

M E M O R A N D U M

DATE: August 15, 1973
 (Dictated August 13, 1973)

TO: William A. Thau

FROM: Larry Vineyard

SUBJECT: American Title Company - Prestonwood
 Easement Problem

In Texas, non-written easements may be created by implication, estoppel, or prescription. [See generally 21 Tex. Jur. 2d, Easements.] Since an easement by prescription involves the adverse holding of a parcel of land for a period of years (usually 10), that doctrine will be inapplicable to the Prestonwood situation. However, both other methods of creating easements constitute valid legal theories and viable alternatives in solving the Prestonwood situation. The application of either or both of these theories to the factual setting should result in the maintenance of the status quo in the Prestonwood area. In addition, a suit for reformation of the deeds should have the same effect without having to invoke either of the above theories if the original parties' intentions to create the easements can be proven.

I. Implied Easements.

The Doctrine of Implied Easements is well entrenched into the Texas law. Perhaps the best discussion of the doctrine is contained in the case of Ulbricht v. Friedsam, 325 S.W. 2d 669 (1959), in which the Texas Supreme Court, citing Corpus Juris Secundum, Easements, determined that the rule of law regarding implied easements was as follows:

"Where the owner of an entire tract of land or of two or more adjoining parcels employs a part thereof so that one derives from the other a benefit or advantage of a continuous, permanent, and apparent nature, and sells the one in favor of which such quasi easement exists, such easement, being necessary to the reasonable enjoyment of the property granted, will pass to the grantee by implication."

The Court then cited with approval the language on an earlier case, Mitchell v. Castellaw, 246 S.W. 2d 163 at 167 (1952):

"It is universally recognized that where the owner of a single area of land conveys away part of it, the circumstances attending the conveyance may themselves, without aid of language in the deed, and indeed sometimes in spite of such language, cause an easement to arise as between the two parcels thus created.... The basis of the doctrine is that the law reads into the instrument that which the circumstances show both grantor and grantee must have intended,...." *had they given the obvious facts of the transaction proper consideration.*
Furthermore, in determining what "circumstances" will require the implication of an easement, the Texas courts have adhered to the following basic proposition:

"Where an owner sells part of a tract of land and there is an apparent continuing and necessary servient use of the tract retained in favor of the tract sold, an easement passes by implication in the conveyance. This is true even though the easement be not specifically mentioned in the conveyance." [Pokorny v. Yudin, 188 S.W. 2d 185 (Civ. App. El Paso, 1945).]

Consequently, since it is evident that all the original purchasers in the Prestonwood area were advised of and agreed to the existence of the intended easements, and since the uses of the various 8 foot strips of land are "apparent, continuing and necessary" it is submitted, on the basis of the foregoing authorities, that each easement did, in fact, arise by implication.

II. Easements by Estoppel.

The Easement by Estoppel is not entirely dissimilar from an Easement by Implication. The basic concept of the Easement by Estoppel arises where an owner of land, by a parol agreement, creates an easement which is acted upon by the other parties to the agreement in reliance upon the easement.

In other words, the elements of an Easement by Estoppel are essentially the elements of an estoppel (representation, belief in the representation, and reliance thereon) applied in an easement context. [Johnson v. Back, 378 S.W. 2d 723 (Civ. App. Amarillo, 1964); Bowington v. Williams, 166 S.W. 719 (Civ. App. El Paso, 1914); Harrison v. Boring, 44 Tex. 255 (1875)]. A specific example of the application of the principals of estoppel to a development situation is found in Forister v. Coleman, 418 S.W. 2d 550 at 562 (Civ. App. Austin, 1967), wherein the court found that a developer's representation that a certain lake front lot had been set aside for use by all persons in the development had caused the purchasers to rely on the representation to their detriment and thus satisfied the elements of an estoppel.

When the holdings of these authorities are applied to the Prestonwood situation the elements of an easement by estoppel seems to be clearly satisfied, since the erection of fences, swimming pools, and other improvements on the various easements is clear evidence of reliance on the existence of the easements.

III. Reformation.

Once it has been determined that the easements are in fact valid and would be upheld by a court of law, it becomes necessary to determine how the deeds may be amended to reflect the easements and thus clear any possible clouds on titles. The easiest way would be for the various owners to grant and receive easements in and to each other's property voluntarily. However, it should be possible, in a suit for reformation of the deeds, to handle the matter even without voluntary compliance. Since the various deeds did not contain the full agreement between the parties, in that the easements were left out, a suit for reformation should clearly lie. [See generally 49 Tex. Jur. 2d, Reformation of Instruments, and the accompanying cases.] In fact, a suit for reformation could be brought on the basis that the deeds did not properly reflect the agreement between the parties, even without resorting to the theories of Implied Easement or Easement by Estoppel. Furthermore, the existence of subsequent purchasers would not prohibit a suit for

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reformation, unless the purchasers are considered to be bona fide purchasers for value without notice. Since the easements were all open and obvious, it is submitted that the subsequent purchasers would not be bona fide purchasers without notice. [Mattox v. Davis, 106 S.W. 169 (Civ. App. 1907); Marchman v. McCoy Hotel Operating Co., 21 S.W. 2d 552 (Civ. App. Ft. Worth, 1929).] Therefore, the parties should have no trouble reforming the deeds to reflect the existence of the easements.

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LV/mjb