Easements: Implied or Otherwise
By Paul Lewis, Title Counsel

I recently had the opportunity to prepare a manuscript for a short presentation on easements. It had been some time since I had done any extensive research on easements. It was a good review, as well as a bit eye opening. Generally, the law of easements is straightforward and involves definitions and classifications. An easement is the non-revocable right to use or enjoy the land of another for a specific purpose which is not inconsistent with the owner's use of the property. An easement is not an estate in land but rather a non-possessory right in the land of another.

Easements can be either appurtenant or in Gross. If appurtenant, the easement benefits another tract of land. The tract on which the easement is located is the subservient tract and the tract that is benefited by the easement is the dominate tract. The easement is an incidence of ownership of the dominate tract and the right to use it passes when title to the dominate tract passes. If an easement is in Gross, an individual or entity is benefited instead of a dominate tract of land. Unless the in Gross easement is commercial, it cannot be assigned and is not inheritable but ends with the death or termination of the easement holder. A poorly drafted easement document may make it difficult to determine if the easement is in Gross or appurtenant. For instance, though the language in an easement grant appears to benefit an individual, if there is another tract of land which may be benefited then it may not be personal at all. If the classification of the easement is difficult to determine, then it is safe to assume it is appurtenant.

We are all accustomed to dealing with express easements. They are in writing, are normally certain and, even though not an estate in land, are insurable when insuring the dominate tract. An express easement may be in the form of a grant or a reservation. While the elements of a conveyance are generally required, an express easement is a grant rather than a conveyance and both the dominate and subservient tracts should be described as well as the easement area. If the easement area is not described, the easement holder can use a particular area and, if not objected to by the owner, that area becomes the easement.

Implied easements can be created in several ways and rely on the theory of inferred intent. An easement implied from prior use, also known as a visible easement, is a quasi-easement due to the fact that the owner of a fee simple title cannot also have an easement over their tract because of the doctrine of merger. The traditional elements of an easement implied by prior use are: (a) a conveyance (b) of part of the grantor's land (c) where, if two tracts, one tract would appear to be subservient to the other and (d) the usage is necessary to the enjoyment of the apparent dominate tract and (e) the usage is visible. The recent case of Adelman v. Gantt, COA 16-339, stated that to establish an easement implied from prior use, the claimant must prove (1) there was common ownership of the dominate and subservient tracts and a subsequent transfer separated the ownership of the two tracts, (2) that before the transfer the owner used part of the tract for the benefit of the

other tract and that the use was apparent, continuous and permanent and (3) the easement is necessary to the use and enjoyment of the dominate tract.

Another form of implied easement is an easement by necessity. This implied easement arises when an owner sells part of their land to another without any express access easement and the only way for the grantee to access their property is through the remaining property of the grantor. The elements for an easement by necessity are: (a) a conveyance (b) of part of the grantor's land (c) so that after the division of the grantor's land by this conveyance, the grantor's land is necessary for access to a public right of way. Traditionally, this easement only ran to the benefit of a grantee meaning that a grantor could in fact landlock themselves should they fail to reserve an easement for their benefit. Beginning in 1988, however, the Court of Appeals has clouded this issue with uncertainty. Adding to this uncertainty is their recent decision in the Adelman v. Gantt case.

The Adelman v. Gantt case involves Adelman's driveway, two feet of which is on Gantt's property bordered by a chainlink fence on the Gantt side of the driveway. In the 1970s, both lots were under common ownership. The common owner sold Gantt's lot to Gantt and the Adelman lot to Gantt's mother. The driveway was there when both lots were under common ownership and the driveway was always used only by the Adelman lot owner. Through escalating acts of the adjoining owners after Adelman acquired their lot from Gantt's mother, Gantt moved the chainlink fence to the property line within the driveway creating various hardships to Adelman. Adelman sued claiming among other things an implied easement from prior use and an easement by necessity.

The Trial Court and the Court of Appeals agreed with Adelman that they had both an easement implied from prior use and an easement by necessity. The Court set out the elements for an easement implied from prior use as mentioned above and set out the elements of an easement by necessity as (1) the dominate and subservient tracts were held in common ownership which was ended by a transfer of part of the land and (2) as a result of the land transfer, it became necessary for the claimant to have an easement. Nowhere did the Court discuss which lot was sold first to establish that a grantor may have landlocked a grantee. Apparently, now the only real difference between an implied easement from prior use and an easement by necessity is that in one case the road (or easement area) was in existence before the conveyance by the common owner, which means that if there was a visible easement prior to the division by the common owner, both easements apply, and if there was no visible easement, only the easement by necessity applies.

It is surprising to me that implied easement cases go so far in our court system. The outcomes in several recent cases make clear that people are emotionally invested in their situations without regard to how badly the law applies to their facts of their case. Unfortunately, there needs to be someone with just as much emotional attachment in an easement in order for there to be more clarity from the Supreme Court on easements by necessity.