

## **Accessing Landlocked Property**

*By Jason R. Page*

Many landowners own property with no access to a public road. Being a good neighbor often solves this problem. However, disputes over the right to access property are common. This is particularly true when an adjoining property is sold or inherited and the new owner gates existing paths. There are several legal theories that landlocked landowners may be able to use to establish an access to their property. A brief summary of each is below. The outcome of each case is often dependent on the specific facts.

**Easements Implied by Necessity.** Easements implied by necessity arise only when a buyer has no access to the land except over either the seller's other land. In such cases, the law implies a right-of-way to the landlocked land over the seller's land or the land of a stranger. The allowed use of an easement implied by necessity is whatever is reasonably necessary for the benefit of the landlocked tract. The proposed land use is a key factor when determining the scope of the easement. Harvesting timber may be reasonable when residential development is not.

**Easements Implied by Prior Use.** Easements implied by prior use are similar to easements implied by necessity. Again, there must have been common ownership of the tract with access and the tract that needs access, and a transfer must have separated the ownership. However, in this case, the person seeking the easement must show 1) that before the transfer the prior owner used the portion of the tract with road frontage to benefit the portion without access; 2) that the use was apparent, continuous and permanent, and 3) that the claimed easement is necessary to the use and enjoyment of the new owner's land.

**Easements by Prescription.** There are several requirements for easements by prescription. First, there must be continued and uninterrupted use for 20 years. Second, the use must be so open that the owners of the land across which the easement is claimed probably had notice of it. The third element is that there must be a "substantial identity of the easement claimed." The problem most landowners face is that they have not met the fourth element: the use of the easement must be hostile or adverse. If the use was by permission, there can be no easement by prescription. Evidence that the person claiming the easement has not helped maintain the road may be used to show that the use was not under a claim of right.

**Cartways.** Land is often divided in a manner that leaves some portion of it without any way to establish a right of way to a public road. The cartway statute ensures that this land does not remain unproductive. The person whose land will be burdened by the cartway is entitled to reasonable compensation paid by the petitioner. In effect, a cartway statute delegates the right to use the State's power of eminent domain to a private person or entity. There are only certain uses for which a cartway can be acquired. It is significant that agriculture and forestry are permissible uses and residential development is not. To be entitled to a cartway, a landowner must show three things: 1) that the easement is necessary for cultivating land, cutting timber, quarrying, industrial development, or a cemetery; 2) that there is no public road; and 3) that the cartway is necessary, reasonable and just. If the Clerk of Court is satisfied that the petitioner has met these requirements, the Clerk will appoint three disinterested landowners to lay off the cartway and determine the compensation that the petitioner must pay the respondent for the easement.

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