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TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2015-CA-001679-MR

KENNETH SHIELDS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE
ACTION NO. 14-CI-004517

UNIVERSITY OF LOUISVILLE
FOUNDATION, INC. — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Kenneth Shields brings this appeal from an August 3, 2015, order adjudicating the legal status of a roadway. We affirm.

Shields and the University of Louisville Foundation, Inc. (Foundation) separately own abutting tracts of real property located in Jefferson County, Kentucky. Before 1942, these tracts of real property were part of a larger 65-acre

tract of real property, and the 65-acre tract was jointly owned by two individuals, Anna B. Steedly and George H. Steedly. Anna and George each made a conveyance from the 65-acre tract by deeds dated February 26, 1942.

First, George and his wife, Elizabeth, conveyed a one-half undivided interest in 22 acres to Anna by deed dated February 26, 1942. This 1942 deed contained the following pertinent language:

> There is excepted from the aforesaid conveyance a 15 ft. easement for a roadway[.]

The successor in title to the 22-acre tract is the Foundation.

Second, Anna conveyed a one-half undivided interest in 43 acres to George by deed, likewise, dated February 26, 1942. This 1942 deed contained the following relevant language:

> As appurtenant to said tract there is likewise conveyed to said grantee herein a 15 ft. easement for a roadway[.]

The successor in title to this tract of real property is Shields. The roadway referred to in the above 1942 deeds runs from Old Shepherdsville Road east through the Foundation's real property to the real property currently owned by Shields. The roadway is roughly 15-feet wide and 700-feet long.

It was this roadway that sparked the present controversy between the parties. Both the Foundation and Shields alleged that the other party impeded use of the roadway, and Shields claimed ownership in fee simple of the roadway. The

parties were unable to resolve their differences, and as a result, the Foundation filed a petition for declaratory relief in the Jefferson Circuit Court. Therein, the Foundation asserted that the roadway constituted an easement burdening its real property and that said easement was created by grant as evidenced by the 1942 deed. Shields filed an answer and counterclaim. In the counterclaim Shields, *inter alia*, alleged that he owned the roadway in fee simple and cited to the 1942 deeds. The Foundation and Shields eventually filed motions for summary judgment upon the legal issues of ownership of the roadway and of the proper interpretation of the 1942 deeds.

By summary judgment entered August 3, 2015, the circuit court interpreted the 1942 deeds as granting a right-of-way easement in the roadway that burdened the Foundation's property for the benefit of the real property currently owned by Shields:

> In describing the easement as "excepted" in the 1942 Deed conveying the 22[-]acre tract of land currently owned by [the Foundation], and as "appurtenant" in the 1942 Deed conveying the 43[-]acre tract of land currently owned by [Shields], the parties show the intent that the 22[-]acre tract is the subservient [sic] estate and the 43[-] acre tract is the dominant estate. By stating that the easement was "appurtenant" in the 1942 Deed conveying the 43[-]acre tract, the parties show the intent that the easement inheres in the land and cannot be terminated by an act of the parties or by operation of law. Therefore, the Court hold that [Shields] does not own the driveway in fee simple, but, rather has an easement appurtenant for the roadway or driveway on the 22[-]acre tract of land owned by [the Foundation].

August 3, 2015, Memorandum and Order at 9-10. The circuit court rejected Shields' claim that he owned the roadway. This appeal follows.

Shields contends that the circuit court committed error in its interpretation of the 1942 deeds. Particularly, Shields argues that the "correct interpretation of the language contained within the deeds is . . . that Shields owns the 15-foot Strip in fee simple, as it was excepted from the Foundation's chain of title and was conveyed with Shield's chain of title." Shield's Brief at 7. Shields points out that the term "except" is a legal term that has acquired a technical meaning. According to Shields, the term except operates to withhold certain property from the property conveyed in the description of a deed. Shields believes that the exception should be strictly construed in the 1942 deed as excluding the roadway from the conveyance of the 22-acre tract. Shields maintains that the roadway was conveyed in fee simple with the 43-acre tract as is evidenced by the language in the 1942 deed that states "there is likewise conveyed to said grantee . . . a 15 ft. easement for a roadway."

The Foundation rejects such a technical and strict interpretation of the term except as found in the 1942 deed. Rather, the Foundation argues that the intention of the parties' controls, and the parties intended to create a right-of-way easement in the roadway, with the servient tenement burdening the real property

owned by the Foundation and the dominant tenement inuring to the benefit of the real property owned by the Shields.

To begin, summary judgment is proper where there exists no material issue of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). The interpretation of a deed presents an issue of law, and our review proceeds *de novo*. *See Baker v. Hines*, 406 S.W.3d 21 (Ky. App. 2013).

The terms except and exception do have technical legal definitions and mean to exclude:

> [F]rom the operation of the conveyance some part of the thing or things covered by the general words of description therein, as when one conveys a piece of land, excepting a certain part thereof, or the houses Thereon . . . .

4 *Tiffany Real Property* § 972 (3d ed. 2016). An exception generally operates to exclude some property from the conveyance to the grantee.

Despite this technical definition of except, there exists much confusion between and intermingling of the terms except and reserve in the language of deeds. *Justice v. Justice*, 216 Ky. 657, 288 S.W. 293 (1926); *Rhoades v. Bennett*, 307 Ky. 507, 211 S.W.2d 693 (1948); see also 4 *Tiffany Real Property* § 972 (3d ed. 2016). In fact, the terms except and reserve are often used interchangeably in deeds. *Rhoades,* 211 S.W.2d 693. So, we must also understand the legal import of the term reserve.

The terms reserve and reservation in a deed typically create a new property right "issuing out of the thing granted and which did not exist before as an independent right in behalf of the grantor . . . ." 4 *Tiffany Real Property* § 972 (3d ed. 2016). Strictly speaking, an easement can only be created by a reservation in a deed and not by an exception.[1]

In this Commonwealth, it has long been recognized that the terms except and reserve will not be dogmatically given their respective technical meanings, but the intention of the parties will control as gleaned from the four corners of the deed. *Rhoades v. Bennett*, 307 Ky. 507, 211 S.W.2d 693 (1948); *Standard Elkhorn Coal Co. v. Bolen*, 193 Ky. 342, 236 S.W. 241 (1921); *Hicks v. Phillips*, 146 Ky. 305, 142 S.W. 394 (1912); *see also* 28A C.J.S. *Easements* § 72 (2017). This rule has been succinctly set forth in relation to easements as follows:

> Since an easement with respect to the granted land can only be created by a reservation, while ownership of part of the land granted is retained by an exception, a decision as to whether the retaining or excluding clause of the deed is a reservation or exception determines whether the grantor retains an easement or ownership. However, the construction of the retaining clause as an exception or reservation depends on the intention of the parties as to the rights to be retained by the grantor. The use in the instrument of the terms "reserving" or "excepting" will not necessarily be determinative. (Footnotes omitted.)

28A C.J.S. *Easements* § 72 (2017). In this case, this Court shall interpret the 1942 deeds and determine whether the parties intended to create an easement in the

[1] An easement is "simply the privilege of the owner of one tenement to enjoy the tenement of another." *Illinois Central Railroad Co. v. Roberts*, 928 S.W.2d 822, 825 (Ky. App. 1996).

roadway or intended to exclude the roadway from the conveyance of the 22-acre tract.

The 1942 deed conveying the 22-acre tract specifically reads "[t]here is excepted from the aforesaid conveyance a 15 ft. easement for a roadway." Thereafter, the 1942 deed contains a detailed description of the roadway. The 1942 deed conveying the 43-acre tract provides that "[a]s appurtenant to said tract there is likewise conveyed to said grantee herein a 15 ft. easement for a roadway." Thereafter, this deed also contains a detailed description of the roadway.

Considering the language of both 1942 deeds, the parties plainly intended to grant a right-of-way easement in the roadway. The 1942 deed conveying the 22-acre tract specifically utilizes the term "easement" and provides that a 15-foot easement for a roadway was excepted. The use of the term easement is plain and unambiguous; it clearly signals the parties' intent to create a right-of-way easement in the "roadway." In this context, it is evident that the parties' use of the term "except" was not in the technical sense, but rather was intended to merely indicate that the grantor created a right-of-way easement in the roadway. Moreover, the 1942 deed to the 43-acre tract further clarified such intent by providing that the easement for a roadway was "appurtenant" or inhered to said tract. *See Dukes v. Link*, 315 S.W.3d 712 (Ky. App. 2010).

In sum, we interpret the 1942 deeds as creating a right-of-way easement in the roadway. In conformity with our interpretation, the dominant tenement was

established upon the real property currently owned by Shields, and the servient tenement was imposed upon the real property currently owned by the Foundation. We, thus, conclude that the circuit court property rendered summary judgment setting out the parties' respective interests and rights regarding the use of the driveway.

For the foregoing reasons, the order of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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