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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2005-CA-000892-MR

WENDELL BRINKLEY — APPELLANT

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE CHARLES W. BOTELER, JR., JUDGE
ACTION NO. 01-CI-00591

W.C. WILSON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE: Wendell Brinkley appeals from findings of fact, conclusions of law and judgment of the Hopkins Circuit Court holding that he is not entitled to a prescriptive easement or a quasi easement over a parcel of real property owned by W.C. Wilson. Brinkley contends that Wilson failed to overcome the presumption that Brinkley's use of a roadway was under claim of right, and also argues that the trial court improperly failed to

[1] Senior Judge Joseph R. Huddleston, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

recognize that Brinkley proved all of the elements of a quasi easement. For the reasons stated herein, we affirm the judgment on appeal.

Prior to 1954, Dudley Johnston owned a parcel of real property situated in Hopkins County, Kentucky. The parcel was, and is now, bounded on the north by Stoney Point Road. In 1954, Johnston severed the parcel and sold a portion consisting of more than 100 acres to Margaret and Wallace Brinkley.[2] In 1999, this parcel was purchased by Wilson. In 1958, Dixie and Oscar Melton purchased the remaining portion of the Johnston property, and that parcel was inherited by Brinkley in about 1980. For purposes of this appeal, the property severed in 1954 and subsequently owned by Margaret and Wallace Brinkley and later Wilson will be referred to as the "Wilson farm". The remainder of the Johnston parcel, which later was owned by the Meltons and then Wendell Brinkley, will be referred to as the "Brinkley farm". Wendell Brinkley was the son of Margaret and Wallace Brinkley.

A roadway extends from Stoney Point Road and runs across the Wilson farm to the Brinkley farm. The roadway came into existence no later than 1958, and the family members who owned the Wilson and Brinkley farms were the primary if not sole

[2] Margaret and Wallace Brinkley will be referred to by their full names, i.e., "Margaret and Wallace Brinkley". Wendell Brinkley will be referred to as "Wendell Brinkley" or simply "Brinkley".

users of it. Prior to Wilson's purchase of the Wilson farm, Wendell Brinkley used the roadway. In 1997, Brinkley's mother, Margaret Brinkley, attempted to stop Wendell Brinkley's access to the roadway by placing a gate across it. Wendell Brinkley removed the gate and kept using the roadway.

After Wilson purchased the Wilson farm, a dispute arose between Wilson and Brinkley as to the latter's use of the roadway. Wilson filed the instant action seeking declaratory relief and a declaration of rights as to the parties' legal interests in the roadway. Brinkley counterclaimed, alleging that he had the right to use the roadway by virtue of adverse possession.

After taking proof, the Hopkins Circuit Court entered findings of fact, conclusions of law and judgment on October 3, 2002. The court found that Brinkley's prior use of the roadway was with the implied consent of Margaret and Wallace Brinkley (the then owners of the Wilson farm), and that as such Brinkley could not make a claim of right under adverse possession. On appeal, a panel of the Court of Appeals remanded the matter to the Hopkins Circuit Court for findings of fact and conclusions of law on the issue of whether Brinkley acquired a prescriptive easement or quasi easement over Wilson's parcel.

On remand, the circuit court entered additional findings of fact, conclusions of law and judgment on April 8,

2005. It concluded in relevant part that since family members owned both parcels from 1958 to 1999, Brinkley's use of the roadway was merely permissive and no clear claim of right had been made. As to the quasi easement, the circuit court opined that Brinkley failed to produce evidence sufficient to prove that the elements of a quasi easement existed before unity of ownership ceased in 1954. That is to say, the court found that there was no clear evidence showing that before the partition in 1954 the use of the roadway was so long, continuous and obvious that it must have been intended to be permanent. This appeal followed.

Brinkley first argues that the trial court committed reversible error in failing to rule that he acquired an easement by prescription over the Wilson farm. He maintains that the evidence showed a continuous, uninterrupted use of the roadway for a period of 15 years or more, which gave rise to a presumption that his use of the roadway was under a claim of right. Since, he argues, Wilson failed to rebut this presumption by offering evidence that Wilson gave him permission to use the roadway, the court was required to find that an easement by prescription existed. He seeks an order reversing the judgment on appeal and holding that he possesses an easement by prescription over the Wilson farm.

We have closely examined Brinkley's argument and find no error. An easement may be created by express written grant, implication, prescription or estoppel.[3] The law of prescriptive easements is derived from the principles underlying adverse possession.[4] As a general rule, in order to obtain a right to a prescriptive easement a claimant's adverse use must be actual, open, notorious, exclusive, and hostile, and must continue in full force for at least fifteen years.[5] "A prescriptive easement is a property right in one landowner (dominant tenement) representing a privilege to use the land of another (servient tenement) and is based on a presumed grant that arises from the adverse, uninterrupted, and continued use for a 15-year statutory period."[6]

In the matter at bar, the trial court determined that Brinkley failed to offer proof of usage which was adverse, hostile and under a claim of right. This conclusion was based on the finding that family members owned both parcels from 1958 to 1999. The court cited testimony of Brinkley's sister in support of the conclusion that Brinkley's continued usage of the roadway arose from his familial relationship with the owner of

[3] Gosney v. Glenn, 163 S.W.3d 894 (Ky.App. 2005).

[4] Cole v. Gilvin, 59 S.W.3d 468 (Ky. App. 2001).

[5] Id. at 475.

[6] Id.

the Wilson farm (i.e., Margaret Brinkley). She stated that there had never been any problems or altercations regarding the use of the roadway because "it was family".

Substantial evidence exists in the record upon which the circuit court based its conclusion that Brinkley's use of the roadway was not hostile and under a claim of right. "Easements are not favored, and the party claiming the right to an easement bears the burden of establishing all the requirements for recognizing the easement."[7] Brinkley has not met that burden. Accordingly, we have no basis for reversing the trial court's conclusion that Brinkley does not possess an easement by prescription over the Wilson farm.

Brinkley also argues that he is entitled to a quasi easement on the Wilson farm. A quasi easement is based on the principle that "where the owner of an entire tract of land . . . employs one part so that another derives from it a benefit of continuous, permanent and apparent nature, and reasonably necessary to the enjoyment of the quasi-dominant portion, then upon a severance of the ownership a grant or reservation of the right to continue such use arises by implication of law."[8] Generally, in order to prove a quasi-easement, a claimant must

[7] Gosney, 163 S.W.3d at 899, citing Carroll v. Meredith, 59 S.W.3d 484, 489-90 (Ky.App. 2001).

[8] Carroll, 59 S.W.3d at 490.

show (1) that there was a separation of title from common ownership; (2) that before the separation occurred the use which gave rise to the easement was so long continued, obvious, and manifest that it must have been intended to be permanent; and (3) that the use of the claimed easement was highly convenient and beneficial to the land conveyed.[9] Because the genesis of a quasi easement is based on the intent of the parties at the time of severance, the date of severance is the point of reference in determining whether an easement has been imposed upon adjoining land.[10]

In examining this issue, the circuit court determined that Brinkley offered no clear evidence in support of the conclusion that at the time of severance in 1954 the then-owner Dudley Johnston either used the roadway or intended it to survive the severance. The court noted that in response to in inquiry as to whether Johnston used the roadway, Brinkley testified "I think he used it some . . . " and Brinkley's sister said she couldn't remember. The court found that this evidence did not compel a conclusion that Johnston intended to create a quasi easement in 1954. We find no error in this conclusion, especially in light of the Carroll case, recognizing that easements are not favored and that the burden to prove the

[9] Id.

[10] Id.

existence of an easement rests with its proponent. The circuit court properly found that Brinkley failed to prove the existence of a quasi easement arising in 1954.

For the foregoing reasons, we affirm the findings of fact, conclusions of law and judgment of the Hopkins Circuit Court.

ALL CONCUR.

| BRIEF FOR APPELLANT: | BRIEF FOR APPELLEE: |
| --- | --- |
| William Clint Prow<br>Providence, KY | William R. Thomas<br>Madisonville, KY |