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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ARTHUR NEWMYER, as Trustee, etc., Plaintiff and Appellant, v. PARKLANDS RANCH, LLC, Defendant and Respondent.	B180461 B184674 (Los Angeles County Super. Ct. No. SC077511)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Lorna Parnell, Judge; Julius Title, Judge; Joe W. Hilberman, Judge. Affirmed.

Lewis R. Landau, for Plaintiff and Appellant.

Rutan & Tucker, LLP, Douglas J. Dennington, for Defendant and Respondent.

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INTRODUCTION

We hold that the owner of the dominant tenement possessing over the servient tenement an access easement that includes the right to grant other easements for "like purposes" may convey to an owner of property adjoining the dominant tenement an enforceable easement for access over the servient tenement. We also hold that when a party records a late notice to preserve easement under Civil Code section 887.070,[1] the attorney fees that can be assessed as a condition to dismissal of an action to establish the abandonment of an easement may include only those fees incurred in connection with that action for statutory abandonment, and not the fees incurred otherwise in the proceeding to contest the validity of the easement.

BACKGROUND

This action concerns three parcels of property located in an undeveloped area of the Santa Monica mountains, west of Kanan Dume Road. Plaintiff and appellant Arthur Newmyer, as Trustee of the Harry S. Kanter Irrevocable Trust, (plaintiff) is the owner of Lot 29, a 45.87 acre parcel adjacent to Kanan Dume Road. Defendant and respondent Parklands Ranch, LLC (defendant) is the owner of Lot 17, a 37.88 acre parcel immediately to the northwest of plaintiff's land. Immediately to the west of plaintiff's property is Lot 903, a 40 acre parcel that adjoins the southerly boundary of defendant's property.

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[1] Civil Code section 887.070 states as follows: "In an action to establish the abandonment of an easement pursuant to this chapter, the court shall permit the owner of the easement to record a late notice of intent to preserve the easement as a condition of dismissal of the action, upon payment into court for the benefit of the owner of the real property the litigation expenses attributable to the easement or portion thereof as to which the notice is recorded. As used in this section, the term 'litigation expenses' means recoverable costs and expenses reasonably and necessarily incurred in preparation for the action, including a reasonable attorney's fee."

A. The Easements

Deed 927

At one time, Beatriz Oakley owned both Lots 29 and 903. In June 1965, Ms. Oakely sold Lot 903 to Palace Court, Inc. and certain other individuals (collectively Palace Court) by Deed 927, recorded with the Los Angeles County Recorder's Office on June 8, 1965. Lot 903 had no access to the then proposed Dume Canyon Road (now known as Kanan Dume Road). In Deed 927, Ms. Oakley conveyed to Palace Court an access easement across Lot 29 (now owned by plaintiff) over a specifically described 60-foot wide strip of land. That deed specifies the rights conveyed as follows: "An easement for ingress, egress, roadway, water lines, utilities and incidental purposes, including the right to grade and improve the same, over a strip of land 60 feet wide, extending in a westerly direction from the new Dume Road across other lands of seller, to the easterly line of the parcel of land being conveyed in fee, such easement to be appurtenant to each and every part of the lands being so conveyed in fee and all sub-divisions and resub-divisions thereof, and with the further right to the grantee to grant easements for like purposes to others to be appurtenant to other lands, and the right to dedicate the same."

Document 1548

On July 16, 1965, Palace Court granted Bethdore Corporation, the owner of the property adjoining Lot 903 on the west, in recorded Document 1548 (Mutual Exchange of Easements), an easement over plaintiff's property identical to the easement Palace Court received from Ms. Oakley. Plaintiff has not challenged this easement. Document 1548 provided in relevant part as follows: "Palace Court, Inc., has undertaken, at its expense, the survey of, and hereby undertakes certain grading and improvement of a roadway upon, a system of easement accesses from the proposed Dume Canyon Road . . . in a generally westerly direction along an easement acquired by it as set forth in deed from Beatriz Oakley to Palace Court, Inc., et al., recorded as Document No. 927 on June 8, 1965, thence continuing in a generally westerly direction across its above

described lands and adjoining easements acquired by it with the right to grant like easements to others, and providing for extensions of said system, westerly and northerly, in a manner which will serve the said lands of Bethdore Corporation and the Northeasterly Quarter of the Northwesterly Quarter (NE 1/4 of NW 1/4) of said Section 13, and which system is further capable of being extended to serve other lands."

Deed 1551

Also on July 16, 1965, Palace Court executed and recorded Deed 1551, conveying to the owner of Lot 17 (now owned by defendant) a series of easements, including an easement over Palace Court's property and a connecting easement over plaintiff's property (the easement in issue here) identical to that granted by Deed 927. It is this easement that is the subject of this action. Deed 1551 states that "[e]ach and every of said easements are hereby made appurtenant to" Lot 17.

Plaintiff acquired Lot 29 in November 1999. Defendant acquired Lot 17 in October 2002. The deed conveying Lot 17 to defendant included a specific conveyance of the easement over plaintiff's property.

B. Procedural History

Plaintiff commenced this litigation on June 6, 2003, by filing a complaint to quiet title in abandoned easement and for declaratory relief. Plaintiff asserted his first cause of action under Civil Code section 887.040 for statutory abandonment of easement. In his second cause of action, plaintiff sought declaratory relief with respect to the parties' respective rights concerning the easement over plaintiff's Lot 29. On June 19, 2003, defendant recorded a late notice of intent to preserve easement[2] under Civil Code section

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[2] Civil Code section 887.060 provides that an easement is not abandoned if a notice of intent to preserve easement is recorded within 20 years of the commencement of the action to establish the abandonment of the easement or a notice of intent to preserve easement is recorded pursuant to Civil Code section 887.070—a "late notice of intent to preserve easement."

887.070. On July 24, 2003, defendant filed a cross-complaint to quiet title and for declaratory and injunctive relief.

On September 1, 2004, defendant filed a motion to dismiss the action under Civil Code section 887.070 because of the filing of the notice to preserve easement. Plaintiff opposed the motion on the ground that defendant was not an owner of an easement within the meaning of Civil Code section 887.070 because the instrument creating the easement in favor of defendant's Lot 17 had not been executed by any owner of Lot 29—plaintiff's property—and was not within the chain of title to plaintiff's property.

The trial court granted defendant's motion to dismiss the action, and as a condition of dismissing plaintiff's statutory abandonment cause of action, ordered defendant to pay plaintiff's reasonable litigation expenses pursuant to Civil Code section 887.070. Plaintiff's reasonable litigation expenses were to be determined on a separate motion if the parties were unable to agree on the amount. The trial court entered judgment against plaintiff on plaintiff's complaint and in favor of defendant on defendant's cross-complaint.

On April 12, 2005, plaintiff filed a motion for an award of litigation expenses pursuant to Civil Code section 887.070, requesting $40,703, the full amount of litigation expenses plaintiff incurred in the action. Defendant opposed the motion on the ground that plaintiff was not entitled to recover litigation expenses incurred after defendant recorded, on June 19, 2003, its notice of intent to preserve easement. The trial court granted plaintiff's motion in part and awarded plaintiff litigation expenses incurred before June 19, 2003.[3] The parties stipulated that these expenses totaled $6,076. Plaintiff filed appeals with respect to the judgment on the easement and as to the award of expenses. The appeals have been consolidated.

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[3] We grant plaintiff's motion to augment the record on appeal to include the transcript of the hearing on plaintiff's motion for litigation expenses.

DISCUSSION

A. Standard of Review

The trial court determined that defendant had a valid easement over plaintiff's property based upon a review of the deeds purportedly creating that easement. There are no disputed facts concerning the deeds or any extrinsic evidence.[4] Under these circumstances, we review independently, as a matter of law, the trial court's interpretation of the deeds and its conclusion that a valid easement exists. (*City of Manhattan Beach v. Superior Court* (1996) 13 Cal.4th 232, 238; *Kerr v. Brede* (1960) 180 Cal.App.2d 149, 151.)

We review the trial court's determination concerning the legal basis for the litigation expense award under Civil Code section 887.070 independently as a question of law (see *Leamon v. Krajkiewcz* (2003) 107 Cal.App.4th 424, 431) and the reasonableness of the amount of such an award for an abuse of discretion. (See *In re Marriage of Gonzalez* (1976) 57 Cal.App.3d 736, 748-749.)

B. Law of Easements

An easement is a nonpossessory interest in land of another. (*Wright v. Best* (1942) 19 Cal.2d 368, 381; 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 382, p. 446 (Witkin) [It "is an interest in the land of another, which entitles the owner of the easement to a limited use or enjoyment of the other's land"]; Bruce and Ely, The Law of Easements and Licenses in Land (2001 ed.) § 1:1, p. 1-2) (Bruce and Ely).) Easements may be either appurtenant or in gross. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 521; 6 Miller & Starr (3d ed. 2000) Cal. Real Estate § 15:6, p. 21 (Miller & Starr).) An appurtenant easement attaches to the land of the easement holder and benefits the

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[4] There was no testimony apart from declarations by plaintiff's expert attesting to a search of the grantor/grantee index at the Los Angeles County Recorder's Office to determine if an easement had been granted by any owner of plaintiff's property in favor of the property now owned by defendant, and by defendant and their counsel concerning abandonment of the easement and the recordation of notices to preserve easement.

holder as the owner or possessor of the land. (*Buehler v Oregon-Washington Plywood Corp.* (1976) 17 Cal.3d 520, 527 (*Buehler*); 12 Witkin, *supra,* Real Property, § 383, at p. 447; see Civ. Code, § 801.) The land to which an appurtenant easement is attached is called the dominant tenement, and the land that is burdened by the easement is called the servient tenement.[5] (*Wright v. Best, supra,* 19 Cal.2d at p. 381; *Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 865; 12 Witkin, *supra,* Real Property, § 383, at p. 447; see Civ. Code, § 803.) An appurtenant easement attaches only to the land of the easement holder; it cannot be severed and transferred separately from the dominant tenement unless otherwise provided by the parties at the time the easement was created. (*Buehler, supra,* 17 Cal.3d at pp. 527-528**;** Rest.3d Property, Servitudes (2000) § 4.6, com. b, p. 549.) An easement in gross is not attached to any particular land, but is a personal right to use the land of another. It exists whenever the easement is not created for the purpose of benefiting land possessed by the easement's owner and does not pass with the land. (*Moylan v. Dykes* (1986) 181 Cal.App.3d 561, 568; 12 Witkin, *supra,* Real Property, § 383, at p. 448; see Civ. Code, § 802.) "Because an easement in gross is personal, it may be conveyed independent of land." (*City of Anaheim v. Metropolitan Water Dist. of Southern Cal.* (1978) 82 Cal.App.3d 763, 768 (*City of Anaheim*).)

An easement can be created to burden or benefit any estate in land, including future estates. (Rest.3d Property, Servitudes, *supra,* § 2.5; Civ. Code, § 808.) "The intent of the parties determines which estates or servitude interests are burdened or benefited by a servitude. If their intent is not expressed, it may be inferred from the circumstances. In the absence of circumstances indicating some other intent, the normal inference is that the parties intend to burden or benefit the estates or other interests they own in the property." (Rest.3d, Property, Servitudes, *supra,* § 2.5, com. a, at p. 99;

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[5] Sometimes the word "estate" is used instead of "tenement." (Black's Law Dict. (8th ed. 2004) p. 589, col. 1 [dominant estate: "An estate that benefits from an easement—also termed dominant tenement"].)

Moylan v. Dykes, supra, 181 Cal.App.3d at p. 569.) Easements as property rights, when appurtenant to land, are transferable and descendible. (*Moylan v. Dykes, supra,* 181 Cal.App.3d at p. 568; Civ. Code, §§ 1044, 1104; Rest.3d Property, Servitudes, *supra,* §§ 4.6, 4.7, 5.1; Bruce and Ely, *supra,* §§ 9:1-9:11 at pp. 9-1 to 9-21.) Easement in gross are also alienable. (*Callahan v. Martin* (1935) 3 Cal.2d 110, 121**;** Civ. Code, §§ 802, 1044; 6 Miller & Starr, *supra,* Cal. Real Estate, § 15:7, at p. 28.)

An easement can be created by an express or implied grant or reservation, prescription, deed, agreement, recorded covenant, or any instrument that transfers an interest or estate in real property. (*Cushman v. Davis* (1978) 80 Cal.App.3d 731, 735; 6 Miller & Starr, *supra,* Cal. Real Estate, § 15:5, at p. 18, § 15:13, at p. 56.) "An instrument creating an easement is subject to the same rules of construction applicable to deeds and is interpreted in the same manner as a contract. [¶] . . . The conveyance is interpreted in the first instance by the language of the document. When the intent of the parties can be derived from the plain meaning of the words used in the deed, the court should not rely on the statutory rules of construction. . . . [¶] When the document creating the easement is ambiguous, the court looks to the surrounding circumstances, the relationship between the parties, the properties, and the nature and purpose of the easement in order to establish the intention of the parties. The cardinal rule of interpretation is to ascertain and enforce the intentions of both the grantor and the grantee." (Miller & Starr, *supra,* Cal. Real Estate, § 15:16, at pp. 62-63 (fns. omitted); see Civ. Code, § 806 ["The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired"]; Civ. Code, § 1066 ["Grants are to be interpreted in like manner with contracts in general, . . ."]; *Continental Baking Co. v. Katz, supra,* 68 Cal.2d at p. 521; *Kerr Land & Timber Co. v. Emmerson* (1965) 233 Cal.App.2d 200, 219 ["in determining the scope of the easement the same rules are applicable as would apply to the construction of the terms of a contract"].)

C. Validity of Easement

The easement at issue here was created by a series of express grants. By Deed 927, Ms. Oakley conveyed an appurtenant easement over plaintiff's property (Lot 29) in favor of Palace Court, the owner of Lot 903 at that time. In addition to granting an appurtenant easement over plaintiff's property, Deed 927 conveyed to Palace Court "the further right . . . to grant easements for like purposes to others to be appurtenant to other lands." Palace Court exercised this further right when, pursuant to Deed 1551, it conveyed an access easement over plaintiff's property, identical to the one it had, in favor of the owner of defendant's property (Lot 17). Palace Court's property is contiguous to plaintiff's property. Defendant's property is contiguous to Palace Court's property on the west and is immediately to the northwest of plaintiff's property.

Plaintiff concedes that Deed 927 granted Palace Court an appurtenant easement over plaintiff's property. Plaintiff argues, however, that Palace Court could not validly extend the benefit of its appurtenant easement to defendant's property because Deed 927 fails specifically to identify another property, such as defendant's property, as a dominant tenement, and that interpreting or applying Deed 927 as providing easement rights to defendant's property would permit an unlimited number of easements outside the chain of title to plaintiff's property and unreasonably burden plaintiff's property. Plaintiff argues that defendant is asserting, in effect, an easement in gross and that appurtenant easements may not be severed and converted into easements in gross.

1. Easement Right of Property Not Specified in Grant of Easement

As a general rule, an appurtenant easement may not be used for the benefit of property other than the dominant tenement specified in the grant of the easement, unless the terms of the easement provide otherwise. (*Wright v. Best, supra,* 19 Cal.2d at p. 381; Rest.3d Property, Servitudes, *supra,* § 4.11, p. 619; Civ. Code, § 806.) The issue plaintiff raises is whether a property not identified in the document creating the easement can thereafter become an additional dominant tenement.

a. *No Identification of Defendant's Property*

Plaintiff contends there is no evidence of an express agreement to extend the benefit of the easement conveyed by Deed 927 to properties other than Lot 903, the property owned by Palace Court at the time of the conveyance. Plaintiff's assertion is contradicted, however, by the language of Deed 927 itself, which, in addition to granting Palace Court an appurtenant easement across a 60-foot wide strip of land on plaintiff's property, unambiguously conveyed the separate and distinct "further right . . . to grant easements for like purposes to others to be appurtenant to other lands."

Wright v. Best, supra, 19 Cal.2d 368, on which plaintiff relies, is inapposite. In that case, the California Supreme Court held that an easement created for the benefit of mines "owned or operated" by the easement holder could not be extended to mines that were not owned or operated by the easement holder at the time the easement was created. (*Id.* at p. 384.) The court reasoned that "[i]n the absence of a very clear intention to the contrary, a court should not assume that the grantor contracted with reference to any claims which were not then in operation." (*Ibid.*) The court further noted, "In order to validly create such rights which will benefit property to be later acquired, the parties must express their intention in such manner as to admit of no doubt." (*Ibid.*) The intention of the parties in this case, as set forth in the terms of Deed 927, was to accord Palace Court the right "to grant easements for like purposes to others to be appurtenant to other lands." The plain language of the deed states the parties' intent that "other lands" benefit from the access easement over plaintiff's property. (*Moylan v. Dykes, supra,* 181 Cal.App.3d at pp. 568-569**;** 6 Miller & Starr, *supra,* Cal. Real Estate, § 15:16, at pp. 62-63; Rest.3d Property, Servitudes, *supra,* § 2.5, com. a., at p. 99.)

Plaintiff also contends the failure of Deed 927 between plaintiff's predecessor, Ms. Oakley, and Palace Court to identify defendant's property as an intended dominant tenement invalidates the subsequent conveyance in Deed 1551 from Palace Court to the owner of defendant's property. Plaintiff also asserts that the language, "the further right . . . to grant easements for like purposes to others to be appurtenant to other lands" is legally insufficient to give Palace Court the right to convey an easement to the owner

of defendant's property because that language does not specify the geographic parameters of the "other lands" to be benefited. Plaintiff states that "[t]his vague and unspecific power to extend the benefits of the appurtenant easement to any owner of any land dooms the validity of the easement."

Plaintiff can point to no authority requiring that, in the document conveying to the owner of the dominant tenement the right to grant other properties an easement over the servient tenement, there be identification of those other properties. Failure to specify the dominant tenement in the instrument creating an easement does not necessarily invalidate the easement. (See 6 Miller & Starr, *supra,* Cal. Real Estate, § 15:8, at pp. 30-31 (fn. omitted) ["When the deed does not identify the dominant tenement to which the easement is appurtenant, the court can examine extrinsic evidence, such as the testimony of the parties to the deed, the context of the transaction in which the deed was given, the physical location of the easement in relation to other property, and the like, in order to identify the dominant tenement"]; see *Moylan v. Dykes, supra,* 181 Cal.App.3d at pp. 569-570 [court may look to extrinsic evidence when deed makes no reference to dominant tenement].) Here, the grantee was the owner of a specifically identified dominant tenement and was given the authority to designate other dominant tenements.

A "dominant owner may not use an appurtenant easement to benefit any property other than the dominant estate." (Bruce and Ely, *supra,* § 8:11, at p. 8-32.) But here, the grantor has authorized multiple dominant tenements. There can be concurrent easement rights in owners of different properties to use the servient tenement. (*Id.* § 8:31, at p. 8-69.) For example, "the right to use an easement appurtenant extends to each subdivided portion of the dominant estate. [¶] . . . [¶ . . . the owner of a divided part of the original dominant tenement may use the easement, even though the owner's particular lot does not abut the servitude." (*Id.* § 9:3, at pp. 9-6 to 9-7.) These principles logically support defendant's easement rights here.

By the express language of Deed 927, Ms. Oakley and Palace Court contemplated that the owners of Lot 903 would not only have an easement over Lot 27, but have the right to grant easements over Lot 27 to owners of other properties, such as Lot 17. Deed

927 conveyed to the owners of Lot 903 an access easement over plaintiff's property, "including the right to grade and improve the same," "extending in a westerly direction from the new Dume Road . . . ." Deed 927 provided the owners of Lot 903 the further right "to grant easements for like purposes to others to be appurtenant to other lands, and the right to dedicate the same."

Even if we consider the non-disputed extrinsic evidence, it supports defendant's position that defendant's property was intended to be a dominant tenement. A month after the recordation of Deed 927, Deed 1551 was recorded, and it conveyed to the owner of defendant's property the roadway access easement referred to in Deed 927. But for the roadway easement, defendant's property, which is located to the northwest of plaintiff's property, would be landlocked, without access to Kanan Dume Road – apparently the only road servicing the area. By Document 1548, pursuant to the authority in Deed 927, Palace Court conveyed an easement over plaintiff's property to a landowner adjoining Palace Court's property and in that document, recorded one month later, described the nature of the area and proposed road. That document states that Palace Court's right to convey "like easements to others" was to provide for extension of the roadway to serve certain properties to the west and north of Palace Court's property. Defendant's property is located within those geographic parameters. Even though Deed 1551 and Document 1548 were executed after Deed 927 and not executed by Ms. Oakley, the documents were executed within the same general time period, and Deed 1551 and Document 1548 are consistent with, and appear to carry out, the purpose of Deed 927's authorization of the right to grant easements for "like purpose." Thus, "the context of the transaction in which the deed was given, the physical location of the easement in relation to other property, and the like," (6 Miller & Starr, *supra,* Cal. Real Estate, § 15:8, at pp. 30-31; see *Moylan v. Dykes, supra,* 181 Cal.App.3d at pp. 569-570) suggest that defendant's Lot 17 was the type of property intended to be a dominant tenement.

b. *Unlimited Future Easements*

Plaintiff contends that interpreting Deed 927 to permit Palace Court to convey subsequent easements to unspecified "other lands" would "seemingly allow[]" Palace Court or its successor to grant "an unlimited number of easements" over plaintiff's property "with no geographic limitation or proximity requirement," thereby unreasonably burdening plaintiff's land. Plaintiff argues that such easement grants would be outside the chain of title to plaintiff's property and would cloud marketable title to that property.

That Deed 927 did not identify with greater specificity the "other lands" to be benefited by subsequent easement grants does not invalidate defendant's easement. Interpreting Deed 927 to allow the conveyance of an easement in favor of defendant's property would not, as plaintiff contends, necessarily grant Palace Court and its successors to right to convey "an unlimited number of easements" over plaintiff's property "with no geographic or proximity requirement." We do not have to determine if the grant was intended to be, and could be, unlimited, because we deal with whether defendant's property can benefit from that easement. Plaintiff has offered no evidence that the servient tenement is overburdened or subjected to unreasonable damage.[6]

Deed 927's indication that the easement was for access to the proposed "Dume Road" and specification that future easement grants be for "a like purpose" do not suggest an unlimited number of potential dominant tenements. Neither do Deed 1551 and Document 1548, which are for such access for properties in the immediate area. Document 1548, recorded one month after Deed 927 and simultaneously with Deed 1551, at least indicate the general geographic boundaries for future easement grants. Document 1548 states that Palace Court had acquired an access easement over plaintiff's property; that Palace Court had "undertaken, at its expense, the survey of . . . grading and

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[6] As to overburdening or unreasonable damage to the servient tenement see Civil Code section 811, subdivision (3); the Restatement Third of Property, Servitudes, *supra*, section 4.10, comment g, page 600; Bruce and Ely, *supra*, section 10:26 at pages 10-62 to 10-65.

improvement of a roadway" upon that easement; and that Palace Court's "right to grant like easements to others" was to provide for extension of that roadway "westerly and northerly," in order to serve "the Northeasterly Quarter of the Northwesterly Quarter" of section 13. Defendant's property is located in the northeasterly quarter of the northwesterly quarter of section 13.

The courts have held use of a roadway easement to be "'limited only by the requirement that it be reasonably necessary and consistent with purposes for which the easement was granted.'" (*Wall v. Rudolph* (1961) 198 Cal.App.2d 684, 692, quoting *City of Pasadena v. California-Michigan Etc. Co.* (1941) 17 Cal.2d 576, 582.) Such use "presumptively includes normal future development within the scope of the basic purpose." (*Id.* at p. 692; see also Annotation, Extent and Reasonableness of Use of Private Way In Exercise of Easement Granted in General Terms (1965) 3 A.L.R.3d 1256, 1266-1272, §§ 4, 5 and cases cited.) Extending the benefit of the easement granted by Deed 927 to "other lands" in the northeasterly quarter of the northwesterly quarter of section 13 for access to Kanan Dume Road appears to be consistent with both the normal future development of the area and the purposes for which the easement was granted. (See *Camp Meeker Water System, Inc. v. Public Utilities Com., supra*, 51 Cal.3d at pp. 866-867 [""It is to be assumed that [the parties] anticipated such uses as might reasonably be required by a normal development of the dominant tenement""].) Moreover, the grantor must have contemplated some significant use of the easement because she gave the grantee the right to "dedicate the same"[7] and gave easement rights to subdivisions of Lot 903.

That defendant's easement may not have been recorded in the chain of title to plaintiff's property is not a reason for invalidating that easement. An easement need not be recorded to be enforceable. (6 Miller & Starr, *supra*, Cal. Real Estate, § 15:14, at p.

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[7] "Dedication has been defined as an appropriation of land for some public use, made by the fee owner, and accepted by the public." (*Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 820.) "A public easement arises only by dedication." (*People v. Sayig* (1951) 101 Cal.App.2d 890, 896.)

60.) Although an unrecorded easement may not be enforceable against a bona fide purchaser of the servient estate (*ibid.*; *Zimmerman v. Young* (1946) 74 Cal.App.2d 623, 626-628), plaintiff does not claim to be a bona fide purchaser against whom defendant's easement rights are unenforceable. Moreover, the easement that was recorded and in the chain of title to plaintiff's property gives notice of the right of the owner of Lot 903 (the initial dominant tenement) to grant to other property owners an easement over plaintiff's property. Because plaintiff does not claim to be a bona fide purchaser without notice of the easement, we need not decide whether there is sufficient notice of defendant's easement rights as against a bona fide purchaser of plaintiff's property.

2. Appurtenant Easement or Easement in Gross

Plaintiff contends that the conveyance in Deed 1551 of easement rights to the owner of defendant's property amounted to an improper attempt to convert an appurtenant easement into an easement in gross, in violation of California real property law. Plaintiff concedes that Deed 927 conveyed two distinct rights – an appurtenant access easement across plaintiff's property in favor of Lot 903 and the right to grant easements over the same access area to benefit other properties. The conveyance in Deed 1551 was an exercise of the latter of these two rights. There is no evidence to suggest that that conveyance was an attempt to sever the access easement appurtenant to Lot 903 and to transfer it to defendant's property or to a non-property owner.

Plaintiff argues that the right conveyed to Palace Court by Deed 927 "to grant easements for like purposes to others to be appurtenant to other lands" was separate and distinct from Palace Court's ownership of Lot 903 and thus constituted an easement in gross. Plaintiff maintains that Palace Court's conveyance in Deed 1551 was for an easement in gross that did not run with defendant's property.

In any grant of property rights, the court will attempt to determine and facilitate the intent of the grantor, so long as it does not conflict with law. (*City of Anaheim, supra,* 82 Cal.App.3d at p. 768.) "Where the grant of an easement is ambiguous and the intent of the grantor cannot be ascertained, the law presumes that the easement is appurtenant."

(*Ibid; Elliott v. McCombs* (1941) 17 Cal.2d 23, 29.) Here, the intent of the grantor can be ascertained from the language of the deeds conveying the easement rights. Deed 927 states that any subsequent easement grant by Palace Court to others was "to be appurtenant to other lands." Deed 1551 provides that the easement rights conveyed, including the easement over plaintiff's property, "are hereby made appurtenant to" the property now owned by defendant.

Plaintiff cites *City of Anaheim, supra,* 82 Cal.App.3d 763, in support of its argument that Deed 927 should be interpreted as conveying to Palace Court the right, at best, to grant only easements in gross, and not appurtenant easements. That case, however, is distinguishable. In *City of Anaheim*, the court held that a deed reservation describing a system of roadway easements intended to benefit "parcels many miles apart and wholly unrelated to each other" as part of a larger community plan was an easement in gross. (*Id.* at p. 768.) The instrument creating the easements at issue in *City of Anaheim*, unlike Deed 927, failed to specify whether the easements reserved were to be appurtenant or in gross. (*Id.* at pp. 766, 768.) Here, the language of Deed 927 expressly states that Palace Court's right to convey subsequent easements to others was for easements "to be appurtenant to other lands." In addition, Deed 1551 expressly provides that the easements conveyed to the grantee are "appurtenant to" the property now owned by defendant.

Elliott v. McCombs, *supra*, 17 Cal.2d 23, upon which plaintiff also relies, is distinguishable. That case involved a series of deed reservations creating roadway easements in favor of the grantor, a land company that originally owned all of the adjoining properties. The deeds did not specify whether the easements reserved were appurtenant or in gross. With respect to easement reservations made by the land company at the time it still owned some of the adjoining properties, the California Supreme Court concluded that the purpose of the land company was to sell the property; that in light of this purpose, the land company would have no use for an easement in gross; and that the logical purpose in reserving an easement would be to give subsequent grantees of the land reasonable access to their respective properties by way of a roadway

easement. (*Id.* at pp. 29-30.) With respect to an easement reservation made in a deed after the land company had disposed of all other parcels, the court concluded that because the grantor no longer had property to which the easement could be appurtenant, "it must be presumed that [the reservation] was made to carry out some purpose, and 'an interpretation which gives effect is preferred to one which makes void.' [Citation.]" (*Id.* at p. 32.) The court accordingly held that the reservation made after the remaining parcels were sold must be construed as an easement in gross. (*Ibid.*) In the instant case, Deed 927 provides for an access easement and other access easements ("for like purposes") to be appurtenant to the properties granted the easements. In order to give effect to the language in Deeds 927 and 1551, the deeds must be interpreted as conveying to the owner of defendant's property an appurtenant access easement over plaintiff's property.

D. Litigation Expense Award

Plaintiff appeals the litigation expenses awarded pursuant to Civil Code section 887.070, contending that the trial court erred by excluding $34,627 in expenses incurred by plaintiff after June 19, 2003, the date defendant recorded its notice of intent to preserve easement. Plaintiff contends the trial court's order limiting the expense award was arbitrary and unreasonable, and that plaintiff is entitled to all fees and costs incurred from May 29, 2003 through the entry of judgment on March 18, 2005, an amount totaling $40,703.

Civil Code section 887.070 provides that, in an action to establish the abandonment of an easement, "the court shall permit the owner of the easement to record a late notice of intent to preserve the easement as a condition of dismissal of the action, upon payment into the court for the benefit of the owner of the real property the litigation expenses attributable to the easement or portion thereof as to which the notice is recorded."

Civil Code section 887.070 is part of a larger statutory scheme "to accommodate the competing interests of owners whose real property was burdened by an easement with

those of property owners whose real property was burdened by an easement." (*Worthington v. Alcala* (1992) 10 Cal.App.4th 1404, 1410; see Civ. Code, §§ 880.020, et seq.) Civil Code section 887.040, the statute pursuant to which plaintiff commenced this action, sets forth the applicable procedures for the owner of property burdened by an easement to clear title by establishing abandonment of the easement.[8] "Section 887.070 enables the owner of an easement to preserve the easement, after commencement of an action to establish its abandonment and clear title, by filing a late notice of intent to preserve the interest." (18 Cal. Law Revision Com. Rep. (1986) 261, 267.) "The primary purpose of section 887.070 is not the payment of litigation costs. It is to 'enable[] the owner of an easement to preserve the easement, after commencement of an action to establish its abandonment . . . .' (18 Cal. Law Revision Com. Rep., *supra,* at p. 267.)" (*Worthington v. Alcala, supra,* 10 Cal.App.4th at p. 1411.) "[T]he Legislature intended litigation costs to be imposed pursuant to section 887.070 only where the sole theory of extinguishment of the easement is statutory abandonment or other theories are voluntarily dismissed and the application of the section will therefore result in preserving the easement interest." (*Ibid.*)

In this case, plaintiff's statutory abandonment cause of action was extinguished by the filing of defendant's late notice of intent to preserve easement on June 19, 2003. Plaintiff thereafter elected to continue the action, not on a statutory abandonment theory, but on the theory that no valid easement had been created in defendant's favor. The two theories are not the same. An action to establish the validity or non-validity of an easement purportedly created by an express grant turns on the intent of the parties. (6 Miller & Starr, *supra*, Cal. Real Estate, § 15:16, at pp. 62-63.) A statutory abandonment

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[8] Civil Code Section 887.040 provides: "(a) The owner of real property subject to an easement may bring an action to establish the abandonment of the easement and to clear record title of the easement. [¶] (b) The action shall be brought in the superior court of the county in which the real property subject to the easement is located. [¶] (c) The action shall be brought in the same manner and shall be subject to the same procedure as an action to quiet title pursuant to Chapter 4 (commencing with Section 760.010) of Title 10 of Part 2 of the Code of Civil Procedure, to the extent applicable."

cause of action, on the other hand, is premised upon the existence of a valid easement, and concerns forfeiture of that easement through non-use. (Civ. Code, § 887.050.)[9] The trial court did not err by limiting the litigation expense award under Civil Code section 887.070 to those expenses incurred only in connection with the statutory abandonment theory, i.e., those incurred before June 19, 2003. (*Worthington v. Alcala, supra,* 10 Cal.App.4th at p. 1411.)

DISPOSITION

The judgment is affirmed, as is the award of litigation expenses under Civil Code section 887.070. Defendant is awarded its costs on appeal.

CERTIFIED FOR PUBLICATION

MOSK, J.

We concur.

TURNER, P. J.

KRIEGLER, J.

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[9] The elements of a statutory abandonment cause of action are set forth in Civil Code section 887.050, which provides in relevant part as follows: "(a) For purposes of this chapter, an easement is abandoned if all of the following conditions are satisfied for a period of 20 years immediately preceding commencement of the action to establish abandonment of the easement: [¶] (1) The easement is not used at any time. [¶] (2) No separate property tax assessment is made of the easement or, if made, no taxes are paid on the assessment. [¶] (3) No instrument creating, reserving, transferring, or otherwise evidencing the easement is recorded."