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Supreme Court of Pennsylvania
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FILE

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Suite and Sauer, P.C.
123 Pepper Street
Madison, Pennsylvania 19998
(999) 999-9999

Memorandum

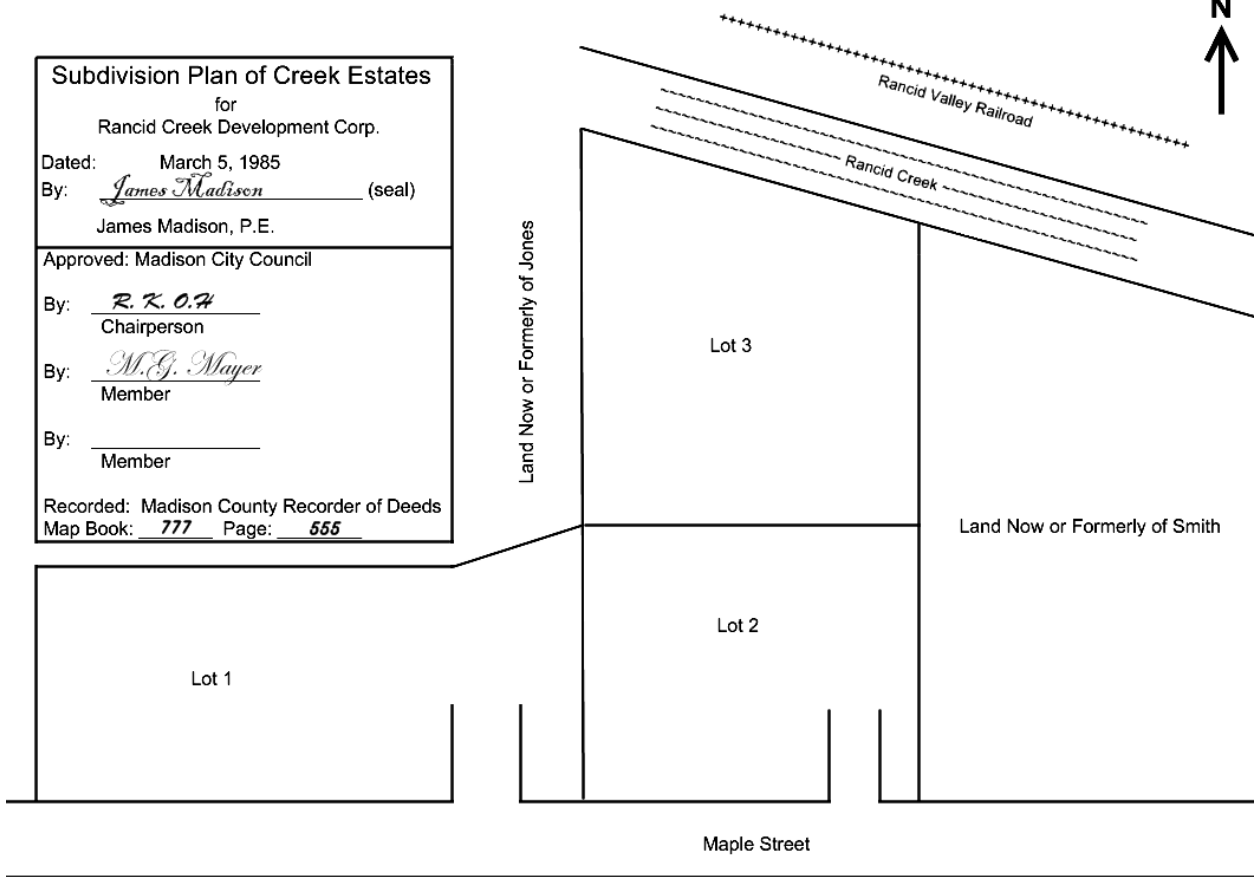
Date: February 23, 2010
To: Applicant
From: Steven Sauer
Re: Bridge Access Problem

Our clients, Mr. and Mrs. Benjamin F. Bridge, have recently purchased a plot of land known as Lot 3, Creek Estates, in Madison, Pennsylvania, at a judicial tax sale. When they attempted to gain access to their new property from Maple Street by going through Lot 2 which is located between Maple Street and the Bridge's property, they found that there was an electrically operated iron gate across the front of the driveway on Lot 2. All attempts to persuade Mr. and Mrs. Eastwood, the owners of Lot 2, to allow them access have been unsuccessful. The Bridges provided me with a letter they recently received from the Eastwoods concerning their request to access the Eastwood's property and with a copy of the subdivision plan (attached) which shows the location of the properties in question.

The Bridges have asked our firm whether they should file suit to require the Eastwoods to allow them access through Lot 2. In my initial meeting with the Bridges based on some preliminary research, I identified the theories of easement by necessity and easement by implication as possible bases on which to bring suit. The Bridges requested an opinion whether either of these theories would support filing suit against the Eastwoods. Please prepare a reasoned opinion letter of counsel for my signature addressed to the Bridges discussing the likelihood of success of each of the theories that I identified.

You should follow our firm's format and guidelines for preparing opinion letters of counsel, which are set forth in a memorandum in the File. The File and Library which are provided contain the only facts and legal principles you should consider and rely upon in completing this assignment. In the attached File, you will find a memorandum of facts from our investigator, as well as certain documents he has obtained.

Subdivision Plan of Creek Estates
 for
 Rancid Creek Development Corp.
 Dated: March 5, 1985
 By: James Madison (seal)
 James Madison, P.E.
 Approved: Madison City Council
 By: R. K. O'H
 Chairperson
 By: M. G. Mayer
 Member
 By: _____
 Member
 Recorded: Madison County Recorder of Deeds
 Map Book: 777 Page: 555



Suite & Sauer, P.C.

Date: January 4, 1995

To: All Associates

Re: Guidelines and Format for Preparation of Opinion Letters of Counsel

All associates should use the following guidelines when preparing opinion letters for clients of Suite & Sauer.

1. The opinion letter should be in formal letter format, dated and addressed to the client(s), but should not contain a letterhead or inside address which your assistant will add. The letter should have a short subject line.
2. Use an appropriate salutation and closing to begin and end the letter. Do not sign your name.
3. At the beginning of the opinion letter, clearly identify and restate the question(s) raised. “You have asked for an opinion regarding . . .” is an example of an appropriate way to begin the body of the letter and introduce the client’s question(s).
4. Briefly state your conclusion(s) to the question(s) raised by the client. Words such as “probably”, “possibly” and “not likely” may be used to qualify your conclusion if the outcome is less than certain.
5. Following your conclusion(s) to the question(s) raised, provide an analysis of the issues raised by the question(s), showing how the relevant authorities as applied to the facts lead to your conclusions. Cite the legal authorities relied upon using a short form of citation (Blue Book format is not required). If there are facts and/or legal principles relevant to any point or element in your analysis which could be argued to support a different conclusion, identify and discuss those principles/facts.
6. If more than one question has been raised, state your conclusion and analysis for each question independently. State the conclusion and analysis for the first question before you address the next question. You should separate the discussions by short, underlined headings of no more than three to six words that relate to the issue being addressed.
7. If you are asked to provide a recommendation regarding the possible settlement of a claim, your recommendation should be based on an assessment of the client’s likelihood of success in asserting or defending the claim, the potential damages that could be awarded, the potential for future liability if the claim succeeds, and the client’s interests in settling the claim. If settlement is recommended, the terms of the recommended settlement should be set forth.
8. The opinion letter should be straightforward, logical, and in language that a layperson can understand.
9. Any specific instructions provided by a managing partner in a particular case should be incorporated in your opinion letter.

January 10, 2010

Mr. and Mrs. Benjamin Bridge
Lot 3, Creek Estates
Madison, Pennsylvania 19999

Dear Mr. and Mrs. Bridge:

This letter is in response to your repeated requests to use our property to access your property from Maple Street. As we have consistently advised you, we have no intention of permitting this use.

When we purchased Lot 2 in 1987, we were aware that Rancid Creek Development Corp. was using our property to access Maple Street. We did not object at that time because we had not yet built our house on Lot 2 and were not using the property. However, we never intended this use to become permanent. The company's use of our property had ceased by the time we began construction of our home, so this did not become an issue.

We are environmentally conscious and wish to keep Lot 3 undeveloped and in its natural state, considering it to be a bird and wildlife sanctuary. We have installed the electronic gate on our property in order to keep unwanted individuals from using our property to access Lot 3. We do not intend to give you permission to use our property to obtain access to Lot 3, and any attempt to do so will be considered to be a trespass for which we will take appropriate legal action.

Sincerely,

Charles Eastwood

Suite and Sauer, P.C.
123 Pepper Street
Madison, Pennsylvania 19998
(999) 999-9999

Memorandum

Date: February 22, 2010
To: Steven Sauer
From: Michael Hammer, Investigator
Re: Bridge Access Problem

You have asked me to investigate the history of Lot 3 of Creek Estates. Here is what I discovered.

Lot 3 was once a part of a larger tract owned by the Rancid Creek Development Corp. In 1985, Rancid Creek Development Corp. subdivided the property into three lots known as Creek Estates. A copy of the subdivision plan has previously been provided to you by the Bridges.

After the subdivision plan was approved, Rancid Creek Development Corp. began to sell the lots. It sold Lot 1 to a Mr. and Mrs. Streep and Lot 2 to a Mr. and Mrs. Eastwood. The deed did not reserve or refer to any easement for access to Lot 3. Reasonable consideration was paid in purchasing each lot. Rancid Creek Development Corp. was unable to sell Lot 3.

Lot 3 is bordered on its north by Rancid Creek. Rancid Creek is a navigable stream with a channel that is regularly maintained by the Army Corps of Engineers. A number of lots abutting Rancid Creek have docks for boats as large as thirty feet in length. There is a public marina with access to Oak Street located approximately one mile downstream from Lot 3.

When the real estate market began to collapse in 2006, Rancid Creek Development Corp. stopped paying the taxes levied against Lot 3, and it was recently sold at tax sale to Mr. and Mrs. Bridge. The deed resulting from the tax sale did not refer to any access easement.

I talked to the president of Rancid Creek Development Corp. who provided the information contained in the attached affidavit. I also talked to Mr. and Mrs. Smith who own the adjoining property located east of Lots 2 and 3 and who provided the information found in the attached affidavit.

Finally, I spoke to the City Director of Public Safety who expressed concern regarding the difficulty in providing police and fire services to Lot 3 if it were occupied. The Postmaster at the Madison Post Office raised a question about the practicality of mail delivery to Lot 3, although he did state that the Bridges could rent a box at the Post Office as many residents do, install a mail box on a post in the right-of-way of Maple Street, or rent a mail box at the marina.

AFFIDAVIT OF RONALD RANCID

COMMONWEALTH OF PENNSYLVANIA:

COUNTY OF MADISON:

Ronald Rancid makes the following statements under penalty of perjury:

1. I am and have been since November 1983 president of Rancid Creek Development Corp.
2. For several years before Lot 2 was sold to the Eastwoods in 1987, Rancid Creek Development Corp. utilized Lot 3 to store construction equipment and supplies, gaining access over the area where the Eastwoods' driveway is now located. Equipment and supplies were moved on and off Lot 3 at frequent intervals, at least on a weekly and sometimes on a daily basis. In the several years following the sale of Lot 2 to the Eastwoods, Rancid Creek Development Corp. continued to move its equipment over Lot 2, although as time passed, the equipment was moved on a less frequent basis. As the years went by and Rancid Creek Development Corp. undertook projects further and further from Madison City, this use became less frequent and eventually stopped.
3. The foregoing is true and correct based on my personal knowledge.

Ronald Rancid

AFFIDAVIT OF JOHN AND JANE SMITH

COMMONWEALTH OF PENNSYLVANIA:

COUNTY OF MADISON:

John and Jane Smith make the following statements under penalty of perjury:

1. We have owned the land immediately to the East of the Creek Estates development since 1981.
2. Beginning in December, 1983, we witnessed the flow of Rancid Creek Development Corp.'s construction equipment across what is now Lot 2 for several years prior to the Eastwood's purchase of Lot 2.
3. Rancid Creek Development Corp. moved equipment to and from Maple Street to its construction yard by the bank of the creek on a frequent basis, at least weekly, and often on a daily basis.
4. As a result of this traffic, a definite dirt trail, approximately twenty feet wide came into existence by the time Lot 2 was purchased by the Eastwoods in July, 1987. The trail was never graded or paved. This trail was clearly visible from Maple Street and from our property. Several years after the Eastwoods purchased Lot 2, Rancid Creek Development Corp. stopped moving its equipment across Lot 2 and the vegetation returned to the area.
5. Sometime thereafter, the Eastwoods built a house on Lot 2, fenced in the lot, and installed a driveway at the bottom right corner of the lot, approximately where the bed of the trail had previously been located, with an electrically operated iron gate at its intersection with Maple Street.

The foregoing is true and correct based on personal knowledge.

John Smith

Jane Smith

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Supreme Court of Pennsylvania

Sam BUCCIARELLI, et al., Appellants

v.

Al DeLISA, Appellee

OPINION OF THE COURT

This is an appeal from an order of the Superior Court reversing an order of the Court of Common Pleas of Susquehanna County permanently enjoining appellee Al DeLisa from interfering with appellants Bucciarelli et al. in their use of an access road ("the cottage road") which traverses DeLisa's property.

The facts underlying this dispute are that in 1986 Maxine Keene conveyed a twenty-acre parcel of land on Lake Shawnee in Susquehanna County to her son, Raymond Keene. Mrs. Keene retained ownership of other land on the lake which she subdivided into four lots. These lots contained cottages which the Keene family had for some years rented out. In 1987, with the assistance of her son Raymond, Mrs. Keene submitted a subdivision plan to the county planning commission. This plan indicated that access to the four lots comprising the subdivision would be by an existing road which traversed the twenty acre tract which Mrs. Keene had conveyed to Raymond the year before. Upon approval of the subdivision plan, Mrs. Keene sold the four lots to appellant purchasers or their predecessors in title.

In 1988, Raymond Keene conveyed his twenty acre parcel to Al DeLisa. For some ten years before he purchased this parcel of land, DeLisa lived across the lake from and within sight of the Keene subdivision of four lots, and in order to get to his house, he drove over an access road which intersected the cottage road. Neither

Mrs. Keene's deed to Raymond nor Raymond's deed to DeLisa indicated that an easement was reserved.

Subsequently, DeLisa blocked the cottage road, which had been used by the appellants for access to their lakeside lots and this action followed.

The trial court held that DeLisa had constructive notice of the easement by way of the recorded subdivision plan The trial court also found that DeLisa had actual notice of the right-of-way. The trial court based its decision on the theory that the recorded subdivision plan created an easement by implication, but it noted that an easement by implication appears to have been created by severance of title as well.

The Superior Court rejected the notion that the subdivision plan placed DeLisa on constructive notice of the easement The Superior Court also held that the trial court had not made any findings which would support an easement by implication at severance of title when the land was conveyed from mother to son in 1986, and the court found insufficient evidence to support either the traditional or Restatement tests for easement by implication at severance of title. Further, the Superior Court found insufficient evidence concerning the use of the easement prior to the mother's conveyance of the parcel to her son, and insufficient evidence to permit an analysis of the factors concerning the creation of easements by implication.

We granted limited allocatur to address two questions: whether an easement by implication was created at the time of severance of title; and whether DeLisa had actual notice of the existence of a right-of-way over the property when he purchased

the property.

* * *

Although the Superior Court is correct that the Chancellor did not find facts specifically in support of the conclusion that an easement by implication at severance of title was created, the Chancellor did make findings as to what DeLisa knew about the Cottage Road before he purchased the property:

[T]his court concluded that the defendant had actual notice of the existence of the right-of-way. Photographic evidence presented at trial clearly demonstrated that the road in question is visible from the defendant's house. He has lived there for a number of years and must have seen vehicular traffic going to and from the cottages served by the road. His denials of such observations were not credible, as photographs demonstrated that the road is not merely some path through the woods. Rather, it is an unpaved private driveway through both woods and open fields, leading to four lake-side cottages, quite common in this rural area. Further, the photographs showed that the roadway has remained in the same condition since the 1970's. Accordingly, the court resolved the issues of credibility against the defendant.

Slip Op. at 3.

The importance of this finding is that it is one of several factors to consider in determining whether an implied easement was created:

The effect of the prior use as a circumstance in implying, upon a severance of possession by conveyance, an easement results from an inference as to the intention of the parties. To draw such an inference the prior use must have been known to the parties at the

time of the conveyance, or, at least, have been within the possibility of their knowledge at that time. Each party to a conveyance is bound not merely to what he intended, but also to what he might reasonably have foreseen the other party to the conveyance expected. Parties to a conveyance may, therefore, be assumed to intend the continuance of uses known to them which are in considerable degree necessary to the continued usefulness of the land. Also they will be assumed to know and to contemplate the continuance of reasonably necessary uses which have so altered the premises as to make them apparent upon reasonably prudent investigation....

Restatement of Property, § 476,
Comment j. (FN1)

The record supports the finding that DeLisa knew of the existence of the cottage road before he purchased the land. Further, examination of the record supports the chancellor's conclusion that this case involves an easement by implication at severance of title.

The traditional test for implied easement at severance of title is set out in *Burns Manufacturing v. Boehm*, 467 Pa. 307, 313-14, 356 A.2d 763, 767 (1976):

It has long been held in this Commonwealth that although the language of a granting clause does not contain an express reservation of an easement in favor of the grantor, such an interest may be reserved by implication, and this is so notwithstanding that the easement is not essential for the beneficial use of the property.... The circumstances which will give rise to an impliedly reserved easement have been concisely put by Chief Justice Horace Stern speaking for the Court in *Tosh*

v. Witts [381 Pa. 255, 113 A.2d 226 (1955)]:

"[W]here an owner of land subjects part of it to an open, visible, permanent and continuous servitude or easement in favor of another part and then aliens either, the purchaser takes subject to the burden or the benefit as the case may be, and this irrespective of whether or not the easement constituted a necessary right of way." Tosh v. Witts, supra, 381 Pa. at 258, 113 A.2d at 228.

(Citations omitted.) The Boehm court further stated:

Easements by implied reservation ... are based on the theory that continuous use of a permanent right-of-way gives rise to the implication that the parties intended that such use would continue, notwithstanding the absence of necessity for the use.

467 Pa. at 314 n. 4, 356 A.2d at 767 n. 4.

Beginning with Boehm's requirement of the parties' intent, it is clear in this case that the mother and son intended the easement to continue. Not only did Raymond Keene assist his mother in creating a subdivision plan which included access to the four lots by way of the cottage road, R.R. 125a-126a, but he allowed the owners of the lots to utilize the road while he owned the twenty acre parcel across which the road ran because he believed there was an easement for the cottage road. RR 123a. Moreover, Raymond Keene testified that he told DeLisa during negotiations for DeLisa to purchase the property that the cottage road was a right-of-way for access to the four lots on the lake. R.R. 130a. It is clear from the record that the grantor, Mrs. Keene, and the grantee, her son Raymond, agreed that the road leading to the four lots on the lake would remain an access road

even after the land was conveyed to Raymond.

Next, we turn to the requirements that an easement by implication at severance of title must be open, visible, permanent and continuous. Photographic evidence depicting the cottage road reveals that it is a one lane dirt road approximately twenty feet wide which has been in existence for at least twenty years, R.R. 151a, and which intersects an access road used daily by DeLisa to get to his home on the other side of the lake. Furthermore, photographic evidence depicting a view of the four lots and the cottage road from DeLisa's side of the lake reveals that the cottage road is highly visible from the side of the lake on which DeLisa's house is located. In fact, one witness, a neighbor whose house is located 200 feet from DeLisa's, testified that he could see the cottage road from his property and that there are no obstructions on DeLisa's land which would prevent him from seeing the road also. R.R. 154a. Thus, it is apparent that the requirements that the easement be open, visible and permanent have been met.

As to the requirement that the use be continuous, one witness testified that he had seen automobiles using the cottage road from 1985 through 1993 or 1994, R.R. 156a, and another witness stated that he used the road since 1976. R.R. 151a. DeLisa himself indicated that he had seen cars utilize the road over the last ten years to get to the cabins on the lake. R.R. 166a.

Powell on Real Property suggests:

The requirement that the quasi-easement must have been "permanent" or "continuous" simply means that the use involved shall not have been occasional, accidental or temporary. This means the use

shall have been of such a character as to enable the claimant to rely reasonably upon the continuance of such use.... It is submitted that ... any well-defined route should be held to satisfy the "permanent" or "continuous" prerequisite for implication.

4 Powell on Real Property § 34.08[2][c] (1996). We agree with this analysis of the continuousness requirement. The road here is well defined and permanent and the evidence is sufficient to support a finding of continuousness.

The requirements stated above have as their purpose the creation of a test to determine whether an easement was intended at severance and whether the person against whom the easement is asserted had notice, actual or constructive, that such an easement existed. In this case, the trial court found that DeLisa had actual notice and the record supports this finding. Additionally, the evidence supports a finding that the grantor, Mrs. Keene, intended to create an easement at severance of the title and that the grantee, her son, was aware of this intent and, after the conveyance, acted in accord with the existence of the easement.

Thus, since the evidence supports a finding of intention to create the easement and a finding that DeLisa purchased the land knowing of the existence of the easement, an easement by implication at severance was created and is binding against DeLisa.

Order of the Superior Court is reversed.

(FN1.) This court has never specifically adopted Restatement of Property § 476 and we decline to do so now, for § 476 is merely a list of frequently encountered considerations as to whether an easement by

implication at severance of title was created. Courts may, nevertheless, find the section useful and persuasive in analyzing cases like this.

Superior Court of Pennsylvania

Clyde A. PHILLIPPI and Roger L. Phillippi,
Appellants,

v.

Charles D. KNOTTER and Virginia
Knotter, Appellees

Appellants appeal from a final decree entered on May 12, 1999, in the Court of Common Pleas of Somerset County that denied appellants' post-trial motions and appellees' post-trial motion. Appellants sued for injunctive relief requesting the grant of an easement over the land of appellees. Appellees counterclaimed by denying the existence of an easement and claiming that appellants had been trespassing on their land. On October 23, 1998, the trial court denied appellants' request for permanent injunctive relief in the form of an easement across appellees' land. The trial court additionally found for appellees on their count of trespass against appellants and granted appellees a permanent injunction enjoining appellants from entering or otherwise interfering with the use of appellees' land. Appellants and appellees filed timely post-trial motions that were denied, and this appeal followed. Upon review, we affirm the final decree of the trial court.

* * *

An easement may be created 1) expressly; 2) by prescription; 3) by necessity; or 4) by implication. (citation omitted). Herein, appellants ask the following:

1. Does an easement by necessity exist in favor of the Appellants over land of the Appellees to provide access for the Appellants to their property when the Appellants' property and the Appellees' property were at one time one property which was divided by Appellees'

predecessor in title and thereby landlocked the Appellant's property?

* * *

3. Does an easement exist by implication in favor of the Appellants over the property of the Appellees?

* * *

The parties to the present case are the owners of two distinct parcels of land that at one time were a single parcel owned by O'Brien Coal Company. On August 19, 1910, O'Brien Coal Company conveyed in fee simple a section of this property one hundred feet in width to the Connellsville and State Line Railroad Company ("Railroad"). This conveyance to the Railroad bisected O'Brien Coal Company's remaining property into an eastern section and western section. However, access to both the eastern and western sections of the property was available via a public road.

On August 25, 1917, O'Brien Coal Company conveyed to E.J. O'Brien, who was the president of the coal company at the time, approximately 45 acres of O'Brien Coal Company's remaining land. This 45-acre tract consisted of approximately 40 acres of land immediately east of the Railroad's property and 5 acres of land immediately west of the Railroad's property. O'Brien Coal Company owned the remaining land to the south of this 45-acre parcel. A public road provided access to the western section of E.J. O'Brien's parcel. The record does not demonstrate how E.J. O'Brien accessed the section of his parcel that laid east of the Railroad's right-of-way. The deed that conveyed this parcel to E.J. O'Brien contains very specific language concerning the description of the property conveyed as well as descriptions of coal mining and timber rights. However, this

deed does not contain language creating an easement from the eastern section of E.J. O'Brien's parcel over the remaining land of O'Brien Coal Company to the public road.

E.J. O'Brien's parcel of land was taken by the Commissioners of Somerset County during the Great Depression due to E.J. O'Brien's failure to pay taxes. Eventually, appellants became the owners of the 45-acre tract once owned by E.J. O'Brien. The remaining land owned by O'Brien Coal Company that was situated to the south of E.J. O'Brien's parcel was also taken by the Commissioners of Somerset County during the Great Depression due to O'Brien Coal Company's failure to pay taxes. Eventually, appellees became the owners of this parcel of land once owned by O'Brien Coal Company.

Appellants' parcel of land remains bisected into an eastern and western section by the strip of land owned by the Railroad. A public road runs through the western section of appellants' parcel of land. Appellants claim that the eastern section of their parcel is landlocked. As a result of this allegation concerning the eastern portion of their property, appellants allege that either an easement by necessity or an easement by implication exists from the southern part of the eastern section of appellants' parcel through appellees' parcel to the public road. This alleged easement connects the eastern section of appellant's parcel to the public road that runs through the western section of appellants' parcel. Although appellants describe the alleged easement as an "access road", this description does not comport with the facts of record that depict this strip of land as an incline of a former tramway that was once used for mining and sporadic timber activities. Usage of this incline occurred only with the consent of appellees' predecessor in title and appellees.

After appellants became the owners of their current parcel, they asked appellees to fill in a ditch that obstructed the alleged easement and for permission to use the alleged easement in order to obtain firewood. Appellees filled in the ditch and allowed appellants to use the alleged easement. Subsequently, appellees revoked their permission when traffic upon the alleged easement increased and purportedly damaged this particular tract of land. In turn, a dispute between the parties concerning the alleged easement ensued and culminated into the present lawsuit.

First, we address appellant's claim that an easement by necessity exists over the property of appellees. Claiming the existence of an easement by necessity contemplates a situation in which a parcel of land is landlocked. (FN1) "It is a well-settled principle of law that, in the event property is conveyed and is so situated that access to it from the highway cannot be had except by passing over the remaining land of the grantor, then the grantee is entitled to a way of necessity over the lands of his grantor." (citations omitted). The three fundamental requirements for an easement by necessity to arise are the following:

- 1) The titles to the alleged dominant and servient properties must have been held by one person.

- 2) This unity of title must have been severed by a conveyance of one of the tracts.

- 3) The easement must be necessary in order for the owner of the dominant tenement to use his land, with the necessity existing both at the time of the severance of title and at the time of the exercise of the easement.

(citation omitted)

An easement by necessity is always of strict necessity. (citation omitted). An easement by necessity never exists as a mere matter of convenience. (citation omitted). As stated previously, "an easement by necessity is extinguished when the necessity from which it resulted ceases to exist." (citation omitted).

Herein, the evidence of record establishes that: (1) there was unity of title between the property of appellants and appellees; and (2) the unity of title was subsequently severed in 1917 when O'Brien Coal Company conveyed the property now owned by appellants to E.J. O'Brien. However, appellants failed to demonstrate the existence of necessity at the time of the original severance and presently.

The fact that O'Brien Coal Company conveyed only one parcel of land to E.J. O'Brien is the principal factor that guides our present analysis in determining the existence of an easement by necessity. From the time of the original severance to the present, the western portion of the land currently owned by appellants has been accessible from a public road. Therefore, the situation caused by the original severance was not that of strict necessity in which property was conveyed in such a way that access to it from a public road could not be had except by passing over the remaining land of the grantor. We believe the term "strict necessity" in this context requires that property be without any access to a public road. Allowing an individual to use the doctrine of easement by necessity to ensure that each portion of his or her singular property has access to a public road would be far too expansive for this intrusive doctrine. Consequently, we find that the trial court's conclusion that an easement by necessity does not exist is correct.

Next, we address appellants' argument that an easement by implication exists in favor of appellants over appellees' property. "An easement by implication can be found to exist where the intent of the parties is demonstrated by the terms of the grant, the property's surroundings and any other *res gestae* of the transaction." (citation omitted). Two different tests have been utilized in this Commonwealth to determine whether an easement has been created by implication: the traditional test and the Restatement of Property test. (citation omitted) The Pennsylvania Supreme Court defined the traditional test as follows:

It has long been held in this Commonwealth that although the language of a granting clause does not contain an express reservation of an easement in favor of the grantor, such an interest may be reserved by implication, and this is notwithstanding that the easement is not essential for the beneficial use of the property.... The circumstances which will give rise to an impliedly reserved easement have been concisely put by Chief Justice Horace Stern speaking for the Court in *Tosh v. Witts* [381 Pa. 255, 113 A.2d 226 (1955)]:

"[W]here an owner of land subjects part of it to an open, visible, permanent and continuous servitude or easement in favor of another part and then aliens either, the purchaser takes subject to the burden or the benefit as the case may be, and this irrespective of whether or not the easement constituted a necessary right of way." [Tosh, 113 A.2d at 228] (citations omitted).

Bucciarelli v. DeLisa, 547 Pa. 431, 437-438, 691 A.2d 446, 448-449 (1997) (citations omitted). Our Supreme Court further stated:

Easements by implied reservation ... are based on the theory that continuous use of a

permanent right-of-way gives rise to the implication that the parties intended that such use would continue, notwithstanding the absence of necessity for the use.

Id., 691 A.2d at 449 (citation omitted).

The Restatement of Property test "emphasizes a balancing approach, designed to ascertain the actual or implied intention of the parties." (citation omitted). "No single factor under the Restatement approach is dispositive." (citation omitted). Section 476 of the Restatement of Property designates the following factors as important in determining whether an easement by implication exists:

- (a) whether the claimant is the conveyor or the conveyee,
- (b) the terms of the conveyance,
- (c) the consideration given for it,
- (d) whether the claim is made against a simultaneous conveyance,
- (e) the extent of necessity of the easement to the claimant,
- (f) whether reciprocal benefits result to the conveyor and the conveyee,
- (g) the manner on which the land was used prior to its conveyance, and
- (h) the extent to which the manner of prior use was or might have been known to the parties.

(citation omitted). In addition, this court has noted that "[t]he extent to which an easement is necessary under the circumstances is a factor heavily weighed in determining whether an easement should be

implied." (citation omitted).

An easement by implication could have arisen only at the time at which ownership of the two parcels in question first became separated. (citation omitted). Thus, the primary focus under either of the two tests is on the time of the original severance of the property which was originally owned by O'Brien Coal Company. Herein, a review of the facts under either the traditional or Restatement test demonstrates that appellants are not entitled to an easement by implication even with the relaxed burden of proof demanded when dealing with a right of ancient origin too remote to be capable of direct proof.

Under the traditional test, appellants failed to demonstrate the existence of an easement by implication. The traditional test requires appellants to prove that at the time of the original severance, there was an open, visible, continuous and permanent use of the alleged easement. . . . Regarding the question of use, we agree with the trial court's conclusion that there was not enough evidence to show open, visible, continuous and permanent use of the alleged easement at the time O'Brien Coal Company conveyed the parcel to E.J. O'Brien. Although there was testimony that appellees allowed previous owners of appellants' parcel to use the alleged easement for various mining and timber activities, this usage was temporary and ceased after the activities were completed.

Under the more flexible balancing approach of the Restatement of Property, appellants also failed to show that an easement by implication arose as a result of the conveyance from O'Brien Coal Company to E.J. O'Brien. Applying the factors set forth by the Restatement of Property, we note the following: (1)

appellants are neither the conveyors nor conveyees; (2) the conveyance did not grant E.J. O'Brien an easement over the property of O'Brien Coal Company; (3) the consideration recited in the conveyance is "the sum of one dollar and other valuable consideration"; (4) the present claim is not made against a simultaneous conveyance. In addition, we note that there is not enough evidence to suggest the existence of necessity for the easement at the time of the original conveyance and whether reciprocal benefits resulted to O'Brien Coal Company and E.J. O'Brien. Furthermore, other than coal mining and timbering, it was not possible to determine the manner in which the land was used prior to the conveyance from O'Brien Coal Company to E.J. O'Brien. In balancing the aforesaid factors, we find that the trial court correctly determined that no easement by implication arose as a result of the conveyance from O'Brien Coal Company to E.J. O'Brien.

Since we find that neither an easement by necessity nor an easement by implication exists over appellees' parcel for the benefit of appellants, appellants' argument concerning the issuance of an injunction to prevent appellees from interfering with appellants' use of the alleged easement is moot. Therefore, we decline to address the merits of this argument.

For the foregoing reasons, we affirm the final decree of the trial court.

Final decree affirmed.

(FN1.) Black's Law Dictionary (7th edition 1999), at 883, defines "landlocked" as "[s]urrounded by land, often with the suggestion that there is little or no way to get in or out without crossing the land of another."

Statutes

33 U.S.C.A. Section 558c

The Secretary of the Army is authorized and empowered, under such terms and conditions as are deemed advisable by him, to grant easements for rights-of-way for public roads and streets on and across lands acquired by the United States for river and harbor and flood control improvements including, whenever necessary, the privilege of occupying so much of said lands as may be necessary for the piers, abutments, and other portions of a bridge structure.

43 U.S.C.A. Section 931

All navigable rivers . . . shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both.

43 U.S.C.A. Section 951

Rights of way for ditches, canals, or reservoirs heretofore or hereafter approved . . . may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation or drainage.

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Instructions

The performance test is designed to test an applicant's ability to perform the legal task that has been assigned using the factual information contained in the File and legal principles that are provided in the Library.

The File contains the only factual information that you should consider in performing the assigned task. The task to be completed is set forth in the first document in the File in the form of a memorandum to the applicant. The Library contains the only legal principles that you should consider to complete the assigned task. Although your general knowledge of the law may provide some background for analyzing the problem, the factual information contained in the File and the legal principles contained in the Library are the only materials that you should use in formulating your answer to the assigned task.

Your response should be written in the answer book that has been provided. Be sure to allow sufficient time for reading the materials, organizing your answer and completing the task assigned. Your answer should demonstrate an understanding of the relevant facts, recognition of the issues and the applicable principles of law and the reasoning that supports your answer. Your grade will be based on the content of your response and your ability to follow instructions in performing the assigned task.

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