

February 1998  
**Question 4**

In 1975, Donna asked her neighbor, Stan, to give her a roadway easement across his property so Donna could have better access to her own property. Stan agreed and asked Len, his lawyer, to prepare a deed granting an "easement for a road thirty feet wide" along a designated path. Len prepared the deed, which Stan signed and instructed Len to give to Donna. Unbeknownst to Stan, Len was also Donna's attorney and had advised her to obtain an easement from Stan.

Stan died that night. Although he was aware of Stan's death, Len gave the deed to Donna the next day. Donna never recorded the deed.

In 1976, Donna constructed a gravel road 15 feet wide along the designated path. Donna continued to farm her land and use the road. She has repaired the road, but not improved it. Stan's son Paul inherited Stan's farm and has never objected to Donna's activities.

In 1997, Donna announced plans to convert her farm to a commercial complex. She now intends to use the road as the complex's main entrance, widening it to 30 feet, paving it, and putting utilities under the pavement.

Paul objects to Donna's plans for the road. A paved road will interfere with his farming. The area is changing and some farms have converted to commercial use, but Paul wants to continue farming.

1. What rights and interests do Donna and Paul each have in the road? Discuss.
2. May Donna, over Paul's objection, carry out her plans for the road? Discuss.
3. Has Len violated any rules of professional conduct? Discuss.

## ANSWER A TO QUESTION 4

### I Rights and Interests to Road

#### A. Donna

##### 1. Easement Appurtenant/Express/Delivery

The Road is an appurtenant easement. Stan's land is the subservient estate. Donna's land is the dominant estate and Donna is the holder of the easement. The easement is appurtenant rather than gross because the purpose of the easement is to all the dominant estate to benefit from use of a road on the subservient estate.

The easement is an express easement. Stan expressly conveyed a 30 foot wide road to Donna along a designated path. The easement satisfies the Statute of Frauds since it is in writing and is signed by the Grantor, Stan. The deed formalities have been complied with, if Len is an independent escrow agent.

The deed is in writing, identifies the parties and sufficiently describes the easement. However, there is an issue of delivery. Stan delivered the deed to Len with express oral instructions to Len to give the deed to Donna. Stan died before Len delivered the deed to Donna.

Delivery to a third party with oral instructions is a valid delivery even if grantor dies before the actual delivery. However, Len was Stan's attorney. When the grantor delivers a deed to his agent, delivery is not effective until the grantee receives the deed and can be revoked prior to delivery. Len was Stan's agent and he did not deliver the deed until after Stan's death. Absence of delivery means the deed fails and thus there is no express easement.

However, Len was also Donna's attorney. If the delivery was made to an escrow agent, it is effective upon delivery and cannot be revoked. Stan did not place any conditions on the delivery and he physically handed Len the title. Further, Len was acting in his capacity as an attorney. Since Len was an agent for both Donna and Stan, and Stan gave the title to Len without condition, delivery was effective when the title was conveyed to Len. Thus, for the reasons stated above Donna has an express easement.

##### 2. Easement by Prescription

Assuming the express easement fails on delivery of lack of consideration, a prescriptive easement is formed when a person possesses the land with hostile intent, the possession is actual and exclusive, continuous and uninterrupted for the statutory period and open and notorious.

Donna possessed the easement before Stan's death with consent so no prescriptive easement could be formed during this time period.  
After

-23-

Stan's death, Donna possessed the road adversely to Paul's interest. The possession

was open and notorious because Donna openly built the road, repaired it and drove on it.

Donna had built and maintained road to the exclusion of others. The use has been continuous and uninterrupted from Stan's death in 1975, or the construction of the road in 1976, until Paul objected in 1977. The statutory period is 20 years, unless otherwise directed by state law. Donna used the road on a regular basis for the 20 year statutory period, regardless of whether the period began at Stan's death or construction of road.

Paul knew Donna was using road but knowledge of Paul does not destroy the adverse possession because Donna's use was hostile. Donna was using Paul's land as a road for her own benefit which is adverse to Paul's interest. For the reasons stated above, Donna owns the easement by adverse possession and has a right to continue to use the road.

### 3. Performance/Estoppel

Assuming the deed does not satisfy the Statute of Frauds, an express deed exists by estoppel or performance of the contract. Paul could argue the deed does not sufficiently identify the property. It does not specify where the road will be built. If the deed does not specify where the road will be built the owner of the subservient estate will chose the location. Since Donna built a road without objection by Paul - laches prevents Paul from choosing the location. Paul waited over 20 years after Donna built the road to object.

Further, the terms of the easement were actual performed because Donna built the road and used it. Donna built the road in reliance of the easement to her detriment.

### 4. Easement by Necessity

Even without prior use, when a landowner divides his lot and sells a portion of it, the grantee is entitled to an easement by necessity if he is landlocked. Donna wanted the road for "better access" rather than no access. Thus, there is no necessity. For these reasons Donna does not have easement by necessity.

### 5. License

If all the easement above fail, Donna has an irrevocable license. A license is a contract right rather than a property right. The license is generally revocable unless the licensee has expended money in reliance of the license. Here, Donna built a gravel road and maintained it in reliance of the licensee, thus, it is irrevocable.

#### B. Paul

##### 1. Burdens run with the land

-24-

The easement touches and concerns the land since it involves use of the land to gain access to another property. The grantor intended the burden to run with the land since Stan granted Donna a deed. Easements generally run with the land unless the purchaser is a bona fide purchaser with no notice.

##### 2. Race/Notice

Under common law, the grantee first in time wins. If the applicable state has a race statute, whoever records first wins regardless

of notice. In a race/notice statute, the subsequent purchaser wins if he had no notice of first purchase and he records before first grantee. In a Notice Statute State, the subsequent purchaser wins if he had no notice regardless of who recorded first.

Notice can be actual, constructive or based on a reasonable inquiry. Here, Paul had no actual notice unless Stan told him about the easement. He had no constructive notice because Donna didn't record the deed. However, if Paul had visited the land and made reasonable inquiry he would have discovered the easement. The gravel road and Donna's use would be notice.

#### Bonafide Purchase for Value

Paul did not purchase the land, he inherited it. Thus, he is not a Bonafide Purchaser for value. There is no evidence either party recorded the deeds, so a purely race statute is inapplicable. Paul cannot set aside the easement based on no notice and no recording for reasons stated above, i.e., runs with land, reasonable in giving notice or no value.

## II. Use of easement Express

If a valid express easement exists based on grounds stated above, Donna has a right to use a 30 foot road in the area of the gravel road. The use is defined by the deed. Since Donna has already built and used the gravel road, Paul is prevented by laches from changing the location.

The court will look at the intent of Stan and Donna when the easement was executed to determine the use and excessive use of the easement. At the time of the execution, Donna was using the land for farming while a paved road and utilities under the road may have been reasonably foreseeable and contemplated by the parties, extensive commercial use was not contemplated. Construction of the road or under the road is not excessive - Donna may need to transport heavy farm equipment and use heavy farm equipment. The court would find this conduct within the intent of the parties and the use of the easement.

If the commercial use is excessive, beyond any foreseeable farming use, Paul could argue this conduct exceeds the use of the easement and is therefore excessive. The court will look to the totality of the circumstances, i.e.,

-25-

predominantly farming community, both estates were used as farms when easement was formed by extrinsic evidence of the intent of the parties.

For reasons stated above, Paul could enjoin Donna from excessive use, multiple commercial vehicles, and traffic, but not regular use - 30 foot road, pavement, and utilities.

#### Easement by Prescription

If the express easement is invalid, Donna can only use the 15 foot road for farming use because the easement is based on the land actually adversely possessed and the use is defined by the parties conduct, i.e., use to get to land to farm. No commercial use because excessive - Paul can enjoin.

### III. Len's duties

#### A. Loyalty

Len has duty of loyalty to both Donna and Stan. Donna and Stan had adverse interests. Donna wanted to use Stan's land for her benefit; Stan wanted to use his land for his benefit.

Len could represent both if he reasonably believed he could adequately represent both party's interests despite the potential conflicts, he fully informed both parties of the conflict and both consented. California requires writing for consent. Consent must comply with reasonable lawyer standard - a reasonable lawyer would have requested consent.

The potential conflicts existed as stated above - Len did not inform Stan of conflict and did not get consent. Len's conduct was improper and subject to discipline.

#### B. Communicate

Len owed Stan a duty to communicate with him concerning all information relevant to his representation. Relationship with Donna is relevant since he was also helping Donna with some task-easement. Len failed to communicate - violation.

#### C. Confidentiality

Len breached duty of confidentiality to Stan and Donna. He had confidential information from both due to course of representation, and disclosed information to other without consent. Stan - Donna wants easement.

### ANSWER B TO QUESTION 4

#### I. Rights and Interests of Paul (P) and Donna (D)

##### Donna

##### easement appurtenant

-26-

An easement appurtenant is a right to use the land of the servient tenement for the benefit of the dominant tenement. Here, D is using Paul's (previously Stan's) land to provide better access to her property. An easement appurtenant is an interest in land; D's property is the dominant tenement while P's (Stan's) property is the servient tenement.

##### Creation of easement - express

Easements can be created several ways but in this case we have an express easement, the granting of the interest by Stan (S) to D. Because easements are interests in land, they must satisfy the Statute of Frauds and because express easements are created by deeds, they must satisfy the requirements of a conveyance.

##### Statute of Frauds

The statute requires a writing signed by the party against whom the enforcement is sought. Here, D has a deed describing the easement as a 30' wide along a designated path from S to D. Stan, the predecessor-in-interest to P, signed the deed, so the statute has been satisfied.

### Conveyance

A deed must contain a sufficient description of the land or interest conveyed and be signed by the grantor. In order to be valid as a conveyance, the deed must be delivered by the grantor to the grantee.

### description of easement

Here, the deed describes the easement as a 30' road along a designated path. Although the facts do not clarify exactly what the designation is, presumably it designated where on S's property the road could be placed and that, in fact, it was on his property.

### Signed by grantor

S did sign the deed, so this is

satisfied. Delivery

Delivery requires only the manifestation of intent to presently pass an interest in the land. Here, it appears S had the present intent to grant the easement to D. Physically he delivered the deed to Len (L), however.

### Delivery to third party -

Delivery to a third party will be valid, as long as no oral conditions are attached and the grantor has the proper intent. Here, S only delivered the deed to L as an intermediary and thus the requirement of delivery is satisfied. The failure to record the deed does not affect delivery but may be a problem for later enforcement.

### Interest of Donna

-27-

As such, D has an easement appurtenant over Stan's land, provided that interest was not extinguished when P inherited Stan's land.

### Paul

Because Paul inherited the servient tenement, he inherited the burden of the easement. In order for the burden to run, it must touch and concern the land and the parties must have intended for it to run with the land and the successor must have notice. Usually, unless the language of an express easement states otherwise, the burden of an easement appurtenant runs with the land and is presumed perpetual.

### Touch and Concern

A burden 'touches or concerns' land when it somehow affects the value of the land. Here, D's easement touches and concerns P's land because it makes D's parcel more valuable and somewhat restricts P's use of his land, as he cannot interface with D's

interest.

### Intent

Although not expressly stated, it appears Stan and D intended the burden (and the benefit) to run with their land, as there were no conditions or time limitations placed on the grant. The requirements for the burden to run are satisfied. Thus, D has an easement appurtenant over P's land and P takes his inheritance subject to the easement, unless P can argue he had no notice of the easement.

### Notice

Notice can be record, inquiry or constructive notice. Here, D failed to record her deed and thus P had no record notice of the easement. However, D would argue P was on at least inquiry notice, since there was a gravel road across his property going through D's property which, had he inspected the property, would put him on notice to inquire whether there was an easement. The same applies for constructive notice. Thus, it appears P had notice of the easement.

### Consent/Estoppel

Although the requirements for a prescriptive easement may not have been met here, D may argue that P's failure to object to D's construction of the road, as well as her reliance prevents P from arguing against the existence of the easement. This argument most likely won't be necessary, since the other requirements have been met.

### Prescriptive easement

D may have obtained the easement by prescription if she can show her use of the property was 1) open and notorious; 2) hostile to Paul; 3) she had actual possession of the easement; 4) she had continuous use of the land; 5) she had met the statutory time period. Finally, she also claimed under color of title.

-28-

### Open and Notorious

This requires a use of the land in the open, holding out to the public that this land was D's. Since D used, repaired, and improved the road (by using gravel) this is satisfied.

### Hostile

This means without the consent of the true owner. This element, as discussed previously, is the most problematic since P never objected to D's use of the land, P may have consented to D's use. P may argue he did not expressly consent and silence is not consent.

### Actual and Continuous Possession

Although D did not occupy the land continuously, she used the land granted to her as a roadway, which is the express purpose of the grant. This will satisfy the requirement - using the land the way a true owner would use it.

### Statutory Time Period

At common law the time period was for 20 years although some state statutes have shorter periods. Here, D used the road from 1976 to 1997, and thus the 20 year statute applies.

Usually, an easement by prescription grants the possessor only that portion of the land actually used; however, if a larger piece of land is claimed under color of title, the adverse possessor is entitled to possession of the entire tract possessed constructively by the title instrument.

#### Color of title - scope of easement

"Color of title" means the possessor has an instrument, either found invalid or void as executed, purporting to convey title to a tract of land. Here, P may argue that D at most can use only the 15' wide road she obtained by prescription, while D would argue she's entitled by constructive adverse possession to the entire 30' road granted by deed.

Thus, D has an easement appurtenant over P's land either expressly or by prescription. An implied easement by necessity would fail because D only needed the road for better access to the property and the facts do not state D and Stan's parcels come from a common grantor.

#### 2. May Donna carry out her plans for the road? Scope of easement

As discussed previously, there is some question as to the scope of the easement, in terms of the width of the road. In any case, an easement holder is limited to the scope intended by the parties at the time the easement is created. Although P is bound to allow D an easement to allow better access to her property, the burden D seeks to impose in 1997 is far greater than that originally contemplated by the parties.

-29-

#### Width of road

Again, P will argue D is entitled only to the 15' wide road by prescription, while D will argue she's entitled to the entire 30' granted

#### by S. Pavement for commercial complex

D intends to pave a previously graveled road and allow access to a commercial complex, substantially increasing the traffic/flow over P's land and interfering with his farming. P wants to continue farming and while D may attempt to argue changed conditions allowing her to exceed the scope of the easement, this will not work, as this is not a defense to the over-burdening of an easement.

#### Underground utilities

The intent of S and D when entering into the original easement was to allow only D access over S's property, not under it. D seeks to put utilities under the pavement, which exceeds the original scope.

#### Donna cannot proceed without risk

As D's plans will not comply with the original contemplation of the parties, she cannot proceed with her plans or she will be subject to a claim for damages by P and/or an injunction against her acts. P would most likely argue her actions constitute an encroachment and thus damages are an inadequate legal remedy (since land is unique).

3. Has Len violated any rules of professional conduct? Conflict of interest - Duty of loyalty

A lawyer always has a duty to clients to avoid a conflict of interest either between two existing clients or a new and existing client. A lawyer has several options: 1) disclose the conflict and get both client's consent if the lawyer feels he can reasonably and adequately represent both sides; 2) refuse representation of a new client; 3) advise an existing client to seek independent counsel or 4) withdraw.

Here, L was currently representing both D and S, but did not disclose to S that he represented D. He advised D to obtain the easement from L, thus compromising S's interest in his land. An attorney must act competently to represent the interests of all of his clients. Although the easement may have been in D's best interest, it may not have been in S's best interest. S did not have the opportunity to receive unbiased representation from L, since he didn't know of the bias nor did he consent to the dual representation.

L may argue he felt he could fairly and adequately represent both sides but he should have obtained both D's and S's consent in writing prior to undertaking dual representation.

Further, he apparently did not advise D to record the deed in order to protect her interests against future owners of S's land and thus breached his duty to D to protect zealously her interests. This too, may have been the result of the conflict, as it was better for S and his successors not to have the deed recorded.

-30-

Thus, L is subject to disciplinary action for breaching his duty to loyalty by failing to disclose his conflict and by failing to represent the best interests of his clients.