

**Nonpossessory Interests**  
(a.k.a. "Servitudes")  
Summary of the Categories and Rules Employed  
in Most American Jurisdictions

**Easement**

Ann has a right to make some limited use of Bill's land

"affirmative": Ann has a right to use Bill's land in a way that ordinarily would constitute a trespass or a nuisance

"negative": Ann has a right to insist that Bill not do something on his land he ordinarily would be entitled to do

only 4 are permitted:

(i) Bill may not block light;

(ii) Bill may not impede the flow of air;

(iii) Bill may not withdraw lateral or subjacent support from artificial structures on Ann's land

(iv) Bill may not interfere with the flow of water in an artificial stream on Bill's land that flows into Ann's land

"appurtenant": Ann benefits from the easement in a fashion inseparable from her interest in her own parcel of land

--Ann's land = "dominant tenement"

--Bill's land = "servient tenement"

"in gross": Ann benefits from the easement in a fashion unrelated to her interest in any tract of land

**Profit**

Ann has a right to sever and remove some substance from Bill's land (timber, gravel, fish, etc.)

always associated with express or implied easement to enter Bill's land

**License**

Ann has an entitlement that resembles an easement or profit but is terminable at will by Bill

**Real Covenant/Equitable Servitude**

Bill promises not to do something on his own land (restrictive covenant or negative equitable servitude) or to perform some affirmative act (affirmative covenant or affirmative equitable servitude)

covenants are enforceable primarily by awards of damages; equitable servitudes are enforceable only through awards of injunctions

## **Requirements for Covenants and Equitable Servitudes to Run with the Land**

For the burden of a covenant to "run with" Bill's land and thus be enforceable against a purchaser (Dan):

- (1) It must be in writing, and signed by Bill;
- (2) There must be both horizontal and vertical privity of estate
  - the meanings of horizontal privity varies by jurisdiction:
    - (a) "mutual privity": Ann and Bill must both have interests that survive the execution of the covenant in the same plot of land
    - (b) "instantaneous" or "successive privity": Ann conveys an interest in land to Bill (or vice versa) at the time the covenant is entered into
    - (c) either (a) or (b) is sufficient (e.g., Restatement)
  - vertical privity requires that Dan succeed to Bill's entire estate
- (3) Ann and Bill must have intended that it run and made their intent explicit; and
- (4) the burden must "touch and concern" Bill's land or estate (some states also require that the benefit "touch and concern" Ann's land or estate)

For the benefit of a covenant to run with Ann's land and thus be enforceable by a purchaser (Carol):

- (1) It must be in writing;
- (2) Carol must succeed to Ann's possessory interest (soft version of vertical privity)
- (3) A minority of states require horizontal privity of estate (see above)
- (4) Ann and Bill must have intended that it run and made their intent explicit; and
- (5) the benefit must "touch and concern" Ann's land or estate

For the burden of an equitable servitude to "run with" Bill's land and thus be enforceable against a purchaser (Dan):

- (1) It must be in writing;
- (2) Dan must have notice of the servitude (recording will suffice);
- (3) Ann and Bill must have intended that it run and made their intent explicit; and
- (4) the burden must "touch and concern" Bill's land or estate

For the benefit of an equitable servitude to run with Ann's land and thus be enforceable by a purchaser (Carol):

- (1) It must be in writing;
- (2) Ann and Bill must have intended that it run and made their intent explicit;
- (3) Some states require vertical privity of estate between Ann and Carol; and
- (4) Some states require that the benefit "touch and concern" Ann's land or estate