

# PROPERTY PRACTICE QUESTIONS

## ANSWER 15

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**Caveat:** The outline of the answer below provides guidance regarding the main issues which you should address in your answer. The answer is *not* designed to be a model answer.

### **Brenda v. Allen**

#### **Express Easement**

- Allen does not have an express easement to use Brenda's dirt road, because he did not put it in the deed

#### **Implied Easement**

- *Implied easement by necessity*
  - Allen may have an implied easement by necessity because his property has no direct access to the highway
  - His own conveyance operated to landlock his piece of property
  - Allen could theoretically attempt driving through the forest, but that would be nearly impossible as Allen would have to cut down many trees first
  - The court could find that Allen has an implied easement by necessity
- *Implied easement by prior use*
  - *Prior use existed before the lots were severed*
    - The road on Brenda's property existed at the time of severance
  - *The parties intended for the prior use to continue*
    - *Prior use is apparent or discoverable by reasonable inspection*

- There was a well-traveled dirt road on Brenda's lot
- *Permanent or continuous use*
  - A dirt road will probably be sufficient to demonstrate a permanent and continuous use
  - It is more than just one set of tracks
- *Necessary and beneficial use*
  - Allen is benefited by the use of the road on Brenda's property, because otherwise he would not be able to drive to the highway without getting stuck in the woods
    - *Implied reservation*
      - Because this is an implied reservation (the grantor meant to reserve the easement for himself but did not), the courts are going to be much stricter with the necessity requirement.
      - The Texas courts require that the grantor show strict necessity which usually means a lack of alternative means of access, that is, it is actually an implied easement by necessity.
      - Texas cases often hold that implied reservations because of prior use are not allowed.
      - Policy: the grantor wrote the deed and should have known better
  - In this case, Allen's best chance is via an implied easement by necessity because Texas courts frequently refuse to recognize implied reservations by prior use.

### **Easement by Prescription**

- *Open and notorious*

- Open → there was a road, and Allen obviously used it
- Notorious → without permission
  - Because Brenda saw Allen use her dirt road every day and smiled at him without objecting to his use, we can assume that Brenda gave Allen permission to use the road
- Because one of the elements of adverse possession, notoriety, is missing, there is no need to explore the rest of the elements
- Allen's use was not prescriptive, because he had Brenda's consent

**Allen v. Bart**

- Will Bart be burdened by Allen's easement?
  - The burden of an easement is connected to the land
  - If the courts find that Allen had an easement on Brenda's land, then Bart's land continues to be burdened UNLESS:
    - It was not apparent or discoverable upon a reasonable inspection
  - Because a well-traveled dirt road existed at the time Bart bought Brenda's lot, the courts will probably decide that Allen's use was discoverable upon a reasonable inspection
  - Bart will probably continue to be burdened by Allen's easement