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Changing to a Right of Way – ‘Deed of Grant and Release’ or ‘Deed of Variation’?

Much property has changed hands during the pandemic and in a cost of living crisis, those with excess land can cash in on transferring some of their land to someone else. However, someone who sells property may want to still gain access over the land they have sold and during the transfer of land, their conveyancer may have negotiated a right of way/accessway onto the title of both properties.

In the future, the owners of the new land, may want to build an extension. They may want to accommodate a growing family, or a new government may relax planning laws. But what happens if the new building is built over the agreed right of way? Can you just give them a route somewhere else that you think is just as good as before?

The Right of Way

A right of way, or an accessway, is defined in law as an ‘easement’ over private land. The property which the right of way travels over is *burdened* by the right of way, whereas the property that needs the access *enjoys* that right of way.

The right of way has to be respected and ignorance may cause problems as we will discuss below.

Land Registry

The Land Registry contains 3 registers:

- 1) The Property Register
- 2) The Proprietorship Register
- 3) The Charges Register

Anyone can access their or a neighbour’s property register for a small fee and are called ‘Official Copies’. If you are in doubt over which property you are, the Property Register should contain detail of which property *enjoys* the right of way and the Charges Register should contain detail of which property is *burdened* by the right of way.

If the right of way is registered, then it will bind the successors in title. This means that the land can change hands and as long as they are not owned by the same person, then the enjoyment and burden of the right of way passes to the new owners.

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However, there are exceptions to this in certain circumstances. For example, there is a still a proportion of land which is not registered in England and Wales and you should seek the advice of a professional if you have doubt over this.

Interference with the right of way

If you go ahead and build over the right of way, without appreciating the legal implications of an existing easement then this could be classed as an 'interference'.

Interference with a right of way can give rise to an action for private nuisance. The party claiming interference must show that they are entitled to the benefit of the right of way, the nature and extent of the right of way and that the interference is of a substantial nature. Substantial does not mean the destruction of the right of way, but a trivial impact will not give rise to a cause of action. This means that it would be a subjective assessment by the court.

But in your building plans, you have allowed a big enough gap to allow access – what is the issue?

Heslop v Bishton and others [2009] EWHC 607 held that interference with an original right of way was actionable even though an alternative and equally convenient way had been provided. This means that a right of way demands respect from a legal point of view.

Should there be an interference then there are a variety of remedies that your neighbour would be able to seek. They can seek damages, get an injunction, or even allow them an abatement; allowing them to come onto your land to put right the interference.

'Deed of Release and Grant' vs 'Deed of Variation'

The principle here, is that the right of way cannot be ignored and even if built across it remains a living thing. This means that both property owners must be party to a document called a 'deed' to consent to any changes. Almost any legal interest in land requires such a document, with some exceptions.

You might think both parties can just draft a 'deed' between themselves. To make it cheaper and quicker. Your architect or builder may have even mentioned drafting up a quick 'Deed of Variation'. But as mentioned, the right of way must be respected.

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A 'Deed of Variation' is the lazier option and contains risks. It is suitable where the right of way needs amending due to an error with its registration or plan on Land Registry but is not prudent to use this method when a right of way is being re-routed completely. It could give rise to an interference as discussed above. The original right of way needs to be completely deleted with the consent of both parties.

The preferred option is a 'Deed of Release and Grant', which is a twofold process. It deletes the existing right of way and grants a new one. This document has to be professionally drafted and correctly registered at Land Registry. Not doing so can have an impact on a future house sale or give rise to a dispute should a neighbour have a healthy appetite for a legal dispute.

The common denominator with both options, is that it is still a matter of negotiation between the parties and releasing a right of way may demand compensation to be paid. There is still a small percentage of land in England and Wales which is not registered and it is key for both sides to seek legal advice to be properly informed of the options and consequences.

What can Complete Property Solutions at Chadwick Lawrence do?

Early advice is crucial and almost certainly more economical than unravelling the consequences of right of way that has been built over. Even more so if you are struggling to sell a property due to a problematic feature in your Land Registry document. Each case is different and heavily depends on the circumstances.

If you are considering extending your property or changing an accessway over your garden, we can provide bespoke advice on the issues of a right of way from cradle to grave. We can provide the advice, the negotiation, the drafting, and the registration.

For more information on how we can help you with a right of way, contact Oliver Newton in our Complete Property Solutions team olivernewton@chadlaw.co.uk.

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