RENDERED: DECEMBER 7, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001861-MR

JONAS ADAMS — APPELLANT

v.

APPEAL FROM BATH CIRCUIT COURT
HONORABLE WILLIAM B. MAINS, JUDGE
ACTION NO. 05-CI-90129

LOUISE PERGREM; AND DWAYNE PERGREM — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, VANMETER AND WINE, JUDGES.

VANMETER, JUDGE: Jonas Adams appeals from an order entered by the Bath Circuit Court regarding the parties' dispute concerning a passway across the farm of appellees Louise Pergrem and Dwayne Pergrem[1] to Adams' adjacent farm. For the reasons stated hereafter, we affirm.

When Adams purchased his farm in 2004, his sole access to the property from Kentucky State Highway 211 was across the Pergrem farm. The location and

[1] Appellees' August 2005 answer and counterclaim to Adams' petition for a declaration of rights clarified that Dwayne Pergrem is the only child of Louise Pergrem and her late husband, who purchased the Pergrem farm in 1955. Although Dwayne had no title or ownership interest in the Pergrem farm, he held his mother's power of attorney and had the right to act on her behalf. Appellees indicated that they had no objection to Dwayne being named as a party below, and Louise Pergrem and Dwayne Pergrem thereafter were consistently referred to as the respondents. For ease of reference, and without further addressing Dwayne's actual legal interest in the property, we will continue to collectively refer to Louise Pergrem, her late husband, and/or Dwayne Pergrem as the Pergrems.

character of the passway across the Pergrem farm had been addressed some forty-four years earlier in a proceeding[2] between the Pergrems and Adams' predecessors in title, the Allens. In its 1960 judgment in that proceeding, the Bath Circuit Court found:

> 2. The [Allens] failed to sustain their burden of proof and accordingly failed to prove by the weight of the evidence that the road or passway through the lands of [the Pergrems] had been used openly, adversely and notoriously for more than fifteen years by [the Allens] and the general public.
>
> 3. There is a passway or easement over the lands of the [Pergrems] leading from Kentucky Highway 211 to the lands of the [Allens] over which the [Allens] and the public generally have the right to travel subject to the right of the [Pergrems] in the reasonable use of their farm to place gates, gaps or cattle guards over or across said passway.
>
> 4. The parties by agreement have established a cattle guard in and across said passway near its junction with Kentucky Highway No. 211 and subject to the duty of [the Allens] to construct and maintain said cattle guard in a legal manner so it will turn stock and be passable for vehicles. The [Pergrems] have no right to obstruct the passway at this point by a gate or gap.
>
> CONCLUSIONS OF LAW
>
> 5. [The Allens] have a passway over the lands of the [Pergrems] leading from Kentucky Highway No. 211 to their own lands along the route said passway now takes. [The Pergrems] in the reasonable use of their farm may erect gates, gaps or cattle guards under or across said passway which will not unduly or unreasonably interfere with the use of said passway by [the Allens] and the traveling public.

[2] Allen v. Pergrem, Bath Circuit Court, judgment signed on May 12, 1960. The case number and filing date are unknown. Neither party raises any challenges to the authenticity or applicability of the judgment.

JUDGMENT

> 6. [The Allens] are adjudged to have a passway or easement over the lands of the defendants leading from Kentucky Highway 211 to their own lands along the route now taken by said passway, and [the Allens] and the traveling public have the right to use same.
>
> 7. [The Pergrems] in the reasonable use of their farm through which the above mentioned passway runs have the right to place gates, gaps or cattle guards under or across said passway as will not interfere unduly or unreasonably with the use of said passway by [the Allens] and the traveling public.
>
> 1. [The Allens] shall erect and maintain a cattle guard across the passway near its intersection with Kentucky Highway No. 211 in a legal manner so as to turn livestock and permit the passage of vehicles and [the Pergrems] may not erect a gap or gate across the passway at this point.

Eventually, the Pergrems and Adams disagreed regarding the location and character of the ten to fourteen-foot-wide gravel passway over the Pergrems' farm to Adams' farm. In July 2005, Adams filed the underlying petition seeking a declaratory judgment establishing his rights to reconstruct and maintain a bridge over a creek, and to install a water line beneath the passway. Further, he sought a clarification of his rights to widen and maintain the passway, as well as a prohibition against activities by the Pergrems which would burden the use of the passway. Although the parties reached an agreement regarding the bridge construction, they continued to disagree as to Adams' rights to enlarge and improve the passway, and to install a water line under or along the passway. The trial court viewed the passway and rejected Adams' argument that the earlier judgment was intended to make a dedication of the passway to the general public,

rather than to simply adjudge the existence of a previously-established passway "that had been acknowledged by the parties[.]" The court found that Adams has the right to maintain and repair the passway, but not to materially change or enlarge its use, including by the installation of a water line. This appeal followed.

First, Adams contends that the trial court erred by determining that the 1960 judgment did not dedicate the passway to public use. We disagree.

Generally, an easement is created by express written grant, implication, prescription or estoppel. *Grinestaff v. Grinestaff,* 318 S.W.2d 881 (Ky. 1958); *Gosney v. Glenn,* 163 S.W.3d 894 (Ky.App. 2005). "As with adverse possession of a fee simple estate, a prescriptive easement may be acquired by actual, hostile, open and notorious, exclusive and continuous possession of the property for the statutory period of fifteen years." *Columbia Gas Transmission Corp. v. Consol of Kentucky, Inc.,* 15 S.W.3d 727, 730 (Ky. 2000); *Allen v. Thomas,* 209 S.W.3d 475, 478 (Ky.App. 2006). *See* KRS[3] 413.010. However, if a passway's use is permissive, no prescriptive right to its use is acquired even after the passage of fifteen years. *Jackey v. Burkhead,* 341 S.W.2d 64 (Ky. 1960). Moreover, a dedicated passway is created when land is appropriated for any general and public use, with the owner reserving no rights which are incompatible with the public's full enjoyment of that use. *Consolidated Realty Co. v. Richmond Hotel & Bldg. Co.,* 253 Ky. 463, 69 S.W.2d 985 (1934). Thus, no dedication occurs if land is appropriated only for use by particular persons, under circumstances which exclude any

[3] Kentucky Revised Statutes.

presumption that the use was intended to be for the general public. *Hofgesang v. Woodbine Ave. Realty Co.,* 414 S.W.2d 580 (Ky. 1967).

Here, the 1960 judgment found that a passway or easement existed over the Pergrems' land between Kentucky Highway 211 and the Allens' property. The court deemed that the Allens and the "public generally" had the right to travel over the passway for the convenience of the Allens, subject to the Pergrems' rights "in the reasonable use of their farm to place gates, gaps or cattle guards over or across said passway[.]" The record suggests that the public also used the passway for access to family cemeteries and another residence. However, as Adams notes, the 1960 judgment specifically rejected any claim that the passway existed through prescription, as the court found that the Allens failed to prove that the passway "had been used openly, adversely and notoriously for more than fifteen years[.]" Moreover, nothing suggests an intent to dedicate the passway for the general public's use in traveling to other destinations, since unlike the situations in *City of Hazard v. Eversole,* 313 Ky. 254, 230 S.W.2d 921 (1950), and *Thompson v. McPherson,* 124 S.W. 272 (Ky. 1909), the character of the usage does not manifest such an intent. Indeed, the Pergrems' acknowledged authority to place certain restrictions across the passway is necessarily incompatible with any intent to dedicate the passway and allow the public to fully enjoy the use of the land. *Consolidated Realty*, 69 S.W.2d 985. It follows, therefore, that the trial court did not clearly err by finding that the passway was not dedicated to general public use. *See Hofgesang,* 414 S.W.2d 580.

Further, we are not persuaded by the remaining issues which Adams raises relating to the location, maintenance and modification of the passway. It is well established that unless a granting instrument provides otherwise, an easement with a fixed location cannot be relocated without the express or implied consent of the owners of both the servient and the dominant estates. *Wells v. Sanor,* 151 S.W.3d 819 (Ky.App. 2004). Although Adams has the duty to maintain the private passway in a safe traveling condition, *Spalding v. Louisville & N.R. Co.,* 281 Ky. 357, 136 S.W.2d 1 (1940), he cannot increase the burden imposed on the Pergrems' estate by the passway. *Plunkett v. Weddington,* 318 S.W.2d 885 (Ky. 1958). Thus, in the absence of any agreement between the parties, Adams' right to use the passway may not be expanded for his own convenience or that of his customers, or for other general purposes. *See Campbell v. Winchester Realty Co.,* 294 S.W.2d 919 (Ky. 1956).

It follows that the trial court did not clearly err by finding that the passway would be impermissibly enlarged if Adams was permitted either to maintain it "at a width sufficient to allow vehicles to pass as they exit and enter" the property, or to install a water line beneath or beside the passway. The record indicates that since Adams acquired his property in 2004, he has established a sizeable horse boarding, training, and riding business which he and his customers must access by using the passway across the Pergrems' land. Adams complains of the difficulties which he and his customers experience because the passway is, in some places, too narrow to permit either the passing of two vehicles, or the property's easy entrance or exit by vehicles with horse

trailers. However, Adams simply has no right to expand his use of the Pergrems' property beyond the limited passway which was established long ago for farm purposes. Further, given that the established rights only provide for the passway's use in accessing other property, Adams clearly has no right to expand the use of the passway through the installation of a water line. *Cf. Higdon v. Nichols,* 204 Ky. 56, 263 S.W. 665 (1924).

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Stephen E. Neal
Mt. Sterling, Kentucky

BRIEF FOR APPELLEE:

Paula Hughes
Owingsville, Kentucky