

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001884-MR

MELVIN PERKINS AND
MARY PERKINS

APPELLANTS

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 90-CI-00157

KEITH RAY HOWARD AND
ALL INTERESTED PARTIES AS
NAMED IN THE NOTICE OF APPEAL

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: DIXON, MAZE AND NICKELL, JUDGES.

MAZE, JUDGE: Melvin and Mary Perkins (the Perkinses) appeal from findings of fact, conclusions of law and a judgment of the Lawrence Circuit Court in favor of the heirs of Thomas Howard (collectively, the Howards). The Perkinses argue that the trial court erred by finding against them and for the Howards in locating a disputed boundary line and on their adverse possession claim. However, the trial

court's factual findings were supported by substantial evidence and its conclusions are not clearly erroneous. Hence, we affirm.

The Perkinses and the Howards are owners of adjoining parcels of real property in a rural area of Lawrence County near Webbville. The Perkins property was part of a farm that had been owned by John W. Perkins, Melvin Perkins' father. Melvin and Mary Perkins acquired their tract through a deed dated September 3, 1989, and recorded in Deed Book 227, p. 551. The Howards are the undivided owners of the adjacent property, which was originally owned by Thomas Howard. After his death in 1973, his 14 children inherited the property, and they and their heirs continue to own the property jointly by the undivided whole.

The dispute in this case concerns the boundary between the two tracts. Specifically, the Perkinses claim that the boundary described in their deed and their predecessor deeds encompasses approximately 7.39 acres of the property claimed by the Howards. The Perkinses also allege that they have adversely possessed an additional 4.52 acres of the Howard property beyond the line set out in the deed descriptions.

The matter proceeded to a bench trial in September 2011. On September 23, 2011, the trial court entered findings of fact, conclusions of law and a judgment for the Howards. The court located the boundary between the Perkins and Howard properties as claimed by the Howards. The court also rejected the Perkinses' adverse possession claim. The court found that the Perkinses' use of

the disputed area was permissive until at least 2001. Consequently, the trial court concluded that they had failed to establish adverse possession of the area for the requisite period. The Perkinses now appeal to this Court.

In cases which are tried without the intervention of a jury, the trial court's findings of fact should not be reversed unless they are determined to be clearly erroneous. In making such consideration the appellate court must keep in mind that the trial court had the opportunity to hear the evidence and observe the witnesses, so as to judge their credibility, and therefore, is in the best position to make findings of fact. Kentucky Rules of Civil Procedure (CR) 52.01. *See also Bealert v. Mitchell*, 585 S.W.2d 417, 418 (Ky. App. 1979). On the other hand, the trial court's conclusions of law are subject to independent appellate determination. *A & A Mech., Inc. v. Thermal Equip. Sales, Inc.*, 998 S.W.2d 505, 509 (Ky. App. 1999).

The boundary description in the 1989 deed to the Perkinses is ambiguous and does not mention many of the monuments on which they now rely in making their claims. However, the description referred to a more detailed description in a 1951 deed to John W. Perkins. The Perkinses also point to a 1927 deed for an adjoining tract owned by Ernest Thompson and describing a common corner between the Thompson, Perkins and Howard properties.

The Perkinses primarily relied on lay testimony concerning the boundary. Melvin Perkins testified that he has lived on the property his entire life and the property has been in his family since the early 1900's. He also testified

extensively about his familiarity with the Perkins property and its boundary with the Howard property. Based on his experiences, Melvin testified that the boundary line came down a hill, across Kentucky Highway 201 at a coal bank located at a water birch in the creek. He stated that the boundary line then went up the hollow, then made a 90-degree turn to the right and then went up the hill.

Roger Perkins, Melvin's brother, also testified for the Perkinses. He stated that he was familiar with the coal bank and that it was on the Perkins property. However, he stated that he could barely remember a water birch and said that there were probably a number of water birches in the creek. He stated that the fence going up the hill was not a boundary fence but was an internal pasture fence. He was not sure about the location of the walnut tree. Roger also added that the fence at the driveway was not the boundary line. Roger's wife, Pamela Perkins, recalled that there was no driveway when Melvin built his house but added that there was a fence where the driveway is now located.

The Perkinses called as a witness Dewey Bocook, a professional engineer and licensed surveyor. Bocook conducted a survey of the Perkins property based on the prior deeds and the information provided by the Perkins family. His survey plat also reflected the line claimed by the Howards. Bocook testified that the descriptions in the most current deeds were vague. However, he also relied on descriptions in prior deeds and on a 1927 mortgage survey description. On cross-examination, Bocook admitted that he did not find the coal

bank upon which the Perkinses relied and could not find any objective evidence to support the Perkinses' claim of the boundary line.

The Howards also retained a land surveyor, Edison Elliott, to testify. Elliott conducted a partial survey of the properties and particularly the border between the Howard and the Perkins tracts. In determining the location of the boundary, Elliott looked at the 1927 mortgage survey, the J.W. Perkins deed, and a 1950 partition survey contained in the court file. He also reviewed Bocook's survey. Elliott testified that he found a number of old large trees with fence in them, including a 28-inch black oak on the ridge, a 30-inch white oak where the line makes a right turn, a beech stump across Highway 201 and a 30-inch white oak in the fence line on the hill. However, he found no evidence of a fence or boundary in the area claimed by the Perkinses. He further testified that he was unable to find any of the four stakes that were called for in the Perkinses' 1989 deed. Elliott concluded that the 1927 survey plat was the most accurate depiction of the boundary and was inconsistent with the line claimed by the Perkinses and depicted on Bocook's survey plat. He also testified that the 1927 survey corresponded almost exactly with the line shown on the 1950 partition survey. Finally, he added that the Bocook survey failed to close and was about one hundred feet off, which was outside the acceptable margin of error.

In addition, the Howards introduced lay testimony to rebut the testimony presented by the Perkinses. Keith Howard, one of Thomas Howard's sons, testified that he lived on the Howard property from the time he was born until

age 16. He stated that the line fence ran from the creek to the hillside right by the edge of the grounds around the Perkinses' home. He added that the Perkinses' garage actually encroached slightly across that line. Keith also identified an electric power pole that was on the boundary line claimed by the Howards. Both Keith and his sister, Ruth Maxine Howard Betts, testified that the fence was in the location found by surveyor Elliott, including the part that followed the fence near the Perkinses' driveway.

In resolving the dispute regarding the boundary, the trial court made the following findings:

The first issue for the Court to determine is the boundary between the parties. Each side had testimony from a surveyor. The [Perkinses'] description contains calls to four stakes, none of which could be located in the ground. The [Perkinses'] predecessor's deed calls for a coal bank. The location of that was testified to by witnesses for the [Perkinses], but no surveyor located any reference to the coal bank. The [Howards'] testimony as to the boundary line relies on a survey description from a 1927 mortgage, the deed to the [Perkinses'] predecessor in title, and the commissioner's map and the partition deed in the 1950 case of *Smith v. Wheeler*. [The Howards'] surveyor Edison Elliott testified that there was absolutely no question in his mind as to the location of the line. He testified that his line lined up within one foot of the line shown in the 1927 survey. He testified that he corresponded almost exactly with the line shown on the 1950 partition map. Although that map states that the line between the Perkins property and the Howard property was not surveyed, it is remarkably similar to the 1927 survey. The Court also notes that the commissioners in that partition action were Lee Thompson, a predecessor in title and relative of the [Howards], and J.W. Perkins, [Melvin Perkins'] father. It seems clear that if the predecessor in title and blood

relatives were in agreement as to the location of the line, that appears to be extraordinarily strong evidence for the location of the line.

The Perkinses argue that Elliott and the trial court erred in relying on the 1927 mortgage survey because that mortgage did not cover the entire tract. The Perkinses note that their tract includes additional property which J.W. Perkins acquired in 1936 and 1951 and could not have been part of the 1927 mortgage or the 1950 partition action. The Perkinses also contend that Elliott failed to identify the water oak identified as a corner of the Perkins and Howard properties.

However, it is well-established that “[a] fact finder may choose between the conflicting opinions of surveyors so long as the opinion relied upon is not based upon erroneous assumptions or fails to take into account established factors.” *Webb v. Compton*, 98 S.W.3d 513, 517 (Ky. App. 2002), *quoting Howard v. Kingmont Oil Co.*, 729 S.W.2d 183, 184-85 (Ky. App. 1987). Since the parties agree that the language in the deed describing the boundary was ambiguous, the trial court properly considered parol evidence as an aid to the proper construction of the language used. *Caudill v. Citizens Bank*, 383 S.W.2d 350, 352 (Ky. 1964). The trial court was within its discretion to weigh the historical and lay testimony relied upon by each surveyor and to reach its own decision regarding the credibility of each survey. *Croley v. Alsip*, 602 S.W.2d 418, 419 (Ky. 1980).

Although there was substantial evidence to support the conclusions reached by Bocook, we cannot say that the trial court clearly erred in finding that the survey prepared by Elliott was more credible.

The Perkinses next argue that the trial court erred by rejecting their adverse possession claim. To prove the elements of adverse possession, the Perkinses' possession must have been hostile, under a claim of right, actual, exclusive, continuous, open and notorious for a period of at least fifteen years. *See Appalachian Reg'l Healthcare v. Royal Crown Bottling Co., Inc.*, 824 S.W.2d 878, 879-80 (Ky. 1992). These elements must be demonstrated by clear and convincing evidence. *Phillips v. Akers*, 103 S.W.3d 705, 709 (Ky. App. 2002).

The primary issue in this case was whether the Perkinses' use of the disputed property was truly adverse for the requisite period of time. Although the Howards did not contest that the Perkinses actually used the disputed area for a significant period of time, they maintain that the use was permissive. The occupancy of real property must be actual and adverse, and a permissive use of land cannot ripen into title no matter how long it continues. *Id.* at 708.

Melvin testified there was a fence extending from the water birch up the hollow through the bottom to a black walnut tree which divided the bottom into two parts and separated the Perkins and Howard properties. Melvin stated that he began to use the Howard portion of the bottom after Thomas Howard died in 1973. He further testified that no one was using the Howard part of the bottom except for a small area rented out for tobacco. He stated that he fenced the bottom and used it continuously for cutting hay and for pasturing horses from 1973 or 1974 until September 2008. He added that he had never asked for permission to use this area and no one ever challenged his use of the property during this time.

However, Keith Howard specifically disputed this testimony. Keith testified that, when Thomas Howard died in 1973, the 14 children each inherited a stake in the property, and his brother, Charles Howard, was left in charge of the estate. Charles actively managed the property until his death in 1989. Keith testified that Charles rented the bottom land to Melvin Perkins in 1979. Keith stated that he was present when Charles made the oral rental agreement with Melvin. In addition, Keith introduced photocopies of a ledger showing rental payments in 1981 and 1984. The documents do not mention payments from Melvin Perkins, but the page from 1981 refers to a payment from Tina Perkins.¹ However, Keith testified that Melvin Perkins was the only person who paid rent during this period. Keith added that he continued to receive a share of rental payments from Charles and his widow until 2001. He further testified that other members of his family received these payments as well. Ruth Betts also testified that she had received copies of the ledger pages.

Keith contested other aspects of the Perkinses' adverse possession claim as well. He testified that he saw no evidence of the Perkinses' use of the bottom land until 1979. In addition, Keith stated that he paid Melvin Perkins to plow a garden in the disputed area in 1999, and Melvin did not mention any adverse claim. Rather, Keith stated that he saw no evidence of any adverse claim until 2001, when Melvin Perkins put up a fence around the disputed area. James

¹ Keith speculated that the reference to "Tina Perkins" actually meant "Tiny Perkins." "Tiny" is Melvin's nickname. However, he also admitted that there is a Tina Perkins who lived in the area and is related to the Perkins family.

Riffe, who worked on the Howard property until the 1990's, also testified that Melvin had told him that Charles Howard had given permission for him to use the bottom land.

The Perkinses first argue that the trial court erred by allowing the Howards to introduce the photocopies of the ledger pages showing the rental payments. The Perkinses note that Keith never attempted to introduce the full ledgers and admitted that those books were probably lost. However, the Perkinses object to the ledger pages only generally as "hearsay" without identifying the particular objection. The Howards argue that the ledger pages were properly authenticated through the testimony of Keith Howard and Ruth Betts. They also contend that the ledger pages properly authenticated as an "ancient document" under Kentucky Rules of Evidence (KRE) 901(b)(8).

It is unnecessary to determine whether the ledger pages were admissible on this particular ground. Although the Perkinses cite to the record where they objected to introduction of the ledger pages, they fail to articulate a sufficiently definite point of objection which was raised before the trial court. CR 76.12(4)(c)(v). Moreover, they provide no citations to authority to support their claims of error, as is also required under CR 76.12(4)(c)(v). "It is not our function as an appellate court to research and construct a party's legal arguments, and we decline to do so here." *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005).

Ultimately, the trial court based its determinations of the merits of the Perkinses' adverse possession claim on the credibility of the witnesses before it. A different fact-finder could have reached different conclusions given the same evidence. Nevertheless, even without the ledger pages and Keith's testimony about the rental payments, we find substantial evidence to support the trial court's finding that the Perkinses' use of the bottom land was permissive until at least 2001. Given this finding, the Perkinses failed to establish that they adversely possessed the disputed area for at least 15 years, and the trial court properly found for the Howards on this issue.

Accordingly, the judgment of the Lawrence Circuit Court is affirmed.

ALL CONCUR.

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