Can a Recorded Easement Exclude an Owner From His Own Property?

By Dale Alberstone, Esq.

On May 22, 2007, the California Court of Appeal rendered a decision which clarifies the nature of an easement and answers the question as to whether a person may maintain an "exclusive" easement, that is: may the holder of an easement prevent the owner of property from using his own land within the easement boundary?

This recent case, entitled Blackmore v. Powell, involved a grant deed by an owner of land which conveyed an easement to an adjoining property for "parking and garage purposes" over a defined area encompassing 6,138 square feet on the owner's property. The easement was recorded in 1979. Following subsequent purchases of both parcels by different parties, the neighbor, whose property benefited from the easement, obtained a building permit from the City of Glendale to erect a two-car garage covering 660 square feet of the easement area. The owner of the property did not challenge the neighbor's entitlement to park vehicles in the designated area, but denied that the neighbor had the right to construct a garage on the owner's property and further denied that even if the neighbor were allowed to build a garage, the neighbor would not have the exclusive use of it.

As you might expect, those disputes gave rise to the neighbor filing a lawsuit against the owner for a court order allowing the neighbor to construct a garage on the owner's property and excluding the owner from the structure.

At trial, the Superior Court generally agreed with the neighbor and determined that the neighbor (i.e. the holder of the easement) could erect a garage and thereafter prevent the owner of the land from using any portion of the garage. As you might further expect, the owner appealed that decision. The California Court of Appeal based in Los Angeles County made the final ruling.

The appellate court first analyzed the nature of an easement. In that regard, it explained that easements are distinguished from estates in land such as ownership, tenancy-in-common and joint tenancy. It explained that the holder of an easement "is not the owner of the property, but merely the possessor of a **right to use someone's land** for a specific purpose." An easement, the court said, involves primarily the privilege of doing an act on, or to the detriment of, another's property.

Where an easement attaches to a neighbor's property (as is usually the case), it is said to be "appurtenant" to the neighbor's property. The property of the neighbor is called the "dominant tenement," and burdens the owner's property, which is called the "serveant tenement."

The court explained that where an easement is created by a deed, as was the case of the 1979 instrument involved in the Blackmore case, "only those interests expressed in the [document] and those necessarily incident thereto pass from the owner of the fee." The owner retains "every incident of ownership not inconsistent with the easement or with the enjoyment of the same."

The court then focused on the language of the deed, and specifically, that it was for "parking and garage purposes."

Because no garage existed when the easement was granted, the court concluded that the express language of the easement deed implicitly authorized the neighbor to build a garage.

It then went on to make the important finding that the Superior Court was correct when it found that the neighbor was entitled to exclusive use of the garage as a "necessary incident" of the easement, reasoning that a shared garage would generate disputes about allocation of parking spaces, security and maintenance costs. The Court of Appeal further found that allowing the owner to share the use of the garage would interfere with the neighbor's rights to it as conferred by the deed.

What is remarkable about the Blackmore case is that it recognized that an easement may be "exclusive," meaning that the neighbor (i.e. the holder of the easement) could use a portion of the owner's land and **exclude the owner from his own land**! That, of course, is most unusual as an easement typically involves a shared use by both parties.

The appellate court contrasted easements which arise by prescription (i.e. prescriptive easements) with easements which are created by a written instrument.

Readers of this column may recall from my prior articles that prescriptive easements, as a general rule, do not vest exclusivity in the neighbor. Instead, where a prescriptive easement is acquired, the neighbor's use of the owner's land is a shared use with the owner.

An easement by prescription may arise where a neighbor continuously uses an owner's land for a period of more than five years, in a hostile manner which is adverse to the owner's rights in the land, and that usage is open and visible. Unless the owner consents to such usage during the five year period, the neighbor may acquire a permanent future right to use the owner's land, albeit in common with the owner.

A perplexing issue arises with prescriptive easements where a neighbor encroaches upon an owner's land by fencing off a portion of the owner's property, such as a few feet of the owner's backyard. If the owner is unable to access his own land because of the fence, then the neighbor does not acquire a prescriptive easement even though he might meet all of the required elements for an easement by prescription. That is because the neighbor's exclusive enjoyment of the owner's land is more akin to ownership of it than mere use. Under such a scenario, our courts have found that the neighbor acquires no easement at all, let alone a prescriptive easement.

If, however, the neighbor had paid (during the preceding five years) the annual property taxes attributable to the fenced off portion of the owner's land, then the neighbor would acquire title to that enclosed area by the doctrine of adverse possession. As a practical matter, it is almost never the case that the neighbor pays the County Assessor any taxes on the owner's property because, these days, property is assessed by recorded lot lines rather than by monuments, such as trees, fences and large boulders. In olden times, such physical structures were used by the assessor to determine the boundaries of a property, and in turn, its applicable property taxes.

The easy way to remember that a prescriptive easement is not based on anything in writing is by focusing on the etymology of the word "prescriptive." The prefix "pre" at the beginning of the word arises from the Latin and means "before." The base of the word "script" also arises from the Latin and means something in writing. Combining the two suggests that the easement arises before anything is placed in writing.

Obviously, an easement which is created by a written document is not a prescriptive easement because its genesis is out of a writing, rather than arising before a writing.

On a practical level, one needs the assistance of a court to formally decree that a prescriptive easement exists, and thereby establish insurable title. Thus, a court judgment, which is a written document, may be rendered at the end of a lawsuit in which the judge recognizes that the prescriptive easement arose and existed prior to the inception of the litigation. The judgment may then be recorded so that it becomes an insurable encumbrance in favor of the neighbor's property and a burden against the owner's property.

Returning to the Blackmore case, the Court of Appeal explained that an owner may confer an exclusive easement in favor of his neighbor by recording the appropriate deed or other instrument. However, a neighbor may not acquire an exclusive easement by prescription on the owner's property no matter how many years the neighbor has used it.

Conclusion

The holding of the Blackman case is valuable because it recognizes and explains in simple terms that an easement may be granted in favor of a neighbor's property to the exclusion of the property owner. Thus, the neighbor may have the exclusive right to park motor vehicles in a garage situated on an owner's property. On the other hand, without something in writing, a neighbor can not acquire an exclusive easement on an owner's property even if he excludes the owner therefrom for longer than the statutory period of five years.

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Mr. Alberstone has been awarded an ***AV*** *rating from Mardindale-Hubbell. An* ***AV*** *rating, registered through Reed Elsevier, reflects an attorney who has reached the heights of professional excellence and is recognized for the highest levels of skill and integrity.*

The foregoing discussion is intended as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.

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