

EASEMENTS 101

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An easement is a means by which a landowner grants another person the right to use the landowner's property for a specific purpose. The land on which the easement is granted is referred to as the "servient estate," and the land the easement benefits is referred to as the "dominant estate." For example, if Amy granted Brett an easement to cross her land to reach his own property, Amy's land would be the servient estate and Brett's would be the dominant estate.

An easement does not convey ownership of the property itself but instead conveys the right to do what is expressly granted and any rights reasonably necessary thereto. Generally, unless otherwise modified by the parties, the person to whom an easement is granted owes a duty to exhibit ordinary care in using the easement and a duty to maintain the easement. The party who granted the easement owes a duty to not interfere with the dominant estate holder's use of the easement.

Generally, there are two categories of easements: express and implied.

EXPRESS EASEMENTS

An express easement is affirmatively granted by the servient estate owner. The terms of this easement are governed by the language creating the easement, rather than by the actions of the parties.

Landowners granting an express easement should be careful in the exact wording included in the granting document, as this could greatly impact the rights of both the dominant and servient estates. For example, in one Texas case, the servient estate owners granted an easement deemed a "ranch road" and tried to

limit use when the dominant estate owners built a development on their property and allowed residents to utilize the roadway (*Boerschig v. Southwestern Holdings*, 2010). The court held that merely using the term "ranch road" without offering a more detailed limitation was insufficient to limit the use of the road. It is advisable to work with an attorney familiar with these issues to ensure the easement reflects the intent of the parties.

Importantly, express easements should always be reduced to writing, and in order for them to be enforceable against third parties, such as new owners of one of the properties at issue, they should be recorded in the county deed records.



IMPLIED EASEMENTS

An implied easement is an easement created not by express grant but is instead one implied by law when certain conditions are satisfied. In this situation, the landowner of a servient estate does not have to agree to give an easement.

Instead, the law will imply an easement exists. In order to obtain an implied easement, the party seeking the easement is required to go to court, prove each of the required elements for the type of implied easement sought, obtain a court order granting the easement, and

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file the court order in the county deed records. As noted above, express easements are always recommended, given the ability to avoid the expense, time, and uncertainty of the process to obtain an implied easement. The various types of implied easements include easements by necessity, prior use easements, easements by prescription, and easements by estoppel.

Easement by necessity. An easement by necessity arises when a grantor either conveys or retains a parcel of land and fails to expressly provide for a means of access. In this situation, courts have made an assumption that the initial landowner had intended to do so and will imply an access easement. For example, assume Amy owned 100 acres and offered to sell the back 50 acres, which had no other means of access, to Brett. This is the type of scenario in which a court would likely conclude an easement by necessity should be implied.

In order to establish an easement by necessity to cross another's property, the party seeking the easement must prove: (1) unity of ownership of the alleged dominant and servient estates prior to severance (in other words, the landlocked property and tract across which access is sought must have, at one time, been owned by the same person); (2) the claimed access is a necessity, not a mere convenience; and (3) the necessity existed at the time the two estates were severed (*Hamrick v. Ward*, 2014). Unless all three of these elements can be shown by the landlocked owner, an easement by necessity will not be recognized. As one might imagine, these elements may be difficult to prove, especially if the severance of the two parcels took place some time ago.

Finding witnesses who can testify about the existence of a necessity at the time of severance can prove difficult, and even impossible, in some circumstances.

Prior use easement. Another type of implied easement is one based upon prior use. This type of easement was recognized by courts after finding the necessity framework was ill-suited for other improvements, such as power lines or utility pipelines. In order to prove a prior use easement, the party seeking an easement must show each of the following elements: (1) unity of ownership of the alleged dominant and servient estates prior to severance; (2) the use of the claimed easement was open and apparent at the time of severance; (3) the use was continuous, so the parties must have intended its use pass by grant; and (4) the use must be necessary to the use of the dominant estate (*Hamrick v. Ward*, 2014). For example, in a case in which a landowner sold one parcel while retaining ownership of another, yet failed to reserve any water lines to service their home, the court held that a prior use easement existed.



Prescriptive easement. A prescriptive easement is essentially like obtaining an easement through adverse possession, whereby a landowner obtains property rights through adverse use when other conditions are met.

Unlike necessity or prior use easements in which the landowner's consent was assumed, prescriptive easements can only exist when there is no such permission to use the easement. Because courts tend to disfavor this type of easement, each element will be strictly scrutinized.

In order to obtain a prescriptive easement, the person claiming the easement must prove that he or she has used the easement for at least 10 years and the use was: (1) open and notorious; (2) continuous; (3) exclusive; and (4) adverse. One example of these elements being satisfied was a case involving a rural road on a landowner's property where the neighbors used it without permission for over 40 years, did not allow any other persons to use the road, maintained the road, and enclosed the road with a fence and gate at the end (*Boerschig v. Southwestern Holdings*, 2010). While possible to acquire a prescriptive easement, these elements are generally very difficult for the party seeking the easement to adequately prove.

Easement by estoppel. An easement by estoppel arises when one person acts in reliance on being told an easement exists. The elements required are: (1) a representation; (2) belief in the representation; and (3) reliance on the representation. Again, in order to enforce this type of easement, the landlocked owner would be forced to file a court action to prove each element and to get an order from a judge.

A recent Texas case illustrates a situation in which this type of easement was granted. In *Cores v. Laborde* (2018), the court held an easement by estoppel existed with regard to a road where prior landowners had utilized the road for years without objection, the

purchasing landowner was told by the seller that he was able to use the road, and the seller rebuilt cattle pens next to the road. With these facts, the court found that the owner purchased the property in reliance on the ability to use the roadway.

CONCLUSION

The best approach to easements is to ensure they are in writing. Having the parameters set forth in a document agreed upon by both parties and recorded in the county deed records protects both the rights of the servient and dominant estate owners. Additionally, any costs incurred for drafting and recording the express easement will likely be minuscule as compared to the costs spent seeking to prove an implied easement in court.

REFERENCES

Boerschig v. Southwestern Holdings, 322 S.W.3d 752 (Tex. Ct. App. – El Paso 2010)

Cores v. Laborde, No. 13-17-00011-CV, 2018 WL 3062478 (Tex. Ct. App. – Corpus Christi June 21, 2018)

Hamrick v. Ward, 446 S.W.3d 377 (Tex. 2014)