

Easements Arising Out of Necessity by Dale Alberstone, Esq.

Over many years of authoring articles for the AOA, I have discussed a multitude of easements, including prescriptive easements, easements by implication, easements by reservation, easements by grant, implied easements, easements created by balancing hardships, and so forth. I have not previously commented on easements which are created by “necessity” as they rarely occur and are of limited interest to owners of apartment buildings.

However, on November 19, 2007, the California Court of Appeal issued a fascinating opinion concerning the creation of an “easement by necessity” in favor of certain landlocked property in Mendocino County. I am hopeful that readers will enjoy the appellate decision even if it is not directly applicable to their own property.

Before discussing the case, let me comment on the nature of an easement by necessity.

Nature of an Easement by Necessity

For our purposes, an easement is the right of one party (usually an adjoining property owner) to use the land of another over an extended period of time. An easement establishes a property right in the easement user’s favor, as contrasted with merely a license to use someone else’s property, such as possessing season tickets to a seat at a baseball arena. Tickets to sporting events do not create a property rights in underlying land. An easement, on the other hand, does establish a right in the property.

To create an easement by necessity, the property must be entirely landlocked, meaning that the property owner has no legal right to travel to or from his land without trespassing on some other owner’s land. Property is deemed landlocked if the owner has no legal method of accessing it from a public street or other public right-of-way.

Further, in order to establish an easement by necessity, the landlocked property had to have been in common ownership with a neighboring property at some time in the past, which neighboring property had access to and from a public right-of-way. When a common owner of the two properties conveys landlocked property, the court will generally imply that the owner intended to create an easement in favor of the grantee over and across the common owner’s retained property because, otherwise, the grantee of the landlocked property would have no ability to enter or exit his property.

In such event, the court will recognize that the grantee acquired an “easement by necessity” over the common owner’s neighboring property.

One other aspect of this type of easement is important to understand. “Necessity” means **strict necessity**. The fact that it might be incredibly difficult and time consuming for the owner to travel from the public roadway to his property (such as having to traverse a mountain on his land), does not satisfy the requirement of strict necessity. The word “necessity” is construed by the Court in its literal sense.

The New Case of Murphy v. Burch

In the November 2007 decision of Murphy v. Burch, the Court of Appeal carefully analyzed easements by necessity and then threw a curveball to the owner of the landlocked parcel when denying that owner such an easement.

The Murphy case involved an unusual set of facts. Prior to 1876, all of the properties involved were owned by the federal government. In that year, the first of several parcels making up the Burch property was deeded by the government to one of several predecessors-in-interest to the Burches.

Between 1876 and 1929, all of the remaining properties now collectively comprising the Burch property were likewise deeded to private owners by the federal government. By 1929, the Burches' predecessors-in-interest owned all of the property the Burches presently own.

The other property, now owned by Murphy, remained owned by the federal government from 1929 through the next 3 years. In 1932, the government granted the property (now owned by Murphy) to John. The property John received (and which is now owned by Murphy) was completely landlocked, meaning that John had no access to a public roadway, except by traveling over the Burch property. Thus, John could not legally enter or exit his property without trespassing on the Burch property.

At the time of the 1932 conveyance, the federal government's grant of the land to John did not include any express grant of an easement from that property to the nearest public road. There was an access road, but it ran across the Burch property which was no longer owned by the government.

Fast forward to approximately 2005 when Murphy (who ultimately succeeded to the land John owned as of 1932) filed a lawsuit against Burch to establish an easement by necessity over the Burch property. Do you think that Murphy was successful since he had absolutely no way to access his property from a public road except by traveling across the Burch property?

If you answered, "Yes," then you are in harmony with the Superior Court which agreed with Murphy and quieted title in Murphy's favor for an easement by necessity over the Burch property. But the Court of Appeal took away that easement by determining that in 1929 when the government conveyed all of the properties to the Burches except the landlocked property, there was no "strict" necessity to the government. Huh? If the John (or Murphy) property was entirely landlocked, wasn't there "strict" necessity?

"No," said the Court of Appeal. It explained that when an entity possessing the power of eminent domain has ownership of landlocked property, strict necessity does not exist. That is because the entity (i.e. the government) can always later acquire the right to later use the neighboring property simply by initiating condemnation proceedings.

To put the Murphy case in perspective, had the common owner of the Burch and Murphy properties been a private party from 1876 to 1929, rather than the federal government, when the Burch property was conveyed, that owner, when retaining the Murphy property, would have had the strict necessity to use the Burch property for ingress and egress to and from the Murphy property. John (and ultimately Murphy) would have succeeded to that easement by necessity since (unlike the government) John could not initiate eminent domain proceedings.

Because strict necessity did not arise when the government conveyed away the Burch property, an easement by necessity could not later arise in John's favor since at the time the government conveyed it to John in 1932, the government was no longer the common owner of both properties. Bear in mind that not only must there be necessity, there must also be a common owner of both properties when the adjoining property alone is conveyed, with the grantor retaining the landlocked property.

Conclusion

I know all this is confusing. What is important to remember is that an easement by necessity is only created if there is common ownership at the time the grantor conveys one property but retains a property which is completely landlocked. The law then presumes the creation of an easement by necessity.

Also, an easement by necessity remains in existence only so long as strict necessity persists. If a different adjoining owner were to later provide the landlocked owner with an easement across that adjoining owner's property to a public roadway, then the easement by necessity would be

extinguished.

One final thought: the doctrine of creating an easement by necessity arose in California decades before airborne transportation was invented. No court has ever directly considered whether the fact that one may access his property by helicopter or fixed wing aircraft eliminates strict necessity. But, it is a safe bet that airborne access does not vitiate necessity, at least in the eyes of the law.

Dale Alberstone is a prominent real estate attorney who has practiced real property and business law in Century City for the past 31 years. He has been appointed to periodically serve as a judge pro tem of the Los Angeles Superior Court and is a former arbitrator for the American Arbitration Association. He also testifies as an expert witness for and against other attorneys who have been accused of legal malpractice.

*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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