Restatement of the Law, Third, Property (Servitudes)

Case Citations

Chapter 2 - Creation of Servitudes

Restat 3d of Prop: Servitudes, § 2.15

§ 2.15 Servitudes Created by Necessity

A conveyance that would otherwise deprive the land conveyed to the grantee, or land retained by the grantor, of rights necessary to reasonable enjoyment of the land implies the creation of a servitude granting or reserving such rights, unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights.

COMMENTS & ILLUSTRATIONS: Comment:

a. History and rationale. The rule that conveyances include those rights necessary to make use of the property conveyed can be traced back in the common law at least as far as the 13th century. A maxim dating from the time of Edward I (1239-1307) states that one who grants a thing must be understood to have granted that without which the thing could not be or exist. From this maxim and its extended applications, developed what came to be known as the easement by necessity. The implied right of access to the thing granted was extended, first, to include access to property expressly excepted from a grant, and, then, to other property of the grantor not mentioned in the conveyance. Although the primary right covered by this servitude is a right of access, it has been stated broadly enough to include other rights necessary to the enjoyment of property conveyed or retained.

The rationale for implying the conveyance or retention of rights necessary to permit enjoyment of the subject of a conveyance has changed over the centuries. In the 13th- and 14th-century cases, judges said that without a way of access, a man could get no profit from his land. In the 17th century, Chief Justice Glyn added a public policy justification: ". . . it is not only a private inconvenience, but it is also to the prejudice of the public weal, that land should lie fresh and unoccupied. . . ."

Public policy favoring use and occupation of land remained the stated basis for the servitude until the 19th century, when the focus shifted back to private needs. Reflecting their tendency to explain transactions in private contract terms, 19th century judges concluded that ways by necessity arose because of the **presumed** intent of the parties. The 20th century has brought renewed recognition of the public-policy basis of servitudes by necessity, although the **presumed** intent of the parties is still the prevailing rationale expressed in the cases.

Both justifications for the rule have force. The **presumed** intent of the parties justifies finding that the conveyance included rights necessary to avoid rendering the property useless. Parties to a conveyance would very rarely intend deliberately to render useless either property conveyed or retained by the grantor. Public policy also justifies the rule because it avoids the costs involved if the property is deprived of rights necessary to make it useable, whether the result is that it remains unused, or that the owner incurs the costs of acquiring rights from landowners who are in a position to demand an extortionate price because of their monopolistic position.

Although the public policy favoring utilization of land and avoidance of the costs involved in forcing the landlocked owner to acquire access rights from the neighboring landowners might have justified it, the common law never developed a general method for providing access to landlocked property. Only if the cause of the landlocking can be traced back to a particular conveyance does the common law provide a solution. The common-law solution is limited to providing access over or through property held by the grantor at the time of the conveyance. Statutes in a number of

states provide a broader solution by permitting the owners of landlocked property to purchase necessary access rights regardless of the manner in which the landlocking occurred. This section states the common-law rules by which servitudes by necessity are acquired in land once held in a common ownership without payment of additional compensation.

b. Rights necessary to reasonable enjoyment of property. Access rights are almost always necessary to the enjoyment of property. In a conveyance that would otherwise deprive the owner of access to property, access rights will always be implied, unless the parties clearly indicate they intended a contrary result. The most commonly implied access rights are those to connect property with a public road, but there are others. A conveyance dividing property into horizontal estates will include implied servitudes for access from the surface estate to the estates above and below the ground. A conveyance of a profit will include a right of access to the subject of the profit. A conveyance of an easement will include a right of access to the easement. The implied rights necessary to enjoy profits and easements are often called secondary easements.

Rights necessary to the enjoyment of property may include rights in addition to access, particularly when the property is severed into horizontal estates, or when nonpossessory interests are created. Support rights are necessary to the enjoyment of all horizontal estates that lie above other horizontal estates. To enjoy a profit, the owner must ordinarily be able to extract and remove the subject of the profit; to enjoy an easement, the owner must often be able to improve and maintain the easement way. Although customary usage has often collapsed the rights necessary to enjoyment of a profit into the concept of the profit itself, the implied secondary rights necessary to enjoyment of profits share a common origin with the implied easements by necessity that provide access to surface possessory estates. For analytical purposes, implied rights necessary to reasonable enjoyment of profits are treated as implied servitudes covered by the rule stated in this section.

Under the rule stated in this section, a servitude will be implied to do whatever is reasonably necessary for the enjoyment of property, if the conveyance would otherwise eliminate the property owner's right to do those things.

Illustrations:

The following Illustrations are based on the assumption that there is no indication in the language or circumstances of the conveyance that the parties intended to deprive the land of rights necessary to its enjoyment.

1. O, the owner of two contiguous parcels, conveyed Blackacre to A, retaining Whiteacre. Blackacre would be landlocked by the conveyance if no servitude to cross Whiteacre were implied. The conveyance grants an implied servitude for rights of access to Blackacre across Whiteacre.

2. Same facts as Illustration 1, except that O conveys Whiteacre and retains Blackacre. The same result follows. The conveyance reserves an implied servitude for rights of access to Blackacre across Whiteacre.

3. O, the owner of Blackacre and Whiteacre, leased Whiteacre to A. Whiteacre does not abut a public highway, but adjoins Blackacre, which does. The lease does not include an express easement for ingress and egress over Blackacre. A servitude for access rights across Blackacre to Whiteacre will be implied.

4. O, the owner of Blackacre, conveys subsurface coal rights to A. Without access through the surface of Blackacre, A has no right to gain access to the coal. There is an implied servitude granting all rights necessary to mine the coal through O's retained surface estate.

5. Same facts as Illustration 4, except that the coal completely underlies Blackacre, so that without access through the coal, O has no right to reach water and oil that underlie the coal. There is an implied servitude reserving rights of access to underlying strata for the benefit of the surface owner.

6. O, the owner of Blackacre, conveyed the standing timber on Blackacre to A. The conveyance did not include express rights to enter Blackacre or to cut and remove the timber. Conveyance of the timber includes an implied servitude for all rights necessary to cut and remove the timber.

7. O, the owner of Blackacre, conveyed an easement for a pipeline to A. The conveyance did not include express rights to enter Blackacre to install or maintain the pipeline. Conveyance of the pipeline

easement includes an implied servitude for all rights necessary to enjoy the pipeline easement, including rights to install and maintain the pipeline.

c. Severance of rights arising out of common ownership is required. The rule stated in this section applies only when a conveyance would otherwise deprive property of rights necessary to its reasonable enjoyment. This means that, prior to the conveyance, the property did enjoy such rights and that, absent the implied servitude, the conveyance would deprive it of such rights. This set of circumstances arises only when the conveyance severs interests held in a single ownership, and when the owned interests include the claimed rights.

Servitudes by necessity arise only on severance of rights held in a unity of ownership. This severance can take place when a grantor, who owns several parcels, conveys one or more to others. It can also take place when a grantor divides a single parcel into two or more parcels, and it can take place when a grantor conveys less than full ownership in a single parcel. Implied servitudes can arise when the grantor simultaneously conveys all the grantor's interests to two or more grantees, as well as when the grantor retains some interest. Servitudes by necessity arise on conveyances by governmental bodies as well as by other grantors. Whether servitudes by necessity arise on severance of parcels held by concurrent owners whose interests overlap, but are not identical, in the two parcels is determined under the principles governing creation of servitudes by less than all owners of the servient estate under § 2.3.

Servitudes will be implied only in conveyances that cause the necessity to arise. If the property did not enjoy the rights prior to the conveyance, there is no basis for implying a servitude to continue the enjoyment of the rights after the severance. Servitudes are not implied to enjoy rights later acquired by the owners of property once held in common ownership.

Illustrations:

8. O, the owner of two contiguous parcels, conveyed Blackacre to A. At the time of the conveyance, Blackacre abutted a public road. O's retained parcel, Whiteacre, abutted a different public road. When the access rights from Blackacre to the public road were later condemned, the owner of Blackacre had no right to cross Whiteacre to reach the public road. Since the conveyance from O to A did not deprive Blackacre of access to a public way, there was no implied servitude for access.

9. O, the owner of two contiguous parcels, conveyed Blackacre to A. At the time of the conveyance, there was an easement appurtenant to Blackacre for access to a public highway across the land of X, a stranger. O's remaining parcel, Whiteacre, abutted on a public highway. When X later extinguished Blackacre's easement by adverse user, the owner of Blackacre had no right to cross Whiteacre to reach the public road. Since the conveyance from O to A did not deprive Blackacre of access to a public way, there was no implied servitude for access.

10. O, the owner of two contiguous parcels, conveyed Blackacre to A, together with an express easement for ingress and egress across Whiteacre, O's retained parcel. A failed to record the deed to Blackacre. O later conveyed Whiteacre to X, a bona fide purchaser without notice of the easement conveyed to A. Under the jurisdiction's recording act, the express easement was destroyed. Even though Blackacre has become completely land-locked, the owner of Blackacre has no right to cross Whiteacre. Since the conveyance from O to A did not deprive Blackacre of access, a servitude will not be implied on the basis of that conveyance.

d. Degree of necessity required. Servitudes are implied under the rule stated in this section on the basis of necessity alone, without proof of a prior use of the properties consistent with the claimed servitude. To support implication of a servitude under this section, the rights claimed must be necessary to the reasonable enjoyment of the property. "Necessary" rights are not limited to those essential to enjoyment of the property, but include those which are reasonably required to make effective use of the property. If the property cannot otherwise be used without disproportionate effort or expense, the rights are necessary within the meaning of this section. Reasonable enjoyment of the property means use of all the normally useable parts of the property for uses that would normally be made of that type of property.

What is necessary depends on the nature and location of the property, and may change over time. Access by water, while adequate at one time, is generally not sufficient to make reasonably effective use of property today. Land access will almost always be necessary, even though water access is available. Even in the case of remote recreational

properties, where access has traditionally been by water, implication of servitudes for land access is justified, unless the parties clearly intended to deprive the property of land access rights.

Until recently, access for foot and vehicular traffic tended to be the only rights regarded as necessary for the enjoyment of surface possessory estates. However, the increasing dependence in recent years on electricity and telephone service, delivered through overland cables, justify the conclusion that implied servitudes by necessity will be recognized for those purposes. Whether access for other utilities and services has also become necessary to reasonable enjoyment of property depends on the nature and location of the property and normal land uses in the community.

Illustrations:

11. O, the owner of two contiguous parcels of land, conveyed Blackacre to A. Blackacre was divided by a deep ravine that could only be bridged at a cost greater than the value of the land. The half of Blackacre contiguous to O's retained parcel, Whiteacre, had no access to a public road except across Whiteacre, or the land of strangers. The other half of Blackacre abutted a public road. Since O's conveyance of Blackacre would otherwise deprive half of it of access, without the expenditure of a disproportionate sum, the conveyance includes an implied servitude for access across Whiteacre.

12. O, the owner of Blackacre and Whiteacre, conveyed Whiteacre to A. Whiteacre is landlocked, but Blackacre abuts a public street. The property is located in a rural residential area and it is suitable for residential use. A servitude for necessity will be implied for access for surface travel and for utility services normal in the area.

13. O, the owner of two contiguous parcels, conveyed Blackacre to A. Blackacre fronts on a navigable river. O's retained parcel, Whiteacre, abuts a public highway. Blackacre has no access to a public highway, other than the river. In the absence of language or circumstances indicating that O and A intended to deprive Blackacre of land-access rights, a servitude for access across Whiteacre will be implied.

e. Contrary intent. Because of the strong public policy favoring avoidance of the costs incurred on account of unusable property, and the strong likelihood that the parties to the conveyance do not intend to deprive it of its utility, servitudes by necessity will be implied unless it is clear that the parties intend to deprive the property of rights necessary to its enjoyment. Thus, servitudes for rights necessary to enjoyment of the property will be implied unless it affirmatively appears from the language or circumstances of the conveyance that the parties did intend that result. Mere proof that they failed to consider access rights, or incorrectly believed other means to be available, is not sufficient to justify exclusion of implied servitudes for rights necessary to its enjoyment.

In an occasional case, a court has denied an easement by necessity to a party who voluntarily created the access problem. Such results are rare, and should only be reached in cases where the conduct of the landlocked party is such that an estoppel against claiming the easement is justified.

Illustrations:

14. Railroad Corporation owned a large parcel of land that had no access to a public highway. The parcel abutted Railroad Corporation's railroad right of way, which it owned in fee simple. Railroad Corporation conveyed the parcel to A by a conveyance which stated: "This conveyance does not include any rights of ingress or egress over other property of grantor, including grantor's adjacent right of way." There is no implied servitude for access over the grantor's retained land to the conveyed parcel because the intent not to create a servitude for access is clearly stated.

15. O, the owner of two contiguous parcels, conveyed Blackacre to A by warranty deed. O's retained parcel, Whiteacre, had no access to a public road except across Blackacre, or the land of strangers. Inclusion of a warranty against encumbrances does not clearly indicate an intent not to retain a servitude for access to Whiteacre across Blackacre.

16. D, the developer of a large tract of land, subdivided the land in such a way as to leave one small parcel landlocked. After D had conveyed all of the other parcels at a price reflecting their value without an encumbrance for an access easement to the landlocked parcel, D asserted a claim of easement by

necessity against the grantees of the parcels abutting the landlocked parcel. Because D controlled the subdivision process and the pricing of the lots sold, the conclusion would be justified that D is estopped to claim an easement by necessity.

REPORTERS NOTES: REPORTER'S NOTE

This section is consistent with the rule stated in § 476, Comment *g*, of the first Restatement.

History and rationale, Comment a. The historical material is drawn from Simonton, Ways By Necessity, *25 Colum. L. Rev. 571 (1925).* Section 476, Comment *g*, of the first Restatement took the position that the inference as to the intention of the parties not to render property useless was influenced largely by considerations of public policy favoring land utilization.

Thompson v. Whinnery, 895 P.2d 537 (Colo.1995) (easement by necessity is implied because the law assumes that no person intends to render property conveyed inaccessible for the purpose for which it was granted or retained; assumed intent has its roots in considerations of public policy that militate against rendering a tract of land useless for lack of access).

Jackson v. Nash, 866 P.2d 262 (Nev.1993) (intent of parties at time of severance is more important than degree of necessity; no intent to reserve easement found where real-estate developer landlocked parcel regarded as of little or no value; easement by necessity will not be imposed contrary to intent of original parties).

Hurlocker v. Medina, 878 P.2d 348 (N.Mex.Ct.App.1994) (implied intent of parties is more reliable foundation than public policy for easement by necessity; public policy is important factor only if record provides no basis for drawing inference as to intent of parties).

Mougey Farms v. Kaspari, 579 N.W.2d 583 (N.Dak.1998) (no easement by necessity implied in transfer of water-rights permit; written easement for 10-year term providing for termination if grantee no longer leased grantor's land negated intent to create implied easement).

Ghen v. Piasecki, 172 N.J.Super. 35, 410 A.2d 708, 712 (App.Div.1980), held that an easement of necessity arose on severance caused by foreclosure of a mortgage, even though the parties probably had no intent to create the easement. "Although many, if not most, of the reported cases involve facts which permit a finding of implied intent, we are satisfied that this mutual intent is not an essential element in the establishment of a way of necessity. Such an easement is created as a result of a strong public policy that no land may be made inaccessible or useless."

Wilson v. Smith, 18 N.C.App. 414, 197 S.E.2d 23 (1973), held that a way of necessity arises from an implied grant or reservation, and rests upon the theory that "lands should not be rendered unfit for occupancy or successful cultivation." Existence of a permissive way to public roads over land of others does not destroy necessity.

In *Burrow v. Miller, 340 So.2d 779, 780 (Ala.1976),* the court stated the requirements of a common source of title and elaborated the standard of reasonable necessity and the rationale for the doctrine: The easement "must be the only practical avenue of ingress and egress." "The underlying principle is that whenever one conveys property, he also conveys whatever is necessary to its beneficial use, coupled with the further consideration that it is for the public good that land should not be unoccupied." Quoted from *Hamby v. Stepleton, 221 Ala. 536, 130 So. 76, 77 (1930).*

Hancock v. Henderson, 236 Md. 98, 202 A.2d 599, 602 (1964). The doctrine of easements by necessity is based upon a public policy favoring full utilization of land and a **presumption** that the parties do not intend that the land conveyed be rendered unfit for occupancy.

Cordwell v. Smith, 105 Idaho 71, 665 P.2d 1081, 1089 (Ct.App.1983). "A way of necessity arises from public policy considerations. It is, literally a creature of necessity."

Graham v. Causey, 284 S.C. 339, 326 S.E.2d 412, 413 (Ct.App.1985). The theory is that where a person conveys a part of his land to another, "it is his intention also to convey that which is reasonably and actually necessary for the enjoyment of the land conveyed."

If no easement of necessity will be recognized unless the claimed servient parcel was used for access to the claimed dominant parcel at the time of severance, the state does not recognize a common-law easement by necessity under the rule stated in this section. Although the state may label such an easement one by necessity, it is in fact an easement implied on the basis of prior use under the rule stated in § 2.12.

Minnesota does not recognize a true common-law easement by necessity. *Lake George Park, L.L.C. v. IBM Mid America Employees Federal Credit Union, 576 N.W.2d 463 (Minn.Ct.App.1998)* (use giving rise to easement must have been so long continued and apparent as to show it was intended to be permanent, and must be necessary to beneficial enjoyment of land granted; property owner has the right to landlock a parcel). The owner of landlocked property must either negotiate to buy an easement from surrounding landowners, persuade the local government to establish a public road, or acquire an easement by prescription as no statutory way of necessity is available.

Rights necessary to reasonable enjoyment, Comment b. O'Buck v. Cottonwood Village Condominium Ass'n, 750 P.2d 813 (Alaska 1988) (no easement by necessity for installation of television antenna; not clear that a "need" for adequate television can ever rise to the level of necessity).

Maywood Mut. Water Co. v. City of Maywood, 23 Cal.App.3d 266, 100 Cal. Rptr. 174 (1972) (developer's conveyance of water system including mains, pipelines and production, transmission and distribution facilities, created easement privileges essential to use of the water system conveyed).

Ames v. Prodon, 252 Cal.App.2d 94, 60 Cal.Rptr. 183 (1967) (dedication of riverfront to use of residents within development created implied easements for access to the beaches).

Thompson v. Whinnery, 895 P.2d 537 (Colo.1995) (necessity for the particular easement must be great; purpose for which property was granted is relevant in determining whether easement is necessary; necessity not sufficient to establish easement for access to 10-acre parcel separated by creek and canyon from balance of property because 10-acre parcel was accessible by foot and horseback and there is no indication in the record that at the time of severance in 1938 the parties contemplated using the parcel for anything other than fishing and hunting).

Carr v. Barnett, 580 S.W.2d 237 (Ky.Ct.App.1979) (easement by necessity for road access to landlocked parcel proper where no other reasonable means of access was available).

Larabee v. Booth, 463 N.E.2d 487 (Ind.Ct.App.1984) (promise to convey parcel completely surrounded by promisor's land includes implied grant of easement for access by necessity).

Helms v. Tullis, 398 So.2d 253, 256 (Ala.1981) (easement for electric power line access denied on grounds that plaintiff failed to show that there was no other route that could be used, and that electrical use was not shown to be necessary to the reasonable enjoyment of the property, even though it was shown to be necessary for use as a site for residence).

United States v. 176.10 Acres of Land, 558 F.Supp. 1379 (D.Mass. 1983) (access easement by necessity would include right to bring in electricity because it is necessary today for a residence).

Morrell v. Rice, 622 A.2d 1156 (Me. 1993) (easement by necessity for ingress and egress includes right to install underground utilities, which are essential for most uses to which property may reasonably be put).

Slotoroff v. Nassau Assocs., 178 N.J.Super. 292, 428 A.2d 956 (Ch.Div. 1980) (easements of light and air created by implication or necessity recognized, but no such easement was proved in the case).

Hynes v. City of Lakeland, 451 So.2d 505 (Fla.Dist.Ct.App.1984) (easement by necessity for access to airport runways implied in favor of a lessee hangar-owner).

Wimberly v. Lake Weir Yacht Club Ass'n, 480 So.2d 224 (Fla.Dist.Ct.App. 1985) (way of necessity is limited to ingress and egress; it does not include parking).

Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196 (Tex.1962) (easements for recreation and pleasure purposes over adjacent ranch not necessary).

Unity of ownership; severance causing necessity, Comment c. Roy v. Euro-Holland Vastgoed, B.V., 404 So.2d 410 (Fla.Dist.Ct.App.1981) (common-law way of necessity does not arise unless the common grantor, who may be a remote grantor in the chain of title, created the situation causing the dominant tenement to become landlocked; the servient tenement must have had access to a public road at the time of severance).

Hurlocker v. Medina, 878 P.2d 348 (N.Mex.Ct.App.1994) (unity of ownership requires only that parcels be contiguous and have the same owner; they need not be undivided prior to the conveyance that renders one of them landlocked).

Tiller v. Hinton, 19 Ohio St.3d 66, 482 N.E.2d 946 (1985) (easement cannot be implied in deed granting express easement; there cannot be simultaneous express and implied grant of easement; express easement was not effective against subsequent purchaser of servient estate because of failure to record; necessity was not caused by severance).

American Small Bus. Inv. Co. v. Frenzel, 383 S.E.2d 731 (Va.1989) (unity of title severed when deed of trust was placed on only 1 of 2 parcels; no easement because necessity arose 3 years later).

Unity of Ownership Required

Teague v. Raines, 270 Ark. 412, 605 S.W.2d 485 (Ct.App.1980) (way of necessity cannot be established over land that was not in common ownership with landlocked parcel).

Koonce v. J.E. Brite Estate, 663 S.W.2d 451 (Tex.1984) (no easement by necessity because claimants failed to prove unity of ownership prior to separation).

Mechlin v. Stronghold, Inc., 48 Md. App. 299, 426 A.2d 439 (Ct. Spec.App.1981), cert. denied, *290 Md. 718 (1981)* (unity of ownership not established where landlocked parcel was acquired by tax sale, later declared void, and severance from lands connecting it to public road was accomplished by declaration that the tax sale was void).

Persons v. Russell, 625 S.W.2d 387 (Tex.Ct.App.1981) (remanded for jury trial on the issue whether the 2 tracts were contiguous when in common ownership based on defendants' claim that a strip owned by a stranger lay in between the 2 parcels when they were in common ownership; plaintiff must establish that dominant and servient tenements were owned by common grantor, as a unit, prior to severance).

Tschaggeny v. Union Pac. Land Resources Corp., 555 P.2d 277 (Utah 1976) (claim of easement by necessity failed because claimant failed to prove common ownership, or, if there was common ownership, that the severance caused their parcel to be landlocked).

Necessity at Time of Severance

Illustration 9 is based on *Szaraz v. Consolidated R.R. Corp., 10 Ohio App.3d 89, 460 N.E.2d 1133 (1983)* (no easement by necessity where necessity arose from extinguishment of express access easement by prescription; no necessity at time of severance).

Griffin v. North, 373 So.2d 96 (Fla. Dist.Ct.App.1979) (proof that prior to severance parcel had access to public way is essential; otherwise, severance did not cause the property to become landlocked, and there is no basis for **presuming** intent to grant easement; the fact of current access to a public way is irrelevant as to intent at time of severance).

Schmid v. McDowell, 199 Mont. 233, 649 P.2d 431 (1982) (no easement by necessity existed over tract that did not have access to public road at the time of severance).

In *Price v. Musselman, 343 Pa.Super. 90, 493 A.2d 1389 (1985),* the railroad conveyed a 45-acre tract, in 1940, with an express provision that the tract was landlocked, and that no easement was granted over the railroad's remaining land. Thirty-five acres were then conveyed from the 45-acre tract, and the remaining 10 acres were subdivided. The owner of the 35-acre tract sued to establish a way of necessity over the 10 acres that had been part of the original 45-acre tract. The court held that the complaint should not have been dismissed on the pleadings because the plaintiff might be entitled to a way of necessity over the remaining 10 acres if that would provide an intermediate step in acquiring access to the outside world.

State v. Innkeepers of New Castle, Inc., 271 Ind. 286, 392 N.E.2d 459 (1979) (knowledge that the state planned to condemn the granted parcel's access to a state highway, at a later date, did not provide a basis for implying an easement by necessity across grantor's remaining lands since the granted parcel did have direct access to the state highway at the time of the severance).

Swartz v. Sinnot, 6 Mass.App.Ct. 838, 372 N.E.2d 282 (1978) (necessity did not exist at time of severance).

Blackwell v. Mayes Co. Util. Serv. Auth., 571 P.2d 435 (Okla.1977) (necessity must exist at time of severance; where it arose later, there can be no easement by implication).

Godfrey v. Pilon, 165 Mont. 439, 529 P.2d 1372 (1974) (plaintiff was not entitled to easement over defendant's land because the conveyance of land to the defendant did not landlock the common grantor's remaining land, of which

plaintiff's land was a part; the landlocking occurred by a subsequent conveyance to another, who was not a party to the action).

Westover Sportsman's Ass'n v. Broome Co., 59 A.D.2d 998, 399 N.Y.S.2d 725 (1977) (easement by necessity arises if essential to give access to landlocked parcel; no prior use is necessary; fact that plaintiff conveyed alleged servient estate by warranty deed does not preclude it from claiming way of necessity).

Peters v. Johnson, 203 Mont. 120, 661 P.2d 24 (1983) (easement by necessity found, although based on prior use of old road crossing granted parcel).

Oliver v. Ernul, 277 N.C. 591, 178 S.E.2d 393 (1971) (conveyance of landlocked parcel created implied easement by necessity; ineffective grant of "rightaway" did not affect necessity for implied easement).

Chaffee v. Fine, 273 Or. 210, 540 P.2d 371 (1975) (easement by necessity created on conveyance of lot out of larger tract without access to public road).

Stowe v. Head, 728 S.W.2d 120 (Tex.Ct.App.1987) (conveyance of landlocked parcel created implied easement by necessity over access parcel in which grantor owned undivided one-half).

Although the necessity must exist at the time of severance, there is no time limit on when the easement may be claimed.

Canali v. Satre, 688 N.E.2d 351 (Ill.Ct.App.1997) (statute of limitations does not apply to claim of easement by necessity; necessity must exist at time of severance, but interest in easement does not arise until use becomes necessary; easement may lie dormant through several transfers of title and be exercised at any time by titleholder).

Degree of necessity required, Comment d. Glenn, Implied Easements in the North Carolina Courts: An Essay on the Meaning of "Necessary," *58 No. Car. L. Rev. 223, 235-36 (1980),* points out that the degree of necessity required to establish a servitude by necessity, without proof of prior use, is greater than that required to establish a servitude based on prior use. He suggests using "important" as the standard for a servitude based on prior use, reserving "necessary" for the servitude based purely on necessity. The position that disproportionate effort or expense justify a finding that a servitude is necessary is the same as that taken in Section 476, Comment *g*, of the first Restatement.

King v. Westbrook, 358 So.2d 727 (Ala.1978) (no easement by necessity existed to use drive on neighbor's property for access to rear of lot where property fronted on public street).

Pipkin v. Der Torosian, 35 Cal. App.3d 722, 111 Cal.Rptr. 46 (1973) (there is no necessity if there is access by a prescriptive easement over other property).

Leonard v. Haydon, 110 Cal.App.3d 263, 167 Cal.Rptr. 789 (1980) (no error in instructing jury to consider evidence of cost of constructing alternate drive in determining whether easement was necessary).

Noll v. Plosky, 484 So.2d 1345 (Fla. Dist.Ct.App.1986) (availability of permissive user over other property for access does not obviate necessity for access easement; necessity exists if there is no legal right of access by other means).

Burley Brick & Sand Co. v. Cofer, 102 Idaho 333, 629 P.2d 1166 (1981) (grantee received easement by necessity to reach landlocked tract over existing road; even if grantee had been given license to use the road, there is still necessity that gives rise to an easement).

Cordwell v. Smith, 105 Idaho 71, 665 P.2d 1081, 1089 (Ct.App.1983) (existence of alternate longer route providing reasonable access to the property justified finding that there was no way by necessity).

Tusson v. Hero Land Co., 446 So.2d 346 (La.Ct.App.1984), writ denied, *449 So.2d 1359 (La.1984)* (parcel was not landlocked where access could be had by bridging a canal).

Amodeo v. Francis, 681 A.2d 462 (Me.1996) (no easement by necessity may be determined to exist benefiting a water-bounded property absent evidence that access via the boundary water is unavailable for all practical purposes).

Morrell v. Rice, 622 A.2d 1156 (Me. 1993) (access to the sea across a tidal flat that recedes 1,000 yards at low tide and freezes in winter is not available for all practical purposes; easement by necessity properly established).

Broadhead v. Terpening, 611 So.2d 949 (Miss.1992) (availability of statutory way by necessity does not prevent establishment of common-law easement by necessity).

Kelly v. Burlington Northern R.R., 927 P.2d 4 (Mont.1996) (strict necessity is lack of practical access to a public road for ingress and egress; necessity existed where property was surrounded on three sides by rugged mountain terrain separated from public road by railroad right of way).

Jackson v. Nash, 866 P.2d 262 (Nev.1993) (standard of reasonable necessity adopted; basis for implication is intent of the parties; relative value of parcels is relevant in determining probable intent of the parties and whether expense of creating the way is reasonable).

Griffeth v. Eid, 573 N.W.2d 829 (N.Dak.1998) (claimant bears burden of establishing that alternate access is not available and practicable over other property; claimant failed to show that offered easement for $ 1,500 over other property owned by claimed servient owner would not provide reasonable access or that price was unreasonable).

Davis v. Henning, 462 S.E.2d 106 (Va.1995) (necessity existed even though landlocked parcel was leased to owner of adjacent parcel that abutted public road; lessor's right to inspect does not include right to cross lessee's other property and lessee's access does not serve lessor's residual interests that will require ingress and egress).

Middleton v. Johnston, 221 Va. 797, 273 S.E.2d 800 (1981) (claimant of easement by necessity must prove lack of other access by clear and convincing evidence).

Berkeley Dev. Corp. v. Hunter, 159 W.Va. 844, 229 S.E.2d 732 (1976) (where evidence supported finding of both easement by necessity and easement by prescription, owner of dominant tract was entitled to the easement by necessity).

Degree of Necessity Required: Strict Necessity

Bob Daniels & Sons v. Weaver, 106 Idaho 535, 681 P.2d 1010 (Ct.App. 1984) ("Great present necessity" required to establish easement by necessity); but see *MacCaskill v. Ebbert, 112 Idaho 1115, 739 P.2d 414 (Ct.App.1987)* (physical impassability establishes great present necessity even though part of tract abuts public road).

A right of way from necessity cannot exist in the absence of strict necessity. As a result of a conveyance by a common owner, one parcel must be completely landlocked. *Horowitz v. Noble, 79 Cal.App.3d 120, 130, 144 Cal.Rptr. 710, 718 (1978); Pipkin v. Der Torosian, 35 Cal.App.3d 722, 111 Cal.Rptr. 46 (1973).*

In *Justus v. Dotson, 168 W.Va. 320, 285 S.E.2d 129 (1981),* the court stated that necessity means there is no other reasonable means of access. Although it recognized that a road could be so bad as to be deemed an unreasonable means of access, it held that a road that was impassible only three to four times per year was not unreasonable in a rural area, particularly since the problem could probably be alleviated by drain pipe.

Degree of Necessity Required: Reasonable Necessity or Less Than Absolute

In *Broyhill v. Coppage, 79 N.C.App. 221, 339 S.E.2d 32 (1986),* the court held that the grantee acquired a way by necessity over one existing road even though there was another existing road because the other was sometimes impassable. The court stated that absolute necessity is not required, and that a way by necessity can arise even if other very inconvenient access exists.

Jowers v. Hornsby, 292 S.C. 549, 357 S.E.2d 710 (1987) (implied easement by necessity requires reasonable necessity, which is less than absolute necessity, and more than mere inconvenience).

In *Schwob v. Green, 215 N.W.2d 240 (Iowa 1974),* the court refused to imply an easement by necessity to make a substantially heavier use of a road in existence on the grantor's land at time of severance than the use contemplated at time of grant. The court ruled that no real necessity was shown, only inconvenience, where the property was bordered on two sides by public roads, even though it would be inconvenient and expensive to provide access to the public roads through his own land.

Liles v. Wedding, 733 P.2d 952 (Or. Ct.App.1987) (existence of access to one part of tract does not preclude finding easement by necessity for another part separated by a natural obstacle; owner may require separate points of access to parcels on either side of the obstacle to obtain access to entire tract and put it to its intended use).

Witten v. Murphy, 71 Or.App. 511, 692 P.2d 715 (Ct.App.1984) (permissive user of other access under oral license did not preclude land owner from seeking statutory way by necessity).

Hitchman v. Hudson, 40 Or.App. 59, 594 P.2d 851 (1979) (easement by necessity acquired for access to use a 50-foot strip serving as a combined taxiway and road laid out through two plats developed by the common grantor;

necessity existed where the only alternate access required either spanning a gully 20 feet deep and 50 feet wide, or purchasing an easement over land of a third party).

Illustration 11 is based on *Miller v. Schmitz, 80 Ill.App.3d 911, 400 N.E.2d 488 (1980),* which held that land bisected by a creek leaving half of it landlocked is entitled to an easement by necessity across land originally owned by a common grantor because the cost of a bridge would outweigh the benefits of farming the landlocked parcel. Absolute necessity is not required; the easement need only be highly convenient and beneficial.

Beeson v. Phillips, 41 Wash. App. 183, 702 P.2d 1244 (1985) (access to lower part of land did not preclude grant of statutory way of necessity to upper part of land that was isolated by steep cliffs from lower part when cost of building road up cliffs was prohibitive).

Illustration 13 is based on *Attaway v. Davis, 707 S.W.2d 302, 303 (Ark. 1986)* (even though easement-by-necessity statute, adopted in 1871, refers to access to public road or navigable water course, land owner fronting on navigable lake is entitled to road access: "Now that travel even for short distances is almost always by motor vehicle, it is not reasonable to require appellee and those wishing to visit her to make the trip by boat.")

Hancock v. Henderson, 236 Md. 98, 202 A.2d 599 (1964) (modern view is that a way of necessity for land access may exist, even though property abuts a waterway, if the water route is not available or suitable to meet the requirements of uses to which the property would reasonably be put).

In *State v. Deal, 191 Or. 661, 233 P.2d 242, 250 (1951),* the court implied an easement for land access, stating: "In this case we think it would be highly unreasonable to say that the owners of what is now Parcel No. 1 were precluded from acquiring a way of necessity over the railroad right of way because they might have been able to reach their property by putting a small boat through the surf on the Oregon coast--an undertaking at all times perilous, and at some suicidal."

In *Cale v. Wanamaker, 121 N.J.Super. 142, 296 A.2d 329, 333 (Ch.Div. 1972),* the court said: "Although some courts have held that access to a piece of property by navigable waters negates the 'necessity' required for a way of necessity, the trend since the 1920's has been toward a more liberal attitude in allowing easements despite access by water, reflecting a recognition that most people today think in terms of 'driving' rather than 'rowing' to work or home... Paren-thetically, it should be noted here that no evidence appears to indicate that access by boat over water would be reasonable or practicable."

In Redman v. Kidwell, 180 So.2d 682, 684 (Fla.Dist.Ct.App.1965), the court said: "For centuries rivers, lakes, seas and oceans provided the principal means of transportation. Land accessible to such bodies of water developed more rapidly and substantially than did lands without such advantages. However, with the development of efficient means of overland transportation by railroad and more recently by the automobile and our great system of roads and highways, means of ingress and egress by water have become less and less necessary and desirable. In applying common law principles to present day problems we must take into account changing conditions to the extent that today access to a parcel of land by boat over water, although reasonable and practicable a century ago, is not so today." A common-law way of necessity will be recognized if necessary for the reasonable, practicable, convenient, and comfortable enjoyment of the property.

Parker v. Putney, 492 S.E.2d 159 (Va.1997) (river access not sufficient where weather and tidal conditions make river travel hazardous during duck-hunting season and nearest public-access point to river is 7 miles distant; river is more like limited-access highway than public road).

Degree of Necessity Required: No Necessity Found

Webster v. Magleby, 98 Idaho 326, 563 P.2d 50 (1977) (no necessity established where claimant's land is divided by a swamp, but evidence showed that cattle can be moved between the parts over public roads, even though the way is longer and less convenient than going over other land of the common grantor, and that the swamp is not entirely impassable).

Peasley v. State, 102 Misc.2d 982, 424 N.Y.S.2d 995 (Ct.Cl.1980) (no easement by necessity where navigable body of water provided access to property).

McQuinn v. Tantalo, 41 A.D.2d 575, 339 N.Y.S.2d 541, 542 (1973) (no way of necessity where lots have access by navigable water; simultaneous conveyance of lots by common grantor also precludes finding way of necessity "since to do so would require the declaring of the way across the land of a stranger.")

Medina v. State, 354 So.2d 779 (Miss.1977) (no easement by necessity where property abutted on public road).

Contrary intent, Comment e. In Jones v. Weiss, 570 P.2d 948, 949 (Okla.1977), a tract landlocked by a conveyance out of probate was later sold for taxes to plaintiff, who sued for a way of necessity. The court rejected an argument that the intent of the parties to create a right of way by necessity must clearly appear from the transaction itself: "... where the conveyor of land retained a landlocked portion, the law implies that a way of necessity was intended, unless contrary intent is inescapably manifested. The intent to create the easement is thus deemed to be shown by the type of transaction involved, and no other evidence is necessary to establish the intent of the parties to create a way of necessity."

Miller v. Stovall, 717 P.2d 798 (Wyo.1986) (failure of claimed oral grant of access easement did not prevent finding easement by necessity to landlocked parcel).

White v. Landerdahl, 625 P.2d 1145 (Mont.1981), held that no easement of necessity would be implied to reach the seller's parcel left landlocked by the conveyance where the parties expressly negotiated over the question of an easement, and the purchaser was adamant that it wanted privacy and no easements over the land if it purchased.

Hewitt v. Meaney, 181 Cal.App.3d 361, 226 Cal.Rptr. 349 (1986), held that the evidence justified a finding that no easement was intended because the physical terrain was so difficult that no one would have contemplated access over the grantor's retained parcel in 1936, the date of severance. The court stated that an easement by necessity is based on the **presumed** intent of the grantor at the time of severance. There is a **presumption** in favor of the easement, which places the burden of proof on the person denying existence of the easement.

Luthy v. Keehner, 90 Ill.App.3d 127, 412 N.E.2d 1091 (1980), held that summary judgment establishing an easement by necessity should not have been granted because a material issue as to the remote grantee's intent was raised by testimony that, at the time of the conveyance landlocking the parcel, he stated that he did not want a right of way, and that he wanted the land "to go the birds and bees."

Jackson v. Nash, 866 P.2d 262 (Nev.1993) (no easement intended where evidence established that grantor was experienced land developer and regarded landlocked parcel as worthless).

Bradley v. Patterson, 121 N.H. 802, 435 A.2d 129 (1981), sustained the trial court's finding that the parties did not intend to create an easement by necessity at the time of severance. The evidence of intent not to create an easement included evidence that, at the time of the severance, the owners of the landlocked parcel gained access over land of third parties, no claim of easement was made until 1980, even though the severance occurred in 1917, and access over the defendant's land was difficult because there was a mountain in the way.

Mougey Farms v. Kaspari, 579 N.W.2d 583 (N.D.1998) (no commonlaw easement by necessity found; intent to create easement by necessity for access to river for use of water right negated by terms of express easement providing it would terminate when grantee no longer leased servient estate; statutory easement by necessity might be available).

Traders, Inc. v. Bartholomew, 142 Vt. 486, 459 A.2d 974 (1983), held that severance by mortgage foreclosure, which landlocked one parcel, created an easement by necessity, even though the mortgagor probably did not intend to create an easement.

In *Shive v. Schaefer, 137 Ill.App.3d 13, 484 N.E.2d 394, 396 (1985),* the court refused to grant an easement by necessity where the plaintiff, who was the developer, had caused the landlocking problem. The court said: "... plaintiff's irresponsible action created his own necessity, and Schaefer [one of plaintiff's grantees] should not be deprived of the full use and enjoyment of his property... We find no case when such an easement has been found in favor of an owner of a large tract who voluntarily conveys all means of access to his retained land."

Gulotta v. Triano, 125 Ariz. 144, 608 P.2d 81 (Ct.App.1980) (plaintiff not entitled to seek statutory easement by necessity where plaintiff had voluntarily terminated other access rights to the land).

Statutes in many states provide for creation of easements by necessity. Often these statutes exist alongside the common-law easement by necessity, supplementing the common-law easement by creating rights to easements against land that was never held in common ownership.

Childers v. Quartz Creek Land Co., 946 P.2d 534 (Colo.Ct.App.1997) (private way of necessity not limited to property used for agricultural, mining, milling, domestic, or sanitary purposes only; statute of limitations does not apply to bar statutory action for private condemnation of way of necessity).

Mersac, Inc. v. National Hills Condominium Ass'n, Inc., 480 S.E.2d 16 (Ga.1997) (court may deny condemnation of statutory way of necessity if "otherwise unreasonable"; developer that fails to reserve easement to access undeveloped parcel is not entitled to private way of necessity).

Fordham v. Bateman, 204 S.E.2d 494 (Ga.Ct.App.1974) (existence of access easement for farm trucks and automobiles of maximum capacity of two tons and farm machinery of the type necessary to cultivation and harvesting of crops on grantor's adjacent land did not prevent dominant owner from acquiring statutory way of necessity to provide access for other vehicles; necessity is in manner of use; without additional easement, property could not be developed for any purpose other than agriculture).

Mougey Farms v. Kaspari, 579 N.W.2d 583 (N.D.1998) (irrigation of farmlands by person holding water permit issued by State Engineer is public use within meaning of statute authorizing any person to use eminent domain to acquire for public use rights necessary for application of water to beneficial uses).

Franks v. Tyler, 531 P.2d 1067 (Okla.Ct.App.1974) (statutory way of necessity does not require prior common ownership of dominant and servient estates).

In Wyoming, the statutory way of necessity has displaced the commonlaw easement by necessity. *Ferguson Ranch, Inc. v. Murray, 811 P.2d 287 (Wyo.1991).*

CROSS REFERENCES: Cross-References:

Section 4.3, Duration of a Servitude; § 4.8, Location, Relocation, and Dimensions of a Servitude; § 7.14, Extinguishment of Servitude Benefits Under Recording Act; § 7.15, Servitudes Not Terminable by Marketable Title Acts.

STATUTORY NOTE

(All statutory citations are to WESTLAW, as of April 1, 1999)

The following statutes provide for the acquisition of servitudes by necessity:

Alabama: Ala. Code § 18-3-1

Alaska: Stat. § 38.05.820 (tidelands)

Arizona: Ariz. Rev. Stat. Ann. § § 12-1201, -1202

Arkansas: Ark. Stat. Ann. § § 27-66-401, -403

California: Cal. Civ. Code § 1001 (easements for utility services only; utility means water, gas, electric, drainage, sewer, telephone); § 1245.325 (owner must establish (1) there is great necessity; (2) the location affords the most reasonable service to the property consistent with the least damage to the burdened property; and (3) the hardship if the taking is not permitted clearly outweighs any hardship to the owner of the burdened property).

Colorado: Colo. Rev. Stat. § 38-1-101

Colo. Rev. Stat. § § 38-4-102 to -104 (tunnel companies, pipeline companies, electric-power companies, tramway companies, and common carriers)

Florida: Fla. Stat. Ann § § 704.01-.04

Hawaii: Haw. Rev. Stat. § 7-1

Indiana: Ind. Code Ann. § 32-5-3-1

Iowa: Iowa Code Ann. § 6A.4

Kansas: Kan. Stat. Ann. § 68-117

Louisiana: La. Civ. Code Ann. art. 689-696

Massachusetts: Mass. Gen. Laws Ann. ch. 185, § 53

Maine: Me. Rev. Stat. Ann. tit. 33, § 460

Missouri: Mo. Ann. Stat. § 228.340; § § 228.350-.450; Mo. Const. art. 1, § 28

Montana: Mont. Code Ann. § § 70-30-102 to -107

North Carolina: N.C. Gen. Stat. § 40A-3 (petroleum, coal, gas, minerals, water supply for schools, bus stations, railroad)

New Mexico: N.M. Stat. Ann. § § 65-4-8, -9 (pipeline)

New York: N.Y. Real Prop Law § 335-a

Nevada: Nev. Rev. Stat. § § 536.060--.090 (irrigation)

North Dakota: N.D. Cent. Code § 61-01-04 (rights necessary for application of water to beneficial uses).

Oklahoma: Okla. Stat. Ann. tit. 27, § 6

Oregon: Or. Rev. Stat. § § 376.150--.200

South Dakota: S.D. Codified Laws Ann. § § 31-22-1 to -8

Tennessee: Tenn. Code Ann. § § 54-14-101 to -117

Texas: Tex. Water Code Ann. § § 11.033-.035 (water)

Washington: Wash. Rev. Code Ann. § 8.20.070; § § 8.24.010-.030

Wyoming: Wyo. Stat. § 1-26-815, § 24-9-101 (authorized businesses)