RENDERED: May 8, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-2387-MR

ROBERT THACKER and
GLEMA THACKER — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 90-CI-919

GARY DEAN ROBINSON and BETTY ROBINSON, his wife, MARY SUE HALL and CLINTON DEAN HALL, her husband, JOYCE BEMBOW and ROBERT BEMBOW, her husband, MARVIN DOUG ROBINSON and IVOLENE JOYCE ROBINSON, his wife, JOHNNY DALE ROBINSON, WILLIAM KENNETH ROBINSON and SARAH DORIS ROBINSON, his wife, the above being certain of the heirs of EARL ROBINSON, HARVEY ROBINSON and ORPHA ROBINSON, his wife, GLADYS CONWAY and BERT CONWAY, her husband, FREDDY ROBINSON and LINDA ROBINSON, his wife, VIRGIL ROBINSON, single, JETTIE THOMPSON and FREELAND THOMPSON, JR., her husband — APPELLEES

OPINION
AFFIRMING

* * * * * * *

BEFORE: GUDGEL, Chief Judge, ABRAMSON, and GUIDUGLI, Judges.

ABRAMSON, JUDGE: Robert and Glema Thacker appeal from a July 29, 1996, order of Pike Circuit Court ordering them to permit the Commonwealth of Kentucky, Transportation Cabinet ("Transportation

Cabinet") to build, on behalf of the Thackers' neighbors, a passway across the Thackers' property near Sword Fork Creek in Pike County, Kentucky. The Thackers maintain that the trial court erred by permitting construction of the passway without requiring the Transportation Cabinet to undertake condemnation proceedings and to pay damages pursuant to KRS Chapter 177. Agreeing with the trial court that the Thackers' property is burdened with an easement which obviates condemnation proceedings and believing that the relocation of the passway and the type of passway authorized by the trial court are reasonable, we affirm.

The parties all own property along the hollow defined by Sword Fork Creek in Pike County. The Thackers own the mouth of the hollow on both sides of the creek near where Sword Fork joins Ford's Branch; the appellees own parcels farther up the creek. Prior to the spring of 1989, the appellees gained access to their land along a roadway that began in the creek bed on the Thackers' property and proceeded in close proximity to the creek (either in the bed or on the bank) up the hollow. In 1989, the Transportation Cabinet widened and otherwise improved Kentucky Highway 23, which, in the vicinity of Sword Fork, generally follows Ford's Branch. Incidental to this work, the Transportation Cabinet altered the course and contour of Sword Fork Creek. It deepened the stream bed and angled the banks, apparently to improve the creek's drainage capacity, and covered the bed with large rocks. These changes and others rendered the creek and its banks unsuitable for vehicular traffic and thus obliterated the appellees' access to the Sword Fork hollow. Soon

thereafter the Thackers erected a fence across what had been the access road and disavowed any right in the appellees to cross their property.

In 1990, the appellees brought suit against the Transportation Cabinet and the Thackers to have access to their Sword Fork properties restored. The trial court ordered the Transportation Cabinet to build a new road up the hollow and approved a plan which called for a portion of the road to cross the Thackers' property near the left bank (right-hand side looking upstream) of Sword Fork Creek. The Transportation Cabinet appealed that ruling to this Court, which upheld the injunction to restore reasonable access, but on separation of powers grounds reversed the part of the order specifying a particular manner of compliance.

On remand, accordingly, the trial court reiterated its order that the Transportation Cabinet restore access to the hollow up Sword Fork, but left to the Cabinet the devising of a suitable means of doing so. The Transportation Cabinet obtained consent from all the appellees for a roadway up the hollow, but failed to reach an agreement with the Thackers, who insist that any right-of-way across their property outside the original way up the creek bed involves a taking of their property which should be compensated.

On motion to resolve this impasse, the trial court found the Thackers' property to be burdened with a passway easement for the benefit of the properties above it in the hollow. It found that this passway is public in nature, and that

the original passway had been obstructed, with the Thackers' knowledge and consent, during the improvement of Highway 23. It further found that the Thackers had unreasonably refused to designate an alternative right-of-way, and that the Transportation Cabinet's proposal for a ten-foot-wide gravel road across the Thackers' land was suitable. The Thackers appeal, claiming that the trial court exceeded its authority by ordering a taking of their land without condemnation proceedings and without just compensation.

We note initially that the Transportation Cabinet has not been named a party to this appeal. Asked to explain why the Transportation Cabinet should not be deemed an indispensable party, the Thackers asserted that their position on appeal is not adverse to the Transportation Cabinet's and so resolution of the issues they have raised does not require the Cabinet's participation. Inasmuch as the Thackers seek compensation from the Commonwealth for taking a portion of their land, we do not agree that the Cabinet would be unaffected by any disposition of this appeal. We do agree, nevertheless, that the Transportation Cabinet is not an indispensable party to this appeal.

In Braden v. Republic-Vanguard Life Ins. Co., Ky., 657 S.W.2d 241 (1983), our Supreme Court held that

> CR 73.03 requires that a "notice of appeal shall specify all of the appellants and all of the appellees . . ." Failure to specify any party whose absence prevents the appellate court from granting complete relief among those already parties would be fatal to the appeal.

657 S.W.2d at 243 (citing Levin v. Ferrer, Ky., 535 S.W.2d 79 (1975)). With respect to the appellees, the Thackers seek reversal of the trial court's order deeming their land burdened by the appellees' easement. Vis-a-vis the Transportation Cabinet, however, the Thackers seek only to have this matter remanded for additional consideration. The Transportation Cabinet's absence does not prevent either remedy. Accordingly, it is not an indispensable party, and this appeal need not be dismissed.

Secondly, we feel compelled to note an apparent issue regarding the finality of the July 26, 1996, order from which the Thackers have appealed. That order, in addition to the findings and conclusions summarized above, provides that "[t]his cause is retained on the docket for further proceedings not inconsistent herewith including the Plaintiffs' claim for damages." If in fact there were still before the trial court additional claims in this matter ripe for adjudication, the July 26 order before us would be merely interlocutory and, because that order was not made final pursuant to CR 54.02, this Court would not be authorized to entertain the Thackers' appeal. Hook v. Hook, Ky., 563 S.W.2d 716 (1978); Huff v. Wood-Mosaic Corporation, Ky., 454 S.W.2d 705 (1970). The trial court's attempt to retain jurisdiction notwithstanding, we believe that the July 26 order is final and appealable under CR 54.01 because the Thackers' entitlement, if any, to damages cannot be adjudicated until the propriety of the relief already awarded is determined. At this point in time, the trial court has decided all that it can

decide. The fact that additional issues may arise upon the resolution of this appeal does not render the July order non-final and non-appealable. Murty Bros. Sales, Inc. v. Preston, Ky., 716 S.W.2d 239 (1986).

Turning to the merits of the Thackers' appeal, the trial court ruled that the Thackers' property is burdened by an access easement for the benefit of the property of the appellees. The obstruction of the original access way gave rise, according to the trial court, to an obligation on the part of the Thackers to designate an alternative path across their property, and their failure or refusal to do so gave the appellees a right to select a reasonable path subject to the trial court's approval. Meanwhile, the Transportation Cabinet had been ordered to remedy its obstruction of the appellees' access-way. Complying with this order, the Transportation Cabinet proposed to build a new access road, including a section across the Thackers' land. The trial court found that the Transportation Cabinet's proposed road would satisfy the appellees' easement right against the Thackers. For their appeal, the Thackers have chosen largely to ignore the rationale of the trial court's ruling--the appellees' easement across the Thackers' property--and have argued instead that the trial court repeated the error this Court identified on the first appeal, that of overstepping its constitutional authority by attempting to tell an executive agency how to perform its duties. The Thackers' alleged errors aside, the questions before us are whether the trial court correctly determined that the appellees have an access easement across the Thackers'

property, and if so whether the road which the Transportation Cabinet has proposed would accord with that right.

An easement may only be created in one of the following ways: either by express written grant, by implication, by prescription, or by estoppel. Loid v. Kell, Ky. App., 844 S.W.2d 428 (1992). The manner of its creation will usually indicate an easement's purposes, and its purposes, in turn, will determine its nature and extent. Newberry v. Hardin, Ky., 248 S.W. 427 (1952); Thomas v. Holmes, 306 Ky. 632, 208 S.W.2d 969 (1948). "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." Commonwealth of Kentucky, Dept. of Fish and Wildlife Resources v. Garner, Ky., 896 S.W.2d 10, 13-14 (1995). If an easement is not definitely located, the servient owner has the right initially to designate a reasonable route, but, if he fails to do so within a reasonable time, that right passes to the dominant owner. If the parties cannot agree, the trial court may decide the easement's location. Daniel v. Clarkson, Ky., 338 S.W.2d 691 (1960). Moreover,

> "[t]he owner of a right of way has the right to enter upon the servient estate on which no actual way has been prepared and constructed and to make such changes therein as will reasonably adapt it to the purposes of a way, having due regard to the rights of others who may have an interest in the way. . . ."

Elam v. Elam, Ky., 322 S.W.2d 703, 706 (1959) (quoting from Walker v. E. Williams & Merrill C. Nutting, Inc., 302 Mass. 535, 20 N.E.2d 441, 445 (1939)). An easement may be abandoned, either expressly or by implication. Illinois Cent. R. Co. v. Roberts,

Ky. App., 928 S.W.2d 822 (1996); Helton v. Jones, Ky., 402 S.W.2d 694 (1966). It may be lost by prescription. City of Harrodsburg v. Cunningham, 299 Ky. 193, 184 S.W.2d 357 (1944). Or it may lapse, if the circumstances giving rise to it cease to exist or if the underlying purposes become impossible to effect. There is a strong presumption, however, against forfeiture. Scott v. Long Valley Farm Kentucky, Inc., Ky. App., 804 S.W.2d 15 (1991).

In this case, the trial court found that an easement for the benefit of appellees' property had been created by an express grant in one of the deeds in the Robinson Heirs' chain of title. That 1912 deed provides for "a ridaway (sic) out to the mouth of Sowards Fork," but does not specify a particular pathway. The trial court found that a route had been established in and along Sword Fork Creek and that the obliteration of that route incident to the Transportation Cabinet's widening of Highway 23 had not terminated the easement. The court further found that the Thackers had refused to designate an alternative route and that the route proposed by the appellees and the Transportation Cabinet is reasonable. Because the transcript of the June 4, 1996, hearing on this matter, although designated, was not included in the record submitted to this Court, we are obliged to presume that the evidence supports the trial court's findings. Dillard v. Dillard, Ky. App., 859 S.W.2d 134 (1993). In light of the principles referred to above, we agree with the trial court that the facts it found establish the appellees' right to a reasonable access way across the Thackers' property and that the Transportation Cabinet's proposal is suitable. The

Thackers have pointed to no evidence suggesting that another type of road or one differently situated would interfere less with their property while still providing the appellees with adequate access to their properties.

Instead, the Thackers rely on Commonwealth of Kentucky, Dept. of Transportation v. Knieriem, Ky., 707 S.W.2d 340 (1986), to claim that the Transportation Cabinet either has no authority to replace the access way lost during work on Highway 23, or may do so only pursuant to a condemnation proceeding. In Knieriem, the Transportation Department condemned a first strip of the Knieriems' land in order to widen a highway, and, when that strip proved to contain a neighboring landowner's private easement, the Department attempted to condemn a second strip of the Knieriems' land to replace the right-of-way. Our Supreme Court deemed the second condemnation invalid as a taking of private property for a private use. Knieriem and the other cases the Thackers cite do not apply in this situation, however, because there has been no taking, either at the time of the highway construction or now. The trial court held, and we agree, that, apart from any state action, the appellees have an easement for ingress and egress across the Thackers' property. The Transportation Cabinet's involvement has confused this issue, but that involvement is ultimately irrelevant to this decision.

For these reasons we affirm the July 29, 1996, order of Pike Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Herman W. Lester
Pikeville, Kentucky

BRIEF FOR APPELLEES:

Lawrence R. Webster
Pikeville, Kentucky