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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

W. GEORGE BROOKBANK, as Trustee, etc.,

Plaintiff, Cross-defendant and Appellant,

v.

CARVER BOWEN et al.,

Defendants, Cross-complainants and
Respondents.

F067642

(Super. Ct. No. VCU242840)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Lloyd L. Hicks, Judge.

Alexander & Associates, William L. Alexander and Alisyn J. Palla for Plaintiff, Cross-defendant and Appellant.

Williams, Brodersen & Pritchett and Steven R. Williams for Defendants, Cross-complainants and Respondents.

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Since 1964, a rancher had been driving cattle across a neighboring parcel to reach summer grazing in the Sequoia National Forest. The trial court found that a prescriptive easement had been acquired to cross that parcel.

The neighbor appealed, contending the trial court's finding that the use had been adverse, rather than permissive, was not supported by substantial evidence. In addition, the neighbor contends the statement of decision failed to resolve all of the controverted issues and the judgment failed to describe the rights and duties defining the easement in sufficient detail.

We conclude the evidence adequately supports the finding of adverse use. Also, the trial court committed no error when it determined that the evidence did not prove the use of the parcel by the rancher's predecessor, which began in the 1930's, had been by permission of the land owner. As to the statement of decision, the trial court fulfilled its statutory obligation to explain the factual and legal basis for its decision and is not required to include a detailed analysis of evidentiary issues.

The judgment describes (1) the easement's location and width, (2) the maximum number of cattle that may use the easement, and (3) the timing for moving the cattle and maintaining the trail. These details are sufficient. Furthermore, the trial court did not err when it ruled the easement was appurtenant to the rancher's land, rather than a right-of-way personal to the rancher (i.e., an easement in gross). (See Civ. Code, §§ 801, 802 [appurtenant easements and personal servitudes].)

We affirm the judgment.

FACTS

Parties and Their Property

W. George Brookbank, in his capacity as trustee for the Brookbank Family Trust, is the plaintiff and appellant in this case. Brookbank currently owns 104 acres in Tulare County (the Brookbank Property), which is roughly two miles north-northeast of the town of Posey and contiguous to land owned by the United States Forest Service. The

Forest Service land lies to the east of the Brookbank Property. The western border of the Brookbank Property is formed by Capinero Drive, a county road.¹

The defendants are (1) Carver – Bowen Ranch, Inc., a California corporation; (2) Carver Bowen Family Limited Partnership; (3) Carver Bowen; (4) Alice Bowen; (5) Jeff Bowen; (6) Sheila Bowen; and (7) Matthew Bowen (collectively, defendants). They operate a cattle ranch and their land holdings, including a 253-acre parcel immediately to the south of the Brookbank Property.

The Studers Grazing Permit and Use of Trail

In February 1931, Wilbur and Winifred Studer obtained from the Forest Service a permit to graze cattle on the Sequoia National Forest. At the time, the Studers owned property near both the Forest Service land and the Brookbank Property.

The Studers moved their cattle to the Forest Service land by driving them from Capinero Drive up a canyon and creek bed that cut across the Brookbank Property, which was owned at the time by Ellis and Dottie Snow. This route from Capinero Drive up the canyon to the Forest Service land is about half a mile in distance and roughly follows a logging road that was made after World War II.² The trial court specifically found that the Studers drove their cattle over the Brookbank Property “under unknown circumstances.”³

The Trail was superior to the alternate route of continuing on Capinero Drive all the way to the Forest Service land because staying on the road was about three or four

¹ This public roadway sometimes was referred to as Jack Ranch Road.

² This opinion will adopt the term used in the trial court’s judgment and refer to the route up the canyon from Capinero Drive to the gate at the edge of the Forest Service land, which route roughly follows the old logging road and varies in width from 10 to 12 feet, as the “Trail.”

³ Mike Bates, a grandson of the Snows who was born in 1950, testified that the Studers and Snows had a very friendly relationship.

times longer and involved moving the cattle up a steep hill. The Trail gained about 200 to 250 feet in elevation before reaching the Forest Service land, while the change in elevation on the Capinero Drive route was about 700 feet.

Bowen's Acquisition of Grazing Permit and Use of Trail

In 1964, Winifred Studer sold 178 head of cattle and the Forest Service grazing rights to Carver and Alice Bowen. Every year thereafter, the defendants drove cattle over the same route across the Brookbank Property to the Forest Service land. They drove up to 214 cattle over the Trail each year.

The grazing permit period usually ran from April 15 to September 1, but could vary depending on conditions. The Forest Service notifies permit holders when they may move their cattle onto Forest Service land. Before each spring drive, defendants inspected the Trail and maintained it by trimming back branches and clearing trees that had fallen across the Trail. Smaller trees could be moved to the side and larger trees were “plugged”—that is, only the section of the tree blocking the Trail was cut and moved. The maintenance was usually done by someone traveling by horse, but sometimes an ATV was used.

Defendants would drive cattle in a single day from their home ranch (not the parcel immediately to the south of the Brookbank Property) using riders on horseback. During the summer, the defendants would use the Trail to cross the Brookbank Property to check on the cattle.

Collecting the cattle and bringing them down usually began in mid-August and could continue for several weeks until all the cattle were recovered. This process usually was finished by the end of September, with the cattle being returned in several trips.

Carver Bowen never asked permission from anyone to take cattle across the Brookbank Property and never received permission to maintain the Trail.

Brookbank's Ownership and Notice of Use by Defendants

Ellis and Dottie Snow owned the Brookbank Property as part of a larger parcel until 1976, when the land was deeded to their descendants, Frank Snow and Rose Brookbank. In 1997, George Brookbank, in his capacity as trustee for the Brookbank Family Trust, became the owner of the Brookbank Property.

When Brookbank inherited the Brookbank Property, it was used by his uncle, Robert Snow, for grazing. In 2005, Brookbank started camping on the parcel. In 2007, Brookbank began fencing the Brookbank Property with a four-strand barbed wire fence and "T" posts. In 2007, after the fence was started, Brookbank first learned that defendants were using the Trail to drive cattle to and from Forest Service land. The fencing was finished in 2008. Also that year, Brookbank installed a gate at the head of the Trail to block access.

Each year after the fence and gate were installed, defendants cut the locks and drove the cattle along the Trail. In 2011, Brookbank installed a cattle guard. Defendants unwired the fence and took the cattle around the cattle guard.

Beginning in 2008, Brookbank leased the Brookbank Property to others for cattle grazing. He also leased it for cutting firewood from downed trees and for hunting. The trial court found that defendants' use of the Trail did not interfere with the use of the Brookbank Property by the lessees.

PROCEEDINGS

In June 2011, Brookbank filed a complaint for trespass seeking damages, declaratory relief and a permanent injunction.

Defendants answered, alleging they held a prescriptive easement to herd cattle across the Brookbank Property. Defendants also filed a cross-complaint requesting a judicial determination recognizing an easement existed and declaring the parties' respective rights and duties with regard to the easement.

A one-day court trial was held in January 2013. After the last witness testified, counsel for Brookbank orally requested a statement of decision.

In March 2013, the trial court issued an "INTENDED DECISION," which stated that it would be the "Statement of Decision" unless a party specified controverted issues or made proposals not covered in the intended decision.

Brookbank responded to the intended decision by filing a request that asked the trial court to provide specific reasoning on 10 controverted issues. Later, both sides filed proposed judgments and proposed statements of decision on controverted issues.

On May 2, 2013, the trial court filed a one-page response to Brookbank's request for a statement of decision. The court stated that (1) the matters referred to in Brookbank's request were covered by the intended decision and (2) the intended decision would stand as the statement of decision. The court also directed defendants to prepare a judgment in conformity with the decision.

Brookbank objected to defendants' proposed judgment and filed his own proposed judgment, which he contended accurately set forth the scope of the easement based on the evidence presented at trial.

On May 20, 2013, the trial court signed and filed the judgment prepared by defendants. The judgment's description of the easement is set forth in part IV.A, *post*.

Brookbank filed a timely notice of appeal.

DISCUSSION

I. ISSUES RAISED ON APPEAL

Brookbank's opening brief requests this court to address the following three issues:

"1. Whether there was substantial evidence introduced at trial to support the trial court's finding that Bowen established a right to a prescriptive easement on the subject property.

“2. Whether the trial court erred in failing and refusing to provide a statement of decision on controverted issues as requested by Brookbank.

“3. Whether the trial court erred in failing to set forth the rights and obligations with regard to the scope of the easement in the Judgment entered on May 20, 2013.”

II. SUBSTANTIAL EVIDENCE SUPPORTS FINDING OF A PRESCRIPTIVE EASEMENT

A. Essential Elements of a Prescriptive Easement

The elements necessary to establish an easement by prescription are open and notorious use of another’s land, which use is continuous and uninterrupted for the statutory period of five years and adverse to the land’s owner. (Civ. Code, § 1007 [title by prescription]; Code Civ. Proc.,⁴ § 321 [five-year period for adverse possession]; *Grant v. Ratliff* (2008) 164 Cal.App.4th 1304, 1308.)

These elements “are designed to insure that the owner of the real property which is being encroached upon has actual or constructive notice of the adverse use and to provide sufficient time to take necessary action to prevent that adverse use from ripening into a prescriptive easement.” (*Zimmer v. Dykstra* (1974) 39 Cal.App.3d 422, 431.)

This appeal concerns the adverse use element, which is synonymous with use “under claim of right.” (*Aaron .v Dunham* (2006) 137 Cal.App.4th 1244, 1252.) Adverse use can be established by the claimant’s use of the property without the explicit or implicit permission of the landowner. (*Ibid.*) In *Felgenhauer v Soni* (2004) 121 Cal.App.4th 445, 450, the court explained:

“Claim of right does not require a belief or claim that the use is legally justified. [Citation.] It simply means that the property was used without permission of the owner of the land. [Citation.] As the American Law of Property states in the context of adverse possession: ‘In most of the cases asserting [the requirement of a claim of right], it means no more than that

⁴ All further statutory references are to the Code of Civil Procedure unless noted otherwise.

possession must be hostile, which in turn means only that the owner has not expressly consented to it by lease or license or has not been led into acquiescing in it by the denial of adverse claim on the part of the possessor.’ (3 Casner, American Law of Property (1952) Title by Adverse Possession, § 5.4, p. 776.)”

B. Standard of Review

Whether the elements of prescription are established is a question of fact for the trial court. (*Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 570.)

The trial court’s findings regarding the existence of a prescriptive easement must be based on clear and convincing evidence. (*Applegate v. Ota* (1983) 146 Cal.App.3d 702, 708.) Nevertheless, if substantial evidence supports the trial court’s findings, the findings will be upheld by an appellate court. (*Ibid.*) Also, “[t]he usual rule of conflicting evidence is applied, giving full effect to respondents’ evidence, however slight, and disregarding appellant’s evidence, however strong. [Citations.]” (*Ibid.*)

The usual rule regarding the substantial evidence standard for review has been described by our Supreme Court as follows:

“Where findings of fact are challenged on a civil appeal, we are bound by the ‘elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,’ to support the findings below. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.” (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.)

Evidence is “substantial” for purposes of this standard of review if it is of ponderable legal significance, reasonable in nature, credible, and of solid value. (*Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 935-936.)

To the extent that Brookbank is arguing that the trial court committed legal error in its analysis, we independently review the trial court’s resolution of legal questions.

(See *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 801 [questions of law are subject to independent review].)

C. Evidence Presented

There is no real dispute that defendants' use of the Trail was open, notorious, continuous and uninterrupted. Consequently, the dispute centers on whether defendants' use of the property was *adverse* (as opposed to permissive).

Brookbank's theory that defendants' use was permissive is based on (1) the factual assertion that the Studers had permission to use Brookbank's land and (2) the contention that defendants' use was simply a continuation of the Studers' permissive use. Brookbank supports this contention by citing *Brandon v. Umpqua Lumber & Timber Co.* (1914) 26 Cal.App. 96 (*Brandon*).

In *Brandon*, the landowner brought a quiet title action against a lumber company that claimed a prescriptive easement to a right of way for a railroad. The trial court found the use of the right of way had been permissive and entered judgment for the landowner. The lumber company appealed. (*Brandon, supra*, 26 Cal.App. at p. 98.) The appellate court affirmed. (*Id.* at p. 99.)

The appellate court concluded the trial court's finding that the use was never adverse was supported by the evidence. The parties had agreed that the road in question was built by Anson Hilton under a written agreement with the landowner's predecessor in ownership. (*Brandon, supra*, 26 Cal.App. at p. 97.) The agreement granted Hilton the exclusive right to occupy and use a strip of land 50 feet wide along the southerly bank of Wages Creek for the purposes of a rail or wagon road, or both, for the time that Hilton continued his lumber business in the area. (*Id.* at p. 98) The court stated that the use, having originated by express permission in a license, was presumed to have continued until the license was repudiated and the license holder was notified. (*Ibid.*) The court

further stated that the presumption regarding continued permissive use was not affected by the fact that the privilege was being claimed by Hilton's successors in interest:

“Continuing the use begun by [Hilton] the presumption would be, in the absence of anything to the contrary, that it was based upon the same right and under the same limitations as characterized [Hilton's] exercise of the privilege. There is not a particle of evidence that this license was ever repudiated or questioned in any manner. Hence the said presumption would justify the court's finding [that the successor's use was permissive].”
(*Ibid.*)

We note an important distinction between *Brandon* and the present dispute regarding the Trail is that written permission for predecessor's use of the right of way existed in *Brandon*. Here, in contrast, the trial court found that defendants' predecessor, the Studers, had used the Trail “under unknown circumstances,” thus indicating that prior permission (express or implied) was not established.

Based on this finding of fact, the trial court rejected Brookbank's argument that the permission given to the Studers continued to their successors in interest unless that permission was clearly repudiated. The court noted that the predicate fact—permission given to the Studers—had not been proven by the evidence presented.

In view of the trial court's treatment of the presumption described in *Brandon* and Brookbank's continued insistence that the Studers' use of the property was permissive, this court must decide whether the trial court erred when it determined that the evidence presented failed to establish the nature of the Studers' use of the Trail.

Where the issue on appeal turns on a failure of proof, the question for the reviewing court is whether the evidence compels a finding in favor of the appellant as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 571; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) A finding of fact is compelled only if the evidence was (1) uncontradicted and unimpeached and (2) of such a character and weight as to leave no room for judicial determination that it was insufficient to support a finding. (*Ibid.*)

The evidence relied upon by Brookbank is testimony from Mike Bates, grandson of Wilbur and Winifred Studer, and testimony of Carver Bowen.

First, Mike Bates answered “never” to the following question: “At any point in time did you have any belief that your family was using the trail ... without the permission of the Snow family?” He also testified that the Studers and Snows had a very friendly relationship.

Second, Brookbank has interpreted the testimony of Carver Bowen as acknowledging “that it was his understanding the Studers *were allowed* to use the Brookbank Property to access the Forest Land.” (Italics added.) This interpretation is derived from a question that asked Carver Bowen whether it was his “understanding, based upon [his] discussions with the Studers, that they had, in fact, used that access through the Brookbank property to reach the Forest Service land.” He replied, “Yeah, that’s correct. But they would have had a slightly different route” The question did not mention *permission* or what the Snows, the landowners at the time, had *allowed*; it only referred to the Studers’ use. Consequently, Brookbank’s view of Carver Bowen’s testimony as acknowledging that the Snows had allowed the Studers’ use of the Trail is not consistent with the actual words in the question and answer.

We conclude that Mike Bates’s testimony about his personal belief that the Studers had permission from the Snow family and Carver Bowen’s testimony that the Studers had used the Brookbank Property to access Forest Service land did not require the trial court to find that the Snow family had given permission to the Studers to move cattle across the Brookbank Property. The court stated that Bates’s testimony about his purely subjective belief, without more, was not relevant and was not substantial evidence of permissive use by the Studers.

In other words, even though the testimony of Mike Bates might be regarded as circumstantial evidence that permission had been granted by the Snow family to the Studers, the trial court in its role as trier of fact, was free to reject that inference and

determine that permission did not exist. (See *Blank v. Coffin* (1942) 20 Cal.2d 457, 461; *La Jolla Casa de Manana v. Hopkins* (1950) 98 Cal.App.2d 339, 346 [trial judge has an inherent right to disregard testimony of any witness].)

Therefore, we conclude that the trial court did not err when it refused to find that the Studers had been granted permission to use the Brookbank Property and, as a result, did not determine that defendants' use was permissive by applying the presumption from *Brandon*. Consequently, defendants were not required to provide clear proof that the permission purportedly given to the Studers had been repudiated.

As to the more general question about whether the trial court's finding of adverse use was supported by substantial evidence, we conclude that the testimony of Carver Bowen and Jeff Bowen, that their use and maintenance of the Trail since 1964 had been without permission, provided a sufficient evidentiary basis for the trial court to find the use by defendants was adverse to Brookbank and his predecessors. (See *Aaron v. Dunham, supra*, 137 Cal.App.4th at p. 1252 [claim of right means the property was used without the permission of the landowner]; *Le Deit v. Ehlert* (1962) 205 Cal.App.2d 154, 163 [claimant's maintenance of a trail or roadway is evidence of a claim of right].)

III. STATEMENT OF DECISION WAS ADEQUATE

A. Legal Principles

After a court trial, the trial "court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial." (§ 632.)

The rules governing the adequacy of a statement of decision are derived from sections 632 and 634.⁵ These sections have been "interpreted to mean that a statement of

⁵ Section 634 provides: "When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, it shall not be

decision is adequate if it fairly discloses the determinations as to the ultimate facts and material issues in the case.” (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513.) Under this interpretation, the term “ultimate fact” generally refers to a core fact, such as an essential element of a claim. (*Ibid.*) Ultimate facts are distinguished from evidentiary facts and from legal conclusions. (*Ibid.*) In other words, the trial court need only state ultimate facts and is not required to make specific findings as to evidentiary facts. (*People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 524 (*Casa Blanca*).

To summarize, reversible error occurs only where a trial court omitted findings as to a material issue necessary to fairly disclose the court’s determinations. (*Casa Blanca, supra*, 159 Cal.App.3d at p. 524.)

B. Brookbank’s Contentions

Brookbank contends that there were numerous factual inaccuracies contained in the statement of decision and many material controverted issues were not addressed. Brookbank’s opening brief asserts:

“Specifically and most importantly for purposes of this appeal, the trial court’s ‘statement of decision’ failed to expressly and clearly address: (1) whether Bowen proved by clear and convincing evidence that he had established a prescriptive easement on the Brookbank Property, and (2) if so, what were the clear and specific terms of the easement.”

C. Analysis of Statement of Decision

We reject Brookbank’s contention that the trial court failed to expressly address whether Bowen proved by clear and convincing evidence that he had established a prescriptive easement on the Brookbank Property.

inferred on appeal ... that the trial court decided in favor of the prevailing party as to those facts or on that issue.”

Brookbank's position is contradicted by the contents of the statement of decision, which includes the following paragraph summarizing the court's findings:

“The Court therefore finds by clear and convincing evidence that Bowen's above described use was adverse to [Brookbank]; was open and notorious, and continuous, and for a period in excess of five years, such that Bowens have proven all the elements of a prescriptive easements, the scope of which has been described above.”

Earlier in the statement of decision, the court discussed each of the elements of a prescriptive easement and concluded that the only element being contested was whether defendants' use was adverse.

Therefore, the contents of the statement of decision clearly show that the trial court correctly identified the burden of proof as clear and convincing evidence, correctly stated that Bowen bore this burden, and made a finding as to each ultimate fact—that is, each element of a prescriptive easement. As a result, we conclude that the trial court fulfilled its obligations under section 632 to fairly disclose its determinations as to the ultimate facts and material issues in the case.

D. Specific Issues Raised by Brookbank

The foregoing discussion demonstrates that the trial court fulfilled its statutory obligation to provide a written decision of its determinations regarding the ultimate facts and the legal basis for its decision. Nonetheless, for illustrative purposes, we will address several of the specific questions posed by Brookbank.

The 10 controverted issues presented by Brookbank to the trial court began with a question about whether the court considered the testimony of Mike Bates.

The statement of decision discusses the testimony of Mike Bates, but misidentifies him as “Ellis.” The court's description of the testimony could apply only to the testimony given by Mike Bates. Therefore, it is reasonably clear that the trial court did, in fact, consider the testimony of Mike Bates. Furthermore, the trial court's mistaken

reference to “Ellis” does not create an ambiguity that constitutes reversible error. The only reasonable interpretation is that “Ellis” means Mike Bates.

Brookbank’s third controverted issue asked whether “Carver Bowen introduced clear and convincing evidence at trial that his use of the Brookbank property was adverse before 2008.” The trial court’s finding that we have quoted in part III.C, *ante*, states that Bowen’s use was adverse for a period in excess of five years. This five-year period clearly predates 2008. Thus, the court’s statement fairly discloses the court’s determination of the issue as phrased by Brookbank. The trial court “need not discuss each question listed in a party’s request; all that is required is an explanation of the factual and legal basis for the court’s decision regarding the principal controverted issues at trial as are listed in the request. [Citation.]” (*Hellman v. La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th 1224, 1230.) Here, the trial court fulfilled that obligation.

Brookbank’s fifth controverted issue asked whether “Carver Bowen’s offer to fence, pay for a lot line adjustment, and / or purchase the purported easement at the same time or shortly after being instructed by George Brookbank that he could no longer use the Brookbank property to access the forestland is evidence that the prior use had been permissive.”

The statement of decision addressed this topic as follows: “The allegations re: offers to purchase were in the nature of settlement negotiations, and not evidence of a lack of right.” Thus, the trial court addressed Carver Bowen’s offer and gave the reason it did not infer from the offer that the use had been permissive. Therefore, Brookbank’s fifth controverted issue failed to identify a matter overlooked in the statement of decision.

We will not address the other seven controverted issues presented in Brookbank’s objections to the statement of decision. His appellate briefing does not distinguish between evidentiary facts and ultimate facts and argue that the questions submitted to the trial court concerned ultimate facts and not evidentiary matters. Therefore, Brookbank has failed to demonstrate the items referenced in those questions were essential to

compliance with section 632. Furthermore, it does not appear that Brookbank could make such a demonstration because the record shows that the statement of decision addresses the ultimate facts upon which the decision is based—that is, it explicitly addressed each essential element of a prescriptive easement.

IV. TERMS DELINEATING THE PRESCRIPTIVE EASEMENT

Brookbank contends the trial court failed to delineate the scope of the easement and that the judgment is unclear, insufficient, and does not comport with the evidence presented at trial.

A. Terms of the Easement

The judgment describes the real property burdened by the easement (i.e., the Brookbank Property) and the land of defendants benefited by the easement. The judgment then describes the terms of the easement itself as follows:

“c) For the purpose of driving up to 214 head of cattle to and from the United States Forest Service Property (APN 345-080-008, hereinafter ‘United States Property’) generally following the 1940’s logging road situated on the Brookbank Property, varying from 10 to 12 feet in width, (hereinafter ‘Trail’) depending upon the terrain, in exercise of grazing permits issued by the United States, including occasional use of the Trail between the beginning and the end of the annual grazing season for the purpose of checking on such cattle.

“d) The United States, pursuant to notice to the permit holders, generally allows grazing on the United States Property, pursuant to its permits, from approximately April 15 to approximately September 1 of each year. The cattle drive back from the United States Property, over the Trail, on as needed basis and is usually completed within a few weeks following the end of the grazing season depending on weather conditions.

“e) The Trail is maintained by Bowen before the spring drive to the United States Property, usually by people on horseback or sometimes with an ATV, which maintenance includes the trimming and cutting of trees extending into the Trail and the cutting of passage ways or ‘plugs’ out of trees which have fallen over the Trail to allow for safe passage. Bowen shall not damage the Brookbank Property in any manner not reasonably

necessary to accomplish the hereinabove mentioned use and maintenance of the Trail.

“f) That [Brookbank], and their successors in interest, are enjoined and restrained from unreasonably interfering with Bowen’s use and enjoyment of the Trail.”

B. Brookbank’s Proposal of Clear, Sufficient Terms

Brookbank’s appellate briefs contend that this court has the authority to define the scope of the easement by directing the trial court on remand to enter a judgment that defines the easement with the following terms:

“1. Following along the canyon and small stream located on the Brookbank property (RT, 12:7-22)

“2. Only for the purpose of driving no more than 214 cattle up to the forestland for summer grazing under the Bowens’ grazing permit (RT, 88:20-89:8);

“3. No more than 12 feet in width with access limited to (a) one day in April to clear and brush the trail, (b) one day in April or May to drive the cattle up to the forestland, and (c) one week during month of August or September to drive the cattle down from the forestland (RT, 17:26-19:18; 19:6-18; 75:14-76:6; 87:4-88:18);

“4. Limited so that no access to the easement shall be available from October 1 to March 31 (RT, 75:9-13);

“5. Limited to access by human, cattle, horse, or ATV only as needed in furtherance of easement (RT, 19:6-18); and

“6. Terminated upon the termination, sale, assignment, or transfer by other means of the grazing lease to some person or entity other than Carver and Alice Bowen.”

C. Analysis of Each Proposed Term

First, Brookbank’s proposal that the easement terms should specify it follows along the canyon and stream implies that the court’s language of “generally following the 1940’s logging road situated on the Brookbank Property” has no foundation in the

evidence presented or is unclear. The exact flaw that Brookbank contends exists in the trial court's reference to the logging road is not identified by Brookbank.

We conclude that the court's reference to the logging road is consistent with and supported by the evidence presented at trial. Carver Bowen testified about the width of the Trail by stating that "[i]t really varies because there was a logging road roughly where you've marked that trail that was there in -- right there after World War II." Thus, there is an evidentiary basis for the court's describing the Trail by referring to the old logging road.

Second, Brookbank proposes that the easement should state it is only for the purpose of driving no more than 214 cattle up to the forestland for summer grazing under the Bowens' grazing permits.

All of these terms (with the exception of the word "only") are included in paragraph c of the judgment. Therefore, the second term proposed by Brookbank does not clarify any ambiguity or provide an essential omitted term. Furthermore, the suggested language is inappropriately narrow because it refers to driving cattle "up to the forestland" but does not mention driving the cattle back down at the end of the summer.

Third, Brookbank proposes that the easement be limited to 12 feet in width and that there be a specific number of days assigned to the tasks of clearing and using the Trail. The judgment states that the Trail varies from 10 to 12 feet. Therefore, modifying the terms to limit the width of the Trail to no more than 12 feet is not necessary. As to limiting the number of days for particular uses, we believe the trial court chose the better course in defining the easement in terms of uses and purposes. For example, if for some reason, the amount of brush and trees fallen across the Trail is particularly heavy, it might not be possible to finish clearing the Trail in one day, which might mean that the Trail is not fit for use by cattle, which would require the cattle to be driven outside the specified 12-foot width or driven to the Forest Service land by another route.

The fourth and fifth terms proposed by Brookbank are express limitations. We conclude the terms prohibiting access from October 1 through March 31 and stating human, horse, cattle and ATV access is limited to that needed to further the easement are unnecessary. Stated generically, if an easement is granted for purposes A and B, the trial court is not required to state that uses C through Z are prohibited. An affirmative statement of the use or uses authorized is sufficient.

The sixth term proposed is a termination provision, which would terminate the easement upon the assignment or transfer of the “grazing lease” to a person other than Carver and Alice Bowen. Brookbank has provided no argument or legal authority for the proposition that a prescriptive easement cannot be transferred. An appurtenant easement is regarded as a property right and, therefore, may be transferred. (Civ. Code, §§ 1044 [property of any kind may be transferred], 1104 [transfer of real property passes all easements attached thereto].) Therefore, we conclude that the addition of the termination provision requested by Brookbank is not required by applicable law.

In summary, we conclude that the terms of the easement contained in the judgment are sufficiently clear and address the points necessary to define the easement.

D. Appurtenant or in Gross

Brookbank also challenges the trial court’s decision to make defendants’ easement appurtenant to defendants’ land. Brookbank argues that the easement should not run with defendants’ land, apparently believing that the easement should be regarded as a personal right (i.e., an easement in gross). Brookbank presents the following statute-based argument:

“Pursuant to Civil Code §802, the right to pasture and the right of way are land burdens, or servitudes upon the land, which may [be] granted and held, but may not attach to land. The evidence presented at trial suggests that Bowen’s ‘easement’ is nothing more than a right of way. Therefore, this judicially granted easement should not be deemed appurtenant.”

“Easements may be *appurtenant* or *in gross*. An easement is appurtenant when it is attached to the land of the owner of the easement, and benefits him or her as the owner or possessor of that land. [Citations.]” (12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 383, p. 447.) The land that bears the burden (i.e., is used or enjoyed by someone other than the owner) is called the servient tenement. (Civ. Code, § 803.) Conversely, the land to which the easement is attached is called the dominant tenement. (*Ibid.*) There is no dominant tenement for an easement in gross, because it belongs to a person individually. (12 Witkin, Summary of Cal. Law, *supra*, Real Property, § 383, p. 448.)

The foregoing principles regarding servitudes upon land are set forth in Civil Code sections 801 and 802. Civil Code section 801 provides in part:

“The following land burdens, or servitudes upon land, may be attached to other land as incidents of appurtenances, and are then called easements: [¶] 1. The right of pasture; [¶] ... [¶] 4. The right-of-way”

There is some overlap between Civil Code sections 801 and 802, as Civil Code section 802 provides:

“The following land burdens, or servitudes upon land, may be granted and held, though not attached to land: [¶] One—The right to pasture, and of fishing and taking game. [¶] ... [¶] Five—The right of way.”

These two code sections, when read together, lead to the conclusion that the right to pasture and a right of way can be either type of servitude—one attached to other land (i.e., appurtenant) or one not attached to land (i.e., in gross).

Therefore, we reject Brookbank’s argument that a right of way, such as the one set forth in the judgment, cannot attach to defendants’ land. Civil Code section 801 clearly permits a right of way to be an appurtenant easement and Civil Code section 802 does not prohibit a right of way from becoming an appurtenant easement. (See *Moylan v. Dykes* (1986) 181 Cal.App.3d 561, 568 [“easements for right of way (‘ingress and egress’) may be either appurtenant or in gross”].) “Most neighbor easement disputes involve

appurtenant easements.” (Neighbor Disputes: Law and Litigation (Cont.Ed.Bar 2014)
§ 1.4 [appurtenant easements].)

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

Franson, J.

WE CONCUR:

Cornell, Acting P.J.

Chittick, J.*

* Judge of the Superior Court of Fresno County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.