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The Easement in Gross Revisited: Transferability and Divisibility Since 1945

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NOTE

The Easement in Gross Revisited: Transferability and Divisibility Since 1945

If we are to speak with strictest accuracy, there is no such thing as an "easement in gross" . . . since an easement presupposes two distinct tenements, one dominant, the other servient . . . . [Courts, however, have recognized] the sort of mere personal, nonassignable, noninheritable privilege or license sometimes loosely described as an "easement in gross."[1]

In this country such privileges have sometimes been spoken of as licenses, or as contractual in their nature, rather than as easements in gross.

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1. Loch Sheldrake Assocs. v. Evans, 306 N.Y. 297, 304, 118 N.E.2d 444, 447 (1954) (citations omitted).

> These are differences of terminology rather than of substance . . . . There does not seem to be any reason why the law should prohibit the assignment of an easement in gross if the parties to its creation evidence their intention to make it assignable.[2]

I. INTRODUCTION

As the above statements indicate, courts have disagreed about the nature, obligations, and privileges that accompany the easement in gross. Generally, an easement is an interest in land which gives the easement holder the right to use that land for a specific purpose, free from the will of the landowner.[3] An easement is in gross when the benefit from the use of another's land inures to the easement holder personally, rather than to the holder's land.[4] The land that is subject to the holder's right of use is the servient tenement.[5] Courts agree on these basic principles of an easement in gross, but have disagreed on the holder's right to transfer his interest to a third party. Similarly, no uniformity exists among courts on the right of the holder of an easement in gross to divide and share his interest with a third party.

In the mid-1940's, two commentators compiled and analyzed the state of the law concerning the transferability and divisibility of easements in gross.[6] Both writers attested to the importance of easements in gross in facilitating commercial activity, especially in the area of transportation rights of way and public utilities.[7] Each author noted that the common law rule disfavored transferability and divisibility of easements in gross because the rights accompanying the easement were personal to the holder.[8] The two writers noted, however, that the common law rule was beginning to change and that courts were allowing limited transfers and divisions of easements in gross.[9] Emphasizing that a party could not realize the maximum value of an easement in gross unless the courts allowed

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2. Miller v. Lutheran Conference & Camp Ass'n, 331 Pa. 241, 249-50, 200 A. 646, 651 (1938).

3. RESTATEMENT OF PROPERTY § 450 (1944).

4. *See* 3 R. POWELL & P. ROHAN, THE LAW OF REAL PROPERTY ¶ 405, at 34-22 (1984) [hereinafter cited as POWELL & ROHAN].

5. RESTATEMENT, *supra* note 3, § 455.

6. *See* Kloek, *Assignability and Divisibility of Easements in Gross*, 22 CHI.-KENT L. REV. 239 (1944); Welsh, *The Assignability of Easements in Gross*, 12 U. CHI. L. REV. 276 (1945).

7. *See* Kloek, *supra* note 6, at 239-40; Welsh, *supra* note 6, at 276-77. Mr. Welsh was a division attorney for American Telephone and Telegraph Co.

8. *See* Kloek, *supra* note 6, at 241-45; Welsh, *supra* note 6, at 276-78.

9. *See* Kloek, *supra* note 6, at 245-52, 255-56; Welsh, *supra* note 6, at 280-81.

the easement holder to transfer or divide his interest,[10] both men concluded their essays with a call for a greater consensus among the courts and for fewer restrictions on the transferability and divisibility of easements in gross.[11]

These commentaries appeared over forty years ago. Today, easements in gross continue to play an important commercial role[12] and are finding new uses in fields such as environmental conservation and historic preservation.[13] Despite the growing importance of easements in gross, commentators during this forty-year span have neglected to address the questions of transferability and divisibility. The purpose of this Note is to gather and analyze the law of transferability and divisibility of easements in gross as the law has developed since 1945. Part II of this Note differentiates easements in gross from other types of real servitudes. Part III discusses the variety of approaches that courts and legislatures have taken in addressing the question of transferability. Part IV deals with the development of the independent exercise doctrine of divisibility. Last, part V advocates that courts should place less emphasis on terminology and should direct more attention toward the parties' intentions and the surrounding circumstances of the easement interest when determining the transferability and divisibility of easements in gross.

II. Differentiating Easements in Gross from Similar Servitudes

A. *Easements Appurtenant*

The second major type of easement is the easement appurtenant.[14] Like the easement in gross, the easement appurtenant gives the holder the right to use another's land for a specific purpose without interference from the landowner.[15] An easement appurtenant, however, differs from an easement in gross in that the benefit from the right inures to the holder's *land* and becomes attached (*i.e.*, appurtenant) to that land.[16] The holder's land is the domi-

10. *See* Kloek, *supra* note 6, at 258-59.

11. *See id.* at 258-60; Welsh, *supra* note 6, at 283-84.

12. *See infra* notes 53-69 and accompanying text.

13. *See infra* notes 92-116 and accompanying text. For a full discussion of the modern role of easements, see generally 3 Powell & Rohan, *supra* note 4, ¶ 414.

14. *See* 3 Powell & Rohan, *supra* note 4, ¶ 405, at 34-18 to -22.

15. Restatement, *supra* note 3, § 450.

16. *See* 3 Powell & Rohan, *supra* note 4, ¶ 405, at 34-20; 2 G. Thompson, Commentaries on the Modern Law of Real Property § 321 (J. Grimes 1980 repl.).

nant tenement and the holder exercises his easement rights on the servient tenement.[17] Courts usually require that the dominant and servient tenements be located near each other, if not adjacent.[18] Traditionally, courts have allowed the transfer of an easement appurtenant when the easement holder transfers his dominant estate.[19] In allowing the transfer, many courts reason that an easement appurtenant has no existence separate from the dominant estate.[20]

B. Easements of Necessity

The easement of necessity is a specialized type of easement appurtenant.[21] When, for instance, a parcel of land is landlocked, courts will provide a right of way for the dominant tenement by creating an easement of necessity for ingress and egress. The easement of necessity becomes appurtenant to the landlocked parcel. Consequently, the easement of necessity, like the easement appurtenant, follows the dominant tenement when the holder transfers his land.[22]

C. Profits a Prendre

A *profit a prendre*, like an easement in gross, gives the holder personal rights in another's land for certain uses, free from the will of the servient owner.[23] The historical distinction between easements in gross and *profits a prendre* arises out of the type of use to which the holder can subject the servient estate. As the name

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17. RESTATEMENT, *supra* note 3, § 456 & comment a.

18. *See* 3 POWELL & ROHAN, *supra* note 4, ¶ 405, at 34-20 to -21 & n.33; 2 G. THOMPSON, *supra* note 16, § 322, at 72-73.

19. *See, e.g.*, St. Louis v. DeBon, 204 Cal. App. 2d 464, 466, 22 Cal. Rptr. 443, 444 (1962) (stating that an easement appurtenant can pass with the dominant tenement without specific mention in the instrument); Passaic Valley Council Boy Scouts of Am. v. Hartwood Syndicate, 46 A.D.2d 247, 249, 361 N.Y.S.2d 945, 947 (1974) (observing that an easement appurtenant is transferred with the dominant tenement); 2 G. THOMPSON, *supra* note 16, § 322, at 67 & n.16.

20. *See, e.g.*, Williams v. Stirling, 40 Colo. App. 463, 466-67, 583 P.2d 290, 292-93 (1978) (holding that easement appurtenant for ski trails depended on dominant tenement for existence); Hall v. Meyer, 270 Or. 335, 339, 527 P.2d 722, 724 (1974) (easement appurtenant for water rights to spring did not exist separately from dominant tenement); Roggow v. Hagerty, 27 Wash. App. 908, 913, 621 P.2d 195, 197 (1980) (despite failure to mention existence of easement appurtenant for right of way in deed, easement was conveyed as part of dominant tenement); 2 G. THOMPSON, *supra* note 16, § 322, at 67 & n.16.

21. *See* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 268 (1962).

22. *See, e.g.*, Horowitz v. Noble, 79 Cal. App. 3d 120, 130, 144 Cal. Rptr. 710, 718 (1978).

23. *See* 1 G. THOMPSON, *supra* note 16, § 139.

indicates, a *profit* is the right to remove a part of the servient estate, usually for commercial purposes.[24] Examples of *profits* are mining, oil and gas, and timber interests.[25] The *Restatement of Property* classifies *profits a prendre* as easements in gross.[26] Courts, however, usually consider easements in gross and *profits* as separate and distinct servitudes that demand different analyses on the issue of transferability.[27] Courts generally acknowledge the transferability of the *profit a prendre*.[28]

III. TRANSFERABILITY

A. *The Long Shadow of* Ackroyd

Traditionally, courts held that because easements in gross were personal to the holder, the holder could never transfer[29] his easements rights to another party. If the easement holder attempted a transfer, the rights in gross would not survive. The transferee would acquire no rights and the servient tenement would no longer carry the easement burden. American courts derived this rule from an early English case, *Ackroyd v. Smith*,[30] in which an easement holder attempted to transfer a right of way across a neighboring parcel of land. In denying the transferee's right to cross his neighbor's land, the court stated: "If a way be granted in gross, it is personal only, and cannot be assigned."[31] Subsequent courts refused to limit *Ackroyd* to easements of passage and the case came to stand for the general principle of the nontransferability of easements in gross.[32] Because the influence of *Ackroyd* still persists,[33] courts must recognize and overcome the

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24. *See id.*; 3 POWELL & ROHAN, *supra* note 4, ¶ 405, at 34-14 to -16.

25. *See* 1 G. THOMPSON, *supra* note 16, § 135.

26. RESTATEMENT, *supra* note 3, § 450 special note & comments f and g.

27. *See infra* notes 49-52 and accompanying text.

28. *See infra* note 48.

29. Throughout this Note, "transfer" of an easement connotes passing the rights of the easement by assignment or inheritance.

30. 138 Eng. Rep. 68 (1850).

31. *Id.* at 77. The court recognized the validity of the easement in gross between the original parties, but held that rights in gross "cannot be granted over." *Id.* The court viewed the attempted transfer between the original holder and his transferee as a creation of a "new species of burthen" on the servient owner's land, rather than a continuation of the original holder's rights. *Id.*

32. *See* Welsh, *supra* note 6, at 277.

33. Commentators have long criticized the persistence of *Ackroyd* in American jurisdictions. *See, e.g., id.* and cases cited therein; Kloek, *supra* note 6, at 244 and cases cited therein; Simes, *The Assignability of Easements in Gross in American Law*, 22 MICH. L. REV. 521 (1924) and cases cited therein.

Ackroyd restriction to deal realistically with the current role of the easement in gross.

The remainder of part III will discuss the variety of approaches that courts and legislatures have taken to overcome the *Ackroyd* restraint on the transferability of easements in gross. The most conservative approach is simply to reclassify the interest at issue as a servitude that is transferable. A more straightforward approach, which has been developing since World War II, is to determine transferability according to the commercial or noncommercial nature of the easement in gross. A third approach, which is potentially the most far reaching, is to base transferability of the easement partly on the intent of the parties. Finally, this section will explore the statutory approach to transferability through the example of conservation easement acts.

B. An Easement in Gross by Any Other Name

Since 1945, many courts faced with decisions concerning the transferability of easements in gross have sidestepped the *Ackroyd* restraint on transferability.[34] These courts have chosen to avoid the issue by attaching to the interest the name of another real servitude that is transferable. Courts primarily choose the easement appurtenant to counter the *Ackroyd* limitation on transferability of an easement in gross. The law consistently has allowed the transfer of easements appurtenant because courts consider them to be an inseparable part of the holder's land.[35] A conveyance of the easement holder's land, therefore, carries the easement appurtenant, just as the land would carry a house or a fence.

In view of the relatively straightforward rules that allow transfer of easements appurtenant, many courts have established a legal presumption that an easement is appurtenant rather than in gross.[36] This presumption against easements in gross is so strong

34. These courts usually begin their easement analysis by restating the *Ackroyd* rule. *See, e.g.*, Martin v. Ray, 76 Cal. App. 2d 471, 478-79, 173 P.2d 573, 578 (1946); Jeffers v. Toschlog, 178 Ind. App. 603, 605, 383 N.E.2d 457, 458-59 (1978); Von Meding v. Strahl, 319 Mich. 598, 610, 30 N.W.2d 363, 369 (1948); Loch Sheldrake Assocs. v. Evans, 306 N.Y. 297, 304, 118 N.E.2d 444, 447 (1954); Nemmer Furniture Co. v. Select Furniture Co., 25 Misc. 2d 895, 899, 208 N.Y.S.2d 51, 56 (Sup. Ct. 1960); Shingleton v. State, 260 N.C. 451, 454, 133 S.E.2d 183, 185 (1963); Lester Coal Corp. v. Lester, 203 Va. 93, 97, 122 S.E.2d 901, 904 (1961).

35. *See supra* notes 19-20 and accompanying text.

36. *See, e.g.*, Continental Baking Co. v. Katz, 68 Cal. 2d 512, 523, 439 P.2d 889, 896, 67 Cal. Rptr. 761, 768 (1968); Schofield v. Bany, 175 Cal. App. 2d 534, 537, 346 P.2d 891, 893 (1959); Barton v. Gammell, 143 Ga. App. 291, 294, 238 S.E.2d 445, 447 (1977); Martin v.

that a few courts have labeled easements as appurtenant that were unambiguously rights in gross.[37] For example, most courts consider utility easements to be in gross;[38] nevertheless, because of the presumption against easements in gross, some courts have held utility easements to be appurtenant.[39]

Connecticut is the only state that has a presumption in *favor* of easements in gross.[40] Because easements in gross are considered nontransferable, the Connecticut presumption operates as a presumption against transferability. The Connecticut presumption, however, has not been strong. In states that have a presumption in

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Music, 254 S.W.2d 701, 703 (Ky. 1953); Murphy v. Mart Realty of Brockton, Inc., 348 Mass. 675, 678, 205 N.E.2d 222, 225 (1965); County of Johnson v. Weber, 160 Neb. 432, 438, 70 N.W.2d 440, 445 (1955); White Cap Sea Foods, Inc. v. Panzner, 2 Misc. 2d 421, 424, 148 N.Y.S.2d 2, 6 (Sup. Ct. 1965); Nolan v. Bender, 42 Ohio Law Abs. 441, 448, 61 N.E.2d 628, 632 (1944); Hall v. Meyer, 270 Or. 335, 339, 527 P.2d 722, 724 (1974); Rusciolelli v. Smith, 195 Pa. Super. 562, 569, 171 A.2d 802, 806 (1961); Lynn v. Turpin, 187 Tenn. 384, 388, 215 S.W.2d 794, 796 (1948); Kemery v. Mylroie, 8 Wash. App. 344, 346, 506 P.2d 319, 320 (1973) (quoting Pioneer Sand & Gravel Co. v. Seattle Constr. and Dry Dock Co., 102 Wash. 608, 618, 173 P. 508, 511 (1918)); Delgue v. Curutchet, 677 P.2d 208, 212 (Wyo. 1984). Welsh noted in 1945 that this presumption was "almost universally the rule." Welsh, *supra* note 6, at 280.

37. One court held that an easement for a right of way was appurtenant and transferable, not in gross, even though the original instrument reserved to the grantor the rigbt " 'to *personally* have the privilege of ingress and egress' " across the grantee's land. Todd v. Nobacb, 368 Mich. 544, 549, 118 N.W.2d 402, 405 (1962) (emphasis added). Another court allowed the transfer of easement rights to use a spring as an appurtenant interest, even though tbe original instrument specified no dominant tenement. Leggio v. Haggerty, 231 Cal. App. 2d 873, 878-81, 42 Cal. Rptr. 400, 403-04 (1965). Another court held that the right to use an outside stairway on one building to reach the second floor of a neighboring building was an easement appurtenant. But, illustrating how far a court will take the presumption beyond its usefulness, the court went on to hold that the right died with the original grantee. Warren v. Brenner, 89 Ohio App. 188, 194, 196, 101 N.E.2d 157, 161 (1950).

38. *See infra* text accompanying note 65.

39. *See, e.g., Martin*, 254 S.W.2d at 703 (easement for sewer lines); *Weber*, 160 Neb. at 439, 70 N.W.2d at 445 (easement for drainage levee); American Reiter Co. v. Dinallo, 53 N.J. Super. 388, 392, 147 A.2d 290, 292-93 (1959) (easement for sewer line); Winsten v. Prichard, 23 Wash. App. 428, 431, 597 P.2d 415, 416 (1979) (general "utilities" easement).

Courts have held other rights, which the majority of courts would consider rights in gross, to be easements appurtenant. *See, e.g.*, Smith v. Hill, 237 Cal. App. 2d 374, 47 Cal. Rptr. 49 (1965) (easement for stockpiling gravel); *Barton*, 143 Ga. App. 291, 238 S.E.2d 445 (recreational easement); *Kemery*, 8 Wash. App. 344, 506 P.2d 319 (right of way easement not touching holder's land).

40. The absence of the words "heirs and assigns" in the instrument raises the presumption. *See* Kelly v. Ivler, 187 Conn. 31, 39-40, 450 A.2d 817, 821 (1982); Leabo v. Leninski, 182 Conn. 611, 614, 438 A.2d 1153, 1155 (1981); Dunn Bros., Inc. v. Lesnewsky, 164 Conn. 331, 335, 321 A.2d 453, 455 (1973); Birdsey v. Kosienski, 140 Conn. 403, 410, 101 A.2d 274, 277-78 (1953). *But see* Burcky v. Knowles, 120 N.H. 244, 247, 413 A.2d 585, 589 (1980) (holding that lack of words of transferability in original easement reservation did not raise a presumption in favor of an easement in gross); Glines v. Auger, 93 N.H. 340, 341, 42 A.2d 219, 220 (1945) (same).

favor of easements appurtenant, the presumption usually withstands rebuttal, and the easement is transferred.[41] In Connecticut, the presumption in favor of easements in gross has not withstood rebuttal; consequently, Connecticut courts often find that the easement is appurtenant and allow the transfer.[42]

A second type of real servitude on which the courts rely to avoid the *Ackroyd* restriction on transferring easements in gross is the easement of necessity.[43] The Maine Supreme Court, for example, created an easement of necessity in *LeMay v. Anderson*,[44] which allowed the parties to transfer a contested interest. The defendant's predecessor in title transferred to the defendant an easement right to cross plaintiff's land. The court held that the easement was in gross to the defendant's predecessor in title and therefore not transferable.[45] The court, however, created an easement of necessity that followed the same route as the original easement.[46] Thus, the court, merely changed the name of the contested interest and left the parties in the same relation as before the action.

Last, some courts have been able to avoid the issue of the transferability of easements in gross by associating the interest with the *profit a prendre*.[47] For many years, the common law has

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41. *See supra* notes 36-39 and accompanying text.

42. The Connecticut courts proceed with a careful rebuttal analysis examining (1) the intent of the parties, (2) the value of the property with or without the easement, (3) the servient owner's recognition of the right of the original holder's successor to use the easement, and (4) the language of the creating instrument. *See Kelly*, 187 Conn. at 42-45, 450 A.2d at 822-23; *Leabo*, 182 Conn. at 614-15, 438 A.2d at 1155; *Dunn Bros.*, 164 Conn. at 335-36, 321 A.2d at 455; *Birdsey*, 140 Conn. at 410-12, 101 A.2d at 277-78.

43. *See supra* notes 21-22 and accompanying text.

44. 397 A.2d 984 (Me. 1979).

45. *Id.* at 986. The court held that the easement was in gross even though the creating instrument reserved the easement rights " 'to grantor and others.' "

46. *Id.* at 987-89. The landlocked parcel in *LeMay* was next to a lake, and the express easement ran across the neighboring land to the highway. The original servient tenement owner was the son-in-law of the original owners of the parcel by the lake. When the son-in-law sold his land to defendants, he expressly reserved an easement across it for the benefit of his parents-in-law. *Id.* at 986. Although the son-in-law did not use the easement, the court said that the easement was personal to him and could not be quitclaimed to plaintiffs, successors of the parents-in-law. *Id.*; *see also* Solana Land Co. v. Murphey, 69 Ariz. 117, 122, 123-25, 210 P.2d 593, 596, 597-99 (1949) (implying an easement of necessity to a section of land along same route over which land's developers had acquired a nontransferable easement in gross).

47. *See, e.g.*, Costa v. Fawcett, 202 Cal. App. 695, 699-703, 21 Cal. Rptr. 143, 146-48 (1962) (right to entor land to tend trees and harvest walnuts); Beckwith v. Rossi, 157 Me. 532, 534, 175 A.2d 732, 734 (1961) (right to enter land and take gravel); Hanson v. Fergus Falls Nat'l Bank, 242 Minn. 498, 503, 65 N.W.2d 857, 861 (1954) (right to hunt on land).

In *Hanson* the original grant of hunting rights was to grantee, " 'his heirs and assigns,

recognized that *profits a prendre* are transferable.[48] The distinction between the personal benefit of the easement in gross and the *profit* is minimal. The Restatement and some commentators actually classify the *profit* as a type of easement in gross.[49] One court, for example, upheld defendant's claim that he inherited the right to remove sand and gravel from plaintiff's land.[50] The court labeled the interest an easement in gross,[51] after noting that the difference between the legal characteristics of a *profit a prendre* and an easement in gross was "microscopic."[52]

C. *The Commercial/Noncommercial Distinction*

1. Commercial Easements in Gross

Courts originally allowed the transfer of *profits a prendre*, in part, because the right to remove a portion of the servient estate had an obvious commercial value.[53] As the easement in gross gained commercial popularity, some courts reconsidered the *Ackroyd* rule prohibiting the transfer of easements in gross and began to condition transferability of easements in gross on the commercial nature of the easement.[54] The Pennsylvania court's decision in *Miller v. Lutheran Conference & Camp Association*[55] was a catalyst for this trend. The *Miller* court allowed the transfer of an easement in gross for boating, fishing, and bathing rights on an artificial lake.[56] Emphasizing the commercial nature of the easement, the court held that commercial easements in gross are transferable and that noncommercial easements in gross are

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forever.' " 242 Minn. at 500, 65 N.W.2d at 859. The trial court held that the grant was an easement in gross and assignable. *Id.* at 503, 65 N.W.2d at 861. The Wisconsin Supreme Court affirmed the assignee's right to hunt, but in different terms:

> While the trial court found that plaintiff had an easement, we need not determine whether we will follow the rule that easements in gross are nonassignable . . . for the reason that we are already committed to the rule that the interest which plaintiff has, if any, is a profit a prendre in gross, not an easement in gross, strictly speaking.

Id.

48. *See* 1 G. THOMPSON, *supra* note 16, § 137; C. TIEDEMAN, AN ELEMENTARY TREATISE ON THE AMERICAN LAW OF REAL PROPERTY §§ 587, 591 (1st ed. 1885); 2 H. TIFFANY, THE LAW OF REAL PROPERTY § 382 (2d ed. 1920).

49. *See supra* text accompanying notes 23-27.

50. Moore v. Schultz, 22 N.J. Super. 24, 91 A.2d 514 (App. Div. 1952), *aff'd per curiam*, 12 N.J. 329, 96 A.2d 732 (1953).

51. *Id.* at 30-31, 91 A.2d at 517.

52. *Id.* at 28, 91 A.2d at 516.

53. *See* 1 G. THOMPSON, *supra* note 16, § 139.

54. Welsh noted this trend in 1945. *See* Welsh, *supra* note 6, at 281.

55. 331 Pa. 241, 200 A. 646 (1938).

56. *Id.* at 247-48, 200 A. at 648, 650.

nontransferable.[57]

Other courts have followed *Miller*'s lead in allowing the transfer of private commercial easements in gross.[58] South Carolina, in *Sandy Island Corp. v. Ragsdale*,[59] relied on *Miller* in formulating a test that distinguished between commercial and noncommercial easements in gross.[60] The *Sandy Island* court held that an easement in gross whose use "results primarily in economic benefit rather than personal satisfaction" is commercial and is therefore transferable.[61] Since 1944, the Restatement has recoguized that commercial easements in gross are transferable "as a matter of law."[62] The Restatement drafters desired that interests in property maintain a "high degree of alienability."[63]

Courts readily acknowledge the distinction between commercial and noncommercial easements in gross when evaluating whether to permit the transfer of public commercial easements in gross. Public commercial easements include those held by governmental units[64] and public utilities.[65] In addition to the policy that

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57. The court stated: "[T]here is an obvious difference . . . between easements for personal enjoyment and those designed for commercial exploitation; while there may be little justification for permitting assignments in the former case, there is every reason for upholding them in the latter." *Id.* at 250, 200 A. at 651.

58. *See, e.g.*, Buehler v. Oregon-Washington Plywood Corp., 17 Cal. 3d 520, 528, 551 P.2d 1226, 1231, 131 Cal. Rptr. 394, 399 (1976) (easement for hauling timber across right of way); Collier v. Oelke, 202 Cal. App. 2d 843, 847, 21 Cal. Rptr. 140, 141-42 (1962) (easement for drainage pipeline for farming operation); Schnabel v. County of DuPage, 101 Ill. App. 3d 553, 557, 428 N.E.2d 671, 678 (1981) (right of way easement transferred from one railroad to another); Moore v. Schultz, 22 N.J. Super. 24, 26-27, 30-31, 91 A.2d 514, 515, 517 (App. Div. 1952), *aff'd per curiam*, 12 N.J. 329, 96 A.2d 732 (1953) (easement for commercial removal of sand and gravel); Sunset Lake Water Serv. Dist. v. Remington, 45 Or. App. 973, 977, 609 P.2d 896, 899 (1980) (easement for right of private company to lay water line for city). *But see, e.g.*, Williams v. Stirling, 40 Colo. App. 463, 466, 583 P.2d 290, 292-93 (1978) (easements for ski trails were commercial, therefore appurtenant).

59. 246 S.C. 414, 143 S.E.2d 803 (1965). The easement in *Sandy Island* was for a right of way to transport timber.

60. *Id.* at 422, 143 S.E.2d at 808.

61. *Id.* at 422, 143 S.E.2d at 807; *see also* Douglas v. Medical Investors, Inc., 256 S.C. 440, 447, 182 S.E.2d 720, 723 (1971) (allowing assignment, based on *Sandy Island* test, of commercial easement in gross for use of driveway). A Utah court recently adopted the *Sandy Island* test, finding that an easement in gross for driving cattle across the servient tenement was commercial and, therefore, transferable. *See* Crane v. Crane, 683 P.2d 1062, 1067 (Utah 1984).

62. RESTATEMENT, *supra* note 3, § 489 comment b.

63. *Id.* comment a; *see also* 2 AMERICAN LAW OF PROPERTY § 8.78 (A.J. Casner ed. 1952) (observing that transferability of commercial easements in gross is "desirable"); 3 POWELL & ROHAN, *supra* note 4, ¶ 419 (noting the courts' acceptance of the transferability of commercial easements in gross).

64. *See, e.g.*, City of Anaheim v. Metropolitan Water Dist., 82 Cal. App. 3d 763, 768, 147 Cal. Rptr. 336, 340 (1978) (easements for rights of way transferred to city and easements

traditionally supports the transferability of commercial easement interests, the courts have noted another reason for justifying the free transferability of public commercial easements in gross: the benefit that the easement provides inures to the entire community, rather than to one individual or business.[66] In *Champaign National Bank v. Illinois Power Co.*,[67] for example, the court rejected plaintiff's attempt to thwart the transfer of a right of way easement in gross to defendant power company for the construction of power lines.[68] Stating that "commercial easements in gross are alienable, *especially* when the easements are for utility purposes," the court upheld the transfer, finding that it served the public's interest.[69]

2. Noncommercial Easements in Gross

Although courts that recognize the distinction between commercial and noncommercial easements consistently allow the transfer of commercial easements in gross, these courts are equally consistent in refusing to allow the transfer of noncommercial easements in gross. Courts fear that the exercise of noncommercial

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for water lines transferred to water district); Albury v. Central and S. Fla. Flood Control Dist., 99 So. 2d 248, 250, 252 (Fla. Dist. Ct. App. 1957) (drainage and canal easements transferred to flood control district); Kansas City Area Transp. Auth. v. Ashley, 485 S.W.2d 641, 645 (Mo. App. 1972) (easement for bus patrons to park cars on lot transferred to municipal transportation authority); City of Papillion v. Schram, 204 Neb. 110, 111-12, 281 N.W.2d 528, 530 (1979) (easement to take water for village's water supply transferred to city); City of San Antonio v. Ruble, 453 S.W.2d 280, 282 (Tex. 1970) (easement to construct dam for flood control transferred to river authority); Thew v. Lower Colo. River Auth., 259 S.W.2d 939, 942 (Tex. Civ. App. 1953) (easement allowing flooding of land by dam construction transferred to river authority).

65. *See, e.g.*, Belusko v. Phillips Petroleum Co., 198 F. Supp. 140, 147 (S.D. Ill. 1961) (transfer of easements for gas pipeline to "commercial utility"), *aff'd*, 308 F.2d 832 (7th Cir. 1962), *cert. denied*, 372 U.S. 930 (1963); Champaign Nat'l Bank v. Illinois Power Co., 125 Ill. App. 3d 424, 431, 465 N.E.2d 1016, 1021 (1984) (transfer of easement for power lines to electric company); Johnston v. Michigan Consol. Gas Co., 337 Mich. 572, 582, 60 N.W.2d 464, 469 (1953) (transfer of easement for gas lines to gas company); Banach v. Home Gas Co., 23 Misc. 2d 556, 559, 199 N.Y.S.2d 858, 862 (Sup. Ct. 1960) (same); Ziegler v. Ohio Water Serv. Co., 18 Ohio St. 2d 101, 106, 247 N.E.2d 728, 731 (1969) (transfer of easement for water pipeline to water company). *But cf.* Delmarva Power & Light Co. v. Eberhard, 247 Md. 273, 277, 230 A.2d 644, 646-47 (1967) (holding that easement for electric lines was not public easement in gross because a privately owned electric company held the rights, rather than a governmental unit); *see also supra* note 39.

66. *See* Salvaty v. Falcon Cable Television, 165 Cal. App. 3d 798, ____, 212 Cal. Rptr. 31, 35-36 (1985); *City of Anaheim*, 82 Cal. App. 3d at 768, 147 Cal. Rptr. at 340; *Ziegler*, 18 Ohio St. 2d at 106, 247 N.E.2d at 731.

67. 125 Ill. App. 3d 424, 465 N.E.2d 1016 (1984).

68. *Id.* at 426-27, 465 N.E.2d at 1017-18.

69. *Id.* at 431, 465 N.E.2d at 1021 (emphasis added).

rights by one other than the original holder would burden the servient owner's land beyond the contemplation of the original parties.[70] The most common type of easement in gross interest that courts classify as noncommercial and nontransferable is the recreational or "novelty" easement.[71] Nontransferable recreational easements in gross include hunting rights,[72] camping rights,[73] and boating and fishing rights.[74] Other types of personal, nontransferable easements in gross are private rights of way[75] and private rights of storage.[76]

The courts' treatment of prescriptive easements in gross illustrates the courts' reluctance to allow the transfer of noncommercial easements in gross. Courts recognize that a person can acquire an easement in gross by prescription.[77] Courts, nevertheless, view prescriptive easements in gross as being so closely bound up in the actions and interests of the holder that they are incapable of transfer.[78] For example the Idaho Supreme Court, in *West v. Smith*,[79]

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70. 3 POWELL & ROHAN, *supra* note 4, ¶ 419, at 34-220.

71. *See* Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196, 209 (Tex. 1962).

72. *See, e.g.*, Maw v. Weber Basin Water Conservancy Dist., 20 Utah 2d 195, 196-97, 436 P.2d 230, 231-32 (1968).

Many courts classify hunting rights as *profits a prendre*, rather than easements in gross. *See* Mikesh v. Peters, 284 N.W.2d 215, 217 (Iowa 1979); Hanson v. Fergus Falls Nat'l Bank, 242 Minn. 498, 508, 65 N.W.2d 857, 861 (1954); Annot., 49 A.L.R.2d 1395 (1956).

73. *See, e.g.*, Gilbert v. Workman's Circle Camp of the New York Branches, Inc., 28 A.D.2d 734, 734, 282 N.Y.S.2d 293, 294 (1967).

74. *See, e.g.*, Williams v. Diederich, 359 Mo. 683, 686, 223 S.W.2d 402, 403-04 (1949). *But cf.* Miller v. Lutheran Conference & Camp Ass'n, 331 Pa. 241, 249-50, 200 A. 646, 650 (1938) (assignment of easement in gross for boating and fishing rights upheld because commercial).

75. *See, e.g.*, Rose Lawn Cemetery Ass'n v. Scott, 229 Ark. 639, 642-43, 317 S.W.2d 265, 267 (1958).

76. *See, e.g.*, Taylor v. Dennehy, 136 Conn. 398, 403, 71 A.2d 596, 598 (1950) (easement for use of garage on adjoining land to store car not transferable because personal to original grantee).

77. *See* Saunders Point Ass'n, Inc. v. Cannon, 177 Conn. 413, 417, 418 A.2d 70, 73 (1979); Loughran v. Matylewicz, 367 Pa. 593, 598, 81 A.2d 879, 882 (1951); Crane v. Crane, 683 P.2d 1062, 1064 (Utah 1984).

Persons gain prescriptive easements by exercising a right adverse to the owner's possession, continuously and without interruption, for a specified period. RESTATEMENT, *supra* note 3, § 457.

78. *See, e.g.*, LeDeit v. Ehlert, 205 Cal. App. 2d 154, 166, 22 Cal. Rptr. 747, 755 (1962) (prescriptive easement in gross for right of way across defendant's land to reach hunting parcel only usable by holder); Morgan v. McLoughlin, 6 Misc. 2d 434, 438, 163 N.Y.S.2d 51, 55 (Sup. Ct. 1957) (father's acquisition of prescriptive easement in gross for roadway to beach not inheritable by son). *But see, e.g.*, Miller v. Lutheran Conference & Camp Ass'n, 331 Pa. 241, 248, 200 A. 646, 650 (1938) (prescriptive easement in gross for bathing rights in lake was assignable because commercial); *Crane*, 683 P.2d at 1067 (prescriptive easement in gross to drive cattle across land was assignable because commercial).

upheld defendants' acquisition of a prescriptive easement in gross to moor their houseboat to plaintiffs' lakefront property.[80] Yet, in light of the general nontransferability of easements in gross and the strict limitations that the law places on prescriptive rights, the court held that "any prescriptive right which the [defendants] may have acquired applies solely to them and not to guests or assignees."[81]

D. Intent of the Parties

In deciding whether to allow the transfer of an easement in gross, courts often look at the intent of the parties to the original transaction. Welsh argued that courts should make the parties' intention controlling as "the true rule of construction" in determining transferability.[82] Mirroring Welsh's position, the Pennsylvania court in *Miller* stated that an easement in gross should be transferable if the parties authorized transferability in the original transaction.[83] Only one court since 1945, however, has accepted Welsh and *Miller* and made the intention of the parties the single controlling consideration in the transferability determination. The Montana Supreme Court, in *Lindley v. Maggert*,[84] allowed the transfer of an easement in gross for a right of way. The court held that the parties' intent as evidenced in their agreement controlled the transfer.[85]

In sharp contrast to *Lindley*, some courts have iguored completely the parties' intent.[86] Most courts, however, regard the in-

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79. 95 Idaho 550, 511 P.2d 1326, 1332-33 (1973).

80. *Id.* at 556-57, 511 P.2d at 1332-33.

81. *Id.*

82. Welsh, *supra* note 6, at 284.

83. Miller v. Lutheran Conference & Camp Ass'n, 331 Pa. 241, 250, 200 A. 646, 651 (1938). The court ohserved that "[T]here does not seem to he any reason why the law should prohibit the assignment of an easement in gross if the parties to its creation evidence their intention to make it assignable." *Id.*

84. ___ Mont. ___, 645 P.2d 430 (1982).

85. *Id.* at ___, 645 P.2d at 431. The court stated: "Whether or not such an easement may be alienated . . . depends upon the manner and terms of the creation of the easement." *Id.*

86. *See, e.g.*, Taylor v. Dennehy, 136 Conn. 398, 402, 71 A.2d 596, 598 (1950) (refusing to look beyond the creating instrument to determine intention of parties concerning transferability); Burcky v. Knowles, 120 N.H. 244, 248-49, 413 A.2d 585, 588 (1980) (same); Warren v. Brenner, 89 Ohio App. 188, 190, 196, 101 N.E.2d 157, 159, 161 (1950) (refusing to extend easement for use of a stairway beyond life of grantee even though the creating instrument said that parties intended that the right " 'shall hold good during the life of said brick building and stairway' ").

Courts that have ignored completely the parties' intent often have reached results that

tent of the parties as one element to consider in determining whether easements in gross are transferable. One group of courts holds that the absence of the words "heirs and assigns" in the original instrument indicates an intention to limit the easement right to the original holder.[87] In contrast, another group of courts interprets the absence of any limiting language as an indication that the parties intended the right to be transferable as an easement appurtenant.[88] Courts frequently interpret the presence of words such as "heirs and assigns" in the original easement instrument to mean that the parties intended the easement to be transferable. Some courts hold that these words create easements appurtenant and allow the transfer.[89] Other courts allow the transfer on a different theory, reasoning that the parties intended these words to create transferable easements in gross.[90] Even in this latter group of

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are totally at odds with the creating instrument. *Compare* LeMay v. Anderson, 397 A.2d 984, 987 (Me. 1979) (holding that an easement in gross was personal to the original holder and not transferable, even though creating instrument reserved the easement right in favor of " 'the grantor and *others*' ") (emphasis added) *with* Todd v. Nobach, 368 Mich. 544, 547, 118 N.W.2d 402, 404 (1962) (holding that an easement was transferable even though the creating instrument reserved to the original holder the right " 'to *personally* have the privilege of ingress and egress' ") (emphasis added). *See also* Gross v. Cizouskas, 53 A.D.2d 969, 970, 385 N.Y.S.2d 832, 834 (1976) (holding that easement in gross was nonassignable even though grantor reserved easement to himself " 'in common with others' ").

87. In Gilbert v. Workman's Circle Camp, 28 A.D.2d 734, 734, 282 N.Y.S.2d 293, 294 (1967), the court stated: "[I]n the absence of any specific intent on [the original grantees'] part in conveying such premises to include this right personal to them, it did not pass to their successors in title." *Accord* Williams v. Diederich, 359 Mo. 683, 686, 223 S.W.2d 402, 403-04 (1949). *Compare* St. Louis v. DeBon, 204 Cal. App. 2d 464, 466, 22 Cal. Rptr. 443, 444 (1962) (in dictum, an easement in gross is assignable only, if at all, through *specific* words of assignment) *with* LeDeit v. Ehlert, 205 Cal. App. 2d 154, 166, 22 Cal. Rptr. 747, 755 (1962) (in dictum, an easement in gross is transferable *"unless* restricted" in the grant).

88. *See, e.g., St. Louis*, 204 Cal. App. 2d at 466, 22 Cal. Rptr. at 444 (saying that parties can assign an easement appurtenant with the dominant estate without a specific mention of the easement); Birdsey v. Kosienski, 140 Conn. 403, 410, 101 A.2d 274, 277-78 (1953) (saying parties intended a "permanent easement" rather than a "personal" easement despite lack of the words "heirs and assigns" in original grant); Chain Locations of Am., Inc. v. Westchester County, 20 Misc. 2d 411, 413-14, 190 N.Y.S.2d 12, 15 (Sup. Ct. 1959); DeShon v. Parker, 49 Ohio App. 2d 366, 367, 361 N.E.2d 457, 458 (1974); Scott v. Leonard, 119 Vt. 86, 97-98, 119 A.2d 691, 698 (1956); Sabins v. McAllister, 116 Vt. 302, 305-06, 76 A.2d 106, 108 (1950).

89. *See, e.g.*, Siferd v. Stambor, 5 Ohio App. 2d 79, 87, 214 N.E.2d 106, 111 (1966) (holding that easement for use of restroom in neighboring building by restaurant employees was appurtenant because of the words " 'heirs and assigns' " in original instrument); Lynn v. Turpin, 187 Tenn. 384, 386-87, 215 S.W.2d 794, 795-96 (1948) (holding that parties intended easement to take water from neighbor's well to be appurtenant because of the words " 'heirs and assigns forever' " in original instrument).

90. *See, e.g.*, Moore v. Schultz, 22 N.J. Super. 24, 30-31, 91 A.2d 514, 517 (App. Div. 1952), *aff'd per curiam*, 12 N.J. 329, 96 A.2d 732 (1953); Weber v. Dockray, 2 N.J. Super. 492, 496, 64 A.2d 631, 633 (Ch. Div. 1949); Sunset Lake Water Serv. Dist. v. Remington, 45

courts, intent is only one of several considerations in the analysis;[91] nevertheless, this group has come close to Welsh's ideal that the intent of the parties, rather than legal labels, should control the transferability of easements in gross.

E. Statutory Developments: The Conservation Easement Act Example

Although the transferability of easements in gross has not developed significantly at common law, the statutory treatment of easements in gross has been developing rapidly since 1945. In the early years of this development, one commentator noted that a few legislatures had passed statutes to facilitate the transfer of easements in gross for the benefit of "public service companies."[92] The statutory development has continued this piecemeal pattern with legislatures providing for the transfer of easements in gross to specific holders for limited purposes. At the present, only Indiana has squarely confronted the common law presumption against the transfer of easements in gross.[93]

The development of conservation easement acts for environmental conservation and historic preservation provides a recent example of the statutory approach to the transfer of easements in gross.[94] Conservation easement acts usually limit those who may

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Or. App. 973, 977, 609 P.2d 896, 899 (1980); Douglas v. Medical Investors, Inc., 256 S.C. 440, 447-48, 182 S.E.2d 720, 724 (1971); Thew v. Lower Colo. River Auth., 259 S.W.2d 939, 941-42 (Tex. Civ. App. 1953).

91. For example, the New Jersey chancery court in *Weber* stated that a court would recognize the right to assign an easement in gross depending on three elements: the intention of the parties, the hurden on the servient tenement, and the existing circumstances at the time of the grant. 2 N.J. Super. at 496, 64 A.2d at 633; *see also Douglas*, 256 S.C. at 447-48, 182 S.E.2d at 723-24 (allowing assignment of easement in gross based on commercial/noncommercial distinction and on parties' use of " 'heirs and assigns' ").

92. Kloek, *supra* note 6, at 256-57.

93. *See* IND. CODE ANN. § 32-5-2-1 (Burns Supp. 1984). The Indiana statute reads: "Easements in gross . . . may he *alienated, inherited,* and *assigned* if instruments that create such easements in real property so state." *Id.* (emphasis added).

Maryland, although not as explicit concerning transferability as Indiana's statute, also has a general easement statute: "No words of inheritance are necessary to create . . . an easement by grant or by reservation. Unless a contrary intention appears by express terms or is necessarily implied, . . . every grant or reservation of an easement passes or reserves an easement in perpetuity." MD. REAL PROP. CODE ANN. § 4-105 (1981).

A few western states have statutes, modeled after California's Civil Code, that recognize the validity of easements in gross as "servitudes unattached to the land." The statutes, however, say nothing concerning transferability. *See* CAL. CIV. CODE § 802 (West 1982); MONT. CODE ANN. § 70-17-102 (1983); N.D. CENT. CODE § 47-05-02 (1983); OKLA. STAT. ANN. tit. 60, § 50 (West 1971); S.D. CODIFIED LAWS ANN. § 43-13-1 (1983).

94. *See, e.g.*, ARK. STAT. ANN. §§ 50-1201 to -1206 (Supp. 1983); CAL. CIV. CODE §§ 815-

hold conservation easements to governmental units or private nonprofit organizations.[95] Legislatures, however, recognize that the entity acquiring the easement may not always be the holder and that the need for allowing the right of transfer may arise. A county, for instance, that acquires a conservation easement to protect a scenic area of a river may want to transfer the easement to a state conservation agency that could administer protection for the entire waterway. Similarly, a city that holds a preservation easement in a

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816 (West 1982); COLO. REV. STAT. §§ 38-30.5-101 to -110 (1982); CONN. GEN. STAT. ANN. §§ 47-42a to -42c (West 1978); DEL. CODE ANN. tit. 7, §§ 6901-6906 (Supp. 1984); FLA. STAT. ANN. § 704.06 (West Supp. 1984); GA. CODE ANN. §§ 85-1406 to -1410 (Supp. 1984); IDAHO CODE § 67-4613 (1980); ILL. ANN. STAT. ch. 30, §§ 401-406 (Smith-Hurd Supp. 1985); IND. CODE. ANN. § 32-5-2.6-1 to -7 (Burns Supp. 1985); IOWA CODE ANN. §§ 111D.1-.5 (West 1984); ME. REV. STAT. ANN. tit. 33, §§ 667-668 (1978 & Supp. 1984); MD. REAL PROP. CODE ANN. § 2-118 (1981); MASS. GEN. LAWS ANN. ch. 184, §§ 31-32 (West 1977 & Supp. 1985); MICH. COMP. LAWS ANN. §§ 399.251-.257 (West Supp. 1985); MINN. STAT. ANN. §§ 84.64-.65 (West 1977); MONT. CODE ANN. §§ 70-17-101 to -102 (1983); NEV. REV. STAT. §§ 111.390-.440 (1983); N.H. REV. STAT. ANN. §§ 477:45-:47 (1983); N.J. STAT. ANN. §§ 13:8B-1 to -9 (West Supp. 1985); N.C. GEN. STAT. §§ 121-34 to -42 (1981); N.D. CENT. CODE § 55-10-08 (1983); OHIO REV. CODE ANN. §§ 5301.67 -.70 (Page 1981); OR. REV. STAT. §§ 271.715-.795 (1983); R.I. GEN. LAWS §§ 34-39-1 to -5 (1984); S.C. CODE ANN. §§ 27-9-10 to -30 (Law. Co-op. 1977 & Supp. 1983); S.D. CODIFIED LAWS ANN. §§ 1-19B-56 to -60 (Supp. 1984); TENN. CODE ANN. §§ 66-9-301 to -309 (1982); TEX. NAT. RES. CODE ANN. §§ 183.001-.005 (Vernon Supp. 1985); UTAH CODE ANN. §§ 63-18a-1 to -6 (1978); WIS. STAT. ANN. § 700.40 (West Supp. 1985). For a complete discussion of the benefit of these acts in conserving natural and historic resources, see generally Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP., PROB. & TR. J. 540 (1979).

Using easements in gross for conservation and preservation provides several advantages. First, acquiring an easement to conserve a natural open space or to preserve a historically or architecturally important building is much less costly than purchasing title to the underlying fee itself. *See id.* at 542. The Rhode Island act, for example, notes the economic advantage in using easements for preservation and conservation in its purpose section: "This chapter is further intended to provide the people of Rhode Island with the continued diversity of history and landscape that is unique to this state without great expenditures of public funds." R.I. GEN. LAWS § 34-39-1 (1984). Second, acquiring an easement for conservation or preservation is a much simpler transaction hetween two parties than ohtaining a zoning ordinance for the same purpose through a municipality. *See* Netherton, *supra*, at 542. Third, the Commissioners of the Uniform Conservation Easement Act (the "Uniform Act") noted that despite the confusion surrounding easement law, the legal system prefers dealing with easements because they are more fiexible in scope and have less strict requirements than restrictive covenants or equitable servitudes. UNIF. CONSERVATION EASEMENT ACT, prefatory note, 12 U.L.A. 55, 56 (Supp. 1981).

95. *See* statutes cited *supra* note 94. Two states have extended holder's rights to businesses and corporations without the nonprofit limitations. *See* MICH. COMP. LAWS ANN. §§ 399.253-.254 (West Supp. 1985); N.C. GEN. STAT. § 121-35(2) (1981). Only four states have extended holder's right to private individuals. *See* ILL. ANN. STAT. ch. 30, § 404(c) (Smith-Hurd Supp. 1985) (right to enforce only); MD. REAL PROP. CODE ANN. § 2-118(e) (1981) (right to hold and enforce); MONT. CODE ANN. §§ 70-17-101 (18), -102(7) (1983) (no holding restrictions listed); UTAH CODE ANN. § 63-18a-3 (1978) (any "party entitled to hold real property interests" may hold preservation easement).

historic structure may prefer to transfer the interest to a private historical preservation society, which would be more knowledgeable of the structure's significance and better equipped to enforce compliance with the easement terms. To accommodate these interests, some states provide a statutory right of transfer. The states, however, are not uniform in the manner in which they approach the transferability question.

Some states approach the question of transferability by retaining the term "easement in gross" to describe the conservation interest.[96] The Maryland statute typifies this group, stating that the conservation interest is "enforceable . . . as an easement in gross, and as such it is *inheritable and assignable.*"[97] Colorado calls its interest a "conservation easement in gross,"[98] but declares that the interest "shall not be deemed personal"[99] and is "perpetual."[100] The Montana statute recognizes that conservation and preservation easements can be in gross,[101] but does not address transferability.

The Uniform Conservation Easement Act[102] ("Uniform Act") adopts a second approach to the question of the transferability of an easement in gross. The Uniform Act carefully avoids labeling the interest as an easement in gross or an easement appurtenant and chooses instead to use the more general term "conservation easement."[103] Nevertheless, when enumerating the elements of a

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96. *See* COLO. REV. STAT. § 38-30.5-102 (1982); DEL. CODE ANN. tit. 7, § 6902 (Supp. 1984); GA. CODE ANN. § 85-1408 (Supp. 1984); MD. REAL PROP. CODE ANN. § 2-118(c) (1981); MONT. CODE ANN. § 70-17-102(7) (1983) ("servitude . . . not attached to land").

97. MD. REAL PROP. CODE ANN. § 2-118(c) (emphasis added); *see also* DEL. CODE ANN. tit. 7, § 6902 (same language); GA. CODE ANN. § 85-1408 (same language).

98. COLO. REV. STAT. § 38-30.5-102.

99. *Id.* § 38-30.5-103(2).

100. *Id.* § 38-30.5-103(3).

101. MONT. CODE ANN. § 70-17-102(7).

102. 12 U.L.A. 57 (Supp. 1981). Approved in 1981, the Uniform Act has been adopted in whole or in part in eight juridictions. *See* ARK. STAT. ANN. §§ 50-1201 to -1206 (Supp. 1985) (some additions); IND. CODE ANN. §§ 32-5-2.6-1 to -7 (Burns Supp. 1985); NEV. REV. STAT. §§ 111.390-.440 (1983); N.D. CENT. CODE § 55-10-08(4) (1983) (§ 4 of Uniform Act only); OR. REV. STAT. §§ 271.715-.795 (1983) (some additions); S.D. CODIFIED LAWS ANN. §§ 1-19B-56 to -60 (Supp. 1984) (some deletions); TEX. NAT. RES. CODE ANN. §§ 183.001-005 (Vernon Supp. 1985); WIS. STAT. ANN. § 700.40(1)-(6) (West Supp. 1985).

103. Section 1(1) of the Uniform Act reads:

> "Conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, arcbitectural, archaeological, or cultural aspects of real property.

valid conservation easement, the Uniform Act cures many of the traditional common-law shortcomings of the easement in gross.[104] The Uniform Act "clarifies common law"[105] by recognizing that the conservation easement is transferable.[106]

A third approach, similar to the Uniform Act, construes the conservation or preservation interest as an "easement."[107] Like the Uniform Act, these statutes do not label the interest specifically as an easement in gross or as an easement appurtenant.[108] Unlike the Uniform Act, however, most of these states do not treat the conservation easement implicitly as an easement in gross; rather, these states have taken special pains to treat conservation easements as easements appurtenant.[109] Florida and Idaho, for example, declare that conservation easements "shall run with the land."[110] Recognizing that courts may treat conservation easements as being in gross, several of these states' statutes declare that the easement shall be enforceable despite a lack of appurtenance to a dominant

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12 U.L.A. at 53 (Supp. 1981); ARK. STAT. ANN. § 50-1201(1); IND. CODE ANN. § 32-5-2.6-1; NEV. REV. STAT. § 111.410; OR. REV. STAT. § 271.715(1); S.D. CODIFIED LAWS ANN. § 1-19B-56(1); TEX. NAT. RES. CODE ANN. § 183.001; WIS. STAT. ANN. § 700.40(1)(a).

104. Section 4 of the Uniform Act reads:

A conservation easement is valid even though:

(1) it is not appurtenant to an interest in real property;

(2) it can be or has been assigned to another holder;

(3) it is not of a character that has been recognized traditionally at common law;

(4) it imposes a negative burden;

(5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;

(6) the benefit does not touch or concern real property; or

(7) there is no privity of estate or of contract.

12 U.L.A. at 60-61 (Supp. 1981); ARK. STAT. ANN. § 50-1204; IND. CODE ANN. § 32-5-2.6-4; NEV. REV. STAT. § 111.440; N.D. CENT. CODE § 55-10-08(4); OR. REV. STAT. § 271.745; S.D. CODIFIED LAWS ANN. § 1-19B-59; TEX. NAT. RES. CODE ANN. § 183.004; WIS. STAT. ANN. § 700.40(4).

105. Commissioners' comment to § 4(2), 12 U.L.A. at 61 (Supp. 1981).

106. Uniform Act § 4(2), 12 U.L.A. at 61 (Supp. 1981); ARK. STAT. ANN. § 50-1204(2); IND. CODE ANN. § 32-5-2.6-4(2); NEV. REV. STAT. § 111.440(2); N.D. CENT. CODE § 55-10-08(4)(b); OR. REV. STAT. § 271.745(2); S.D. CODIFIED LAWS ANN. § 1-198-59(2); TEX. NAT. RES. CODE ANN. § 183.004(2); WIS. STAT. ANN. § 700.40(4)(b).

107. *See* CAL. CIV. CODE §§ 815-816 (West 1982); FLA. STAT. ANN. § 704.06 (West Supp. 1985); IDAHO CODE § 67-4613 (1980); IOWA CODE ANN. §§ 111D.1-.8 (West 1984); MICH. COMP. LAWS ANN. §§ 399.251-.257 (West Supp. 1985); OHIO REV. CODE ANN. §§ 5301.67-.70 (Page 1981); PA. STAT. ANN. tit. 71, § 1047.1e(a)(12) (Purdon Supp. 1985); TENN. CODE ANN. §§ 66-9-301 to -309 (1982).

108. *See* statutes cited *supra* note 107.

109. *See* CAL. CIV. CODE § 815.2(b), (c); FLA. STAT. ANN. § 704.06(4); IDAHO CODE § 67-4613; IOWA CODE ANN. § 111D.2; PA. STAT. ANN. tit. 71, § 1047.1e(a)(12).

110. FLA. STAT. ANN. § 704.06(4); IDAHO CODE § 67-4613.

tenement.[111] Perhaps because of the implicit emphasis on treating conservation easements as appurtenant rather than in gross, only half of the states in this group recognize by statute that conservation easements are transferable.[112] Presumably, the other half of the group expects common law rules to determine the transferability of conservation easements.

The last statutory approach to the transferability question appears in those states that do not refer to conservation or preservation rights as easements at all; instead, these states use the general term "conservation restriction,"[113] which is defined broadly as an interest "in the form of a restriction, easement, covenant or condition."[114] These states, in effect, have created a new hybrid of real servitude; each state among this group, except one, explicitly allows transferability on a clean slate.[115] For example, the South Carolina statute provides that despite common law precedent, a conservation restriction "shall be devisable, assignable, and otherwise freely alienable, whether held by public or private interests."[116]

The conservation easement acts are a good example of the varied approaches that legislatures have taken to adapt the common-law easement in gross to a modern usage. Some legislatures, like some courts, have avoided the transferability question by calling easements in gross for conservation and preservation by other names. Other legislatures and the Uniform Act have tried to erase

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111. *See* MICH. COMP. LAWS ANN. § 399.253; OHIO REV. CODE ANN. § 5301.70; TENN. CODE ANN. § 66-9-306.

112. *See* FLA. STAT. ANN. § 704.06(2); IOWA CODE ANN. § 111D.2; MICH. COMP. LAWS ANN. § 399.256(2), (3); OHIO REV. CODE ANN. § 5301.70. The California, Idaho, Pennsylvania, and Tennessee statutes make no mention of transferability.

113. *See* CONN. GEN. STAT. ANN. §§ 47-42a to -42c (West 1978); ILL. ANN. STAT. ch. 30, §§ 401-406 (Smith-Hurd Supp. 1985) ("conservation right"); ME. REV. STAT. ANN. tit. 33, §§ 476-479 (Supp. 1985); MASS. GEN. LAWS ANN. ch. 184, §§ 31-32 (West 1977 & Supp. 1985); MINN. STAT. ANN. §§ 84.64-.65 (West 1977 & Supp. 1985); N.H. REV. STAT. ANN. §§ 477:45-:47 (1983); N.J. STAT. ANN. §§ 13:8B-1 to -9 (West Supp. 1985); N.C. GEN. STAT. §§ 121-34 to -42 (1981) ("conservation" and "preservation agreement"); R.I. GEN. LAWS §§ 34-39-1 to -5 (1984); S.C. CODE ANN. §§ 27-9-10 to -30 (Law. Co-op. 1977 & Supp. 1984).

114. *See* CONN. GEN. STAT. ANN. § 47-42a(a), (b); ILL. ANN. STAT. ch. 30, § 401(a); MASS. GEN. LAWS ANN. ch. 184, § 31; MINN. STAT. ANN. § 84.64(2); N.H. REV. STAT. ANN. § 477:45(I), (II); N.J. STAT. ANN. § 13:8B-2(b), (d); N.C. GEN. STAT. § 121-35(1), (3); R.I. GEN. LAWS § 34-39-2(a), (b); S.C. CODE ANN. § 27-9-10.

115. Massachusetts does not allow explicitly for transferability. For states expressly allowing transfer, see CONN. GEN. STAT. ANN. § 47-42b; ILL. ANN. STAT. ch. 30, § 401(b); ME. REV. STAT. ANN. tit. 33, § 477(1); MINN. STAT. ANN. § 84.65(1), (3); N.H. REV. STAT. ANN. § 477:46; N.J. STAT. ANN. § 13:8B-4; N.C. GEN. STAT. § 121-38; R.I. GEN. LAWS § 34-39-3(a); S.C. CODE ANN. § 27-9-30.

116. S.C. CODE § 27-9-30 (Law. Co-op. Supp. 1984).

the appurtenant/in gross distinction in favor of a general "conservation easement" that is transferable despite its benefit to land or person. Finally, some legislatures have confronted the interests squarely as easements in gross and have declared them to be transferable.

IV. DIVISIBILITY

A. *The "One Stock" Approach*

The courts' and legislatures' recognition that easements in gross are transferable raises a related question—the divisibility of easements in gross. Divisibility differs from transferability because the original holder of the easement grants only a portion of his rights to another while retaining the remainder of his original rights for his own use.[117] Divisibility, however, cannot arise as an issue unless courts first recognize transferability. If a court does not permit the transfer of an easement in gross as a whole, a court clearly will not permit a partial transfer of the easement.

The creating instrument is the starting point for determining whether an easement in gross is divisible.[118] Because division of easements most often occurs in commercial settings,[119] the original parties usually have a written instrument to which courts may refer when determining whether to allow a division. By reference to the creating instrument, courts first must discern whether the original grant of the easement in gross was exclusive or nonexclusive. An exclusive grant of an easement in gross gives the easement holder complete control of the easement interest, even to the exclusion of the owner of the underlying land.[120] A nonexclusive grant, on the other hand, retains for the owner of the underlying land a right to use the easement interest simultaneously with the

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117. *See* Hoffman v. Capitol Cablevision Sys., Inc., 52 A.D.2d 313, 315, 383 N.Y.S.2d 674, 676 (1976).

118. *See* Brown v. Heidersbach, 172 Ind. App. 434, 438, 360 N.E.2d 614, 618 (1977). The court stated that "[e]asements created by grant depend, *for the determination of the extent of the right acquired*, upon the terms of the grant properly construed . . . ." *Id.* (emphasis added).

119. *See infra* notes 139-40 and accompanying text.

120. *See* 3 POWELL & ROHAN, *supra* note 4, ¶ 419, at 34-225. *But cf.* Passaic Valley Council Boy Scouts of Am. v. Hartwood Syndicate, Inc., 46 A.D.2d 247, 250, 361 N.Y.S.2d 945, 948 (1974) (holding that, despite original exclusive grant for easement for recreational rights on reservoir, grantee's successor could not prevent grantor's latest successor from sharing in those rights because both groups had exercised rights together for the 80 years since the grant).

easement holder.[121] The resulting rule states that an easement holder can divide his interest only if his original grant was exclusive.[122] According to this rule, because the landowner has granted away all of his rights to the easement area, he cannot object to his grantee's division of the easement if the total use remains within the extent of the original grant.[123] The holder of a nonexclusive right, however, cannot divide his easement because the right of division remains with the owner of the underlying land.[124]

After deciding this threshold question, courts next must determine whether the exercise of the divided easement complies with the terms of the original grant. The traditional rule developed from the sixteenth century decision of *Lord Mountjoy's Case*.[125] Lord Mountjoy conveyed a piece of land to Brown but retained for himself the right to dig for ore in the land.[126] Mountjoy subsequently transferred his right to dig to two other parties.[127] In approving the division of Mountjoy's *profit a prendre*, the court limited its holding with the restriction that "the two assignees could not work severally, *but together with one stock*, or such workmen as belonged to them both."[128]

The "one stock" rule was a check on the division of easements through the first half of this century. In 1938 the Pennsylvania Supreme Court, for example, reaffirmed the "one stock" rule in *Miller v. Lutheran Conference & Camp Association*.[129] The court recognized that the original grantee of an easement in gross for commercial boating, bathing, and fishing rights to a lake could divide his easement with another party.[130] The court asserted, however, that the parties had to exercise their use of the easement jointly as "one stock."[131] Because the two parties did not have "common consent and joinder" to the transaction, the court con-

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121. *See* RESTATEMENT, *supra* note 3, § 493 comment d.

122. *See Hoffman*, 52 A.D.2d at 315-16, 383 N.Y.S.2d at 676; Hinds v. Phillips Petroleum Co., 591 P.2d 697, 699 (Okla. 1979); RESTATEMENT, *supra* note 3, § 493 comment c.

123. *See* Friedman Transfer & Constr. Co. v. City of Youngstown, 176 Ohio St. 209, 211-12, 198 N.E.2d 661, 663 (1964).

124. *See* Consolidated Gas Co. v. City Gas Co., 477 So. 2d 351, 352 (Fla. Dist. Ct. App. 1984); RESTATEMENT, *supra* note 3, § 493 comment d.

125. 78 Eng. Rep. 11 (1583).

126. *Id.* The right was exclusive because Mountjoy had complete control of the property interest.

127. *Id.* at 11-12.

128. *Id.* at 12 (emphasis added).

129. 331 Pa. 241, 200 A. 646 (1938).

130. *Id.* at 250-51, 200 A. at 651.

131. *Id.*

cluded that the division of the easement rights to the camp was invalid.[132]

The rationale for the "one stock" rule is to prevent the imposition of a "surcharge" on the servient tenement.[133] A surcharge on the servient tenement occurs when the holder's use of the easement exceeds the terms of the original grant and interferes unreasonably with the fee owner's rightful use of his land.[134] Even if the parties do not restrict the terms of the grant, courts will impose a duty on the easement holder to exercise his rights in a reasonable manner.[135] A surcharge on the easement can result in the holder's forced cure of the excessive burden,[136] the holder's liability to the servient owner in trespass,[137] and, if seriously excessive, the termination of the holder's easement interest.[138]

B. Independent Exercise Not to Exceed Original Burden

Although the "one stock" rule has endured for 400 years, the rule recently has lost ground to the notion of the original burden. Divisibility cases usually concern public commercial easements in gross for utilities[139] or rights of way.[140] These divided easement

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132. *Id.* at 252, 200 A. at 652. One commentator criticized *Miller* for its reliance on the "one stock" rule to prevent a surcharge on the easement. *See* Kloek, *supra* note 6, at 255. He argued that, as a practical matter, the "one stock" rule is unworkable because the nature of commercial easement rights rarely permits the holder and his transferee to exercise their rights jointly. *Id.* at 255-56. He reasoned that courts should allow division of exclusive commercial easements into separate rights if the independent exercise of the easement does not exceed the original extent of the easement burden. *Id.* If the transferees of a divided interest did cause a surcharge on the servient estate, then the fee owner would have the same remedies available against the transferees as against the original holder. *Id.* at 255.

133. 3 POWELL & ROHAN, *supra* note 4, ¶ 419, at 34-224.

134. 1 G. THOMPSON, *supra* note 16, § 427, at 660-63.

135. *See* Beckwith v. Rossi, 157 Me. 532, 536-37, 175 A.2d 732, 735 (1961).

136. *See, e.g.*, County of Johnson v. Weber, 160 Neb. 432, 444, 70 N.W.2d 440, 447-48 (1955) (forcing easement holder to reduce height of levee to original easement terms).

137. *See, e.g.*, Reed v. A.C. McLoon & Co., 311 A.2d 548, 552 (Me. 1973) (easement holder of right to maintain gasoline storage tanks on servient tenement liable in trespass for maintaining kerosene storage tanks on which landowner's young son injured); Beetschen v. Shell Pipe Line Corp., 363 Mo. 751, 756-58, 253 S.W.2d 785, 786-87 (1952) (holder of subsurface easement for pipeline liable in trespass for erecting fence along surface of plaintiff's land).

138. *See, e.g.*, Crimmins v. Gould, 149 Cal. App. 2d 383, 390-94, 308 P.2d 786, 791-93 (1957) (holder's unreasonably excessive use of right of way not curable by injunction resulted in forfeiture of easement).

139. *See, e.g.*, Salvaty v. Falcon Cable Television, 165 Cal. App. 3d 798, 212 Cal. Rptr. 31 (1985) (telephone lines); Martin v. Music, 254 S.W.2d 701 (Ky. 1953) (sewer line); Hoffman v. Capitol Cablevision Sys., Inc., 52 A.D.2d 313, 383 N.Y.S.2d 674 (1976) (power and telephone lines); Crowley v. New York Tel. Co., 80 Misc. 2d 570, 363 N.Y.S.2d 292 (Dist. Ct. 1975) (telephone lines); Jolliff v. Hardin Cable Television Co., 26 Ohio St. 2d 103, 269

rights are incapable of joint exercise as one stock because the original easement holder, for example, already has installed electric lines or built a road when he decides to transfer a portion of the easement. Because public commercial easements provide community benefits, courts have been unwilling to invalidate division of these easements even when the parties do not exercise the rights jointly as "one stock."[141] The courts instead have chosen a more realistic limitation on divisibility: the burden that the division places on the servient owner must not exceed the burden that the parties contemplated in the original grant.[142]

Three recent cases concerning the rights of cable television companies to use existing utility easements illustrate the courts' applications of the "original burden" standard of divisibility.[143] In each case, plaintiffs were the owners of the servient tenement across which they had granted easements for power and telephone lines to defendants.[144] The plaintiffs sued the defendants for dividing their easement interests and transferring to cable television companies the right to string cable lines along the easements.[145] In the first case to address the issue, the Ohio Supreme Court in *Jolliff v. Hardin Cable Television Co.*[146] found a justification for the division in the terms of the original easement that plaintiff granted to the power company. Created " 'for the purpose of transmitting electric or other power, including telegraph or telephone wires . . . ,' "[147] the easement grant bound the power company

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N.E.2d 588 (1971) (power lines); Hinds v. Phillips Petroleum Co., 591 P.2d 697 (Okla. 1979) (oil and gas line); Williams v. Humble Pipe Line Co., 417 S.W.2d 453 (Tex. Civ. App. 1967) (oil pipeline).

140. *See, e.g.*, City of Anaheim v. Metropolitan Water Dist., 82 Cal. App. 3d 763, 147 Cal. Rptr. 336 (1978); Ziegler v. Ohio Water Serv. Co., 18 Ohio St. 2d 101, 247 N.E.2d 728 (1969); Friedman Transfer & Constr. Co. v. City of Youngstown, 176 Ohio St. 209, 198 N.E.2d 661 (1964).

141. *See, e.g., Salvaty*, 165 Cal. App. 3d at ____, 212 Cal. Rptr. at 31-36; *City of Anaheim*, 82 Cal. App. 3d at 768, 147 Cal. Rptr. at 340; *Hoffman*, 52 A.D.2d at 316-18, 383 N.Y.S.2d at 677-78; *Ziegler*, 18 Ohio St. 2d at 105-06, 247 N.E.2d at 731.

142. *See, e.g., Hoffman*, 52 A.D.2d at 316-17, 383 N.Y.S.2d at 677; *Jolliff*, 26 Ohio St. 2d at 108, 269 N.E.2d at 591; *Hinds*, 591 P.2d at 699.

143. Jolliff v. Hardin Cable Television Co., 26 Ohio St. 2d 103, 269 N.E.2d 588 (1971); Hoffman v. Capitol Cablevision Sys., Inc., 52 A.D.2d 313, 383 N.Y.S.2d 674 (1976); Crowley v. New York Tel. Co., 80 Misc. 2d 570, 363 N.Y.S.2d 292 (Dist. Ct. 1975).

144. *Jolliff*, 26 Ohio St. 2d at 104, 269 N.E.2d at 589; *Hoffman*, 52 A.D.2d at 314, 383 N.Y.S.2d at 676; *Crowley*, 80 Misc. 2d at 571, 363 N.Y.S.2d at 293.

145. *Jolliff*, 26 Ohio St. 2d at 104, 269 N.E.2d at 589; *Hoffman*, 52 A.D.2d at 314-15, 383 N.Y.S.2d at 676; *Crowley*, 80 Misc. 2d at 571, 363 N.Y.S.2d at 293.

146. 26 Ohio St. 2d 103, 269 N.E.2d 588 (1971).

147. *Id.* at 108, 269 N.E.2d at 589.

and its " 'successors, assigns, lessees, and tenants.' "[148] The court held that stringing a cable line was not an extra burden on the easement because the original grant expressly contemplated installing wires in addition to the electric line.[149]

A few years later, a New York district court in *Crowley v. New York Telephone Co.*[150] expanded the *Jolliff* precedent by upholding the division of a telephone line easement to a cable company, even though the original grant did not contemplate this use.[151] The *Crowley* court stated that the public benefited from access to cable television and that the court must interpret the 1949 creating instrument in light of technological advances.[152] The court, therefore, upheld the division because of the absence of any express restrictions in the original grant.[153] On similar facts, the New York Appellate Division in *Hoffman v. Capitol Cablevision System*[154] upheld the divisibility of an easement despite the absence of express authorization in the original grant.[155] According to the court, the public interest in allowing a cable company to string its lines far outweighed any additional burden imposed on the servient tenement.[156]

In *Jolliff*, *Crowley*, and *Hoffman*, the cable companies' use of their divided easement rights was similar to the use authorized by the original easement that plaintiffs granted to the telephone and power companies. Although the *Jolliff* court noted this similarity,[157] other courts have not made similarity of use a requirement for divisibility.[158] For example, the Ohio Supreme Court, prior to

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148. *Id.* at 109, 269 N.E.2d at 590.

149. *Id.* at 109, 269 N.E.2d at 591.

150. 80 Misc. 2d 570, 363 N.Y.S.2d 292 (Dist. Ct. 1975).

151. *Id.* at 572, 363 N.Y.S.2d at 294.

152. *Id.*

153. *Id.*

154. 52 A.D.2d 313, 383 N.Y.S.2d 674 (1976).

155. *Id.* at 316-17, 383 N.Y.S.2d at 677.

156. *Id.* at 317-18, 383 N.Y.S.2d at 677-78; *see also* Salvaty v. Falcon Cable Television, 165 Cal. App. 3d 798, ____, 212 Cal. Rptr. 31, 35-36 (1985) (relying on *Jolliff* and *Hoffman* in allowing telephone companies to divide easement in gross with cable television company).

157. 26 Ohio St. 2d at 108-09, 269 N.E.2d at 591; *see also* Martin v. Music, 254 S.W.2d 701, 703 (Ky. 1953) (upholding grantee's division of easement for sewer lines to three assignees because the assignment was for a similar use).

158. *See, e.g.*, City of Anaheim v. Metropolitan Water Dist., 82 Cal. App. 3d 763, 769, 147 Cal. Rptr. 336, 340 (1978) (allowing highway and water line along same easement); Ziegler v. Ohio Water Serv. Co., 18 Ohio St. 2d 101, 106, 247 N.E.2d 728, 731 (1969) (same); Friedman Transfer & Constr. Co. v. City of Youngstown, 176 Ohio St. 209, 213, 198 N.E.2d 661, 663 (1964) (same); Hinds v. Phillips Petroleum Co., 591 P.2d 697, 699-700 (Okla. 1979) (allowing surface access and oil pipeline along same easement).

its *Jolliff* decision, ruled in *Freidman Transfer & Construction Co. v. City of Youngstown*[159] that plaintiff could not prevent the city from installing a water main along a highway bridge easement that plaintiff earlier had granted to the state.[160] The court found that dividing the highway easement for the water line was a valid secondary public use of the right of way and that this use imposed no additional burden on plaintiff.[161] Courts require only that the dissimilar uses of a divided easement be compatible enough to prevent burdening the servient tenement beyond the contemplation of the original grant.[162]

Landowners usually contest divisibility of easements to gain the economic advantage of making the transfer to the second easement holder, rather than allowing the first grantee to reap the economic benefit of a division.[163] Courts have not been sympathetic to the landowner's position and, as the preceding discussion indicates, uniformly have supported the first grantee's right to divide his easement.[164] Courts have been equally unsympathetic to landowner challenges to the division of "expansible easements."[165] Expansible easements usually arise in the oil and gas industry and, by their express terms, give the holder the right to expand the burden on the servient tenement by paying additional consideration to the fee owner.[166] Because an expansible easement is so flexible, it renders the "original burden" restriction on divisibility almost meaningless. For example, in *Williams v. Humble Pipe Line Co.*[167] the court allowed the first holder to transfer freely the expansible part of its easement, the right to lay additional oil and gas pipelines, to a second holder because the creating instrument itself removed the

159. 176 Ohio St. 209, 198 N.E.2d 661 (1964).

160. *Id.* at 213, 198 N.E.2d at 663.

161. *Id.* The dissent, however, objected to the division because the uses were so dissimilar. *Id.* at 214-15, 198 N.E.2d at 665 (Gibson, J., dissenting).

162. *See, e.g., City of Anaheim*, 82 Cal. App. 3d at 770, 147 Cal. Rptr. at 341; *Hinds*, 591 P.2d at 699.

163. *See, e.g., Crowley*, 80 Misc. 2d at 571, 363 N.Y.S.2d at 293 (plaintiff suing for " 'easement fee' " that cable company had paid to defendant).

164. *See supra* notes 143-56 and accompanying text.

165. *See, e.g.*, Williams v. Humble Pipe Line Co., 417 S.W.2d 453 (Tex. Civ. App. 1967).

166. *See, e.g., id.* at 455; *accord* Sorrell v. Tennessee Gas Transmission Co., 314 S.W.2d 193, 196 (Ky. 1958); Hamilton v. Transcontinental Gas Pipe Line Corp., 236 Miss. 429, 436, 110 So. 2d 612, 614 (1959); Baker v. Tennessee Gas Transmission Co., 194 Tenn. 368, 375, 250 S.W.2d 566, 569 (1952); Phillips Petroleum Co. v. Lovell, 392 S.W.2d 748, 750-51 (Tex. Civ. App. 1965).

167. 417 S.W.2d 453 (Tex. Civ. App. 1967).

"original burden" restriction on divisibility.[168]

V. ANALYSIS

Courts have shown a great reluctance to discard the old common law standards on transferability and to formulate a new rule more compatible with modern commercial and noncommercial uses of easements in gross. Welsh and Kloek noted this reluctance in the 1940's[169] and the passage of forty years has not changed materially the courts' adherence to ancient standards. Welsh and Kloek each argued that the parties' intent should control any determination regarding the transferability of an easement in gross.[170] Only one court to date, however, has followed this approach.[171] For most courts, the parties' intent is merely one element for the court to consider when determining whether easements in gross are transferable.[172]

The statutory route offers some hope for moving the law toward free transferability of all easements in gross based on the parties' intent. As the conservation easement acts illustrate, legislatures have dealt directly with the issue by statute.[173] The statutory approach, nevertheless, is limited because the statutes generally address only a few specific easement uses. Indiana stands alone in passing a general statute that allows for the transfer of easements in gross based upon the parties' intent.[174] If other legislatures follow Indiana's lead, the statutory approach could contribute greatly to free transferability of easements in gross.

Courts have had difficulty abandoning the common law rule prohibiting the transfer of easements in gross because of an excessive dependence on a black-letter system bent on routinely connecting legal terms with attendant consequences. Specifically, courts have taken a legal term in the abstract, such as "easement in gross," and have attached a consequence to the term, such as nontransferability, without considering the specific facts of the case at issue.[175] If the facts fall into a category that the legal term

168. *Id.* at 456.

169. *See* Kloek, *supra* note 6, at 258-60; Welsh, *supra* note 6, at 283-84.

170. Kloek, *supra* note 6, at 258; Welsh, *supra* note 6, at 284.

171. Lindley v. Maggert, 645 P.2d 430 (Mont. 1982); *see supra* notes 84-85 and accompanying text.

172. *See supra* notes 82-91 and accompanying text.

173. *See supra* notes 94-116 and accompanying text.

174. *See* IND. CODE ANN. § 32-5-2-1 (Burns Supp. 1985).

175. *See* McCoy, *Logic vs. Value Judgment in Legal and Ethical Thought*, 23 VAND. L. REV. 1277, 1279, 1281-82 (1970).

represents, then the particular consequence automatically follows despite the parties' intentions and the attendant circumstances. To do justice, therefore, these courts must force the facts of a case into a different legal category that allows for the proper consequence or must carve out an exception to the general rule.

LeMay v. Anderson[176] illustrates the counterproductive nature of this process. In *LeMay* the court ruled that the expressed reservation of a right of way "to the Grantor and others" for the purpose of crossing plaintiff's land was an easement in gross.[177] Because of this classification, the court concluded that the interest was nontransferable.[178] The severity of the defendant's situation, however, compelled the court to imply an easement of necessity along the same route.[179] By forcing a different label on the easement, the *LeMay* court arguably left the parties with the same rights and encumbrances they would have had under the express easement in gross while imposing a new hindrance of an implied delineation of the parties' rights.

Courts also have had problems overcoming the common-law prohibitions against transferring or dividing easements in gross because of an overreliance on legal terminology unsuited for the modern role of easements in gross. In 1945 Welsh noted this problem and advocated the abolition of the in gross/appurtenant distinction.[180] More recently, some commentators have advocated a radical restructuring of the entire law of servitudes into a single body of law.[181] Property law, however, does not move with such giant steps. Property law regarding easements would be better served if courts focused on the specific interest that the parties designed the easement to protect, whether the interest be appurtenant or in gross. A starting place would be to eliminate completely the presumption that favors finding easements appurtenant rather than easements in gross.[182] As long as this presumption exists, courts have no incentive to confront the interest as an easement in gross because they can reclassify the interest as a less restricted easement appurtenant. With the presumption removed, courts may

176. 397 A.2d 984 (Me. 1979).

177. *Id.* at 986.

178. *Id.* at 989.

179. *Id.*

180. Welsh, *supra* note 6, at 283-84.

181. *See* French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1304-18 (1982); Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1179, 1230-59 (1982).

182. *See supra* notes 36-42 and accompanying text.

look more directly at the actual circumstances of each case and then give more weight to the parties' intent when determining transferability of *all* types of easements in gross. As the Duchess told Alice at the croquet party: "[T]he moral of that is—'Take care of the sense, and the sounds will take care of themselves.' "[183]

When courts have eliminated the common law presumption against transferability, as with public commercial easements in gross, the law has moved much more rapidly. The development of the original burden notion for divisibility illustrates this rapidity.[184] Courts began to allow the holders of commercial easements in gross to transfer their interests according to the intent in the original grant and the surrounding economic circumstances. As a result, no reason remained to prevent holders from then dividing their easements according to the same terms. Thus freed from the common law presumption against transferability, courts quickly overcame the common law restriction of *Mountjoy*'s "one stock" rule on divisibility.[185] Courts found that the parties' intent and economic circumstances would allow independent exercise of divided easement interests if the holders did not exceed the original burden contemplated in the instrument.[186]

After focusing on the parties' intent and attendant circumstances in determining the transferability of commercial easements in gross, the courts should apply the same approach to noncommercial easements in gross. Judicial scrutiny of the parties' intent and the attendant circumstances would act as a safeguard by preventing transferability of noncommercial rights if the transfer would burden the servient owner's land beyond the contemplation of the original parties. The development of a more realistic approach to divisibility in the commercial context illustrates the capacity for change. At least one legislature has taken a step toward free transferability.[187] Courts also should also recognize this capacity for change and examine the parties' intent and attendant circumstances when determining the transferability and divisibility of all easements in gross.

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183. L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND 79 (Washington Square Press ed. 1951).

184. *See supra* notes 139-68 and accompanying text.

185. *See supra* notes 125-38 and accompanying text.

186. *See supra* notes 142-62 and accompanying text.

187. *See supra* note 93 and accompanying text.

VI. Conclusion

Today, easements in gross continue to play an important commercial role and are finding new uses in fields such as environmental conservation and historic preservation. Courts, however, still disagree about whether a holder of an easement in gross may transfer or divide his interest. The transferability of easements in gross still is unsettled. Some courts persist in presuming that easements are appurtenant, rather than in gross, despite the intent of the parties. This improper presumption has hindered the development of the transferability of easements in gross. Other courts have begun to uphold the transferability of both public and private commercial easements in gross. These courts, however, are still hesitant to allow the transfer of noncommercial easements in gross. Most courts have not yet given controlling weight in questions of transferability to the intention of the parties. Legislative approaches have advanced the transferability of easements in gross, but only for easements for specific uses. The divisibility of easements in gross, on the other hand, has developed more rapidly. The eclipse of the "one stock" rule in favor of the original burden notion was important in this development. The intent of the parties plays an important role in determining whether an easement is divisibile. If the law in this area is to continue to develop in a positive direction, courts must be willing to place less emphasis on terminology and to direct more attention toward the parties' intentions and surrounding circumstances of the easement interest when determining both the transferability and divisibility of easements in gross.

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