Review of Recent Developments: Law Professors' Perspectives

PAULA FRANZESE, Seton Hall University
JOHN LOVETT, Loyola-New Orleans University
JOHN V. ORTH, University of North Carolina
DAVID A. THOMAS, Brigham Young University

1. Hershman-Tcherepnin v. Tcherepnin, 873 N.E.2d 771 (Mass. App. 2007) (although no particular words are required for the creation of a life estate, a devise to multiple devisees, one of whom is given a "right to occupy for life," results in a tenancy in common with no additional rights to possession in any co-tenant). O

Testator who died in 1998 devised a one-fifth interest in certain residential property to his wife along with "the right to remain there for as long as she desires." The remaining four-fifths he devised to his four children by a prior marriage. In 2002 the widow excluded the children from the premises by changing the locks, and in 2004 she petitioned for partition of the property, asserting that she had a "right to occupy for life" and that she and the four children together held the remainder interest. The probate judge found that the will "unambiguously" devised to the widow "a life estate…with the exclusive right to reside on the premises" and that she and the children shared the remainder. The judge determined the fair market value of the property and allocated it largely to the life tenant. The court of appeal reversed and held that the will devised the property to the widow and children together as tenants in common. In a footnote the appellate court noted that it did not decide whether a devise of a "life estate defeasible by the termination of the recipient's desire to occupy the property is defeased by the filing of the petition to partition."

This case is noteworthy because of the difficult constructional problem it presents, but also because it illustrates the difficulties that can arise when an intelligent layman – the testator was a long-time Harvard Music Professor and well-regarded composer – uses commercial software to draft his own will.

2. Hooper v. Hooper, 941 So.2d 726 (La. Ct. App. 2006) (acquisitive prescription does not run against an incompetent co-owner when the co-owner asserting acquisitive prescription fails to demonstrate intent to possess as owner to the incompetent's legal representatives and the incompetent co-owner retains a usufruct by virtue of a deed purporting to convey ownership from the incompetent co-owner to the acquisitive prescription claimant). L

Richard and Leona Hooper owned 160 acres of land in Rapides Parish, Louisiana. When Richard died he was survived by Leona, two sons and six daughters. In January 1958, Leona conveyed her one half interest in the land to her son Billy. In December 1958, another deed conveyed an interest in the land to Billy. The purported vendor here was Billy's brother, R.P., who sadly was born with severe brain damage and was mentally and

physically incompetent his entire life. Although R.P. was listed as vendor, R.P.'s mother, Leona, signed over his name. (The deed elsewhere identified Leona as R.P.'s representative.) The consideration for the sale was $200. In the deed, R.P. purported to retain a usufruct (a civil law life estate) over the property for the rest of his life. R.P. also retained mineral and timber rights on the property. Leona's signature on R.P.'s behalf was legally meaningless because an interdiction proceeding on his behalf was not held until 1995, at which time R.P.'s sister, Sue Hooper Bennett, was named his curatrix (a legal guardian in effect).

In 1960, Billy built a house for his mother and R.P. on other property owned by one of his sisters and moved onto the 160 acres and began to reside in his parents' home. In 1964, a local court issued a judgment of possession in Richard's succession recognizing the eight children as his heirs, each entitled to a 1/16 interest in his estate, subject to the usufruct of his mother. The same year, the six sisters all conveyed their undivided interests to Billy, although these transfers (along with the transfer from Leona) were allegedly simulations designed for the sole purpose of giving Billy record title so he could mortgage the property. Later he was supposed to re-convey the property back to his sisters and mother. Billy eventually built a new house on the property, mortgaged it to secure a construction loan, and then he and his wife continued to live on the property for the rest of his life, during which time he performed numerous acts of possession, including fencing all 160 acres, using the land for a cattle operation, cutting hay, selling timber, and paying all of the property taxes.

After Billy finally died, a 1995 judgment of possession in his succession recognized his interest as being only a 15/16 interest in the 160 acres. In 2003, his two sons, plaintiffs Edward, Jr. and Gregory Hooper, filed suit against their mentally and physically incompetent uncle, R.P. to be declared owner of the undivided 1/16 interest he purportedly conveyed to their father back in 1958. In addition to claiming that the 1958 deed was effective (a pointless argument that was dead on arrival with the court), they claimed that their father acquired ownership of the 1/16 interest by 30 year acquisitive prescription (otherwise known as "bad faith" acquisitive prescription in that it requires neither a just title or objective good faith on the part of the claimant). Later in 2003, R.P. died and his sister, Sue Hooper Bennett, acting as administrator of his succession, sought and obtained court approval to transfer R.P.'s 1/16 interest to third parties for $15,000. These third parties were substituted as defendants in the suit brought by Billy's sons against R.P. Eventually, the trial court hearing Billy's sons' claims ruled in their favor, holding that Billy had in fact acquired R.P.'s 1/16 interest by 30 year acquisitive prescription.

Under Louisiana law, a co-owner generally cannot assert acquisitive prescription (*i.e.*, adverse possession) against a fellow co-owner because he is considered to be a *precarious* possessor, that is, someone who possesses the property in fact but lacks the requisite intent to possess as owner. A co-owner, however, can terminate the precariousness of his possession and begin to prescribe on his own behalf if he demonstrates by "overt and unambiguous acts sufficient to give notice to his co-owner" that he intends to possess the property for himself. The primary issue in the case, then,

seemed to be whether Billy's acts of possession could ever be sufficient to give his incompetent brother notice of his intent to possess for himself.

The Louisiana Court of Appeal for the Third Circuit reversed the trial court and dismissed Billy's sons' claims, holding that prescription never began to run in favor of their father for two reasons. First, it could not run because R.P. was incompetent and thus no acts, however overt and unambiguous could have constituted sufficient notice to R.P. of Billy's intentions. The court here draws on old Louisiana cases which appear to suggest that notice to commence acquisitive prescription running must be of a nature to give the particular person interested knowledge that a "new order of things" has begun—in other words a subjective, not a reasonable man standard. The court seems to imply here that the only way Billy could have met this standard would have been to give R.P.'s legal representative notice. But, of course, this was not possible until 1995, approximately the same time as Billy's death. The court here also had to sidestep two relatively new provisions in the Louisiana Civil Code that seem to make it clear that acquisitive prescription can run against incompetents. *See* La. Civ. Code art. 3468 ("prescription runs against absent persons and incompetents, including minors and interdicts, unless exception is established by legislation"), *and* La. Civ. Code art. 3478 (10 year acquisitive prescription runs against incompetents). The court acknowledges Article 3478, but finds it has no bearing on 30 year acquisitive prescription. It fails to acknowledge Article 3468 at all.

Perhaps sensing the inadequacy of this line of reasoning, the court actually rests its holding on another ground. Even assuming that notice could be established sufficient to start acquisitive prescription running, the court holds that Billy's subsequent possession was marred by the vice of being equivocal and thus could not generate 30 years of continuous, unequivocal possession necessary to establish ownership because of R.P.'s usufructuary interest. According to the court, the problem all along was the fact that R.P.'s 1958 deed purporting to transfer ownership, which the court acknowledges was without legal effect because of R.P.'s lack of capacity, only changed the nature of R.P.'s possession from that of a co-owner to that of a usufructuary possessor. This, according to the court, negated the effectiveness of Billy's possession as owner and relegated it to possession on behalf of another possessor, the usufructuary R.P. Somehow this made Billy's possession "equivocal" and thus insufficient to sustain acquisitive prescription.

This whole line of reasoning is frankly quite dubious. But it is hard to say what the right answer was. No case like this has ever arisen under Louisiana law. One thing is clear, though. The decision reveals the lengths to which a court will go to prevent acquisitive prescription from running against an incompetent co-owner unless it can be convinced that an incompetent's legal representative is given a real opportunity to respond to open and hostile acts of possession. Here, the folks who were in fact looking out after R.P.'s interests—his mother and sisters took care of him his entire life so that he was never institutionalized—were probably aware of Billy's intentions to act as owner, but probably never quite believed he would really take the one asset his brother legally possessed. Now that everyone has passed away, the court seems content to leave the property in undivided co-ownership, perhaps implying that a partition or a buy-out of the remaining

1/16 share by Billy's heirs is the most just result after all to this strange tale of remarkable legal complexity and real human drama.

3. Sathoff v. Sutterer, 869 N.E.2d 354 (Ill. App. 2007) (conveyance by two of three joint tenants from themselves as joint tenants to themselves as joint tenants severed the joint tenancy with the third joint tenant). O

Grantor conveyed property to a married couple and a third party "as joint tenants with right of survivorship." Thereafter, the married couple conveyed their interest "from themselves as joint tenants to themselves as joint tenants." The husband died, then the wife died. The third party filed an action against the executor of the wife's estate to quiet title in herself in the entire estate and for a declaratory judgment that the married couple's conveyance had not severed the joint tenancy. The circuit court granted the executor's motion to dismiss the complaint, and the court of appeals affirmed.

Understanding the issue in this case requires a quick review of first-year Property law. The creation and continuance of a common law joint tenancy, which included a so-called "right of survivorship," required that the interests of the joint owners share four unities: time, title, interest, and possession. That is, their interests must commence at the same time, derive from the same title, be of the same quality, and give the same undivided right of possession. As a necessary consequence, a conveyance by a sole owner to himself and another did not at common law result in a joint tenancy, even if it was intended to have that effect. To create a joint tenancy in such a case required the use of a so-called "straw-party conveyance," that is, a conveyance from the sole owner to a third party (the straw man), who then re-conveyed to the two as joint tenants. This requirement has been eliminated by statute in most states, including Illinois, but the plaintiff in the present case argued that the language of the statute did not cover the case of two of three joint tenants conveying from themselves as joint tenants to themselves as joint tenants. As a matter of statutory construction, this was unpersuasive, and in any event the court indicated that it would give the statute a liberal construction. (It is a nice question whether the statute was needed at all in this case. Even at common law, the grantors here had all the unities to begin with.)

In a few states another nice question could arise concerning the grant to the married couple. At common law all such grants were presumed to be in tenancy by the entirety unless a contrary intention is expressed in the conveyance, and a few states continue the presumption as a matter of common law or by statute. Was the indication that the three held "as joint tenants with right of survivorship" enough to rebut the presumption? Or could it be interpreted to mean that the married grantees held their interest in tenancy by the entirety with the third grantee "as joint tenants with right of survivorship"? If the couple took in tenancy by the entirety, another question could arise: whether they took one share or two; that is, whether among the three, the married pair as a unit took one-half or they together took two-thirds? There is authority, most of it old, that in such cases they took one-half.

The case illustrates the perils of the joint tenancy. As the court reminds us: "An undisputable right of each joint tenant is the power to convey his or her separate estate without the knowledge or consent of the other joint tenant and thereby to sever the joint tenancy, transforming it into a tenancy in common and extinguishing the right of survivorship." (356) By self-conveyance, one (or in this case, two) of the joint tenants can continue the concurrent ownership but eliminate the "winner take all" feature. Was the plaintiff in this case taken by surprise? And did that explain the motive for pursuing the lawsuit?

4. Estate of Johnson, 739 N.W.2d 493 (Iowa 2007) (joint tenancy may be severed by self-conveyance if that is the grantor's intent). O

Husband and wife held property as joint tenants with right of survivorship. When the wife became seriously ill, the family prevailed upon her in her hospital room to execute a power of attorney allowing them to retitle the property in the husband's sole name. This they attempted by having the husband and the wife's attorney-in-fact convey from themselves as joint tenants to him alone. Confounding the family's expectations, the husband predeceased the wife. The wife (or those acting on her behalf) alleged that she was incompetent at the time she executed the power of attorney and claimed the property by right of survivorship. The trial court agreed that the power of attorney was invalid, but held that the effect of the husband's participation in the grant from the couple as joint tenants to him as sole owner had the effect of severing the joint estate, converting it into a tenancy in common. The Iowa Supreme Court reversed on the issue of severance, holding that the deed was void and therefore the wife became sole owner on her husband's death.

The Supreme Court used the case as the occasion to announce Iowa's abandonment of the time-hallowed requirement of the four unities (of time, title, interest, and possession) to create and maintain a joint tenancy. Henceforth, the state would join others in following an "intent-based approach" for recognizing the existence of a joint tenancy. The problem in this case, of course, was determining intent. It was argued on behalf of the husband's estate that his intent to terminate the joint tenancy was clear and although without the wife's joinder he could not transfer the entire estate to himself, his action in executing the deed was effective to convert the joint tenancy into a tenancy in common. While accepting that a conveyance from himself as joint tenant to himself as tenant in common – impossible at common law under the rule of the four unities – would have been effective under the new intent test, the court held that the husband's intent in this case, as gathered from the deed, was not simply to sever his interest from his wife's, but to secure the entire estate for himself.

Intention alone is not enough. The court held that there must be "an instrument effectuating the intent." (499) In this case, the deed relied upon as evidencing the intent to sever was void, and a void conveyance cannot be evidence of intent. Of course, the discarded four-unities test would have produced the same result in this case. I assume the court does not intend to carry its "intent-based approach" so far that the intent to sever if

unequivocally expressed in a will would eliminate the right of survivorship. Perhaps the court addressed this by saying that its new rule required, in place of the formal requirement of the four unities, a formal requirement that there be "some action or instrument sufficient to corroborate and give effect to that intent."

5. Walling v. Przybylo, 851 N.E.2d 1167 (N.Y. 2006) (an adverse possessor may acquire title by adverse possession no matter that he had actual knowledge that the property was owned by another.) F

Plaintiffs, the Wallings, purchased residential lot 22 in Queensbury, New York in January 1986. The Przybylos, defendants, purchased the adjoining residential lot – lot 23 –in 1989. Both parties built homes on their respective lots; however, defendants did not construct their residence until 1991 and waited until May 1994 to obtain a certificate of occupancy and move in. In 1987, prior to the construction of the defendants' residence, plaintiffs used the defendants' land often. They bulldozed and deposited fill and topsoil on the northerly side yard belonging to defendants, including the parcel at issue in this litigation. They also dug a trench and installed PVC pipe for the purpose of carrying water under the disputed parcel to ultimately be discharged in and over the disputed parcel. Plaintiffs also constructed an underground dog wire fence to enclose their dog and constantly mowed, graded, raked, planted, and watered the grassy area in dispute.

In 2004, subsequent to their moving in, defendants had the land surveyed and discovered that they had title to the disputed portion of the land. Plaintiffs then brought an action to quiet title. The trial court granted plaintiffs' motion for summary judgment quieting title to the land. Defendants filed a motion to renew, and the motion court modified its decision by denying summary judgment to the plaintiffs and found that there were triable issues of fact regarding whether the plaintiffs had *actual* knowledge of the true owners prior to making improvement on the land. The appellate division reversed the denial of summary judgment to the plaintiffs, thus granting plaintiffs' motion for summary judgment. The court there determined that "In the absence of an overt acknowledgment, our courts have recognized . . . that an adverse possessor's claim of right or ownership will not be defeated by mere knowledge that another holds legal title."

The New York Court of Appeals affirmed. A claim of adverse possession is established by proving the following five elements: Possession must be (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period – in New York, ten years. The court found that plaintiffs possessed the disputed parcel of land as early as 1986 in a manner that met these five elements.

The court determined that an adverse possessor's actual knowledge of the true owner is not fatal to an adverse possession claim. The court reasoned that an adverse possessor with knowledge of a deed still defeats the deed because the issue is "actual occupation," rather than "subjective knowledge."

In response to this rule, the New York legislature passed a bill that would bar a claim of adverse possession if the person making the claim had "actual knowledge" that the property was owned by another. Governor Elliot Spitzer vetoed this bill in August 2007, noting that, while "at first blush" the bill "would seem to be a logical improvement to the law," in reality the change would result in "extensive litigation of virtually every adverse possession claim." Jay Romano, *Adverse Possession: Mind Your Property*, N.Y. Times, Nov. 11, 2007. Hence, the State legislature's attempt to overrule the decision of New York's highest court was trumped by the executive.

6. Hebert v. City of Fifty Lakes, 744 N.W.2d 226 (Minn. 2008) (in Minnesota, an entity holding eminent domain power may not acquire by de facto eminent domain land that is registered under the state's Torrens system). T

Landowners owned six lots that were registered under the state's Torrens system in 1953. In 1954 a roadway abutting the land was dedicated and recorded. When the city actually constructed the roadway in 1971, the road as built deviated from the platted and dedicated road and encroached on the landowners' lots. The extent of invasion varied from 29 to 49 feet. The owners demanded that the road be removed, and the city refused. The owners filed action in 2005, seeking a declaratory judgment that the city had no ownership interest in the portion of landowners' property invaded by the road. The city claimed ownership of that portion by "de facto taking," and was granted dismissal for failure of the complaint to state a claim uponwhich relief could be granted.

The court of appeals reversed, holding that no de facto taking had occurred, because the invasion of the landowners' land was not substantial enough to constitute a taking "in the constitutional sense."

The state supreme court considered whether a "de facto taking" had occurred in this case. Such a taking occurs when an entity with eminent domain power interferes with an owner's use, possession or enjoyment of the land. If such a taking has occurred, the owner may be entitled to compensation, but may not eject the condemnor. A prior case had held that utilizing property for a public roadway can be a de facto taking.

However, the question of first impression presented by this case was whether property registered under the Torrens system is subject to a de facto taking. The Torrens statute specifically provides that registration does not change the right to take land by eminent domain. The statute also prohibits acquisition of title to registered land by prescription or by adverse possession. These provisions, and the strict construction required of statutes conferring compulsory power to take private property, lead the court to conclude that the only exercise of eminent domain power permitted for Torrens land is by formal eminent domain proceedings under state statute. To permit a de facto taking would also be contrary to Torrens notice principles, according to which court action for registration of a title certificate is accompanied by notice to and opportunity to be heard for all interested parties.

The statute of limitations is not a defense in this case, because adverse possession of Torrens land is not permitted.

7. Goldstein v. Pataki, 516 F.3d 50 (2nd Cir. 2008) (the legislature's decision to utilize its eminent domain power to acquire land to transfer to a private developer, for purposes of building a sports arena that will be home to the Nets Basketball Franchise, passes constitutional muster since the project bears at least a rational relationship to several well-established categories of public uses.) F

Plaintiffs here are fifteen property owners of homes or businesses. They file this action against defendants, a private developer and various officials of the state and city of New York, alleging that their Fifth Amendment rights were violated by defendants use of the power of eminent domain where the "claims of public benefit are a pretext." The allegations focus on the Atlantic Yards Arena and Redevelopment Project (the "Project").

The Project is a publicly subsidized development project slated to cover twenty-two acres within the heart of downtown Brooklyn, New York. The plan for the Project includes the construction of a sports arena that will be home to the New Jersey Nets National Basketball Association franchise, at least sixteen high-rise apartment towers and a number of office towers. The Project site includes a parcel of land with less blight, which is held by private parties and referred to by plaintiffs as the "Takings Area." If necessary, the land in the Takings Area will be acquired by use of eminent domain.

The plaintiffs challenge this project alleging that it has not been driven by a legitimate concern for the public benefit. Rather, they claim that various government officials have been motivated by the desire to benefit Bruce Ratner, the man whose company first proposed it, who serves as the Project's primary developer, and is also the principal owner of the New Jersey Nets. Plaintiffs claim that the alleged "public uses" advanced by defendants for the Project are mere pretexts for what really is a private taking that violates the Fifth Amendment.

In granting defendants' motion to dismiss under Rule 12(b)(6), the district court for the eastern district of New York found that the Project did not violate the Takings Clause, since it would serve several well-established public uses, including redress of blight, construction of a sporting arena and the creation of new housing, including 2,250 new units of affordable housing. Additionally, the court found that while a "pretext" argument provided a valid basis for a public-use challenge under the Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), such a claim could not succeed here because a reasonable juror could not conclude that the public purposes offered in support of the Project were nothing more than mere pretexts.

On appeal, the Second Circuit affirmed the decision below. Citing *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984), the court stated that while there is a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, it is an extremely narrow one. The court reasoned, "[o]ur review of a legislature's public-

use determination is limited such that 'where the exercise of the eminent domain power is rationally related to a conceivable public purpose,' . . . the compensated taking of private property for urban renewal or community redevelopment is not proscribed by the Constitution.'" *quoting Rosenthal & Rosenthal, Inc. v. New York State Urban Development Corp.*, 771 F.2d 44, 46 (2d Cir. 1985).

The court found that specific allegations in the complaint foreclose any blanket suggestion that the Project can be expected to result in no benefits to the public. Effectively, appellants conceded what the court in *Rosenthal* found to be a complete defense to a public-use challenge: that viewed objectively, the Project bears at least a rational relationship to several well-established categories of public uses.

Similarly, the court rejected the claim that the alleged public uses are mere "pretexts."

The court did add, however, that "a fact pattern may one day arise in which the circumstances of the approval process so greatly undermine the basic legitimacy of the outcome reached that a closer *objective* scrutiny of the justification being offered is required."

8. Mount Laurel Township v. MiPro Homes, L.L.C., 910 A.2d 617 (N.J. 2006), *cert. denied*, 76 U.S.L.W. 3167 (Oct. 1, 2007) (towns can utilize their eminent domain powers to dedicate the targeted land to open public space even when that land had been acquired by a private developer who had obtained the necessary town approvals for development). F

Defendant MiPro Homes, L.L.C., owns 16.3 acres in an area of Mount Laurel Township zoned for residential use. MiPro purchased the site with plans to build twenty-three single-family homes priced between $400,000 and $450,000, and obtained preliminary subdivision approval for this on May 9, 2002.

Meanwhile, the municipal governing body learned of MiPro's development plans and attempted to obtain the MiPro site as part of its open-space acquisition program. However, because MiPro had obtained final subdivision approval earlier that month, the township was unable to obtain the parcel by voluntary acquisition. Mount Laurel brought this condemnation action on May 24, 2002 and filed a declaration of taking.

The trial court dismissed Mount Laurel's action, concluding that while the township had initiated proceedings to condemn the property for a facially valid purpose (passive open space), its "real reason" was to slow residential development, which it could not accomplish through condemnation.

The appellate division reversed, concluding that an action to condemn property for open space may be maintained even if the party whose property is being condemned can show that the municipality's motive in selecting that property is to slow down residential development. The court also found that such a goal does not provide a foundation for

finding that the municipality's use of eminent domain constitutes bad faith or manifest abuse.

The New Jersey Supreme Court affirmed the holding of the appellate division permitting the municipality's use of eminent domain to acquire the property, noting that New Jersey citizens have expressed a strong, sustained public interest in the acquisition and preservation of open space. To that end, numerous statutes have been enacted authorizing loans and grants to expand the state's Green Acres Program. Some of them give municipalities the power of eminent domain to acquire land for recreation and conservation purposes. Indeed, New Jersey residents have voted repeatedly for the issuance of state and county bonds to provide funding for open-space acquisition.

That the township sought to limit development, thereby seeking to allay the problems of overcrowded schools, traffic congestion and pollution, does not alter the disposition here. The town's motive is not inconsistent with the motive driving the public interest in open-space acquisition generally.

On remand there will be an appointment of condemnation commissioners and the property will be valued at its fair market value, including the value associated with MiPro's final subdivision approval.

Justice Rivera-Soto dissented, finding that a township seeking to slow development should be obliged to purchase available property rather than condemn private tracts under development over owners' objections.

Opponents of this decision have warned that it threatens the housing industry by rendering less than certain parties' otherwise reasonable reliance on building approvals. This in turn could deter lenders from investing in projects. Supporters of the decision counter that this is an important precedent, now available to inspire municipalities to be proactive in enhancing the quality of life in their areas.

9. Hudson Savings Bank v. Austin, 479 F.3d 102 (1st Cir. 2007) (an interpleader action involving claims by both state and federal governments brought in state court and removed to federal court is not barred by the Eleventh Amendment, although claims against the state by private parties must be remanded for determination by the state court). O

Mortgaged property was subject to tax liens by both the state and federal governments. After the mortgagor defaulted, the mortgagee foreclosed. The foreclosure sale produced a surplus, but not one large enough to discharge both liens. The mortgagee, which made no claim on the remaining sum, filed an interpleader action in state court, naming the state and the United States as defendants. The mortgagee, the nominal plaintiff, requested the court to determine the relative priority of the defendants' claims and discharge it from further liability to either defendant. The United States removed the action to federal court before the mortgagee had been discharged and dismissed by the

state court as a party, as would have been occurred in due course. The state then moved for dismissal on the ground that the Eleventh Amendment to the U.S. Constitution deprives federal courts of jurisdiction over suits against states, and this action still included a claim by the mortgagee against the state. The federal district court dismissed the action, and the United States appealed.

The Eleventh Amendment was adopted in 1795 to overturn the Supreme Court's decision in Chisholm v. Georgia, 2 U.S. 419 (1793), which held that the Court had original jurisdiction over claims by private parties against a state. The Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." Caselaw over the last two centuries has resulted in the Amendment meaning both more and less than its words imply. For example, the Amendment has supported the holding that the federal courts lack jurisdiction over cases against a state if brought by its own citizens (rather than citizens of another state) – here, by the mortgagee-stakeholder against the state. The court of appeals carefully reserved the difficult constitutional questions that would arise if the stakeholder in an interpleader action involving the state and federal governments made any claim on its own behalf to the stake or sought more than mere discharge from further liability, or if a private party asserted any claim to the stake. Picking its way carefully, the court of appeals reasoned that the reality of the action before it involved only a dispute between the state and the federal government. Neither by its terms nor by judicial gloss does the Eleventh Amendment deny federal jurisdiction over such cases. The court of appeals therefore reversed and remanded the case to the district court for determination of the relative priority of the federal and state claims. Thereafter, if any claim against the state by the mortgagee remained, the case was to be remanded to the state court.

10. City of Bowie v. MIE Properties, Inc., 923 A.2d 509 (Md. 2007) (19 year old restrictive covenants designed to facilitate development of research and technology park held enforceable despite alleged change in circumstances since creation of the covenants due to withdrawal of a university from development project). L

In 1986, the owners of a 466 acre parcel executed a set of restrictive covenants limiting the development of the property to 14 specifically permitted uses. In consideration for being named the covenantee, the City of Bowie, annexed the parcel within its municipal limits, extended roadways and other public services and facilities to the property and set up a tax increment financing mechanism for the joint benefit of the city and the developers. The development plan called for the creation of a research park that would be affiliated with the University of Maryland.

Unfortunately, the development was not as successful as planned and one of the original development partners, the University of Maryland Foundation, withdrew. Later MIE acquired ownership of portions of the burdened property and began developing 150,000 square feet of "flex-space" buildings to accommodate tenants. In 2001, it leased a

portion of this space to a dance studio, a use which the City claimed was in violation of the use provisions of the covenants. (The City allegedly had approved the studio at one point but reneged when MIE had refused to construct a large office building requested by the City). The City sued to enjoin the operation of the dance studio and MIE counterclaimed for a declaratory judgment that the covenants were invalid and unenforceable. The trial court ruled for the City finding, *inter alia*, that the dance studio failed to qualify under category nine of the permitted uses--"public and quasi-public uses of an educational or recreational nature." The Court of Special Appeals vacated and remanded to the trial court, instructing it to determine the "reasonable probability that the parties will be able to achieve the goals of the covenant within a reasonable time."

The Court of Appeals of Maryland reversed and reinstated the trial court ruling. At the outset, the court determined that the covenants did not require the property to be developed in conjunction with the University and thus its withdrawal from the project did not vitiate them. (The absence of an escape clause to this effect was significant.) Reaching the crucial changed conditions issue, the court specifically rejected the Court of Special Appeals' attempt to require the City to prove that there was a "reasonable probability" that the research center would be developed. To the contrary, the Court of Appeals held that MIE bore the burden of proving that the covenants could not further the purpose for which they were formed in light of "changed relevant circumstances" and "objective factors outside of the property owner's control." The court articulated what some of those objective factors might be: (1) whether there has been a radical change in the neighborhood causing the restrictions to outlive their usefulness; (2) whether the covenantee still exists if the covenant is held in gross; (3) comparative hardship; (3) the amount of time that has passed since creation of the covenant; and (4) whether the covenant was imposed for a specific duration. On factor (3), the court noted in particular that when a covenant does not specify the duration of a restriction or it prescribes an indefinite duration, courts, using equity principles, may limit the covenant's duration to a reasonable period of time. The court refused to set any "bright line expiration date," explaining that "the question of validity is a combination of a reasonable period of elapsed time and frustration of purpose, in light of changed circumstances occurring over that time."

Turning to the facts, the court concluded that at the time of the challenge, 19 years after the covenants' execution, there had not been a radical change to the character of the neighborhood that was pervasive enough to defeat the covenants' purpose, despite the university's withdrawal from the project and some unspecified physical and zoning changes in the neighborhood. The Court of Appeals appeared to be impressed with the conclusion drawn by the trial court, based on ample expert testimony, that given enough time a developer committed to the original vision of the project could make it work and thus the covenants could still serve their original purpose.

On a doctrinal level, the result here is not particularly surprising given the current trend in American decisions to resist using the changed conditions doctrine to terminate covenants except in the most extreme cases of radical change, despite the strong endorsement of the doctrine in the *Restatement (Third) of Property: Servitudes* § 7.10.

From a more practical perspective, and notwithstanding the rhetoric about burdens of proof and objective factors, the result is still striking. The court blocked an owner of some "flex-space" from leasing a small portion of that space for a modest dance studio, relying on 19 year old covenants that had been executed to facilitate a research and technology park that never really got off the ground and for which a probably key university partner had withdrawn. Was the operation of the dance studio really going to harm the City or the other property owners in the area still affected by the covenants? Probably not. Instead, the court allowed the City to use the covenants as a tool to extract unrelated concessions from the burdened property owner. Courts in other jurisdictions like England or Scotland probably would not countenance this. The decision thus typifies the powerful attachment of American courts to a contractarian view of covenants.

11. Citizens Voices Assn v. Collings Lakes Civic Assn., 934 A.2d 669 (N.J. App. Div. 2007) (50 year old covenants allowing successor to developer of common interest community to collect annual fee in exchange for access to common recreational facilities held to be enforceable but developer not permitted to increase annual fee to cover increased maintenance and capital improvement costs). L

A community of approximately 1100 homes was formed in the 1950's surrounding four lakes and four dams. Its name was "Collings Lakes." Master deeds were recorded when the development was created placing certain covenants and restrictions on all the parcels. One of the covenants imposed an annual charge of $48 on grantees and their successors for "beach, lakes, rivers, parking areas, boat landing and playground privileges, [whether] or not such privileges are exercised." Title to these common facilities was originally held by the developer. The covenants also provided that these common facilities will be subject to rules and regulations then in force and created by the developer or "which may from time to time be made by the Grantor [the developer], its successor or assigns."

In 1956, the original developer entered into a series of transactions, the sum total of which made clear that the property owners whose parcels were encumbered with the master deeds have the right to use the common facilities (including the lakes), which are to be maintained by the developer and that the developer would never impose a financial obligation on the property owners for the use of these facilities greater than the $48 annual charge. In 1956, the Collings Lake Civic Association (CLCA) was also incorporated, but not as a mandatory homeowners association.

In 1979, after litigation between CLCA and the developer, title to the common recreational facilities was transferred to CLCA, along with the right to collect the $48 fee. Subsequent litigation clarified the enforceability of the deed restrictions and CLCA's right to collect the annual $48 fee prospectively.

In 2000, the New Jersey Department of Environmental Protection (DEP) notified CLCA that upgrades were necessary for the four dams which formed the four lakes at the heart of the Collings Lake Community to comply with the Safe Dams Act. N.J.S.A. 58:4-1 to -10. CLCA realized that the funds it had collected from the $48 annual assessment were

insufficient to maintain and operate the recreational areas and perform the improvements to the dams required by the DEP, so CLCA amended its by-laws and increased the maintenance fee from $48 to $75 per year. Plaintiff Civic Voices Association (CVA) filed suit to quiet title and remove the deed restrictions, alleging abandonment and laches. CLCA filed an answer and counterclaim, seeking recognition of its right to assess property owners for additional costs for maintenance and repairs and seeking attorneys fees. The trial court ruled that the deed restrictions imposing the $48 annual fee were enforceable as to the parties whose properties were so encumbered but that CLCA did not have the right to increase the annual fee or otherwise assess property owners.

The appellate division essentially affirmed, but with one significant qualification. First, it found that CLCA had not abandoned its right to collect the annual fee. Even though there was evidence that its collection habits were not perfect, CLCA's efforts were not so deficient as to clearly evidence a relinquishment of the covenants and the attendant right to collect the annual fee or to constitute laches. Turning to the key issue, the ability of CVA to increase the annual fee, the court first noted the common law default rule, now recognized in section 4.13 of the *Restatement (Third) of Property: Servitudes*, that the obligation to maintain an easement or servitude falls on the owner of the dominant estate, unless otherwise provided under the terms of the controlling agreement. But here, as the court explained, the original parties deviated from the default rule and assigned to the owner of the servient estate (eventually CVA) the obligation to maintain the common facilities over which the members of the community enjoyed easement like rights and gave it limited rights to collect fees to support its maintenance obligations.

In perhaps the most intriguing part of the decision, though, the appellate division commented on the trial court's dismissal of CLCA's request for authorization to approve an increase in the annual charge "with prejudice." As it explained, a new claim might well arise later regarding the necessity of increasing the annual fee (or perhaps even invalidating the covenants altogether) based on a whole range of yet unknown changes in circumstances. Citing explicitly the *Restatement (Third) of Property: Servitudes* § 7.10., the court speculated that "if there were a material change in circumstances . . . a court could modify the covenants restricting the annual $48 charge, provided the modification was equitable to all the parties and would preserve the purpose of the servitude." Alternatively, a court also might terminate the easement rights and restrictions if modification were not feasible, the appellate division advised. Thus, the trial court's dismissals with prejudice were limited only to "the record presented at this time." In a striking final plea, the court criticized both parties for ignoring the "common good" and forgetting that "the common good cannot be accomplished without certain sacrifices from all parties."

This case is illuminating on several levels. On one hand, we see a court enforcing the specific contractual commitments of the original parties to a common interest community covenant scheme. On the other hand, we see the same court bristling at the self-destructive tendencies of parties who insist on strict enforcement of these contractual commitments and indicating that under the right circumstances it might refuse to enforce these contractual restrictions or commitments. The case thus reminds lawyers drafting

foundational covenant documents for CIC's to build in flexibility, either by explicitly allowing a homeowners association to increase the level of annual fees or dues within certain parameters or by providing for a relatively easy by-law amendment mechanism. It also reminds us of the need for the use of alternative dispute mechanisms in these contexts to resolve conflicts like this and to avoid costly litigation.

12. Citibrook II, L.L.C. v. Morgan's Foods of Missouri, Inc., 239 S.W.3d 631 (Mo. Ct. App. 2007) (covenant purporting to restrict use of burdened property to the operation of a Kentucky Fried Chicken store "forever" held to be unenforceable against successors because indefinite duration of covenant was unreasonable as to time). L

Plaintiff Citibrook owned real estate and improvements in St. Louis on which it operated a shopping center. It also secured the franchise rights to operate a Kentucky Fried Chicken restaurant on one particular parcel of its holdings. In 1982, it transferred this parcel to the Kirkwoods. A covenant in the general warranty deed "forever" restricted the use of this parcel "to the erection and operation of a Kentucky Fried Chicken store" and provided that it "may be used for no other purpose." After purchasing the parcel, the Kirkwoods acquired the franchise rights to operate a KFC store and erected and operated one on the property.

In 1999, after a series of mesne conveyances, Morgan's Foods acquired the burdened parcel. Morgan's operated the building on the parcel as a KFC restaurant until 2004, at which time it executed a lease of the property with another company. Thereafter, a J.J.'s Fish and Chicken restaurant was opened on the property. (Are you hungry yet?) Citibrook sued for injunctive relief in 2005, alleging that the 1982 restrictive covenant prohibits any business from being operated on the parcel except for a KFC. Morgan answered, pleading waiver and asserting that the restrictive covenant was invalid as a matter of public policy because it constitutes an unreasonable restraint on trade and unreasonable restraint on alienation.

The trial court granted Morgan's Food's motion for summary judgment, finding that the restrictive covenant was in fact "unenforceable, invalid, void, and of no effect . . . because it is unreasonable on its face, unreasonable in duration, repugnant to trade and commerce, contrary to business interests and endeavors in the area . . . is not favored by the law, and has the effect of a creating a monopoly." (Is there any doubt about the court's feelings here?) In a relatively brief opinion, the court of appeal affirmed solely on the ground that the indefinite temporal nature of the restriction made it unreasonable as to time.

The court of appeals ruling has two prongs. First, it identifies the purpose of the covenant as being nothing other than what it seems—"to restrict the use of the Parcel to the erection and operation of a KFC store and for no other use." Second, it focuses on the perpetual duration of the covenant, making special note of the covenant's use of the word "forever." Citing *Hall v. American Oil Co.*, 504 S.W.2d 313, 317 (Mo. Ct. App. 1973),

the court states that a restrictive covenant will not be upheld "unless it is clear that the restriction against the use of the land is, *inter alia*, reasonable as to time." The court then rejects Citibrook's attempt to save the covenant by reading in an implied "reasonable duration" for the covenant, keyed for instance to the viability of a KFC franchise or the presence of the shopping center on Citibrook's retained lands, as having been raised too late on appeal. The court also distinguished the result in *Hall*, where the court had enforced a covenant restricting use of a servient parcel as a gas station for as long as a gas station was operated on the dominant estate, noting that there the *potentially* indefinite time limitation was directly and rationally related to the purpose of the covenant. Here, by contrast, the indefinite duration of the covenant had no relationship to the purpose of the covenant because on its face it would *never* end.

Although some initial commentators have expressed concern that the court announces a new and dangerous public policy that perpetual easements, servitudes and covenants are unenforceable *per se*, I doubt the court meant to go so far. Most likely, it meant to reinforce the relatively commonplace rule that covenants with an anti-competitive purpose—to restrict trade that will be in competition with a business on the dominant estate—must be limited in both their geographic and temporal reach. Another way of looking at this decision (thanks to Gerry Korngold) is to recognize it as an essentially sound response to an attempt by the parties to impose an excessively narrow restrain on alienation—limiting the potential purchasers of the parcel to those willing or able to operate a KFC franchise, far too narrow a group for us to be comfortable in light of our general property law policy preference for freedom of alienation. (NB: Professor Korngold elaborates on these themes in an interesting new article, *Resolving the Intergenerational Conflict of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 Amer. L. Rev. 1525 (2007)).

13. Allen v. Hall, 148 P.3d 939 (Utah 2006) (a conveyance from a former husband to a former wife, declaring that the property "shall revert" if the grantee moves more than 50 miles away, creates a fee simple determinable). T

(This case is not especially novel or complex, but we don't get many fee simple determinable cases in our state supreme courts, so this case seemed worth noting.)

As part of a divorce settlement the husband conveyed the marital home to the wife, but if the wife moved more than fifty miles from Salt Lake City before their youngest child turned 18, the fee interest in the home would revert to the former husband, who would then be required to sell the home and divide the equity equally with the former wife. If the property so reverted, the former husband would "be responsible for all indebtedness thereon." The former wife moved to North Carolina when the youngest child was only 14 years old. Meanwhile, she had refinanced the home several times and conveyed her interest to another, who had made substantial improvements to the home. At that time, the former wife moved from the home but did not relocate more than 50 miles from Salt Lake City. Meanwhile, the grantee, threatened with foreclosure, transferred the property

to the mortgagee by deed in lieu of foreclosure, and a married couple thereafter purchased the property from the mortgagee.

The Utah Supreme Court held that the former husband conveyed a fee simple determinable to the former wife. This, then, was the interest held by the former wife's grantee, who made improvements to the home. The Utah Occupying Claimants Act, intended to provide relief to those who wrongfully but innocently occupy property under color of title, entitles such occupants to recover the value of improvements from a successful claimant to the title. The Court held that the former wife's grantee did not have color of title, because the title he did hold was valid, albeit restricted. The grantor of a fee simple determinable interest should not be exposed to liability for the costs of improvements over which the grantor had no control.

The former husband, as grantor of the fee simple determinable, was also not liable for indebtedness on the home created after the conveyance by the former wife. Upon reversion of the fee to the former husband, the fee simple determinable title that reverts is the same interest as held at the time of the conveyance.

14. Smith v. Kansas Gas Service Co., 169 P.3d 1052 (Kan. 2007) (the escape of natural gas from a facility, and a resulting explosion, could not sustain a judgment of liability to undamaged property of nearby residents, based on the perceived stigma among the land-buying public). T

After explosions and geysers of gas and brine occurred at various locations in the city of Hutchinson, Kansas, experts determined that the source of the problem was natural gas escaping from the well casing that was part of a natural gas storage facility located near the city. The escaped gas had purportedly migrated through a porous geologic formation and had risen to the surface in the city through abandoned brine wells that were not properly plugged. After the incidents, deep well vents were installed to allow the gas to escape into the atmosphere.

Various property and business owners settled their damage claims against the storage facility, but a class of property owners whose property had not suffered physical damage brought action claiming loss of the quiet enjoyment of their property. Eventually it was determined that no actual physical intrusion, interference or injury had occurred on any of the plaintiff properties. Witnesses at trial testified as to difficulty in selling their properties. The plaintiffs obtained a jury verdict for nearly $8 million dollars of damages, but this was all reversed by the state supreme court on appeal.

The Kansas Supreme Court noted that no evidence established loss of market value based on any physical injury to the real property or on any interference with the use and enjoyment of the property. Instead, the testimony as to loss of market value was based on a perceived stigma or fear among the buying public, whether or not the fear was factually or scientifically justified. Although stigma damages are recognized in Kansas, it is only in cases where the property has sustained physical injury as a result of the defendant's

conduct. Thus, in Kansas a property owner cannot collect damages, under either a negligence or nuisance theory, for diminution in property value caused by stigma or market fear relating to accidental contamination when neither injury to nor interference with the property has occurred.

15. Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association, 929 A.2d 1060 (N.J. 2007) (homeowners' associations are private actors, however, constitutional remedies may apply in certain circumstances when those associations abridge residents' free speech rights). F

Twin Rivers is a planned unit development. By acquiring property in Twin Rivers, an owner automatically becomes a member of the Twin Rivers Homeowners' Association. The association is governed by a board of directors whose members are elected.

Various residents of Twin Rivers formed the Committee for a Better Twin Rivers to affect the manner in which Twin Rivers is governed. The committee and three individual residents filed a complaint seeking to invalidate the rules relating to the posting of signs, the use of the community room, and access to the association's newspaper. They argued that the association's internal rules should be subject to the free speech and free association clauses of the New Jersey Constitution.

The trial court held that the association's rules were not subject to the right of free speech embodied in the state constitution. The appellate division reversed, holding that the association was subject to state constitutional standards with respect to its internal rules.

The New Jersey Supreme Court reversed the judgment of the appellate division, reinstating the judgment of the trial court. The court applied its previously articulated *Schmid/Coalition* multifaceted standard and found that the association's rules and regulations governing the posting of signs, the use of the community room, and access to its newsletter did not violate the state constitutional guarantees of free expression.

Ruling that the minor restrictions on plaintiffs' expressional activities are not unreasonable or oppressive, the court held that the restrictions at issue are reasonable concerning the time, place and manner of such restrictions. Balancing plaintiffs' expressional rights against the association's private property interest, the association's policies do not violate the free speech and right of assembly clauses of the state constitution.

Significantly, however, the court recognized that, in appropriate circumstances, constitutional protections *do* apply when homeowner's associations abridge residents' free speech rights.

The *Twin Rivers* decision is not a model of clarity. While a substantial portion of the opinion underscores the premise that homeowner's associations are private actors, the court opens the door to the possibility of a constitutional remedy for the private

curtailment of speech under appropriate circumstances. The court determined that such circumstances were absent of the record before it, and gave minimal guidance as to when and how its newly fashioned constitutional standard might apply. It may well require years of litigation to more clearly flesh out the contours of the *Twin Rivers* constitutional remedy.

16. Fashion Valley Mall LLC v. National Labor Relations Board, 172 P.3d 742 (Cal. 2007) (the California Supreme Court reaffirms its prior holding in Robins v. Pruneyard Shopping Center, 23 Cal.3d 899, (1979), aff'd 447 U.S. 74 (1980), protecting a union's handbilling in a shopping mall urging a boycott of a mall tenant. The Pruneyard holding has been widely rejected by other states, and the U.S. Supreme Court has held that the constitution does not prohibit rules such as the mall tried to enforce in this case.). T

The U.S. Court of Appeals for the District of Columbia requested the California Supreme Court to decide whether, under California law, a shopping mall could enforce a rule prohibiting persons from urging a boycott of a store in the mall.

In 1998 several dozen union members distributed leaflets to customers of a store in the shopping mall. The store advertised in a newspaper where the union members were employed and with which they had a labor dispute. The leafletting was in violation of mall rules requiring a permit for such expressive activity to be obtained at least five days in advance, and interfering with the business of any store in the mall. The rules also prohibited boycotting or urging customers to not do business with any store in the shopping center. An administrative law judge and the NLRB found the mall in violation of California law, as declared in the Pruneyard decision. The U.S. Court of Appeals concluded that no California court had determined "whether a shopping center may lawfully ban from its premises speech urging the public to boycott a tenant," and thus filed a request for such a determination with the California Supreme Court.

The California Supreme Court declared in Pruneyard that the California Constitution "grants broader rights to free expression than does the First Amendment to the United States Constitution. . . ." California law treats the area of even a privately owned shopping mall as a public forum where persons may exercise their right to free speech. Since that decision, federal constitutional law on this topic has evolved, and now is not deemed to protect free speech in a shopping mall. The Pruneyard decision does protect free speech in a shopping mall in California, including even a free speech activity that is unrelated to the business of the shopping mall. The California Supreme Court further decided that the shopping mall may not enforce a no-boycotting rule, even though in Pruneyard it held that a shopping mall "may prohibit conduct calculated to disrupt normal business operations or that would result in obstruction of or undue interference with normal business operations." The court does not explain why a no-boycotting rule does not fall into this classification described in Pruneyard, except that it is contrary to other language in other cases.

In reaffirming its view that the shopping mall may impose restrictions on time, manner and place of free speech activities, the court rejects the mall's claim that a no-boycott rule is "content-neutral." Instead, the court proclaims the no-boycott rule may be "viewpoint neutral," but it is not "content-neutral," because it prohibits an entire category of speech. It takes this position even though it has previously approved an ordinance prohibiting aggressive soliciting or begging near an ATM or a bank.

The lone dissent points out that "In the nearly three decades that have since elapsed [after the Pruneyard decision], jurisdictions throughout the nation have overwhelmingly rejected it. We should no longer ignore this tide of history. The time has come for us to forthrightly overrule Pruneyard and rejoin the rest of the nation in this important area of the law. Private property should be treated as private property, not as a public free speech zone…. Even if we do not overrule Pruneyard,… we should at least not carry it to the extreme that the majority does. Pruneyard is easily distinguished. The free speech activity that Pruneyard sanctioned was compatible with normal use of the property. The opposite is true here. Fashion Valley Mall is a privately owned shopping center. A shopping center exists for the individual businesses on the premises to do business. Urging a boycott of those businesses contradicts the very purpose of the shopping center's existence. It is wrong to compel a private property owner to allow an activity that contravenes the property's purpose."

17. Simone v. Heidelberg, 877 N.E.2d 1288 (N.Y. 2007) (an easement is extinguished when title to the easement and title to the servient land become vested in the same entity; the easement is not automatically reinstated if title is later separated). F

Plaintiffs are the owners of 163 Driggs Street on Staten Island, New York, which they purchased in 1993. Defendants are the owners of 157-159 Driggs Street on Staten Island, the property adjacent to plaintiffs' property, which they purchased in 1996. At issue is a purported easement granting defendants access to plaintiffs land for purpose of a driveway to a garage.

In 1933, these properties were owned by two separate owners. The owner of 157-159 Driggs Street entered into an agreement creating a reciprocal easement with the owner of 163-165 Driggs Street. Under this agreement, a portion of each property was to be used solely as a driveway. The apparent purpose of this easement was to allow the owner of 157-159 Driggs, the dominant estate, to access a garage structure located on the parcel. In 1978, the parcels were acquired by common owners, the Accardos. In 1982, the Accardos subdivided 163-165 Driggs into the separate estates they are now, and the deed transferring the purported servient estate, now 163 Driggs, to the Webers did not make any reference to a driveway easement. Later, in 1984, the Accardos conveyed what had previously been the dominant estate, 157-159 Driggs, under a deed to the Corrados that referenced the driveway easement and burdened the neighboring property – 163 Driggs.

Upon plaintiffs' purchase of 163 Driggs in 1993, their deed made no mention of a driveway easement; however, plaintiffs did have knowledge that there had once existed

an easement. Three years later, when defendants purchased 157-159 Driggs, from the Corrados, the deed contained language identical to the driveway easement language found in their immediate predecessor's deed.

In 2003, defendants had a large tree on their property, which was blocking access to the garage, and fencing, which prevented automobile access to the garage, removed in order to allow access to the garage via the purported driveway easement. Plaintiffs commenced this action for a declaration that the easement was no longer in force or effect. Defendants counterclaimed, seeking a declaration that the easement remained effective and, alternatively, survived by necessity.

The trial court granted plaintiffs' motion, finding that the easement was extinguished when it came under common ownership, and was never recreated because the deed conveying the servient estate, 163 Driggs, did not reference the easement. The appellate division reversed, finding that while the easement was extinguished by the merger when the properties came under common ownership, it was recreated *de novo* when the properties were separately sold.

The court of appeals of New York reversed and reinstated the judgment of the trial court. Noting that the easement was extinguished when the common owners, the Accardos, acquired title to both parcels, the court found that the subsequent conveyance by the Accardos to the Webers of 163 Driggs, which did not make any mention of the extinguished driveway easement, did not revive the easement.

The court found it irrelevant that plaintiffs may have had notice of the earlier easement because the easement was not in existence when they purchased their property, as it was not recreated upon sale to plaintiffs' predecessor in title.

The court also found that this was not an easement by necessity. An easement by necessity must be proved by clear and convincing evidence and must be "absolutely necessary." "'[T]he necessity must exist in fact and not as a mere convenience.'" Here, the easement was not absolutely necessary. The court deemed the defendant's alleged "necessity" to access off-street parking as "nothing more than a mere convenience."

18. Patterson v. Sharek, 924 A.2d 1005 (D.C. Ct. App. 2007) (right of way easement may be terminated by a permanent obstruction but not by a temporary obstruction). O

Owners of a 34-foot wide right of way sued the burdened (servient) landowner for unobstructed access. Thirty years earlier the burdened landowner had built a patio enclosed by a brick wall that extended 9 feet into the right of way, leaving 25 feet for access by the easement owners. Over the years, the burdened landowner also frequently parked in the right of way, recently in such a way that allegedly interfered with the easement owners' access.

Easements may be terminated by adverse use – that is, "actual, exclusive, continuous, open and notorious" use that is continued for the requisite period of time (in D.C. 15 years). Because the patio enclosure was a permanent obstruction, the trial court held that it had terminated the easement as to the 9-foot-wide strip of land that it had covered for more than 15 years. And, because parking interfered with the easement owners' access, the trial court enjoined the burdened landowner from parking on the right of way. The court of appeals affirmed the lower court's decision concerning the permanent obstruction, but reversed its decision concerning parking by the burdened landowner. The case was remanded for a determination concerning whether the parking unreasonably interfered with the easement owners' access.

The case demonstrates an important point concerning termination of easements by adverse use. Unless an easement gives the easement owner the right to exclusive use, a burdened landowner may make any use of the burdened land that does not unreasonably interfere with use by the easement owner. Because the patio and wall constituted a permanent obstruction, it was an adverse use. But because the parking involved only a temporary obstruction, it was within the burdened landowner's right – unless, that is, it unreasonably interfered with the easement owners' access. Even then, the court noted in dictum, the interference might have been tolerated by the easement owners out of "neighborly accommodation"; that is, implied permission might have been given on each occasion that the parking interfered with access.

Many cases concerning "parking on a right of way" have involved parking *by the easement owner* and courts have regularly enjoined it. Parking is not included in the right of access, so it exceeds the scope of the easement. Parking imposes an additional burden on the burdened land. If it continued for a long enough period, it could result in the acquisition by the easement owner of a parking easement in addition to the easement of right of way. Parking *by the burdened landowner* is a different matter. Except in cases of exclusive easements, which are not favored, the burdened landowner may make any use of the burdened land that is not inconsistent with the easement. Unlike a permanent obstruction, such as the brick-wall-enclosed patio, ordinary parking is temporary and not indicative of a claim of adverse use by the one doing the parking. Absent a permanent obstruction maintained for the requisite period of time, the issue is properly not one of termination by adverse use but unreasonable interference with the easement owner's use.