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Unlocking Landlocked Land

from the desk of David M. Touchstone

By the time the earth has turned over enough times for one's whiskers to go gray (like mine), one hears a lot of different things. Much of it is foolishness. For instance, it has come to my attention that real estate agents and (egad!) real estate lawyers sometimes advise their clients that landlocked property cannot be marketed and sold. This simply isn't true.

What do I mean by the term "landlocked"? A landlocked tract is one that does not touch a public road along any portion of its periphery. Practically speaking, it is a tract that does not border a public road for a sufficient length of its boundary to allow for vehicular traffic. So, if a public road touches only the corner of a tract, or runs along the boundary of a tract for no more than a few feet, the tract is for all practical purposes landlocked. Such a tract is said to have no access. Sometimes it is described as lacking ingress to and egress from a public road. Whichever way one wishes to describe it, the meaning is the same: a landlocked tract is one that requires passage over one or more other private property owners' tracts. Crossing other people's property is problematic, for the very essence of ownership is the right to exclude. When one is the owner of a thing, such as land, he has the *exclusive* right to the use of that thing. Accordingly, the owner of the land that lies between the public road and the landlocked tract has the right to prevent the owner of the landlocked tract from crossing his property.

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We real estate lawyers customarily address this problem by drafting a document known as a servitude of passage agreement. In a servitude of passage agreement, the owner of the tract that abuts the public road agrees to a servitude of passage that links the otherwise landlocked tract to the public road. Naturally, the owner of the tract abutting the public road has to sign the servitude of passage agreement. If the agreement is properly drafted, once it is recorded with the clerk of court, it will create legal access to the otherwise landlocked tract not only for the benefit of the first owner of the landlocked tract, but also for all future owners of the landlocked tract. Likewise, all future owners of the tract traversed by the servitude of passage will be obligated to allow passage across their tract to all future owners of the landlocked tract.

Generally speaking, those persons who will have a right of crossing include the owner of the landlocked tract as well as his guests and agents. A recent Louisiana Court of Appeals decision, *Carabine v. DeGravelle*, 11 So. 3d 85 (3d Cir. 2009), is illustrative of the scope of protection available to the landlocked owner by a properly drafted servitude of passage. In *Carabine*, the DeGravelles owned the tract traversed by the servitude of passage which served the tract owned by the Carabines. These neighbors did not get along. On frequent occasions, the DeGravelles stopped various persons who were travelling the servitude of passage to get to the Carabines' property and told them that they were trespassing on the DeGravelles' land and that unless they departed immediately the DeGravelles would have them arrested. Those who received this warning included guests to the Carabines' social events, friends of the Carabines' teenage children, UPS drivers, deliverymen of water, fertilizer, and other products that the Carabines needed to service their property, and garbage truck drivers coming to service a dumpster on the Carabines' property. The court in this case issued an injunction against the DeGravelles prohibiting them from such harassing conduct and entered a $15,000 money judgment in favor of the Carabines and against the DeGravelles. Further, the Court let it be known that any additional harassment of the Carabines, their guests, workers, and other authorized visitors by the DeGravelles could result in jail time for the violators.

So, at this point, if you have your thinking cap on, you might be asking yourself how you can know whether a tract you have been asked to list has legal access. Honestly, this isn't a question that most agents are in a position to figure out for themselves. Here's the reason why: the law does not require a comment on each deed of the "landlocked" tract that it is served by a servitude of passage. As an example, let us suppose that Joe Brown purchases Blackacre and that Blackacre is landlocked. Joe goes to his neighbor, Tom Smith, whose land lies between Blackacre and the public road and requests Tom to grant a servitude of passage across Tom's land. Tom agrees and signs the servitude of passage agreement that Joe's lawyer drafts. The servitude of passage agreement is then recorded with the parish clerk of court. A few years later Joe sells Blackacre to Dave Williams. The deed from Joe mentions nothing about the servitude of passage; it simply says that Joe sells Dave Blackacre for the agreed price. Then the property is sold four more times and each of the successive deeds makes no statement regarding the servitude of passage. What does all this mean to you when you are asked to list the property by the current owner of Blackacre? First, if you do your customary due diligence by going to the Parish Assessor's office and looking at the Assessor's plat map, you will be put on notice that Blackacre does not touch a public road. At that point, you will probably ask the owner whether or not there is a servitude of passage connecting Blackacre to the public road. He will probably tell you something like: "Oh, that's no problem. See that driveway there. That's the way we have always come in and out to the property." You, of course, will explain to him that a physical driveway does not necessarily constitute *legal access*. By now you are beginning to realize that the owner doesn't have any more information to relate and you ask to look at a copy of his deed. When you look at the deed, there is nothing on it to tell you that Blackacre has the benefit of a servitude of passage. At this point you have gone about as far as you are able to go

on your own; you need some help. The only way to get to the bottom of this is by having the title examined. In the scenario I have laid out above, there *is* a servitude of passage agreement that *does* provide legal access to Blackacre. You just can't find it. You should ask the real estate lawyer who customarily handles your closings to examine the title and report back to you whether or not he is able to locate a servitude of passage agreement providing access to the tract you have been asked to list. You should also ask the attorney to provide you with a copy of the servitude of passage agreement so that you can determine if there are any special issues arising from it. Sometimes the landowner who grants the servitude of passage requires inclusion of certain provisions. For instance, if the granting landowner keeps livestock on his property, he may require that there be a locked gate at the entrance to his property and at the entrance to the landlocked property. On some occasions I have seen maintenance requirements in the servitude of passage agreement such that the owner of the landlocked tract must periodically pave or re-grade the driveway that runs along the servitude. Maintenance provisions may require the owner of the landlocked tract to periodically kick in some cash to be used for maintenance of the driveway. Sometimes the servitude of passage agreement requires liability insurance coverage. Sometimes the servitude of passage agreement creates speed limits for traveling the driveway or puts limits on what kind of vehicles can travel the driveway, or puts limits on what times during the day or night the driveway can be traversed.

Any type of limitation in the servitude of passage agreement matters. You want to get to the bottom of this and figure out exactly what the situation is. The courts of this state have required of real estate agents a strong duty of disclosure. If you know something that negatively affects the value or use of the property and you fail to disclose it to the buyer, you can find yourself on the wrong end of a lawsuit filed by the buyer. If you fail to adequately counsel your seller on his duty to disclose and he gets sued by a disgruntled buyer, then you will probably find yourself on the wrong end of a lawsuit filed against you by the seller. Access matters a lot and you need to find out what documents are filed in the public records that affect access.

What happens if the attorney performs the title examination and then reports back to you that he cannot find a servitude of passage agreement filed in the public records? The next step in that instance is to ascertain whether it is possible to get one. Most of the time neighbors want to be neighborly. If that is the case, then without delay, you should request the title attorney to draft a servitude of passage agreement and without delay you should undertake to obtain signatures from the appropriate persons. These signatures will need to be given in the presence of a Notary Public and two witnesses. Asking a person to sign a document before a Notary is where the rubber meets the road. I have been privy to a number of situations in which a neighbor agreed or sort of agreed to sign a servitude of passage agreement, but when it got right down to him appearing before a Notary and signing the paper, he balked. That's why you do not want to dilly-dally on this. It is better to find out at the earliest possible time whether or not there is a problem. You don't want to discover this kind of problem when the buyers' moving van is on the way here from Iowa.

Now let's start talking worst-case scenarios. After the real estate lawyer makes the title examination, he reports back to you that there is no servitude of passage agreement filed of record. On further investigation, you discover that the neighbor despises your client and will never, never agree to sign a servitude of passage agreement. Is it game over? Fortunately, the law provides relief to the landlocked owner in most such instances. Louisiana courts have often opined that the law favors putting property into commerce. There are provisions in the Louisiana Civil Code that allow a landlocked owner to force a servitude of passage across the land of the recalcitrant neighbor. Effective January 1, 2008, there are some fact patterns that will allow a court to pronounce that a servitude of passage already exists because it has been in use for thirty years. In these instances, the facts will need to show that a visible roadway (driveway) has been in place for at least thirty years that has been used to access the landlocked tract. Instances in which these facts exist will not, however, be adequate to support issuance of a title insurance policy until a lawsuit has been filed and a judgment obtained in court against the intervening landowner with the judgment declaring that a servitude of passage has been acquired by the landlocked landowner through acquisitive prescription.

Since I have raised the issue of title insurance, we ought to spend some time now talking about how it plays into all of this. In at least 90% of transactions involving financing from institutional lenders such as banks and mortgage companies, one of the requirements of the borrower for obtaining the loan is that a lender's title insurance policy is issued to the lender. Boilerplate language in the lender title insurance policy guarantees that there is legal access to the insured tract. The lender wants assurance that if it ever has to foreclose on its collateral that it and anyone to whom it may wish to sell the property can obtain access to the property. Long ago, lenders starting requiring title insurers to include provisions in their policies guaranteeing such access in the event of foreclosure. Lenders will not waive this requirement. Therefore, when we title agents write a lender policy we must ascertain that there is unquestionable legal access. In the case of a servitude of passage gained through acquisitive prescription (physical driveway that has been used for at least thirty years), title insurance companies will not allow their agents (people like me) to issue a lender policy unless and until a judge has granted a judgment against the intervening landowner declaring that the servitude of passage is in existence as a matter of law.

What about a situation in which no driveway has been in use for at least thirty years and the intervening landowner refuses to give a servitude of passage? In most such instances, the law of Louisiana allows the landlocked owner to sue the intervening owner to force a servitude of passage which is to be located "generally…along the shortest route from the enclosed [landlocked] estate to the public road at the location least injurious the intervening lands." In certain fact patterns, the landlocked owner does not have to pay anything to his neighbor while in other cases he will be required to "indemnify his neighbor for the damage he may occasion." Whether or not the landlocked owner has to pay his neighbor something, he will certainly have to pay his own lawyer's fee, some court costs, and may have to pay such expert witness fees as are charged by appraisers and surveyors. As long ago as Shakespeare's time, there have been complaints about "the law's delay" (see Hamlet's

"To Be or Not to Be" soliloquy). Things haven't much improved since the Bard's day. It still takes a long time to move one of these babies through the court. Expect to spend a year if you have to go the distance, and there isn't an appeal. However, on the other hand, I have known of a number of cases in which a neighbor would not sign a servitude of passage agreement, but having been sued and obtaining benefit of counsel, decides it will be more prudent and cost effective to negotiate a servitude of passage agreement than to await the judgment that will almost inevitably rule against him. Like Confucius says, "The longest journey begins with the first step." If you have a client in this situation who wants to sell his property, advise him to get started with court action now. Sometimes just a demand letter from an attorney is enough to get the neighbor to cooperate.

Let's go back to the original premise of this article…the question of whether one can sell property that doesn't have legal access. The answer is that there is nothing wrong with selling property with no legal access. Lack of legal access does not constitute a title defect. However, if I were a real estate agent, I would disclose to the buyer everything I knew and everything I could find out about the issue of legal access. At a practical level, if there is institutional financing of the kind that requires issuance of a lender title insurance policy, the deal just won't happen until legal access is obtained in the form of a servitude of passage agreement or a judgment of a court.

Other problems that have arisen in my practice have sometimes involved getting servitudes of passage over railroads and federal lands. Until recently, it was questionable as to whether any judicial relief was available in these instances. In the last two years, there have been a number of ground-breaking federal court decisions in Louisiana as to these matters, which have been very helpful to landlocked owners. I don't think this is the time or place to try to wend through the intricacies of this developing body of law, but if you know of a landowner who has given up on trying to get access across a railroad or across federal land (forget Barksdale), relief may well be possible.

As always, I will be pleased to answer any questions you may have regarding the matters discussed above or any other real estate law questions. I am David M. Touchstone, and I can be reached by telephone at (318) 752-8080, by email at dmtouchstone@firstcommercetitle.com, or at my business location at 2708 Village Lane, Bossier City, Louisiana 71112.