

§17:20.20(d) *Implied Grant*

In certain situations, the law may imply the grant of an easement even where there are no express words of creation. Obviously this can only be done if there is no wording in the conveyance which expressly precludes such an implication. The grant of an easement may be implied in three situations:

- (1) to allow the enjoyment of a right which has been expressly granted; for instance, where owners of adjoining properties agree to dig a well for their common use, situated on the lands of one, an implied right-of-way will be granted to the owner of the other property;¹⁴
- (2) to carry out the common intention of the parties;¹⁵ or
- (3) where land previously owned by one owner is severed¹⁶ and the easement being claimed meets the criteria set out following.

When land owned by one person is divided and part of the land conveyed to another, even if there are no words in the instrument expressly creating an easement, a court will imply that the new owner was granted easements of necessity and any continuous and apparent easements which existed as quasi-easements¹⁷ during unity of ownership. Thus, the implied grant will render the retained land servient and the newly acquired portion dominant.

The test for necessity is fairly stringent. In order to make a successful claim for an easement of necessity, it would have to be shown that it would be impossible to enjoy the dominant land otherwise.¹⁸ A common example is a right-of-way which would provide the only possible access to a piece of land.

In order for a quasi-easement which was exercised during unity of ownership to become an easement by implication of law, the right claimed must meet certain criteria:

- (a) it must be necessary to the reasonable enjoyment of the part granted;
- (b) it must have been used by the owner of the entirety for the benefit of the part granted up to and at the time of the grant; and
- (c) it must have been apparent at the time the land for which the easement is claimed was acquired.

For an easement to be apparent, its previous use must have been indicated by some visible, audible or other apparent evidence on either the quasi-dominant or the

¹⁴ *Bruce & Bruce v. Dixon*, [1957] O.W.N. 489 (C.A.). See also *Weeks and Toporowski v. Rogalski*, [1954] 4 D.L.R. 439 (Ont. H.C.J.), affd 1 D.L.R. (2d) 709 (C.A.); *Carpenter v. Smith*, [1951] 2 D.L.R. 609 (Ont. Co. Ct.).

¹⁵ *Richards v. Rose* (1853), 9 Ex. 218 at p. 221, 156 E.R. 93; *Lewis v. Allison* (1899), 30 S.C.R. 173.

¹⁶ *Phillips v. Low*, [1892] 1 Ch. 47; *Browne v. Flower*, [1911] 1 Ch. 219 at p. 225. See also *Hart v. McMullen* (1900), 30 S.C.R. 245; *Knock v. Knock* (1897), 27 S.C.R. 664.

¹⁷ *Israel v. Leith* (1890), 20 O.R. 361 (H.C.J.). Since at common law there can be no easement when there is unity of ownership of the dominant and servient tenements, the right or privilege that one part of the tenement had over the other during common ownership is known as a quasi-easement: *supra*, §17:20.10(c).

¹⁸ *Devoe v. Hoeg* (1990), 95 N.S.R. (2d) 361 (S.C.); *Re Stone* (1982), 38 N.B.R. (2d) 492 (Q.B.); *Goguen v. Fougère* (2005), 38 R.P.R. (4th) 219 (N.B.Q.B.); *Evans v. Oshawa SII Congregation* (2005), 37 R.P.R. (4th) 211 (Ont. S.C.J.); *Lanty v. Ontario (Minister of Natural Resources)* (2006), 38 R.P.R. (4th) 275 (Ont. S.C.J.), *supp. reasons as to costs* 89 L.C.R. at p. 210 (S.C.J.), affd 93 L.C.R. 193 (C.A.).

quasi-servient tenement which could be seen, heard or smelled by a reasonable inspection.¹⁹ An easement which is by its nature not continuous and apparent, such as an ordinary right-of-way, will not pass on the severance of a tenement unless it meets the test for necessity set out in the previous paragraph or unless the grantor by appropriate language shows an intention that it should pass.²⁰