

## **Yes! You Can Obtain An Easement By Having A Hardship By Dale Alberstone, Esq.**

Readers of my column know from past articles that the two most common ways for a neighbor to obtain an easement on an adjoining owner's property are (1) by a voluntary written conveyance from the owner, and (2) by hostile, non-consensual, visual use of the land for a continuous period of more than five years. The neighbor's use must not completely exclude the owner from his/her own land.

The first type of easement is called an "easement by grant" because the owner voluntarily executes and records a document which grants the neighbor an easement.

The second type of easement is known as an "easement by prescription" as it arises solely by hostile usage of the owner's property, but without any writing to document the easement. An easement by grant does not require any judicial action to establish its existence. On the other hand, in order for a neighbor to demonstrate the existence of a prescriptive easement, he/she must first obtain a judgment from the court.

An entirely different method for acquiring an easement is one which arises in the context of balancing hardships between the neighbor and the owner. It is similar to a prescriptive easement, except that it arises innocently and generally in the context of the owner giving his/her permission to the neighbor to use the owner's land, whether that permission is express or implied. A prescriptive easement can never arise if the use by the neighbor is consensual. However, an easement by balancing relative hardships may arise even though the owner has given his consent.

Thus, a court may recognize the existence of an easement on equitable grounds even though the user is not entitled to an easement under one of the more traditionally accepted doctrines. The elements necessary to establish an easement by balancing hardships are (1) a party (usually a neighbor) has used and improved the owner's property for a long period of time with the innocent belief that he/she had a right to use the property, (2) the neighbor would be irreparably harmed if he/she could not continue to use the easement, and (3) the owner would suffer relatively little harm from the neighbor's further use of the land.

One of the leading cases on the issue is Field-Escandon vs. DeMann, 204 C.A.3d 228, in which I was both the trial attorney and the attorney before the California Court of Appeal on behalf of the neighbor. In that case, my clients owned a property which contained an underground gravity sewer line across the adjoining owner's property. The owner's property was unimproved and situated at a slightly lower elevation, allowing the sewage from my client's property to flow under the owner's property and into the main sewer line located in the abutting street. The sewer pipe was not visible to the eye.

When the owner of the property determined 25 years following the time the sewer line was installed, he brought suit to have it removed in order that he could build on his land. In ruling in my client's favor, the Court of Appeal determined that my clients had acquired an easement by balancing the hardships because (1) the sewer line did not interfere in any substantial way with the owner's construction plans, (2) my client's predecessor (who constructed the sewer line) acted innocently and (3) the sewer line was the only way of discharging sewage from my client's property. Note that the more traditional way of obtaining an easement for the sewer line (i.e. a prescriptive easement) was not available to my client because the sewer line was buried under the ground and, therefore, not visible.

Another interesting case is Hirschfield vs. Schwartz, which relies, in part, on the Field-Escandon case. In Hirschfield, the court granted an injunction in favor of a neighbor whose chain link fence encroached upon the owner's backyard in the city of Bel Air. The court found that some time in the 1950s, the neighbor's predecessor built a chain link fence on the owner's property. Between 1976 and 1979 the neighbor made improvements to the area between the boundary and the chain link fence, including construction of water falls, a koi pond, a stone deck and a putting green.

The Court of Appeal determined that no prescriptive easement was acquired (because the area in dispute was exclusively used by the neighbor) but under principles of equity and balancing of hardships, the neighbor had acquired an equitable right for an injunction excluding the owner from the owner's land at least so long as the neighbor resided in or owned the property.

One odd aspect about the Hirschfield case is that the court required the neighbor to pay the owner approximately \$23,000, which was equal to the fair market value of the land that the neighbor was exclusively using. But, the court also ordered that the right to use the owner's land would terminate if the neighbor sold or ceased residing in his house. The court did not order the owner to return any portion of the payment upon the termination of the usage even though he received payment for the full value of the land.

### **CONCLUSION**

"There are many ways to skin a cat," so it is said. So, too, there are many ways in which a neighbor may acquire an easement over an owner's land. Any owner who becomes aware that a neighbor is using his property should immediately seek advice from competent real estate counsel.

Ownership of property is among the most cherished of all rights accorded to each of us in the United States. It is, indeed, unfortunate for an owner to lose an interest in his/her property simply by failing to remain vigilant.

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*The foregoing discussion is intended solely 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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