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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002588-MR

DONNA LANDRETH CURRY AND HUSBAND, CLEODIS CURRY; ALAN LANDRETH AND WIFE, DENISE LANDRETH; AND DAVID LANDRETH AND ANY UNKNOWN SPOUSE — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 05-CI-01369

JOHN PIPE GAINES AND RANDALL JOE TAPP, SR. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND TAYLOR, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: This is an appeal from an order for declaratory judgment entered by the Warren Circuit Court on December 11, 2006. The appellants, Donna Landreth Curry and her husband Cleodis Curry, Alan Landreth and his wife Denise Landreth; and David Landreth and any unknown spouse (hereinafter the Landreths),

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

dispute the circuit court's finding that a neighboring landowner, John Pipe Gaines, owns an easement over the Landreths' property. They also contest the circuit court's characterization of the scope of that easement. We affirm.

Randall Joe Tapp, the Landreths, and John Pipe Gaines own neighboring tracts of property in Warren County. Tapp's tract adjoins the Morgantown Road. The Landreths own a farm which adjoins Tapp's farm on the opposite side. Their only access to the Morgantown Road is provided by a gravel road which runs across their property and Tapp's property. Gaines owns property adjoining the Landreths' farm. His only access to the Morgantown Road is via the same gravel road running across the Landreth and Tapp properties. The gravel road terminates at the Gaines property.

The legal dispute among the neighbors began when, in a letter dated July 27, 2005, the Landreths informed Gaines that, as of August 1, 2005, the lock on the gate located at the entrance to the road would be changed and access to the road would be denied. Gaines and Tapp[2] filed a complaint in Warren Circuit Court on September 1, 2005, requesting a declaration of rights on several issues, the most significant for purposes of this appeal being the existence of an easement appurtenant to the Gaines property across the Landreths' property.

The circuit court found the existence of an easement appurtenant and an easement by necessity to the benefit of Gaines's property. The circuit court's findings of

[2] Although Tapp is able to access his property from his frontage along the Morgantown Road, he uses the gravel road to access the southern portion of his property.

fact are subject to the clearly erroneous standard of review. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky.App. 2005). Its conclusions of law are reviewed de novo. *Id*.

On appeal, the Landreths argue that Gaines is not entitled to any form of easement across their property because there is no express reservation of such an easement in their deed or in Gaines's deed. By contrast, their deed does provide for a right of way from their property across what is now Tapp's property to the Morgantown Road. The Landreths submit that they should not be bound by any restriction that is not set forth within their deed or within their chain of title, in reliance on *Oliver v. Schultz*, 885 S.W.2d 699 (Ky. 1994). But as the Landreths themselves concede, the *Oliver* case addressed restrictive covenants, not easements. The *Oliver* court was careful to distinguish between the two in overruling *Paine v. LaQuinta,* 736 S.W.2d 355, 358 (Ky.App. 1987):

> In *Paine v. LaQuinta Motor Inns, Inc.*, . . . the court noted that "a subsequent purchaser for value who takes with notice of the restriction may be bound, even though the restriction may not be recorded." In support of this proposition, the Court cited *Swinney v. Haynes*, 314 Ky. 600, 236 S.W.2d 705 (1951), and *Hedges v. Stucker*, 237 Ky. 351, 35 S.W.2d 539 (1931). Neither of these cases are truly applicable to the validity of a restrictive covenant purportedly established by an unrecorded instrument, since both involve implied grants or reservations of easements.

Oliver, 885 S.W.2d at 701.

It is well-established law in Kentucky that an express written grant is not the sole means of establishing an easement. An easement may also be created by

implication, prescription, or estoppel. *Loid v. Kell*, 844 S.W.2d 428, 429 (Ky.App. 1992). In the case before us, the circuit court found an easement by implication, in reliance on the general rule which states

> that, where one conveys a part of his estate, he impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which are reasonably necessary for the use of that part.

Further:

> It may be considered as settled in the United States that, on the conveyance of one of several parcels of land belonging to the same owner, there is an implied grant or reservation, as the case may be, of all apparent and continuous easements or incidents or property which have been created or used by him during the unity of possession....

Meade v. Ginn, 159 S.W.3d 314, 321 (Ky. 2004) (citations omitted).

From April 16, 1914 to November 7, 1931, George B. Newton owned the property now comprised of the Gaines and the Landreth properties. In 1931, he conveyed what is now the Gaines property to Fred Newton, without reserving an easement or right of way. When, approximately four months later, he conveyed what is now the Landreths' property to their predecessors, Hettie and Enid Howard, the deed expressly reserved a right of way to the Morgantown Road. In applying the rule set forth above, the circuit court concluded that George B. Newton impliedly granted Fred Newton an easement across George B. Newton's land at the time of severance because such an easement was reasonably necessary for use of the property.

The circuit court characterized the easement created as an easement appurtenant, as opposed to an easement in gross.

> [A]n easement in gross is a mere personal interest in or right to use the land of another. It is attached to and vested in, the person to whom it is granted. In fact, the principal distinction between an easement in gross and an easement appurtenant is that in the first there is not, and in the second there is, a dominant tenement to which it is attached.

Id. at 320 (citations omitted).

Significantly, for the case before us,

> [i]t is the general rule that easements in gross are not favored, and that an easement will never be presumed to be a mere personal right when it can fairly be construed to be appurtenant to some other estate.

Id. at 320-321(citations omitted).

In light of the fact that this implied easement was created upon the severance of the tracts by a common grantor, George B. Newton, and that it was necessary for use of the dominant tenement owned by Fred Newton, the circuit court did not err in determining that an implied easement appurtenant was created when the properties were severed.

The Landreths also dispute the circuit court's finding of an easement by necessity.

> [A]n easement or way of necessity is based primarily on the policy favoring beneficial use of property. . . . an easement by necessity exists in favor of the dominant estate whether it is used or not, so long as it is necessary for access.

> The three prerequisites to creation of an easement or way of necessity are (1) unity of ownership of the dominant and servient estates; (2) severance of the unity of title by a conveyance of one of the tracts; and (3) necessity of the use of the servient estate at the time of the division and ownership to provide access to the dominant estate. . . . a requirement of "strict" necessity has traditionally applied to easements or ways of necessity. Strict necessity has generally been defined as absolute necessity such as where property is landlocked or otherwise inaccessible.

Carroll v. Meredith, 59 S.W.3d 484, 491 (Ky.App. 2001).

The Landreths point to the following portion of Gaines's deposition testimony as proof that Gaines had other means of accessing his property:

> Q. How do you get your large farm equipment into the property?
>
> A. By this road [the gravel road] and sometimes the man who grows my crops or farms my property, he brings some equipment in across Craig Wickman [a neighboring property], who he also has a farming relationship with.
>
> . . .
>
> Q. Is there some road across the Wickman property that permits this type of access?
>
> A. There is a road of sorts that goes down a hill near Craig Wickman's residence and somewhere at the bottom of the hill, the road ends and any equipment would just have to come across one or two large fields to get to my property.

The Landreths maintain that the trial court erroneously found that the easement was necessary since Gaines himself admitted that he can access his property over Wickman's land. "A way of necessity generally will not be implied if the claimant

has another means of access to a public road from his land, however inconvenient." *Id.* But Gaines has no means of access to a public road from his land; he is merely occasionally allowed to bring farm equipment across his neighbor's fields. The circuit court did not err in finding an easement by necessity.

The Landreths also dispute the scope of the easement delineated by the circuit court, which held that traffic was allowed so long as it does not unreasonably and unnecessarily burden the servient estate, and was reasonably necessary for the use and enjoyment of the dominant estate. They argue that if an easement does exist, the scope of such an easement must be limited solely to Gaines's individual personal use. However, since we agree with the circuit court that this is an easement appurtenant which runs with the land, rather than an easement in gross, its use is not confined to one person.

The following principles govern the scope of an easement appurtenant:

> The owners of the easement and the servient estate have correlative rights and duties which neither may unreasonably exercise to the injury of the other. *Higdon v. Kentucky Gas Transmission Corp.*, Ky., 448 S.W.2d 655 (1969). The use of an easement must be reasonable and as little burdensome to the landowner as the nature and purpose of the easement will permit. *Horky v. Kentucky Utilities Co*., Ky., 336 S.W.2d 588 (1960). *Cf. Farmer v. Kentucky Utilities Co.*, Ky., 642 S.W.2d 579 (1982). The nature and extent of an easement must be determined in light of its purposes. *Thomas v. Holmes*, 306 Ky. 632, 208 S.W.2d 969 (1948).

Commonwealth, Dept. of Fish & Wildlife Resources v. Garner, 896 S.W.2d 10, 13 -14 (Ky. 1995).

The circuit court correctly followed these guidelines in determining that Gaines may use the roadway in a reasonable manner, and allow others to use the roadway in a reasonable manner in order to access his property. The Landreths argue that if Gaines is allowed to permit others to use the gravel road, it will eventually be transformed into a public roadway. But such a usage would clearly contravene the reasonableness requirement established by the circuit court, and could accordingly be successfully challenged by the Landreths.

For the foregoing reasons, the judgment of the Warren Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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