

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002572-MR

LOUELLA C. ASH

APPELLANT

v. APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 00-CI-00137

WILLIAM WOLFE AND
ALMA WOLFE

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND GUIDUGLI, JUDGES.
GUIDUGLI, JUDGE. Louella Ash ("Ash") appeals from findings of fact, conclusions of law, and judgment of the Lewis Circuit Court dismissing her action to permanently enjoin William and Alma Wolfe ("the Wolfes") from blocking a roadway over which Ash sought to access a parcel of real property. For the reasons stated herein, we affirm.

On March 8, 1999, Ash purchased from Larry Fannin a parcel of real property situated in Lewis County, Kentucky. The Wolfes purchased a nearby parcel from Emil and Jacquelin Bloomfield on August 25, 1978. Situated between the two parcels is a third parcel owned by Alice Hronek, who is not a party to the instant action.

When Ash purchased her parcel, she did not investigate whether there existed a right of way to the property, but she did observe an alleged roadway running across the Wolfes' parcel to her parcel. The alleged roadway is sometimes referred to in the record as Lower Twin Branch Road. She also noted at the time of purchase that the alleged roadway was blocked by a cable.

On July 21, 2000, Ash filed a complaint against the Wolfes in Lewis Circuit Court. She alleged therein that the roadway in question was once maintained by Lewis County and that it provided the only access to her parcel. She sought an order establishing her right to use the roadway and permanently enjoining the Wolfes from blocking it. She also sought damages for the alleged wrongful deprivation of her rights to use the road.

A bench trial was conducted on May 28, 2002. Upon taking proof, the court rendered its findings of fact, conclusions of law, and judgment on July 11, 2002. It

determined in relevant part that Ash was not alleging the existence of a prescriptive easement or adverse possession, and opined that an easement by necessity and/or implication could not be found because the two parcels at issue did not come from a common grantor. It also found that no evidence was tendered to establish that Lewis County ever maintained or incorporated into the county road system a road known as Lower Twin Branch Road. It concluded that Ash was not entitled to use the alleged roadway, and it dismissed her action. On November 15, 2002, an amended judgment was rendered which reached the same conclusion as the July 11, 2002 judgment, but went into greater detail regarding the conclusions of law upon which the judgment was based. This appeal followed.

Ash now argues that the trial court erred in rendering a judgment in favor of the Wolfes. Specifically, she maintains that the general and long-continued use of the roadway by the public creates the right to continue its use; that she has the right to use the roadway whether it was abandoned by the public or adversely possessed by the Wolfes; that she has no other access to her parcel; that she presented evidence of a former right of way; and, that the disputed roadway is a county road. She seeks an order reversing the judgment and granting her access to her property over the disputed roadway without interference from the Wolfes.

We are not persuaded by Ash's first argument, i.e., that the general and long-continued use of the roadway by the public creates the right to continue its use. Ash contends that the only testimony before the trial court showed conclusively that the road is a public road, and she relies on this contention as a basis for concluding that she (and others) have the right to use what should be characterized as a public roadway. The trial court, however, found that all of Ash's witnesses on this issue were young children decades ago when they used the roadway, and that none knew if they used it with permission or whether they had a right to use the roadway. Conversely, the Wolfes offered un rebutted testimony that they purchased their property in 1978 and that the roadway was closed and blocked by a cable ever since that date. Thus, the court opined that even if it were a public roadway, it would have been closed by adverse possession. Funk v. Whitaker, Ky., 342 S.W.2d 675 (1950). We have no basis for tampering with these findings of fact and conclusions of law, Carroll v. Meredith, Ky. App., 59 S.W.3d 484 (2001), and thus find no error on this issue.

Ash goes on to contend that even if the roadway was abandoned by the public, she still has a private right to use it by virtue of the holding in Hylton v. Belcher, Ky., 290 S.W.2d 475 (1956). Hylton, however, is distinguishable from the facts at bar in that the parties in Hylton shared a common grantor and

were seeking to quiet title to an abandoned county road that bordered each of the parcels. The trial court found in the matter at bar that the roadway was never a county roadway, and Ash and the Wolfes do not share a common grantor. Hylton is not persuasive, and does not support Ash's claim that she is entitled to use the roadway at issue even if it was abandoned.¹

Ash's third argument is that her property is landlocked and that she has no means of accessing the property without the use of the disputed roadway. She reasons that because the parcel is landlocked, she must retain a private easement over the roadway to the extent necessary for reasonable ingress and egress. Without so stating, Ash appears to contend that she is entitled to an easement by necessity. This argument must fail as a matter of law, as such an easement requires a common grantor of the affected parcels. Carroll, supra, citing 28A C.J.S *Easements* § 93 (1996 and Supp. 2001).

Ash next contends that she presented evidence of a former right of way to one of the tracts which now make up her parcel, and suggests that this evidence supports her assertion that she is entitled to traverse the Wolfes' parcel. She

¹ An easement may be created by express written grant, implication, prescription or estoppel. Easement by implication includes two legal theories: (1) quasi-easement and (2) easement by necessity. A quasi-easement arises from a prior existing use of land, whereas an easement by necessity is based on public policy and an implied intent of the parties favoring the use and development of land as opposed to rendering it useless. Carroll, 59 S.W.3d at 489.

concedes, however, that this alleged former easement does not cross or otherwise affect the Wolfes' parcel, and she cites no case law or statutory law in support of the assertion that this alleged former easement would have any bearing on the issues at bar. As such, we are not persuaded that the trial court erred in failing to rely on the evidence of the alleged former easement, and accordingly find no error.

In her final argument, Ash raises the issue of whether the disputed roadway is a county roadway. She notes that evidence was adduced at trial that the roadway has appeared on county road maps, but concedes that the Lewis County Judge Executive and a county road foreman each testified that to the best of their knowledge it was not a county road. She argues that if it were to be determined to be a county road, the Wolfes have failed to comply with guidelines set forth in KRS 178.116 requiring a joint petition to discontinue the roadway.

The evidence on this issue is conflicting. Clearly, the Judge Executive and county road foreman testified that no evidence existed that the roadway was maintained by the county, and the Wolfes produced county road maps showing no roadway. Conversely, Ash produced maps showing a county roadway to exist. A trial court's factual findings shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the

witnesses. Carroll, 59 S.W.3d at 489. The trial court's finding that no county roadway existed is supported by the evidence and is not clearly erroneous, and accordingly we find no error.

For the foregoing reasons, we affirm the findings of fact, conclusions of law, and judgment of the Lewis Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Delores Woods Baker
Maysville, KY

BRIEF FOR APPELLEE:

John R. McGinnis
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