IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ORMIL SAVAGE and JENNIFER SAVAGE,	)	
	)	
Petitioners,	)	
	)	
v.	)	*Civil Action No. 7918-VCG*
	)	
JOHN T. BARRETO,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

Date Submitted: April 25, 2013
Date Decided: July 17, 2013

Michael R. Smith, of THE SMITH FIRM, LLC, Laurel, Delaware, Attorney for Petitioners.

John A. Sergovic, Jr. and Elizabeth L. Soucek, of SERGOVIC, CARMEAN & WEIDMAN, P.A., Georgetown, Delaware, Attorneys for Respondent.

GLASSCOCK, Vice Chancellor

This matter involves a purported prescriptive easement created by more than twenty years of use of a driveway by a nephew across the adjoining property of his aunt. The conflict arose after the death of the aunt and subsequent sale of her property. The successor owner has blocked the driveway; the nephew seeks declaratory and injunctive relief allowing him to continue to use it. Because I find that the nephew (together with the co-Petitioner, his current wife) has demonstrated all elements of a prescriptive easement with the requisite rigor, he is entitled to the relief he seeks.

I. BACKGROUND

The Assawoman Canal cuts across the headland on which Bethany Beach is located. It connects the natural inland waterways which exist south from Little Assawoman Bay in Delaware, with Indian River and Rehoboth Bays in the north.[1] The Assawoman Canal was formerly owned by the federal government, as was a strip of land along the west side of the Canal, presumably used for canal maintenance. That land (the "Government Strip") is now owned by the State of Delaware. Just to the west of this narrow strip, prior to World War II, was a multi-acre parcel of property bordered on its west by a public road, Daisey Avenue. The

[1] U.S.G.S., *Bethany Beach, Delaware* [map], 1:24,000, 7.5' Series (1991); *See, e.g.*, *Sierra Club v. DNREC*, 2005 WL 3359113, at *1 (Del. Ch. Dec. 2, 2005).

parcel was owned by Archie F. Savage ("old Mr. Savage").[2] Old Mr. Savage was a waterman. He kept a boat at a landing on the Assawoman Canal.[3] He crossed his property to reach the boat by driving down a private lane, now called Savage Lane, which ran from Daisey Avenue inside the southern boundary of his property, and onto the Government Strip.[4]

In the 1940s, old Mr. Savage began subdividing his property and giving it to his children. He created a family compound with 8 lots.[5] Two lots were created along the southern boundary line, three lots along the northern boundary line and three lots were located in the middle of the parcel.[6] The configuration of the Savage properties is graphically illustrated in Figure 1.[7]

[2] *See* Resp.'s Tr. Ex. 11 (Division of Lands of Archie F. Savage).
[3] Trial Tr. vol. II, 317:10-17, Jan. 31, 2013.
[4] Trial Tr. vol. II, 322:7-13.
[5] Resp.'s Ex. 11.
[6] *Id.*
[7] *Id.* The Exhibit depicted in Figure 1 has been modified for clarity.

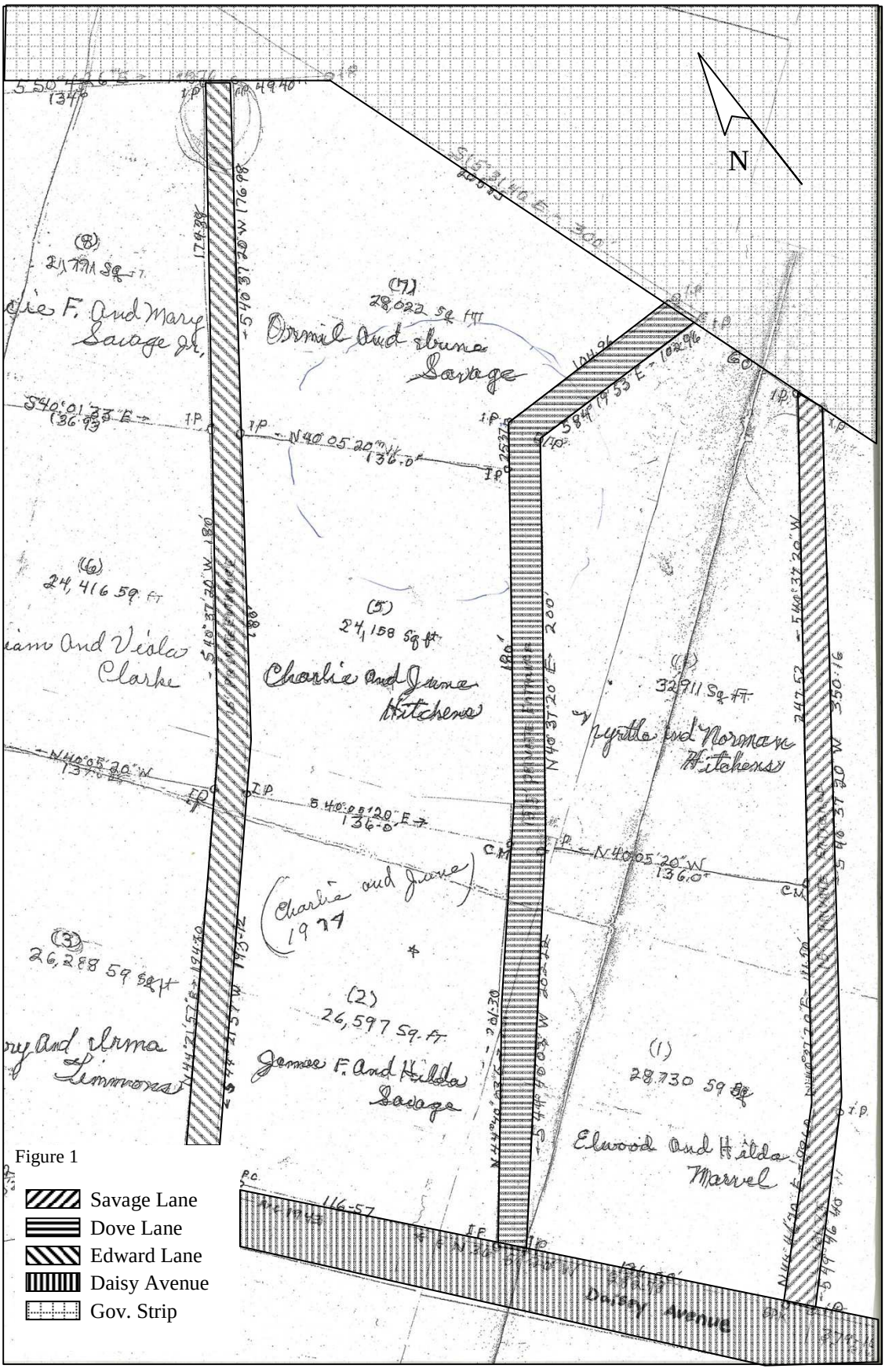

N
(8)
21,711 Sq. Ft.
Savage Jr.
(7)
28,022 Sq. Ft.
Ormel and Irma
Savage
(6)
24,416 Sq. Ft.
Clarke
(5)
24,158 Sq. Ft.
Charlie and Jamie
Hitchens
(4)
32,911 Sq. Ft.
Myrtle and Norman
Hitchens
(3)
26,288 Sq. Ft.
Limmons
(2)
26,597 Sq. Ft.
James F. and Hilda
Savage
(1)
28,730 Sq. Ft.
Elwood and Hilda
Marvel
Daisy Avenue
Savage Lane
Dove Lane
Edward Lane
Daisy Avenue
Gov. Strip

Figure 1

To provide access to these parcels, old Mr. Savage laid out three private roadways running east from Daisey Avenue towards the Government Strip through the now-subdivided parcels; Savage Lane in the south, Dove Lane next to the north, and further north yet, Edward Lane.[8] Savage Lane was the roadway which was already in use to provide access to the boat landing and is depicted in the lower-right corner of Figure 1.

One of the lots was given to old Mr. Savage's son, Ormil Savage, Sr. ("Savage, Sr.").[9] This lot, Lot Number 7, was bordered by Edwards Lane to the north; Dove Lane to the south; the Government Strip along the Canal to the east and Lot Number 5; belonging to Savage, Sr.'s sister and her husband, Charlie and James Hitchens, on the east.[10] While Edwards and Dove Lanes were depicted on the plot plan at the time Savage, Sr. took up the property after World War II, they do not appear to have been opened.[11] Access to Lot 7 from Daisey Avenue was via Savage Lane.[12] Savage Lane formed the southern boundary of two parcels also given to old Mr. Savage's children, Lot 1 belonging to Elwood and Hilda Marvel and Lot 4 belonging to Myrtle and Norman Hitchens.[13] Myrtle was old Mr.

[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* The residents of Lot 7 did not use Dove Lane or Edward Land on account of two borrow pits which blocked access. Trial Tr. vol. I, 141:4-142:4. These borrow pits are indicated by the hand-drawn circles on Figure 1. *Id.* The pits have since been backfilled. *Id.* at 142:6-9.
[12] *See, e.g.*, Trial Tr. vol. I, 42:21-43:1, Dec. 10, 2013.
[13] Resp.'s Ex. 11.

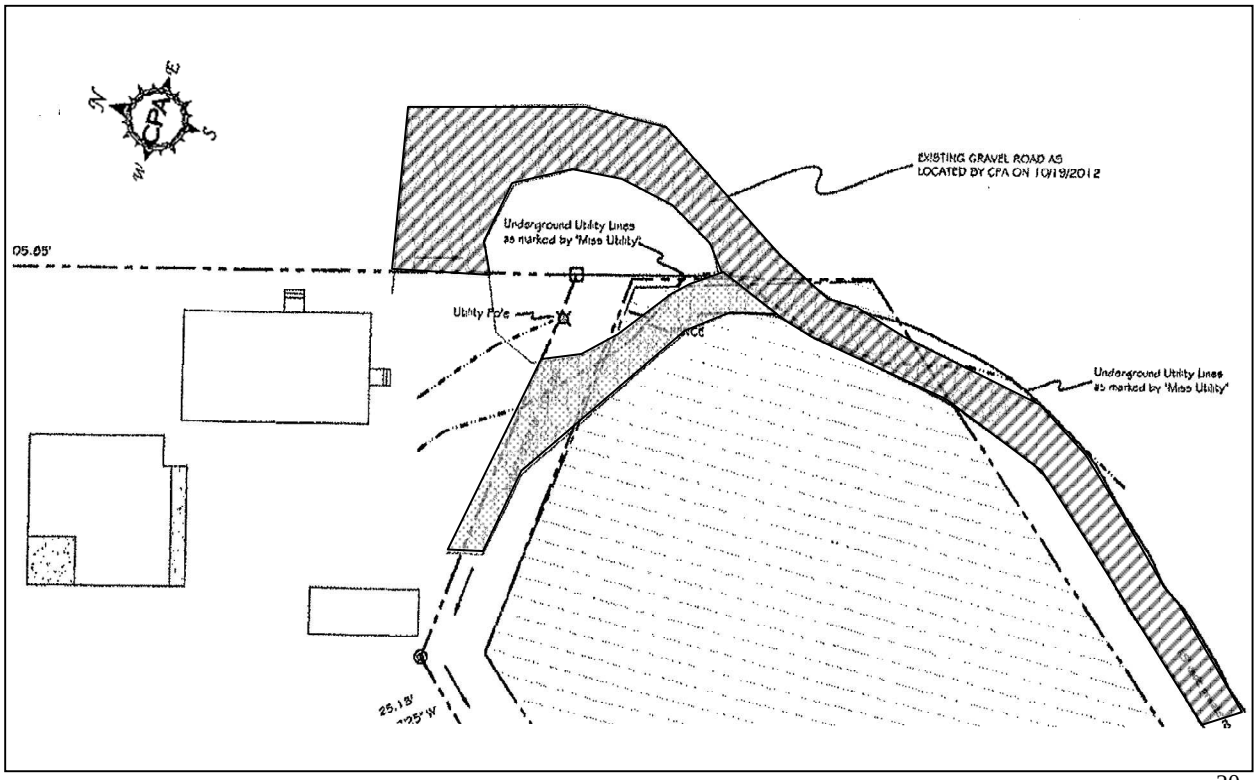
Savage's daughter and Savage, Sr.'s sister.[14] Lot 1 is in the lower-right corner of Figure 1, and Lot 4 is on the right side of Figure 1.

As previously described, Savage Lane ran onto the Government Strip and served old Mr. Savage's boat landing. To reach Lot 7, Savage, Sr. would drive down Savage Lane, onto the Government Strip along the Canal, north along the Canal for several feet and then west onto Lot 7.[15] Although the plot plan depicts Savage Lane exiting onto the Government Strip south of Lot 4, in actuality, at some point in the past, the roadway shifted slightly so that it cut across the extreme southeastern portion of what became Lot 4. It is unclear from the record what use Savage Sr. made of Lot 7; the property remained unimproved during the time he owned it.

On March 5, 1980, Ormil Savage, Jr. ("Savage, Jr."), one of the Petitioners here,[16] acquired Lot 7 from his father.[17] He built the first house on the property.[18] From the time he began using the property, his access was down Savage Lane, across the southeastern portion of the Hitchens's property (Lot 4) onto the Government Strip, and onto his lot from the south and east.[19] Early in his tenancy, it became Savage, Jr.s' practice to exit directly across the extreme eastern portion

[14] Trial Tr. vol. I, 10:18-24.
[15] Trial Tr. vol. II, 328:5-14.
[16] The other Petitioner is Jennifer Savage, wife of Savage, Jr.
[17] Joint Ex. 4.
[18] Trial Tr. vol. I, 70:10-14.
[19] *Id.* 71:1-10.

of Lot 4 to access Savage Lane, rather than driving onto the Government Strip. Thus, Savage, Jr. used the property in a way that crossed Lot 4 in two places: across its southeastern tip and driving onto the Government Strip, then north along those lands then west onto his property, and then back across the eastern portion of Lot 4, regaining Savage Lane when exiting. The parties refer to the portion of the loop which runs from Savage Lane (as plotted) across Lot 4 to the Government Strip as the "Outer Loop" and the portion that runs from Lot 7 directly to Savage



Lane as the "Inner Loop". This configuration is graphically depicted in Figure 2.[20]

[20] Pet'r.'s Ex. 3. This figure has been modified for clarity.

Figure 2

Outer Loop
Inner Loop

In October, 2010, after the death of Myrtle Hitchens,[21] the Respondent, John Barreto, purchased Lot 4.[22] Barreto is not a member of the Savage family. At first, relations between Savage, Jr. and Barreto, whose parcels were separated only by the fifteen-foot width of the unopened Dove Lane, were cordial.[23] Eventually, however, the neighbors had a falling-out.[24] Ultimately, Barreto built a fence which cut off the existing driveway to Savage, Jr.'s house by blocking both the Inner and the Outer Loops.[25] Savage, Jr. sought interim injunctive relief, alleging that he could not reach his property without the use of the Inner and Outer Loop. After a hearing and visit to the Savages' property, I determined that Edward Lane, the private roadway on the north side of Lot 7, gave sufficient access to the property to alleviate any need for interim relief. The matter was scheduled for discovery and a trial on Savage, Jr.'s claim that he held an easement across Lot 4 by prescription. Meanwhile, Savage, Jr. opened up the extreme eastern end of Savage Lane as plotted, which permitted him to drive from Daisey Avenue onto the Government Strip, thence north to Lot 7, without using either the Inner or Outer Loop. Savage, Jr.'s Petition seeks a declaration that an easement exists allowing him to use the

[21] Myrtle's husband, Norman, died sometime around 1980, after which Myrtle became the sole owner of Lot 4. Trial Tr. vol. I, 10:10-13.
[22] Joint Ex. 1.
[23] Trial Tr. vol. II, 337:9-11.
[24] Trial Tr. vol. II, 338:1-8.
[25] Trial Tr. vol. II, 342:4.

Inner Loop across Lot 4.[26] Although the Outer Loop is by far the older roadway, and although the evidence at trial demonstrated that it existed prior to the partition of the lots in question and thus may be subject to an implied easement, Savage, Jr. has not sought to establish an easement over the Outer Loop, presumably because that loop leads to land held by state government, which is immune from adverse possession claims.[27] Instead, he seeks a prescriptive easement over the area of Lot 4 occupied by the Inner Loop, which would allow him access to Savage Lane even if the Government Strip became closed to him. The matter has been tried and briefed; what follows is my post-trial Opinion.

II. DISCUSSION

In order for an easement to arise by prescription, the use of the land as a right-of-way must have been open, notorious, exclusive, and hostile for a period of no less than 20 years.[28] Because Barreto erected a fence across the Outer and Inner Loops on September 21, 2012, prescriptive use of the Inner Loop must have commenced no later than September 21, 1992 in order for an easement to have

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[26] Pet. ¶¶ 16-24.

[27] Trial Tr. vol. I, 7:3-10 ("THE COURT: But just so I am clear, if I were to find that the use that was open, notorious, and hostile was the Savage Lane as it exists utilizing the outer loop which crosses on the state property, you concede here that that does not establish a claim of an easement?
MR. SMITH: I believe I have to, Your Honor, yes.").

[28] *E.g. Dewey Beach Lions Club, Inc. v. Longanecker*, 905 A.2d 128, 134 (Del. Ch. 2006). To the extent that exclusive use is a required element to obtain an easement by prescription, *e.g. Tubbs v. E & E Flood Farms, L.P.*, 13 A. 3d 759, 766 (Del. Ch. 2011), the Respondent has conceded that Savage's use here was exclusive. *See* Resp.'s Post-Trial Br.

been created. Because easements by prescription work forfeitures, they are disfavored at law.[29] Therefore, the evidence that establishes an easement by prescription must be clear and convincing.[30]

A. Open and Continuous Use

The evidence is uncontested and clear that the occupants of Lot 7 have been using the Inner Loop for an uninterrupted period of 20 years. Savage, Jr. testified that he began using the Inner Loop in the mid 1980s:

> Q: Okay. The testimony in this photograph indicates the presence of what we are calling the inner loop. You mentioned in 1980 you used the outer loop. Can you tell me when you first started using the inner loop?
> A: That would be about the mid eighties.[31]

This use is corroborated by other witnesses who testified that the Inner Loop was used by Savage, Jr. and his friends by the late 1980s.[32] I also find that the use was

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[29] *Id.*; *Berger v. Colonial Parking, Inc.*, 1993 WL 208761, at *7 (Del. Ch. June 9, 1993).
[30] *Dewey Beach Lions*, 905 A.2d at 134.
[31] Trial Tr. vol. I, 71:14-19.
[32] *See, e.g.*, Trial Tr. vol. I, at 184:4-14 (Kimberly Latchum) ("Q: Do you recall, when you took this photograph, if the inner loop was being used at that point in time?
A: Um, I believe that Ormil did with his equipment off and on, yes.
Q: But you, yourself, were not using it?
A: No.
Q: Did you know anyone else that was using the inner loop at this point in time aside from Ormil?
A: Um, our good friends with boats. That was easily accessible, going in that way instead of this way closest to the canal.");
Trial Tr. vol. I, 267:4-268:6 (Robert Steffens) (Q: All right. If you will look at the screen that's in front of you and also large monitor, you will see a point of reference on here which is a survey, or a blowup of the survey, that has arrows indicating an outer loop and an inner loop.
A: Uh-huh.
Q: Do you recognize those point of references as they exist on the ground today?

open, that is, regular and not surreptitious. Savage, Jr. and other witnesses testified that they simply drove out across the undeveloped eastern-most portion of Lot 4 when exiting Lot 7. I next address whether the use was notorious.

B. Notoriety

The burden is on the Petitioners to demonstrate by clear and convincing evidence that their use of the Inner Loop was notorious. In this context, notorious use must be such that it would put the owner of the purportedly burdened property on notice that rights were being asserted in her lands. The use must be "so open, visible, and apparent that it gives the owner of the [purportedly] servient tenement knowledge and full opportunity to assert his rights."[33] Numerous cases considering the creation of a prescriptive easement involve obvious roadways across the purportedly servient parcel offering access to adjoining properties. In such cases, simply driving across the roadway regularly to reach the purportedly dominant

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A: Yes, I do.
Q: All right. And you said that you would drive down Savage Lane. Can you be more specific for me as to which way you would go when you reached this area of Savage Lane?
A: Both ways, truthfully. Okay. Most of the time we would drive straight down to the outer loop. And then, when we would leave, we would come through the inner loop and go back out Savage Lane.
Q: Okay. Can you tell me how frequently you would have visited Ormil's house from 1988 forward?
A: Oh, I would say, you know, a few times a month.
Q: Okay. In 1988 can you tell me if there was stone on this inner loop?
A: In 1988 there was not, I believe, at that time.
Q: Did the inner loop exist at that time?
A: Yes.

[33] *Anolick v. Holy Trinity Greek Orthodox Church, Inc.*, 787 A.2d 732, 741 (Del. Ch. 2001) (citations omitted).

parcel may be sufficient to put the owner on notice; there, open use *is* notorious use.[34]

The facts here are different. Before and after 1992, Savage, Jr. had access to Lot 7 by using an existing and obvious roadway—via Savage Lane and the Outer Loop—to the Government Strip. This roadway clearly crossed a small portion of Lot 4 on the Outer Loop at the eastern end of the Lot. At some point before 1992, Savage Jr. began driving his truck on a regular basis back to Savage Lane across an undeveloped portion of Lot 4 just inside its eastern border with the Government Strip.[35] There was no existing roadway in this area; Savage, Jr. was driving over open ground. Savage, Jr.'s ex-wife did not regularly exit Lot 7 in this way, she drove her passenger car to and from Lot 7 using the Outer Loop.[36] The question, then, is whether Savage, Jr.'s use of the Inner Loop was sufficiently notorious to put the owner of Lot 4 on notice of his claim of right.

Without additional evidence of use, Savage Jr.'s use of the Inner Loop was not itself sufficiently notorious to secure him an easement by prescription. Hitchens surely knew that her nephew was using her property to access his own,

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[34] *Eg.*, *id.*; *Tubbs*, 13 A.3d. at 766.

[35] Trial Tr. vol. I, 71:19.

[36] Trial Tr. vol. I, 182:5-15 ("Q: Do you recall in 1980, when you first moved into the Savage property, how you came to and from your home at that point?
A: Yes. I came off of Daisy Avenue [sic], which was an established right-of-way road. I would come all the way around beside the home. But, before that, there was a telephone pole, and often it was used, with everyone else, the inner loop there. I didn't, because it was usually muddy, and I always liked to maintain a clean vehicle, so I opted not to.").

over the existing Outer Loop. The Inner Loop ran just inside where her property bordered the Government Strip. Observing Savage Jr. driving the Inner Loop from a distance—her house, for instance—would not put her on notice that he was using her property, rather than the Government Strip, without something more visible, such as grading of a driveway, wheel ruts, or at least ground made bare in a way demonstrating vehicular traffic. I find that Savage Jr.'s crossing of Lot 4, just inside the property line on unimproved ground, was not notorious use, without more.

This Court's decision in *Calvary United Presbyterian Church, Inc. v. Gordon* is helpful in my analysis of the type of evidence sufficient in this situation to put a property owner on notice that a neighbor is asserting prescriptive rights in her unimproved land.[37] In that case, then-Vice Chancellor Short considered whether a married couple's open and frequent use of their neighbor's property as a driveway to reach their garage was sufficient to put their neighbor—a church—on notice of the potential forfeiture of its rights.[38] There, as here, the pertinent portion of the church's property was an undeveloped area in the extreme corner of the lot, and no paving or other permanent improvements demarked a roadway used by the claimant.[39] The record established that for the prescriptive period,

[37] *Calvary United Presbyterian Church v. Gordon*, 1963 WL 64646 (Del. Ch. Sept. 11, 1963).
[38] *Id.* at *1.
[39] *Id.*

> [T]ire ruts and the like were visible there which were attributable to the [claimants'] using their automobile to reach the street from their home and garage, and it was agreed that [claimants] had improved the surface by placing cinders and other materials thereon. Notwithstanding the absence of a permanent roadway . . . *the mere presence of a visible path* served to put the [church] on notice of the use being made of [its] land.[40]

Here, I find by clear and convincing evidence that a visible path was in existence over the Inner Loop by 1992. There is some conflict in the evidence submitted. The Respondent submitted evidence that a surveyor in 2001 noticed no evidence of a roadway passing through the area now referred to as the Inner Loop.[41] The Respondent also relies on aerial photographs of the area.[42] I find both pieces of evidence inconclusive. The surveyor simply attested to the lack of gravel, not the lack of wheel ruts or other markers, and the aerial photographs are of little utility because the area is generally wooded. On the other hand, the Petitioners point to

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[40] *Id.* at *2 (emphasis added).

[41] Charles Coffman, a surveyor who conducted a survey of the Barreto parcel in 2001, testified at deposition that there was no gravel or other improvements on the Inner Loop at that time. Resp.'s Ex. 14, 8:19-9:12 ("Q: And I notice that there is no depiction of what we have identified in this litigation, and I believe I have discussed with out about an inner loop?

> A: No, there is no depiction of that and to the best of my ability I can't recall that there was one at the time. I am reasonably sure there was not actually.
> Q: There was not an inner loop, is that correct?
> A: Not that I recall.
> Q: Did you notice, the gravel driveway that you did depict on your survey in 2001, that was improved by some kind of evident maintenance?
> A: Well, it was graveled.
> Q: And with respect to the alleged inner loop, was there any gravel showing in the inner loop?
> A: No, I do not believe that there was."

[42] *See* Resp.'s Exs. 4-10.

testimony that wheel ruts were in place as early as 1988.[43] More persuasive is a photograph taken in approximately 1990.[44] Savage, Jr. was able to date the photo due to the presence of a BB gun target shown, and the damage that the BB gun inflicted on the plastic sheath of a guy-wire attached to a utility pole.[45] To me, the photograph provides clear and convincing evidence that distinct wheel ruts were in place by 1990. A second photo a few years later shows the same condition.[46] The distinctive marks caused by automobile tires, depressed strips of bare ground with grass between, are common in farm lanes and drives all over Sussex County. Such marks are shown in the photographs. As in *Calvary United*, the presence of a visible path served to put the property owner, Mrs. Hitchens, on notice that Savage, Jr. was using her property to reach his own. Therefore, I find that the Petitioners have shown by clear and convincing evidence that notorious use was occurring by September 21, 1992.

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[43] *See, e.g.*, Pet'r.'s Ex. 12; Trial Tr. vol. I, 268:1-16 (Robert Steffens) ("Q: Okay. In 1988 can you tell me if there was stone on this inner loop?
A: In 1988 there was not, I believe, at that time.
Q: Did the inner loop exist at that time?
A: Yes.
Q: Okay. What was the surface of the inner loop?
A: It was basically dirt with grass. But it was like after you had gone down a road numerous times, then you have the tracks where tires would go, which would be dirt, and then there would be like a grass center spot and grass on either side.
Q: In your opinion, how visible was the lane?
A: Oh, you could tell it was there. It was used.").

[44] Pet'r's Ex. 14.

[45] Trial Tr. vol. I, 84:12-85:15.

[46] Pet'r's Ex. 15.

C. Hostile

The remaining issue is whether the use of the Inner Loop was hostile to the owner of the burdened estate. On its face, Savage, Jr.'s use of the Inner Loop—traversing the area in his truck, wearing wheel ruts in the ground, and, eventually, grading the driveway and laying down gravel—was hostile; that is to say, it was in clear conflict with Hitchens's right to exclusive possession of her property.[47] The difficult question is whether the Petitioners' use of Hitchens's property was, as the Respondent contends, permissive rather than truly hostile. Before I assess whether or not the evidence supports a finding that Savage, Jr.'s use of the Inner Loop was hostile, I will address the threshold issue of who bears the burden of proof.[48]

Although the party seeking an easement by prescription bears the burden of proving the existence of the easement by clear and convincing evidence, this Court has held that "where the use of the disputed property is open and visible . . . and where '[t]here is no semblance of proof that the use[] was permissive . . . the adverse character of the user may be presumed.'"[49] The Petitioners argue that

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[47] *See Tubbs v. E & E Flood Farms, L.P.*, 13 A.3d 759, 767 (Del. Ch. 2011) ("[Petitioners] changed [the road's] physical composition by purchasing and laying down fill material . . . . Such activities clearly violated Respondent's right of exclusive possession of real property.").

[48] The burden of proof is often dispositive in adverse possession and prescriptive easement cases for the simple reason that the passage of time obscures the relevant facts. This case is illustrative: of the few people who could provide direct testimony of hostile use, one, Myrtle Hitchens, has passed away.

[49] *Cordrey v. Dorey*, 1996 WL 633293, at *4 (Del. Ch. Oct. 4, 1996) (citing *Marta v. Trincia*, 22 A.2d 519 (Del. Ch. 1941)). *See also Huggins v. McGregor*, 1 Harr. 447, 447-48 (Super. 1834) (holding that a jury may presume the existence of an easement by prescription where "a person

Savage, Jr. is entitled to a presumption that his use of Hitchens's property was hostile because there is a total lack of evidence here that she ever gave him permission to use it. I agree that there is no direct evidence that Hitchens ever gave such permission. The evidence that the Respondent cites to show permission is entirely unpersuasive. First, the Respondent points to the testimony of Brenda Taylor, Hitchens's daughter. However, she testified only that her mother *would have* given permission for Savage, Jr. to drive across the property. [50] Her testimony sheds no light on the question of whether or not permission was actually granted. Second, the Respondent relies on the testimony of Ellen Hitchens, Myrtle's daughter-in-law, to show that Myrtle gave Savage, Jr. written permission to cross her land by means of Savage Lane.[51] Here too, I find that Ellen's testimony has no value with regard to the question of permission. She testified that she had "heard of" such a writing.[52] However, the document she referred to is not in evidence. She did not indicate what rights, if any, were granted to Savage, Jr.'s to cross Myrtle's property. She did not see Myrtle sign any such document or even

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has been in the uninterrupted use and occupation of a right of way over another's grounds for twenty years.").

[50] Trial Tr. vol. II, 313:24-314:5 ("Q: Would Ormil Savage have been allowed to cross over Myrtle Hitchens' property except by her consent?
A. By her consent, yeah. I would – now this is my assumption because I know my mother, and she would have given him permission to do so.").

[51] Trial Tr. vol. II 329:14-330:8.

[52] Trial Tr. vol. II 330:4-8("Q. And you believed that Myrtle Hitchens gave permission?
A. I don't know. I don't know that she signed it. I heard about it. I knew that there was a piece of paper, and that's all I know.").

see the document itself. And, ultimately, she equivocated on the issue of whether she actually believed that Myrtle had given Savage, Jr. permission to cross her land.[53] No other witness has testified to the existence of this elusive license to use Savage Lane, and other evidence of record suggests that it does not exist.[54] Because the Respondent has not presented any credible evidence that Myrtle Hitchens gave Savage, Jr. permission to use the Inner Loop, I now turn to the question of whether or not the familial relationship between Savage, Jr. and Hitchens negates the presumption that his use of the Inner Loop was hostile.

Though Delaware has not directly addressed this question,[55] other jurisdictions recognize that the presumption of hostile use does not arise "where the user and servient landowner are related by blood."[56] This rule sensibly

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[53] *Id.*

[54] This confusion likely arose from Savage, Jr.'s attempt in 1980 to secure access to Lot 7 via an easement in Dove Lane. Pet'rs' Ex. 19. Myrtle Hitchens was never asked to sign that easement, because a different property owner, Hilda Marvel, refused to grant Savage, Jr. the easement. Counsel for the Petitioners, while cross-examining Ellen Hitchens, asked her if she was familiar with the unrecorded easement which sought the right to use Dove Lane, but she responded that she was not familiar with that document. *See* Trial Tr. vol. II, 331:17-333:8.

[55] *Cf. Brown v. Houston Ventures, LLC*, 2003 WL 136181, at *6 (Del. Ch. Jan. 3, 2003) (noting the existence of a family relationship between the adverse user and the owner of a servient tenement, but relying on other evidence in finding clear and convincing evidence of hostile use).

[56] *McNeill v. Shutts*, 685 N.Y.S.2d 318, 319 (N.Y. App. Div. 1999). *See also Grant v. Ratliff*, 164 Cal. Rptr. 3d 902, 906 (Cal. Ct. App. 2008) ("Here evidence that the alleged adverse users are the landowner's sons traveling to and from their former family home is more than sufficient to rebut a presumption affecting the burden of producing evidence, and even sufficient to rebut a presumption affecting the burden of proof."); *Androkites v. White*, 10 A.3d 677, 683 (Me. 2010) ("White's historical use of the Shore Path in a manner that, had the use been by a stranger, might appear to have been under a claim of right adverse to the owner, was explained by the family relationship."); *Boldt v. Roth*, 618 N.W.2d 393, 396 (Minn. 2000) ("We have recognized that this general rule of presumed hostility is modified in cases in which family members own both the dominant and servient estates."); *Brick House Cafe & Pub, L.L.C. v. Callahan*, 151 S.W.3d 838,

provides that "the law will infer that comings and goings of family members, across property owned within the family, are by accommodation or permission and do not have the requisite adversity to support imposition of a prescriptive easement by one family member upon another."[57] This rule must apply here, given that the burdened estate was owned by the claimant's aunt, and given the evidence in the record showing that Savage, Jr. and Hitchens had a close materteral relationship. Accordingly, Savage, Jr. bears the burden of proving by clear and convincing evidence that his use of his aunt's property was not permissive.[58]

I find that Savage, Jr. has met that burden. His testimony—self-serving but convincing—is unrebutted that he did *not* seek such permission.[59] Furthermore, Savage, Jr.'s ex-wife, who lived with him during the relevant time period, also testified that she never sought or obtained permission from Hitchens to use the

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844 (Mo. Ct. App. 2004) ("[T]he presumption of adverse usage that arises out of long and continuous use of another's land does not apply when there is a family relationship between the owners of the respective tracts.").

[57] *Androkites*, 10 A.3d at 683 (citing Richard R. Powell, *Powell on Real Property* § 34.10[2][c] (2005)).

[58] Because the party seeking a prescriptive easement bears the burden of proving each element necessary for the creation of the easement by clear and convincing evidence, *Lowry v. Wright*, 2006 WL 1586371, at *2 (Del. Ch. June 5, 2006), and because I find that Savage, Jr. is not entitled to a presumption in his favor as to hostility, his burden is to show hostility by clear and convincing evidence.

[59] Trial Tr. vol. I, 103:12-20 ("Q: Okay. Was there ever any conversations between you or either Norman or Myrtle Hitchens regarding the use of Savage Lane or, more particularly, the inner loop?
A: No, sir.
Q: Did you ever receive permission, written or otherwise, from Myrtle Hitchens or Norman Hitchens, to use Savage Lane?
A: No, sir.").

Inner Loop.[60] Ms. Latchum was a co-tenant of Lot 7 in 1992.[61] Her clear and disinterested testimony that she was never aware of any discussion of a right to use the Inner Loop is especially convincing. She would have likely been aware of any agreement memorializing a license to use the Inner Loop. This evidence of hostile use, though limited, is direct evidence wholly unrebutted at trial. Accordingly, I find that the direct testimony of both owners of the dominant parcel at the commencement of the prescriptive period—one of them disinterested— constitutes clear and convincing evidence that Savage, Jr. used the Inner Loop in a way hostile to Hitchens's title.

III. CONCLUSION

The Petitioners have established by clear and convincing evidence that they have used the Inner Loop in a manner open, notorious and hostile for an uninterrupted period of more than twenty years, as of September 21, 2012. They are entitled, therefore, to a declaratory judgment that they hold an easement by prescription over the Inner Loop.[62] The parties should confer and inform me by

[60] Trial Tr. vol. I, 193:15-20.
[61] Savage, Jr. and Kimberly Latchum divorced September 6, 2000. Trial Tr. vol. I, 179:8.
[62] I note here the Respondent's argument that granting an easement by prescription over the Inner Loop would be inequitable, because Savage, Jr.'s use of his driveway involved trespassing the Government Strip, and because his use of the inner Loop without access to the Government Strip was largely for egress. To the extent I need to address this argument here—the scope of Savage, Jr.'s easement over Barreto's being still undetermined—I find it to be unpersuasive. As the Respondent notes, there is no basis in caselaw to support the proposition that a party who normally uses another's property in only one direction—in this case, away from Lot 7, across Lot 4 toward Savage Lane—may obtain only a one-way prescriptive easement. Furthermore, the

Friday, July 26, 2013 what issues remain with respect to the Petitioners' request for injunctive relief.

fact that the Savages regularly "trespass" government property is irrelevant to the question of whether the Petitioners may obtain a prescriptive easement over Barreto's parcel. Regulation of the use of the Government Strip is within the purview of the State of Delaware, not the Respondent here.