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Unavoidable Difficulties in Drafting Easements

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Gray v McCormick

Gray v McCormick (2008) 167 CA4th 1019, 84 CR3d 777, reported at p 17, is a good example of how hard it can be to draft an easement that is clear enough to eliminate all future disagreements between the parties. The CC&Rs in this case recited that an "exclusive easement of access, ingress and egress" had been reserved for the benefit of the Grays' lot over the McCormicks' lot. The Grays argued that this meant they could exclude even the McCormicks from using the driveway, while the McCormicks contended that they, as owners of the servient estate, could themselves still use the easement, even though everyone else was excluded.

Both positions were reasonable, and it took considerable effort by the court in examining the rest of the document to conclude that the Grays' position was the stronger one. Without that additional guidance, I could have been persuaded either way.

From the dominant owners' (Grays') point of view, since the word "exclusive" means no one else, it should naturally exclude the servient owners as well. But from the servient perspective, a fee interest normally entitles those owners to make any use of the property that they want as long as it does not unreasonably interfere with the dominant tenants' activity. This would equally naturally lead the McCormicks to believe that they could also use the driveway whenever their activity did not get in the way of the Grays—including "exclusive" as a modifier in the document only meant that they, the McCormicks, could not grant any third parties similar privileges over the driveway. (After all, if a dominant tenant is only protected against unreasonable interference with his easement, why should nonharmful use by the servient tenants matter? The trouble with that logic, however, is that while protecting a dominant tenant against nonharmful uses sounds like a silly outcome, it is no sillier than allowing a fee owner to prohibit trespasses even when they do not hurt her—which is what property law is all about, and which is why the McCormicks lost.)

So, why did counsel for the subdivider fail to make clearer just what was intended?

The Restatement of Servitudes says that "exclusive" in the context of easements means "the right to exclude others," which brings "exclusive" and "excluding" uncomfortably close together—a discomfort it then amplifies by adding that the "degree of exclusivity" is "highly variable" and may cover either the persons who may be excluded or the uses that may be excluded. That feature is what often condemns competent drafting of easement documents to be a difficult and lengthy process.

Estates in fee are easy to create because they transfer the entire bundle of sticks; qualifiers do not thereafter have to be added. But easements, covenants, and other restricted interests are more difficult because the bundle of sticks has to be divided between the parties, with all of the little slivers and fragments cleanly accounted for. Here, for instance, it is clear that the Grays could use their driveway for "access, ingress and egress," but can they also drive a motorhome over it,

or park their yacht on it? The McCormicks cannot drive on the driveway, but may their tree branches overhang it? Are they entitled to the gold that is in the ground under it?

There is always a temptation to blame counsel for poor drafting in failing to anticipate problems like these, but that is often unfair to the lawyers. The world keeps on changing, and no amount of worrying or extensiveness of drafting is going to anticipate everything. Think of all of the new smart and "green" buildings on line today that few of us suspected 10 years ago. In this field, document drafting is always going to look defective when viewed with hindsight. The only safe prediction is that the litigators will always be challenging what the transactionalists did.