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"The Court Let Me Keep My Fence On Your Land": Neighborhood Boundary Encroachments and Exclusive Easements

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"Good fences make good neighbors."[1] However, when those fences are ignored, missing, or wrongly situated, litigation is often the result. Litigation involving boundary disputes frequently includes legal questions about whether one neighbor has the right to use the property of another neighbor for driveway, parking, landscaping, or other purposes. Rarely will the doctrine of adverse possession apply to allow such encroachments to be maintained because the landowner did not pay his neighbor's taxes. While California courts may grant a *prescriptive* easement to an owner to use his or her neighbor's property for a limited use, a prescriptive easement will not be granted for "exclusive" use of neighboring property. On occasion, even where a prescriptive easement is not available, courts may nevertheless employ their equitable powers to deny the neighboring property owner an injunction to remove an encroachment, even if that denial has the practical effect of granting "exclusive" use to the encroaching neighbor. This article explores the factors courts consider (i) when determining whether an intended use of neighboring property is "exclusive," and therefore prohibited as a prescriptive easement; and (ii) in deciding whether to grant what amounts to an "exclusive equitable easement."

I. ADVERSE POSSESSION MAY NOT MASQUERADE AS A PRESCRIPTIVE EASEMENT

Persons who seek the legal right to use a neighbor's residential property usually begin their argument by invoking the doctrine of adverse possession. To establish adverse possession under California common law, the claimant must prove (1) possession under claim of right or color of title; (2) actual, open, and notorious occupation of the premises constituting reasonable notice to the true owner; (3) possession which is adverse and hostile to the true owner; (4) continuous possession for at least five years; and (5) payment of all taxes assessed against the property during the five-year period.[2] In the typical neighborhood boundary encroachment cases, claimants normally fail to prove adverse possession because they have not paid the taxes assessed for the neighboring property at issue.

To establish the right to a prescriptive easement, a claimant needs to prove the same elements as adverse possession, except for the requirement to pay taxes on the neighboring property. As such, the claimant must establish use which is (1) open and notorious; (2) continuous and uninterrupted; (3) under claim of right; (4) hostile to the true owner; and (5) for the statutory period of five years.[3]

Because a prescriptive easement does not require payment of taxes,[4] some claimants who have exercised the requisite possessory rights over neighboring property invoke the doctrine of prescriptive easements to escape the tax requirement for adverse possession.[5] However, courts have uniformly rejected that approach.[6]

> [T]he requirement for paying taxes in order to obtain title by adverse possession is statutory. The law does not allow parties who have possessed land to ignore the statutory requirement for paying taxes by claiming a prescriptive easement.[7]

The key difference between adverse possession and prescriptive easements is the nature of the right obtained under the two doctrines. "[A] claimant relying on adverse possession seeks *fee title* to disputed property."[8] A prescriptive easement, by contrast, "is not an ownership interest, and certainly does not amount to a fee simple estate."[9] A prescriptive easement "simply allows a claimant the restricted *use* of property owned by another."[10] "Every incident of ownership not inconsistent with the enjoyment of the easement is reserved to the owner of the servient tenement."[11] With an easement, "the owner of the burdened land is said to own the servient tenement, and the owner of the easement is said to have the dominant tenement."[12]

Thus, there is a difference between a prescriptive use of land culminating in an easement and adverse possession, which creates a change in title or ownership: "the former deals with the use of land, the other with possession."[13] A claimant may not properly acquire what is, under the circumstances, the equivalent of fee ownership, without satisfying the requirements of adverse possession.[14] In short, "adverse possession may not masquerade as a prescriptive easement."[15]

In deciding whether a neighbor has the right to a prescriptive easement, courts look to whether the "use" of the neighboring property is so extensive that it constitutes the practical equivalent of adverse possession (without the payment of taxes). That issue is at the heart of the rule discussed below that "exclusive" prescriptive easements are not permitted in the context of neighborhood boundary encroachments.

II. "EXCLUSIVE" PRESCRIPTIVE EASEMENTS MAY NOT BE GRANTED FOR USE OF A NEIGHBOR'S PROPERTY

A. Though Unusual, Exclusive Express Easements are Permitted

By way of background, and perspective, California courts have permitted exclusive easements in the context of *express* easements.[16] In general, "[a]n easement is a restricted right to specific, limited, definable use or activity upon another's property, which right must be less than the right of ownership."[17]

The exclusivity of an easement (i.e., the right to exclude others), involves "who may be excluded and the uses or area from which they may be excluded."[18]

> At one extreme, the holder of the easement . . . has no right to exclude anyone from making any use that does not unreasonably interfere with the uses authorized by the servitude. . . . At the other extreme, the holder of the easement . . . has the right to exclude everyone, including the servient owner, from making any use of the land within the easement boundaries.[19]

An exclusive easement is therefore "an unusual interest in land" because it amounts "almost to a conveyance of the fee."[20]

B. Exclusive Prescriptive Easements Are Not Permitted

However, in the context of *prescriptive* easements, the intention to convey an exclusive easement cannot be imputed to the owner of the servient tenement. Indeed, the property owner's permission to use the disputed property will defeat the prescriptive right.[21]

California courts therefore apply the rule that "an exclusive prescriptive easement, 'which as a practical matter completely prohibits the true owner from using his land,' will not be granted in a case (like this) involving a garden-variety residential boundary encroachment."[22] The rationale behind that prohibition is that such exclusive use would impair the determinative legal effect to the description of land contained in a deed and would dispossess a non-consenting landowner of property while circumventing readily available, accurate legal descriptions.[23]

C. Courts Consider Four Factors in Determining Whether a Prescriptive Easement is Prohibitively "Exclusive"

Whether a prescriptive easement is "exclusive" is a question of law.[24] The case law demonstrates that there are essentially four factors that courts examine to determine whether a prescriptive easement for a neighborhood boundary encroachment is "exclusive" and therefore prohibited.

1. *Is the Owner of the Dominant Tenement Using the Disputed Neighboring Property in a "Restricted, Partial or Intermittent" Manner?*

An easement gives a right to do a certain act on or to another's property,[25] or to make a specific use of that property.[26] The limitations on use make easements distinguishable from occupancy, possession, and ownership of the property.[27] The fewer restrictions there are on the encroacher's use of the neighboring property, the more likely the use is impermissibly exclusive. Also, the more frequent the use of the neighboring property, the more likely the use will be found prohibitively exclusive. In the express easement context, one court explained:

> As the difference between prescriptive use and adverse possession is sometimes obscure, so is the difference between an exclusive easement and outright title. The former is a right to use property of another; every incident of ownership not inconsistent with enjoyment of the easement is reserved to the owner of the servient tenement; the latter may make use of any of the property which does not unduly interfere with the easement. An exclusive interest labeled "easement" may be so comprehensive as to supply the equivalent of an estate, i.e., ownership. In determining whether a conveyance creates an easement or estate, it is important to observe the extent to which the conveyance limits the uses available to the grantor; an estate entitles the owner to the exclusive occupation of a portion of the earth's surface.[28]

Another court adopted that same argument in the prescriptive easement context:

> A prescriptive use of land culminates in an easement (i.e., an incorporeal interest). This interest differs from a corporeal interest . . . , which creates a change in title or ownership. Where an incorporeal interest in the use of land becomes so comprehensive as to supply the equivalent of ownership, and conveys an unlimited use of real property, it constitutes an estate, not an easement.[29]

Thus, a key factor in determining the exclusivity of the prescriptive easement is the degree to which the claimant's use of the disputed property is limited in scope, frequency, or both.

Courts have long held that a prescriptive easement is not "exclusive," and therefore may exist, for the limited purpose of using neighboring property as a right of way.[30] However, a number of reported decisions hold that the claimant's use of neighboring property was so unlimited that the prescriptive easement requested was "exclusive" and therefore prohibited. For example, in *Reab v. Casper*, defendants built a part of the driveway to their home and installed utility lines, lawn, fences, shrubs, fruit trees, and other landscaping on their neighbors' property.[31] The trial court awarded defendants "an easement for the maintenance of lawn, fences, shrubs, fruit trees, and landscaping around the [landowners'] house."[32] The court of appeal reversed, finding that the prescriptive easement granted by the trial court "was undoubtedly designed to give defendants *unlimited* use of the yard around their home," and "exclude plaintiffs from defendants' domestic establishment," "creat[ing] the practical equivalent of an estate."[33]

Such impermissible "exclusive" use by a prescriptive easement claimant is often found where the claimant has fenced off a portion of the neighbor's property, thereby "possessing" that portion for the claimant's own use. For example, in *Silacci*, the court of appeal reversed a trial court's ruling granting an "exclusive prescriptive easement" to a landowner who had enclosed a portion of a neighbor's property with a three-foot high picket fence and used it as a backyard garden area.[34] Similarily, plaintiff purchased property in a common interest development and obtained a 1/80th undivided interest in a roadway parcel in that development. Plaintiff found that some of his improvements on the property, including portions of his driveway, gate, and perimeter fence encroached onto the roadway parcel. Plaintiff argued in subsequent litigation that he acquired a prescriptive easement over the areas enclosed by his improvements. The court of appeal disagreed.[35] Although plaintiff had "enclosed

and possessed the land in question," the court was "required to observe the traditional distinction between easements and possessory interests."[36]

Thus, the fewer limitations that exist on the claimants' use of the neighboring property, the more likely a court will find that the claimant's use is "exclusive," and therefore prohibited as a prescriptive easement.

2. As a Practical Matter, Will the Prescriptive Easement Prohibit the Owner of the Servient Property from Using the Property in a Meaningful Way?

Because "the owner of the servient tenement may make any use of the land that does not interfere unreasonably with the easement,"[37] an easement should not deprive the owner of all use of the property encumbered by the easement. Thus, it is important to consider the extent to which a purported easement limits the uses available to the owner of the servient tenement.[38]

A prescriptive easement that prohibits the owner of the servient property from using that property in a meaningful way is impermissibly "exclusive." In *Silacci,* the court refused to grant a prescriptive easement claimant the right to use his neighbor's property as his own fenced backyard.[39] The court in *Silacci* held: "The notion of an exclusive prescriptive easement, which *as a practical matter completely prohibits the true owner from using his land,* has no application to a simple backyard dispute like this one."[40] In *Harrison,* a neighbor sought to enforce a prescriptive easement to protect a woodshed and some landscaping that encroached on a vacant lot next door. The court of appeal affirmed the trial court's denial of a prescriptive easement for the woodshed because the encroaching woodshed, "just as much as any encroaching fenced-in landscaping, 'as a practical matter completely prohibits the true owner from using his land.'"[41]

Other courts have described that rule with language that is arguably more accommodating to the servient property owner. In *Mehdizadeh,* a prior owner of the defendants' property had constructed a boundary fence with the acquiescence of the prior owner of the plaintiff's neighboring property (the "first fence").[42] When the defendants conducted a survey and found that the actual boundary line was ten feet closer to the plaintiff's property than the first fence, the defendants built a new fence on the actual boundary line (the "second fence").[43] Before defendants built the second fence, plaintiff occasionally cared for trees and shrubs on the 10-foot wide strip of disputed property between the two fences, maintained and repaired a sprinkler system in the disputed property that was connected to his own water supply, enjoyed the view of the disputed property, and let his dog use the disputed property.[44] After the defendants constructed the second fence, the plaintiff brought an action against the defendants seeking a prescriptive easement for the disputed property and an injunction ordering the defendants to remove the second fence.[45]

The court of appeal reversed the trial court's grant of a prescriptive easement for "landscaping and recreation" purposes over the disputed property.[46] The court reasoned that the prescriptive easement granted by the trial court would divest the defendants of "*nearly all* the rights that owners customarily have in residential property."[47] The court explained that the first fence will bar the defendants' access to the property, "and they cannot build on, cultivate, or otherwise use it."[48] Instead of stating that the defendants lost all use of the disputed property under the prescriptive easement, the court questioned whether the defendants could "use, occupy, or enjoy it in any *meaningful* way."[49]

In *Bustillos v. Murphy,* the plaintiff sought a prescriptive easement to a network of trails crisscrossing the majority of a neighboring property.[50] The court of appeal affirmed the trial court's refusal to grant such an easement because it violated Civil Code section 1009, which provides that no recreational use of private property shall ever ripen to confer upon the public a vested right to continue such use. In dicta, however, the court cited *Mehdizadeh* for the general rule that "a prescriptive easement may not be granted if doing so would result in *depriving the owner of essentially all rights in the property.*"[51] The court went on to note that the prescriptive easement sought by the plaintiff would have deprived the neighboring property owner "of essentially all rights to the property, rendering it unbuildable and unsaleable."[52]

3. Does the Prescriptive Easement Effectively Prevent the Owner of the Servient Tenement from Determining how the Property Covered by the Easement is to be Used?

In determining whether a prescriptive easement is "exclusive," courts consider not only the *extent* to which the owner of the servient tenement may use the disputed property, but also whether the owner can decide *how* the disputed property will be used. For example, in *Harrison,* the plaintiff Welch sought a prescriptive easement for landscaping that encroached on the neighboring property owned by the Harrisons. Welch argued that she was not seeking an "exclusive" easement for such landscaping because there were no "physical" or "practical" barriers that excluded the Harrisons from the landscaped area (such as the fence in the *Mehdizadeh* case).[53] The court of appeal disagreed and stated that the landscaping "effectively prevents the Harrisons from determining how the area of the encroachment is to be used."[54] The court of appeal cited the trial court's explanation of this point with approval:

> It is the exclusivity of the use of the surface of the land in the encroachment area that is determinative, and the landscaping scheme of Welch has essentially co-opted the encroachment area to an exclusive use designed by Welch.[55]

Thus, the determination of whether a prescriptive easement is impermissibly "exclusive" should include an examination of whether the owner of the servient tenement may still use the disputed property in the manner of his or her choosing, including the purposes for which he or she obtained the property.

4. What Impact will the Prescriptive Easement Have on the Ability of the Owner of the Servient Tenement to Use that Owner's Remaining Adjacent Property that is not Covered by the Easement?

In at least one case, the court's exclusivity analysis included a consideration of the impact that the prescriptive easement would have on the servient owner's ability to use the remaining adjacent property that was not covered by the requested ease-

ment. For example, in *Mehdizadeh*, the court not only examined the impact that the prescriptive easement would have on precluding any meaningful use of the 10-foot wide strip of the disputed property by the record owner, but also considered the practical consequences that the requested easement would have on the use of the remaining residential property that was not covered by the easement.[56] The court explained:

> The fence [on the servient property] reduces the size and alters the shape of [the defendants'] lot, potentially creating problems with setbacks and building codes that could impede alterations to structures the [defendants] might wish to make, and also potentially reducing the value or salability of their property. The easement thus burdens the [defendants'] property heavily . . . .[57]

Such considerations do not appear to address directly the exclusivity of use of the disputed property by the owner of the servient tenement. But, the *Mehdizadeh* case indicates that those considerations may be relevant in the court's determination of whether the use is "exclusive." One may argue that the greater the impact of the prescriptive easement on the servient owner's ability to use remaining adjacent property that is not covered by the requested easement, the greater the likelihood that the claimant's use on the covered property is "exclusive."

III. APPLYING THE EQUITABLE DOCTRINE OF RELATIVE HARDSHIP, A COURT MAY ALLOW AN ENCROACHMENT ON A NEIGHBORING PROPERTY, EVEN IF THAT ENCROACHMENT MAKES EXCLUSIVE USE OF THE PROPERTY

Even though an "exclusive" prescriptive easement is prohibited in the neighborhood boundary encroachment context, courts may nevertheless use their equitable powers to deny an injunction sought by a property owner to remove a neighbor's unlawful encroachment.[58] The doctrine of relative hardship has also been referred to as "balancing of equities," "balancing conveniences," "relative hardship," and "comparative injury."[59] Given the balancing of hardships analysis that a court must undertake, this doctrine necessarily presumes the existence of an encroaching structure, and not just an encroaching use without any structure.

A. The Doctrine of Relative Hardship Allows the Creation of An Equitable Easement

In *Harrison v. Welch*, the court of appeal described how the doctrine of relative hardship fits into litigation involving neighborhood boundary encroachments.

> [E]ven though a person who encroaches on a residential boundary cannot establish an exclusive prescriptive easement, in ruling on the owner's request for injunctive relief, the court may refuse to enjoin the encroachment and may "exercise [its] equity powers to affirmatively fashion an interest in the owner's land which will protect the encroacher's use." Such an equitable "encroachment right" is similar to, but doctrinally distinct from, a prescriptive easement.[60]

Such a "protective interest in equity" has been recognized as essentially a judicially created "easement."[61] Such an interest in equity has therefore been referred to as an "equitable easement."[62]

B. To Create An Equitable Easement, the Court Must Find Three Factors Exist

Under the doctrine of relative hardships, the trial court must first identify the competing equities underlying each party's position, then balance the relative hardships of granting or denying an injunction to remove encroachments from the property.[63] To deny an injunction, the court must find the following three factors: (1) The encroacher must be innocent; (2) the injury caused by the encroachment must be less than irreparable; and (3) the cost of removing the encroachment must be greatly disproportionate to injury caused by the encroachment. Doubtful cases should be decided in favor of the property owner seeking the injunction, and against the encroaching party.[64]

1. The Defendant Encroacher Must be Innocent

To deny an injunction to enjoin a neighborhood boundary encroachment, a court must first find that the neighbor who created the encroachment is "innocent."[65] That is, the encroachment "must not be willful or negligent."[66] If an encroachment is intentional, then the court's inquiry is over and an injunction will issue.[67] The California Supreme Court explained that to be willful, the encroaching party "must not only know that he is building on the plaintiff's land, but act without a good faith belief that he has a right to do so."[68] Thus, an encroaching party's action can be "intentional and yet be innocent if he acted in good faith."[69]

If the defendant was merely negligent rather than willful, then the court has discretion to grant or deny the injunction. While the doctrine of relative hardships "does not apply to willful conduct," it could "hardly be applied if a showing of some negligence is in every case enough to defeat its application.[70] Thus,

> [t]he question whether the defendant's conduct is so egregious as to be willful or whether the quantum of the defendant's negligence is so great as to justify an injunction, is a matter best left to the sound discretion of the trial court.[71]

In exercising that discretion, the court must also consider the conduct and intent of the plaintiff.[72] For example, if the plaintiff induced the defendant to believe that he had a right to act even without the plaintiff's express consent, then the defendant's claim of good faith is supported. However, the defendant's continued acts after objection by the plaintiff suggests a lack of good faith on the part of the defendant.[73]

2. The Plaintiff's Injury Caused by the Encroachment Must be Less Than Irreparable

The second factor in the relative hardship doctrine involves the injury caused by the encroachment. Unless the rights of the public would be harmed, the court should grant the injunction in favor of the property owner "if the plaintiff 'will suffer irreparable injury . . . regardless of the injury to defendant.'"[74]

Irreparable injury was found, for example, where an overhanging structure prevented repairs on an adjacent building.[75]

3. The Cost to Defendant of Removing the Encroachment Must be Greatly Disproportionate to Plaintiff's Injury Caused by the Encroachment

The third factor in the relative hardship doctrine involves the hardship to the defendant if the encroachment is ordered removed. To deny an injunction to enjoin a neighborhood boundary encroachment, a court must further find that the hardship to the defendant from granting the injunction is "greatly disproportionate to the hardship caused plaintiff by the continuance of the encroachment."[76] That fact must clearly appear in the evidence and be proven by the defendant.[77]

To prove this third factor, the defendant must demonstrate more than the loss of a substantial benefit if the encroachment is removed.[78] Case law indicates that a defendant must establish the significance of the cost of removing the encroachment if the injunction is granted. For example, in *Christensen,* the court of appeal held that the evidence was "unsatisfactory" on the question of defendant's hardship where there is "no evidence at all as to the estimated costs of removing the encroachments."[79]

The court then weighs the defendant's cost in removing the encroachment against the hardship to the plaintiff caused by the encroachment. For example, in *Hirschfield,* the trial court found, on the one hand, that the defendants' cost to remove certain encroachments would be "significant" and cause substantial hardship, while on the other hand, the plaintiffs' plans to use the disputed property "lacked weight" and "cause little true hardship" to the plaintiffs.[80] In *Warsaw,* the California Supreme Court held that the denial of an injunction was proper where the cost of removing of the encroachment "would greatly exceed the inconvenience to the plaintiff by its continuance."[81]

Where all three criteria are met, the court may, in its discretion, decide not to enjoin the encroachment.[82]

C. A Trial Court Has Great Flexibility in Fashioning an Equitable Easement

Courts have great flexibility in fashioning an appropriate equitable easement between the neighboring parties.

> The object of equity is to do right and justice. It "does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention. 'It has always been the pride of courts of equity that they will so mold and adjust their decrees as to award substantial justice according to the requirements of the varying complications that may be presented to them for adjudication.'"[83]

Guiding courts in the exercise of their equitable powers is the principle that the scope of an equitable easement "should not be greater than is reasonably necessary to protect the defendant's interests."[84] "An abundance of caution is warranted when imposing an easement on an unwilling landowner."[85]

In exercising their equitable powers to fashion an easement under the relative hardship doctrine, courts have applied the following remedies:

- Reducing the area of plaintiff's property that defendant is able to use for the encroachments;[86]
- Preventing the defendant from adding to the encroachments;[87]
- Ordering the equitable easement rights to terminate if the defendant sells or fails to reside in his or her house;[88]
- Requiring the defendant to pay monetary damages to plaintiff for the encroachments, if plaintiff proves the amount of damages suffered.[89]

If these criteria are met, a court has great flexibility in its equitable powers to fashion a remedy that allows an encroachment to exist on neighboring residential property, even if that encroachment constitutes exclusive use of the neighbor's property.

IV. CONCLUSION

In cases involving a property owner who seeks to maintain a structure that encroaches on a neighboring parcel, counsel should examine the applicability of three doctrines: adverse possession, prescriptive easements, and equitable easements. A property owner who builds a structure that crosses the boundary with a neighboring parcel will likely have difficulty establishing a claim for adverse possession over the neighboring parcel because the encroaching owner almost certainly did not pay taxes assessed on that parcel.

Furthermore, the owner probably will be unable to establish a prescriptive easement over the neighboring parcel for purposes of maintaining the structure if that structure constitutes "exclusive" use of the parcel. Thus, there is no "sword" that the owner can wield to establish the right to maintain the encroaching structure.

But there is a "shield." If the neighbor seeks an injunction to have the encroachment removed, the owner could petition the court, sitting in equity, to deny the injunction and establish an equitable easement. Establishing the necessity for an equitable easement requires the owner to prove that (a) the owner is innocent; (b) the neighbor's injury caused by the encroaching structure is less than irreparable; and (c) the owner's cost in removing the structure is greatly disproportionate to the neighbor's injury caused by the structure. Furthermore, the owner must be prepared to satisfy other equitable limitations imposed by the court, and to pay the monetary damages incurred by the neighbor as a result of the structure.

Because resolution in litigation may not make good neighbors, the best course is still to have good fences and to keep any structures on the correct side of the fence.

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ENDNOTES

1 Robert Frost, *Mending Wall, in* NORTH OF BOSTON (1914).
2 *Buic v. Buic*, 5 Cal. App. 4th 1600, 1604 (1992).
3 *Kapner v. Meadowlark Ranch Ass'n*, 116 Cal. App. 4th 1182, 1186 (2004); *Mehdizadeh v. Mincer*, 46 Cal. App. 4th 1296, 1305 (1996); *Warsaw v. Chicago Metallic Ceilings, Inc.*, 35 Cal. 3d 564, 570 (1984).
4 *Mehdizadeh*, 46 Cal. App. 4th at 1305 (citing *Gilardi v. Hallam*, 30 Cal. 3d 317, 321-22 (1981)).
5 *Kapner*, 116 Cal. App. 4th at 1187.
6 *Id.* (citing *Mesnick v. Caton*, 183 Cal. App. 3d 1248, 1261 (1986)); *see Silacci v. Abramson*, 45 Cal. App. 4th 558 (1996); *Mehdizadeh*, 46 Cal. App. 4th at 1304-08.
7 *Kapner*, 116 Cal. App. 4th at 1187 (citing CAL. CIV. PROC. CODE § 325).
8 *Mehdizadeh*, 46 Cal. App. 4th at 1300, 1305 (emphasis added); *see Silacci*, 45 Cal. App. 4th at 562 ("Adverse possession, by use of the term 'possession,' implies ownership and title.").
9 *Silacci*, 45 Cal. App. 4th at 564.
10 *Mehdizadeh*, 46 Cal. App. 4th at 1300, 1305 (emphasis added); *see id.* at 1306 ("An easement involves primarily the privilege of doing a certain act on, or to the detriment of, another's property."); *Kapner*, 116 Cal. App. 4th at 1186 (An easement is "a right to a specific use of another's property.").
11 *Silacci*, 45 Cal. App. 4th at 562.
12 *Id.*
13 *Raab v. Casper*, 51 Cal. App. 3d 866, 876 (1975).
14 *Blackmore v. Powell*, 150 Cal. App. 4th 1593, 1601 (2007).
15 *Kapner*, 116 Cal. App. 4th at 1185.
16 *See, e.g., Gray v. McCormick*, 167 Cal. App. 4th 1019, 1025-29 (2008) ("[A]n express exclusive easement may be created by an instrument clearly stating the intention that the easement be exclusive."); *cf. Pasadena v. California-Michigan Land & Water Co.*, 17 Cal. 2d 576, 578-79 (1941) (No intention to convey an exclusive easement can be imputed to the owner of the servient tenement in the absence of a "clear indication of such an intention.").
17 *Scruby v. Vintage Grapevine, Inc.*, 37 Cal. App. 4th 697, 702 (1995) (internal quotation marks and citation omitted).
18 *Gray*, 167 Cal. App. 4th at 1024 (quoting RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 cmt. c (2000) (internal quotation marks omitted).
19 *Id.*
20 *Pasadena*, 17 Cal. 2d at 578-79.
21 *See generally Grant v. Ratliff*, 164 Cal. App. 4th 1304, 1310-11 (2008); *Aaron v. Dunham*, 137 Cal. App. 4th 1244, 1249-50 (2006).
22 *Harrison v. Welch*, 116 Cal. App. 4th 1084, 1093 (2004) (citations omitted); *see also Silacci*, 45 Cal. App. 4th at 564 ("The notion of an exclusive prescriptive easement, which as a practical matter completely prohibits the true owner from using his land, has no application to a simple backyard dispute like this one.")
23 *Mehdizadeh*, 46 Cal. App. 4th at 1308; *see Hirschfield v. Schwartz*, 91 Cal. App. 4th 749, 768 (2001) ("[B]oth *Silacci* and *Mehdizadeh* held that an exclusive prescriptive easement which effectively amounted to ownership could not be awarded in a simple residential boundary dispute where the encroaching landowner was unable to meet the requirements for outright adverse possession.").
24 *Silacci*, 45 Cal. App. 4th at 562.
25 *Mehdizadeh*, 46 Cal. App. 4th at 1306.
26 *Kapner*, 116 Cal. App. 4th at 1186.
27 *See Mehdizadeh*, 46 Cal. App. 4th at 1306 ("Occupancy, connoting a claim of possession and title, differs from restricted, partial, or intermittent use.").
28 *Raab v. Casper*, 51 Cal. App. 3d 866, 876 (1975).
29 *Mehdizadeh*, 46 Cal. App. 4th at 1306.
30 *See, e.g., Taormino v. Denny*, 1 Cal. 3d 679, 684-87 (1970); *Smith v. Smith*, 21 Cal. App. 378, 380 (1913); *cf. Silacci*, 45 Cal. App. 4th at 562 ("[I]f one uses a road across the land of another for a certain period, one may acquire an easement by prescription"); *id.* at 564 ("An easement, after all, is merely the right to use the land of another for a specific purpose — most often, the right to cross the land of another.").
31 *Raab*, 51 Cal. App. 3d at 876.
32 *Id.* at 877.
33 *Id.* (emphasis added).
34 *Silacci*, 45 Cal. App. 4th at 562-64.
35 *Kapner*, 116 Cal. App. 4th at 1186-87.
36 *Id.*
37 *Camp Meeker Water Sys., Inc. v. Pub. Utilities Comm'n*, 51 Cal. 3d 845, 867 (1990) (internal quotation marks omitted).
38 *Raab*, 51 Cal. App. 3d at 876.
39 *Silacci*, 45 Cal. App. 4th at 562-64.
40 *Id.* at 564 (emphasis added).
41 *Harrison*, 116 Cal. App. 4th at 1093 (quoting *Silacci*, 45 Cal. App. 4th at 564).
42 *Mehdizadeh*, 46 Cal. App. 4th at 1301.
43 *Id.*
44 *Id.* at 1301-02.
45 *Id.* at 1300-02.
46 *Id.* at 1304-08.
47 *Id.* at 1305 (emphasis added).
48 *Id.*
49 *Id.* at 1308 (emphasis added). The *Mehdizadeh* court distinguished *Otay Water Dist. v. Beckwith*, 1 Cal. App. 4th 1041, 1045 (1991), where a public utility water district was granted the exclusive right to use a reservoir on the servient property, because of the unique public health and safety concerns involved in that context. *Mehdizadeh*, 46 Cal. App. 4th at 1306-07; *see also Silacci*, 45 Cal. App. 4th at 564 ("The *Otay Water Dist.* case must be limited to its difficult and peculiar facts.").
50 *Bustillos v. Murphy*, 96 Cal. App. 4th 1277 (2002).
51 *Id.* at 1281 (emphasis added).
52 *Id.* at 1282.
53 *Harrison*, 116 Cal. App. 4th at 1093-94.
54 *Id.* at 1094.
55 *Id.*
56 *Mehdizadeh*, 46 Cal. App. 4th at 1308.
57 *Id.*
58 *See Hirshfield*, 91 Cal. App. 4th at 758 ("California courts have long applied the relative hardship doctrine in deter

mining whether to grant an injunction to enjoin a trespass by encroachment on another's land.").

59 *Id.* at 754 n.1.

60 *Harrison*, 116 Cal. App. 4th at 1093 n.3 (citations omitted).

61 *See Hirschfield*, 91 Cal. App. 4th at 764 ("When a trial court refuses to enjoin encroachments which trespass on another's land, 'the net effect is a judicially created easement by a sort of non-statutory eminent domain.'"); *id.* at 754-55, 765, 769, 771; *see, e.g., Baglione v. Leue*, 160 Cal. App. 2d 731, 735-36 (1958); *Ukhtomski v. Tioga Mut. Water Co.*, 12 Cal. App. 2d 726, 729 (1936).

62 *See Arrowhead Mut. Serv. Co. v. Faust*, 260 Cal. App. 2d 567, 578-79 (1968) ("When a covenant does not run with the land because of some lack of an essential requirement, equity will sometimes enforce the obligation against the successors of the covenantor by an injunction against breach. The burden of the covenant thus becomes an equitable easement or servitude in the land of the covenantor."); *Nadell & Co. v. Grasso*, 175 Cal. App. 2d 420, 426-27 (1959) ("enforceable equitable servitude[s]" involving restrictions on the use of land "'are frequently spoken of as 'equitable easements.'" (quoting *Werner v. Graham*, 181 Cal. 174, 180 (1919)); *see* 6 MILLER & STARR, CAL. REAL ESTATE § 15.46 at 15-161.

63 *Hirshfield*, 91 Cal. App. 4th at 761.

64 *Id.* at 759; *Christensen v. Tucker*, 114 Cal. App. 2d 554, 562 (1952).

65 *Hirschfield*, 91 Cal. App. 4th at 759. If the defendant's predecessor-in-interest created the encroachment, the case law is unsettled as to whether the focus should be on the state of mind of the predecessor-in-interest, or on the defendant. *Compare Dolske v. Gormley*, 58 Cal. 2d 513, 520-21 (1962) ("[A] court . . . must consider various factors including the good faith of the party who constructed the encroachments."], *with Hirshfield*, 91 Cal. App. 4th at 759 ("To deny an injunction . . . the defendant must be innocent."); *Christensen*, 114 Cal. App. 2d at 562-63 ("In order to deny the injunction . . . [d]efendant must be innocent."). The California Supreme Court's most recent analysis of the relative hardship doctrine does not resolve the issue, but merely states that the court's inquiry should be whether the encroachment "was innocently made." *Warsaw v. Chicago Metallic Ceilings Inc.*, 35 Cal. 3d 564, 575-76 (1984).

66 *Hirschfield*, 91 Cal. App. 4th at 759; *see, e.g., Baglione*, 160 Cal. App. 2d at 735 (injunction denied where "the encroachment was the result of a mistake").

67 *See Morgan v. Veach*, 59 Cal. App. 2d 682, 690 (1943).

68 *Brown Derby Hollywood Corp. v. Hatton*, 61 Cal. 2d 855, 859 (1964).

69 *Id.*

70 *Linthicum v. Butterfield*, 172 Cal. App. 4th 1112, 1119 (2009).

71 *Id.*

72 *Id.*; *see Christensen*, 114 Cal. App. 2d at 563, 564 (A court should ascertain if the plaintiff is "in any way responsible for the situation," and where plaintiff's conduct also contributes to the situation, "then the trier of fact is entitled to weigh the hardships each may suffer, and the negligence of one against the other.").

73 *Brown Derby*, 61 Cal. 2d. at 859.

74 *Hirschfield*, 91 Cal. App. 4th at 759 (quoting *Christensen*, 114 Cal. App. 2d at 562-63).

75 *Pahl v. Ribero*, 193 Cal. App. 2d 154, 164 (1961).

76 *Hirschfield*, 91 Cal. App. 4th at 759 (quoting *Christensen*, 114 Cal. App. 2d at 562-63) (internal quotation marks omitted). In describing the hardship that defendant must establish, courts have interchangeably used the terms "unusual injury," "substantial hardship," and "irreparable injury." *Hirschfield*, 91 Cal. App. 4th at 760, 762-63.

77 *Christensen*, 116 Cal. App. 2d at 563.

78 *See Fairrington v. Dyke Water Co.*, 50 Cal. 2d 198, 200 (1958) ("Deprivation of a substantial benefit . . . falls short of the imposition of substantial hardship.").

79 *Christensen*, 116 Cal. App. 2d at 565.

80 *Hirschfield*, 91 Cal. App. 4th at 762-63.

81 *Warsaw*, 35 Cal. 3d at 575-76.

82 *See, e.g., Pearson v. Baldwin*, 125 Cal. App. 2d 670, 672 (1954) (injunction properly denied where defendant's encroaching wall was constructed in good faith, where plaintiff sustained no damage from the encroachment, and where resetting the wall would be costly and materially interfere with full use of defendant's building).

83 *Hirshfield*, 91 Cal. App. 4th at 770 (citations omitted).

84 *Linthicum*, 175 Cal. App. 4th at 268.

85 *Id.*

86 *See, e.g., Hirschfield*, 91 Cal. App. 4th at 772.

87 *Id.*

88 *Id.*

89 *Id.* (defendants to pay as damages a sum equal to the fair market purchase price of the disputed property on which the encroachments lie); *but see Linthicum*, 175 Cal. App. 4th at 268 (trial court did not err in refusing to award damages where plaintiff "points to no credible evidence of the amount of damages"); *D'andrea v. Pringle*, 243 Cal. App. 2d 689, 698-99 (1966) (trial court erred in awarding damages where "[n]o evidence was introduced as to the value of plaintiffs' land or the reasonable value of the use thereof upon which to predicate an award.").