Property

Easements by Necessity: What Level of Necessity is Required?

One of the most coveted rights people possess is the privilege to own real property. But without a means of ingress and egress, land would be of little use or value. Problems often arise when part of a tract of land is conveyed and either the part conveyed or the part retained is shut off from access to a roadway by the land from which it was severed or by the land of a third party. An easement by necessity or "way of necessity," either implied by common law or codified by a state statute, has been deemed by various courts to be an appropriate remedy for these problems.

An easement is an equitable remedy defined by Black's Law Dictionary as a "non-possessory interest in the land of another." The land burdened or having an easement imposed upon it is called the servient estate, while the land benefited by the easement is known as the dominant estate. An easement by necessity is an interest in the land of another that is supported by a public policy favoring the full and productive utilization of land. This easement provides a solution for the problems arising when the owner of a parcel of real estate conveys part of his land to another and the remainder of the land is left without ingress or egress. Most courts will imply an easement necessity when four "traditional" requirements are met: first, there must be common ownership and unified title for both parcels of land *prior to* the transfer of one of the parcels; second, there must be a severance of this title; third, the necessity must arise at the time of the severance; and fourth, the necessity for an easement must continue. An enduring controversy has developed between courts over the exact degree of necessity required before an easement of necessity may be implied.

An easement by necessity is an equitable remedy derived from a common law doctrine that can be traced to Edward I. The common law doctrine states that anyone who grants a thing to someone is understood to grant that without which the thing cannot be or exist. This presumption was initially used as the basis for an easement by

necessity, but later determinations rest on the aforementioned public policy theory, which favors the occupancy and utilization of land. However, since the 19th century some modern courts have begun to view easements by necessity as contractual relationships between adjoining landowners. These courts have determined that the parties' intent to create an easement could be implied only after a showing of strict necessity; therefore, the grant of the implied easement hinges on the necessity of the easement, rather than the intent of the parties. This slight change in the law of implied easements identifies the distinction between the majority and minority positions. However, both theories are still cited as the foundations of easements by necessity.

The Idaho Court of Appeals stated that "[f]ew things are as certain as death, taxes, and the legal entanglement that follows a sale of land-locked real estate."[1] Due to the confusion, a conflict of authority as to the level of necessity required to imply an easement by necessity exists. Some courts hold that a reasonable necessity is sufficient, while other authorities require absolute or strict necessity. Still other states have statutes that recognize easements by necessity and allow an owner of landlocked property to condemn a private right-of-way over neighboring land. Regardless of these differences, the overwhelming majority of jurisdictions holds that an easement by necessity must be more than simply a matter of convenience.

Because the doctrine of implied easements is firmly rooted in public policy favoring the productive use of land, there are very few cases in which the owner of landlocked property has been denied an easement by necessity. However, a claimant seems to have a better chance of receiving an implied easement in a majority jurisdiction, requiring reasonable necessity, than in one requiring strict necessity. This favoritism is probably due to the consideration courts generally give to public policy conflicts in its decisions. The majority's view more closely mimics the public policy theory because it more effectively prevents land from becoming unapproachable and useless. Under the public policy theory, an easement should be implied when access to a parcel of real estate is interrupted and the owner can no longer make full and productive use of his land. The exact degree of necessity usually varies according

1. Bob Daniels & Sons v. Weaver, 106 Idaho 535, 681 P.2d 1010 (Ct. App. 1984).

to the facts of the particular case, but the courts will normally consider the circumstances of both parties and then balance the needs of the claimant against the burden that will be placed on the servient estate. This standard is based on the concept that the property owner is entitled as a matter of public policy to its use for all lawful purposes, and that to accomplish this goal, a court will lend its hand to establish a right of ingress and egress where none exists.

The minority view is based on the notion that necessity is the best gauge of the parties' intent to establish or grant an easement and that this intent should only be inferred in the most unique situations. Therefore, a claimant cannot receive an implied easement of necessity as long as an alternative means of access exists, even when the alternate route is substantially more difficult or expensive. This harsh stance is taken because implied easements are sometimes seen in derogation of the rule that written instruments shall speak for themselves; therefore, to justify the use of implied easements by necessity, the requirement of strict necessity operates to safeguard against a person unlawfully gaining entrance onto the land of another.

Many landowners, unable to establish the required elements of an implied easement, were left with useless land and virtually no recourse. To remedy this problem, several states enacted statutes that eliminated certain elemental requirements and removed a portion of the subjective nature from the necessity analysis of implied easements.

Unlike a common-law easement by necessity, a statutory way of necessity requires just compensation from the dominant estate for the burden being imposed on the servient estate. Although the codification of state statutes recognizing private ways of necessity has not ended the dispute over the level of necessity required, some clear and unambiguous statutes have expedited or prevented many conflicts from becoming judicial proceedings.

For cases in which courts require only a "reasonable" necessity before imposing an easement by necessity:

See Helms v. Tullis, 398 So. 2d 253 (Ala. 1981); Chandler Flyers, Inc. v. Stellar Dev. Corp., 121 Ariz. 553, 592 P.2d 387 (Ct. App. 1979); Brandenburg v. Brooks, 264 Ark. 939, 576 S.W.2d 196 (1979); Collins v. Ketter, 719 P.2d 731 (Colo. Ct. App. 1986); Hollywyle Ass'n, Inc. v. Hollister, 164 Conn. 389, 324 A.2d 247 (1973); Kellett v. Salter, 244 Ga. 601, 261 S.E.2d 597 (1979) (statutory easement

case); MacCaskill v. Ebbert, 112 Idaho 1115, 739 P.2d 414 (Ct. App. 1987); Seiber v. Lee, 158 Ill. App. 3d 361, 511 N.E.2d 1296 (1987); Roland v. O'Neal, 122 S.W. 827 (Ky. Ct. App. 1909); Shpak v. Oletsky, 280 Md. 355, 373 A.2d 1234 (1977) (must show that an alternative way cannot be made without unreasonable expense); Uliasz v. Gillette, 357 Mass. 96, 256 N.E.2d 290 (1970); Badura v. Lyons, 147 Neb. 442, 23 N.W.2d 678 (1946); Goudie v. Fisher, 79 N.H. 424, 111 A. 282 (1920); Manning v. Port Reading R.R., 33 A. 802 (N.J. Ch. 1896); Broyhill v. Coppage, 79 N.C. App. 221, 339 S.E.2d 32 (1986); Hitchman v. Hudson, 40 Or. App. 59, 594 P.2d 851 (1979); Jowers v. Hornsby, 292 S.C. 549, 357 S.E.2d 710 (1987); McMillan v. McKee, 129 Tenn. 39, 164 S.W. 1197 (1914); Tschaggeny v. Union Pac. Land Resources Corp., 555 P.2d 277 (Utah 1976); Middleton v. Johnston, 221 Va. 797, 273 S.E.2d 800 (1981) (but holding that reasonable necessity must be proven by clear and convincing evidence); Hellburg v. Coffin Sheep Co., 66 Wash. 2d 664, 404 P.2d 770 (1965); Justus v. Dotson, 168 W. Va. 320, 285 S.E.2d 129 (1981).

For cases in which courts require "strict" necessity be proven before an easement of necessity will be imposed:

See Roemer v. Pappas, 203 Cal. App. 3d 201, 249 Cal. Rptr. 743 (1988); Pencader Assocs., Inc., v. Glasgow Trust, 446 A.2d 1097 (Del. 1982); Matthews v. Quarles, 504 So. 2d 1246 (Fla. Dist. Ct. App. 1986); Roberts v. Walker, 238 Iowa 1330, 30 N.W.2d 314 (1947); Horner v. Heersche, 202 Kan. 250, 447 P.2d 811 (1968); O'Connell v. Larkin, 532 A.2d 1039 (Me. 1987); Schmidt v. Eger, 94 Mich. App. 728, 289 N.W.2d 851 (1980); Graham v. Mack, 216 Mont. 165, 699 P.2d 590 (1985); Carlo v. Lushia, 144 A.D.2d 211, 534 N.Y.S.2d 524 (N.Y. App. Div. 1988); Tiller v. Hinton, 19 Ohio St. 3d 66, 482 N.E.2d 946 (1985) (plurality opinion); Traders, Inc. v. Bartholomew, 142 Vt. 486, 459 A.2d 974 (1983).

For statutes expressly including the level of necessity required in an easement by necessity:

See MO. CONST. art. 1, § 28; ALA. CODE § 18-3-1 (1990 & Supp. 1994); ARIZ. REV. STAT. ANN. §§ 12-1201—12-1202 (1994); ARK. CODE ANN. § 27-66-401 (Michie 1994); COLO. REV. STAT. ANN. § 38-1-102(3) (West 1990); FLA. STAT. ANN. §§ 704.01(2), 704.03-704.04 (West 1988 & Supp. 1995); GA. CODE ANN. §§ 44-9-40—44-9-53 (1982); KAN. STAT. ANN. § 68-117 (1992); MICH. COMP. LAWS ANN. §§ 229.1-229.6 (West 1990); MISS. CODE ANN. § 65-7-201 (1972); MONT. CODE ANN. § 70-30-107 (1995); OKLA. STAT. ANN. tit. 27, § 6 (West 1991); OR. REV. STAT. §§ 376.150—376.200 (1987 & Supp. 1994); S.D. CODIFIED LAWS ANN. §§ 31-22-1—31-22-8 (1984); TENN. CODE ANN. § 54-14-101 (1993);

WASH. REV. CODE ANN. § 8.24.010 (1992); WIS. STAT. ANN. § 80:13 (West 1990 & Supp. 1994); WYO. STAT. § 24-9-101 (1977).

For treatment of this area in legal periodicals and treatises:

See JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND ¶¶ 1.01, 4.02 (1988); 3 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 34.07 (Patrick J. Rohan rev. ed. 1994); 7 THOMPSON ON REAL PROPERTY, THOMAS EDITION § 60.03(b)(5)(iii) (David A. Thomas ed., 1994); 3 HERBERT T. TIFFANY, THE LAW OF REAL PROPERTY § 411 (3d ed. 1970); Kenneth L. Gartner, Witter v. Taggart *and* Ammirati v. Wire Forms, Inc.: *The Potential Ramifications of New York's Newly Restrictive Definition of "Chain of Title" and Newly Expansive Definition of "Easement By Necessity"*, 5 HOFSTRA PROP. L.J. 101 (1992); Peter G. Glenn, *Implied Easements in the North Carolina Courts: As Essay on the Meaning of "Necessary"*, 58 N.C. L. REV. 223 (1979); Albert A. Haller, Comment, *Real Property—Easements by Implication—Effect of the Restatement of Property*, 57 MICH. L. REV. 724 (1959); David B. Jensen, *Easements of Necessity: The Last Resort for Access to Land*, 5 CHICAGO B. ASS'N REC., June 1991, at 26; Ernest W. Rivers, Note, *Implied Easements of Necessity Contrasted with Those Based on Quasi-Easements*, 40 KY. L.J. 324 (1952); Galen G.B. Schuler, *Easements by Necessity: A Treshold for Inholder Access Rights Under the Alaska National Interest Lands Conservation Act*, 70 WASH. L. REV. 307 (1995); James W. Simonton, *Ways by Necessity*, 25 COLUM. L. REV. 571 (1925); Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55 (1987).

Hunter C. Carroll