RECENT DEVELOPMENT

HAMRICK V. WARD: CLARIFYING IMPLIED EASEMENT LAW

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I. INTRODUCTION

Texas's dynamic landscapes are changing at an unprecedented rate due to rapid population and urbanization increases, as well as changes in land use.[1] It is imperative that the law keep pace with these changes to stay relevant.[2] Recently, the Supreme Court of Texas has provided clarity on a

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1. *See Land Use Trends*, CTR. TEX. CONSERVATION P'SHIP, http://www.texasconservation.org/page.php?page=land_use (last visited Apr. 14, 2015) (recognizing factors influencing the changing landscape, such as urban sprawl, rapidly-increasing population, and "rapid urbanization [that creates] intense pressure on the sustainability of the land and resources around Texas communities").

2. *See generally id.* (providing information regarding recent changes in Texas lands).

long standing doctrine in Texas—the law of implied easements.[3]

In *Hamrick v. Ward*,[4] the court explains when it is appropriate to apply the doctrine of a prior use easement[5] and when the doctrine of necessity easements is applicable.[6] The court's holding is not only informative for easement holders who may find themselves in similar situations, but it also implicitly promotes the general notion that a written agreement is preferable to an alleged unwritten agreement or understanding between parties.[7]

II. IMPLIED EASEMENTS

An easement is a non-possessory right to enter and utilize land that is in the possession of another individual or entity.[8] This right prevents the party in possession of the land from interfering with the easement holder's entry and use.[9] The party gaining the benefit of the easement is known as the dominant estate, and the party who is burdened by the easement is the servient estate.[10] Typically, the terms of an easement are memorialized in

3. *See, e.g.*, Alley v. Carleton, 29 Tex. 74, 74 (1867) (recognizing the doctrine of implied easements as early as 1867); *see also* Hamrick v. Ward, 446 S.W.3d 377, 379 (Tex. 2014) (mentioning implied easements have been present in Texas courts for more than 125 years). *But cf.* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 cmt. a (2000) (noting that although servitudes date back to medieval times, "[c]lassification of servitudes into easements, profits, and covenants is relatively recent").

4. Hamrick v. Ward, 446 S.W.3d 377 (Tex. 2014).

5. *See id.* at 382–84 (discussing circumstances in which applying the doctrine of a prior use easement would be proper).

6. *See id.* at 382 (revealing facts that lead to the application of a necessity easement).

7. *See* U.C.C. § 1-303(e)(1) (2012) ("[E]xpress terms prevail over course of performance, course of dealing, and usage of trade . . . ."); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 575 (2003) ("Since the written contract trumps evidence in the other evidentiary categories, and disputes are expensive, parties benefit from producing a writing that makes clear to a later court what was promised." (citation omitted)).

8. *See* Severance v. Patterson, 370 S.W.3d 705, 721 (Tex. 2012) (stressing the property owner's relinquishment of his right to exclude); Stephen F. Austin State Univ. v. Flynn, 228 S.W.3d 653, 658 (Tex. 2007) (acknowledging the possessor of the land does not lose ownership rights to an easement holder); Marcus Cable Assocs. v. Krohn, 90 S.W.3d 697, 700 (Tex. 2002) (specifying the scope of allowances made for easement holders (citing RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 cmt. d (2002))).

9. *See* Drye v. Eagle Rock Ranch, Inc., 364 S.W.2d 196, 207 (Tex. 1963) (asserting the servient estate should not interfere with the dominant estate); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 (1) (2002) (identifying the possessor's obligation to minimize interference of the easement's terms).

10. *See Severance*, 370 S.W.3d at 721 ("Because the easement holder is the dominant estate owner and the land burdened by the easement is the servient estate, the property owner may not interfere with the easement holder's right to use the servient estate for the purposes of the easement."); *Drye*, 364 S.W.2d at 207 (distinguishing the rights incidental to the dominant and servient estates).

a writing;[11] however, if there is no writing and a previously unified parcel of land undergoes a severance, an easement may arise by implication if a court determines that was the original intent of the parties.[12] Depending on the specific circumstances, a prior use easement[13] or necessity easement[14] may be established.

A. *Prior Use Easements*

Prior use easements arise when a single parcel of land is severed into adjoining parcels, leaving one parcel benefiting the other in some way.[15] The resulting benefit and burden are not initially contemplated by the parties and are incidental to the transaction.[16]

To successfully prove the existence of an easement implied through prior use, the claimant must establish four elements: (1) unification of the two parcels prior to the severance; (2) open and apparent use of the easement at the time of the severance; (3) a continuous use of the easement; and (4) the use of the easement is necessary for the use and enjoyment of the dominant estate.[17] Prior use easements are generally appropriate when the imposition of the easement is a lesser encumbrance[18] and therefore require a lower burden of proof—

11. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.1 (1) (2000) (emphasizing the creation of an easement through a writing).

12. *See* Stephenson v. St. Louis Sw. Ry. Co. of Tex., 181 S.W. 568, 573 (Tex. Civ. App.—Dallas 1915, writ ref'd) (identifying methods in which an easement can be created).

13. *See Drye*, 364 S.W.2d at 207–08 (listing the standardized elements used to assess prior use easements); Mitchell v. Castellaw, 151 Tex. 56, 246 S.W.2d 163, 167 (1952) (exploring the doctrine of prior use easements); Howell v. Estes, 71 Tex. 690, 12 S.W. 62, 63 (1888) (contemplating the application of a prior use easement).

14. *See* Koonce v. J.E. Brite Estate, 663 S.W.2d 451, 452 (Tex. 1984) (discussing necessity easements); Duff v. Matthews, 158 Tex. 333, 311 S.W.2d 637, 638 (1958) (arguing for the existence of a necessity easement); Bains v. Parker, 143 Tex. 57, 182 S.W.2d 397, 398 (1944) (alleging a necessity easement); Alley v. Carleton, 29 Tex. 74, 78 (1867) (exploring elements of necessity easements).

15. *See, e.g.*, *Drye*, 364 S.W.2d at 208 (illustrating a situation that appropriately leads to the imposition of a prior use easement).

16. *See Mitchell*, 246 S.W.2d at 167 ("[T]he law reads into the instrument that which the circumstances show both grantor and grantee must have intended, had they given the obvious facts of the transaction proper consideration."); Michael V. Hernandez, *Restating Implied, Prescriptive, and Statutory Easements*, 40 REAL PROP. PROB. & TR. J. 75, 95–96 (2005) (explaining that the doctrine of prior use easements "is based on the maxim 'necessary *et quasi* appendant thereto,'" which translates to "whatever is necessary and related is appended").

17. *See Drye*, 364 S.W.2d at 207–08 (summarizing the elements a party must prove in order to successfully establish a prior use easement); *see also* Hernandez, *supra* note 16, at 96 (providing an alternate list of factors).

18. *See, e.g.*, *Howell*, 12 S.W. at 62 (1888) (concerning controversy regarding the use of a stairway—a lesser encumbrance).

"reasonable necessity at severance."[19]

B. *Necessity Easements*

"[A] necessity easement results when a grantor, in conveying or retaining a parcel of land, fails to expressly provide for a means of accessing the land," leaving one parcel landlocked.[20] Texas courts will imply a necessity easement for a previously unified, landlocked parcel to promote productivity of the property.[21] "Accordingly, . . . the balance of [the] jurisprudence on necessity easements focuses on roadway access to landlocked, previously unified parcels."[22]

A higher burden of proof is needed to establish an easement implied through necessity—"strict and continuing necessity."[23] Traditionally, to successfully claim a necessity easement, three elements must be demonstrated: (1) unification of the two parcels prior to severance; (2) access to the claimed easement is not merely a convenience, but a necessity; and (3) existence of the necessity when the parcels underwent severance.[24] A necessity easement terminates when the necessity ends.[25]

III. *HAMRICK V. WARD* FACTUAL AND PROCEDURAL BACKGROUND

Two landlocked acres of a forty-one acre property were deeded to a third party in 1953.[26] A previously-constructed dirt road provided a means of ingress and egress between the public road and the landlocked

19. Hamrick v. Ward, 446 S.W.3d 377, 379 (Tex. 2014); *see Drye*, 364 S.W.2d at 208–09 (distinguishing between burden of proof standards); Hernandez, *supra* note 16, at 96–97 (including a discussion regarding the split in authority as to the appropriate burden of proof).

20. *Hamrick*, 446 S.W.3d at 382 (citing Alley v. Carleton, 29 Tex. 74, 78 (1867)).

21. *See* Alley v. Carleton, 29 Tex. 74, 78–79 (1867) (exemplifying when a Texas court will imply a necessity easement); *see also* Hernandez, *supra* note 16, at 81 ("Theoretically, if the basis for the easement is a public policy against landlocked or unproductive tracts, then the easement should exist even if the parties did not intend to create it.").

22. *Hamrick*, 446 S.W.3d at 382.

23. *Id.* at 384 (reasoning that a harsher standard should be used for a major encroachment, such as a road).

24. *See* Koonce v. J.E. Brite Estate, 663 S.W.2d 451, 452 (Tex. 1984) (asserting the elements of necessity easements); *see also* Hernandez, *supra* note 16, at 80 (generalizing the necessity easement requirements of American courts).

25. *See* Bains v. Parker, 143 Tex. 57, 182 S.W.2d 397, 399 (1944) (describing necessity easements' temporal nature); *Alley*, 29 Tex. at 79 ("It is a fallacy to suppose that a right of way of necessity is a permanent right, and the way a permanent way, attached to the land, and which may be conveyed by deed, irrespective of the continuing necessity of the grantee." (quoting Pierce v. Selleck, 18 Conn. 321, 329 (1847))).

26. *Hamrick*, 446 S.W.3d at 379.

parcel.[27] The third party and all subsequent owners of the landlocked acreage continuously utilized the dirt road.[28] In 2004, the Wards purchased the landlocked parcel[29] and, like those before them, continued to use the road.[30] The Hamricks and Bertrams ("the Hamricks") acquired homes on two lots in a new development on the larger, servient tract of land where the dirt road crossed,[31] with the understanding that they would regain full access to the dirt road.[32] Contrary to this understanding, the Wards continued to use and make improvements to the road.[33]

The Hamricks sued the Wards to enjoin their use of the road and were granted a temporary injunction.[34] The Wards also filed a counterclaim against the Hamricks, "arguing they had an implied, prior use easement to use the dirt road and requesting the trial court enter a judgment declaring an unrestricted twenty-five foot easement connecting their property" to the public thoroughfare.[35] The Wards' motion for summary judgment was granted.[36] On appeal, the Hamricks contended the Wards had not succeeded in proving a beneficial use of the alleged easement preceding the severance of the forty-one acres or a continuous necessity.[37] The court of appeals "unanimously held that the Wards were required to prove necessity at the time of severance, not a continuing necessity as the Hamricks proposed."[38] Both the Hamricks and Wards petitioned the Supreme Court of Texas for review.[39]

27. *Id.* ("[A] dirt road was constructed on the eastern edge of the 41.1 acre tract, providing access from the remainder of the land to a public thoroughfare, Richardson Road.").

28. *See id.* at 379–80 (recounting the property's ownership history).

29. *Id.* at 380.

30. *Id.* ("After purchasing the property, the Wards continued to use the dirt road.").

31. *Id.*

32. Previously, a subdivision developer had unilaterally created a prescriptive easement, which was intended solely for the use of a prior owner who was unaware of the creating document until 2005. Hamrick v. Ward, 446 S.W.3d 377, 379–80 (Tex. 2014). It seems the developer told the Hamricks they would regain the dirt road's full use because he was under the mistaken belief that this prescriptive easement would terminate when the prior owner's use ceased. *See id.* at 379–80 (detailing the subdivision development and the perhaps misguided actions of the developer).

33. *Id.* at 380 ("[T]he Wards continued to use the dirt road. The Wards then reinforced the dirt road with gravel and made use of the road to construct a new home on the land.").

34. *Id.*

35. *Id.*

36. *Id.* (reviewing the trial court's decision to grant the motion after finding proof of a prior use easement).

37. *See* Hamrick v. Ward, 359 S.W.3d 770, 774 (Tex. App.—Houston [14th Dist.] 2011) (elaborating on the Wards' claims on appeal), *rev'd*, 446 S.W.3d 377 (Tex. 2014).

38. *Hamrick*, 446 S.W.3d at 380.

39. *Id.* at 381. *See generally* Cross-Petition for Review, *Hamrick*, 446 S.W.3d 377 (No. 12-0348), 2012 WL 3210419 ("Cross-Petitioners Tom Ward and Betsey Ward ask the Honorable Supreme

IV. THE TEXAS SUPREME COURT'S ANALYSIS

To begin its analysis, the Supreme Court of Texas recognized that the law of implied easements often breeds confusion because both necessity and prior use easements may result from the severance of a unified parcel of land.[40] "Imprecise semantics" and lack of consistency by Texas courts have furthered this confusion.[41] For these reasons, the court granted the parties' petitions for review.[42]

"[S]eparate and distinct doctrines for these two implied easements [have existed] for well over a century."[43] The court's comparison of the factual circumstances in which prior use and necessity easement doctrines are typically applied illustrates when it is appropriate to apply each of the doctrines.[44] It explains that a necessity easement is the appropriate doctrine when a parcel of land becomes landlocked subsequent to a severance and a means of access to the landlocked parcel is not expressly stated,[45] even though the court has previously allowed a prior use easement where a party asserted such "for a roadway to access his previously unified, landlocked parcel."[46] Prior use easements are better suited for property improvements—a lighter burden on the servient estate.[47]

Following the analysis regarding when to apply a necessity or prior use easement, the sole issue the court resolved was "whether the Wards' use of the roadway is appropriate to assess under the prior use easement

Court of Texas to grant this Cross-Petition for Review . . . ."); Petition for Review, *Hamrick*, 446 S.W.3d 377 (No. 12-0348), 2012 WL 3210417 (requesting the Supreme Court of Texas grant the Hamricks' petition for review).

40. *Hamrick*, 446 S.W.3d at 381 (citing Seber v. Union Pacific R.R. Co., 350 S.W.3d 640, 648 (Tex. App.—Houston [14th Dist.] 2011, no pet.)).

41. *Id.* at 381–82 & nn.2–3 (admitting to a lack of uniformity in identifying types of easements among Texas courts, including the Supreme Court of Texas).

42. *Hamrick*, 446 S.W.3d at 379 (Tex. 2014) ("This case presents the [c]ourt with an opportunity to provide clarity in an area of property law that has lacked clarity for some time: implied easements.").

43. *Id.* at 382.

44. *See id.* at 382–84 (overviewing types of implied easements and the factual circumstances that will lead to each type).

45. *See id.* at 384 (confessing that the nonrestrictive elements of a prior use doctrine could technically be used to assess a roadway easement for a previously unified, landlocked parcel, but even so, the appropriate doctrine is that of an easement implied by necessity).

46. *Id.*; *see* Bickler v. Bickler, 403 S.W.2d 354, 357 (Tex. 1966) (asserting the doctrine of prior use easements for the shared use of a driveway), *abrogated by* Hamrick v. Ward, 446 S.W.3d 377 (Tex. 2014).

47. *See* Hamrick v. Ward, 446 S.W.3d 377, 384 (Tex. 2014) (allowing more forgiving proof requirements for prior use easements because they typically involve only "modest impositions").

doctrine."[48] The court clearly concluded that a necessity easement is the correct doctrine to apply in this case:[49]

> [The courts have] developed the two types of implied easements for discrete circumstances. The less forgiving proof requirements for necessity easements (strict and continuing necessity) simply serve as acknowledgment that roadways typically are more significant intrusions on servient estates. By contrast, improvements at issue in prior use easements (*e.g.*, water lines, sewer lines, power lines) tend to involve more modest impositions on servient estates. Accordingly, for such improvements, we have not mandated continued strict necessity but instead carefully examine the circumstances existing at the time of the severance to assess whether the parties intended for continued use of the improvement.[50]

The court remanded the case in light of this clarification and allowed the Wards to pursue a claim under the theory of a necessity easement rather than a prior use easement.[51]

V. SIGNIFICANCE OF *HAMRICK V. WARD*

The court's holding clarifies that Texas courts "adjudicating implied easements for roadway access for previously unified, landlocked parcels must assess such cases under the necessity easement doctrine."[52] In light of growing population and suburbanization, Texas landowners should be aware of the implications of this holding.[53] Parties in similar situations will be held to the more stringent standards of necessity easements and will no longer be able to claim prior use easements.[54]

This case also exemplifies the importance of written easement agreements.[55] If the Wards, or any of the previous owners of the

48. *See id.* (ignoring additional claims of the parties).

49. *See id.* (favoring necessity easements for previously unified, landlocked parcels).

50. *Id.*

51. *Id.* at 385 (permitting the Wards to pursue a necessity easement claim).

52. *Id.* at 384.

53. *See id.* at 385 (mandating parties in similar situations to pursue necessity easement claims).

54. *See id.* (applying the holding of *Hamrick* to all Texas property owners claiming a roadway easement for a previously unified, landlocked parcel); Tiffany Dowell, *Texas Supreme Court Clarifies Law Regarding Implied Easements*, TEX. A&M AGRILIFE EXTENSION (Sept. 2, 2014), http://agrilife.org/texasaglaw/2014/09/02/texas-supreme-court-clarifies-law-regarding-implied-easements/ (warning Texas landowners of the holding's effects).

55. *See* U.C.C. § 1-303(e)(1) (2012) (giving preference to express terms); Schwartz & Scott, *supra* note 7, at 575 (favoring written agreements); Dowell, *supra* note 54 (expressing the benefits of written easement agreements); Charles Sartain, *Easements: Roads Traveled, Less Traveled, and Not Traveled*, ENERGY & THE L. (Oct. 7, 2014), http://www.energyandthelaw.com/2014/10/07/easements-roads-travelled-less-travelled-not-travelled/ ("Get it in writing, even if it is from Grandma and Grandad, or Momma, and especially if it[']s from the in-laws.").

landlocked parcel, had memorialized their intentions in a written agreement and properly recorded the instrument, giving notice of the easement to subsequent purchasers,[56] the parties could have settled their dispute much more efficiently. The Wards would not have been subjected to the strict standards of necessity easements on remand, but rather the terms of their agreement.[57] Written agreements aid in avoiding court costs[58] and attorneys' fees.[59] Attorneys drafting easement agreements should include pertinent details that the parties may not initially contemplate: the specific location of the easement described in metes and bounds, an extensive list of the uses the parties will allow for the easement, how long the easement will last, whether the easement is transferable, width and length of roads, types of vehicles allowed to access the road, weight of vehicles allowed to access the roads, and types of improvements permitted on the easement.[60] Precise terms to fit the individual client's needs should be used to produce the best possible outcome for the client if a dispute does arise.[61]

VI. CONCLUSION

Although implied easements have been utilized for centuries,[62] confusion still exists because courts have lacked uniformity when relying

56. *See* TEX. PROP. CODE ANN. § 13.002 (West 2014) ("An instrument that is properly recorded in the proper county is: (1) notice to all persons of the existence of the instrument . . . .").

57. *See, e.g.*, Coleman v. Forister, 514 S.W.2d 899, 903 (Tex. 1974) (entitling the plaintiff to "the rights granted by the instrument, and no more").

58. *See generally* Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 CASELOAD HIGHLIGHTS (Nat'l Ctr. for State Courts: Court Statistics Project, Williamsburg, Va.), no. 1, Jan. 2013 (finding that, on average, real property claims that go through trial cost $66,000).

59. *See generally* STATE BAR OF TEX. DEPT. OF RESEARCH & ANALYSIS, 2013 HOURLY FACT SHEET (2013), *available at* http://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=27264 (surveying Texas attorneys to find average hourly attorney's fee rates and finding the median rate for full-time attorneys in 2013 to be $242 per hour).

60. *See, e.g.*, 17 HERBERT S. KENDRICK & JOHN J. KENDRICK JR., TEXAS TRANSACTION GUIDE—LEGAL FORMS § 75.240 (2014) (demonstrating typical terms of easement transactions); *see also* Dowell, *supra* note 54 (suggesting terms for easement agreements that may prove beneficial to both parties).

61. *Cf.* W. Beach Marina, Ltd. v. Erdeljac, 94 S.W.3d 248, 264–65 (Tex. App.—Austin 2002, no pet.) (construing the express grant of the easement liberally, showing the importance of narrow, precise terms).

62. *See, e.g.*, Alley v. Carleton, 29 Tex. 74, 74 (1867) (implying a necessity easement in 1867); *see also* Hamrick v. Ward, 446 S.W.3d 377, 379 (Tex. 2014) ("For over 125 years, we have distinguished between implied easements by way of necessity . . . and implied easements by prior use . . . ."); Hernandez, *supra* note 16, at 79–81 (overviewing the historical development of implied easements).

on implied rules of law.[63] *Hamrick v. Ward* resolves some of this confusion by expressly confirming that easements arising from a previously unified, landlocked parcel of land should be assessed under the doctrine of necessity easements, which require a higher burden of proof than prior use easements.[64] However, if landowners expressly memorialize the terms of these easements in a written document, thereby clarifying their intentions, they will be able to rely on the terms of their agreements rather than a courts application of the implied principles of law.[65]

63. *See Hamrick*, 446 S.W.3d at 381–82 (conceding that Texas courts have been inconsistent with their analysis of implied easements).

64. *Id.* at 379 ("Today, we clarify that the necessity easement is the legal doctrine applicable to claims of landowners asserting implied easements for roadway access to their landlocked, previously unified parcel."). *See generally* Andrew McIntyre, *Texas Supreme Court Clarifies Implied Easement in Land Row*, LAW360 (Aug. 29, 2014, 8:10 PM), http://www.law360.com/articles/572442/texas-supreme-court-clarifies-implied-easement-in-land-row (dissecting the court's holding).

65. *See* Dowell, *supra* note 54 ("This type of express easement allows parties to address any future concerns and set forth their intentions and understandings about the easement when created, rather than relying on implied rules of law that may or may not be applicable at a later date.").