Landlocked Property

Easements by Implication, Necessity, and Prescription; and the Creation of Private

Local governments are often approached by owners of landlocked property who believe that their local elected officials or local ordinances may provide them with assistance in obtaining desired rights-of-way. Usually, however, the remedy lies not with the local government, but with the courts. In fact, in most cases, neither municipal acquiescence nor participation are essential or required elements for establishing an owner's right to an easement of ingress and egress to land-locked property. Among the possible solutions to the problem of "landlocked" property are the establishment of an easement or the creation of a "private road."

Easements

The common law[1] provides various means whereby an owner of landlocked property might assert a right to an easement over the land of another for the purpose of highway access. Some examples are provided in *Tricker v. Pennsylvania Turnpike Commission*:[2]

> . . . An **easement by implication** may be acquired where the intent of the parties is clearly demonstrated by the terms of the grant, the surrounding property and other [things done regarding] the transaction . . . . In Pennsylvania, to determine whether an easement by implication has been created, three essential elements must exist for the creation of an easement by implication upon the severance of the unity of ownership in an estate:
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> (1) a separation of title;
>
> (2) prior to the separation of title, that the use which gave rise to the easement had been so long continued and so obvious or manifest as to show that it was meant to be permanent; and
>
> (3) the easement was necessary to the beneficial enjoyment of the land granted or retained.
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[1] "Common law.." The body of law derived from judicial decisions [caselaw precedent], rather than from statutes or constitutions. *Black's Law Dictionary*, 11th ed., West Group, St. Paul, Minn., 2019.

[2] 717 A.2d 1078, 1081-83 (Pa. Cmwlth. 1998), *appeal denied,* 559 Pa. 684 (1999) (emphasis supplied, citations omitted, footnote added).

> . . . An **easement by necessity** is created when, after severance from an adjoining property, a piece of land is without access to a public highway. . . . To establish that an "easement by necessity" has been created, a property owner must prove:[3]
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> (1) the titles to the property in question and the property over which the alleged easement exists had once been held by one person;
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> (2) this unity of title had been severed by a conveyance of one of the tracts; and
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> (3) the easement was necessary in order for the owner of the property in question to use his land, with the necessity existing both at the time of the severance and at the time of the exercise of the easement.
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> . . . Just as is required for an easement by implication, an easement by necessity also requires that there be "unity of ownership" of both the property that must be accessed and the property over which the easement allegedly lies . . . .
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> . . . An **easement by prescription**[4] is created by adverse, open, continuous, notorious, and uninterrupted use of land for the prescriptive period – in Pennsylvania, that period is for 21 years . . . .

Private Roads

In addition to the aforementioned common law mechanisms, provisions of Act 169 of 1836,[5] commonly known as the Private Road Act (PRA),[6] allow owners of landlocked property to petition the court for the creation of a "private road." Procedurally, if the landlocked owner can successfully prove in court that the factual and legal requisites for a private road exist, the land of another can be "condemned" and damages for this taking are paid by the person on whose behalf the private road is created. Until recently, the constitutionality of the law had been upheld by Pennsylvania state and federal courts.[7]

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[3] *See also* the holding in *Bartkowski v. Ramondo*, 219 A.3d 1083 (Pa. 2019), that a landowner does not have to establish impossibility of alternative access before a court will grant an easement by necessity:

> "Determining whether a landowner has established necessity is a fact-intensive question which does not fit a one-size-fits-all, bright-line standard. The central inquiry is whether, absent the recognition of an easement, the proposed dominant estate will be left without a means of ingress and egress, rendering the property inaccessible and thus unusable."

[4] *See* related *Deskbook* article entitled "Title by Adverse Possession & Easement by Prescription."

[5] This act is commonly referred to as the "General Road Law."

[6] Sections 11-16 of the General Road Law are considered the "Private Road Act."

[7] *See, e.g., Marinclin v. Urling*, 262 F. Supp. 733 (W.D. Pa. 1967), *aff'd*, 384 F.2d 872 (3rd Cir. 1967) (holding that the Private Road Act does not violate the United States Constitution); *In re Private Road in East Rockhill Tp., Bucks County, Pa.*, 645 A.2d 313 (Pa. Cmwlth. 1994), *appeal denied*, 539 Pa. 698 (1994) (upholding the Private Road Act as consistent with Article 1, Section 10 of the Pennsylvania Constitution).

In 2010, the Pennsylvania Supreme Court significantly limited the scope of the law without declaring it unconstitutional on its face.[8] In holding that the PRA is a manifestation of the power of eminent domain, the court determined that the only constitutionally permissible use of the act is if the public is the "primary and paramount beneficiary" of the taking.[9]

[8] *In re Opening a Private Rd. ex rel. O'Reilly,* 607 Pa. 280 (2010).

[9] *See* 607 Pa. at 299. Although this appears to be a significant hurdle to surmount in a typical private road proceeding, the Supreme Court in *O'Reilly* remanded with direction to Commonwealth Court to consider whether an earlier condemnation by the Commonwealth for purposes of interstate construction that allegedly caused the isolation of the property was sufficiently "interconnected" to the PRA proceeding to render the public the primary beneficiary of the taking. *See* 607 Pa. at 299-301. After further remand, the development of the record did not find that the public was the primary beneficiary of the taking because owner of the landlocked property failed to demonstrate an original taking and the use of the PRA was an "interconnected course of events." *In Re O'Reilly*, 100 A.3d 689, 694 (Pa. Cmwlth. 2014), *appeal denied*, 631 Pa. 733 (2015). Despite the questionable constitutionality of the use of the act depending on the facts of the taking, the Supreme Court has, post *O'Reilly*, decided cases under the act without discussing its constitutionality. *See O'Reilly v. Hickory on the Green Homeowners Ass'n*, 22 A.3d 291, 297 n.5 (Pa. Cmwlth. 2011), *citing In re Private Rd. in Speers Boro*, 608 Pa. 302 (2011). However, the Commonwealth Court noted in *In Re Tax Parcel 27-309-216*, 98 A.3d 750, 754 (Pa. Cmwlth. 2014), that it could not infer from the *Speers Boro* decision any retreat from its principles established in *O'Reilly*.