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Fixing the Right of Passage from an Enclosed Estate: Deciding Where to Break Out Using Louisiana Civil Code Article 692

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Fixing the Right of Passage from an Enclosed Estate: Deciding Where to Break Out Using Louisiana Civil Code Article 692

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As land becomes less available, more necessary for public habitation, use, and support, it would run contrary to public policy to encourage landlocking of such a valuable asset and forever removing it from commerce and from public as well as private benefit.¹

I. INTRODUCTION

This comment is intended to be a reference for the practicing attorney dealing with an enclosed estate. Louisiana Civil Code article 689 grants an enclosed landowner access to the nearest public road by providing a servitude over neighboring property.² How does one determine which property must provide the servitude? To answer this question, one must interpret Louisiana Civil Code article

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1. *Rockholt v. Keaty*, 256 La. 629, 641, 237 So. 2d 663, 668 (1970).

2. La. Civ. Code art. 689 provides: "The owner of an estate that has no access to a public road may claim a right of passage over neighboring property to the nearest public road. He is bound to indemnify his neighbor for the damage he may occasion."

692, which provides the general rule that access shall "generally" be taken along the shortest route from the enclosed estate to the nearest public road.³ The Code and jurisprudence envision that the estate or estates that provide the shortest access be burdened with the servitude. This comment focuses on Article 692 and explores the analysis used when dealing with an enclosed estate.⁴

There are only eight Louisiana Civil Code articles that specifically address the right of passage.⁵ The word "generally," as used in Article 692, implies that exceptions exist in which the access may be granted along a route other than the shortest. Under what conditions should the courts grant an exception? Only in rare circumstances should courts allow access along a route other than the shortest. *Anderton v. Akin*⁶ addressed this question but used a questionable analysis.

The Civil Code requires a two-step analysis. Courts must first determine which estate owes the servitude granted by Article 689, and only after the servient estate is established should courts engage in a balancing test to determine where on the servient⁷ estate the servitude should be located. These principles were violated in *Anderton*; the court merged the analysis, thereby making the result unpredictable.

II. BRIEF OVERVIEW OF THE RULES GOVERNING ENCLOSED ESTATES

Article 689 establishes the basis for a right of passage.⁸ The Louisiana Supreme Court has declared this servitude to be a predial and not a personal one.⁹

3. La. Civ. Code art. 692 provides: "The owner of the enclosed estate may not demand the right of passage anywhere he chooses. The passage generally shall be taken along the shortest route from the enclosed estate to the public road at the location least injurious to the intervening lands."

4. La. Civ. Code art. 646 cmt. b defines "estate" as "a distinct corporeal immovable." An estate is enclosed when it does not have access to a public road, La. Civ. Code art. 689, or when the access is "insufficient for its exploitation." A.N. Yiannopoulos, *Predial Servitudes* § 93, at 269, in 4 Louisiana Civil Law Treatise (1983). See also *Rockholt*, 256 La. at 640, 237 So. 2d at 667 (property left without public access because of expropriation and construction of a non-access public road was held to be enclosed); *Bouis v. Watts*, 29 So. 2d 783, 785 (La. App. 2d Cir. 1947) (plaintiffs, who had to park their automobile, climb two fences, and walk a fourth of a mile in wet weather to reach their land, were entitled to a right of passage to the nearest public road via the shortest and most direct route); 1 Marcel Planiol & George Ripert, *Treatise on the Civil Law* § 2920, at 718-19 (Louisiana State Law Institute trans., 12th ed. 1959). See also *Inabnet v. Pipes*, 241 So. 2d 595 (La. App. 2d Cir. 1970). However, mere inconvenience does not make an estate enclosed. See *Pittman v. Marshall*, 104 So. 2d 230, 233 (La. App. 2d Cir. 1958); *Robinson v. Herring*, 20 So. 2d 811, 813 (La. App. 2d Cir. 1945).

5. La. Civ. Code arts. 689-696.

6. 493 So. 2d 795 (La. App. 2d Cir.), writ denied, 497 So. 2d 1014 (1986).

7. La. Civ. Code art. 646 cmt. d states: "In the civilian literature, the estate burdened with a predial servitude is designated as 'servient'; the estate in whose favor . . . the servitude is established is designated as 'dominant.'"

8. See *supra* note 2. The plaintiff's "petition must state that plaintiff's estate is enclosed, identify the neighbor from whom the right of passage is sought, indicate the route or routes to be followed, and offer payment of the appropriate indemnity. Unless these statements are made, plaintiff does not disclose a cause of action." Yiannopoulos, *supra* note 4, § 95, at 281 (footnotes omitted).

9. Regarding former La. Civ. Code art. 699 (1870) (now Article 689), the Louisiana Supreme

A predial servitude is not attached to a particular person but benefits whomever owns the dominant estate.¹⁰ The predial servitude established by Article 689 is further classified as a legal servitude as opposed to a natural or conventional servitude.¹¹

The purpose of the servitude provided by Article 689 is to keep valuable property in commerce. Article 689 thus benefits not only the enclosed landowner but also the general public.¹² Anyone who has a real right on the enclosed estate can claim the right of passage for the benefit of the estate.¹³ Adhering to the purpose of Article 689, courts have allowed an enclosed landowner to bring an action seeking a right of passage even if a neighbor has voluntarily allowed temporary ingress and egress.¹⁴

The right of passage should be suitable for the kind of traffic that is reasonably necessary,¹⁵ and the enclosed landowner may construct at his own expense the type of road necessary for the exercise of the servitude.¹⁶ Since the automobile has become essential to modern life, it would be rare for a court to provide a passage not capable of vehicular traffic.¹⁷ Courts have allowed the interests of the

Court stated: "The right of passage granted by Article 699 of the LSA-Civil Code to the owner of an enclosed estate is a predial or real servitude due by one estate to another estate" *Harwood Oil & Mining Co. v. Black*, 240 La. 641, 652-653, 124 So. 2d 764, 768 (1960).

10. 1977 La. Acts No. 514, Exposé des Motifs, at 1311 (effective Jan. 1, 1978).

11. *LeBlanc v. Thibodeaux*, 615 So. 2d 295, 297 (La. 1993). La. Civ. Code art. 654, which governs the different kinds of predial servitudes, states: "Predial servitudes may be natural, legal, and voluntary or conventional. Natural servitudes arise from the natural situation of estates; legal servitudes are imposed by law; and voluntary or conventional servitudes are established by juridical act, prescription, or destination of the owner." For further discussion about the different kinds of predial servitudes, see 1977 La. Acts No. 514, Exposé des Motifs.

12. See *Vermilion Parish Sch. Bd. v. Broussard*, 263 La. 1104, 1109, 270 So. 2d 523, 524-25 (1972); *Rockholt v. Keaty*, 256 La. 629, 641, 237 So. 2d 663, 667 (1970).

13. Professor Lee Hargrave states that various individuals could be entitled to claim the passage for the benefit of the estate. Real right holders who could claim a right of passage under La. Civ. Code art. 689 "include usufructuaries, holders of limited personal servitudes, and owners of timber estates. Mineral lessees would qualify, but not predial lessees." Lee Hargrave, *Property—Servitudes & Building Restrictions, Developments in the Law, 1989-1990*, 51 La. L. Rev. 371, 382 (1990). See also Yiannopoulos, *supra* note 4, § 95, at 278. In *Harwood Oil & Mining Co.*, 124 So. 2d at 768, the Louisiana Supreme Court held a mineral lessee could not claim an Article 699 (1870) right of passage. However, the Louisiana Third Circuit Court of Appeal believed *Harwood* to be legislatively overruled, and thus allowed a mineral lessee to claim an Article 689 right of passage in *Salvex, Inc. v. Lewis*, 546 So. 2d 1309, 1313 (La. App. 3d Cir.), *writ denied*, 551 So. 2d 1323 (1989).

14. *Wilfair Assocs. v. Southern Pac. Transp. Co.*, 572 So. 2d 185, 190 (La. App. 1st Cir. 1990). The same principle holds true if the enclosed landowner seeks a gratuitous servitude under Article 694 but has secured informal access across other property after being denied access across the servient estate. *Atkins v. Johnson*, 535 So. 2d 1063, 1066 (La. App. 2d Cir. 1988).

15. La. Civ. Code art. 690 provides: "The right of passage for the benefit of an enclosed estate shall be suitable for the kind of traffic that is reasonably necessary for the use of that estate."

16. La. Civ. Code art. 691 provides: "The owner of the enclosed estate may construct on the right of way the type of road or railroad reasonably necessary for the exercise of the servitude."

17. See *Patin v. Richard*, 291 So. 2d 879, 885 (La. App. 3d Cir. 1974). See also A.N. Yiannopoulos, *Enclosed Estates; Louisiana and Comparative Law*, 23 Loy. L. Rev. 343, 354 (1977).

servient estate to be considered in determining the extent of the servitude, and under certain situations the dominant estate owner's access has been impeded.¹⁸

A neighbor does not have to provide access when the enclosed landowner voluntarily encloses himself.¹⁹ In the recent decision of *LeBlanc v. Thibodeaux*,²⁰ the Louisiana Supreme Court narrowly interpreted this voluntary enclosure rule so that it only applies when the owner has "caused his dilemma by selling off his access property, or at the least by not applying Article 693 where the voluntary 'alienation' which causes the enclosure is a partition."²¹ The language in *LeBlanc* suggests that the voluntary enclosure rule will only apply when the enclosure results from the voluntary sale of the access property.

When the partition of an estate causes property to become enclosed, passage shall be furnished gratuitously by the owner of the land on which the passage was previously exercised, even if it is not the shortest route to the public road.²² However, if a gratuitous right of passage exists, a landowner is not enclosed and cannot claim a right of passage under Article 689,²³ which allows access to the nearest public road. Similarly, a landowner who sells a portion of a larger tract but reserves an enclaved portion for himself is not entitled to a gratuitous right of passage.²⁴

The servient estate owner has a right for indemnity against the enclosed landowner for the servitude.²⁵ However, this right for indemnity may pre-empt.²⁶ Nevertheless, losing the right to indemnity will not affect the exercise of the servitude.²⁷ The owner of the servient estate also has the right to relocate

18. *Pittman v. Marshall*, 104 So. 2d 230, 233 (La. App. 2d Cir. 1958) (keeping cattle enclosed within the servient estate outweighed the inconvenience caused by a locked gate and was thus justified).

19. La. Civ. Code art. 693 provides: "If an estate becomes enclosed as a result of a voluntary act or omission of its owner, the neighbors are not bound to furnish a passage to him or his successors."

20. 615 So. 2d 295 (La. 1993).

21. *Id.* at 299.

22. La. Civ. Code art. 694 provides:

When in the case of partition, or a voluntary alienation of an estate or of a part thereof, property alienated or partitioned becomes enclosed, passage shall be furnished gratuitously by the owner of the land on which the passage was previously exercised, even if it is not the shortest route to the public road, and even if the act of alienation or partition does not mention a servitude of passage.

23. *Marceaux v. Broussard*, 338 So. 2d 308, 311 (La. App. 3d Cir. 1976), *writ denied*, 340 So. 2d 992 (1977) (interpreting Article 701 (1870), which is the predecessor to present Article 694). The revision comment to La. Civ. Code art. 694 states that Article 694 reproduces the substance of La. Civ. Code art. 701 (1870) and does not change the law.

24. *Henry v. Rembert*, 336 So. 2d 323, 325 (La. App. 1st Cir. 1976) (interpreting Article 701 (1870), which is the predecessor to present Article 694). The holding in *Henry* complies with the narrow application given to the voluntary enclosure rule articulated in *LeBlanc*, 615 So. 2d 295.

25. La. Civ. Code art. 689.

26. Indemnity actions are personal actions, subject to ten-year liberative prescription. La. Civ. Code art. 3499. See also Yiannopoulos, *supra* note 17, at 369 n.185 and accompanying text.

27. La. Civ. Code art. 696 provides: "The right for indemnity against the owner of the enclosed

the servitude at his own expense to a more convenient location provided it affords the same access.²⁸

III. ANDERTON V. AKIN

A. Background

Since relatively few cases deal with enclosed estates, the existing appellate decisions are extremely influential sources for interpreting the applicable Civil Code articles. In addition, land per capita is ever decreasing, and the courts are cognizant of the complicated conflicts that are inevitable as people struggle for this scarce resource.²⁹ This struggle and the vast resources devoted to land development create a need for clear precedent concerning the imposition of servitudes.

In *Anderton v. Akin*, Mrs. Anderton brought an action to obtain a right of passage from her enclosed estate to the nearest public road, Sherwood Lane, so she could market the timber growing on her eighty acres of land. She sought a right of passage 50 feet wide and 250 feet long across the two vacant residential lots offering the shortest route (Proposition 1 as shown on the plat *infra*) to a public road. The lots were owned by Mr. Sherwood Akin, who owned most of the lots in the subdivision.³⁰

Two months after the suit was filed, Mr. Akin sold lots 10 and 11 to Mr. Brandt and Mrs. Ownby, who were both aware of the pending lawsuit. The plaintiff therefore amended her petition making Brandt and Ownby additional defendants. Mrs. Anderton only sued the landowners to the south of her estate because she believed the servitude was clearly owed by the Akin estate, it providing the shortest access.³¹

estate may be lost by prescription. The accrual of this prescription has no effect on the right of passage." In Louisiana, the indemnity for the right of way has been paid by lump sum as opposed to an annual charge. See generally Yiannopoulos, *supra* note 4, § 98, at 289-90. The trial judge is given broad discretion in determining the amount of damages. *Collins v. Reed*, 316 So. 2d 134, 138 (La. App. 3d Cir.), *writ denied*, 319 So. 2d 444 (La. 1975).

28. La. Civ. Code art. 695 provides:

The owner of the enclosed estate has no right to the relocation of this servitude after it is fixed. The owner of the servient estate has the right to demand relocation of the servitude to a more convenient place at his own expense, provided that it affords the same facility to the owner of the enclosed estate.

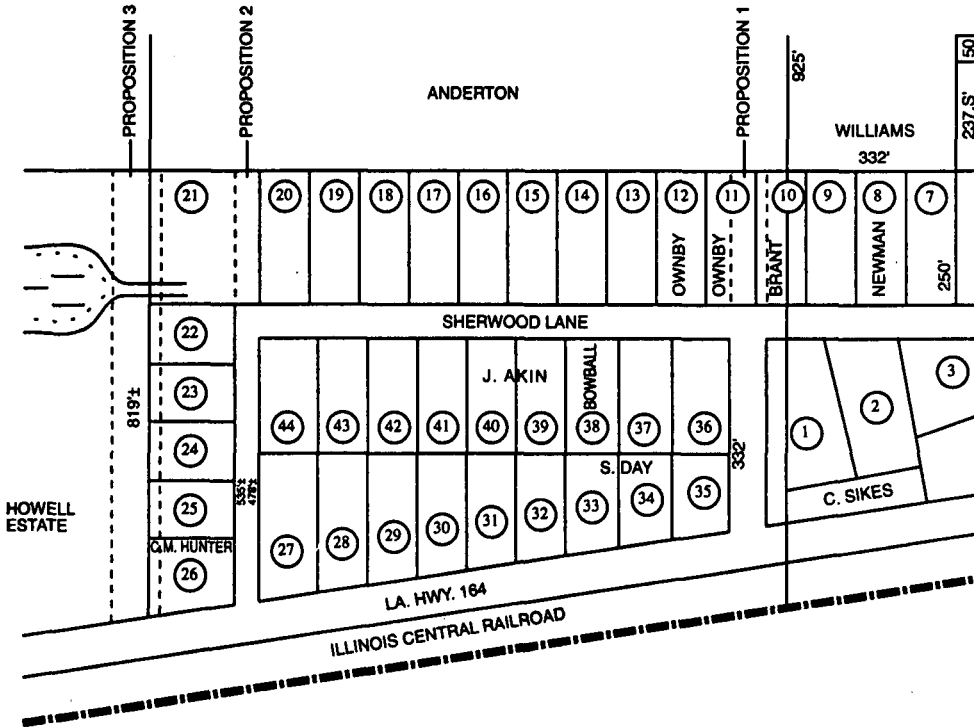
29. In *Rockholt v. Keaty*, 256 La. 629, 638-39, 237 So. 2d 663, 667 (1970), the Louisiana Supreme Court stated:

We cannot be blind to the great change in the nature of land in our country and the needs of the people in regard to land The open country and estates . . . have rapidly disappeared, and the problems of access to estates for full utilization of them have become more complex.

30. *Anderton v. Akin*, 493 So. 2d 795, 796 (La. App. 2d Cir.), *writ denied*, 497 So. 2d 1014 (1986).

31. The second shortest route to a public road would have been 332 feet across the Williams estate which was located on the east side of the Anderton tract. Since it was not the shortest route

PLAT OF ANDERTON TRACT AND SURROUNDING ESTATES³²



and since houses costing over \$100,000 were directly in the pathway of routes to the public road, it "was never seriously considered as an appropriate passage by either side." *Id.*

32. The Anderton tract and surrounding estates are shown by the plat above. Proposition 2 was eliminated from consideration by the trial court without elaboration. *Anderton v. Akin*, 493 So. 2d 795, 796 (La. App. 2d Cir.), writ denied, 497 So. 2d 1014 (1986).

The defendants asserted that "a more suitable right of passage,"³³ 815 feet long (Proposition 3 on the plat *supra*), could be located on the western side of the subdivision across a tract of land known as the Howell estate. However, the owners of the Howell estate were not parties to the suit. The trial court nevertheless found the "most appropriate" right of passage was across the Howell estate. The second circuit court of appeal affirmed and agreed with the trial court's analysis.³⁴

Since the Howell estate owners were not parties to the suit, the judgment was not binding against them. The plaintiff's motion for a rehearing and writ to the Louisiana Supreme Court were denied.³⁵

The court in *Anderton* focused on the word "generally" in Article 692 and extended that word's meaning beyond any previous interpretation; this judicial extension gives courts wide discretion to determine which estate owes the right of passage. If the same analysis is used by later courts, it will be impossible for landowners or their attorneys to reasonably predict which estates will be burdened with servitudes. Thus, *Anderton* should be reconsidered.

The recent decision of the Louisiana Supreme Court in *LeBlanc v. Thibodeaux*,³⁶ in which the court narrowly limits the application of the voluntary enclosure rule,³⁷ intensifies the need to reconsider *Anderton*. In *LeBlanc*, the court determined that a partition, executed in 1929, created an enclosed estate owned in indivision.³⁸ The court held the estate was entitled to an Article 689 servitude despite the fact that a conventional servitude had been established concurrently with the partition but had prescribed by nonuse. *LeBlanc* now allows landowners whose estates become enclosed through a partition to gain an Article 689 servitude, even if a conventional servitude existed but was allowed to prescribe some fifty or more years ago.

Instead of first determining which estate owes the servitude granted by Article 689, and then deciding where on the servient estate it should be located, the *Anderton* court apparently used a totality of the circumstances analysis to decide which estate/route provided the more appropriate access.³⁹ By merging the two-step analysis, which this author believes is mandated by the Civil Code and jurisprudence, the *Anderton* court forces one to consider many turbid factors in determining *which estate* owes the servitude.

33. *Id.*

34. *Id.* at 800.

35. *Anderton v. Akin*, 497 So. 2d 1014 (La. 1986).

36. See *supra* notes 20-21 and accompanying text.

37. See *supra* notes 20-21 and accompanying text.

38. Because the tract remained in indivision and was never "alienated," the LeBlancs were not entitled to a gratuitous right of passage under Article 694. *LeBlanc v. Thibodeaux*, 615 So. 2d 295, 296 (La. 1993).

39. The appellate court stated that the trial court made its decision "[a]fter considering all of the evidence and testimony presented at trial," which dealt with many diverse factors. *Anderton*, 493 So. 2d at 796. The appellate court later stated that the trial court was "correct in balancing these considerations." *Id.* at 800.

Some of the factors which were important in the court's "more appropriate" analysis were explicitly given. One such factor was "lower overall cost."⁴⁰ The court stated that defendants' Proposition 3 had a "lower overall cost than Proposition 1, considering the cost of the land, inconvenience to the parties involved, and other factors."⁴¹ How can one accurately compute overall cost when inconvenience and "other factors," which are not given or stated, are part of the court's analysis? Overall costs and inconvenience are appropriate factors under the second part of the two-step analysis to determine where on a given estate the servitude should be placed, but a comparison of these factors is not appropriate in deciding which estate owes the servitude.

The *Anderton* court mentioned the defendants' belief that commercial traffic over the vacant lots would render the lots useless for residential purposes.⁴² By this assertion, the court seemed to imply that residential uses of property may be more important than commercial uses in right of passage analysis. The court also noted the defendants' claim that Proposition 3 provided a "more direct" route without burdening the existing subdivision streets.⁴³ Thus, in addition to the burden on the streets, the court may have considered it important whether the route was direct or serpentine.

In addition to the factors above, the court of appeal recounted many elements of the witnesses' testimony. These extensive references indicate that the factors addressed were quite influential in determining which estate was ultimately burdened with the servitude.⁴⁴ However, one cannot ascertain from the decision how much emphasis each of the factors carried or if they were all equally weighed in the analysis.

40. *Id.* at 796.

41. *Id.*

42. *Id.* No matter where a servitude is granted, the physical presence of the road will render the land physically under the road useless for residential and many other purposes. The subdivision plot plan filed in the Webster Parish records indicates that lots 10 and 11 measured 100 feet wide and 250 feet long. Lots 10 and 11 certainly would have decreased in value since each lot would have been only 75 feet wide and 250 feet long. However, granting the servitude between the lots would not necessarily make the lots useless for residential purposes. For comparison purposes, a survey appraisal conducted by a state certified real estate appraiser indicates many of the homes in Village St. George Subdivision, located in Baton Rouge, are on lots measuring only 70 feet wide and 113.6 feet long. Instead of running between the two lots, why could the servitude not have been granted in the middle of one of the vacant lots, thereby taking only one lot out of the residential market?

43. *Id.*

44. The court felt it necessary to summarize the testimony of all eight witnesses who testified before the trial court. *Id.* at 798-99. In *Lirette v. State Farm Ins. Co.*, 563 So. 2d 850, 852 (La. 1990), the court stated:

When findings are based on determinations regarding the credibility of witnesses, the manifest error—clearly wrong standard demands great deference to the trier of fact's findings; for only the fact finder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. (citations omitted).

The witnesses elaborated on a broad spectrum of issues. One witness testified that the lower elevation of Proposition 3 would cause water accumulation problems.⁴⁵ Testimony included a discussion of the differences in the costs of building a road via Proposition 3 as compared to Proposition 1. In determining the costs, the court considered the length of the road, the type of surface to be used, and the availability and proximity of fill material.⁴⁶ The court also considered the additional costs that would be created if utility lines had to be relocated.⁴⁷

Curiously, the court was concerned about third parties who were not before the court and had not voiced any complaints to the court. The court considered whether the existing public street could "sustain the type of loads usually associated with the logging business" in light of the fact that the public street was already "showing some deterioration."⁴⁸ The court found it relevant to consider which route would cause the least disturbance to neighborhood traffic. The court even thought it relevant to consider how construction of a road in the area would impact other "landowners in the area."⁴⁹

The commercial value of the estates was also a factor used in the court's determination of which estate owed the servitude. The court devoted a lengthy paragraph to testimony regarding which surrounding property would be diminished the most in value by the addition of the requested access road.⁵⁰ Finally, the court considered the possible present and future uses of the plaintiff's property to determine which estate owed the servitude. Determining that residential development was not close at hand, the court decided that the best route for hauling timber was Proposition 3.⁵¹

B. *Problems with Anderton*

Anderton provides an excellent application of the second part of the two-step analysis: determining where on a given tract of land the servitude should be located. However, a condition precedent to the *Anderton* analysis should be that the court already has decided by other means which property owes the servitude. A two-step analysis complies with the general and easy-to-apply rule of Article 689 yet allows for deviation in exceptional circumstances as provided for by Article 692. The merger of the two steps makes it difficult to predict where a servitude will be imposed. *Anderton* sets dangerous precedent and creates numerous problems—the first being uncertainty.

45. *Anderton v. Akin*, 493 So. 2d 795, 798 (La. App. 2d Cir.), writ denied, 497 So. 2d 1014 (1986).

46. *Id.* at 798-99.

47. *Id.* at 798.

48. *Id.* at 799.

49. *Id.* at 800.

50. *Id.* at 799.

51. *Id.* at 800.

1. *Uncertainty*

After *Anderton*, in addition to suing the landowner whose land provides the shortest route to access, an attorney must also determine whether more appropriate routes possibly exist. Even routes three times longer than the shortest must be considered.⁵² Just as in *Anderton*, named defendants can be expected to argue that the most appropriate route lies across some unnamed defendant's estate, and the unnamed defendants will not be in court to argue their cases.

Undoubtedly, in some cases an attorney could accurately determine that a certain landowner need not be made a party to the suit.⁵³ But if the surrounding estates are being used for similar purposes and have similar values per acre, the only way to ensure a binding judgment is to sue all the surrounding landowners. *Anderton* requires complex cost and value analysis of the surrounding estates—greatly increasing the cost of litigation, but adding nothing to the predictability of the outcome.

What recourse is available to the parties should the conditions change and the estates reverse places in terms of value and usefulness? What is Mrs. *Anderton's* recourse in the future when residential development is close at hand? Could a later court change which estate owes the servitude after many years of reliance by the parties? Concepts of value and usefulness are not appropriate factors to determine which estate owes the servitude. Only after the servient estate is located and established are these factors useful in determining the separate issue of where on the estate the servitude should be placed. If a mistake is made or conditions change, Article 695 allows the servitude to be relocated within the already established servient estate.

2. *Res Judicata*

In *Anderton*, the court determined the most appropriate route lay across the Howell estate, even though the owners of the Howell estate were not made defendants to the suit. What would be the result if Mrs. *Anderton* later brings suit against the owners of the Howell estate, relying on the determination by the *Anderton* court, only to learn that the owners had recently signed a contract to build a shopping mall across their property? How can Mrs. *Anderton* enforce her right of passage across the Howell estate if the Howells refuse to honor the court's decision? *Res judicata* would prevent the plaintiff from seeking the right of passage across the Akin estate. Would the court now find that a third estate, under the circumstances, was the "more appropriate" place for the servitude? Would the plaintiff be expected to name all surrounding landowners as defendants in the

52. Proposition 3 (815 feet long) was three times longer than Proposition 1 (250 feet long). *Id.* at 796.

53. If a shopping mall covered a neighboring estate and it was not the shortest route to access, even under *Anderton*, an attorney could reasonably decide not to make that landowner a party to the suit.

second suit to ensure a binding judgment? Before a court declares a more appropriate route lies elsewhere, the landowner whose estate is to be burdened with the servitude should be made an indispensable party to the suit.⁵⁴

3. *Imposing Servitudes on Another by One's Own Acts*

Another problem with the *Anderton* analysis is that landowners can utilize their land in such a manner that other estates are burdened. Professor A.N. Yiannopoulos, citing Planiol and Ripert, states: "[A] landowner should not be allowed to impose by his own volitional acts the burden of a forced passage on neighboring lands."⁵⁵ Surrounding landowners are encouraged by the *Anderton* analysis to quickly develop their property so that a right of passage across their estate would not be the most appropriate route. Landowners could avoid a threatened servitude and have it imposed elsewhere by using the *Anderton* factors to make their land more useful or valuable than other surrounding estates. Taking the *Anderton* analysis to its extreme, the ignorant or unwary neighbor could discover that a servitude now belongs more appropriately on his own land after idly watching the other neighbors improve their estates. Land developers should not be allowed to evade predial servitudes by turning pastures into subdivisions.⁵⁶

4. *Needless Costs and Delays*

Suing and proceeding against the neighbors on all sides requires needless costs and delays. In *Anderton*, if each subdivision lot was separately owned, there would have been nineteen neighbors to sue.⁵⁷

When dealing with immovable property, one should at least be able to accurately predict which estate owes an Article 689 right of passage. Should a practitioner tell a client with an enclosed estate and limited finances to sue the closest three estates? Would it constitute malpractice not to sue all the surrounding estates—for not guessing the correct landowner to sue? What does one tell a client whose estate provides the second closest access to a public road, but the client is only farming or growing timber? Should the client be warned to do something more valuable or useful on his land until the servient estate has been established?

54. La. Code Civ. P. art. 645 allows the trial or appellate court, on its own motion, to notice the failure to join an indispensable party. The relevant portion states: "The failure to join an indispensable party to an action may be pleaded in the peremptory exception, or may be noticed by the trial or appellate court on its own motion."

55. Yiannopoulos, *supra* note 4, § 99, at 291-92.

56. It is beyond the scope of this article, but worth noting, that constitutional claims (takings clause, equal protection, and due process) may arise if courts impose predial servitudes for private purposes based on a determination of whose estate is the least useful or valuable.

57. In addition to the money involved (which could be substantial depending on how many estates border the enclosed tract), a plaintiff should not be required to bring suit against all his neighbors—clearly not a "good-neighbor" policy.

The *Anderton* analysis muddies the water of predictability in an area that needs clarity.

C. *Post Anderton*

In *Mitcham v. Birdsong*,⁵⁸ the second circuit court of appeal acknowledged that a court should first decide which estate owes the servitude and then determine the location of the servitude within that estate.⁵⁹ However, *Mitcham* recognizes *Anderton* as a valid exception to the general rule⁶⁰ that the servient estate is the one offering the shortest route to the nearest public road.⁶¹

The plaintiffs in *Mitcham* wanted a right of passage to haul timber. They did not want access across the shortest passable route because a road constructed there "*would not be suitable to the type of traffic associated with timber operations*" because it would require constant maintenance.⁶² The plaintiffs cited *Anderton* to support their position. The court wisely declined to extend *Anderton*, stating: "The inconvenience expected here, in an area that has long been used for logging operations, is not factually analogous to the probability of damage to a residential street from logging operations that was shown in *Anderton v. Akin*."⁶³ This statement illustrates that the *Mitcham* court still believes that potential damage to a street should be a factor in determining which estate owes the servitude.

The court in *Mitcham* was wise not to extend *Anderton*, but the facts in *Anderton* should not warrant an exception to the general rule of Article 692. The benefits of predictability outweigh the rare exception of having to tolerate logging trucks going through one block of a residential neighborhood. Landowners will know or will be deemed to have constructive knowledge that their estate owes a right of passage; they can plan their subdivisions accordingly, leaving appropriate space for access. Potential damage to a public street should not influence a court's determination of which estate owes a servitude—especially when the city is not a party to the suit and has not complained.⁶⁴

IV. OTHER JURISDICTIONS

Professor Yiannopoulos states that "[i]n principle, in all legal systems under consideration, courts will fix the right of way along the shortest route. Courts are

58. 573 So. 2d 1294 (La. App. 2d Cir. 1991).

59. *Id.* at 1300.

60. *See* La. Civ. Code art. 692.

61. *Mitcham*, 573 So. 2d at 1297.

62. *Id.* at 1299 (emphasis in original).

63. *Id.*

64. When the requested access route would violate limited access provisions or cross areas in which certain traffic is prohibited, courts might consider the route not pragmatically feasible. But this was not the situation in *Anderton*.

not bound to follow the shortest route, but departure from this standard must be supported by 'weighty considerations.'⁶⁵

In common-law jurisdictions, if adjoining lands can be traced to a common ancestor, courts "imply" access to the nearest public road via a "way of necessity."⁶⁶ The parties are presumed to have intended that an easement was reserved to prevent landlocking. Yiannopoulos writes:

The obligation to furnish a way of necessity may be asserted against the heirs and assigns or the original parties to the conveyance, regardless of the remoteness in time and the number of intervening conveyances. A way of necessity does not exist when the ownership of the adjoining lands may not be traced to a common ancestor. In such a case, the owner of the enclosed estate may obtain access to a public road only with the consent of his neighbors and upon payment of whatever price they demand.⁶⁷

As a result of decreasing land per capita, landlocked estates and disputes concerning access occur more frequently in France.⁶⁸ Potential purchasers of French real estate are given the following warning:

As many rural buildings sold for restoration may be land-locked, enquiries should be made as to whether there are appropriate and legally enforceable rights of access for people and vehicles across adjoining land. . . . Conversely, one should find out if the property being bought is subject to rights of way in favour of others so as to avoid being taken by surprise when heavy farm machinery is driven across the garden.⁶⁹

French Civil Code article 683⁷⁰ is very similar to Louisiana Civil Code article 692. Regarding the location of the passage, Planiol and Ripert state:

65. Yiannopoulos, *supra* note 4, § 97, at 286 (footnote omitted) (quoting *Miller v. Thompson*, 3 La. Ann. 567, 568 (1848)). For comparison purposes, Yiannopoulos was considering the common law, French, German, and Greek legal systems. *Id.* § 90, at 261.

66. Yiannopoulos, *supra* note 17, at 350-51.

67. *Id.* at 351 (footnotes omitted).

68. In France, there is an average of 266 people per square mile as compared to an average of 100 people per square mile in Louisiana. See the 1990 Almanac 138-39, 756 (43d ed. 1990).

69. W. H. Thomas, *Buying Property in France* 10-11 (1991). Other writers also warn of access problems:

As has been said elsewhere, contracts for the sale of land can be quite cavalier and unspecific in their reference to easements and certainly in the purchase of country properties great care should be taken in establishing the existence or non-existence of easements both for the benefit of the land to be bought and to which it may be subject. To some extent, the French succession system, which often leads ultimately to the splitting-up of property into small parts, leads to the creation of easements which otherwise might not exist.

Henry Dyson, *French Real Property and Succession Law: A Handbook* 63 (1988).

70. French Civ. Code art. 683 provides: "The passage should normally be taken where the route is shortest from the enclaved land to the public way. Nevertheless, it should be fixed in the place the least damaging to him on whose land it is granted." The French Civil Code 151 (John H. Crabb trans., 1977).

Art. 683 thus formulates this principle: "the passage must be taken from the side where the distance is shortest from the enclosed estate to the public road." But there are two derogations from this principle.

(1) The court may lengthen the distance, either in order to make it less harmful to the estate traversed or to make access more convenient to the enclosed estate. An example of the first kind arises when there are constructions or enclosing walls which may be avoided by making a detour. An example of the second is presented when a straight line would call for too steep a descent. The court should take the interests of both parties into consideration (new Art. 683, par. 2; old Art. 684).⁷¹

The second derogation deals with partitions and is similar to the gratuitous right of passage granted by Louisiana Civil Code article 694. Note that the first derogation allows a change in location on the servient estate: the court may "lengthen the distance."⁷²

One jurisdiction seems to expressly take *Anderton* considerations into contemplation in determining which estate owes the servitude. The Civil Code of Quebec, which replaced the Civil Code of Lower Canada, uses a different analysis from other jurisdictions. Civil Code of Quebec article 998 provides that the "[r]ight of way is claimed from the owner whose land affords the most natural way out, taking into consideration the condition of the place, the benefit to the enclosed land and the inconvenience caused by the right of way to the land on which it is exercised."⁷³ Leaving the court broad discretion makes it difficult to predict which estate owes the servitude; a determination of the most natural way out may be too aesthetic a standard for secure property titles.⁷⁴

V. LOUISIANA CIVIL CODE ARTICLE 692

A. *Statutory History*

Louisiana Civil Code article 692 provides:

The owner of the enclosed estate may not demand the right of passage anywhere he chooses. The passage generally shall be taken along the

71. Planiol & Ripert, *supra* note 4, § 2921, at 719.

72. Under French law the shortest straight-line distance is presumed to be the location for the right of passage. The second rule of French Civ. Code art. 683 allows courts to derogate from this rule and allow a simple detour around enclosing walls or steep cliffs. See Dennis Landreau, *L'enclave*, 37 *La Semaine Juridique* 1784 (1963). In France, access has been granted by means of a subterranean passageway and by means of an air cable above the servient estate. Yiannopoulos, *supra* note 4, § 97, at 289.

73. Civil Code of Quebec art. 998.

74. "A prudent man will not purchase a lawsuit, or risk the loss of his money and labor upon a litigious title." *Parker v. Overman*, 59 U.S. (18 How.) 137, 140 (1855).

shortest route from the enclosed estate to the public road at the location least injurious to the intervening lands.

Some basic observations may be drawn from the history and development of Louisiana Civil Code article 692. Article 692 has its genesis in Code Napoleon article 683 of 1804, which translates as, "The passage shall be regularly taken on the side where the distance is the shortest from the enclosed estate to the public road."⁷⁵ In 1808 a second paragraph was added which provided, "Nevertheless it shall be fixed in the place the least injurious to the person on whose estate said passage is granted."⁷⁶ The language clearly implies the court should first determine which estate owes the servitude, and then place it in the least injurious location on that estate. The second paragraph sounds like an afterthought: the person on whose estate the passage is granted merely has the right to tell the court where he would like the route to cross his estate.

In contrast, when a gratuitous right of passage exists, Louisiana Civil Code article 694⁷⁷ explicitly allows the servitude to remain located where it was exercised in the past.⁷⁸ The language of Article 694 allowing the servitude "*even if it is not the shortest route to the public road*"⁷⁹ supports the argument that the drafters thought it unusual to allow a legal right of passage to weave wastefully across land when a shorter route exists. The "even if" language of Article 694 adds force to the argument that only in exceptional circumstances should the route's length not be the dispositive factor under Article 692.

In 1825, the predecessor to Article 692 was amended to provide:

The owner of the estate, which is surrounded by other lands, has no right to exact the right of passage from which of his neighbors he chooses.

The passage shall be generally taken on the side where the distance is the shortest from the inclosed estate to the public road.

Nevertheless it shall be fixed in the place the least injurious to the person on whose estate the passage is granted.⁸⁰

In 1870, a comma was inserted after the word "Nevertheless" and it became Article 700.⁸¹ Paragraph (1) of Article 700 limited an enclosed landowner's right to seek

75. Code Napoleon 1804, Art. 683, La. C.C. Comp. Ed., in 16 West's LSA-C.C. p. 429 (1972).

76. La. Civ. Code art. 47 (1808).

77. La. Civ. Code art. 694 provides:

When in the case of partition, or a voluntary alienation of an estate or of a part thereof, property alienated or partitioned becomes enclosed, passage shall be furnished gratuitously by the owner of the land on which the passage was previously exercised, even if it is not the shortest route to the public road, and even if the act of alienation or partition does not mention a servitude of passage.

78. The servitude granted by La. Civ. Code art. 694 does not even need to be over the *estate* that provides the shortest route to the nearest public road—it remains where it was exercised previously. *Young v. Manuel*, 385 So. 2d 544, 547 (La. App. 3d Cir. 1980).

79. La. Civ. Code art. 694 (emphasis added).

80. La. Civ. Code art. 696 (1825).

81. La. Civ. Code art. 700 (1870).

access: he "has no right to exact the right of passage from which of his neighbors he chooses." Article 700 provided the landowner a right of passage, but if access was desired via a different estate, then the landowner had to purchase a conventional right of passage. Present Article 692 embodies the essence of former Article 700.⁸² The revision comment to Article 692 states: "This provision reproduces the substance of Article 700 of the Louisiana Civil Code of 1870. It does not change the law."⁸³

B. Analysis of Jurisprudence

A preliminary issue to be determined is from what point should distances be measured? Initially there was dispute about whether the distance should be measured from improvements on the land or from the estate boundary. This issue seems to have been resolved by the first circuit court of appeal in *Rieger v. Norwood*,⁸⁴ in which the court stated, "We think it clear that, under Article 692 of the Civil Code, the distance to the nearest public road must be measured from the boundaries of the enclosed estate, and not from the improvements thereon."⁸⁵

The jurisprudence has not clearly delineated the analytical process that should be followed in enclosed estate analysis, and the language in many of the decisions is misleading. For instance, the *Anderton* court reached its decision after citing more than ten cases that allegedly supported its analysis and result.⁸⁶ However, none of the cases cited actually support the analysis and result in *Anderton*. Although many of these cases discuss the meaning of the word "generally" in Article 692, only two of them allowed the right of passage to be located on an estate that did not provide the shortest route.⁸⁷ Unlike these two cases, the facts in *Anderton* do not merit an exception.

In *Rieger v. Norwood*, *Littlejohn v. Cox*,⁸⁸ *Bandelin v. Clark*,⁸⁹ and *Miller v. Thompson*,⁹⁰ the servient estate had already been determined, and the issue was merely where on the servient estate the servitude should be placed. In *Wells v.*

82. See 1977 La. Acts No. 514, § 1 (effective Jan. 1, 1978).

83. La. Civ. Code art. 692 cmt.

84. 401 So. 2d 1272 (La. App. 1st Cir.), writ denied, 409 So. 2d 618 (1981).

85. *Id.* at 1274. See also *Mercer v. Daws*, 186 So. 877 (La. App. 2d Cir. 1939).

86. The *Anderton* court cited the following cases in support of its analysis: *Rockholt v. Keaty*, 256 La. 629, 237 So. 2d 663 (1970); *Littlejohn v. Cox*, 15 La. Ann. 67 (1860); *Miller v. Thompson*, 3 La. Ann. 567 (1848); *Rieger v. Norwood*, 401 So. 2d 1272 (La. App. 1st Cir.), writ denied, 409 So. 2d 618 (1981); *Finn v. Eoff*, 368 So. 2d 199 (La. App. 1st Cir. 1979); *Morgan v. Culpepper*, 324 So. 2d 598 (La. App. 2d Cir. 1975), writs denied, 326 So. 2d 377, 378 (1976); *Estopinal v. Storck's Estate*, 44 So. 2d 704 (La. App. Orl. 1950); *Wells v. Anglade*, 23 So. 2d 469 (La. App. 1st Cir. 1945); *Morris v. Nesbitt*, 9 So. 2d 75 (La. App. 2d Cir. 1942); *Mercer v. Daws*, 186 So. 877 (La. App. 2d Cir. 1939); *Bandelin v. Clark*, 7 La. App. 64 (1st Cir. 1927).

87. *Morgan*, 324 So. 2d 598, and *Mercer*, 186 So. 877, allowed the route over an estate which did not provide the shortest route to the public road.

88. 15 La. Ann. 67 (1860).

89. 7 La. App. 64 (1st Cir. 1927).

90. 3 La. Ann. 567 (1848).

*Anglade*⁹¹ and *Morris v. Nesbitt*,⁹² the defendants argued unsuccessfully for the servitude to be located on another estate. However, once the court determined the defendants' estates provided the shortest access to the nearest public road, their estates were burdened with the servitude. In *Rockholt v. Keaty*,⁹³ *Finn v. Eoff*,⁹⁴ and *Estopinal v. Storck's Estate*,⁹⁵ the cases were remanded because of the court's concern that shorter routes existed.⁹⁶

C. *The Leading Cases*

In many of the previously mentioned cases there is language, often quoted out of context, that may lead one to erroneously conclude that the analysis used in *Anderton* is jurisprudentially correct. By examining the earlier Louisiana cases, one can better understand when an exception to the general rule was intended to be granted. In *Broussard v. Etie*,⁹⁷ the existing right of passage was near the defendant's home and bisected his plantation. The defendant objected to this location for the servitude, and the court remanded so the defendant could "point[] out the place least injurious to him, for the exercise of the plaintiff's right."⁹⁸ The servient estate was already established; the dispute was about where on the servient estate the servitude should be located.

In *Miller v. Thompson*, one of the defendant's claims was that "the plaintiff may procure, elsewhere, a way equally convenient to himself, and less injurious to other proprietors,"⁹⁹ which sounds similar to the defendants' assertions in *Anderton*. The *Miller* court upheld the jury's finding and imposed the servitude on the defendant's estate because it provided the shortest route to the nearest public road.¹⁰⁰ The court stated, "At the same time that the shortest way has been granted, the jury have paid due regard to the rights of the defendant, by fixing it on the side line of his land, where it will be least injurious."¹⁰¹

91. 23 So. 2d 469 (La. App. 1st Cir. 1945).

92. 9 So. 2d 75 (La. App. 2d Cir. 1942).

93. 256 La. 629, 237 So. 2d 663 (1970).

94. 368 So. 2d 199 (La. App. 1st Cir. 1979).

95. 44 So. 2d 704 (La. App. Ori. 1950).

96. In *Rockholt*, an additional reason for remand was that the plaintiffs had not sought passage to a public road as required by the Code.

97. 11 La. 394 (1837).

98. *Id.* at 400-01.

99. *Miller v. Thompson*, 3 La. Ann. 567, 567 (1848).

100. *Miller* is usually cited for the following quotation: "Toullier, commenting upon the corresponding article of the Napoléon Code, says, the rule which grants the shortest road ought only to be departed from for weighty considerations." *Id.* at 568.

101. *Id.* Another early case has language that is ambiguous and even seems to support using a balancing test in determining whose estate owes the servitude. In *Adams v. Harrison*, 4 La. Ann. 165, 169 (1849), the court states:

It is not shown over whose land the shortest way may be obtained, and with the least injury to the party who may be required to submit to the servitude, nor what indemnity should be paid. It may well be that the passage is not due by the plaintiff, but by another

In *Littlejohn v. Cox*, the court broadly interpreted former Articles 695¹⁰² and 696.¹⁰³ The plaintiff in *Littlejohn* wanted a servitude in order to transport wood. The defendant objected because the plaintiff was not going to use the servitude for purposes of cultivation. The court broadly interpreted former Article 695:

The purport of the law is more general, and its object is to enable the owner to enjoy his property in the manner which he may deem the most profitable. In the case at bar, it is unimportant whether the plaintiffs intend to cultivate cotton or cane on the lands which are enclosed They are entitled to connect these lands with a public road.¹⁰⁴

The court then stated that in "determining the *place* where the right of way shall be exercised, the matter is not left entirely at the caprice or option of *the party compelled* to grant the servitude."¹⁰⁵ The opinion implies that the parties were disputing the location of the servitude on the defendants' estate—not whether the defendants' estate owed the servitude. The court stated: "The defendants cannot exact that an extremely circuitous, impracticable and expensive route should be taken by the plaintiff, because it may happen to be *less burdensome to the former*."¹⁰⁶ Thus, the defendants were burdened with the servitude, and the controversy entailed the extent of the burden, i.e., where the servitude would be located on the defendants' estate. Thus, the interests of both parties should be taken into consideration in deciding where *on the servient estate* the servitude should be fixed.

In *Rockholt v. Keaty*, a portion of property was left without public access after the expropriation and construction of a limited-access public highway. The court found the property to be enclosed by reason of the superior power of the state to expropriate property and deny the plaintiffs access along the portion of the highway running through their land. However, the plaintiffs sought access to other land they owned instead of to the nearest public road. The plaintiffs claimed the route was the "'shortest legally permissible and feasible passage to a public road' when cost, convenience, and practicality are considered."¹⁰⁷ The court rejected the plaintiffs' arguments:

The record reflects that there are numerous points of abutment where passage to a public road may be obtained, the shortest being a distance of

neighbor.
(citation omitted).

102. La. Civ. Code art. 695 (1825) provided: "The proprietor, whose estate is inclosed, and who has no way to the public road, may claim the right of passage on the estate of his neighbors for the cultivation of his estate, but he is bound to indemnify them in proportion to the damage he may occasion."

103. See *supra* note 80 and accompanying text.

104. *Littlejohn v. Cox*, 15 La. Ann. 67, 67-68 (1860).

105. *Id.* at 68 (emphasis added).

106. *Id.* (emphasis added).

107. *Rockholt v. Keaty*, 256 La. 629, 635, 237 So. 2d 663, 666 (1970) (presumably quoting from the plaintiff's petition).

approximately 125 feet. Plaintiffs contend that these latter properties are subject to building restrictions which would negate the possibility of obtaining passage across them, and that therefore the route here sought is the "legally" shortest and most feasible. We are not impressed with this contention. These restrictions alone would not be controlling of a landowner's right to obtain passage from enclosed land across neighboring property.¹⁰⁸

Two principles emerge from *Rockholt*. First, a plaintiff does not have discretion to choose which estate should be burdened with an Article 689 right of passage. If the plaintiff wants access elsewhere, then the plaintiff's remedy is to attempt to purchase a conventional right of passage. Second, the best public policy is served when the servitude is imposed on the estate that provides the shortest route to the nearest public road.¹⁰⁹ The Louisiana Supreme Court, commendably, seems reluctant to play games with how to calculate the shortest distance.

Two years after *Rockholt*, the Louisiana Supreme Court decided *Vermilion Parish School Board v. Broussard*.¹¹⁰ The Vermilion Parish School Board owned an estate without access to a public road. Before suit, access to the property was not a problem because the land was leased by the defendants, who owned adjoining property that allowed them access to nearby Pine Island Road. However, the defendants refused to allow passage across their estate when the school board leased the land to a third party. The district court found the passage across the defendants' estate to Pine Island Road the "least burdensome" route, but refused to impose the servitude on their estate because an estate providing shorter access to a public road existed.¹¹¹ The supreme court agreed with the district court and dismissed the plaintiff's suit, stating that the "right of passage was to be to the nearest public road."¹¹² The court stated:

Article 700 clearly provides that the owner of the landlocked estate cannot choose from which of his neighbors' estates he will exact a right of passage, but that it "shall be" where the distance is the shortest from the enclosed land to the public road. The mandatory language of that article

108. *Id.* at 642, 237 So. 2d at 668. Incidentally, the route noticed by the court in *Rockholt* as being the shortest, 125 feet long, cut through residential lots in Drusilla Place Subdivision to reach Wesson Street, where commercial traffic would then be forced to weave through the subdivision until reaching Drusilla Lane, a much larger street.

109. There is an exception to this rule which will be discussed *infra* at notes 122-143 and accompanying text—it is not applicable to the facts of *Rockholt*.

110. 263 La. 1104, 270 So. 2d 523 (1972).

111. *Id.* at 1107, 270 So. 2d at 524. The district court initially granted the school board a right of passage over the defendants' estate to Pine Island Road—after determining it to be the least burdensome. However, the defendants moved for a new trial, and in its second judgment the district court found Motty Road to be a public road providing shorter access than the route across the defendants' estate. Thus, the school board's suit was dismissed.

112. *Id.* at 1109, 270 So. 2d at 525.

is modified by the term "generally" as an acknowledgment of certain exceptions which . . . have no application to the case we consider.¹¹³

Although the *Vermilion* opinion does include some ambiguous language,¹¹⁴ the court first analyzes "whether the plaintiff has established that it is entitled to a servitude of passage across defendants' land because it affords the nearest route to a public road."¹¹⁵ After determining that the route across the defendants' estate did not provide the shortest distance, the court forcefully states that "[u]nder the express language of Civil Code Article 700 the School Board is not entitled to a right of passage over defendants' land."¹¹⁶

*LeBlanc v. Thibodeaux*¹¹⁷ is the most recent Louisiana Supreme Court case dealing with enclosed estates. In *LeBlanc*, the court held that a partition, executed in 1929, created an enclosed estate owned in indivision; thus, the estate was entitled to an Article 689 right of passage even though a conventional servitude had been established concurrently with the partition but had prescribed by ten years of nonuse.¹¹⁸ The court also implicitly reaffirms that Article 689 establishes a legal servitude, and that "the right to a legal servitude of passage does not prescribe."¹¹⁹

LeBlanc narrowly interprets the voluntary enclosure rule¹²⁰ to apply "only to instances where the enclosed estate's owner has caused his dilemma by selling off his access property, or at the least by not applying Article 693 where the voluntary 'alienation' which causes the enclosure is a partition."¹²¹ This interpretation complies with the state's public policy of discouraging landlocking. However, the supreme court remanded the case to determine the location of the right of passage without providing any Article 692 analysis.

VI. PRAGMATIC INFEASIBILITY: THE EXCEPTION TO THE RULE

The general rule of Article 692 is that the estate providing the shortest route to the nearest public road must provide the right of passage. However, the presence of the word "generally" in Article 692 means there are situations that allow the servitude to be imposed on an estate that does not provide the shortest route. When

113. *Id.*

114. At one point in the decision, the court states its accord with the district court's holding that "the School Board failed to sustain the burden of proving that the right of passage it sought over defendants' land was the most convenient outlet to a public road." *Id.* at 1111, 270 So. 2d at 525.

115. *Id.* at 1110, 270 So. 2d at 525.

116. *Id.* at 1111-12, 270 So. 2d at 525-26.

117. See *supra* notes 20-21, 36-38 and accompanying text for further discussion of *LeBlanc*.

118. *LeBlanc v. Thibodeaux*, 615 So. 2d 295, 297 (La. 1993). La. Civ. Code art. 753 provides: "A predial servitude is extinguished by nonuse for ten years." To determine when the commencement of nonuse begins, see La. Civ. Code art. 754.

119. *LeBlanc*, 615 So. 2d at 297.

120. La. Civ. Code art. 693.

121. *LeBlanc*, 615 So. 2d at 299.

it is pragmatically infeasible to provide access across the estate offering the shortest route, courts have allowed access across a different estate. Until *Anderton*, these aberrations from the general rule of Article 692 occurred in two typical situations.¹²² The first occurred when the estate providing the shortest route was covered by water or was otherwise not accessible year-round. The second occurred when the costs required to traverse the servient estate were so exceptional that from a practical standpoint it was economically impossible to construct access.¹²³

A. *Water-Related Category*

Although Louisiana's right of passage articles were derived from the French articles, Louisiana does not have the same problems that led the French to allow exceptions. Louisiana's main problem is not steep slopes, cliffs, or enclosing walls: Louisiana's problem is water. Early courts used the word "generally" to carve out exceptions in response to Louisiana's unique flooding problems. In *Morris v. Nesbitt*, the second circuit court of appeal noticed the difference between a route that was "impassable many times during the year and after every rain" and "one that could be used at all times of the year."¹²⁴

The water-related exception is clearly established in *Morgan v. Culpepper*.¹²⁵ In *Morgan*, the court found the plaintiff's property to be enclosed because the "roads which defendants allege provide access to public roads are in low-lying areas and are impassable part of the year due to flooding from Loggy Bayou."¹²⁶ The court imposed the right of passage on the defendants' property even though the route across their property was not the shortest to the public road. After noting that the shortest route, which traversed another estate, was impassable part of the year due to flooding, the court stated:

This fact brings this case within the Supreme Court's "certain exceptions" to the general rule that the passage shall be taken on the side where the distance is shortest to the public road. We find that the shortest route to a public road which is passable at all times of the year lies over defendants' property.¹²⁷

122. Other categories may arise. For instance, if the requested access route would violate limited access provisions or cross areas in which certain traffic is prohibited, courts might consider the route not pragmatically feasible. But see *Rockholt v. Keaty*, 256 La. 629, 642, 237 So. 2d 663, 668 (1970), discussed *supra* notes 93, 96, 107-108 and accompanying text.

123. Since it is now technologically possible to build a road or bridge like the Lake Pontchartrain Causeway, the second category seems to be a judicial recognition that the spirit of Article 692 does not require extraordinary access costs. It may take exceptional costs to construct a road or bridge across an estate that is flooded most of the year, but an overlap of the categories will clearly satisfy the exception.

124. *Morris v. Nesbitt*, 9 So. 2d 75, 79 (La. App. 2d Cir. 1942).

125. 324 So. 2d 598 (La. App. 2d Cir. 1975), *writs denied*, 326 So. 2d 377, 378 (1976).

126. *Id.* at 605.

127. *Id.* (quoting *Vermilion Parish Sch. Bd. v. Broussard*, 263 La. 1104, 1109, 270 So. 2d 523, 525 (1972)).

After determining that the plaintiffs were entitled to a right of passage over the defendants' property, the court remanded the case to fix the location of the servitude on the defendants' estate in the place least injurious.¹²⁸

B. Exceptional Costs Category

The second basic situation in which courts find it pragmatically infeasible to traverse the estate providing the shortest route occurs when exceptional costs are required.

In *Mercer v. Daws*,¹²⁹ a landowner sought access by seeking a right of passage across the two estates north of his tract. The estate north of the plaintiff's was owned by Daws, and the northwestern tip of Daws' estate adjoined a public road. The estate north of Daws' was owned by the Reitzell defendants. For over 30 years, a north-to-south road crossing the eastern edge of both the Daws and Reitzell estates provided access to the plaintiff's land.¹³⁰ The Reitzell defendants claimed that it was possible to construct access across the northwestern tip of Daws' estate without ever having to cross their estate. Alternatively, the Reitzells argued the route should be on the western portion of their estate instead of on the eastern high ground because they wanted to build a house on the present road's location.

After walking across the estates and looking at the proposed routes, the district judge found the existing route which crossed the eastern portion of both estates to be not only passable during all seasons of the year, but also "the shortest distance and most direct route from plaintiff's estate to the public road by about 350 or 400 yards."¹³¹

The Reitzell heirs appealed after realizing the district court had erroneously measured the distance from the plaintiff's residence instead of from the estate boundary.¹³² Correct measurements revealed the distance from the plaintiff's estate to the northwestern tip of Daws' estate was shorter than the eastern route. However, building a road via the shortest route required constructing two bridges across branches of a swamp, draining a portion of the swamp, and elevating the road. Noting the excessive costs, the appellate court affirmed the lower court's decision even though the route was not the shortest because:

It took into consideration the impracticability of a road from the closest point of plaintiff's estate to the public road and the excessive cost of constructing a road from that point. It can not now be seriously contended that Articles 699 and 700 of the Revised Civil Code are to be so strictly

128. *Morgan*, 324 So. 2d at 605-06.

129. 186 So. 877 (La. App. 2d Cir. 1939).

130. *Id.* at 880. The passageway the Reitzells were disputing, which had been used for over 30 years, crossed 85 yards of their estate. *Id.* at 878.

131. *Id.*

132. See *supra* notes 84-85 and accompanying text.

construed as not to allow any deviation from the literal words thereof under any condition. If so, there are many instances where the cost of an outlet would exceed many times the value of the estate.¹³³

This exception was recognized more recently in *Pearson v. Theriot*.¹³⁴ In *Pearson*, the shortest route to a public road was declared "an impossible route" because it would require spanning the "longest part of a canal."¹³⁵ The second shortest route required construction of a \$25,000 bridge over the width of the canal in order to reach a private extension road. The third shortest route, which was ultimately chosen by the court, required traversing two estates.¹³⁶ The correct result was reached in *Pearson* even though the court's analysis was flawed in three respects: (1) the court stated that the legal issue depended on whether "more appropriate routes" existed;¹³⁷ (2) the court cited *Anderton* as authority;¹³⁸ and (3) the court erroneously cited *Littlejohn v. Cox* as establishing a "balancing test" that allows courts to "depart[] from the strict letter of the codal articles."¹³⁹ The correct estates were ultimately burdened with the servitude because the court realized that the third route was the shortest route that was pragmatically feasible. The court stated: "In making the selection, the traversal of the Greathouse property [the third shortest route geometrically] would seem to be mandated by Civil Code Article 689, because it's simply closer in distance."¹⁴⁰

It sometimes may be difficult to determine if the costs involved warrant an exception to the general rule of Article 692. However, in such situations, parties should be able to reasonably predict that a dispute may arise and can take appropriate measures.¹⁴¹ In *Pearson*, the result seems correct considering the infeasibility of crossing the canal: (1) water permits had to be requested and approved to build a bridge, and (2) the bridge would cost approximately \$25,000 not including the additional construction and maintenance costs to upkeep the bridge in such a manner that it would not interfere with boat traffic.¹⁴²

133. *Mercer*, 186 So. at 880. In *Martini v. Cowart*, 23 So. 2d 655, 657 (La. App. 2d Cir. 1945), the court stated that, even if proposed routes are relatively the same distance over the servient estate, the most convenient route for the servient estate will not be chosen if it would entail construction costs equal to the value of the dominant estate.

134. 534 So. 2d 35 (La. App. 3d Cir. 1988).

135. *Id.* at 37.

136. This route, incidentally, was only 100 feet longer than the route requiring the \$25,000 bridge.

137. *Pearson*, 534 So. 2d at 37 (quoting the trial judge's oral reasons for judgment).

138. The *Anderton* interpretation "recognizes that the nature and location of the right of passage are governed by the circumstances of each case." *Id.* at 36.

139. *Id.* at 36-37. See also *supra* notes 88, 102-106 and accompanying text.

140. *Pearson*, 534 So. 2d at 37.

141. If an attorney locates the shortest route and immediately decides the costs would be excessive, he will realize the landowner with the shortest feasible route should also be made a defendant. In addition, neighboring landowners can predict with some certainty whether or not their estate may owe a servitude and can develop their estates accordingly.

142. *Pearson*, 534 So. 2d at 37.

Once the *Pearson* court determined that an exception was warranted, the court then appropriately balanced the parties' interests in determining the least inconvenient location of the servitude on the servient estates.¹⁴³

VII. RECOMMENDED APPROACH TO THE ARTICLE 692 ANALYSIS

After determining an estate is enclosed, one should attempt to determine how the estate became enclosed. Was the access route voluntarily sold by the enclosed landowner so as to fall within the voluntary enclosure rule of Article 693?¹⁴⁴ Although *LeBlanc* narrows the applicability of Article 693, there are still many unanswered questions regarding the voluntary enclosure rule.¹⁴⁵ Assuming Article 693 is not applicable, then courts should engage in a two-step analysis under Article 692.¹⁴⁶

First, the court should determine which estate or estates owe the servitude. The court need only measure distances from the boundary of the enclosed estate to the nearest public road—no other factors should be considered. The shortest straight-line distance determines which estate or estates owe the servitude: all estates that would be crossed on a straight line path to the public road owe the servitude. A party arguing that the servitude should be imposed on an estate that does not provide the shortest access should bear the burden of establishing that an exception is applicable. If constructing the access road is pragmatically feasible, distance alone should determine which estate owes the servitude.

If two or more estates provide equidistant access to the nearest public road, which may not be uncommon in subdivisions, then all should owe the servitude.

143. *Id.* at 38.

144. An initial title check of the Webster Parish conveyance records indicates the outcome in *Anderton* may have been appropriate even if the analysis was flawed. Even though it was not mentioned by either side, J.Y. Webb, the plaintiff's great-grandfather, sold a portion of land in 1901 to Richard A. Robertson in such a manner that it may have isolated the land now owned by the plaintiff. Depending on how far back the supreme court is willing to go in applying Article 693, it could have been argued that the plaintiff's predecessor voluntarily enclosed himself.

145. The court in *LeBlanc* recognizes the potential problems that could be created if the article is applied to voluntary acts or omissions other than enclosures caused by selling off access property. *LeBlanc v. Thibodeaux*, 615 So. 2d 295, 299 (La. 1993). For example, how far back should the court look to determine if the enclosure was created by predecessors in title? The court notes that "the LeBlancs and their ancestors had not committed any voluntary act or omission, distinct from the partition, that had enclosed the estate." *Id.* at 297 (emphasis added). Does it contravene the policy against landlocking to penalize a landowner today for a voluntary enclosure created by predecessors in title over 100 years ago? This question will have to wait for another day.

146. In *Patin v. Richard*, 291 So. 2d 879 (La. App. 3d Cir. 1974), Judge Domengeaux stated in his dissent that "[t]he articles clearly reflect that it is to be fixed upon the estate over which the distance is shortest to the public road. It is then that the question of the least injurious place comes into consideration." *Id.* at 886 (Domengeaux, J., dissenting). Likewise, in *Mitcham v. Birdsong*, 573 So. 2d 1294, 1300 (La. App. 2d Cir. 1991), Chief Judge Marvin, writing for the court, states: "The trial court must consider the shorter straight-line distance . . . the first mandate of CC Art. 692. . . . [T]he trial court may then consider locating the right of way so that it is least injurious to the servient estate, the second mandate of Art. 692."

In such a case, parties can argue between themselves which particular estate should ultimately be burdened with the servitude. In such a situation, the cost, convenience, and practicality would be appropriate factors for a court to balance in deciding which estate owes the servitude.

After the estate providing the shortest route to the public road is determined, the court should use a balancing test in considering the distance, cost, convenience, and practicality in fixing the exact location of the servitude on that estate. The servitude should be placed in the least injurious location considering the interests of all parties whose estates must be crossed to reach the public road. It should be noted that no cases considered the interests of non-parties to the suit except for *Anderton*.

VIII. CONCLUSION

Only in exceptional circumstances should courts allow access along a route other than the shortest. The word "generally" in Louisiana Civil Code article 692 allows courts to deviate only in rare situations in which it is not pragmatically feasible to construct an access road across the estate that provides the shortest access. The *Anderton* approach should not be followed because it creates needless uncertainty and allows nebulous factors and analysis to determine whose land shall be burdened with predial servitudes. "Nothing so much retards the growth and prosperity of a country as insecurity of titles to real estate. Labour is paralysed where the enjoyment of its fruits is uncertain."¹⁴⁷ If the legislature intended courts to determine servient estates on an ad hoc basis using equity as the guide, the legislature could have so provided.

C. Sherburne Sentell, III

147. *Lewis v. Marshall*, 30 U.S. (5 Pet.) 470, 477-78 (1831).

