Judicial Council Standing Committee
Model Utah Civil Jury Instructions

Agenda

August 8, 2022
4:00 to 6:00 p.m.
Via Webex

Welcome New Members / Thank you Marianna and Joel		Alyson / Lauren
Approval of Minutes	Tab 1	Alyson / Lauren
Implicit Bias Instructions Update		Alyson McAllister
Easement by Necessity	Tab 2	Robert Fuller
Progress on Instruction Topics	Tab 3	(Informational)
Updates on upcoming topics • In-person vs. Virtual Meetings • Products Liability		Stacy / Alyson / Lauren

Committee Web Page

Published Instructions

Next meeting: September 12, 2022 at 4:00 p.m.

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
May 9, 2022
4:00 p.m.

Present: Ruth A. Shapiro, Stacy Haacke (staff), Marianna Di Paolo, Douglas G. Mortensen, Randy Andrus, Lauren A. Shurman, Judge Keith A. Kelly, Samantha Slark, Ricky Shelton, Adam D. Wentz
Also present: Robert Cummings, Robert Fuller

Excused: Alyson McAllister, Judge Kent Holmberg

1. *Welcome.*

Lauren Shurman welcomed and thanked the Committee.

2. *Approval of Minutes.*

March 2022 meeting minutes approved.

3. *Discussion of Boundary by Acquiescence.*

- CV____ Boundary by Acquiescence
  - Marianna Di Paolo questioned whether "you must be satisfied that" language in second paragraph should be changed to be consistent with past instructions.
    - Suggested revision: "To establish [name of plaintiff]'s claim of boundary by acquiescence, [he or she] must prove each of the following elements by clear and convincing evidence: . . . ."
  - Revised minor typos within the instruction.
- CV_____: Visible Line
  - No comments by Committee.
- CV_____ : Occupy Defined
  - Placed "his/her" in brackets to be consistent with past instructions.
  - Changed "the boundary" to "a boundary" to be consistent with past instructions.
- CV_____: Mutual Acquiescence
  - The last bracketed "name of defendant" language was changed to "he/she".
  - Revised "the boundary" to "a boundary" in multiple instances to be consistent with past instructions.
  - Revised the last sentence of the instruction to active voice.
- CV_____: Exception to Silence Equaling Acquiescence
  - Put "he or she" and "his or her" in brackets in multiple instances to be consistent with past instructions.

- Changed “shows by a preponderance of the evidence” to “proves by a preponderance of the evidence . . . .”
- The last sentence of the burden of proof note was struck as suggested by Judge Kelly.

Judge Kelly moved for the adoption of these revised instructions. Ricky Shelton seconded. The Committee formally approved the Boundary by Acquiescence instructions.

4. *Discussion of upcoming queue*

- Judge Kelly discussed whether the Committee should tackle implicit bias instructions and argued for the benefits of doing so.
  - Marianna Di Paolo also voiced her interest in participating in this subcommittee.
  - The Committee had no objections to creating a subcommittee on this topic. Lauren Sherman asked Judge Kelly to take the lead in organizing the same.
  - Marianna Di Paulo, Ruth Shapiro, Doug Mortensen, Judge Su Chon, and Judge Clem Landau were suggested subcommittee members.
  - A meeting for this new subcommittee was tentatively scheduled.
- Stacy Haacke continues to contact subcommittee members to check on status of instruction updates for the Committee to review.
- The Committee discussed potential candidates for various future topics.

5. *Adjournment*.

The meeting concluded at 5:19 PM.

Tab 2

[220808 First Draft Easement by Necessity]

CV _____ Easement by Necessity

An easement by necessity arises when there is a conveyance of part of a tract of land which is so situated that either the part conveyed or the part retained is surrounded with no access to a road to the outer world.

[Plaintiff] and [Defendant] are adjoining landowners. [Plaintiff] asserts that because its parcel is completely landlocked, it should be granted an "easement by necessity" across [Defendant's] parcel for the purpose of ingress and egress from [Plaintiff's] parcel to the [public highway]. [Defendant] asserts that [Plaintiff] has no right to enter or use [Defendant's] parcel to access [Plaintiff's] parcel of land.

In order for the [Plaintiff] to establish an easement by necessity across [Defendant's] parcel, [Plaintiff] must prove by clear and convincing evidence that each of the following factual elements are satisfied:

(1) Unity of title followed by severance;

(2) That at the time of the severance the servitude was apparent, obvious, and visible;

(3) That the easement is reasonably necessary to the enjoyment of the dominant estate; and

(4) It must usually be continuous and self-acting, as distinguished from one used only from time to time when occasion arises.

I will now define some of the words from these elements and offer more guidance:

First, "Unity of title followed by severance" means that the [Plaintiff's] property and the [Defendant's] property were once owned by a single person or entity who then divided the land into two tracts and conveyed away one tract of land.

[Authority: "¶ 15 An easement by necessity requires that " 'all the property is once owned by a single person' " who then " 'divides it into two tracts and conveys away one tract.' " *Id.* (quoting *Savage*, 197 P.2d at 121)." *Abraham & Assocs. Tr. v. Park*, 2012 UT App 173, ¶ 15, 282 P.3d 1027, 1031.]

Second, a "servitude" is an encumbrance consisting in a right to the limited use of a piece of land without possession of it. For example, a servitude and encumbrance could be a roadway crossing a parcel of land.

> [Authority: Black's Law Dictionary, 1103 (Abr. 7th Ed.)("[A]n encumbrance consisting in a right to the limited use of a piece of land without possession of it.")

Finally, the "dominant estate" is an estate that benefits from an easement.

[Authority: *Id.*, p. 449.]

References:
Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1132 (1916)
Savage v. Nielsen, 114 Utah 22, 31–33, 197 P.2d 117, 121–22 (1948)
Tschaggeny v. Union Pac. Land Res. Corp., 555 P.2d 277, 280–81 (Utah 1976)
Abraham & Assocs. Tr. v. Park, 2012 UT App 173, ¶¶ 11-12, 282 P.3d 1027, 1030–31
Potter v. Chadaz, 1999 UT App 95, ¶¶ 15-20, 977 P.2d 533, 538
Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, ¶ 13, 447 P.3d 1278, 1281
David A. Thomas & James H. Backman on Utah Real Property Law, Easement by Necessity, § 12.02(b)(2)(ii), at 341 (ed. 2021).

I. Points for Discussion and Possible Committee Comments:

1. Theory of an Easement by Necessity. The committee may want to include this comment from *Tschaggeny* which captures the essence of an easement by necessity:

> The theory upon which a way of necessity is based is that all the property is once owned by a single person. He divides it into two tracts and conveys away one tract. The physical location of the other tract is such that it is not reasonably accessible without crossing the tract conveyed away. If the grantor retains the tract which is thus surrounded, without any mention of a way, it is presumed that he intended to reserve a right of way to and from the tract retained. If he sells the tract which is thus surrounded without mention of a means of ingress and egress it is presumed that he intended to create a servient estate in himself to the extent of a right of way in favor of the other tract of land.

Tschaggeny v. Union Pac. Land Res. Corp., 555 P.2d 277, 280–81 (Utah 1976)

The following from *Abraham* is also useful:

> Key to this analysis is the proper identification of which conveyance created the claimed necessity. That is, we must look for the exact moment at which a loss of unity of property ownership landlocked one or more of the just-divided parcels of land.

Abraham & Assocs. Tr. v. Park, 2012 UT App 173, ¶ 12, 282 P.3d 1027, 1031

2. Should Elements (2) and (4) be Omitted? All four easement by necessity elements from *Morris* are still referred to in some reported cases following *Tschaggeny*. (See, for example, *Abraham & Assocs. Tr. v. Park*, 2012 UT App 173, ¶¶ 11-12, 282 P.3d 1027, 1030–31.) However, the Utah Supreme Court mentioned the following in Tschaggeny about elements (2) and (4) when establishing an easement by necessity:

> The requirements for a way of necessity are set out in the case of Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1132, as follows:
>
> '(1) Unity of title followed by severance;
>
> '(2) That at the time of the severance the servitude was apparent, obvious, and visible;
>
> '(3) That the easement is reasonably necessary to the enjoyment of the dominant estate; and
>
> '(4) It must usually be continuous and self-acting, as distinguished from one used only from time to time when occasion arises.'
>
> 1 In both the case cited above and the one upon which it relied (Morris v. Blunt,) there were elements of and evidence about rights of way by prescription, as well as ways of necessity; and, therefore, ***elements (2) and (4) set out in the opinion above are not necessary elements in a case based solely upon a claim of a way of necessity***.[2]
>
> 2 Where a party conveys a portion of land which he owns, he impliedly conveys all those apparent or visible easements over the land retained, which at the time of the conveyance are used by the grantor for the benefit of the part conveyed and which are reasonably necessary for the use thereof. This is an implied easement and is not dependent upon the need for a way to go to and from a parcel of land entirely surrounded by land belonging to others or retained by the seller.

Tschaggeny v. Union Pac. Land Res. Corp., 555 P.2d 277, 280 (Utah 1976)(emphases added). F.N.2: "28 C.J.S.Easements s 35(a)." *Id.*

3. Alternative Easement Names. It may be helpful to mention in the comments that an "easement by necessity" is an implied easement:

> Implied easements are three specific types — implied easements based on a prior use, easements by necessity and easements implied from a subdivision plat.29 While express easements are created by written expressions of intent, implied easements arise from the circumstances of a transaction or the circumstances surrounding the properties involved30. Courts are willing to imply an easement because they are convinced that the parties intended to create an easement based on the circumstances accompanying a conveyance of property. The court thereby brings into existence the results of the perceived, unexpressed intent of the parties derived from the facts of the situation.

Thomas, p. 340. An "easement by necessity" is defined as "[a]n easement created by operation of law because the easement is indispensable to the reasonable use of nearby property, such as an easement connecting a parcel of land to a road." Black's Law Dictionary, p. 415 (Abr. 7th Ed.). There is reference to "easement by severance" (*Morris v. Blunt*, 49 Utah 243, 161 P. 1127, 1132 (1916)), and "way of necessity" (*Savage v. Nielsen*, 114 Utah 22, 31–33, 197 P.2d 117, 121–22 (1948)), and appearing to use the same test.

4. Clear and Convincing Evidence. Implied easement elements considered by the jury:

> The jury was tasked with deciding whether the factual elements of an implied easement were met, and it found each element was satisfied.[4] Specifically, the jury found, by clear and convincing evidence,[5] that Sorf's claimed easement was "apparent, obvious, and visible" at the time of severance in 2001; that the claimed easement was "reasonably necessary" to Sorf's use of the west property; that Sorf's use of the claimed easement was "continuous rather than sporadic"; and, finally, that Sorf and Partner at the time of severance "intended, or, having formed no conscious intent, probably would have intended, to create an easement" in favor of the west property.

Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, ¶ 13, 447 P.3d 1278, 1281

> The trial court ruled as a matter "of first impression" that because implied easements " 'deprive an individual of an interest in real property,' " they must be established by clear and convincing evidence. (Quoting *Essential Botanical*

Farms, LC v. Kay, 2011 UT 71, ¶ 22, 270 P.3d 430.) The parties appear to accept the clear and convincing evidence standard. We therefore assume without deciding that that standard applies.

Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, 447 P.3d 1278, 1281, f.n.5.

II. Key Passages from Cases Cited (emphases added):

The elements essential to constitute an easement by severance are: (1) Unity of title followed by severance; (2) that at the time of the severance the servitude was apparent, obvious, and visible; (3) that the easement is reasonably necessary to the enjoyment of the dominant estate; and (4) it must usually be continuous and self–acting, as distinguished from one used only from time to time when occasion arises.

Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1132 (1916)

That there must exist a reasonable necessity is apparent from an examination of the decided cases. Some of these cases go to the extent that, in order to create a servitude upon severance, there must be shown an absolute necessity. However, the requirement of reasonable necessity seems to be supported by the weight of authority and by reason.

Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1132–33 (1916)(citations omitted).

One of the errors urged by counsel for the appellant is the failure of the trial court to make a finding in favor of the appellant that no such way of necessity existed, or any other finding as to a way of necessity. Let us first then consider this problem for a moment.
12 The theory upon which a way of necessity is based is that all the property is once owned by a single person. He divides it in two tracts and conveys away one tract. The physical location of the **122 other tract is such that it is not reasonably accessible without crossing the tract conveyed away. If the grantor retains the tract which is thus surrounded, without any mention of a way, it is presumed that he intended to reserve a right of way to and from the tract retained. If he sells the tract which is thus surrounded without mention of a means of ingress and egress it is presumed that he intended to create a servient estate in himself to the extent of a right of way in favor of the other tract of land. The requirements for a way of necessity are set out in the case of Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1132, as follows:
‘(1) Unity of title followed by severance;

(2) That at the time of the severance the servitude was apparent, obvious, and visible;
(3) That the easement is reasonably necessary to the enjoyment of the dominant estate; and
(4) It must usually be continuous and self-acting, as distinguished from one used only from time to time when occasion arises.'
See also: Adamson v. Brockbank, Utah, 185 P.2d 264; citing Morris v. Blunt, and reaffirming requirement number three above, and discussing generally the doctrine of easements by implication, and reasonable necessity; *32 Smith v. Sanders, Utah, 189 P.2d 701; Fayter v. North, 30 Utah 156, 83 P. 742, 6 L.R.A.,N.S., 410.
3 It is apparent then, from an analysis of the above requirements, that the doctrine has its basis in the theory of a grant by reason of the circumstances attendant at the time of the grant. It is inconsistent with the adversity contemplated in the theory of an easement based upon prescription.
4 ***A way of necessity arises from the existence of such necessity at the time of the dividing of the property.*** A right of way by prescription can only be attained by satisfying certain other requirements. . . .
567 The distinction between a way of necessity and a prescriptive right is set out in Bertolina v. Frates, 89 Utah 238, 57 P.2d 346, 350; as follows:
'Ways of necessity arise by virtue of conditions entirely different from ways created by prescription. A prescriptive right can be acquired by anyone. It may be appurtenant or in gross. There need be no connection so far as the chain of title is concerned between servient and dominant estates, but ***ways of necessity exist only where the title springs from a common source.'***
And, as indicated in 28 C.J.S., Easements, § 18, page 674:
'*A right of way of necessity* over another's land is distinguished from a right of way by prescription, and *cannot ripen into a prescriptive *33 easement while the necessity continues*. Where one has the right to use an easement by the grant of the owner as a way of necessity, the user cannot be adverse, at least where the user does not exceed the right, until after the necessity has ceased and the land owner has notice of a hostile claim.' (Italics added)

Savage v. Nielsen, 114 Utah 22, 31–33, 197 P.2d 117, 121–22 (1948)

A way of necessity is defined in the case of Savage v. Nielsen[1] as follows:
The theory upon which a way of necessity is based is that all the property is once owned by a single person. He divides it into two tracts and conveys away one tract. The physical location of the other tract is such that it is not reasonably accessible without crossing the tract conveyed away. If the grantor retains the tract which is thus surrounded, without any mention of a way, it is presumed that he intended to reserve a right of way to and from the tract retained. If he sells the tract which is thus surrounded without mention of a means of ingress and egress it is presumed that he intended to create a servient estate in himself to the extent of a

right of way in favor of the other tract of land. The ***requirements for a way of necessity*** are set out in the case of Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1132, as follows:
'(1) Unity of title followed by severance;
'(2) That at the time of the severance the servitude was apparent, obvious, and visible;
'(3) That the easement is reasonably necessary to the enjoyment of the dominant estate; and
'(4) It must usually be continuous and self-acting, as distinguished from one used only from time to time when occasion arises.'
1 In both the case cited above and the one upon which it relied (Morris v. Blunt,) there were elements of and evidence about rights of way by prescription, as well as ways of necessity; and, therefore, ***elements (2) and (4) set out in the opinion above are not necessary elements in a case based solely upon a claim of a way of necessity***.[2]
2 Where a party conveys a portion of land which he owns, he impliedly conveys all those apparent or visible easements over the land retained, which at the time of the conveyance are used by the grantor for the benefit of the part conveyed and which are reasonably necessary for the use thereof. This is an implied easement and is not dependent upon the need for a way to go to and from a parcel of land entirely surrounded by land belonging to others or retained by the seller.
34 An example is the sale of an apartment served by common halls and stairways. Easements in the halls and stairways are conveyed even though there is no express wording to that effect written into the deed of conveyance. This is true even if entrance and exit may be had by way of a fire escape attached only to the apartment in question. These are easements by implication. The inference is drawn from the surrounding circumstances under which the conveyance was made rather than from the language used. In such a case, the easement must be apparent, obvious, and visible.[3]
567 ***On the other hand, a way of necessity arises when there is a conveyance of part of a tract of land which is so situated that either the part conveyed or the part retained is surrounded with no access to a road to the outer world.*** In either *281 case, there is an implied grant or reservation of a way across the part not so surrounded unless it clearly appears that the parties to the conveyance did not intend such an easement. However, it is not necessary that the easement be visible, apparent, or obvious. There is no implied grant where the instrument of conveyance specifically provides for a way over the parcel not land locked. While the implied reservation applies to both the grantor and the grantee, an implied grant is more likely to be found in a disputed case where the grantee gets the land-locked parcel than it is where the grantor retains it.[4]

Tschaggeny v. Union Pac. Land Res. Corp., 555 P.2d 277, 280–81 (Utah 1976)

ANALYSIS

I. Easement By Necessity

4567 ¶ 12 Abraham asserts that because its parcel is completely landlocked, it should *1031 be granted an easement by necessity via the existing road that runs across the Parks' land. The Utah Supreme Court addressed the requirements for an easement by necessity in the seminal case of *Tschaggeny v. Union Pacific Land Resources Corp.*, 555 P.2d 277 (Utah 1976). The Court articulated the four requirements as follows:

(1) Unity of title followed by severance;

(2) That at the time of the severance the servitude was apparent, obvious, and visible;

(3) That the easement is reasonably necessary to the enjoyment of the dominant estate; and

(4) It must usually be continuous and self-acting,[5] as distinguished from one used only from time to time when occasion arises.

Id. at 280 (quoting *Morris v. Blunt*, 49 Utah 243, 161 P. 1127, 1132 (1916)) (minor changes in capitalization and structure as per *Tschaggeny;* internal quotation marks omitted). Further, " '[t]he physical location of the other tract [must be] such that it is not reasonably accessible without crossing the tract conveyed away.' " *Id.* (quoting *Savage v. Nielsen*, 114 Utah 22, 197 P.2d 117, 121–22 (1948)). *Tschaggeny* explained that where a property owner " 'sells the tract which is thus surrounded without mention of a means of ingress and egress it is presumed that he intended to create a servient estate *in himself* to the extent of a right of way in favor of the other tract of land.' " *Id.* (quoting *Savage*, 197 P.2d at 122) (emphasis added). ***Key to this analysis is the proper identification of which conveyance created the claimed necessity. That is, we must look for the exact moment at which a loss of unity of property ownership landlocked one or more of the just-divided parcels of land***. Further, a landlocked property owner with no other means of access to the outside world does not have an automatic right to an easement by necessity across the most *convenient* parcel to invade, but across "the tract conveyed away." *Savage*, 197 P.2d at 122. Thus, once the conveyance that landlocked the property is identified, the proper course, if the doctrine of easement by necessity is to be employed, is to find an avenue for relief through the property from which the landlocked parcel was separated. *See Tschaggeny*, 555 P.2d at 280.

Abraham & Assocs. Tr. v. Park, 2012 UT App 173, ¶¶ 11-12, 282 P.3d 1027, 1030–31

¶ 15 An easement by necessity requires that " 'all the property is once owned by a single person' " who then " 'divides it into two tracts and conveys away one tract.' " *Id.* (quoting *Savage*, 197 P.2d at 121).

Abraham & Assocs. Tr. v. Park, 2012 UT App 173, ¶ 15, 282 P.3d 1027, 1031

> However, "the ultimate determination of whether an easement exists is a conclusion of law, which we review for correctness." *Judd v. Bowen*, 2018 UT 47, ¶ 8, 428 P.3d 1032 (cleaned up). Nevertheless, "such a determination is the type of highly fact-dependent question ... which accords the [district court] a broad measure of discretion when applying the correct legal standard to the given set of facts." *Id.* (cleaned up). Accordingly, we will "overturn the finding of an easement only if [we] find[ ] that the [district court's] decision exceeded the broad discretion granted." *Id.* (cleaned up).

Ross & Norma Allen Fam. Tr. v. Holt, 2019 UT App 197, ¶ 15, 455 P.3d 616, 620

> In support of the trial court's determination that the plaintiffs had an easement in the above-mentioned ditch for the purpose of conveying water to their property, reliance is placed on the doctrine of easement acquired by implication or necessity.
> 2 It has previously been recognized by this Court that such an easement may be found when these elements are present: a previous unity of title, followed by severance; that at the time of the severance the servitude was so plainly apparent that any prudent observer should have been aware of it; that the easement is reasonably necessary to the use and enjoyment of the dominant estate; and it must have been continuous, at least in the sense that it is used by the possessor whenever he desires.[2]

Ovard v. Cannon, 600 P.2d 1246, 1247 (Utah 1979)

> "The ultimate determination of whether an easement exists is a conclusion of law," but "the existence of an easement is also a highly fact-dependent question." *Carrier v. Lindquist*, 2001 UT 105, ¶ 11, 37 P.3d 1112. Thus, the jury found the factual elements of an implied easement, but the trial court ultimately granted the easement.

Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, 447 P.3d 1278, 1281

> ¶24 To imply an easement from prior use, the fact-finder must find evidence of four elements: "(1) that unity of title was followed by severance; (2) that the servitude was apparent, obvious, and visible at the time of severance; (3) that the easement was reasonably necessary to the enjoyment of the dominant estate; and (4) that the use of the easement was continuous rather than sporadic." *Butler v. Lee*, 774 P.2d 1150, 1152 (Utah Ct. App.
> 1989); *accord Morris v. Blunt*, 49 Utah 243, 161 P. 1127, 1132 (1916).

Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, ¶ 24, 447 P.3d 1278, 1282

II. The implied easement's scope includes parking.

12¶30 Now we must decide the easement's scope, specifically whether the implied easement grants Sorf the right to park in the alley.[7]

13¶31 ***Utah has not yet adopted a test for defining the scope of an implied easement***. The trial court determined the easement's scope based on "the parties' intent *1284 and necessity existing at the time of severance." And a number of other jurisdictions determine the scope of an implied easement based on the parties' probable expectations at the time of severance. *See, e.g.*, *Tobias v. Dailey*, 196 Ariz. 418, 998 P.2d 1091, 1095 (App. 2000); *Thorstrom v. Thorstrom*, 196 Cal.App.4th 1406, 127 Cal. Rptr. 3d 526, 539 (2011); *McCoy v. Barr*, 47 Kan.App.2d 285, 275 P.3d 914, 921 (2012); *Tungsten Holdings, Inc. v. Kimberlin*, 2000 MT 24, ¶ 27, 298 Mont. 176, 994 P.2d 1114, *overruled on other grounds by Shammel v. Canyon Res. Corp.*, 2003 MT 372, 319 Mont. 132, 82 P.3d 912; *Barbour v. Pate*, 229 N.C.App. 1, 748 S.E.2d 14, 18 (2013); *see also* Restatement (First) of Property § 484 cmt. b (Am. Law Inst. 1944) (explaining that the extent of an easement by implication "is to be measured ... by such uses as the parties might reasonably have expected from future uses of the dominant tenement"). This approach is an "inherently factual" one, *McCoy*, 275 P.3d at 921, with the parties' reasonable expectations being "ascertained from the circumstances existing at the time of the conveyance," *Thorstrom*, 127 Cal. Rptr. 3d at 539 (cleaned up); *see also* Restatement (First) of Property § 484 cmt. b.

¶32 We agree with this approach.

Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, ¶¶ 29-32, 447 P.3d 1278, 1283–84

The jury was tasked with deciding whether the factual elements of an implied easement were met, and it found each element was satisfied.[4] Specifically, the jury found, by clear and convincing evidence,[5] that Sorf's claimed easement was "apparent, obvious, and visible" at the time of severance in 2001; that the claimed easement was "reasonably necessary" to Sorf's use of the west property; that Sorf's use of the claimed easement was "continuous rather than sporadic"; and, finally, that Sorf and Partner at the time of severance "intended, or, having formed no conscious intent, probably would have intended, to create an easement" in favor of the west property.

Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, ¶ 13, 447 P.3d 1278, 1281

The trial court ruled as a matter "of first impression" that because implied easements " 'deprive an individual of an interest in real property,' " they must be established by clear and convincing evidence. (Quoting *Essential Botanical Farms, LC v. Kay*, 2011 UT 71, ¶ 22, 270 P.3d 430.) The parties appear to accept the clear and convincing evidence standard. We therefore assume without deciding that that standard applies.

Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, 447 P.3d 1278, 1281,f.n.5.

2. Easement by Implication

9 ¶ 16 There are four elements necessary to constitute an easement by implication: (1) unity of title followed by severance; (2) at the time of severance the servitude was apparent, obvious, and visible; (3) the easement is reasonably necessary to enjoy the dominant estate; and (4) use of the easement was continuous rather than sporadic. *See Butler v. Lee*, 774 P.2d 1150, 1152 (Utah Ct.App.1989). Here, it is undisputed that Chadaz has never used the claimed right-of-way. Because the fourth requisite element has not been satisfied, an easement by implication cannot exist in this case. Therefore, we need not address the remaining elements.

* * *

4. Easement by Necessity

11 ¶ 18 ***An easement by necessity arises "when there is a conveyance of part of a tract of land which is so situated that either the part conveyed or the part retained is surrounded with no access to a road to the outer world."*** *Tschaggeny v. Union Pac. Land Resources Corp.*, 555 P.2d 277, 280 (Utah 1976). In this case, the undisputed evidence shows that Chadaz's property is not landlocked and that she has at least one, if not several, access routes to her property that were used in lieu of any claimed right-of-way across the Potter's land. Therefore, Chadaz cannot establish an easement by necessity over the claimed right-of-way.

Potter v. Chadaz, 1999 UT App 95, ¶¶ 15-20, 977 P.2d 533, 538

Utah Real Property Law

§ 12.02(b)(2)(ii). Easement by Necessity. The easement by necessity is based on the public policy of maximizing the productive use of land.41 This type of implied easement is recognized because it is necessary in order for the easement holder to have reasonable use of the dominant property. Thus, a landlocked property would be cut off from access to any public roads unless the courts recognize an implied easement across a neighbor's property. The required circumstances are similar for both the easement by necessity and the implied easement based on prior use.42 The requirements are: **(1) unity of title followed by severance, (2) apparent,**

obvious and visible use, (3) necessity of the easement for enjoyment of the dominant estate, and (4) continuous use.43 The test for necessity is greater for the easement by necessity than in the case of an easement implied from prior use.44 Such an easement is based on the theory of a grant by reason of 35. Ovard v. Cannon, 600 P.2d 1246, 1247 (Utah 1979); Chournos v. Alkema, 494 P.2d 950, 952 (Utah 1972); Butler v. Lee, 774 P.2d 1150, 1152 (Utah Ct. App. 1989). 36. Southland Corp. v. Potter, 760 P.2d 320, 323 (Utah Ct. App. 1988). 37. Butler, 774 P.2d at 1154. 38. See Backman & Thomas, supra note 6, at § 2.02[3][b]; see Powell & Rohan, supra note 24, at § 34.08[3]. 39. Chournos, 494 P.2d at 952 . 40. Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, 447 P.3d 1278. 41. See Backman & Thomas, supra note 6, at § 2.02[3][b]. 42. Culbertson v. Bd. of County Comm'rs, 44 P.3d 642 (Utah 2001); Tschaggeny v. Union Pacific Land Resources Corp., 555 P.2d 277, 280 (Utah 1976). 43. Savage v. Nielsen, 197 P.2d 117, 122 (Utah 1948); see also Abraham & Associates Trust v. Park, 282 P.3d 1027 (Utah Ct. App. 2012) (holding that an easement by necessity did not exist over the most convenient land and route because there was not common ownership of the parcels followed by a division of that common ownership). 44. Alcorn v. Reading, 243 P. 922, 926 (Utah 1926). 342 the circumstances at the time of severance, and is inconsistent with the adversity contemplated in the prescription theory.45 Several limitations apply to recognition of an easement by necessity. A claimant cannot have the benefits of an easement by necessity if that person has created the conditions producing the necessity.46 An owner who blocks an existing access road by building a structure is not entitled to an easement by necessity over neighboring property. The claimant can remedy the lack of access by removing the obstructing building. The easement by necessity terminates if the need for the easement no longer exists.47

David A. Thomas & James H. Backman on Utah Real Property Law, Easement by Necessity, § 12.02(b)(2)(ii), at 341 (ed. 2021)(emphasis added).

Link: https://www.utahbar.org/wp-content/uploads/2021/07/Utah-Property-Treatise-2021-final-5-26-2021.pdf

Tab 3

MUJI Civil Upcoming Queue:

Numbers	Subject	Members	Progress	Next Report Date
1000	Products Liability	Tracy Fowler, Paul Simmons, Nelson Abbott, Todd Wahlquist	Appeared on Agenda November 2021. Continuing to work and will report back.	
	Implicit Bias	Judge Kelly, Judge Landau, Alyson McAllister, Doug Mortensen, Rachel Griffin, Ruth Shapiro, Marianna Di Paolo, Annie Fukushima	Judge Kelly has scheduled meetings for this group. Alyson will give an update at August meeting.	
	Easements and Boundary Lines	Adam Pace, Robert Cummings, Robert Fuller, Doug Farr	Appeared on Agenda February 2021. Waiting for final review on Boundaries and new instructions.	August 2022
1700	Assault / False Arrest	Mitch Rice, David Cutt, Andrew Wright, Alyson McAllister	Mitch is circulating instructions with the group and will report back.	
2400	Insurance	Andrew Wright, Richard Vazquez, Stewart Harman, Kigan Martinaeu	Appeared on Agenda March 2022. Currently 5 members – 3 defense, 2 plaintiffs. Will work on one more plaintiffs attorney.	Sept. 2022
	Unjust Enrichment	David Reymann	Stacy researching and following up on these instructions.	
1700	Abuse of Process	David Reymann	Instructions were shared in the past, where these completed? Marianna could only find notes as to intention to form this subcommittee.	
2700	Directors and Officers Liability	Adam Buck	Lauren has been working with Adam to fill this group and has reached out regarding a timeframe.	
2500	Wills / Probate	Matthew Barneck; Rustin Diehl	Matthew and Rustin have met to discuss direction and have started reaching out to various recommendations – Elder law section, Probate Subcommittee, WINGS, recommended individuals.	
2300	Sales Contracts and Secured Transactions	Matthew Boley, Ade Maudsley	Matthew and Addie are willing to work on this topic and would like more feedback from the Committee.	
	Case law updates	TBD	Previous chairs or group leads may have feedback.	

Archived Topics:

Numbers	Subject	Completed
1500	Emotional Distress	December 2016
200 / 1800	Fault / Negligence	October 2017
1300	Civil Rights: Set 1 and 2	September 2017
1400	Economic Interference	December 2017
1900	Injurious Falsehood	February 2018
1200	Trespass and Nuisance	October 2019
100	Uniformity	February 2020
1600	Defamation Update	March 2022