

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000957-MR

EDNA JENKINS; MARK STILLWELL;  
AND LISA STILLWELL

APPELLANTS

v. APPEAL FROM HARDIN CIRCUIT COURT  
HONORABLE JANET P. COLEMAN, JUDGE  
ACTION NO. 99-CI-01475

A.D. WILLIAMS; MARY ELIZABETH WILLIAMS;  
HAROLD TERRY; MARILLES TERRY; AND  
PAULINE TERRY

APPELLEES

OPINION  
AFFIRMING

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BEFORE: KNOFF, JOHNSON AND MILLER, JUDGES.

JOHNSON, JUDGE: Edna Jenkins and Lisa and Mark Stillwell have appealed from a judgment of the Hardin Circuit Court entered on March 31, 2000, which set a boundary line between the parties' property along an old fence line. Having concluded that the trial court's decision on the location of the fence line was not clearly erroneous, we affirm.

In 1974, A. D. and Mary Elizabeth Williams purchased a piece of property from Bobby and Sara Pennington, adjacent to and west of property owned by Edna Mae and William Ervin Jenkins, who

had previously purchased their tract in 1967. The Jenkinses' and Williamses' property also bordered property owned by Ronnie and Charon Choate on the north. Harold Terry, and his former wife, Pauline, are predecessors in title to the Williamses' property, having owned it between 1956 and 1960. Edna Jenkins deeded a portion of her property that borders the Williamses' tract to her granddaughter, Lisa Stillwell and Lisa's husband, Mark, in the 1980's.

When the Williamses purchased their property, they believed, as had their predecessors in interest, that an old fence marked the east-side boundary. They cleared the land and sewed grass up to the fence line. Similarly, the Jenkinses and Stillwells generally recognized the old fence line as their western boundary and treated the land on the eastern side of this boundary as their own. The fence line was not maintained by the parties and fell into disrepair. At some point, the old fence was taken down. There is some dispute as to when the old fence was removed and as to who removed it. The Williamses assert that A. D. Williams removed the fencing in 1975 or 1976; whereas, the Stillwells state that Williams removed only a portion of the fence and they took down the remainder around 1979 or in the early 1980's.

In 1984, C. E. Pence prepared a survey for the Williamses that relied in part on the Terry deed, which had erroneously placed the boundary line west of the old fence line and the property line known as the Smith-Gardner line. Consequently, the descriptions in the various deeds created an approximately 30-foot rectangular area between the line called

for in the Terry deed and the Smith-Gardner line. The old fence line dissected the rectangular area. The Pence survey included the fence line, but it identified an erroneous boundary line based on the faulty description in the Terry deed.

After the old fence was removed, the Williamses placed electric fencing at various points near the line to contain their cattle. The Jenkinses and Stillwells also conducted activities such as mowing, parking cars, storing old washing machines, and placement of a child's swing-set just west of the fence line near the Jenkinses' residence. At some point in 1997-98, the parties attempted to settle the dispute over ownership of the strip of property. Anna Sloan, who is Edna Jenkins' daughter and who held a power of attorney for her, met with A. D. Williams and Harold Terry about the boundary. They informally agreed to mark the location of the old fence line with posts at the north and south ends as evidence of the boundary.

In April 1999, the Williamses hired Sam Anzelmo, Jr. to perform a survey of the area especially with reference to the disputed boundary. He reviewed the various deeds and discovered the error in the description of the Terry deed and the Pence survey. He identified the actual recorded boundary line as the Smith-Gardner line, the erroneous line in the Terry deed and Pence survey, and the old fence line. His survey described the old fence line as a straight line dissecting the rectangular strip between the Terry deed line and the Smith-Gardner line with reference points on the southwest corner of Jenkins Road and the northeast corner at a white oak tree. The deeds in the Jenkinses' line of title identified a black oak stump as the

northeast reference point but that marker no longer existed, so Anzelmo identified an existing white oak tree at the same approximate location based on measurements taken from the deeds of the adjoining properties and a 1993 survey he had conducted earlier of the Jenkins and Choate properties. Anzelmo further confirmed the white oak marker by personal observation of an existing old fence along the Williams-Jenkins-Choate boundary extending both north and east of the white oak. He also reconstructed the old fence line between the parties' property from old fence holes he observed on the property.

On October 1, 1999, the Williamses filed a complaint in the Hardin Circuit Court against Edna Jenkins, the Stillwells, and the Terrys seeking to quiet title to the entire piece of property between the eastern boundary line described in the Terry deed and the Smith-Gardner line. In their answer, the appellants asserted a claim to the entire disputed property based on adverse possession and estoppel by agreement. The Terrys agreed to cooperate and convey any interest they had in the property consistent with the decision of the trial court. Following the exchange of discovery information, including interrogatories and requests for production of documents, a trial date was scheduled.

The trial court conducted a bench trial on March 21, 22 and 27, 2000. Witnesses for the appellants included Harold Terry, Bobby Pennington, Paul Choate, A. D. Williams, and Sam Anzelmo. Witnesses for the appellees included Phyliss Reese, Don Priddy, Vernon Wilson, Edward Sloan, Lisa and Mark Stillwell, and Anna Sloan. A. D. Williams testified that he initially believed the old fence line was his eastern boundary. He stated that

after he removed the old fence in 1974 or 1975, he cleared the area, applied lime, fertilizer, and grass seed, and used it for growing hay and grazing his cattle. He denied ever agreeing with Anna Sloan on a boundary line west of the old fence line.

Williams, Terry and Pennington all testified that the old fence line ran along a ridge approximately 5-6 feet west of the Jenkinses' residence to a post at the north end that was approximately 3-5 feet west of the white oak tree.

Sam Anzelmo testified that based on a review of the deeds he identified the white oak tree as the north reference point for the Williamses' eastern boundary. He explained the error in the Pence survey based on the faulty legal description in the Terry deed. Anzelmo stated that he reconstructed the location of the old fence line based on his observations of a few post holes and the existing portion of the old fence north of the Williamses' property. His survey represented the old fence as a straight line connecting the southwest and northeast reference points of the Williamses' property and dissecting the disputed 30-foot strip between the Terry deed line and the Smith-Gardner line. During the trial, the Williamses abandoned their original claim to the entire disputed area and asserted a claim only to that portion up to and west of the old fence line.

Several witnesses for the appellants testified that after the old fence was removed, the Jenkinses and Stillwells mowed grass, stored items, and used the land 30-40 feet west of the old fence line. Phyliss Reese, a relative of the Jenkinses, testified that the old fence ran along a small ridge 5-7 feet west of the Jenkinses' residence. Lisa Stillwell testified that

A. D. Williams removed a portion of the south end of the fence in 1975-76 and that the appellants had removed the rest of the old fence in the early 1980's. She stated the old fence ran along a ridge and was tied to a corner post at the northern end approximately 12 feet west of the white oak tree. She referred to a photograph (Defendants' Exhibit No. 8) taken in 1978-79 showing the fence post and white oak tree in the background. On cross-examination, she disputed Anzelmo's plotting of the old fence line asserting that it was 12 feet further west and was not entirely straight.

Anna Sloan testified that her father, Ed Jenkins, put up the old fence line in the 1940's, but he had told her the boundary line actually was west of the old fence line approximately 39 feet west of the white oak tree, which was consistent with the Pence survey. She stated the first dispute over the boundary line occurred in 1989, but that in 1990-91, she and A. D. Williams agreed on a boundary line west of the old fence line. Sloan disagreed with all of the boundary lines identified by Sam Anzelmo. Mark Stillwell testified that Edna Jenkins indicated to him the boundary line was approximately 40 feet west of the white oak tree. He stated that A. D. Williams, Harold Terry and Anna Sloan had agreed on the boundary line as being 39 feet west of the white oak tree. The appellants did not call C. E. Pence or any other expert witness.

Following the bench trial, the trial court on March 31, 2000, entered findings of fact, conclusions of law and a judgment declaring the Williamses as the owners of the disputed property west of the old fence line. The trial court held that appellants

had not established adverse possession by sufficient, open, notorious, hostile, continuous, visible and exclusive possession of the disputed property west of the old fence line for the requisite 15-year period. It noted that Anna Sloan testified the boundary dispute first occurred in 1979 and the appellants' use of the property was intermittent and very limited. The trial court also held that there was not strong, clear evidence of a parol agreement between the parties on a boundary line.<sup>1</sup> It noted that while Anna Sloan testified that an agreement existed, A. D. Williams vehemently denied such an agreement. Finally, the trial court held that the best evidence of the old fence line was the survey prepared by Sam Anzelmo. It adopted his reconstructed representation of the old fence line as the proper boundary line of the parties' property. It ordered Harold Terry to execute a quitclaim deed to the disputed property west of the old fence line to the Williamses.

On April 5, 2000, the appellants filed a CR<sup>2</sup> 59.05 motion to alter, amend or vacate the judgment. They sought a modification of the judgment consistent with their testimony that the old fence line was 12 feet west of the white oak tree. On April 13, 2000, the trial court summarily denied the motion. This appeal followed.

Since this case was tried before the court without a jury, its factual findings "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of

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<sup>1</sup>See, e.g., Wolf v. Harper, Ky., 233 S.W.2d 409 (1950).

<sup>2</sup>Kentucky Rules of Civil Procedure.

the trial court to judge the credibility of the witnesses . . . .  
."3 A factual finding is not clearly erroneous if it is supported by substantial evidence.<sup>4</sup> Substantial evidence is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.<sup>5</sup> "It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence."<sup>6</sup> With respect to property title issues, the appropriate standard of review is whether or not the trial court was clearly erroneous or abused its discretion, and the appellate court should not substitute its opinion for that of the trial court absent clear error.<sup>7</sup> A trial court's determination of a boundary line should be upheld unless it is clearly against the weight of the evidence.<sup>8</sup> 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

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<sup>3</sup>CR 52.01. See also Lawson v. Loid, Ky., 896 S.W.2d 1, 3 (1995); and A & A Mechanical, Inc. v. Thermal Equipment Sales, Inc., Ky. App., 998 S.W.2d 505, 509 (1999).

<sup>4</sup>Owens-Corning Fiberglass Corp. v. Golightly, Ky., 976 S.W.2d 409, 414 (1998); Faulkner Drilling Co. v. Gross, Ky. App., 943 S.W.2d 634, 638 (1997); Uninsured Employers' Fund v. Garland, Ky., 805 S.W.2d 116, 117 (1991).

<sup>5</sup>Golightly, 976 S.W.2d at 414; Janakakis-Kostun v. Janakakis, Ky.App., 6 S.W.3d 843, 852 (1999) (citing Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972)).

<sup>6</sup>Garland, 805 S.W.2d at 118.

<sup>7</sup>Church & Mullins Corp. v. Bethlehem Minerals Co., Ky., 887 S.W.2d 321, 323 (1992), cert. denied, 514 U.S. 1110, 115 S.Ct. 1962, 131 L.Ed.2d 853 (1995).

<sup>8</sup>Croley v. Alsip, Ky., 602 S.W.2d 418, 419 (1980) (quoting Rowe v. Blackburn, Ky., 253 S.W.2d 25, 27 (1952)).



into account established factors.<sup>9</sup> When the opinions of the expert witnesses conflict, a fact-finder's choice of which witness to believe "rarely can be held 'clearly erroneous.'"<sup>10</sup>

The appellants contend that the trial court clearly erred in setting the location of the old fence line.<sup>11</sup> They argue that the court improperly relied upon the opinion of Sam Anzelmo. They maintain that Anzelmo's survey is based on the erroneous assumptions that the old fence line was straight and that it ended at the white oak tree. The appellants also assert that the testimony of Anna Sloan and Lisa Stillwell support a finding that the old fence line was 12 feet west of the white oak tree at the north end. More importantly, they state that they introduced a photograph (Defendants' Exhibit No. 8)<sup>12</sup> that irrefutably supported their position.

After reviewing the record, we believe the trial court's decision should not be disturbed. Sam Anzelmo testified that he based his placement of the old fence line on an inspection of the property, information provided by the residents including A. D. Williams, Harold Terry and Anna Sloan, and prior surveys. He utilized observable post holes and the existing portion of the old fence that continued north from the white oak

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<sup>9</sup>Howard v. Kingmont Oil Co., Ky.App., 729 S.W.2d 183, 184-85 (1987).

<sup>10</sup>Gatliff v. White, Ky., 424 S.W.2d 843, 844 (1968).

<sup>11</sup>We note that the appellants do not challenge the trial court's findings on adverse possession or the existence of a parol boundary line agreement.

<sup>12</sup>Counsel incorrectly identifies the photograph as Exhibit 9 in his brief.

tree on the Choate property. While the majority of the testimony indicated that the old fence line "zig-zagged" or was not perfectly straight, it also did not reveal that there was a material or significant deviation from the location adopted by the trial court. Anzelmo understandably represented the old fence line as a straight line in order to connect the known markers taken from the deeds. The appellants did not present evidence or attempt to establish the precise route of the entire old fence line but rather argued that the northern section should be moved 12 feet to the west. The Anzelmo line is consistent with the appellants' testimony that the old fence line ran along the ridge at the southern end of the property. Consequently, the trial court's adoption of Sam Anzelmo's reconstruction of the old fence line as a straight line is not clearly erroneous or an abuse of discretion.

Similarly, the appellants' assertion that the evidence clearly established that the old fence line was 12 feet west of the white oak tree is unconvincing. Harold Terry, A. D. Williams and Bobby Pennington all testified that the old fence was connected to a post that was approximately 3-5 feet west of the white oak tree. We have carefully inspected the photograph exhibits, especially Defendant's Exhibit No. 8, and cannot agree that they establish that the post was 12 feet west of the white oak tree. The angle of the photograph simply does not allow one to determine the relationship between the post and the white oak tree with any degree of certainty. Thus, the appellants' reliance on this photograph is misplaced. Given the conflicts in the evidence, the trial court had the discretion to weigh the

evidence and to determine the credibility of the witnesses. The trial court's adoption of the Anzelmo survey line as the old fence line for the purpose of establishing a boundary line was not clearly erroneous or an abuse of discretion .

The judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

James T. Kelley  
Elizabethtown, Kentucky

BRIEF FOR APPELLEES:

Barry Birdwhistell  
Elizabethtown, Kentucky