

RIGHTS OF WAY

This article is intended to provide some basic guidance on rights of way, how they are defined and a simple summary of how they function. However, the law which surrounds rights of way is complex and by their nature, rights of way are varied. While there may be some defining characteristics that are common to all, the details of individual rights of way must be examined closely to see how they affect the property to which they relate.

As with all of our articles, the within information is not a substitute for legal advice and we recommend you consult a solicitor to discuss your particular circumstances for advice tailored to your situation.

Characteristics

A right of way is a form of easement, which is a category of legal rights that generally amount to rights to cross or otherwise use another's lands for a specific purpose. Other examples of common easements would be wayleaves for water or sewer pipes or percolation areas for septic tanks, etc. While this article is intended to be a simple guide to the nature and issues surrounding rights of way, there are a number of characteristics that must be present to meet the definition of an easement, the most obvious of which are as follows:

There must be two properties, one which enjoys the benefit of the right (the dominant property) and the other over which the right is enjoyed (the servient property).

The owners of the dominant and servient properties must not be the same person (i.e. one cannot have a right of way against oneself).

Applying therefore the first and second characteristics to a private right of way a landlocked field may enjoy a private right of way over an adjoining field between it and the public road. The servient property owner will continue to own the roadside field, but must allow access by the dominant property owner to the dominant inner field. Rights of way can either be general or can be limited as to the extent of the entitlement to their use by the owner of the dominant property.

The express limitations of the use of a right of way can take many forms. For example, the person granting the right of way could require the right of way to be secured by a lock at night or oblige the user of the right of way to close gates or restrict the time at which the right of way maybe exercised. The most common limitations of the extent to which a right of way can be exercised are restrictions as

to the mode and purpose of the use of the right (e.g. a right of way to access lands for agricultural purposes only will likely not include the right for heavy machinery that may be required for construction to pass over the relevant area).

An exercise of a right of way by the dominant owner which exceeds the limitations for which the right of way was granted is "excessive user". For example, it would be an excessive user to drive vehicles down a right of way which is too narrow to take them. Another example of excessive user may be where a right of way exists for access to a single dwellinghouse and the owner of the dominant tenement (i.e. the property with the benefit of the right of way) constructs one or more additional dwellinghouse houses thereby significantly increasing the amount of use of the area the subject of the right of way.

Each situation will therefore require to be judged based on its own circumstances and if the matter comes before a court, the court will typically take into account the perceived intention of the parties and the circumstances that existed at the time the right of way was granted. Liability for the maintenance of the right of way will often be specified in the document which creates the right or will be established by custom if the right was created by long use and may therefore vary depending on the details of the property and the history of the use as between the parties.

Creation

Private rights of way are generally created legally by a Deed of Grant of Right of Way which is typically prepared by agreement between the parties by their legal advisors. This document is typically registered which means that the details of the right of way may be reviewed by examining the title deeds for the property in question.

A right of way can also arise through long use by a process called prescription. If use of servient land for the benefit of the dominant land is enjoyed for a defined period of time then that use can become a right. Due to their nature, rights which have been acquired by prescription are therefore often not registered until some event prompts one of the parties to set about registering the right (almost always the party who enjoys the benefit of the right).

The Land & Conveyancing Law Reform Act of 2009 reduced the time necessary for the acquisition of a right of way by prescription to a period of 12 years, where that time period has been 20 years in most cases before then. Changes introduced by this legislation mean that it is now very important that rights of way are registered by their owners or there is a risk that the rights may not continue to be valid, depending on the details of the particular situation.

If you have the benefit of a right of way which is not registered it is very important that you review this with your solicitor without delay to ensure that this right does not expire through inaction on your part.

While many have expressed frustration with the changes introduced by the 2009 Act, as it can result in rights of way expiring without their owners' knowledge, the intention is that all rights of this kind should be more clearly recorded in the future so that transactions in land can be more transparent.

Other details

Most rights of way must identify a point where the right commences and a point where it terminates and the area over which travel is intended so that the right may be clearly identified. This is almost always by reference to a map.

There is no obligation on the dominant property owner to accept an offer to substitute a new route for his existing right of way.

To maintain a legally enforceable action for the obstruction of a right of way it is necessary to demonstrate and prove that the obstruction constitutes a disturbance of the right. A disturbance of a right of way must be a real and substantial interference with, and/or unreasonable use of, the right of way. When the right of the dominant and servient owners come into conflict, their actions are weighed on the scales of convenience and reasonableness. The question of whether the obstruction is real and substantial is, in each case, a question of fact. A person who claims or is entitled to a right of way does so by virtue of his ownership or occupation of the land for which the benefit of the right of way exists. The right, as indicated previously, benefits the dominant property but is not personal to the dominant owner. Therefore, the dominant owner can authorise the use of the way by other persons for the benefit of his property provided such use is consistent with the terms of the grant creating the right. It would generally be considered consistent with a grant of a right of way to a private dwellinghouse that the right of way maybe used by members of the family of the dominant owner and his servants, tradesmen, visitors and guests.

Extinguishment & Abandonment

A right of way can cease to exist in a number of ways. The dominant and servient property owners may decide by mutual agreement to enter into a legal arrangement whereby the right of way will cease. Obviously, if there is unity of ownership between the dominant and servient properties then the right of way will automatically cease as one cannot have a right of way against one's self.

A right of way can also cease if abandoned by the dominant owner. Generally speaking, the act of abandonment has to be more than simple non-user over a period of time. There usually has to be an event whereby the dominant owner by his action or his inaction, abandons the right of way with the clear intention that it will never be used again. In such circumstances the servient owner can rely upon the actions of the dominant owner, treat the right of way as abandoned and act accordingly. An example of this would be where a passage is allowed to become completely overgrown and incapable of use for a long period of time (usually 12 years or longer).

Private & Public Rights of Way

There is a distinction in Irish law between public and private rights of way. A private right of way is the right to enter on to private lands for the purposes of gaining access to or exiting from another piece of land and most of the advice set out above is relevant to private rights-of-way.

A public right of way is a persons right of passage along a path or road. Historically, public roads and public rights of way were the same thing and came about in the same way. Readers will be familiar with the “taking in charge” of a road by the County Council. Taking in Charge means that County Council formally decide to become responsible for the maintenance and upkeep of a roadway to a minimum standard suitable for cars and traffic. On the foundation of the State roads became regulated and registers were kept of all roads taken in charge from or about 1925 onwards. Unfortunately the same did not apply for public rights of way until very recently. The maintenance of a register of public rights of way is now required under the Planning Act 2000 for all public rights of way recognised or created under the Act. Unfortunately, a lot of information was lost between 1925 and 2000 and the process of registering public rights of way is still in its infancy. Public rights of way were often creatures of common law or arose from court decisions. In general, it can be said that any road or pathway that has been used by the public for as long as anyone can remember is a public right of way.

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