SLIP OPINION

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA 08-1366

WILMER PAUL ORR AND BARBARA ORR; EDWARD LEE MULLENS AND EDITH JOY MULLENS; and DAVID HELM AND JOAN HELM APPELLANTS	**Opinion Delivered** September 9, 2009 APPEAL FROM THE GRANT COUNTY CIRCUIT COURT, [NO. CIV-07-38-1]
V.	HONORABLE CHRIS E WILLIAMS, JUDGE
CLEO M. ORR APPELLEE	AFFIRMED

COURTNEY HUDSON HENRY, Judge

This case involves a family dispute over easements. Appellants appeal the Grant County Circuit Court's order denying their request to establish various easements. For reversal, appellants contend that the trial court's findings are clearly erroneous. We affirm.

The parties are landowners whose properties were once owned by Irma and J.W. Orr as a single forty-acre tract. Irma and J.W. acquired the property in 1937, and ownership passed to Irma upon J.W.'s death. In 1997, Irma divided the property among her four children and their spouses. First, Irma conveyed 3.24 acres to James Orr and his wife, appellee Cleo Orr. A month later, she conveyed 12.258 acres to appellants Barbara and Paul Orr; 12.253 acres to appellants Joy and Edward Mullens; and 12.251 acres to appellants Jo and David Helm. Appellants' parcels are roughly rectangular in shape. The Mullenses' property lies between the lands of Barbara and Paul Orr and the Helms, with the Orrs owning the far

SLIP OPINION

western tract and the Helms owning the far eastern tract. Appellee's land is square-shaped and is carved out of the southern portions of the Mullenses' and the Helms' properties. Appellee's property is accessed from the south by Dallas County Road and then by a gravel drive that curves to the west in front of a trailer. North of the driveway is a pasture that is surrounded by woods. Appellants' properties are mostly wooded and are used primarily for recreation, such as hunting. Appellant Jo Helm also owns adjacent property to the east of her and her husband's tract along with property to the south of appellee's and the Orrs' properties.

James Orr died in 2005, and appellee acquired ownership of the 3.24 acres upon his death. In 2007, appellants filed suit seeking to establish three easements across appellee's property. Appellants asserted that they were entitled to the easements either by implication, by prescription, or by necessity. In deciding the case, the trial court conducted a hearing and personally inspected the properties.

At the hearing, appellants maintained that there are two trails in the woods at the northern edge of appellee's pasture. Appellants called one of them the "Cotton Pen Road" and the other the "New Ground Road." According to appellants, the Cotton Pen Road runs to the northeast, crossing the Mullenses' property and leading into the Helms' property. Appellants offered testimony that the New Ground Road heads northwest into the Mullenses' property and leads to Barbara and Paul Orr's property. Appellants proposed to widen appellee's gravel drive to a width of thirty feet and extend a thirty-foot wide roadway to the north across appellee's pasture with a fork in this roadway to lead to these two trails. Appellants also presented testimony that there was a trail in the woods to the southwest of

SLIP OPINION

appellee's trailer and gravel drive. Appellants proposed to lengthen the gravel drive by the trailer to connect to this southwest woods road. Appellants maintained that these three routes in the woods had existed for many years and had been routinely used by them to access their properties until the death of appellee's husband. Appellants also presented testimony that they had no other means to access their properties and that any other roads that existed were in disuse or not feasible to travel because they were in low, wet-lying areas.

Appellee testified that she had never known anyone to cross the pasture since she and her husband purchased the property. She stated that she had never heard of the Cotton Pen Road and that she and her husband planted a vegetable garden and fruit trees in the pasture during the year that they lived there. Appellee also offered the testimony of George Riggan, who owns adjacent property and who has harvested timber on the forty acres, along with Boyd Reichenbach, who had worked for appellee's husband. These witnesses avowed that there were other roads appellants could use to access their properties.

The trial court found that appellants did not offer sufficient proof to establish a right to easements across appellee's property. The trial court also found that burdening appellee's small parcel with three easements would render her property valueless. Appellants argue on appeal that the trial court erred by finding that they were not entitled to easements by prescription, by implication, or by necessity.

Standard of review

In reviewing matters concerning easements, this court conducts a de novo review and will not reverse a finding of fact made by the trial court unless it is clearly erroneous. *Sluyter*

SLIP OPINION

v. Hale Fireworks P'ship, 370 Ark. 511, 262 S.W.3d 154 (2007). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Bobo v. Jones*, 364 Ark. 564, 222 S.W.3d 197 (2006). This court will give due deference to the opportunity of the trial court to judge the credibility of the witnesses and the weight to be given their testimony. *Jennings v. Burford*, 60 Ark. App. 27, 958 S.W.2d 12 (1997).

Prescriptive easement

Appellants' first argument is that the trial court erred in finding that they failed to establish prescriptive easements. One asserting an easement by prescription must show by a preponderance of the evidence that one's use has been adverse to the true owner and under a claim of right for the statutory period. *Manitowoc Remfg., Inc. v. Vocque*, 307 Ark. 271, 819 S.W.2d 275 (1991). Overt activity on the part of the user is necessary to make it clear to the owner of the property that an adverse use and claim are being asserted. *Id.* Some circumstance or act in addition to, or in connection with, the use which indicates that the use was not merely permissive is required to establish a right by prescription. *Wilson v. Brandenburg*, 252 Ark. 921, 481 S.W.2d 715 (1972). Mere permissive use of an easement cannot ripen into an adverse use without clear action placing the owner on notice. *Fullenwider v. Kitchens*, 223 Ark. 442, 266 S.W.2d 281 (1954). Both adverse possession and easements by prescription require that the party occupying the land of another do so in a manner that is hostile. *See Williams v. Fears*, 248 Ark. 486, 452 S.W.2d 642 (1970). When adverse possession is asserted by one member of a family against another, stronger evidence

SLIP OPINION

is required to support the claim than in cases where the family relationship does not exist. *Williams v. Killins*, 256 Ark. 491, 508 S.W.2d 753 (1974). The reason for this rule is that, as between parties with family relations, the possession of the land of one by the other is presumptively permissive or amicable, and to make such possession adverse, there must be some open assertion of hostile title, other than mere possession, and knowledge thereof brought home to the owner of the land. *Robertson v. Lees*, 87 Ark. App. 172, 189 S.W.3d 463 (2004).

Absent in this case is any evidence tending to establish the elements of adverse use that are required for a prescriptive easement. While appellants may have used the pasture to access their properties, there is no evidence of overt activity or the kind of hostility necessary to support their adverse claim, as distinguished from permissive use. We find significant the testimony of Paul Orr who stated that a family meeting was held to discuss access prior to the 1997 conveyances and that the parties agreed that access would not pose a problem because "it's all in the family." This testimony indicates that appellants' alleged use of appellee's property was permissive in nature. We also note that appellee disputed appellants' use of her property for access. Based on this record, we hold that the trial court's decision is not clearly erroneous.

Easement by implication

Appellants also assert that they proved entitlement to easements by implication. An easement by implication arises where, during unity of title, a landowner imposes an apparently permanent and obvious servitude on part of his property in favor of another part and where,

SLIP OPINION

at the time of a later severance of ownership, the servitude is in use and is reasonably necessary for the enjoyment of that part of the property favored by the servitude. *Vocque*, *supra*. In order for such an easement to be established, it must appear not only that the easement was obvious and apparently permanent but also that it is reasonably necessary for the enjoyment of the property. *Hanna v. Robinson*, 86 Ark. App. 180, 167 S.W.3d 166 (2004). The term "necessary" in this context means that there could be no other reasonable mode of enjoying the dominant tenement without the easement. *Id*. The necessity for the easement must have existed at the time of the severance. *Id*. Further, the apparently permanent nature of the easement must be in existence at the time of common ownership. *Id*.

Here, appellants' claim for implied easements must fail because appellants are seeking to establish easements where no roads exist. The record is clear that appellee's property contains no roadways leading to any of the three trails. Thus, one can hardly say that the easements appellants claim are apparent, obvious, and permanent. In order to establish an easement by implication, an access route must exist on the servient tract prior to and at the time of the severance. *Burdess v. United States*, 553 F. Supp. 646 (E.D. Ark. 1982). Thus, the trial court's refusal to find implied easements is not clearly erroneous.

Easement by necessity

Appellant's final argument is that the trial court erred by not finding easements by necessity. In contrast to an easement by implication, an easement by necessity allows for a route of access where one previously did not exist. *Id*. To establish an easement by necessity, appellants had to prove (1) that title to the tracts in question were once held by one person;

SLIP OPINION

(2) that unity of title was severed by conveyance of one of the tracts; and (3) that the easement is necessary in order for the owner of the dominant tenement to use his land, with the necessity existing both at the time of the severance of title and at the time the easement is exercised. *Hedger Bros. Cement and Materials, Inc. v. Stump*, 69 Ark. App. 219, 10 S.W.3d 926 (2000). The degree of necessity must be more than mere convenience. *R&T Properties, LLC v. Reyna*, 76 Ark. App. 198, 61 S.W.3d 229 (2001).

In this case, the evidence was conflicting as to the availability of alternative routes to appellants' properties. The trial court inspected the properties and was persuaded by appellee's witnesses that appellants had other reasonable means to access their lands. The trial court also noted that the Helms owned property adjacent to their parcel severed from the forty-acre tract. The trial court thus concluded that appellants' request for the easements was driven more by convenience than necessity. From our review, we are not able to say that the trial court's findings are clearly erroneous.

Affirmed.

KINARD and BAKER, JJ., agree.