

Memorandum

To: Drafting Committee, Relocation of Non-Utility Easements Act
From: John A. Lovett, Loyola University New Orleans College of Law
Re: State of the Law - Circa September 2017
Date: March 13, 2018

(The report below is an excerpt from a paper that was published under the title *A Deep Dive into Easements*, THE ACREL PAPERS, 23-108 (Fall 2017). I co-authored that larger paper with Diane B. Davies and James C. Smith. I received valuable feedback from my co-authors on this section of the paper, but all errors are my own.)

In 2000, the Restatement (Third) Property: Servitudes offered a new approach to the subject of easement relocation. Although the proposed rule garnered relatively little attention initially, over time it has become one of the more controversial rules found in the new Restatement.

Under the common law majority rule, neither a servient estate owner nor a dominant estate owner may relocate or modify an easement unless the other party consents to the relocation or modification or such a right has been specifically reserved in the instrument creating the easement.¹ Under section 4.8(3) of the Restatement, however, a servient estate owner may, under certain circumstances, unilaterally relocate an easement:

Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not:

- (a) significantly lessen the utility of the easement,
- (b) increase the burdens on the owner of the easement in its use and enjoyment, or
- (c) frustrate the purpose for which the easement was created.²

With this succinct rule, the Restatement embraces a utilitarian solution to the deadlock that often results when an easement holder rejects a servient estate owner's request to change the location of an easement to facilitate development or safe enjoyment of the servient estate. As the following discussion demonstrates, judicial reactions to the Restatement approach have varied

¹ JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 7.13 (2017); LEONARD A. JONES, A TREATISE ON THE LAW OF EASEMENTS §§ 343, 345, 352 (1898).

² RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8(3) (2000).

widely with several state courts adopting a strong version of section 4.8(3), others adopting the new rule but circumscribing its application in some way, and others rejecting it outright. In many states, reported decisions have not yet addressed relocation disputes since the advent of the new Restatement, and thus the common law mutual consent rule presumably still governs.

The controversy over whether to recognize a unilateral relocation right has also divided academic property lawyers. Several leading scholars regard unilateral easement relocation as an intrusion into a core area of state common law development and believe that the current majority rule requiring mutual consent for easement relocation is consistent with a traditional, contractarian vision of property rights.³ Some even contend that judicial approval of a unilateral relocation request would amount to a judicial taking.⁴ Others defend the Restatement rule, noting that under the Restatement, if properly applied, the easement holder will not lose a property right without compensation. Instead, the easement holder will obtain a substitute and equally beneficial property right at the servient estate owner's expense. In other words, the easement holder is simply compensated "in kind" rather than through a monetary damage award.⁵

1. States Permitting Some Form of Unilateral Easement Relocation

Some form of unilateral easement relocation is currently permitted in twenty states. This general statement is subject, however, to considerable qualification. Courts in six states (Colorado, Massachusetts, Nebraska, New York, South Dakota and Vermont) have expressly adopted section 4.8(3) of the Restatement for relocation of express easements in some form or another, although, as the discussion below indicates, some courts (namely Massachusetts and to slightly lesser extent Colorado and Nebraska) apply it more widely than others.⁶ Indeed, in one of those states (Vermont), the highest court adopted the Restatement relocation rule for sub-surface easements,⁷ but rejected it for surface easements.⁸

Illinois courts also seem to be tentatively moving toward adoption of the Restatement approach, though using it to buttress a prior line of authority.⁹ Furthermore, two states (Kentucky and Louisiana) have long recognized the right of a servient estate owner to relocate an easement,

³ See John A. Lovett, *A Bend in the Road, Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 CONN. L. REV. 1, 3-4 (2005) (discussing views of John V. Orth, Jon M. Bruce and James W. Ely, and Patrick A. Randolph, Jr. in opposition to section 4.8(3)). For more, see John V. Orth, *Relocating Easements, A Response to Professor French*, 38 REAL PROP. PROB. & TR. J. 643 (2004); JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 7.17 (2017); Patrick A. Randolph, Jr., *ABA REAL ESTATE QUARTERLY REPORT* 14 (Spring 2004).

⁴ Patrick A. Randolph, Jr., *ABA REAL ESTATE QUARTERLY REPORT* 14 (Spring 2004).

⁵ John A. Lovett, *A Bend in the Road, Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 CONN. L. REV. 1, 44 (2005). Susan French, the Reporter of the Restatement, offers a general policy defense of unilateral easement relocation as proposed in section 4.8(3) on grounds of efficiency and fairness in Susan French, *Relocating Easements: Restatement (Third) Servitudes § 4.8(3)*, 38 REAL PROP. PROB. & TR. J. 1 (2003).

⁶ See *infra* notes 354-63 and accompanying text.

⁷ *Roy v. Woodstock Community Trust, Inc.* 94 A.3d 530, 537-40 (Vt. 2014), discussed *infra* notes 377-84 and accompanying text.

⁸ *Sweezy v. Neal*, 904 A.2d 1050, 1057-58 (Vt. 2006).

⁹ See *McGoey v. Brace*, 918 N.E.2d 559 (Ill. Ct. App.) (2009), and *527 S. Clinton, LLC. v. Westloop Equities, LLC.*, 7 N.E.3d 756, 768 (Ill. Ct. App. 2014), discussed *infra* notes 385-89 and accompanying text.

with the Louisiana Civil Code providing the initial inspiration for section 4.8(3).¹⁰ Another state, Idaho, has adopted a unilateral easement relocation regime, limited in scope to vehicular access easements¹¹ and to irrigation ditches.¹² One more state, Virginia, offers a narrowly tailored, statutory-based unilateral easement relocation option for older easements.¹³ These eleven states form the hard core of the emerging minority position on easement relocation.

In six other states, courts have allowed relocation of certain non-express easements.¹⁴ Finally, in three more states, courts have occasionally condoned unilateral easement relocations by balancing the equities in certain circumstances.¹⁵

a. Strong and Moderate Versions of Section 4.8(3): Colorado, Massachusetts and Nebraska

In leading decisions, the highest courts in two states, Colorado¹⁶ and Massachusetts,¹⁷ adopted relatively strong versions of section 4.8(3) pursuant to which a servient estate owner may file a declaratory judgment action to obtain judicial approval to relocate either an express or implied easement, even when its location was specifically fixed by the creating instrument, some other agreement, or previous use. In these two states, parties to an easement could theoretically opt out of application of section 4.8(3), but they would need to expressly deny the servient estate owner the right to apply for easement relocation. In *MPM Builders, LLC v. Dwyer*,¹⁸ the Massachusetts Supreme Court authorized a servient owner to relocate a sixty-two year old cartway to make way for the development of three subdivided lots, praising section 4.8(3) as a sensible development in the law, one that “strikes an appropriate balance between the interests of the respective estate owners by permitting the servient estate owner to develop his land without unreasonably interfering with the easement holder’s rights.”¹⁹

¹⁰ RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8(3), cmt. (f) at 583 (2000). See discussion of Kentucky and Louisiana authorities at *infra* notes 389-95 and accompanying text.

¹¹ IDAHO CODE § 55-13 (Michie Supp. 2010), discussed *infra* note 408 and accompanying text.

¹² IDAHO CODE § 18-4308 (Michie Supp. 2010); IDAHO CODE § 42-1207 (Michie Supp. 2010), discussed *infra* notes 408-15 and accompanying text.

¹³ V.A. CODE § 55-50 (LexisNexis 2007), discussed *infra* note 415 and accompanying text.

¹⁴ See *infra* notes 397-403 and accompanying text.

¹⁵ See *infra* notes 404-07 and accompanying text.

¹⁶ *Roaring Fork Club, L.P. v. St. Jude’s Co.*, 36 P.3d 1229, 1237-39 (Colo. 2001) (adopting section 4.8(3) to govern applications for relocation of irrigation ditch easements, but holding that servient estate owners cannot engage in self-help and must, in the absence of easement holder consent, apply for a declaratory judgment to obtain judicial approval to relocate an irrigation ditch easement). See also *Clinger v. Hartshorn*, 89 P.3d 462, 469 (Colo. Ct. App. 2003) (affirming *Roaring Fork* and holding that trial court did not abuse its discretion in concluding that relocation of prescriptive access easement used for guiding and outfitting purposes was improper due to increased burden it imposed on the dominant tenement).

¹⁷ *MPM Builders, LLC v. Dwyer*, 809 N.E.2d 1053, 1057-59 (Mass. 2004) (adopting section 4.8(3) but emphasizing that servient owner may not resort to self-help and must, as servient owner did here, seek a declaratory judgment before making any alteration); *Carlin v. Cohen*, 895 N.E. 793, 796-799 (Mass. App. Ct. 2008) (applying *MPM Builders* to hold that servient owner was entitled to relocate specifically defined pedestrian beach access easement on Martha’s Vineyard).

¹⁸ 809 N.E.2d 1053 (Mass. 2004).

¹⁹ *MPM Builders*, 809 N.E.2d at 1057.

In *Roaring Fork, L.P. v. St. Jude's Co.*,²⁰ the Colorado Supreme Court adopted section 4.8(3) to approve retroactively the servient estate owner's relocation of irrigation ditch easements for purposes of facilitating a major fishing and golf course development on the servient estate. The court justified judicial interest balancing in this context by asserting that the relationship between an easement holder and servient estate owner should be governed by principles of mutual accommodation and use maximization rather than rigid adherence to "property rights."²¹ Although the court in *Roaring Fork* stated broadly in its conclusion that henceforth "parties seeking to alter easements, and who cannot secure the consent of the other estate, may address the courts for permission in line with the Restatement test,"²² its actual holding applied the Restatement as "the correct statement of controlling legal principle for purposes of analyzing a *ditch* easement relocation or alteration."²³ For this reason, Colorado's adoption of Section 4.8(3) may be somewhat less robust than that of the Massachusetts Supreme Court in *MPM Builders*.²⁴

An appellate court in Nebraska soon followed the lead of the Massachusetts and Colorado courts and adopted section 4.8(3) to approve the unilateral relocation of a sanitary sewer lagoon easement in light of the fact that the creating instrument did not expressly deny the servient owner the power to relocate *and* despite the fact the new lagoon was further away from the dominant estate than called for in the creating instrument.²⁵

b. Weak Version of Section 4.8(3): Unilateral Relocation Limited to Undefined Easements -- New York, South Dakota, and Nevada

In three states, the highest courts have adopted section 4.8(3) to authorize relocation of an easement only when its location or route is "undefined," *i.e.*, when its location was *not* specifically determined by (1) a metes and bounds description or other express language in the creating instrument, (2) subsequent agreement, or (3) subsequent conduct. The leading decision in this line of authority comes from the New York Court of Appeal in *Lewis v. Young*.²⁶ In that case, the court held that a servient landowner could relocate a driveway burdened with an *undefined* ingress and egress easement benefiting an adjoining parcel so that she could construct

²⁰ 36 P.3d 1229 (Col. 2001).

²¹ *Roaring Fork Club*, 36 P.3d 1229 at 1235-39.

²² *Id.* at 1239.

²³ *Id.* at 1237 (emphasis added).

²⁴ In *Clinger v. Hartshorn*, 89 P.3d 462, 469 (Colo. App. 2003), the Colorado Court of Appeals relied on the Restatement and *Roaring Fork* to recognize the right of a servient owner to relocate a prescriptive access easement to maximize the use of his or her property, even though it concluded that the relocation was improper because of increased burdens it imposed on the beneficial owner's use and enjoyment of the easement. In *City of Boulder v. Farmer's Reservoir and Irrigation Co.*, 214 P.3d 563, 565-66, 567-68 (2009), the court of appeals used broad language in discussing the *Roaring Fork* rule recognizing relocation or modification with court permission, but denied a proposed modification of a drainage ditch to improve safety on a hiking trail because of adverse effect on the ability of the easement holder to maintain the ditch. As in *Roaring Fork*, it appears the ditch in the *Farmer's Reservoir* case was an historic easement, rather than a granted easement with a location certain. *Id.* at 564-65.

²⁵ *R & S Investments v. Auto Auctions, Ltd.*, 725 N.W.2d 871, 879-881 (Neb. 2006). Here, the court noted that the dominant estate owner's resistance to relocation was "completely unreasonable" in light of environmental concerns over the viability of the old lagoon and the fact that the new lagoon provided the dominant estate owner with equal or enhanced wastewater capacity. *Id.*

²⁶ *Lewis v. Young*, 705 N.E.2d 649, 653-54 (N.Y. 1998).

a tennis court, as long as she paid for constructing the new driveway and otherwise satisfied the Restatement criteria.²⁷ In reaching this conclusion, the court emphasized the importance of balancing the easement holder's access rights against the servient estate owner's development rights and speculated that adopting this approach in the context of undefined easements would not lead to excessive litigation and would instead promote rational bargaining to avoid unnecessary litigation.²⁸

Subsequent appellate decisions in New York confirm that a servient owner may only seek authorization to relocate an *undefined* easement.²⁹ While references to an existing roadway or driveway may be insufficient to prevent unilateral relocation in some instances,³⁰ references to surveys and, in particular, to metes and bounds descriptions generally have precluded application of the Restatement rule in New York.³¹ When easements are in fact "undefined," however, New York courts have routinely applied the Section 4.8(3) analysis to uphold relocations and modifications of easements.³²

The Supreme Court of South Dakota adopted a similar version of section 4.8(3) in approving *ex post* the modification of an express ingress and egress easement whose location was not specified in the creating instrument.³³ The Nevada Supreme Court also adopted section 4.8(3), but it, too, limited its scope to situations when the creating instrument does not define the easement through specific reference to its location or dimensions.³⁴ This court relied heavily on the language found in the introductory clause of section 4.8 ("Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a

²⁷ Id. at 653-54 (relying on then tentative draft of Section 4.8(3); servient estate owner may unilaterally relocate an easement that lacks a metes and bounds description or other indication of the easement's location "so long as the change does not frustrate the parties' intent or object in creating the right of way, does not increase the burden on the easement holder, and does not significantly lessen the utility of the right of way").

²⁸ Id. at 652-54.

²⁹ Cf., *Rosen v. Mosby*, 51 N.Y.S.3d 629, 634, 148 A.D.3d 1228 (App. Div. 2017) (holding that servient estate owner could not unilaterally change location of existing private roadway easement – the location of which was fixed by deed, a maintenance agreement and that agreement's subsequent amendment).

³⁰ *Mackinnon v. Croyle*, 899 N.Y.S.2d 422, 424-72 A.D.3d 1356, (App. Div. 2010) (finding that agreement's description of easement as following an existing driveway was insufficient to opt out of section 4.8(3) relocation analysis); *Checkijian v. Mans*, 825 N.Y.S.2d 281, 283, 34 A.D.3d 1029, 1031 (App. Div. 2006) (right of way language referring to a general direction and to an "existing road" and an "existing macadam road" insufficient to bar unilateral relocation); *Green v. Blum*, 786 N.Y.S.2d 839, 840-41, 13 A.D.3d 1037, 1038 (App. Div. 2004) (grant's reference to existing road crossing servient property insufficient to bar relocation).

³¹ *Marsh v. Hogan*, 867 N.Y.S.2d 786, 788, 56 A.D.3d 1090, 1092 (App. Div. 2008) (settlement agreement resolving action to establish an easement by necessity indicated a fixed location for resulting right of way with enough specificity—by referencing a survey to be performed and a metes and bounds description of where easement was to be located—to bar unilateral relocation); *Estate Court v. Schnell*, 856 N.Y.S.2d 251, 254, 49 A.D.3d 1076, 1078 (App. Div. 2008) (servient estate owner not entitled to relocate prescriptive easement because judgment recognizing easement expressly defined it by reference to a survey map showing precise path through metes and bounds description).

³² See e.g., *Anzalone v. Costantino*, 43 N.Y.S. 3d 204, 206, 145 A.D.3d 1236, 1237-38 (App. Div. 2016) (allowing unilateral modification of easement by widening driveway and constructing a retaining wall since easement was not unequivocally fixed and modifications did not impair adjacent property owner's right of access).

³³ *Stanga v. Husman*, 694 N.W.2d 716, 718-720 (S.D. 2005). In *Stanga*, the only reference to location in the creating instrument was to an "existing road." Id. at 719. See also *Burkhart v. Lillehaug*, 664 N.W.2d 41, 42-43 (S.D. 2003) (rejecting suit by dominant estate owners to compel servient estate owners to restore easement to original relocation 17 years after changes had been made, applying section 4.8(3) and noting that depiction of road on plat did not provide enough information to enable it to be precisely located).

³⁴ *St. James Village, Inc. v. Cunningham*, 210 P.3d 190, 193-196 (Nev. 2009).

servitude . . .”) to justify its limitation of unilateral relocation to cases involving undefined easements and rejected an argument that this prefatory language only applies to sub-parts (1) and (2) of section 4.8.³⁵

Finally, in a recent decision,³⁶ the Maryland Court of Appeal adopted Restatement sections 4.8(1) and (2) for use by courts in the initial step of *locating* a “general” easement, *i.e.*, an easement whose particular location is not specified in a deed and not otherwise indicated by the surrounding circumstances.³⁷ The court did not reach the question of whether section 4.8(3) could be used to *relocate* a general easement once its location has been initially determined according to agreement of the parties, prior use, or pursuant to a judicial proceeding involving application of Restatement section 4.8(1) and (2).³⁸

The rationale for this weaker approach to unilateral easement relocation is that when the parties to an easement have specifically determined its location, this localization represents an indication that the parties have intended to reserve to the easement holder the right to consent to any proposed relocation or modification. In other words, any specific indication of an easement’s location represents a contractual—*i.e.* mutual—choice that the location must be permanent until both parties agree to relocation.

c. Vermont’s Curious Compromise: Unilateral Relocation for Sub-surface Easements

In two important decisions, the Vermont Supreme Court has straddled the divide created by the Restatement’s new rule on unilateral easement relocation. First, in *Sweezy v. Neal*³⁹, the court reaffirmed the traditional common law rule that the owner of a servient estate cannot change the location of a right-of-way without the consent of the easement owner. In expressly rejecting Section 4.8(3) in this context, the court voiced concern that adopting the Restatement approach would upset the complex economic bargain that the original parties to the easement struck in negotiations over its creation and location, lead to windfall gains and profits, introduce uncertainty into land ownership, and generate litigation.⁴⁰

Eight years later, in *Roy v. Woodstock Community Trust, Inc.*,⁴¹ the court reached the opposite conclusion in a case involving a request by a servient estate owner to relocate

³⁵ Id. at 193, 195-96.

³⁶ USA Cartage Leasing, LLC v. Baer, 55 A.3d 510, 515-20 (Md. 2013).

³⁷ Sections 4.8(1) and (2) provide:

Except when the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows:

(1) The owner of the servient estate has the right within a reasonable time to specify a location that is reasonably suited to carry out the purpose of the servitude.

(2) The dimensions are those reasonably necessary for the enjoyment of the servitude.

RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8 (2000).

³⁸ USA Cartage Leasing, LLC v. Baer, 55 A.3d 510, 515-20 (Md. 2013).

³⁹ *Sweezy v. Neal*, 904 A.2d 1050, 1057-58 (Vt. 2006).

⁴⁰ Id. at 1058 (quoting *MacMeekin v. Low Income Housing Inst.*, 45 P.3d 570, 579 Wash. 2002); *Herrin v. Pettengill*, 538 So.E.2d 735, 736 (Ga. 2000); and *Davis v. Bruk*, 411 A.2d 660, 665 (Me. 1980)).

⁴¹ *Roy v. Woodstock Community Trust, Inc.*, 94 A.3d 537, 538-40 (Vt. 2014).

subsurface water line easements to facilitate an affordable housing development on an eight-acre tract of land. In *Roy*, the court observed that it had never taken “the extreme position” that easement relocation is forbidden in all circumstances without easement holder consent, noting that even in *Sweezey* it had affirmed the trial court’s ruling allowing the servient estate owner to “bend the defendant’s easement to avoid having to move a permanent structure that encroached a few meters onto the original easement.”⁴² But going further, the court in *Roy* observed that a “result that meets the needs of both the owner of the dominant estate and owner of the servient estate is desirable.”⁴³

In the following passage, the *Roy* court attempted to distinguish its new found flexibility with respect to subsurface easements from its relatively inflexible position with respect to surface easements in *Sweezey*:

Both considerations [upsetting the economic bargain of the original parties and introducing uncertainty that generates litigation] are far less important for subsurface easements, where the location is relatively unimportant as long as the purpose of the easement is satisfied. It is much less likely that the parties bargained over the path of a water easement with respect to price. Nor is it likely that there would have to be litigation to determine the new path of the easement. On the other hand, there is significant likelihood that an objection to a subsurface easement would be used to stop development and not to ensure that the purpose of the easement is fulfilled. In the underground-easement context, we agree with the Supreme Judicial Court of Massachusetts that the Restatement approach “strikes an appropriate balance between the interests of the respective estate owners by permitting the servient owner to develop his land without unreasonably interfering with the easement holder’s rights. . . . For these reasons we adopt the Restatement (Third) of Property: Servitudes § 4.8(3) approach for underground easements.”⁴⁴

The court in *Roy* also aligned itself with other states that, in the court’s view, adopted a distinction in easement relocation cases “based on the nature of the easement.”⁴⁵ The similarity between its reasoning in support of unilateral relocation of subsurface easements and other courts’ rationales for allowing relocation of any easement did not escape the court’s attention in *Roy*.⁴⁶ Still, the court in *Roy* did not overrule *Sweezey*. So, in Vermont, a servient owner can unilaterally relocate a crucial and expensive underground water, utility or telecommunications easement within the parameters of section 4.8(3), but must obtain (or pay for) the consent of the easement holder to move a modest driveway before proceeding with some more productive use of the servient estate.

d. Gradual Adoption in Illinois

⁴² Id. at 538-39. See *Sweezey*, 904 A.3d at 1054-57 (upholding trial court decision to allow a unilateral “bend” of the easement based on circumstances indicating reasonable reliance on statements made by easement holder that modest “bend” would be permissible).

⁴³ Id. at 539.

⁴⁴ Id. at 539.

⁴⁵ Id. at 539-40 (discussing *R & S Invs. v. Auto Auctions, Ltd.*, 725 N.W.2d 871, 881 (Neb. 2006) (applying Restatement approach in the context of a sanitary sewer lagoon easement); and *Roaring Fork Club, L.P. v. St. Jude’s Co.*, 36 P.3d 1229 (Col. 2001) (applying Restatement approach in the context of irrigation ditch easements).

⁴⁶ *Roy*, 94 A.3d at 539, n. 5.

Several Illinois appellate court decisions suggest that state is gradually moving in the direction of adopting section 4.8(3) to approve unilateral easement relocation and other unilateral modifications of an easement. In a 2009 decision, *McGoey v. Brace*,⁴⁷ concerning a driveway and sidewalk easement established for purposes of ingress and egress, the court held that the approach of section 4.8(3) comports with prior Illinois precedent allowing either the dominant or servient estate owner to make changes to an easement as long as the changes are not “substantial.”⁴⁸ In *McGoey*, the court further indicated that when evaluating the “substantiality” of a proposed relocation, courts should examine the burden and harm to the dominant estate owner resulting from the relocation in light of the policy factors set forth in the Restatement.⁴⁹

In a 2010 decision involving an *undefined* easement of ingress and egress, the court held, briefly citing *McGoey* and the Restatement, that a servient estate owner may modify or relocate an easement “so long as the changes would not cause substantial harm to the dominant estate.”⁵⁰ In 2014, in another decision emanating from the same dispute that spawned the 2010 decision, the court again cited and discussed the “substantiality of the change” analysis stated in *McGoey* approvingly, even though it reversed a summary judgment in favor of the servient estate owner and remanded for further consideration of the genuine issues of material fact concerning the potential impact on the easement holder’s access rights.⁵¹

e. Traditional Minority Rule States: Kentucky and Louisiana

Two states, Kentucky and Louisiana, have long permitted easement relocation. Kentucky courts have allowed easement relocation since the 1930s.⁵² An appellate court decision in 2007, however, casts some doubt on that state’s commitment to unilateral relocation.⁵³

⁴⁷ 918 N.E.2d 559 (Ill. Ct. App. 2009).

⁴⁸ *McGoey*, 918 N.E.2d at 563-567 (discussing at length the substantiality test derived from *Sullivan v. Bagby*, 166 N.E. 449 (Ill. 1929).

⁴⁹ *Id.* at 569. It is noteworthy that in *McGoey*, the servient estate owner sought relocation of an easement located only a few feet from her home in order to alleviate flooding allegedly caused by the easement’s current location and often rendering her home uninhabitable. *Id.* at 561.

⁵⁰ 527 S. Clinton, LLC. v. Westloop Equities, LLC., 932 N.E.2d 1127, 1138 (Ill. Ct. App. 2010).

⁵¹ 527 S. Clinton, LLC. v. Westloop Equities, LLC., 7 N.E.3d 756, 768 (Ill. Ct. App. 2014).

⁵² *Wells v. Sanor*, 151 S.W.3d 819, 823 (Ky. Ct. App. 2005) (“Kentucky follows a minority position that in addition to mutual consent also allows the owner of a servient estate to unilaterally modify or alter the location of a roadway easement so long as it does not change the beginning and ending points and does not result in material inconvenience to the rights of the dominant estate.”). See also *Stewart v. Compton*, 549 S.W.2d 832, 833 (Ky. Ct. App. 1977); *Terry v. Boston*, 54 S.W.2d 909, 909-910 (Ky. 1932). Kentucky’s flexible approach apparently derived from a now repealed statute that allowed for a special court proceeding to approve easement relocations. See F.M. English, Annotation, *Relocation of Easements*, 80 A.L.R.2d 743, § 9 (1961). For a recent example of Kentucky’s solicitude toward servient estate owners in the context of a state sanctioned easement in favor of relatives of deceased persons buried in a private cemetery allowing the relatives to use a private road crossing adjacent land for purposes of visiting the cemetery, see *Ambrose v. Ward*, 2016 WL 447753, *4 (Ky. Ct. App. 2/5/16) (upholding set of restrictions established by trial court regulating relatives’ use of cemetery access easement and right of servient owner to establish and subsequently change location of easement as long as termini remained unchanged).

⁵³ *Adams v. Pergrem*, 2007 WL 4277900 (Ct. App. Ky. Dec. 7, 2007) (citing *Wells* and observing in dicta that “unless a granting instrument provides otherwise, an easement with a fixed location cannot be relocated without the express or implied consent of the owners of both the servient and dominant estates).

Louisiana has long allowed the relocation of both conventional servitudes and servitudes of passage established by law to provide access to enclosed estates. The servient owner must pay for the relocation, and relocation is allowed only if the servitude continues to furnish equal convenience to the owner of the dominant estate or the “same facility” to the owner of the enclosed estate.⁵⁴

Louisiana borrowed its basic servitude relocation rule directly from Article 701 of the French Civil Code of 1804 (“the Code Napoleon”).⁵⁵ Recently, one Louisiana appellate court held that the servient estate owner satisfied the relocation requirements of Article 748 of the Louisiana Civil Code by providing the dominant estate owner with another equally convenient location for the exercise of a servitude of passage at the servient estate owner’s expense, but ordered the servient estate owner to remove a fence alongside the new driveway because it made maintenance and use of the driveway more difficult.⁵⁶ In another recent decision, a Louisiana appellate court considered a clause in a servitude agreement giving the servient estate owner the right to relocate the servitude “one time at the grantee’s expense.” The servitude provided an enclosed estate with a right of passage to a public road (the Civil Law equivalent of an easement of necessity). In a suit by the servient owner to compel the dominant owner to relocate the roadway, the court held the clause was unenforceable because it deviated from the general rules of the Civil Code in that it limited the servient estate owner’s relocation to just one occasion and shifted the allocation of costs to the dominant estate.⁵⁷ Finally, in a very recent decision, a Louisiana court applied Article 748 and found that the developer of a new subdivision on a servient estate violated the principles inherent in the article when it unilaterally relocated a thirty foot wide right-of-way benefiting three enclosed residential lots because the new rights-of-way the servient owner/developer provided over public roads were only twenty feet wide and thus diminished the utility of the servitude to the dominant estates.⁵⁸

f. States Permitting Relocation of Implied and Prescriptive Easements

When servient estate owners seek to relocate easements of necessity, easements implied by recorded plats or by prior use, and prescriptive easements, some courts give owners more leeway to make changes as long as they do not burden the easement holder. Citing section

⁵⁴ LA. CIVIL CODE art. 748 (1977) (“If the original location [of a servitude] has become more burdensome for the owner of the servient estate, or if it prevents him from making useful improvements on his estate, he may provide another equally convenient location for the exercise of the servitude which the owner of the dominate estate is bound to accept. All expenses of relocation are borne by the owner of the servient estate.”); LA. CIV. CODE art. 695 (1977) (provides the servient estate owner the right to “demand relocation” of a servitude of passage [*i.e.*, an easement of necessity] to “a more convenient place at his own expense” in situations equivalent to those giving rise of easements of necessity at common law, provided the relocated servitude “affords the same facility to the owner of the enclosed estate”).

⁵⁵ C CIV. (Fr.) art. 701 (Daloz 2009). For a detailed discussion of the evolution of Louisiana’s servitude relocation provisions, see John A. Lovett, *A New Way: Servitude Relocation in Scotland and Louisiana*, 9 EDIN. L. REV. 352, 377-80 (2005).

⁵⁶ *Coleman v. Booker*, 94 So.3d 174, 177-78 (La. Ct. App. 2012) (applying Article 748 of the Louisiana Civil Code). In *Coleman*, the court noted that the servient estate owner’s duty to provide a servitude at another equally convenient location did not require construction of a driveway of the same general *quality* as the one used prior to relocation. *Id.* at 117.

⁵⁷ *Thibco Investments LLC v. Thibodeaux*, 102 So.3d 1043, 1046-47 (La. Ct. App. 2012).

⁵⁸ *Welch v. Planning and Zoning Comm. of East Baton Rouge Parish*, 220 So. 3d 60 (La. Ct. App. 4/262017).

4.8(3), two appellate court decisions in South Carolina allowed servient estate owners to relocate easements of necessity at their own expense, provided the relocation did not burden the dominant estate owner.⁵⁹ Courts in Minnesota⁶⁰ and Mississippi⁶¹ have also reached similar conclusions regarding easements of necessity, though without relying on the Restatement.

Courts in Florida and Maryland have allowed unilateral relocation of easements created by implication, that is, easements established by reliance on recorded subdivision plats⁶² or based on prior use.⁶³ In addition, Pennsylvania courts have subjected prescriptive easements to unilateral relocation.⁶⁴

As noted above, the Maryland Court of Appeal endorsed the judicial use of the factors listed in Restatement sections 4.8(1) and (2) for determining the location of a not-yet localized general easement, but did not address whether relocation of such an easement would be permitted without the consent of the easement holder.⁶⁵

g. States Allowing Balancing of the Equities

Finally, courts in three more states have allowed limited balancing of the equities when easement holders have sought injunctive relief in response to proposed or completed relocations. In New Jersey, one court denied injunctive relief and thus allowed temporary relocation of an implied beach access easement when the servient estate owner showed that enforcement of the easement in its original location “would have a severe adverse effect upon the [servient owners’] beneficial enjoyment of their property” and that this adverse effect “substantially outweighs the inconvenience to plaintiffs” in being required to walk an additional distance to gain access to the beach and ocean via another route or a substitute easement.⁶⁶ Another New Jersey decision compelled relocation of an easement “to advance the interests of justice where the modification

⁵⁹ Goodwin v. Johnson, 591 S.E.2d 34, 37-39 (S.C. Ct. App. 2003) (applying Restatement § 4.8(3) to approve unilateral relocation of easement of necessity, but noting that it “should be more difficult to relocate an express easement”); Sheppard v. Justin Enterprises, 646 S.E.2d 177 (S.C. Ct. App. 2007) (suggesting that South Carolina courts would not adopt the Restatement with respect to express easements and finding that under the circumstances of this case easement relocation was not warranted under section 4.8(3) as it would increase the burden on the dominant estate).

⁶⁰ Bode v. Bode, 494 N.W.2d 301, 302 (Minn. Ct. App. 1992) (relying on equitable principles to hold that where the location of an easement by necessity has not been established by agreement of the parties, trial court has power to establish the location in a place desired by the owner of the servient estate).

⁶¹ Huggins v. Wright, 774 So.2d 408, 412 (Miss. 2000) (servient tenant could be granted the option of relocating easement by necessity for utilities and ingress/egress, at its expense, in part because old, existing roadway in which original easement of necessity was located divided property in half); Taylor v. Hays, 551 So.2d 906, 908-10 (Miss. 1989) (same).

⁶² Enos v. Casey Mountain, Inc., 532 So.2d 703, 706 (Fla. Dist. Ct. App. 1988).

⁶³ Millison v. Laughlin, 142 A.2d 810, 813-816 (Md. 1958) (holding that servient estate owner could relocate utility pole easement to reduce danger and annoyance and given that termini would remain unchanged).

⁶⁴ McNaughton Properties, LP v. Barr, 981 A.2d 222, 225-229 (Penn. Sup. Ct. 2009) (rejecting Restatement approach as applied to express easements as a question of first impression and limiting *Soderberg v. Weisel*, 687 A.2d 839, 842 (Pa. Sup. Ct. 1997), which recognized possibility of unilateral relocation of a prescriptive easement if new easement location is as safe as the original, the relocation is a *relatively minor change* and the reasons for relocation are substantial, to prescriptive easements).

⁶⁵ USA Cartage Leasing, LLC v. Baer, 55 A.3d 510, 515-20 (Md. 2013). See *supra* notes 374-76 and accompanying text.

⁶⁶ Bubbis v. Kasson, 803 A.2d 146, 152 (N.J. Super. Ct. App. Div. 2002).

is minor and parties' essential rights are fully preserved," but cautioned that relocation should be "an extraordinary remedy and should be grounded in a strong showing of necessity."⁶⁷ A court in Oregon allowed relocation of a beach access easement when the servient owner mistakenly built a house that minimally encroached on the easement, the cost of removing the house would have been substantial, and the easement holders knew of the encroachment at the time construction began.⁶⁸ Finally, courts in Missouri have occasionally denied injunctive relief to easement holders in cases involving minor unilateral easement relocations coupled with periods of acquiescence by the easement holders.⁶⁹

h. Limited Statutory Relocation Rights

Two other states have statutes authorizing a limited form of easement relocation. Idaho permits unilateral easement relocation in two different contexts. First, the owner of a servient estate in Idaho burdened by an irrigation ditch easement may relocate the ditch at his own expense if relocation is achieved without impeding water flow or injuring any water user.⁷⁰ Second, Idaho law provides:

Where, for motor vehicle travel, any access which is less than a public dedication, has heretofore been or may hereafter be, constructed across private lands, the person or persons owning or controlling the private lands shall have the right at their own expense to change such access to any other part of the private lands, but such change must be made in such a manner as not to obstruct motor vehicle travel or to otherwise injure any person or persons using or interested in such access.⁷¹

In 2011, the Idaho Supreme Court upheld the constitutionality of this statute when a servient estate owner wishing to develop a 15-acre parcel filed a declaratory judgment action to relocate an express easement established by deed that served seven adjacent parcels of land.⁷² In affirming the district court order allowing the proposed relocation, the Idaho Supreme Court first ruled that the statute was unambiguous on its face and the access road at issue was not excluded from its scope merely because it entered onto a public highway.⁷³ The court next held that a unilateral relocation of an access road under the statute did not amount to a per se injury merely

⁶⁷ *Kline v. Bernardsville Ass'n, Inc.* 631 A.2d 1263, 1267 (N.J. Super. Ct. App. Div. 1993).

⁶⁸ *Vossen v. Forrester*, 963 P.2d 157, 161-62 (Or. Ct. App. 1998).

⁶⁹ *Southern Star Central Gas Pipeline, Inc. v. Murray*, 190 S.W.3d 423, 430 (Mo. Ct. App. 2006) (denying injunction sought by dominant estate, a pipeline company, several years after it received notice of servient estate owners' expansion of home and encroachment on easement, and noting that the conveyance granting the easement did not definitely fix the location; observing general rule that *grantee* of easement is entitled to a convenient, reasonable, and accessible way within the limits of the grant); *Umprhes v. J.R. Mayer Enters., Inc.*, 889 S.W.2d 86, 90 (Mo. Ct. App. 1994) (denying dominant estate owner's request for injunction to restore a prescriptive roadway easement to its original position and relegating dominant owner to monetary damages, even though servient owner unilaterally relocated roadway 10-12 feet from its original location; stressing minor injury to dominant estate, original location's lack of uniqueness, and new roadway's close fit to description in original deed on which dominant owners based their interest).

⁷⁰ IDAHO CODE § 18-4308 (Michie Supp. 2010). *See also* IDAHO CODE § 42-1207 (Michie Supp. 2010) (same).

⁷¹ IDAHO CODE § 55-313 (Michie Supp. 2010).

⁷² *Statewide Construction, Inc. v. Pietri*, 247 P.3d 650 (Idaho 2011), *abrogated on other grounds by* *Verska v. Saint Alphonsus Regional Medical Center*, 265 P.3d 265 (Idaho 2011)

⁷³ *Statewide Construction*, 247 P.3d at 653-54.

because the result deviated from the traditional common law, mutual consent rule.⁷⁴ Third, the court held that relocation of the access road was not an unconstitutional taking of private property without just compensation because the statute expressly requires that the change must be made in “a manner as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access.”⁷⁵ In two recent cases, Idaho courts rejected proposed access easement relocations under the same statute because the proposed routes would have injured the dominant estate owner either by requiring significant changes to the use of the dominant estate,⁷⁶ or making vehicular access more dangerous.⁷⁷

In Virginia, a servient estate owner is statutorily authorized to relocate an easement of “ingress and egress” that has been “in existence for not less than ten years” as long as the servient owner provides notice to all parties in interest, obtains court approval, and the relocation will not cause “economic damage to the parties in interest” or “undue hardship.”⁷⁸ In its broad grant of judicial discretion to approve relocation of ingress and egress easements, Virginia’s statute resembles the Restatement approach, except that it provides a ten-year safe harbor during which easement relocation cannot occur without the easement holder’s consent (assuming the relevant instrument does not reserve this right to the servient estate owner). Indeed, Virginia’s statutory relocation provision may even be stronger than the Restatement if it is interpreted to allow application for relocation even if the instrument creating the easement expressly denies relocation rights to the servient owner. Virginia’s statute might provide an attractive model for uniform state legislation because it balances the demand for some period of stability and certainty for the initial parties to an easement with the policy objective of providing judicially controlled flexibility after the passage of a fixed period of time.

2. States Adhering to Common Law Majority Rule

Over the past two decades, courts in fifteen states and the District of Columbia have expressly or impliedly rejected the Restatement approach to easement relocation and announced their adherence to the traditional common law majority rule. In the remaining states, courts have yet to address this issue. In some of these states, older decisions clearly articulate the traditional common law majority rule. In others lacking authority on point, the common law majority rule presumably applies.

a. States Where Courts Have Expressly Rejected Section 4.8(3)

⁷⁴ Id. at 654-55. The court noted that the legislature likely intended to modify the common law no-unilateral relocation rule as it left intact two other statutes requiring easement holder consent for relocation of irrigation ditches, canals, laterals, drains or buried irrigation conduits, while allowing relocation of motor vehicle access under I.C. § 55-313 without requiring easement holder consent. Id.

⁷⁵ Id. at 656 (quoting I.C. § 55-313). In other words, any relocation authorized by the statute will thus “provide the dominant estate holders with the same beneficial interest they were entitled to under the easement by its original location,” Id. at 657, meaning that the easement holders would suffer no specific injuries that would impair their ability to access their properties if relocation of the access road was permitted. Id. at 657-658.

⁷⁶ Manning v. Campbell, 266 P.3d 1184, 1187 (Idaho 2012) (relocated easement would have required construction of new driveway across dominant estate owner’s front lawn).

⁷⁷ Belstler v. Sheler, 264 P.3d 926, 933 (Idaho 2011) (relocation would have resulted in unreasonably steep road grades”).

⁷⁸ VA. CODE § 55-50 (LexisNexis 2007). This statute was enacted in 1992. VA. ACTS 1992, c. 373.

Courts in the following eight states have expressly rejected section 4.8(3) of the Restatement: Alabama,⁷⁹ Connecticut,⁸⁰ Georgia,⁸¹ North Carolina,⁸² Pennsylvania,⁸³ Vermont,⁸⁴ Washington,⁸⁵ and Wisconsin.⁸⁶

b. Recent Court Decisions Applying Traditional Rule But Not Addressing Restatement

Ever since the tentative draft of the new Restatement began to be widely discussed in judicial decisions and property law literature, courts in the District of Columbia⁸⁷ and the

⁷⁹ Tietel v. Wal-Mart Stores, Inc. 287 F.Supp.2d 1268, 1276-1277 (M.D. Ala. 2003) (declining to apply section 4.8(3) as inconsistent with Alabama law, especially *Arp v. Edwards* 706 So.2d 736, 739 (Ala. Civ. App. 1997)); *see also* *Folsom v. Stagg Run Development, LLC*, 42 So.3d 732, 739-740 (Ala. 2009) (denying proposed relocation of easement, without citing Restatement, because new location would not be equally convenient as old and relocation would materially and adversely affect dominant estate owner).

⁸⁰ *Alligood v. Lasaracina*, 122 Conn. App. 473, 476-78, 999 A.2d 836, 839 (App. Ct. 2009).

⁸¹ *Herrin v. Pettergill*, 538 S.E.2d 735, 736 (Ga. 2000) (expressly rejecting section 4.8(3)); *Sloan v. Rhodes*, 560 S.E.2d 653, 655 (Ga. 2002) (affirming *Herrin v. Pettergill*). But *see* *Suntrust Bank v. Fletcher*, 548 S.E.2d 630, 633-634 (Ga. App. 2001) (noting *exception* to the general rule that a fixed easement cannot be relocated without the consent of the dominant estate owner when the creating instrument expressly reserves for the servient estate owner an express relocation right); *Wilcox Holdings, Ltd. v. Hull* 659 S.E.2d 406, 408-09 (Ga. 2008) (upholding right of one owner to rearrange building and parking spaces as long as easement is maintained because reciprocal servitude agreement reserved right to relocate buildings, walkways and parking areas); *and* *Calhoun, GA NG, LLC v. Century Bank of Georgia*, 740 S.E.2d 210, 212-14 (Ga. Ct. App. 2013) (upholding bank's right to construct convenience store and gas station on one of two parcels subject to reciprocal easement and covenant agreement based on provision allowing owners to construct buildings or other structures and make other alterations as long as development generally complies with easements and covenants).

⁸² *A. Perin Dev. Co., LLC, v. Ty Par Realty, Inc.*, 667 S.E.2d 324, 326-327 (N.C. Ct. App. 2008).

⁸³ *McNaughton Properties, LP v. Barr*, 981 A.2d 222, 225-229 (Penn. Sup. Ct. 2009) limiting *Soderberg v. Weisel*, 687 A.2d 839, 842 (Pa. Sup. Ct. 1997) (owner of servient estate may unilaterally relocate a prescriptive easement if new easement location is as safe as the original, the relocation is a *relatively minor change* and the reasons for relocation are substantial) to prescriptive easements).

⁸⁴ *Sweezy v. Neal*, 904 A.2d 1050, 1057-58 (Vt. 2006) (rejecting Restatement approach on grounds given by earlier decisions but allowing servient estate owner to “bend the easement” around a new addition to his house). But *see* *Roy v. Woodstock Community Trust, Inc.* 94 A.3d 530, 537-40 (Vt. 2014) (allowing relocation of sub-surface easements), discussed *supra* notes 380-87 and accompanying text

⁸⁵ *Crisp v. Vanlaecken*, 122 P.3d 926, 928-929 (Wash. Ct. App. 2005); *MacMeekin v. Low Income Housing Institute*, 45 P.3d 570, 579 (Wash. Ct. App. 2002) (expressly rejecting section 4.8(3)).

⁸⁶ *AKG Real Estate, LLC v. Kosterman*, 717 N.W.2d 835, 842-847 (Wisc. 2006) (rejecting proposed relocation of right of way easement under the impossibility of purpose doctrine as stated in Restatement § 7.10(1), the changed conditions doctrine as stated in Restatement § 7.10(2), and the unilateral relocation rule found in §4.8(3)); stating that “parties need not include a provision in an express easement to prevent unilateral modification or relocation” and thus “the rule is that the owner of the servient estate cannot unilaterally modify an express easement”. *See also* *Berg v. Ziel*, 870 N.W.2d 666, 670-73 (Wisc. Ct. App. 2015) (affirming default rule that servient estate cannot unilaterally relocate an express easement and holding that general easement had been localized by prior use and agreement of previous owners and thus trial court erred in establishing a new location for easement at request of new servient estate owner).

⁸⁷ *Carrrollsburg v. Anderson*, 791 A.2d 54, 61-64 (D.C. 2002) (rejecting proposed relocation of easement allowing condominium owners access to underground garage under traditional common law majority rule because location of access route had been fixed for 30 years and condominium owners did not consent to relocation *and* under § 4.8(3)

following seven states continued to apply the common law mutual consent rule in decisions involving servient estate owners' attempts to relocate easements unilaterally without either rejecting or accepting the Restatement: Kansas,⁸⁸ Maryland,⁸⁹ Montana,⁹⁰ Oregon,⁹¹ Virginia,⁹² West Virginia,⁹³ and Wyoming.⁹⁴

c. States Without a Recent Relevant Decision: Implying Continuation of Traditional Rule

Courts in the remaining states have not addressed easement relocation since the Restatement approach began to be widely discussed. But older authorities in many of these states clearly suggest that the common law majority rule still prevails. In the following eleven states courts have at some point clearly adopted or applied the common law mutual consent rule: Arizona,⁹⁵ Delaware,⁹⁶ Florida,⁹⁷ Iowa,⁹⁸ Maine,⁹⁹ New Hampshire,¹⁰⁰ New Jersey,¹⁰¹ New

approach because servient owner failed to demonstrate that requiring use of alternative entrance would not burden easement holders and there was no showing that change was necessary "to permit normal use or development of the servient estate;" not indicating whether it would allow relocation if facts permitted under Restatement approach). See also *Washington Metropolitan Area Transit Authority v. Georgetown University*, 347 F.3d 941, 946-47 (D.C. Cir. 2003) (applying *Carrollsborg*, pointing out that *Carrollsborg* relies on the common-law majority mutual consent rule, and rejecting dominant estate's proposal to widen already existing easement).

⁸⁸ *City of Arkansas City v. Bruton*, 137 P.3d 508, 514 (Kan. Ct. App. 2006) (citing Restatement § 4.8, but observing that "an easement with a fixed location cannot be substantially changed or relocated without the express or implied consent of the owners of both the servient and dominant estate"), *rev'd on other grounds*, 166 P.3d 992 (Kan. 2007).

⁸⁹ *Rogers v. P-M Hunter's Ridge*, 967 A.2d 807, 822-826 (Md. 2009) (rejecting proposed relocation based on interpretation of deeds, subsequent agreements and actions of parties and quoting statement of traditional common law majority rule in *Sibbel v. Fitch*, 34 A.2d 773, 774-75 (Md. 1943)); see also *Everdell v. Carroll*, 336 A.2d 145, 150, 155 (Md. Ct. Spec. App. 1975) (noting that "right of way may not be relocated without the consent of the owners of both the dominant and servient estates").

⁹⁰ *Gibson v. Paramount Homes, LLC*, 254 P.3d 903, 908-09 (Mont. 2011) (adhering to traditional mutual consent rule and affirming trial court order commanding servient estate owner to rebuild two new right angle turns so that larger vehicles could use road easement safely but allowing other "improvements" and minor modifications to location to remain).

⁹¹ *D'Abbracci v. Shaw-Bastian*, 117 P.3d 1032, 1040-1043 (Or. Ct. App. 2004) (servient estate owner's right to relocate a road is subordinate to terms of the instrument granting the easement; but where road did not occupy the entire easement, servient estate owner may unilaterally relocate road within boundaries of easement if the change does not unreasonably interfere with the dominant estate holder's use; concluding that safe and stable road was built in new location within easement's boundaries).

⁹² *Shooting Point, LLC, v. Wescoat*, 576 S.E.2d 497, 502 (Va. 2003) (upholding *Buxton v. Murch*, 457 S.E.2d 81, 84 (Va. 1995), and observing that generally when a fixed location of a granted easement is established, that location may be changed only with the express or implied consent of the persons interested). But recall that Virginia also permits unilateral application for relocation of easements of ingress and egress by a servient estate owner once ten years has elapsed since creation of the easement. See VA. CODE § 55-50 (LexisNexis 2007), discussed *supra* note 419 and accompanying text.

⁹³ *Chapman v. Catron*, 647 S.E.2d 829, 833 (W.V. 2007) (owner of servient estate burdened with access easement created by private dedication required to restore easement to prior location, even though that location was not where roadway was originally platted, so long as any benefitted landowners feel "as though their complete enjoyment of their land had been impeded").

⁹⁴ *R.C.R., Inc. v. Rainbow Canyon, Inc.*, 978 P.2d 581, 588 (Wyo. 1999) (adopting rule that unilateral relocation of an easement is not permitted, absent an express provision in the granting instrument, and observing that a unilateral relocation rule would introduce considerable uncertainty into land ownership, incite litigation and could subject dominant estate owner to harassment by the servient owner's attempts to relocate to serve his own conveniences).

⁹⁵ *Stamatis v. Johnson*, 225 P.2d 201, 203 (Az. 1950) ("The general and almost universal rule with reference to change in the location of an easement after the location has once been definitely established, regardless of whether it

Mexico,¹⁰² Ohio,¹⁰³ and Texas.¹⁰⁴ In addition, courts in the following six states have issued rulings or made statements in dicta that imply adherence to the common law majority rule: Arkansas,¹⁰⁵ California,¹⁰⁶ Idaho,¹⁰⁷ Indiana,¹⁰⁸ Montana,¹⁰⁹ and Rhode Island.¹¹⁰

has been acquired by grant or by prescription, is that the location of an easement once selected cannot be changed by either the landowner or the easement owner without the other's consent. A definite location binds the grantor so that he has no right either to hinder the grantee in the exercise of his right or to compel him to accept another location, although the latter location may be equally convenient with the right or privilege originally granted.”)

⁹⁶ Edgell v. Divver, 402 A.2d 395, 398 (Del. Ch. 1979).

⁹⁷ White Sands, Inc. v. Sea Club v. Condominium Assoc., Inc., 581 So.2d 589, 590 (Fla. Dist. Ct. App. 1990; Fields v. Nichols, 482 So.2d 410, 414 (Fl. Dist. Ct. App. 1985); Florida Power Corp. v. Hicks, 156 So.2d 408, 410 (Fla. Dist Ct App. 1963).

⁹⁸ Bagley v. Petermeier, 10 N.W.2d 1, 3 (Iowa 1943); Karmuller v. Krotz, 18 Iowa 352, *5 (Iowa 1865).

⁹⁹ Gilder v. Mitchell, 668 A.2d 879, 881-82 (Me. 1995) (observing “[o]nce the site of an easement has been established, its location cannot be changed thereafter unless both the owner of the servient estate and the owner of the dominant estate agree or unless the location is changed in accordance with a grant or reservation,” and holding that reservation of right in deed to relocate easement was personal to original grantor of easement and could not be exercised by successor servient estate owners); Davis v. Bruk, 411 A.2d 660, 665 (Me. 1980) (disallowing unilateral relocation as it would deprive dominant estate owner of present security of property rights and confer windfall on servient estate owner);

¹⁰⁰ Ellison v. Fellows, 437 A.2d 278, 280 (N.H. 1981); Sakansky v. Wein, 169 A. 1, 2-3 (N.H. 1933) (holding that servient owner could not relocate a servitude of way around a proposed building but could make opening through the proposed building to allow dominant estate owner to pass through it; height of opening would be subject to “rule of reason” and consideration of changing needs of parties).

¹⁰¹ Sussex Rural Elec. Coop. v. Township of Wantage, 526 A.2d 259, 264-65 (N.J. Sup. Ct. 1987) (where township required relocation of utility lines to accomplish road widening, court held that utility company was entitled to relocation expenses; observing that servient owner cannot change location of utility company’s servitude to place poles and lines once fixed by installation, even though easement grant did not specify location). But recall that New Jersey courts have sometimes denied injunctive relief to easement holders on equitable grounds. *See* notes ___-___ and accompanying text.

¹⁰² Sedillo Title Guaranty, Inc. v. Wagner, 457 P.2d 361, 363 (N.M. 1969).

¹⁰³ Holley v. Gershkowitz, 98 N.E.2d 314, 316 (Ohio Ct. App. 1950) (servient owner not entitled to relocate a three foot walkway to an alleged equally convenient location because “treating location as variable would incite litigation, depreciate the value of the land, and discourage its improvement”); *but see* Clagg v. Baycliffs Corp., 695 N.E.2d 728, 730 (Ohio 1998) (implied easement over road was statutorily limited and could be changed subject to requirements of statute governing changes to a previously recorded plat).

¹⁰⁴ Holstrom v. Lee, 26 S.W.3d 526, 533 (Tex. App. 2000); Samuelson v. Alvarado, 847 S.W. 2d 319, 323 (Tex. App. 1993).

¹⁰⁵ Bradley v. Arkansas Louisiana Gas Co., 695 S.W.2d 180, 182 (Ark. 1983) (“The grantee of an easement or right of way has the right to determine the exact location of such easement if the grantor fails to do so. This right is subject to the convenience and reasonableness of the dominant and servient estates. After the location is designated and used it cannot thereafter be re-designated at a different location *without another grant*. Therefore, the chancellor was clearly erroneous in determining that appellee [dominant estate owner] had the right to relocate its right of way without an additional grant.”)

¹⁰⁶ Red Mountain, LLC v. Fallbrook Public Utility Dist., 48 Cal.Rptr.2d 875, 891 (Ca. Ct. App. 2006) (“Parties may change the location of an easement by mutual consent, which may be implied from use and acquiescence. . . . When the parties consent to relocation, ‘their rights are not affected by the change but attach to the new location.’”)

¹⁰⁷ Bedke v. Picket Ranch and Sheep Co., 137 P.3d 423, 426-27 (Idaho 2006) (the location of an easement depends upon the intention of the parties and the circumstances in existence at the time the easement was given and carried out; dominant estate owner had no right to change the location or increase the width of the easement); Bethel v. Van Stone, 817 P.2d 188, 193-94 (Idaho Ct. App. 1991) (parties to imprecise mutual easement intended purchasers of parcel to have 60 foot easement for road purposes through one grantor/grantee’s meadow; exact location of easement had to provide convenient and suitable way but not reasonably interfere with rights of current owner; current owner had right in first instance to locate road within meadow and, if reasonably suitable for such purpose, such specific location could not be questioned).

3. Reserving Contractual Right to Relocate an Easement

As several of the cases discussed above illustrate, courts will generally enforce an express reservation of the right of the servient estate owner to relocate an easement.¹¹¹ These relocation clauses can provide a valuable escape hatch for the servient owner or even for adjacent property owners who are bound by reciprocal easement arrangements.

A recent Maine Supreme Judicial Court decision, however, illustrates the hazards of a poorly drafted clause reserving the rights of a servient estate owner to relocate an easement.¹¹² In that case, the so-called “Back Lot Owners,” as dominant estate owners, enjoyed an easement for pedestrian and vehicular access along “the traveled way” to the ocean, but the oceanfront property owners, the servient estate owners, clearly held a unilateral right to relocate the easement across their property as a result of various reservations in the deeds.¹¹³ In 2001 the original servient estate owners obtained government approval of a plan for relocating the “Trail to the Ocean (Easement)” and recorded the plan in the public land records without express notice to the dominant estate owners. At that time the servient owners did not make any physical changes to the location of the easement “on the face of the earth.” At the end of the day, the court held that the recorded plan had no legal effect, and relocation could not proceed absent judicial determination of whether the relocation would significantly lessen the utility of the easement, increase the burdens on the easement holders or frustrate achievement of the easement’s purpose within the meaning of Restatement section 4.8(3).¹¹⁴ Accordingly, the court required the new servient estate owner to remove a stone wall and stockade fence that had been constructed in

¹⁰⁸ Daviess-Martin County REMC v. Meadows, 386 N.E.2d 1000, 1002-03 (Ind. App. 1979) (observing that a landowner may waive or be estopped from asserting his right to object to the changing of the route of an existing easement if he fails to complain for a significant period of time, but finding no waiver under facts of the case); Henning v. Neisz, 268 N.E.2d 310, 315-16 (Ind. App. 1971) (dominant estate owner, by using relocated easement for five years and three months, acquiesced in relocation of easement by servient estate owner, gave his implied consent to such relocation and was not entitled thereafter to have easement changed back to its old location).

¹⁰⁹ Anderson v. Stokes, 163 P.3d 1273, 1285-86 (Mont. 2007) (construing instrument creating radio tower easement and concluding that dominant estate owner is not entitled to relocate easement without consent of servient estate owner).

¹¹⁰ Hilley v. Lawrence, 972 A.2d 643, 649-50 (R.I. 2009) (owner of dominant estate attempted to change the location of an easement that was granted by deed that specifically delineated the boundaries of the easement; grant of easement will normally control its location if the location is specified therein; holding there was no express easement for access to benefit defendant’s land across plaintiff’s land).

¹¹¹ See, e.g., Suntrust Bank v. Fletcher, 548 S.E.2d 630, 633-634 (Ga. App. 2001) (noting *exception* to the general rule that a fixed easement cannot be relocated without the consent of the dominant estate owner when the creating instrument expressly reserves for the servient estate owner an express relocation right); Wilcox Holdings, Ltd. v. Hull 659 S.E.2d 406, 408-09 (Ga. 2008) (upholding right of one owner to rearrange building and parking spaces as long as easement is maintained because reciprocal servitude agreement reserved right to relocate buildings, walkways and parking areas); and Calhoun, GA NG, LLC v. Century Bank of Georgia, 740 S.E.2d 210, 212-14 (Ga. Ct. App. 2013) (upholding bank’s right to construct convenience store and gas station on one of two parcels subject to reciprocal easement and covenant agreement based on provision allowing owners to construct buildings or other structures and make other alterations as long as development generally complies with easements and covenants).

¹¹² McCormick v. LaChance, 32 A.3d 1037 (Me. 2011).

¹¹³ Id. at 1038-39.

¹¹⁴ Id. at 1039-41.

conjunction with the relocated easement, to refrain from placing any obstacles within the bounds of the original easement, and to restore the grassy surface of the original easement.¹¹⁵

¹¹⁵ Id. at 1040-41.