IMPLIED EASEMENTS UPON DIVISION OF TITLE

By Elizabeth Brekhus

Even the most seasoned real estate attorney may never have had a case involving the somewhat obscure theory, implied easement upon division of title. My encounter with the legal theory arose in a case I was handling for a friend. My friend called me, delighted, because he had learned that the back of his residence encroached onto adjoining property by as much as 11 feet and in his mind, he just got 11 extra feet of property by doing nothing. About 20 seconds later he became my client.

To further complicate matters, the portion of the residence that encroached on the adjoining property included a back door, porch, and stairs that lead to an area, also on the adjoining property, that my client has always considered his, and that was necessary to the use of a parking area and a side street. Thus my client wanted to be able to forever maintain his encroaching residence and to continue using an additional amount of the neighboring property for access to and from his residence.

My client acquired his property from Deutsche Bank. Deutsche Bank acquired title by foreclosing on a loan to the previous owner, Thomas Candy.[1] A little research revealed that the adjoining property had also been owned by Thomas Candy, and that the current owner, Bank of America, had also acquired title by foreclosure. In fact, the two properties had, historically, <u>always been owned by the same owner</u>, until Thomas Candy went out and burdened each property with loans from different banks.

The immediate practical problem we faced was that BofA was offering the adjoining property for sale without disclosing the existence of the encroachment. I therefore filed suit and placed a lis pendens on the property the same day I got to disillusion my friend about his "good news."

I got the impression that BofA wanted this case off its books when counsel for BofA suggested I propose something she could "sell" to her client as a reasonable outcome given the situation.

The encroachment issue was fairly simple. It was highly unlikely a Court would order my client to remove his home given that it had been built by a mutual predecessor of the parties,

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[1] I have changed the name of the previous owner to "Thomas Candy" because I don't want the prior owner to sue me for telling the truth.

some 40 years prior. It seemed far more likely that the Court would balance the hardships in our favor, Christensen v. Tucker (1952) 114 Cal.App.2d 554, 250 P.2d 660, and grant an exclusive, equitable easement to maintain the encroachments, Hirshfield v. Schwarz (2001) 91 Cal.App.4th 749, 110 Cal.Rptr.2d 861. Counsel for BofA did not dispute this.

The harder issue was justifying an access easement. Because the two properties had been owned by a common owner up until a few years ago, there was no way we could argue my client had acquired a prescriptive easement, which requires 5 years of open, notorious, continuous use and use hostile to the true owner and under a claim of right. Warsaw v. Chicago Metallic Ceilings, Inc., (1984) 35 Cal.3d 564, Applegate v. Oata (1983) 146 Cal.App.3d 702, 708; and Miller & Starr, Cal. Real Estate 3rd (2011) §15:33. A property owner cannot acquire prescriptive rights in other property they own, since such use is not hostile to the true owner, and thus Thomas Candy and his predecessors could not have perfected an easement right of access. Miller & Starr, Cal. Real Estate (3rd ed. 2011) §§ 15:33 and 15:35. Thus, some other legal doctrine was going to have to come to the rescue to support my client's claim to the adjoining property.

The implied easement upon division of title doctrine applies when a common owner of two properties uses one parcel of land for the use and benefit of another parcel, and the owner of said properties sells one parcel, the purchaser acquires the property sold with all the benefits of and all the burdens associated with the property. There is no easement when the parcels are both owned by one coterminous owner, but upon the sale of one parcel, benefits are conferred and burdens are assumed in the manner in which they existed openly and visibly at the time of the transaction. Kytasty v. Godwin (1980) 102 Cal.App.3d 762; Miller & Starr, Cal Real Estate (3rd ed. 2011) §15:20.

The facts of my case that compelled a finding of an implied easement on division of title were:

(1) there was a common owner of the two properties and a transfer or conveyance of one parcel by the common owner;

(2) the parties' common predecessor built my client's residence to encroach onto his other parcel, and some amount of additional land was needed if my client was to:

(A) exit the back door and stairs;

(B) maintain the back of his residence;

(C) access a gate to a side street that was attached to a fence that extended from his property; and

(D) conveniently access a driveway easement; and

(3) the use of the property by the parties' predecessor was open and visible because the use was necessary to reasonably use the encroaching residence and because the area was landscaped

differently from the landscaping surrounding the neighboring residence, as if the property belonged to my client's property.

At first impression, you might think the theory could only be raised in very limited circumstances. However, the doctrine can be implied against a grantor who sells one parcel or even a portion of a parcel and fails to specifically disavow that incidental easement rights are being conveyed when such use can reasonably be assumed from the existing use of the property. Horowitz v. Noble (1978) 79 Cal.App.3d 120 citing Miller & Starr, Cal Real Estate (3rd ed. 2011) Easements, §15:24.

The doctrine can also be found to imply an easement in favor of a tenant, and notwithstanding the contrary provisions of Civil Code §820, when the easement is necessary for the beneficial enjoyment of the premises leased. Dubin v. Robert Newhall Chesebrough Trust (2002) 96 Cal.App.4th 465

The doctrine may also be applied to support a finding that an owner has the right to maintain an encroaching structure on neighboring property. Dixon v. Eastown Realty (1951) 105 Cal.App.2d 260.

In addition, at least one case has found an implied easement existed upon division of title to discharge surface waters over the land of another. Fischer v. Hendler (1942) 49 Cal.App.2d 319.

The circumstances under which an implied easement will be found is not unlimited. California does not generally recognize implied easements for light or air, Pacifica Homeowner's Assoc. v. Wesley Palms Retirement Community (1986) 178 Cal.App.3d 1147, or for solar purposes. Miller & Starr, Cal Real Estate (3rd ed. 2011) §§ 15:10 and 15:11. Implied easements are an exception to the general rule that easements are created by prescription or express grant. Miller & Starr, Cal. Real Estate (3rd ed. 2011) §15:13. Because the creation of an easement denies a property owner the exclusive right to use and control their property, implied easements are disfavored, Horowitz v. Noble (1978) 79 Cal.App.3d 120, and the circumstances under which they will be found are limited to recognized exceptions. Miller & Starr, Cal. Real Estate (3rd ed. 2011) §15:19.

Elizabeth Brekhus of Brekhus Law Partners has been practicing real property litigation in Marin County since 1997.