they can involve several parcels of land and need not be adjacent to one another.

Easements may be affirmative or negative easements. Affirmative easements are granted by a servient owner and grant a dominant owner the right to enter or perform an act on the servient land. There are a limited number of recognized, affirmative easements. The most common is the right of way, in which one property owner A has the right to enter and cross over the adjacent property of another B as a permanent property interest, the benefit of which passes on to A's successors in title and the burden of which passes on to B's successors in title. Affirmative easements have grown in both type and extent of use made by the dominant owner over the servient land. There are a limited number of negative easements wherein a granting landowner (servient estate) grants to another owner (dominant estate) that the granting landowner will restrict the use of his land such as not to block one's windows. See list of negative easements, pp. 736-7.

Easements are also classified into appurtenant or in gross. An easement appurtenant give the right to whomever owns the parcel of land that the easement benefits (and burdens whomever owns the parcel of land that the easement burdens). An easement appurtenant is meant to remain with the owner of the land (the dominant estate's successors in title) and to continue to burden the successors in title to the granting or servient estate. [The text states that appurtenant easements are usually transferable, because it can be made personal to the easement owner only, and not transferable. I disagree and it is easier and more accurate to consider all appurtenant easements as property interest, and automatically transferable.]

By comparison, an easement in gross gives a right to some person over another's land without regard to the first party's ownership of the land. For example, it A grants B (for consideration) the right to enter A's land and swim in A's swimming pool with the understanding that the interest was transferable and could be sold (or assigned) by B and that A would respect B's assignee, then it would be an

easement in gross. Easements in gross may be alienable if they were granted to be so. Their transferability raises special problems as discussed on pp. 709-16. See p. 676, note 4.

## **5. How are easements created?**

**The majority of easements are created as most possessory estates, future interests, and leasehold interests in land are created. They are conveyed or granted from the Grantor to a Grantee, in a written deed (pursuant to the Statute of Frauds), signed by the Grantor, acknowledged (notarized), and recorded in the county courthouse records, for valuable consideration, following a written contract and negotiation. This point is easily missed in the text because the text focuses on the various exceptional ways by which easements are created.**

**One exceptional way in which easements are created is through exceptions to the Statute of Frauds, such as fraud, part or full performance, estoppel, etc. (See p. 671, 472-79.)**

**Other exceptional ways by which easements are created are 1) by reservation, 2) by implication (easement by necessity), 3) a quasi-easement, or 4) by prescription (adverse possession).**

## **6. When is an easement by reservation?**

An easement by reservation occurs when an owner of land grants a subdivision of that land to another owner (usually by sale or by gift) but reserves to himself expressly or by implication a right over that granted land. At common law, the Grantor was said to reserve the easement, and usually only for the Grantor (and not another third party) although the Grantor could later convey the easement by reservation to a third party. An easement could be reserved by the Grantor and possibly conveyed to a third party (see Willard case, p. 672) whereas an exception could not. See p. 673, fn 9. A reservation of easement is a newly created interest at the time of the grant of the subdivided estate, whereas an exception excludes from the grant creating the subdivided estate some preexisting servitude on the land. (See note 3, p. 676.) The rationale for allowing a reservation easement to be conveyed to a third party was the legal fiction that the original grant from A to B reserved by regrant from B to A the easement. Whereas the exception did not automatically transfer the interest to a third party. The modern rule, Restatement of Servitudes, allow the Grantor to reserve for the benefit of a third party.

## **7. What issues, rules, authority, and rationale can one discern from the Willard case?**