

A Reprint from *Tierra Grande*



By Judon Fambrough

Many people believe if you own land in Texas you have the unquestionable legal right to access it. Nothing could be further from the truth. As Texas' population increases and land becomes more and more fragmented, landlocked property becomes more prevalent. Understanding easements is critical if access depends on one.

Access easements are divided into two categories: appurtenant and in gross (or personal). *Appurtenant easements* attach to land and benefit the owner. The owner has the right to use the easement to access the property. Whenever the land is sold, the easement remains attached to the property and benefits the subsequent owner(s).

An *easement in gross* attaches to and follows a specific individual. It stays with the individual who receives it even if ownership of the land changes. It is more a personal right than ownership in real property.

Easements in gross cannot be assigned or transferred unless the right is stated (or granted) in the easement. When in doubt, appurtenant easements take precedence over easements in gross.

Access easements, especially appurtenant ones, involve two tracts. The tract (or estate) whose owner has the right to cross another tract is called the dominant estate. The tract burdened by the easement (the one being crossed) is called the servient estate.

## Unobstructed Easements

**A** question often raised is whether the owner of the burdened estate (the one being crossed) has the right to erect gates or barriers across the easement. Likewise, can the same owner erect signs at the entrance to advertise a business or plant trees along the roadway for aesthetic purposes?

A recent appellate decision (*Ferrara v. Moore*) issued by the Texarkana Court of Civil Appeals addresses some of these issues. However, the opinion binds only cases arising within the appellate jurisdiction of that court.

Hays owned 111 acres next to a county road. He subdivided the tract into five lots. Each lot received a deed stating that it had a “nonexclusive right-of-way for the purpose of ingress and egress between the public road and the tract conveyed.”

In 2005, the defendant, Ferrara, purchased Lot 2. The noted easement served two tracts, Lot 2 and Lot 5. The owner of Lot 5 had to cross Lot 2 for access. After purchasing Lot 2, Ferrara blocked the entrance to Lot 5 with a locked gate, a fence and later felled trees across the lane to make it impassable. Hays, the original owner, tried unsuccessfully to resolve the problem amicably.

In 2009, the Moores purchased Lot 5 and discovered that Ferrara was blocking entry. The Moores attempted, again with the assistance of Hays, to resolve the problem. Ferrara refused, and the Moores filed suit asking the court to order Ferrara to remove the gate and enjoin him from erecting any other impediments, thus allowing *free and unrestricted use* of the easement. Ferrara countered by alleging the fence and gate had been in place for three-and-a-half years and was thus abandoned.

At the conclusion of the bench trial (a trial without a jury), the judge ruled in the Moores’ favor and enjoined Ferrara from “erecting or placing gates, fences, posts, barriers, wires, chains, locks, rocks or any other impediment or obstacle (that would

interfere in any manner with the free and unrestricted use and enjoyment of the easement.” In addition, the judge ordered Ferrara to pay damages and the Moores’ attorneys’ fees.

Ferrara, who represented himself at trial, retained counsel and filed an appeal. The appellate court affirmed the trial court’s decision for several reasons.

As a general rule, Texas courts have held the inclusion of the wording “free and unobstructed (or unrestricted) use” in the description of the easement prohibits the construction of gates and other impediments. In this instance, the wording was absent. The easement simply called for the “right-of-way for purposes of ingress and egress.”

Here, the court still affirmed the trial court by citing and quoting from *McDaniel v. Calvert* (875 SW 2d 482, 1994), which reads, “Whether a party has the right to erect gates depends on the intent of the parties. The parties’ intent can be determined by considering the following four factors: the terms (language) of the grant, its purpose, the nature and situation of the property, and the manner in which the easement is (or was) used.”

In *McDaniel*, the court focused primarily on the fourth element, prior usage. “[W]here an easement is granted to provide abutting landowners access to a roadway, and no gates existed

prior to the grant of the easement, it is evident that access to the roadway was to be unobstructed” (emphasis added). The servient estate cannot interfere with the right of the dominant estate to use an easement for the purpose for which it was granted or sought.

The dissenting judge in the Ferrara decision disputed this ruling, citing several appellate cases demonstrating that where the “free and unobstructed” language is absent, the courts must focus solely on the wording of the grant to determine the intent of the parties. The judge further asserted the other three factors mentioned in *McDaniel* should not be considered, and, if ambiguity exists, it should be resolved against the grantor or servient estate (the Moores).

However, the court in the Ferrara decision found that neither side alleged ambiguity at trial. Under contract law (which applies to easements), if ambiguity is not pled, then its construction is solely a question of law for the court to decide as it did here.



Finally, the dissenting judge attacked the ruling as being too restrictive, saying it imposed a burden on the servient estate (Ferrara) greater than what is reasonably needed to fulfill the purposes of the easement. The judgment prohibited *all gates* from being erected. Instead, he said, it should have enjoined the placement of any barriers (or gates) that prevented the Moores from accessing their property. Gates to contain livestock or prevent trespassing should not have been enjoined.

Because this issue was not raised at trial, it could not be addressed on appeal. The property's future usage remains speculative.

### Who Can Use the Easement?

**A**ssume you own five tracts of landlocked property. All tracts adjoin, or touch, each other. You approach the owner of the land lying between your tracts and the public roadway for an easement. He or she grants it. The easement describes only the tract lying next to the neighbor's as the dominant estate. None of the other four are mentioned or described in the easement. In this instance, can the easement be used to access the other four tracts? This was one of the issues addressed in *Boerschig v. Southwestern Holdings, Inc.* (SHI), an appellate case handed down by the El Paso Court of Civil Appeals in 2010.

During a series of transactions involving several large ranches in Presidio County, the surveys questioned the validity of an access route used to reach resort property. The route crossed a ranch owned by Boerschig. The surveys also revealed an encroaching fence on Boerschig's property.

Boerschig eventually sued the resort owner, SHI, to cease the use of the roadway and remove the encroaching fence. For the most part, the trial court ruled against Boerschig. He appealed.

### Scope of Express Use

Boerschig contended the original easement was conveyed solely for private use to benefit abutting ranches. It changed from private to public when SHI's guests began using it to access the resort. This expanded use exceeded what was envisioned or contemplated when the easement was granted.

The appellate court affirmed the trial court's ruling against Boerschig on this point. It did so by ascertaining the intent of the parties by looking solely at the wording of the instrument.

"When considering the terms of an express easement, we apply basic principles of contract construction and interpretation," the court stated. "The contracting parties' intentions, as expressed in the grant, determine the scope of the interest conveyed. We read the terms of an easement as a whole to

reach an adequate interpretation of the parties' intentions and to carry out the purpose for which the easement was created. Any doubts about the parties' intent are resolved against the grantor, or servient estate (Boerschig). We adopt the interpretation that is the least onerous to the grantee, or dominant, estate (SHI) in order to confer on the grantee the greatest estate permissible under the instrument."

The court did not examine the other three factors mentioned in *McDaniel* to determine the parties' intent. Instead, it relied solely on the wording of the easement. This decision highlights one of the problems with interpreting easements. There is no uniformity among the Texas appellate jurisdictions regarding how to interpret parties' intent. Some apply the four factors in *McDaniel*; others rely solely on the express language.

Here, citing *Shipp v. State*, the court ruled that an easement granted for general purposes of ingress and egress includes not

only the use required at the time of the grant but also the right to use the easement for any purpose connected with use of the property in the future.

In *Shipp*, the court found the easement could be used for both residential and business purposes when the easement contains no restrictions on its use.

"Absent any expressed language limiting or negating what the owners may do on their properties," the court ruled, "we

decline to hold that simply labeling the properties as 'ranches' or as a 'ranch road' is sufficient by itself to limit the properties to ranching operations only."

### Accessing Other Properties

**B**oerschig contended that the trial court ruled incorrectly when it allowed SHI the right to access property not originally described in the easement as the dominant tract or estate. This goes back to the opening example. Can an easement granted to access one tract be used to access other adjoining tracts not described in the easement?

The answer is no. The four tracts not described in the opening example are called nonappurtenant property. The applicable rule is referred to as the Dominant-Estate Doctrine as pronounced by the Texas Supreme Court in 1979.

This doctrine limits use of an easement to the dominant tract described in the grant. It cannot extend to any other land or be converted into a public way without the consent of the owner of the servient estate. For more information on this topic, see Center publication 1199, "Easements in a Rut."

The appellate court reversed the trial court on this issue. The ruling stated the grantee (SHI) could not use the easement to access property not described as the dominant estate, and neither could SHI's invitees or guests.



*If the language is ambiguous or uncertain, the resolution of the issue will be against the servient estate (the tract being crossed) in favor of the dominant estate.*



## Fence Encroachment

Finally, Boerschig contended the trial court erred by failing to order the removal of the encroaching fence. The court found that:

- the fence was already on the Boerschig's property four years prior to purchase,
- the fence had not caused any new injury after the purchase occurred,
- Boerschig did not have the right to assert a trespass claim and
- any trespass claim was barred by the statutes of limitation.

The appellate court agreed, holding "[W]here injury to land results . . . the right of action for all the damages resulting from that injury accrues to the owner of the land at the time the damages arise. . . . The right to sue for the injury (damages) is a personal right that belongs to the person who owns the property at the time of the injury."

Consequently, absent any evidence showing Boerschig bargained for an assignment of the prior owner's right to sue for injuries, he cannot rely on the discovery rule to defeat the statute of limitations.

The court ruled correctly regarding the recovery of damages. Boerschig needed an assignment from the prior owner to

pursue recovery. This issue is discussed in Center publication 1591, "Right to Sue in Sales Contracts."

Boerschig was not seeking damages, however, but the removal of the fence as an encroachment. On this issue, it appears the appellate court should have reversed the trial court and ordered its removal, assuming the statute of limitations had not expired for the equitable remedy. Boerschig was not suing for damages but for the removal of the fence. For more details, see Center publication 1074, "Encroachments: Unwelcome Invaders." ➔

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### THE TAKEAWAY

As large tracts in Texas are broken into smaller properties, landlocked properties increase. Before purchasing land, buyers should investigate whether easements exist and, if so, what type of easements. Appurtenant easements attach to the property and benefit the buyer and subsequent owners. An easement in gross attaches to the person who receives it and may stay with that person even if ownership of the land changes.

## What Should Landowners Glean from These Cases?

Anyone contemplating buying rural land in Texas must remember that it is possible to own landlocked property. Consequently, understanding easements is vital for anyone relying on one to access property. Here are some rules to be garnered from these cases.

- If an easement exists or will be created to access the property, get an attorney to determine whether the easement is appurtenant or in gross. An easement in gross will not benefit the new owner unless it can be (and is) assigned.
- Likewise, have the attorney determine whether any impediments such as gates or cattleguards may be constructed at the entry or across the easement. This depends on the intent of the parties. Some courts determine intent solely from the wording in the easement. Others examine the four factors described in *McDaniel*.
- If the language is ambiguous or uncertain, the resolution of the issue will be against the servient



estate (the tract being crossed) in favor of the dominant estate.

- As a general rule, the servient estate cannot interfere with the rights of the dominant estate to use the easement for the purpose for which it was granted, unless specifically limited.
- Only the owners of the land described as the dominant estate(s) in the appurtenant easement may use it for access. If you are purchasing land that has a recorded easement, but

the tract or tracts being purchased are not described as a dominant estate, the property may be landlocked.

- If an unauthorized use of the easement has occurred or is occurring at the time of the purchase, make sure the statutes of limitation have not expired to remedy the infraction. Likewise, make sure an assignment of the right to cure the infraction judicially is conveyed to the purchaser.