

A man contacted his lawyer regarding his right to use a path that was on his neighbor's vacant land.

Fifteen years ago, after part of a path located on his land and connecting his cabin to the public highway washed out, the man cleared a small part of his neighbor's land and rerouted a section of the path through the neighbor's land.

Twelve years ago, the neighbor leased her land to some hunters. For the next 12 years, the hunters and the man who had rerouted the path used the path for access to the highway.

A month ago, the neighbor discovered that part of the path was on her land. The neighbor told the man that she had not given him permission to cross her land and that she would be closing the rerouted path after 90 days.

The man's land and the neighbor's land have never been in common ownership.

The period of time necessary to acquire rights by prescription in the jurisdiction is 10 years. The period of time necessary to acquire title by adverse possession in the jurisdiction is 10 years.

What should the lawyer tell the man concerning his right to use the rerouted path on the neighbor's land?

- A. The man has an easement by necessity to use the path.
- B. The man has an easement by prescription to use the path.
- C. The man has fee title by adverse possession of the land included in the path.
- D. The man has no right to use the path.

### Explanation:

An easement is a nonpossessory interest in land that gives the easement holder the right to use another's land for a limited purpose (eg, to use the path). One type of easement is an **easement by prescription**, which is acquired through use that is:

**Open and notorious** – apparent or visible to a reasonable owner

**Continuous** – uninterrupted for the statutory period

**Actual** – use of the land

**Nonpermissive** – hostile and adverse to the owner (ie, without the owner's permission)

Unlike with adverse possession, the use **need not be exclusive** of the owner or other users—including the owner's tenants (eg, the hunters).

Here, the man cleared a small portion of his neighbor's land and created a path through the land. For 12 years—which exceeds the 10-year statutory period—the man openly and continuously used the path to access the highway. And since he did so without the neighbor's permission, the man acquired an easement by prescription to use the path **(Choice D)**.

**(Choice A)** An easement by necessity arises when two parcels of land are separated from *common* ownership (not seen here), making it absolutely necessary for the owner of one parcel to cross the other parcel to access the land.

**(Choice C)** To acquire title by [adverse possession](#), a person must have exclusive possession of the land—mere use is not enough.

### Educational objective:

To acquire an easement by prescription, a person must use another's land in a way that is (1) open and notorious, (2) continuous, (3) actual, and (4) nonpermissive.

### References

Restatement (Third) of Property: Servitudes §§ 2.16–2.17 (Am. Law Inst. 2000) (easement by prescription).

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### Adverse possession v. Easement by prescription

	Open and notorious	Continuous	Exclusive	Actual	Non-permissive
Adverse possession				Possession	
Easement by prescription				Use	

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