

RENDERED: SEPTEMBER 3, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-002201-MR

TIM LEVI

APPELLANT

v. APPEAL FROM HARRISON CIRCUIT COURT
HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 01-CI-00235

PATRICIA C. PERRAUT

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: Tim Levi appeals from a judgment of the Harrison Circuit Court finding that Patricia C. Perraut has an easement across his land, and enjoining him from interfering with her use of that easement. He argues that the easement reserved by their common grantor could only pass by specific grant to subsequent grantees, and not to all subsequent grantees of property adjacent to the easement. We find that the easement reserved by the

common grantor was appurtenant to the land, and therefore passed to all subsequent grantees. Hence, we affirm.

The tracts owned by Levi and Peerraut were originally parts of a larger tract owned by Pauline Moss Florence, Virgil D. Florence, Jr., and Kathleen Bruce Florence (the Florences), located near the city of Cynthiana in Harrison County, Kentucky. Sometime prior to 1990, the Florences apparently decided to subdivide the farm. They divided the farm into sections, and over time sold off various lots in each of these sections. They designated the entire development as the "Todd Lane Subdivision."

On May 26, 1990, the Florences conveyed Lot 1, Section D of the Todd Lane Subdivision to Levi. Since this tract was landlocked, this deed also included a passway easement for the purpose of ingress and egress from Carl Stevens Road (Ky. 1731). On February 19, 1991, the Florences conveyed the real property underlying the easement to Levi. This area is a strip of land 350 feet long by 50 feet wide, is located between Lot 1 and Lot 2 of Section C of the Todd Lane Subdivision, and includes a lane running from Carl Stevens Road to Levi's property. The 1991 deed contained the following reservation:

The parties of the First Part [Florences], their heirs and assigns, reserve the right to use the hereinabove described tract as a 50' right of way for ingress and egress to and from the remaining lands of the parties of the First Part, their heirs and assigns forever, and this right to run with the

remaining lands of the parties of the First Part, their heirs and assigns forever.

On February 25, 1994, the Florences conveyed Lot 2, Section C of the Todd Lane Subdivision to Perraut. Lot 2 has frontage on Carl Stevens Road. Furthermore, Perraut's deed does not mention the easement adjacent to Lot 2, and she concedes that it was not discussed when she purchased the property. In 1996, however, the Florences conveyed a tract adjacent to Levi's tract which did not have direct frontage to Carl Stevens Road. This deed specifically included the right to use the easement.

In 1995 or 1996, Perraut approached Levi and asked his permission to use a portion of the lane to access her garage. Levi agreed. In 2000, however, after a dispute arose between the parties, Levi revoked his permission and announced that he planned to fence the boundary between Perraut's property and the lane.

In response, Perraut brought this action, alleging that she had acquired an interest in the reserved right-of-way from the Florences. She sought a judgment granting her an absolute right to use the right-of-way and enjoining Levi from interfering with her use of the right-of-way. Levi filed a counter-claim seeking to enjoin Perraut from using the lane. The matter was submitted to the trial court on cross-motions for summary judgment. In an order entered on August 15, 2003, the trial

court granted Perraut's motion for summary judgment. Thereafter, on September 22, 2003, the trial court entered an order finding that the easement of way extended to all adjoining grantees of the Florences, enjoining Levi from interfering with the use of the right of way. This appeal followed.

As a preliminary matter, we note that the trial court's order of September 22, 2003, does not recite that it is a final and appealable order, as required by CR 54.02. Nevertheless, the trial court had previously denied Levi's motion for summary judgment and granted Perraut's motion. Because the trial court's September 22 order adjudicated all of the rights of the parties to the action, it was, by operation of law, a final judgment.¹ Therefore, while the absence of finality language is unfortunate, it is not fatal to this appeal.

The parties agree that there are no genuine issues of material fact, and that interpretation of the deeds is entirely a question of law. Consequently, this matter was ripe for summary judgment.² We also note that Perraut is not claiming that her right to use the roadway arose by prescriptive use or by adverse possession. Furthermore, she does not claim that her right to

¹ CR 54.01.

² CR 56.03; Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

use the right of way arises out of necessity or by implication of law.³ Thus, Levi's arguments on these points are unavailing.

Rather, Perraut claims that the easement reserved by the Florences runs with the land and passed to all of the Florence's subsequent grantees. We agree. Although the parties have not framed the issue thus, it is apparent that Perraut claims the easement reserved by the Florences was appurtenant to the land.

If an easement is to be exercised in connection with the occupancy of particular land, then ordinarily it is classified as an easement appurtenant.⁴ The land benefited by the easement is known as the dominant tenement, and the land burdened by it is the servient tenement.⁵ Furthermore, an appurtenant easement exists for the benefit of the dominant estate as an entirety, and not for any particular part thereof.⁶ In contrast, an easement in gross is merely a personal right to

³ See Cole v. Gilvin, Ky. App., 59 S.W.3d 468 (2001).

⁴ Martin v. Music, Ky., 254 S.W.2d 701, 703 (1953).

⁵ Scott v. Long Valley Farm Kentucky, Inc., Ky. App., 804 S.W.2d 15, 16 (1991); citing Lyle v. Holman, Ky., 238 S.W.2d 157 (1951).

⁶ 25 Am. Jur. 2d Easements and Licenses § 10, p. 578 (1996 & 2004 Supp.).

use the land of another, and does not run with the land. There is no dominant or servient estate.⁷

The specific language used in the deed from the Florences to Levi created an easement appurtenant to the land. While Levi concedes that the easement runs with the land, he argues that it could only pass to grantees specifically named by the Florences and not to all of their subsequent grantees. He also asserts that the Florences' inclusion of the easement in the deeds of some but not all grantees demonstrates that they only intended the easement to be for the benefit of grantees who lacked direct access to Carl Stevens Road.

However, the failure of the Florences to specifically grant an easement to Perraut in her deed would not preclude her from having a right to use the roadway. Easements appurtenant pass with the land to which they are appurtenant without mention in the deed.⁸ The right-of-way reserved in the Florences' deed to Levi was designated for the benefit of all of the Florences' reserved property, which would include the tract subsequently

⁷ Inter-County Rural Elec. Co-op. Corp. v. Reeves, 294 Ky. 458, 171 S.W.2d 978, 983 (1943). See also 25 Am. Jur. 2d Easements and Licenses § 11, p. 579.

⁸ Smith v. Combs, Ky. App., 554 S.W.2d 412, 413 (1977); citing KRS 381.200(1), "[e]very deed, unless an exception is made, shall be construed to include all buildings, privileges and appurtenances of every kind attached to the lands therein conveyed." See also Thomas v. Brooks, 188 Ky. 253, 221 S.W.542 (1920).

purchased by Perraut. Therefore, the trial court properly found that it passed to all subsequent grantees of the Florences who were adjacent to the easement, even if the right-of-way was not specifically granted in their deeds. While it could be argued that the subsequent grantees' use of the easement places an unreasonable burden on the servient estate,⁹ that question has not been raised. The trial court did not err by entering a judgment for Perraut or by enjoining Levi from interfering with Perraut's use of the easement.

Accordingly, the judgment of the Harrison Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Edwin M. Culbertson
Cynthiana, Kentucky

BRIEF FOR APPELLEE:

Wayne W. Fitzgerald
Cynthiana, Kentucky

⁹ Smith v. Combs, 554 S.W.2d at 413.