Thirty years ago, a brother owned Lot 1, a lot contiguous to Lot 2, in fee simple. He executed and delivered to his sister an instrument in writing which was denominated "Deed of Conveyance." In pertinent part it read, "[Brother] does grant to [sister] and her heirs and assigns a right-of-way for egress and ingress to Lot 2." If the quoted provision was sufficient to create an interest in land, the instrument met all other requirements for a valid grant. The deed was recorded. The sister held record title in fee simple to Lot 2, which adjoined Lot 1.

Twelve years ago, a cousin succeeded to the brother's title in fee simple in Lot 1. Seven years ago, a friend succeeded to the sister's title in fee simple in Lot 2 by a deed that made no mention of a right-of-way or driveway. At the time the friend took title, there existed a driveway across Lot 1 which showed evidence that it had been used regularly to travel between a public highway and Lot 2. Lot 2 did have frontage on a public side road, but this means of access was seldom used because it was not as convenient to the dwelling situated on Lot 2 as was the highway. The driveway originally was established by the sister.

The friend has regularly used the driveway since acquiring title. The period of time required to acquire rights by prescription in the jurisdiction is 10 years.

Six months ago, the cousin notified the friend that he planned to develop a portion of Lot 1 as a residential subdivision and that the friend should cease any use of the driveway. After some negotiations, the cousin offered to permit the friend to construct another driveway to connect with the streets of the proposed subdivision. She declined this offer on the ground that travel from Lot 2 to the highway would be more circuitous.

The friend brought an appropriate action against the cousin to obtain a definitive adjudication of their respective rights. In such lawsuit, the cousin relied upon the defense that the location of the easement created by the grant from the brother to the sister was governed by reasonableness and that the cousin's proposed solution was reasonable.

Should the cousin prevail?

A. No, because the location had been established by the acts of the brother and the sister.

B. No, because the location of the easement had been fixed by prescription.

C. Yes, because the reasonableness of the cousin's proposal was established by the friend's refusal to suggest any alternative location.

D. Yes, because the servient owner is entitled to select the location of a right-of-way if the grant fails to identify its location.

Explanation:

Location & relocation of easements

Location Initial location set by:

express easement's terms
circumstances surrounding easement's creation
servient owner, provided location is set within reasonable time & reasonably suited to easement's purpose (if neither of above provisions applies)

Relocation Servient owner may relocate (at own expense) to permit normal use/development of servient estate if relocation is reasonable & does not:

violate express easement's terms
significantly lessen easement's utility
increase burden on dominant owner's use or enjoyment of easement
frustrate easement's purpose

The **location** of an **express easement** is **set by its terms**. But when those terms are **unclear** (eg, "a right-of-way for egress and ingress to Lot 2"), courts will look to the parties' **intent** to determine the easement's location. Intent is often evidenced by the **parties' conduct** (eg, the sister using a driveway across Lot 1 without objection from the brother).

Once the location of the easement has been established, the **servient-estateowner** may **relocate the easement** at his/her **own expense** to permit normal use or development of the servient estate. But the new location must be reasonable and **may not**:

violate the easement's terms
significantly lessen the easement's **utility**
increase the burden on the dominant-estate owner's use or enjoyment of the easement *or*
frustrate the easement's purpose.

Here, the cousin became the servient-estate owner when he succeeded to the brother's title in Lot 1. He later sought to relocate the easement to develop a portion of Lot 1 as a residential subdivision. But the cousin asked the *friend*, who had succeeded to the sister's title in Lot 2, to bear the expense of building the new driveway. Additionally, the proposed location would significantly lessen the easement's utility by making travel from Lot 2 to the highway more circuitous. Therefore, the cousin should not prevail.

(Choice B) The easement's location was *not* fixed adversely by prescription (ie, OCAN) since the brother did not object to the sister establishing or using the driveway.

(Choice C) The cousin's proposal did not satisfy the requirements for relocating the easement, and the friend was not required to suggest an alternative location.

(Choice D) The servient-estate owner is only entitled to select the initial location of an easement if it has not been set by the easement's terms *or* the circumstances surrounding its creation (eg, the parties' conduct—as seen here).

Educational objective:

The servient-estate owner may relocate the easement at his/her own expense to permit normal use or development of the servient estate. But this right has limitations—eg, relocation cannot significantly lessen the easement's utility.

References

Restatement (Third) of Property: Servitudes § 4.8 (Am. Law Inst. 2000) (location and relocation of easements).