Terminating Easements in States East of the Mississippi River

By Adam Leitman Bailey and Israel Katz

One of this century's most common sources of real estate litigation in the states east of the Mississippi River is easements. In urban areas, entire development projects have been halted as a result of easement agreements, many of them ancient. In our nation's system of transferring title, in which each parcel of land is transferred with all of the rights of its predecessor owners (no matter how old), these disputes will continue. This article discusses how to terminate easements and notes that some states combat these ancient agreements by barring the enforcement of, or by expressly eliminating, old defects in land records.

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Methods of Termination

Easements can be terminated or extinguished in a variety of ways. Some easements, of course, may terminate on their own when the easement was created for a limited purpose or period of time and the term or purpose stated in the written instrument has expired. In other cases, easements may be terminated with the cooperation of the owner of the dominant estate, such as through an express release by the holder of the easement giving away all rights and remedies under the easement. In addition, there are a number of ways in which an easement can be terminated even if the owner of the dominant estate is not willing or able to execute a termination agreement. These methods of termination are abandonment, merger, prescription, end of necessity, demolition or destruction, marketable title statutes, misuse, estoppel, and death of the holder of an easement in gross.

The discussion that follows analyzes each method of easement termination and its respective elements and highlights where states diverge from one another in the 26 states east of the Mississippi River. An alternative version of this discussion with additional case references, for which space here does not allow, is posted by the authors at http://alblawfirm.com/articles/terminatingeasements.

Release

In all 26 states east of the Mississippi River, an easement can be extinguished if the easement holder releases the easement, agreeing to

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give away the holder's rights and remedies under the easement. See, e.g., *Great Cove Boat Club v. Bureau of Public Lands*, 672 A.2d 91, 94 (Me. 1996). Just as the creation of an express easement must be in writing because of the statute of frauds, a release must be in writing as well. See, e.g., *Guy v. Delaware*, 438 A.2d 1250, 1253 (Del. Super. Ct. 1981). When building a large development or even a house, it often makes financial sense to pay to have the easement holder release the easement instead of litigating the dispute or building around the easement.

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Abandonment

All states east of the Mississippi River recognize abandonment as a form of terminating an easement. See, e.g., *Montgomery County v. Bhatt*, 130 A.3d 424, 434 (Md. 2016). Typically, an easement is abandoned by the holder if there exists (1) non-use of the easement and (2) affirmative conduct on the part of the easement holder that manifests an unequivocal intent to relinquish the easement. See, e.g., *Satterwhite v. Rodney Byrd Millenium Props., Inc.*, 180 So. 3d 890, 899 (Ala. Civ. App. 2015). Mere non-use of an easement, even for prolonged periods of time, does not constitute abandonment. See, e.g., *Skvarla v. Park*, 303 S.E.2d 354, 357–58 (N.C. Ct. App. 1983) (holding that an access easement across an alleyway that had not been used in 70 years did not constitute abandonment because there was no evidence that the easement holder affirmatively intended to abandon the easement); see also Adam Leitman Bailey, *Setting the Law Straight on Terminating Easements*, N.Y.L.J. (July 29, 2015), at 5, https://alblawfirm.com/articles/easements. The party claiming abandonment must establish the easement holder's intent to abandon by clear and convincing evidence or some other similar form of heightened standard of proof. See, e.g., *Walls v. DeNoone*, 550 S.E.2d 653, 657 (W. Va. 2001). Georgia has codified abandonment of easements in Ga. Code Ann. § 44-9-6, which provides that "[a]n easement may be lost by abandonment or forfeited by nonuse if the abandonment or nonuse continues for a term sufficient to raise the presumption of release or abandonment." Although not abundantly clear from the face of the statute, Georgia courts have interpreted this statute to require clear and unequivocal intent on the part of the easement holder to abandon. See, e.g., *Gaston v. Gainesville & D. Electric Ry. Co.*, 48 S.E. 188 (Ga. 1904) (abandonment "must be evidenced by some decisive and unequivocal act").

Abandoning Easements Created by Prescription. Although non-use in and of itself generally does not constitute abandonment, a handful of states, including Maryland and Michigan, provide an exception for an easement created by prescription. See, e.g., *Chevy Chase Land Co. v. United States*, 733 A.2d 1055, 1082 n.8 (Md. 1999); *Cook v. Grand River Hydroelectric Power Co.*, 346 N.W.2d 881 (Mich. Ct. App. 1984). In these states, when non-use lasts for the period of prescription, the easement is extinguished, even absent an overt act or some affirmative conduct by the easement holder manifesting intent to abandon. For example, in *Cook v. Grand River Hydroelectric Power Co.*, owners of properties abutting a river upstream from a dam sued the dam purchaser after closing of the dam caused flooding to their properties. *Cook*, 346 N.W.2d at 826. The court dismissed the claims reasoning that the dam purchaser had acquired a prescriptive easement over the owner's properties. In addition, the court held that any prescriptive flowage easements were not abandoned by the dam purchaser because the property owners failed to prove non-use for the 15-year prescription period. Instead, the dam purchasers "continued to operate the dam gates and impound water to the top of the spillway until 1970." Id.

In Georgia, New Jersey, North Carolina, Ohio, and Kentucky, this exception for a prescriptive easement is not recognized outright, but nonuse of an easement for the prescriptive period raises a rebuttable presumption that a prescriptive easement has been abandoned. See, e.g., *Gilbert v. Reynolds*, 212 S.E.2d 332, 335 (Ga. 1975); *Burns Trading Corp. v. Blue Front Market*, 85 A.2d 320, 323–24 (N.J. Super. Law Div. 1951); *Hunter v. West*, 90 S.E. 130, 131 (N.C. 1916); *Tudor Boiler Mfg. Co. v. I. & E. Greenwald Co.*, 26 Ohio C.C. 556, 559 (1904); *City of Harrodsburg v. Cunningham*, 184 S.W.2d 357, 360 (Ky. 1944).

Intent to Abandon. In examining which uses indicate an intent to abandon an easement, an important consideration is whether the easement holder's actions were permanent or temporary in nature. See James W. Ely Jr. & Jon W. Bruce, *The Law of Easements and Licenses in Land* § 10:20 (2011). For instance, if the easement holder were to maintain locked gates across the easement or build a permanent structure on the dominant estate completely obstructing the easement, that would constitute an overt act with intent to abandon. See, e.g., *Pencader Assocs., Inc. v. Glasgow Trust*, 446 A.2d 1097, 1100 (Del. 1982). Conversely, no intent to abandon will be found when an easement holder simply fails to maintain a right of way easement or uses a different, equally convenient road to access his property instead of the easement. See *Lindsey v. Clark*, 69 S.E.2d 342, 344–45 (Va. 1952).

In a majority of jurisdictions, the affirmative conduct required to

demonstrate intent to abandon must be that of the easement holder, not that of the owner of the servient estate. See Ely & Bruce, supra, § 10:20. Courts in Georgia and Maine have held, however, that an easement holder's acquiescence to the conduct of the servient owner, which has the effect of destroying the purpose of the easement, also constitutes abandonment. *Walker v. Georgia Power Co.*, 339 S.E.2d 728, 730–31 (Ga. Ct. App. 1986); *Chase v. Eastman*, 563 A.2d 1099, 1102 (Me. 1989). For example, in *Walker v. Georgia Power Co.*, the Georgia Court of Appeals held that an easement holder who did not object to the removal of her ancestors from a cemetery and reinternment in another location effectively abandoned her easement in the original property. 339 S.E.2d at 730–31.

Abandonment by Statute for Public Streets. Certain states have adopted statutory schemes that delineate specific time periods for which non-use of a public street or highway will constitute an abandonment. For instance, New York Highway Law § 205 provides that every highway or public right of way that has not been travelled on or used for a period of six years shall be deemed abandoned. N.Y. High. Law § 205(1). Similarly, a Maine statute provides that a rebuttable presumption of abandonment arises when a public right of way is not kept passable for 30 or more years. Me. Rev. Stat. Ann. tit. 23, § 3028.

Prescription

Another method of terminating an easement recognized uniformly across the 26 states east of the Mississippi River is termination by prescription. See, e.g., *Vandeleigh Indus., Inc. v. Storage Partners of Kirkwood, LLC*, 901 A.2d 91, 102 (Del. 2006). The elements of a claim for terminating an easement by prescription are usage or possession that is (1) adverse, (2) open and notorious, (3) continuous, and (4) that lasts for the requisite prescriptive period. See, e.g., id. (For a full treatment of the laws for acquiring an easement by prescription in the states east of the Mississippi River, see Adam Leitman Bailey & Israel Katz, A*nalyzing Easement Laws and Cases in the States East of the Mississippi River*, Prob. & Prop., Jan./Feb. 2017, at 12.

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Because the servient estate owner already has the right to use the easement area to the extent it does not interfere with the easement holder's rights, the servient owner must demonstrate significant adverse activity to successfully extinguish an easement by prescription. See, e.g., *Smith v. Muellner*, 932 A.2d 382, 389 (Conn. 2007). The Supreme Court of Vermont explained that the "possession must be unequivocal and incompatible with possession and use by the [easement holder]." *Rowe v. Lavanway*, 904 A.2d 78, 84 (Vt. 2006).

The high level of adversity required in these situations is illustrated by *Lemieux v. Rex Leather Finishing Corp.*, 388 N.E.2d 1195, 1198 (Mass. App. Ct. 1979). In that case, the servient estate owner attempted to terminate an easement on his property by positioning gates at both ends of the easement that he locked during the night and by erecting permanent loading platforms, stairways, and entries that extended about five or six feet into the easement. The servient owner also placed telephone poles and electric transformers onto the easement. The Massachusetts Court of Appeals held that despite the extensive and adverse use of the easement area by the owner of the servient estate, the adverse use and obstruction of the easement was not entirely inconsistent or irreconcilable with the easement holder's right of way and thus did not extinguish the easement holder's rights. The court reasoned that the servient owner did not entirely block the right of way because the gates remained open during the daytime. In addition, the obstructions within the easement area did not block the entire easement area, and the area was still accessible to the easement holder by foot.

End of Necessity

In nearly all states east of the Mississippi River, when an easement is created by necessity the easement is terminated when the necessity ends. See, e.g., *Oyler v Gilliland*, 382 So. 2d 517, 519 (Ala. 1980) ("[b]y its very nature, an easement of necessity is extinguished once the necessity ceases"); see also *Zakutansky v. Kanzler*, 634 N.E.2d 75, 84 (Ind. Ct. App. 1994).

It is unclear whether this principle applies in Illinois and South Carolina. A Westlaw search did not produce any case in either jurisdiction that explicitly adopts this method of termination. See *Smith v. Comm'rs of Pub. Works of Charleston*, 441 S.E.2d 331, 334 n.2 (S.C. Ct. App. 1994) ("When an easement is implied by necessity, courts in other jurisdictions have held that the easement ceases at the time the necessity no longer exists. We have been unable to locate a South Carolina case that holds such").

Easements by necessity arise when the owner of a tract of land conveys part of the tract to another and, in doing so, causes either the conveyed land or the grantor's retained land to become landlocked (that is, without access to a public road). Typically, necessity for this type of easement ends when alternative access to the property becomes available—for example, when a neighboring landowner allows the easement holder passage through his or her property and the neighbor's property abuts a public road. Courts in Mississippi and Tennessee, however, have taken the position that permissive access

across a neighboring property does not necessarily terminate an easement of necessity because the neighbor could always withdraw permission. See, e.g., *Threlkeld v. Sisk*, 992 So. 2d 1232, 1241 (Miss. Ct. App. 2008); *City of Whitwell v. White*, 529 S.W.2d 228, 234 (Tenn. Ct. App. 1974) (accommodations by a neighbor in allowing the use of a road "being temporary and not arising to the dignity of enforceable right," did not defeat the easement). Instead, for an easement of necessity to terminate in these states, the easement holder must acquire either an adjoining property or an easement across an adjoining property that provides access to a public road. *Threlkeld*, 992 So. 2d at 1241.

Merger

With the possible exceptions of Indiana and Kentucky (in which the authors, using a Westlaw search, could not locate case law explicitly recognizing merger), all states east of the Mississippi River recognize termination of an easement by merger. See, e.g., *Louis Pizitz Dry Goods Co. v. Penney*, 4 So. 2d 167, 170 (Ala. 1941) ("It is a familiar principle that if the title in fee to all the parcels of the property be vested in one individual or owner, all rights are merged in the title in fee, terminating subordinate easements or right of user"). Merger occurs when one party acquires ownership of both the dominant and servient estates, such as when the person or entity that holds the easement acquires title to the servient estate or when a third party acquires title to both estates. The merger doctrine applies equally to easements in gross when the easement holder acquires title to the servient estate. See Ely & Bruce, supra, § 10:27. The rationale for the merger doctrine is the recognition that a person cannot have an easement over his or her own land because at that point the easement no longer serves a purpose. Consequently, when the dominant and servient estates become vested in one person or entity, the easement terminates. See Restatement (First) of Property § 497 cmt. a.

In a majority of jurisdictions, an easement destroyed by merger is not revived when the original parcels are later severed. See, e.g., *Appletree Mall Assocs., LLC v. Ravenna Inv. Assocs.*, 33 A.3d 1097, 1101 (N.H. 2011). Notably, however, the Pennsylvania Supreme Court carved out an exception stating that an easement may be revived "where it is required by the nature of the estate, and where in the interest of honest owners it should be preserved to effect a valid and legitimate purpose." *McClure v. Monongahela Southern Land Co.*, 107 A. 386, 388 (Pa. 1919).

Demolition or Destruction

Eleven states east of the Mississippi River—Alabama, Florida, Indiana, Maine, Massachusetts, New Hampshire, New York, Rhode Island, South Carolina, Vermont, and Virginia—recognize that if the part of the servient estate that the easement applies to is destroyed, the easement will be extinguished. See, e.g., *Rudderham v. Emery Bros.*, 125 A. 291, 292 (R.I. 1924). Most of the time, this situation will arise only when a building rather than land serves as the servient estate. See, e.g., id.; see also *Hopkins the Florist, Inc. v. Fleming*, 26 A.2d 96, 98 (Vt. 1942) ("[w]hile the servient tenement to which an easement attaches must be real estate it has often been held that it may attach to some structure erected on the land and not to the land itself"). For example, an easement can be created for a right of access through a stairway or hallway of a building. These easements will cease to exist if the burdened building is substantially destroyed.

There is disagreement among the states, however, whether voluntary destruction by the owner of the servient building will terminate the easement. In *United National Bank of Lowell v. Nesmith*, 130 N.E. 251 (Mass. 1921), two adjacent property owners erected buildings on their respective lots with a common entrance from the street and common stairways leading to the upper floors of the building. Half of each side of the entrance, landing, and stairs was on each side of the property line. The defendants had gained an easement for the use of the entranceway and stairways through prescription. A new owner, who succeeded one of the original property owners in title, attempted to tear down its building without providing a common entrance and stairways. The Supreme Judicial Court of Massachusetts held that, even as a result of the intentional destruction of the building, the easement in the common entrance and stairways terminates. The court reasoned that the easement holder cannot compel the servient estate holder to maintain a building on his property and restrain the maximum enjoyment out of the property.

Conversely, at least one court in Maine has taken the position that willful destruction of a burdened building does not destroy the easement. In *Grace v. Yarnall*, 441 F. Supp. 2d 130 (D. Me. 2006), the U. S. District Court of Maine concluded that an easement appurtenant for the use of a wharf did not terminate on the willful destruction of the wharf by the owner. Id. at 137. The court reasoned that the purpose of the easement still remained intact and was not an economic liability to the owners of the servient estate; thus, willful destruction did not terminate the easement.

In the reverse case, when a building serves as the dominant estate and gets destroyed, the easement benefitting that building is extinguished. See, e.g., *Andersen v. Schmidt*, 168 N.W.2d 437, 438–39 (Mich. Ct. App. 1969) (holding that an easement is terminated when the purpose for the easement was to access a boathouse and the boathouse was destroyed). This applies whether the destruction was from natural forces or voluntary acts of the dominant owner. *Kakas Bros. Co. v. Kaplan*, 118 N.E.2d 877, 879 (Mass. 1954); *Hopkins the Florist*, 26 A.2d at 98–99.

Termination Through the Recording System

Marketable Title Statutes. Ten states east of the Mississippi River—Connecticut, Florida, Illinois, Indiana, Michigan, North Carolina, Ohio, Vermont, Rhode Island, and

Wisconsin—have enacted statutes allowing certain ancient interests in land to be ignored by limiting title searches to some reasonable period of recent history. Conn. Gen. Stat. Ann. §§ 47-33b et seq.; Fla. Stat. Ann. §§ 712.01 et seq.; 735 Ill. Comp. Stat. Ann. 5/13-118–5/13-121; Ind. Code §§ 32-20-1-1 et seq.; Mich. Comp. Laws Ann. §§ 565.101–565.109; N.C. Gen. Stat. §§ 47B-1–47B-9; Ohio Rev. Code Ann. §§ 5301.47–5301.56; R.I. Gen. Laws §§ 34-13.1-1 et seq.; Vt. Stat. Ann. tit. 27, §§ 601 et seq.; Wis. Stat. Ann. § 893.33. These statutes are known as Marketable Title Acts or, in some states, as Marketable Record Title Acts.

In the interest of simplifying and facilitating land transactions, Marketable Title Acts avoid the necessity of examining title all the way back to the original creation of title for each new transaction. See, e.g., *Mitchell v. Redvers*, 22 A.3d 659, 666 (Conn. 2011); Prefatory Note, Uniform Marketable Title Act, drafted by the National Conference of Commissioners on Uniform State Laws,www.uniformlaws.org/shared/docs/marketable%20title/umta_final_90.pdf. In these states, the time period set for record search ranges from 30 to 75 years and operates by either barring or extinguishing certain claims and interests that cloud title to property and that predate the time period designated in the statute.

Vermont's and Wisconsin's Marketable Title Acts operate as a statute of limitations and bar claims and remedies for actions affecting the title to real estate after 40 years. Vt. Stat. Ann. tit. 27, § 601; Wis. Stat. Ann. § 893.33(6) (easements and covenants restricting the use of real estate may be enforced at any time within 40 years after their recording). By contrast, Florida, Connecticut, Michigan, Indiana, North Carolina, Ohio, and Rhode Island statutes expressly eliminate or extinguish all prior claims predating the statutory time period, which ranges from 30 years in North Carolina and Florida to 50 years in Indiana. N.C. Gen. Stat. § 47B-1; Conn. Gen. Stat. Ann. § 47-33c (40 years); Fla. Stat. Ann. § 712.02 (30 years); Mich. Comp. Laws Ann. § 565.101 (40 years); Ohio Rev. Code Ann. § 5301.48 (40 years); R.I. Gen. Laws § 34-13.1-10 (40 years); Ind. Code § 34-13.1-2. Illinois has enacted a two-tiered statutory scheme under which claims to real estate are limited to a 40-year statute of limitations, but title defects giving rise to the claims are completely eliminated after 75 years. See 735 Ill. Comp. Stat. Ann. 5/13-118, 5/13-114. In all of these states, holders of interests predating the time specified in the statute can save or at least extend their interests by recording notice to preserve that interest. Conn. Gen. Stat. Ann. §§ 47-33f, 47-33g; Fla. Stat. Ann. §§ 712.05, 712.06; 735 Ill. Comp. Stat. Ann. 5/13-118; Ind. Code § 32-20-4-1; Mich. Comp. Laws Ann. § 565.103; N.C. Gen. Stat. § 47B-4; Ohio Rev. Code Ann. § 5301.51; R.I. Gen. Laws §§ 34-13.1-5, 34-13.1-6; Vt. Stat. Ann. tit. 27, § 603; Wis. Stat. Ann. § 893.33(2).

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These statutes encompass a broad variety of interests in land, whether of record or not of record, including ancient easements. For example, in *H & F Land, Inc. v. Panama City-Bay County Airport and Industrial District*, 736 So. 2d 1167 (Fla. 1999), H & F Land, Inc., claimed that it was entitled to an easement of necessity after its predecessor in interest transferred all but a small portion of its land to Bay County in 1940, rendering a small piece of land retained by H & F's predecessor landlocked and waterlocked. Fifty-six years after the transfer, H & F filed suit to enforce its right of way of necessity across Bay County's land. The Florida Supreme Court held that the common law way of necessity was extinguished under Florida's Marketable Title Act because the claimant's predecessor failed to record notice of the interest within the required time period. The result may be different if the easement of necessity is created by statute instead of common law. See *Blanton v. City of Pinellas Park*, 887 So. 2d 1224 (Fla. 2004) (holding, on certified question, that statutory ways of necessity are not subject to the marketable title act).

Similarly, in *Affeldt v. Lake Court Beach Ass'n*, No. 315277, 2015 WL 405761 (Mich. Ct. App. Jan. 29, 2015), the Michigan Court of Appeals ruled that Michigan's Marketable Title Act extinguished a written easement agreement recorded in 1926. Id. at *4. The defendants were the owners of beachfront property near Lake Michigan. The plaintiffs asserted that their predecessor in title acquired a right of way easement over the defendants' property as a result of a 1925 conveyance by the defendants' predecessor in title. In upholding the trial court's ruling, the court held that, although the plaintiffs' predecessor in title acquired an express easement to use a portion of the defendants' property, the easement was extinguished. The court pointed to a plat map recorded in 1932 that made no mention of the plaintiffs' easement, thereby conveying a fee interest unencumbered by the easement to the defendants. Under Michigan's Marketable Title Act, if a person has an unbroken chain of title to an interest in land for 40 years or more, and nothing in the record after that 40-year period divests that person of that interest, then all interests that predate the 40-year period are extinguished. Id. Because the easement acquired by the 1925 conveyance predated the 40-year period, the court held that the plaintiffs' easement had been extinguished. Id.

In *Noblin v. Harbor Hills Development, L.P.*, 896 So. 2d 781 (Fla. Dist. Ct. App. 2005), the District Court of Appeal of Florida held that a genuine issue of material fact existed as

to whether an implied easement for rights of ingress and egress to extract oil and minerals was extinguished by Florida's Marketable Title Act. In that case, the dispute surrounded a parcel of property owned by the Raineys, who on October 1, 1948, executed a deed that conveyed half of the mineral rights in the property to E.C. Huey. Included in this oil and mineral conveyance was a right to enter the property to exploit these oil and mineral rights. On October 22, 1950, the Raineys conveyed the entire parcel of property to Collins by deed that made no mention of the previously conveyed easement to Huey. After a series of subsequent conveyances, the plaintiff in this case, Harbor Hills, acquired title to the property in 2000. Harbor Hills initiated a suit against Boyles, an heir of Huey, to quiet title to the property. When Boyles died, her heir (Noblin) was substituted as a defendant. The trial court entered partial summary judgment for Harbor Hill, holding that Noblin did not have an easement over Harbor Hill's property and alternatively, if an easement had existed, it was extinguished under the Marketable Title Act. On appeal, the court held that the 1948 conveyance of mineral rights did in fact create an implied easement in favor of Huey but remanded the case back to the lower court to determine, among other issues, whether the "use" exception to Florida's Marketable Title Act applied in this case. Id. at 786. (Florida's use exception is found in Fla. Stat. Ann. § 712.03(5), which provides, in pertinent part, that excepted from extinguishment under Florida's Marketable Title Act are "[r]ecorded or unrecorded easements or rights, interest or servitude in the nature of easements . . . so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof.") The court concluded the evidence provided by Noblin did not resolve whether Huey, or any of his successors in interest, used the easement within the past 30 years to enter the property to extract minerals. *Noblin,* 896 So. 2d at 786–87.

Some Easements Excepted from Marketable Title Statutes. All of these states incorporate some important exceptions to the extinguishment of easements under their respective marketable title statutes. The existence of any of these exceptions results in an easement holder's interest remaining in full force even if that interest predates the time period prescribed in the statute. For instance, in Connecticut, Florida, Illinois, Indiana, Michigan, Ohio, Vermont, and Rhode Island, easements that are still in use or clearly observable by physical evidence are not affected by the statute and are not extinguished, notwithstanding how antiquated they are. Conn. Gen. Stat. Ann. § 47-33h; Fla. Stat. Ann. § 712.03(5); 735 Ill. Comp. Stat. Ann. 5/13-120(3); Ind. Code § 32-20-4-3(b); Mich. Comp. Laws Ann. § 565.104; Ohio Rev. Code Ann. § 5301.53(C), (D); Vt. Stat. Ann. tit. 27, § 604(6); R.I. Gen. Laws § 34-13.1-7.

An example of the physical evidence exception is demonstrated in *Traders, Inc. v. Bartholomew,* 459 A.2d 974 (Vt. 1983), in which the plaintiff claimed an easement of necessity across defendant Bartholomew's property. The plaintiff asserted that, as a result of a 1931 foreclosure sale, the plaintiff's property had become landlocked and the only access to a public road was through the defendant's property. The defendant countered that, even if such a right of way did exist, it was extinguished in 1971 (50 years after its creation) by virtue of Vermont's Marketable Title Act. The Supreme Court of Vermont rejected Bartholomew's argument, holding that because the easement at issue was clearly observable by physical evidences of its use, the easement was not extinguished under the Marketable Title Act. Id. at 979. The court pointed to the trial court's findings that there were physical indications on the ground outlining what appeared to be the remains of a road. In addition, there was testimony and photographs establishing that the roadway continued to exist and was visibly apparent. Id. See also *Simonds v. Shaw,* 691 A.2d 1102, 1106 (Conn. App. Ct. 1997) (holding that an easement was evidenced by the road that ran through the property and therefore not extinguishable under the act).

Connecticut, Illinois, Michigan, North Carolina, Ohio, Rhode Island, and Wisconsin acts provide a blanket exception for easements of public utility corporations. Conn. Gen. Stat. Ann. § 47-33h; 735 Ill. Comp. Stat. Ann. 5/13-120(2); Mich. Comp. Laws Ann. § 565.104 (excepting "any easement . . . if the existence of such

easement or interest is evidenced by the location beneath, upon or above any part of the land described in such instrument of any pipe, valve, road, wire, cable, conduit, duct, sewer, track, pole, tower, or other physical facility and whether or not the existence of such facility is observable"); N.C. Gen. Stat. § 47B-3; Ohio Rev. Code Ann. § 5301.53(B); R.I. Gen. Laws § 34-13.1-7; Wis. Stat. Ann. § 893.33(5). In Florida, public utility easements are excepted but only if they are being used. Fla. Stat. Ann. § 712.03(5). Connecticut, Illinois, Michigan, North Carolina, Ohio, Vermont, and Rhode Island also except interests held by the United States and state governments. Conn. Gen. Stat. Ann. § 47-33h; 735 Ill. Comp. Stat. Ann. 5/13-120; Ohio Rev. Code Ann. § 5301.53(G); Mich. Comp. Laws Ann. § 565.104; N.C. Gen. Stat. § 47B-3(9); R.I. Gen. Laws § 34-13.1-7; Vt. Stat. Ann. tit. 27, § 604(b).

In Connecticut, Florida, and Ohio, easements specifically referenced in a deed recorded within the 40-year time period are excepted. Conn. Gen. Stat. Ann. § 47-33d; Fla. Stat. Ann. § 712.03(1); *Toth v. Berks Title Ins. Co.*, 453 N.E.2d 639 (Ohio 1983) ("[a]ny interest or defect which is referred to specifically in a muniment within the marketable record title of a parcel of property . . . is not extinguished by the Ohio Marketable Title Act"). Finally, in Vermont, all recorded easements, even those not specifically referenced in a deed or other document recorded after the prescribed period, are explicitly excepted. Vt. Stat. Ann. tit. 27, § 604(7).

Misuse

In most states, if an easement holder misuses an easement, the servient estate owner may generally obtain an injunction to curtail the abuse. See, e.g., *Ezikovich v. Linden*, 618 A.2d 570, 573 (Conn. App. Ct. 1993) (enjoining easement holder from maintaining a storage boat rack on an easement for boating purposes). In Indiana, Maryland, Michigan, Ohio, and Virginia, however, courts will terminate an easement if an easement holder misuses an easement through either unauthorized or excessive use. These courts have specified, however, that termination of an easement is appropriate only if the easement holder so misuses the easement that "it is impossible to sever the increased burden in such a way as to preserve to the dominant tenement that to which it is entitled." *Selvia v. Reitmeyer,* 295 N.E.2d 869, 874 (Ind. Ct. App. 1973).

Estoppel

Ten states—Alabama, Delaware, Georgia, Maine, Massachusetts, New Jersey, Pennsylvania, Rhode Island, Vermont, and Virginia—recognize that an easement can be terminated by estoppel. See, e.g., *Alabama Power Co. v. Martin*, 341 So. 2d 695, 698–99 (Ala. 1977). Estoppel terminates an easement when the easement holder indicates, either verbally or through conduct, that he intends to make no further use of the easement, and the servient owner relies on this representation to his material detriment.

For example, in *Alabama Power Co.*, a power company filed suit to enjoin certain property owners from building on property that was subject to a flood easement in favor of the power company. The property owners presented evidence that an agent of the power company induced the property owners to purchase the land by informing them that the easement had been extinguished and the power company no longer claimed an easement on the property. The property owners then purchased the property for a more expensive price and began building on the property. The Alabama Supreme Court held that the power company was now estopped from claiming any rights to the easement because the property owners had been induced to their detriment by the easement holder to purchase and begin building on the property. Id. at 698.

Death of the Holder

In most states east of the Mississippi River, a noncommercial easement in gross will terminate on the death of the easement holder. Termination results from the fact that noncommercial easements in gross are generally non-assignable and non-inheritable. See, e.g., *Sandy Island Corp. v. Ragsdale*, 143 S.E.2d 803, 807 (S.C. 1965) ("[a]n easement in gross is a right personal to the one to whom it is granted and ordinarily cannot be assigned by him to another"). Thus, the easement in gross can no longer be exercised on the death of the easement holder. See, e.g., *O'Shaughnessy v. Bice*, No. 03C-02-018, 2003 WL 22787612 at *2 (Del. Sup. Ct., Nov. 24, 2003) ("[a]n easement in gross does not extend beyond the life of the grantee, and cannot be made inheritable by the grant creating it"). But see Va. Code Ann. § 55-6 ("any interest in or claim to real estate, including easements in gross may be disposed of by deed or will"); *Hise v. BARC Elec. Co-op.*, 492 S.E.2d 154, 157 (Va. 1997) ("[a]lthough personal to the grantee, the easement is transferable by the grantee").

Typical examples of noncommercial easements in gross include "hunting rights, camping rights, and boating and fishing rights." Alan David Hegi, *The Easement in Gross Revisited: Transferability and Divisibility Since 1945*, 39 Vand. L. Rev. 109, 120 (1986). States differ on whether the intent of the parties of the original easement agreement to allow for the transferability of noncommercial easements in gross changes this outcome. In most states, courts consider the intent of the parties in determining whether easements in gross are transferable. See, e.g., Ind. Code Ann. § 32-23-2-3(b) (a noncommercial easement in gross may be "alienated, inherited, or assigned in whole or in part," if the instrument creating the easement so states).

Conclusion

Easements often are an unwelcome burden that could hinder construction or other land projects on the servient estate, but there are various ways that practitioners and landowners can terminate these interests. By understanding how to terminate an easement on a state-by-state basis, land development and improvement should be better facilitated. ■

METHODS OF TERMINATING EASEMENTS

State	Merger	Release	Abandonment	End of Necessity	Prescription	Demolition or Destruction	Marketable Title Acts	Misuse	Estoppel	Death of the Holder[1]
Alabama	✔	✔	✔	✔	✔	✔		✔	✔	✔
Connecticut	✔	✔	✔	✔	✔		✔			✔
Delaware	✔	✔	✔	✔	✔				✔	✔
Florida	✔	✔	✔	✔	✔	✔	✔			✔
Georgia	✔	✔	✔	✔[2]	✔				✔	✔
Illinois	✔	✔	✔		✔		✔			✔
Indiana		✔	✔	✔	✔	✔	✔	✔		✔
Kentucky		✔	✔	✔	✔					✔
Maine	✔	✔	✔	✔	✔	✔			✔	✔
Maryland	✔	✔	✔	✔	✔			✔		✔
Massachusetts	✔	✔	✔	✔	✔	✔			✔	✔
Michigan	✔	✔	✔	✔	✔		✔	✔		✔
Mississippi	✔	✔	✔	✔	✔					✔
New Hampshire	✔	✔	✔	✔	✔	✔				✔
New Jersey	✔	✔	✔	✔	✔				✔	✔
New York	✔	✔	✔	✔	✔	✔				✔
North Carolina	✔	✔	✔	✔	✔		✔			✔
Ohio	✔	✔	✔	✔	✔		✔	✔		✔
Pennsylvania	✔[3]	✔	✔	✔	✔				✔	✔
Rhode Island	✔	✔	✔	✔	✔	✔	✔		✔	✔
South Carolina	✔	✔	✔		✔	✔				✔
Tennessee	✔	✔	✔	✔	✔					✔
Vermont	✔	✔	✔	✔	✔	✔	✔		✔	✔
Virginia	✔	✔	✔	✔	✔	✔		✔		
West Virginia	✔	✔	✔	✔	✔					✔
Wisconsin	✔	✔	✔	✔	✔		✔			✔

Footnotes

1. Only applies to noncommercial easements in gross.

2. By statute. Ga. Code Ann. § 44-9-5 ("Where a way of necessity is appurtenant to land and the owner thereof purchases other land which provides him access to a highway over his own land, the way of necessity ceases").

3. The original easement may be revived "where it is required by the nature of the estate, and where in the interest of honest owners it should be preserved to effect a valid and legitimate purpose." *McClure v. Monongahela Southern Land Co.*, 107 A. 386, 388 (Pa. 1919).