

Harvell and Collins, P.A. Quarterly Report

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*It is our pleasure to send you the September Edition of our **NEWSLETTER** for the year 2007.*

*This **NEWSLETTER** will concentrate on various legal concepts and we would suggest that you keep it with your important files to refer to from time to time*

*For those of you who have not received our **NEWSLETTER** in the past and are new clients, our **NEWSLETTER** attempts to keep you informed of any new developments in local, state, and federal law that might affect your personal life or your business. The **NEWSLETTER** will advise you on these developments and, when appropriate, make suggestions that will help you deal effectively with these changes. Also, the **NEWSLETTER** will serve as a way to communicate with you. As always, if you would like to have us address a particular matter, please feel free to call or write, and we will address that issue in a future **NEWSLETTER**.*

We always try to expand the scope of our services and sharpen our skills in the areas of practice that we provide. We would like to take this opportunity to remind you of the services provided by this law firm.

“The Right Advice at the Right Time”
Visit us at www.harvellandcollins.com

If you have not done so already, we encourage you to visit our website. The website serves as yet another way to render superior service to our clients. There is a wealth of information disclosed on the website, including important links to useful government agencies that will assist our clients in obtaining valuable information.

“About the Firm” presents the history and purpose of the law firm. “Staff Profile” introduces our lawyers and legal assistants. Contact information is provided for all employees. The website provides an extensive list of services offered by Harvell and Collins, P.A.

Please visit us at www.harvellandcollins.com. We look forward to comments from our clients regarding our website.

Fiduciary Duties in a Family Business

Often when friends or extended family members decide to enter into business ventures, they take the step of incorporating their family business under state law. While this practice has its benefits, it also exposes those involved to civil liability for any misconduct. Certain types of corporations called "closely-held" corporations, in which the stock is held by a close group of family members and not open to public purchase, are governed by very strict rules of conduct pertaining to corporate agents and directing officers.

Due to the close nature of the family relationships involved, the duty of the directors of the corporation towards its shareholders is elevated from one of ordinary care to one of a fiduciary nature. This means that the parties involved share relationships based on trust and control, and a high level of care is required to avoid negatively affecting the rights of the shareholders. The directing officers of a corporation also have an obligation not to waste or misuse corporate assets and finances for improper purposes, purposes unauthorized by the shareholders, or purposes that do not benefit the corporation. In addition to those duties, the president or directing officer must provide shareholders with notice of any proposed sale of stock in the company. The process for affording such notice must always comply with the corporate by-laws and Chapter Fifty-Five (55) of the North Carolina General Statutes which regulates standards of conduct for and the operation of corporations.

In a publicly held, open corporation, the standards of care that are owed by directing officers as well as the sorts of good-faith conduct that must be observed are of a much lesser extent. The thinking behind that is that shareholders in a public corporation have much more opportunity to enforce their statutory rights because the ownership of the company is not as concentrated in the hands of the few and subject to oppressive conduct of a single controlling officer.

The family relationships that accompany certain closely-held corporations can give rise to certain expectations. These expectations include continuing employment with the corporation and a meaningful say in its management and direction. The frustration of these reasonable expectations can give rise to civil actions in certain cases.

Because of the heightened standard of care imposed by the trust and control relationships involved in closely held corporations and the reasonable expectations that accompany those relationships, a person wishing to incorporate their family business under North Carolina law should take special care to eliminate any conduct that may give rise to a breach of fiduciary duty in order to avoid the possibility of litigation.

Quantum Meruit and Co-habiting Partners

What do you do when your former live-in boyfriend or girlfriend refuses to honor a pre-existing business arrangement?

Although it is always best to record a contractual agreement in a written instrument signed by the parties involved, the courts have long accepted the theory of Quantum Meruit as a means of recovery when one does not exist. This contract law principle provides that even in the absence of a written agreement, a person is entitled to recover the value of the services that he or she renders to another person.

The phrase itself is derived from Latin and means "as much as he deserves." It stems from the idea that a person who benefitted from the services of another without giving anything of value in return would be unjustly enriched. To prevent that unjust enrichment, the courts will imply a "quasi-contract" which allows the party to be restored to the position it occupied before the conferring of the services. This does not necessarily permit for the recovery of the payment you would have expected if there had been a contract, but it does permit for the recovery of your losses for things such as time spent or materials delivered.

Quantum Meruit is not without its limitations. It has long been recognized that under certain situations, the benefit conveyed is done so gratuitously, and Quantum Meruit will not apply. These situations usually arise when some familial or intimate relationship is involved. For instance, if a father were to loan his son a sum of money without an actual contract, he could not later sue to recover that amount under Quantum Meruit. Due to their close relationship, the benefit would be considered gratuitous and the loan would be treated as a gift, not a contract. Of course, there are ways to avoid the presumption of gratuity when it comes to co-habiting partners.

It must be shown that the services were rendered and accepted with a mutual understanding that there would be compensation. In looking for the existence of this mutual understanding, courts look at certain factors involved. For example, if the business arrangement in dispute was entered into before the parties involved began living together, that would support a conclusion that the benefit was not conveyed gratuitously. If the type of services rendered do not fall within the category of those typical in a domestic setting or if they go above and beyond those which are expected in that sort of relationship, it may be possible to recover. It is important to show that the benefit conveyed was in no way bargained for with sexual favors, as those agreements are clearly against public policy.

Even if the barrier of gratuity can be overcome, there are other limitations. Quantum Meruit, which is essentially a claim arising from contract law, is subject to the statute of limitations on contract claims. As a result, a party suing under this theory will only be able to recover for services rendered within the three (3) year period preceding the filing of a claim. There is also a burden on the suing party to prove their damages with specific evidence of the value of the services rendered such as receipts and other financial records. Though Quantum Meruit provides a possible method of recovery in the absence of a signed, written contract, it is always good practice to record all business or financial arrangements. Clearly, we all know the old adage "get it in writing"!

The Easement - An Interest in Land?

An easement is a right given to someone to use property that they do not own. The grantee of the easement does not own any interest in the land, only a right to use the land described in the easement. There are two types of easements:

- *Easements in gross* An easement in gross does not pertain to a piece of land that is being served by an easement, but rather to individuals who have a specific right to do something on a piece of land. A common example is an easement to use one's boat ramp. When the person who holds the easement sells the land, the right to use the land is lost.
- *Appurtenant easements*. An appurtenant easement is not considered a personal right, but a land right. For example, if a landowner is granted an easement to use a strip of land on an adjoining piece of property, the right to use that strip of land belongs to the owner of the adjacent land, not the specific person who was first granted the easement. Appurtenant easements always involve two parcels of land. The dominant estate has the benefit of the easement, and the servient estate is subject to the easement right.

Almost every homeowner has a type of appurtenant easement on their property, usually in the form of a utility, water, or drainage easement. While there are many different ways to create an easement, an express easement that is placed on record in the Office of the Register of Deeds is a sure way to notify all interested parties of an encumbrance on the property. An express easement is an interest in land; therefore, the Statute of Frauds applies. This means that any easement must be in writing and signed by the grantor. Unless otherwise stated in the conveyance, an easement is presumed to be perpetual.

Just as an express grant creates an easement, so does an express reservation. An express reservation occurs when the owner of a parcel of land conveys title to another person or entity, yet reserves the right to continue to use the land for a special purpose after the conveyance. For example, a person could own a large tract of farmland. If that person sells the front part of the farm, but reserves the right to use the driveway to reach the back part, he has created an easement by reservation.

Another type of appurtenant easement is an *easement by implication*. The previous easements discussed are created by written instrument. An easement by implication differs because it is created by operation of law. This type of easement is an exception to the Statute of Frauds. There are two types of easements by implication:

- *Intended easement* An intended easement is based on a use that existed at the time that the two (2) tracts of land were severed. This means that prior to the time the land was divided into separate parcels, a use existed on the servient part of the land that is reasonably necessary for the enjoyment of the dominant part of

the land. This type of easement is sometimes referred to as a “quasi-easement”, because a basic principle of property law is that a person cannot hold an easement on their own land. However, a North Carolina statute allows the holder of an interest in real property to create easements which benefit their own property.

- *Easement by necessity* This type of easement is implied when the two (2) parcels of land were once held by the same owner, and that as a result of a transfer of part of the land, one piece of land is denied access to a public road. In this instance, an easement by necessity would be implied. There is a question about the degree of necessity that must be shown to create this type of easement. The traditional test would be one of *absolute* necessity. However, North Carolina cases tend to lean towards the idea that it would be sufficient to show that an easement would be *reasonably* necessary to proper enjoyment of the property.

The final type of appurtenant easement is *easement by prescription*, which is similar to obtaining property through adverse possession. The requirements for a prescriptive easement are that the use of the easement must be notorious and open; adverse and under claim of right; and continuous and uninterrupted for the statutory period. In order for use to be notorious and open, a true owner would have to have notice of the claim. The adverse requirement is probably the most difficult to prove in this state. North Carolina follows a minority rule that the use of another’s land is presumed to be permissive, which makes it difficult to establish that any use was actually adverse and hostile. There must be continuous and uninterrupted use for a period of 20 years, and last, there must be a substantial identity as to the location of the easement.

The creation of one of the abovementioned easements is only the first step in understanding easements. There are many issues as to the scope and termination of these easements. It is important to understand that this is a general outline of how easements are created; different circumstances and facts will lead to different results. If you have an issue with an express easement, or believe that another type of easement might have been formed on your property, consult your attorney to find out about your rights with regard to your land.

Property Flooding Caused by Neighbor’s Conduct

What remedies exist when the actions of a neighbor cause flooding on your property? The issue of surface water flooding across property lines is well developed in North Carolina case law. As the state has grown and developed, the issue has recurred with increased frequency, causing courts to take a closer look at the existing law on the subject.

The prevailing common law rule in the United States is the Common Enemy Doctrine which stands for the proposition that each landowner is free to alter his property in any way he or she chooses, including the diversion of the flow of surface waters. North Carolina has long rejected this theory and favored the maxim that a property owner can alter or divert the flow of water on their property as long as it does not damage the property of his neighbor. This rule

remained good law in our state for many years, but with increasing development has needed clarification in recent years.

As a result, the Supreme Court of North Carolina developed the Reasonable Use Doctrine. The Reasonable Use Doctrine states that a landowner may make reasonable use of his land even if the flow of surface water is diverted causing some damage to others. It is only when the interference with the flow of water is unreasonable and causes substantial harm to others that a civil action becomes a possibility.

If the conduct of your neighbor is unreasonable and damages your property, you have several remedies available to you including private nuisance and trespass actions. Any unsafe public health situation relating to public health created by the neighbor's conduct could be the subject of a public nuisance action. There is also the possibility of obtaining an indictment and civil penalty if local government has passed ordinances or zoning regulations which prohibit altering the existing flow of surface water.

Any successful action will require proof that the actions of your neighbor were intentional or carried out with knowledge to a substantial certainty that they would cause damage to your property. It will also require a determination that the social benefit of your neighbor's conduct is outweighed by the harm it has caused. In each case, this determination is a question of fact which must be decided by either the judge or the jury. After that, you would need only to prove damages to your property to receive money damages or a court order enjoining your neighbor from the repeated flooding of your property.

What if the neighbor's use is reasonable, but the damage to your property is of a substantial character? In that situation, you would not be able to enjoin your neighbor's actions causing the flooding, but your neighbor would have to pay money to you for the continuing trespass of water onto your property.

"Let's Talk Legal"
Radio Station: WTKF - 107.3 FM

As many of you know, Harvell and Collins, P.A., presents a talk radio program each and every Tuesday at 7:30 a.m. The purpose of the live radio program is to present to the listening audience legal information and allow the listeners to call in and ask questions. We have thus far discussed the following topics:

- Estate Planning
- Elder Law and Medicaid Planning
- Litigation in all Courts
- Estate Administration
- Real Estate Transactions
- Corporate and Business Transactions
- Family Law and Domestic Relations

If you have suggestions for a topic to be discussed, or if you have a question, give us a call. Or, call in during the show at 1-800-818-2255. Please join us on Tuesday mornings, bright and early on the talk station at WTKF - 107.3 FM.

We are now archiving our weekly radio program on the website so that our clients may listen once again to the program by visiting our website at www.harvellingcollins.com

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Postscript

This writing is intended to generally familiarize you with various legal issues. The scope of this document is necessarily limited, and consultation with your attorney or tax advisor should always precede taking any action.