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**California Equitable Easements. When they apply, and the three step test for establishing one.**

California courts have generally provided for equitable easements when the requirements for a prescriptive easement or adverse possession were not present. In a recent decision the court granted an equitable easement for future use where the access road had never been used by the people acquiring the easement.

Tashakori had bought 2 adjacent properties, one of which had a house, the other, Lot 18, bare land. They sold the house property, and then learned that they did not have a recorded deed of easement to Lot 18. There was a shared driveway they could use, but the owner of the underlying property (the servient estate ) protested. (Tashakri v Lakis, (2011) 196 Cal.App.4th 1003.)

To create an equitable easement, three factors must be present:

1. The party needing the easement is innocent, that is not willful or negligent.
2. where adverse possession and prescriptive easement rules do not apply; Adverse possession require unless the rights of the public would be harmed, the court will allow it if the party needing the easement would otherwise be irreparably harmed, regardless of the injury to the other party; and
3. The hardship to the party needed the easement must be greatly disproportionate to the hardship faced by the other party and this fact must clearly appear in the evidence

The court found that the owners of Lot 18 were innocent, in that they had diligently investigated access before buying the property, relying on misinformation from the broker, prior owner, and preliminary title report. It found the owner of the driveway would suffer little or no harm- they had never used the driveway, it is

completely separated from the rest of their property by a fence and is not accessible without jumping the fence. They have never paid for maintenance of the driveway.

In contrast, the owners of Lot 18 would be irreparably harmed if denied an equitable easement. Lot 18 would be landlocked and unusable. The owners could not legally access it, or even walk on it. The injury to them outweighed that of the other owners.

The servient owners argued that prior decisions all involved longstanding encroaching uses, which did not exist here. Such decisions covered uses from 15 to over 25 years. But this court found that length of use was never a condition in these decisions, and another decision noted that plaintiff's encroachment may be of recent origin.

This must seem unfair to the owner of the servient estate. Presumably the owner or his predecessor was compensated at some time for granting the easement for use of the shared driveway to owners of lots other than Lot 18. Now Lot 18 gets a free ride without compensating them. On the other hand, the court had to find a solution to the landlocked parcel. Ultimately the fault was with the original owner who created the parcels for failing to ensure access to them all. The court took the easiest route here. Given that this equitable easement did not require a long existing use, like prescriptive easements do, there may be more claims of equitable easement.