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Ancient, Antiquated & Archaic: South Carolina Fails to Embrace the Rule That a Grantor May Reserve an Easement in Favor of a Third Party

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ANCIENT, ANTIQUATED & ARCHAIC: SOUTH CAROLINA FAILS TO EMBRACE THE RULE THAT A GRANTOR MAY RESERVE AN EASEMENT IN FAVOR OF A THIRD PARTY

I. INTRODUCTION

In a recent case, *Springob v. Farrar*,[1] the South Carolina Court of Appeals held that an appurtenant easement in a deed of sale, reserving access to a well on an adjoining lot, was actually an easement in gross.[2] The court reached this conclusion, in part, because of the inconsistencies in South Carolina law regarding the admissibility of evidence to effectuate a grantor's intent.[3] Although the court recognized that the cardinal rule in South Carolina is to effectuate the grantor's intent, it refused to do so in this case.[4] Consequently, the court failed to consider the viability of the stranger to the deed rule, stating that "the question of the rule's viability is purely academic."[5]

In an articulated and well-reasoned dissent, Judge Anderson argued that parol evidence should be admissible to effectuate the grantor's intent.[6] Judge Anderson further reasoned that the common law rule prohibiting the creation of an interest in a stranger to the deed was no longer viable.[7] In reaching this conclusion, Judge Anderson stated that "the efficacy of the common law rule in modern property relationships is obsolete and lacking in any utilitarian value. Moreover, the rule is antiquated and in direct contradiction with our cardinal rule of construction, which is to ascertain and effectuate the intention of the parties."[8]

This Note, in Part II, first reviews the *Springob* case in detail. Part III outlines the differences between, and the elements required for, an appurtenant easement verses an easement in gross. Part IV traces the foundation of deed interpretation in South Carolina, while Part V complements the preceding issues by outlining the type of evidence that is admissible to effectuate the grantor's intent. Finally, this Note suggests that the Supreme Court of South Carolina should have followed the cutting edge lead of other jurisdictions, as well as Judge Anderson's dissent, by overruling the antiquated common law

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1. 334 S.C. 585, 514 S.E.2d 135 (Ct. App. 1999), *reh'g denied* (May 8, 1999), *cert. denied* (Sept. 24, 1999).
2. *Id.* at 589, 514 S.E.2d at 138.
3. *Id.* at 590, 514 S.E.2d 138.
4. *Id.* at 594, 514 S.E.2d 140.
5. *Id.* at 592, 514 S.E.2d at 139.
6. *Id.* at 593, 514 S.E.2d at 140.
7. *Id.* at 599, 514 S.E.2d at 143.
8. *Id.*

rule that a grantor cannot reserve an easement in a third party through a single instrument of conveyance.

II. *SPRINGOB V. FARRAR*

Dr. Narayan R. Shenoy owned an unimproved lot (Lot 14) in Block H of the Spring Valley Subdivision in Columbia, South Carolina.[9] His wife, Sulochana N. Shenoy, owned the contiguous lot (Lot 13) where the couple resided.[10] The couple titled Lot 13 in Mrs. Shenoy's name and Lot 14 in Dr. Shenoy's name.[11] Prior to May 1996, the Shenoys dug a well on Lot 14 and immediately connected the well to a new irrigation system located around their house on Lot 13.[12] The electric power for the well pump (located on Lot 14) was connected to the electric service for Lot 13.[13] The Shenoys continuously enjoyed the benefit of the well while they resided on Lot 13.[14]

On May 19, 1986, Dr. Shenoy deeded Lot 14 to L.G.B., Inc.[15] The Contract of Sale stated, inter alia: "Seller to reserve perpetual easement for the continual operation of maintenance [sic] of water well which straddles property line & fence that extends over property line. (Seller shall acquire easement rights)."[16]

The attorney who prepared the deed of Lot 14 from Dr. Shenoy to L.G.B., Inc., knew that the contract reserved a perpetual easement for Dr. Shenoy to operate the well on Lot 14.[17] However, the attorney testified that he did not know that the well on Lot 14 was connected to the irrigation system on Lot 13.[18] Moreover, the attorney mistakenly believed that Lot 13 was titled to Dr. Shenoy and not to his wife.[19] The deed prepared by the attorney to convey Lot 14 from Dr. Shenoy to L.G.B., Inc., and reserve an easement for Dr. Shenoy states, in relevant part:

> There is reserved to the Grantor an easement from Lot Thirteen (13), Block H, onto the hereinabove described premises [Lot 14] for ingress and egress to and for the maintenance and operation of a well situated on said Lot

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9. *Id.* at 587, 514 S.E.2d 136.
10. *Id.*
11. Brief for Appellant at 3, Springob v. Farrar, 334 S.C. 585, 514 S.E.2d 135 (Ct. App. 1999) (No. 96-CP-40-1174).
12. *Id.*
13. *Id.*
14. *Id.* at 5.
15. *Id.* at 4.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

> Fourteen (14), Block H adjacent to the lot line between Lots Fourteen (14) and Lot Thirteen (13) Block H.[20]

That same day, L.B.G., Inc., immediately deeded Lot 14 to its partner, Irwin Marmostein, d/b/a Irbo Developers.[21] The same attorney who drafted the deed from Dr. Shenoy to L.B.G., Inc., preserved the easement, in relevant part, as follows:

> There is reserved to Narayan R. Shenoy and [sic] easement from Lot Thirteen (13), Block H, onto the hereinabove described premises [Lot 14] for ingress and egress to and for the maintenance and operation of a well situated on said Lot Fourteen (14) Block H, adjacent to the lot line between Lots Fourteen (14) and Lot Thirteen (13), Block H.[22]

The deeds contained essentially the same language reserving an easement for the benefit of Lot 13 and burdening Lot 14.

Subsequently, Irbo Developers constructed a house on Lot 14.[23] On August 1, 1988, Irbo sold Lot 14 to the Farrars.[24] The deed from Irbo Developers to the Farrars did not specifically mention an easement.[25] The deed stated that "[t]his conveyance is subject to all easements, rights, reservations, restrictions and covenants of record affecting said property."[26] When the Farrars purchased the lot, the closing attorney informed them about the existence of the easement on their property.[27]

During the next year, the Shenoys continued to live on Lot 13 while the Farrars lived on Lot 14.[28] The Shenoys maintained exclusive use and control of the well on Lot 14 to operate their sprinkler system on Lot 13.[29] The well did not connect to any sprinkler system on Lot 14, and the Farrars knew that the well exclusively serviced the Shenoy's sprinkler system on Lot 13.[30]

After moving onto Lot 14, the Farrars installed a sprinkler system for the benefit of their lot.[31] They connected the sprinkler system on Lot 14 to the city water supply instead of drilling a well on their property.[32] As a result, the

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20. Springob v. Farrar, No. 96-CP-40-1174, at 3 (S.C. Cir. Ct. July 7, 1997) (order of special referee holding that the easement was in gross).
21. *Id.*
22. *Id.*
23. Brief for Appellant at 5, *Springob* (No. 96-CP-40-1174).
24. *See id.*
25. *Id.*
26. *Springob*, No. 96-CP-40-1174, at 3.
27. Brief for Appellant at 5, *Springob* (No. 96-CP-40-1174).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 6.
32. *Id.*

Farrars often incurred water bills as high as $200.00 per month to irrigate their yard during the summer.[33]

On May 19, 1989, Mrs. Shenoy sold Lot 13 to Kenneth and Ellen Perry.[34] While the Perrys owned Lot 13, they continued to use the well located on Lot 14 for the exclusive benefit of their irrigation system on Lot 13.[35] In early1993, South Carolina Federal Savings Bank obtained title to Lot 13 in a foreclosure proceeding, and the house on Lot 13 remained vacant for at least four months.[36] During this time, the Farrars disconnected the sprinkler system and electrical service from Lot 13 and reconnected the well and electrical service to the sprinkler system located on their property (Lot 14).[37]

Mr. V. Les Springob subsequently purchased Lot 13 from the lender and moved onto the property.[38] At the time of purchase, Springob did not know about the easement, and the Farrars represented to Springob that they owned the well.[39] When Springob later learned about the easement from a copy of the L.G.B. Deed, he demanded that the Farrars surrender the well for the benefit of his property.[40] The Farrars refused.[41] After the dispute arose, Dr. Shenoy and his wife executed and recorded a "Corrective Title to Real Estate" and an "Easement Agreement" to clarify that Dr. Shenoy created an appurtenant easement in perpetuity for the owner of Lot 13 to have access to the well on Lot 14.[42]

Springob eventually sued Farrar for "trespass and intentional interference with and obstruction of an easement."[43] At trial, the Special Referee found that because "Narayan R. Shenoy only reserved the easement to himself the easement was an 'Easement in gross' and a mere personal privilege to use the lands of the Grantee for the uses reserved and incapable of transfer to another."[44] Further, the Special Referee found that the easement was incapable of being classified as an "appurtenant easement" and "that South Carolina follows the Common Law rule that a reservation in a deed cannot create an

33. *Id.*

34. *Springob*, No. 96-CP-40-1174, at 2.

35. Brief for Appellant at 6, *Springob* (No. 96-CP-40-1174).

36. *Id.* First Union National Bank of South Carolina, as successor by merger with South Carolina Federal Savings Bank, actually deeded Lot 13 to Mr. Springob. *Springob*, No. 96-CP-40-1174, at 2.

37. Brief for Appellant at 6, *Springob* (No. 96-CP-40-1174).

38. *Id.* at 7.

39. *Id.* Springob relied on the Fararr's representations about the well ownership because they were friends and business partners. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Springob v. Farrar*, 334 S.C. at 588, 514 S.E.2d at 137.

44. *Springob*, No. 96-CP-40-1174, at 4.

easement in favor of a third party."[45] Springob's motion to reconsider was denied and an appeal followed.[46]

III. APPURTENANT EASEMENTS VS. EASEMENTS IN GROSS

There are two types of easements in American Jurisprudence—the appurtenant easement and the easement in gross.[47] In *Fisher v. Fair*,[48] the Supreme Court of South Carolina affirmed the ruling in *Whaley v. Stevens*[49] that a "right of way appurtenant is a right which inheres in the land to which it [is] appurtenant, is necessary to its enjoyment, and passes with the land, while a right of way in gross is a mere personal privilege, which dies with the person who may have acquired it."[50] More specifically, in *Steele v. Williams*,[51] the court noted:

> The important difference between a way appurtenant and one in gross . . . is that a way in gross is an individual right, non-transferable, and dying with the claimant. A way appurtenant, however, makes the estate to which it is attached a dominant estate and the one over which it runs a servient one, and this relation lasts as long as the estates last, and it inheres, not only in the dominant estate as a whole, but to every portion and subdivision thereof. It is a complete servitude which runs with the land. It would seem in principle, therefore, that before such an important right should be acquired by one close over another that there should be some necessity therefor, it should not be a mere matter of convenience. [The court further noted that] "ways are said to be appendant or appurtenant when they are incident to an estate; one terminus being on the land of the party claiming. They must inhere in

45. *Id.* (citing Glasgow v. Glasgow, 221 S.C. 322, 70 S.E.2d 432 (1952)).

46. Springob v. Farrar, No. 96-CP-40-1174, at 2 (S.C. Sept. 18, 1997) (order of the special referee denying Springob's motion to reconsider).

47. *See infra* note 50.

48. 34 S.C. 203, 13 S.E. 470 (1891).

49. 27 S.C. 549, 4 S.E. 145 (1887).

50. *Fisher*, 34 S.C. at 208, 13 S.E. at 472; *see* Safety Bldg. & Loan Co. v. Lyles, 131 S.C. 542, 546, 128 S.E. 724, 725 (1925) (affirming the holding in *Fisher* that easements must either be appurtenant or in gross). For a detailed analysis of the easement in gross, *see generally* Alan David Hegi, Note, *The Easement in Gross Revisited: Transferability and Divisibility Since 1945*, 39 VAND. L. REV. 109 (1986).

51. 204 S.C. 124, 28 S.E.2d 644 (1944) (quoting Whaley v. Stevens, 27 S.C. 549, 560, 4 S.E. 145, 147 (1887)).

> the land, concern the premises, and be *essentially necessary to their enjoyment.*"[52]

Generally speaking, an appurtenant easement attaches to a certain piece of land for the benefit of the easement holder.[53] The benefitted estate is known as the "dominant tenement" and the burdened estate is the "servient tenement."[54] Conversely, an easement in gross is a benefit personal to its holder and is not tied to any particular parcel.[55]

South Carolina courts adhere strictly to the requirements for an appurtenant easement. While a majority of jurisdictions hold that an appurtenant easement "must inhere in the land, [and touch and] concern the premises," South Carolina adds the additional requirements that an appurtenant easement "be essentially necessary to the enjoyment thereof" and "have one terminus on the land of the party claiming it."[56] Without the requirement of a terminus on the dominant estate, what would be an appurtenant easement in other jurisdictions becomes an easement in gross under South Carolina law.[57] It is also well settled that unless an easement has all of the elements essential to be considered appurtenant, the courts will characterize the easement as an easement in gross.[58]

The facts of *Springob* indicate that the appurtenant easement met the test[59] to transfer the easement with the dominant estate.[60] As such, the easement for the well clearly inhered in the land. After all, it is impossible to remove a well from one location and transfer it to another. Additionally, the easement was

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52. *Id.* at 130, 28 S.E.2d at 646-47; *see also* Sandy Island Corp. v. Ragsdale, 246 S.C. 414, 420, 143 S.E.2d 803, 806 (1965) (stating that "[a]n appendant or appurtenant easement must inhere in the land, concern the premises, have one terminus on the land of the party claiming it, and be essentially necessary to the enjoyment thereof. It attaches to, and passes with, the dominant tenement as an appurtenance thereof. An easement, or right-of-way, in gross is a mere personal privilege to the owner of the land and incapable of transfer by him, and is not, therefore assignable or inheritable.").

53. RESTATEMENT OF PROPERTY § 453 (1944).

54. 12 S.C. JURIS. *Easements* § 2 (1992).

55. *Id.* Another type of easement, the "quasi easement," is an easement-like right that arises when two tracts of land are owned by the same person. Because a landowner cannot have an easement over his or her own property, the notion of a quasi easement arises. A quasi easement may develop into an easement appurtenant or easement in gross if the landowner sells one of the tracts. HERBERT THORNDIKE TIFFANY, A TREATISE ON THE MODERN LAW OF REAL PROPERTY AND OTHER INTERESTS IN LAND §540 (1940).

56. Brasington v. Williams, 143 S.C. 223, 245, 141 S.E. 375, 382 (1927).

57. An appurtenant easement remains with the property whenever title to either the servient estate or the dominant estate is transferred. However, most courts hold that an easement in gross is usually not transferrable unless it is of a commercial nature. *See* 12 S.C. JURIS. *Easements* § 3 (1992).

58. Tupper v. Dorchester County, 326 S.C. 318, 326, 487 S.E.2d 187, 191 (1997); 12 S.C. JURIS. *Easements* § 3(c) (1999).

59. Both the majority test and the South Carolina test were met in this case.

60. *See* Carolina Land Co. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975) (affirming the holding in *Ragsdale, infra* note 62, that an appurtenant easement passes with the dominant estate even if the conveyance of the dominant estate does not expressly mention it).

essentially necessary for the enjoyment of the irrigation system as originally designed. Because the South Carolina courts have never precisely defined what "essentially necessary" means, it is entirely plausible that the well was "essentially necessary" in this case because the sprinkler system was unable to function after the Farrars disconnected it from the well. Moreover, the sprinkler system had a terminus[61] on the dominant estate, qualifying it as an appurtenant easement under South Carolina law.

IV. DEED INTERPRETATION IN SOUTH CAROLINA

In South Carolina, the "cardinal rule of construction [of a deed] is to ascertain and effectuate the intention of the parties, unless that intention contravenes some well settled rule of law or public policy."[62] It is also well established that "the character of an express easement is determined by the nature of the right and the intention of the parties creating it."[63] Without further analysis the law of deed interpertation in South Carolina creating an easement appears relatively straight forward. Unfortunately, such a conclusion is far from reality in South Carolina. As Judge Anderson noted in his dissent in *Springob*, "[t]he efficacy of the majority's opinion is to place the law of easements in a continuum of confusion."[64] The Supreme Court of South Carolina was finally in a position to clarify and update the easement law of South Carolina by reversing the lower court's ruling. In choosing to ignore Judge Anderson's warnings by denying certiorari, the Supreme Court has again contributed to the ancient, antiquated, and archaic easement law of South Carolina.

V. STANDARD OF REVIEW AND ADMISSIBLE EVIDENCE

In 1998, the Supreme Court of South Carolina held that the interpretation of a deed purporting to create an easement was "a question of fact in a law action and subject to an any evidence standard of review when tried by a judge

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61. According to THE AMERICAN HERITAGE COLLEGE DICTIONARY 1399 (3d ed. 1993), a terminus is "[t]he final point; the end." Although it can be argued that the sprinkler system did not have a single terminus on the dominant estate within the historical meaning of the word, an analogy can be drawn in this case to the many ends (sprinkler heads) of the sprinkler system on the dominant estate.

62. *Ragsdale*, 246 S.C. at 420, 143 S.E.2d at 806; *see* Byars v. Cherokee County, 237 S.C. 548, 118 S.E.2d 324 (1961); Davis v. Davis, 223 S.C. 182, 75 S.E.2d 46 (1953). *See, e.g.*, Wayburn v. Smith, 270 S.C. 38, 239 S.E.2d 890 (1977); Lake View Acres Dev. Co. v. Tindal, 306 S.C. 477, 412 S.E.2d 457 (Ct. App. 1991); Wall v. Huguenin, 301 S.C. 94, 390 S.E.2d 372 (Ct. App. 1990); Batesburg-Leesville Sch. Dist. Number 3 v. Tarrant, 293 S.C. 442, 361 S.E.2d 343 (Ct. App. 1987).

63. Smith v. Commissioners of Pub. Works, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct. App. 1994). *See generally* 25 AM. JUR. 2D *Easements and Licenses* § 13 (1996) (stating that the parties will determine what constitutes an express easement).

64. Springob v. Farrar, 334 S.C. at 593, 514 S.E.2d at 140.

without a jury."[65] In *Townes Assocs, Ltd. v. City of Greenville*,[66] the court held that an appellate court can make its own findings of fact for an action in equity first tried by a special referee.[67] *Tupper*[68] also adopted this position and noted that the determination of the existence of an easement was a question in equity.[69]

The Supreme Court of South Carolina has also held that, as a general rule, "[p]arol evidence is admissible to elucidate latent ambiguities in written instruments generally."[70] In an odd departure from this broad standard of review and evidentiary interpretation, the Supreme Court of South Carolina also held, as recently as 1986, that "[t]he terms of . . . a deed may not be varied or contradicted by evidence drawn from sources other than the deed itself [even though] the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy."[71] Other cases hold that in effectuating the grantor's intent, the court must interpret the deed as a whole and cannot contradict an unambiguous deed with evidence drawn from other sources.[72] When additional evidence can only come from the deed itself, it is difficult to effectuate the any evidence standard of review. Given these holdings, it is clear that the standard of deed interpretation in South Carolina is far from "well settled."

VI. EFFECTUATING THE PARTIES' INTENT: ABOLISHING THE STRANGER TO THE DEED RULE

At common law, a property owner could not create a deed in favor of a stranger to the title.[73] The rule originally developed based on feudal considerations and early common law courts upheld the rule because they "mistrusted and wished to limit conveyance by deed as a substitute for livery by seisin."[74] However, the trend in modern American jurisprudence is to allow a grantor to create a reservation or exception to a stranger to the deed. In the leading case, *Willard v. First Church of Christ, Scientist, Pacifica*,[75] the Supreme Court of California rejected the common law rule's mistrust

65. Slear v. Hanna, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998).
66. 266 S.C. at 81, 221 S.E.2d at 773 (1976).
67. *Id.* at 86, 221 S.E.2d at 776.
68. 326 S.C. 318, 487 S.E.2d 187 (1997).
69. *Id.* at 323, 487 S.E.2d at 190.
70. Richardson v. Register, 227 S.C. 81, 88, 87 S.E.2d 40, 43 (1955) (applying this standard to deed interpretation).
71. Vause v. Mikell by Solomonic, 290 S.C. 65, 68, 348 S.E.2d 187, 189 (Ct. App. 1986); *see supra* note 62.
72. Gardner v. Mozingo, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987); *cf.* Douglas v. Medical Investors, Inc., 256 S.C. 440, 182 S.E.2d 720 (1971) (stating that there is no well settled rule of law that would prohibit giving effect to the parties' intent when interpreting a deed).
73. Willard v. First Church of Christ, Scientist, Pacifica, 498 P.2d 987, 989 (Cal. 1972).
74. *Id.*
75. *Id.*

foundation because "it [was] clearly an inapposite feudal shackle today."[76] In that case, the court also rejected the rule because it frustrated the grantor's intent.[77] More specifically, the court noted that the rule was unfair and produced an inequitable result because "the original grantee has presumably paid a reduced price for title to the encumbered property."[78] After balancing both equitable and policy considerations, the *Willard* court concluded that the grantor's intent should be effectuated and, therefore, overruled the antiquated common law rule.[79]

In reaching its conclusion, the *Willard* court relied on two previous decisions which favored effectuating the grantor's intent by establishing an interest in favor of a third party rather than following the archaic common law rule. The Supreme Court of Oregon held in *Garza v. Grayson*[80] that the grantor's intent to reserve an interest in a third party should not be defeated merely because the third party was not a party to the deed.[81] In that case, the defendants attempted to prevent a sewer line easement from burdening their property.[82] Ultimately, the court stated that the grantor intended

> to impose the servitude upon defendants' land for the benefit of the land previously conveyed to plaintiffs. The grantor himself testified that this was his purpose. Considering the location of the easement in relation to the surrounding land, it is difficult to conceive of the easement as having any other purpose than to benefit plaintiffs' land.[83]

A substantial parallel can be drawn from the facts of that case to the facts of *Springob*. Given the close proximity and function of the easement that Dr. Shenoy created, together with the contract of sale and his testimony (in the form of a "Corrective Title to Real Estate" and "Easement Agreement"), the cases are virtually identical.[84]

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76. *Id.*

77. *Id.*

78. *Id.* By allowing an easement to be reserved to a stranger to the deed, the *Willard* court also made it easier for future purchasers to know what reservations lie in their chain of title. More specifically, by allowing an interest to be reserved to a stranger to the deed, it is more likely that a future purchaser searching a title would find this reservation rather than if a separate document was drafted to grant an interest and never recorded.

79. *Id.* at 991.

80. 467 P.2d 960 (Or. 1970).

81. *Id.* at 961.

82. *Id.*

83. *Id.* at 962.

84. Because of the lawyer's mistaken belief that Dr. Shenoy owned both lots, these documents were later executed to memorialize Dr. Shenoy's intent to create an appurtenant easement.

The Supreme Court of Kentucky was also on the cutting edge of easement law in *Townsend v. Cable*[85] when it had "no hesitancy in abandoning this archaic and technical rule."[86] By overruling the common law, the court determined that it should respect the grantor's intent and that minor technicalities were irrelevant where the grantor's intention was clear.[87]

Subsequent to the precedent established by these leading cases, a number of other jurisdictions overruled the antique common law rule as well.[88] Curiously, only a small number of courts that have addressed the issue declined to overrule the common law rule, favoring instead the principles of stare decisis.[89] As these courts noted, relying on the common law rule only frustrates the parties' intentions. Now that livery of seisin has been abolished perhaps the appellate court would have ruled differently in *Springob* if Dr. Shenoy and the subsequent grantors dressed in elaborate ritual costumes and symbolically delivered possession of the easement with a twig, a clod, or a piece of turf. Actually, a ceremonial raindance may have been more appropriate in this case.

The leading case in South Carolina, *Glasgow v. Glasgow*,[90] carved out an exception to the common law rule.[91] In that case, a single instrument of

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85. 378 S.W.2d 806 (Ky. 1964).

86. *Id.* at 808.

87. *Id.*; *see* Hogan v. Blakney, 251 P.2d 209, 213 (Idaho 1952) (holding that deed technicalities should be disregared and the real intention of the grantor should be effectuated).

88. More recent cases include, *inter alia*, Aszmus v. Nelson, 743 P.2d 377 (Alaska 1987) (rejecting justification for the rule and holding that a deed can create an easement in favor of a third party); Katkish v. Pearce, 490 A.2d 626, 628 (D.C. App. 1985) ((following the RESTATEMENT OF PROPERTY §472 (1944): "[b]y a single instrument of conveyance, there may be created an estate in land in one person and an easement in another") in holding that a single instrument of conveyance can create a new estate in one person while reserving an easement in another); Nelson v. Parker, 670 N.E.2d 962 (Ind. App. 1996) (rejecting the common law rule and effectuating the grantor's intent for an unambiguous deed); Enderle v. Sharman, 422 N.E.2d 686 (Ind. App. 1981) (holding that a grantor cannot reserve a life estate to a stranger to the deed but can convey an easement by reservation to a party who is a stranger to the deed); Medhus v. Dutter, 603 P.2d 669 (Mont. 1979) (recognizing that the intent of the grantor, as evidenced by the grantor's testimony, to create an easement in favor of a stranger to the deed will prevail over the common law rule); Borough of Wildwood Crest v. Smith, 509 A.2d 252 (N.J. 1986) (adhering to the RESTATEMENT OF PROPERTY rule that an easement can be created to a stranger to the deed); Malloy v. Boettcher, 334 N.W.2d 8 (N.D. 1983) (effectuating the intent of the grantor to create a property interest in a stranger to the deed should prevail over the common law rule); Zurn Indus., Inc. v. Lawyers Title Ins. Corp., 514 N.E.2d 447 (Ohio App. 1986) (following the more enlightened approach that a grantor can create an easement in one party and an estate in land in another party by a single instrument of conveyance); Simpson v. Kistler Inv. Co., 713 P.2d 751, 756 (Wyo. 1986) ("[j]oining the enlightened approach that intent should control and that archaic and inappropriate feudalistic principles should no longer apply, this court determines that the rule is repealed").

89. *See* Tripp v. Huff, 606 A.2d 792 (Me. 1992) (relying on the principals of stare decisis as an excuse for not overruling the common law rule); Estate of Thomson v. Wade, 509 N.E.2d 309 (N.Y. 1987) (declining to follow the *Willard* court in rejecting the common law rule that a property interest cannot be reserved in a stranger to the deed); Pitman v. Sweeney, 661 P.2d 153 (Wash. App. 1983) (holding that an easement cannot be created in a stranger to the deed).

90. 221 S.C. 322, 70 S.E.2d 432 (1952).

91. *Id.* at 331, 70 S.E.2d at 435.

conveyance attempted to create a fee estate in the grantor's son while preserving a life estate in the grantor's wife.[92] In concluding that the wife was a stranger to the deed, the trial court held that although the grantor intended to create two separate property interests through a single instrument of conveyance, the court could not effectuate his intent because it violated the common law rule.[93] The Supreme Court of South Carolina reversed the trial court and held that because the wife "had an inchoate right of dower in the land, a homestead right and an expectancy of inheritance from her husband if she survived him, . . . [she was] not a stranger to the title."[94] In short, the court carved out an exception to the common law rule by allowing a grantor to reserve an interest in his or her spouse even if the spouse is a stranger to the deed.

In the present case, there is a strong argument that, at the very least, Dr. Shenoy created this reservation for his wife. However, even if this was his intent, the court's interpretation of an easement in gross then it would have ended when Mrs. Shenoy sold her lot. As such, the exception in *Glasgow*[95] does not parallel the real issues in this case. Nevertheless, it is a concrete example of how South Carolina previously embraced the notion of allowing a grantor to reserve an easement in favor of a third party.

VII. ANALYSIS AND CONCLUSION

After acknowledging and effectuating the parties' intent, Dr. Shenoy clearly did not intend for the easement to be personal to himself. Rather, he intended the easement to burden Lot 14 for the benefit of Lot 13 in perpetuity. Dr. Shenoy's intent is the only plausible explanation for his actions. After all, although he did not "own" Lot 13, Dr. Shenoy did stand to benefit from the added value which the easement undoubtedly vested in that property. Some people may argue that the easement was in gross because Dr. Shenoy personally benefitted from it as a resident of Lot 13. However, considering the lawyer's mistaken belief that Dr. Shenoy owned both lots together with Dr. Shenoy's later execution of the corrective instruments, he clearly intended for the easement to be appurtenant to Lot 13.

The special referee held that "South Carolina follows the Common Law rule that a reservation in a deed cannot create an easement in favor of a third party."[96] In reaching this conclusion, the special referee erred by finding that the grantor did not attempt to reserve an easement in anyone but himself.[97] By affirming this judgment, the majority in *Springob* further confounded the error

92. *Id.*
93. *Id.* at 325, 70 S.E.2d at 433.
94. *Id.* at 331, 70 S.E.2d at 435.
95. 221 S.C. 322, 70 S.E.2d 432 (1952).
96. Springob v. Farrar, No. 96-CP-40-1174, at 4 (S.C. July 7, 1997) (order of special referee holding that the easement was in gross and did not vest an interest in a third party).
97. *Id.*

because the "Corrective Title to Real Estate" and "Easement Agreement" prove distinctly that Dr. Shenoy intended to create an appurtenant easement in favor of a third party.

Given these facts, the inconsistencies and ambiguities in South Carolina's easement law cannot be overstated. *Springob* presented the majority with a clear opportunity to clarify and update the law. However, the court chose not to do so, leaving the state of easement law as confusing as ever.

If the cardinal rule of deed construction in South Carolina is to effectuate the grantor's intent, the courts must consider all of the available evidence. Favoring an antiquated common law rule which serves no purpose today only frustrates the grantor's intent. These inconsistencies often allow the cardinal rule to directly contradict the grantor's intent. In previous opinions, the majority agreed that the "general rule is that the character of an express easement is determined by the nature of the right and the intention of the parties creating it."[98] The majority author also held that "a determination of the width of the easement becomes a matter of construction of the instrument with strong consideration being given to what is reasonable, convenient and necessary to accomplish the purpose for which the right-of-way was created."[99] These previous opinions only make the *Springob* holding even more illogical and inconsistent.

By overruling the common law, states like California and Kentucky made it easier for potential buyers conducting a title search to find encumbrances on a specific tract of land. Under the common law rule, if a grantor wanted to reserve an easement in favor of a third party he first had to execute a deed of easement to that third person. Next, the grantor had to execute a deed to the grantee. While there are numerous incentives for the grantee to record his deed, the easement holder will likely not have similar incentives. As such, deeds of easement are less likely to be recorded, making it harder to find such encumbrances during a title search. By eliminating the common law rule and allowing a grantor to reserve an easement in favor of a third party to the deed, it becomes much easier to conduct a title search and precisely locate all encumbrances.

Although the majority believed that the Springob deed was unambiguous, an ambiguity clearly arises when the deed is given effect.[100] Moreover, the majority's holding in *Springob* cannot be squared with the line of reasoning in earlier South Carolina (and other states') opinions. By considering the overwhelming evidence that Dr. Shenoy intended to create an appurtenant easement burdening Lot 14 for the benefit of Lot 13 in perpetuity, the South

98. *Smith*, 312 S.C. at 467, 441 S.E.2d at 336.

99. Moore v. Reynolds, 285 S.C. 574, 578, 330 S.E.2d 542, 545 (Ct. App. 1985); *see* 12 S.C. JURIS. *Easements* § 22 (1992).

100. *See, e.g.*, Jennings v. Talbert, 77 S.C. 454, 456, 58 S.E. 420, 421 (1907) (stating that where deed ambiguities are latent, parol testimony is admissible to effectuate intent).

Carolina Court of Appeals should have logically and rationally reached this decision and effectuated the grantor's intent.

Reaching this conclusion, the court should have followed the cutting edge lead of Judge Anderson in overruling the common law rule. South Carolina had no problem finding that an interest may be reserved in a grantor's spouse who is a stranger to the deed in *Glasgow*.[101] The time has come for the Supreme Court of South Carolina to take a stand and overrule the antiquated common law rule once and for all. The rule serves no modern purpose except to frustrate the grantor's intent, which is the very result that the law tries to prevent. When taken as a whole, the facts in *Springob* presented an excellent opportunity for the South Carolina Supreme Court to clarify the easement law of South Carolina. By denying certiorari, the court failed to overrule the common law rule thus ignoring the ultimate consideration when interpreting a deed: to effectuate the intent of the grantor.

John E. Lansche, Jr.

101. 221 S.C. 322, 70 S.E.2d 432 (1952).

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