

RENDERED: SEPTEMBER 25, 2009; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001702-MR

JOHNNY LITTLE; AND
MARY LITTLE

APPELLANTS

APPEAL FROM KNOTT CIRCUIT COURT
v. HONORABLE JOANN SPINKS COLEMAN, SENIOR JUDGE
ACTION NO. 01-CI-00285

RUTH HALL; PATTY ANN DECOURSEY;
FOREST DEAN HALL AND MIONI HALL,
his wife; ANDREA LYNN CARTER; RUBY
SHEPHERD; RUTH STURGILL; JANIE SLONE;
AND JUDY HALL WOOSLEY

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; VANMETER, JUDGE; LAMBERT,¹
SENIOR JUDGE.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

VANMETER, JUDGE: Johnny Little and Mary Little appeal from the Knott Circuit Court's order granting permanent injunctive relief which barred them from obstructing a road across their property. We affirm.

This appeal stems from actions taken by the trial court pursuant to this court's reversal and remand in a prior appeal involving all the same parties as this appeal. We therefore set out the text of the prior opinion,² in which a panel of this court stated:

Johnny and Mary Little (Appellants) appeal from an order of the Knott Circuit Court granting Ruth Hall, Patty Ann Decoursey, Forest Dean Hall, Mioni Hall, Andrea Lynn Carter, Ruby Sheperd, Ruth Sturgill, Janie Slone, and Judy Hall Woosley (Appellees) a permanent injunction and recognizing a prescriptive easement across Appellants' property to a mountainside family cemetery. Concluding the trial court failed to make the necessary findings to establish a prescriptive easement, we reverse and remand.

Appellees' family cemetery was established and has been in continuous use since 1949. The roadway in question has been used since that time for burials, visitations and memorial services, and to clean and maintain the gravesites. It has been traveled by cars, trucks, a hearse, and a bulldozer. Burials took place in 1949, 1950, 1951, 1955, 1957, 1970, 1979, 1980, 1982, and 1996.

Appellants acquired the roadway property in 1965. Appellees continued to maintain the road and use it in a manner consistent with travel to and from a cemetery until it was blocked in 1997.

In 2001, Appellees sued Appellants to reopen the road. On May 29, 2003, a temporary injunction was entered against the Appellants ordering them to remove all obstacles placed in the roadway. In November 2004,

² *Little v. Hall*, Appeal No. 2007-CA-000267-MR, 2008 WL 682434 (March 14, 2008).

Appellants were found in contempt for not clearing the roadway and ordered to do so by December 8, 2004. In May 2006, this Court affirmed the contempt order. Following an August 10, 2006, hearing, the Knott Circuit Court found Appellees to have acquired a prescriptive easement to use and maintain the roadway to access their family cemetery and granted them a permanent injunction allowing them to use the roadway for such purposes. Appellants were ordered to remove all obstructions within 45 days or pay \$200.00 per day until roadway was cleared. This appeal followed.

The law of prescriptive easements is generally derived from the principles of adverse possession. *Cole v. Gilvin*, 59 S.W.3d 468, 475 (Ky.App. 2001). In order to obtain a right to a prescriptive easement, the party seeking to establish the right must demonstrate adverse use that is “actual, open, notorious, forcible, exclusive, and hostile, and must continue in full force ... for at least fifteen years.” *Id.* This Court stated the differing standards for obtaining fee simple title to land by adverse possession and for obtaining a prescriptive easement as follows:

A private passway may be acquired by prescriptive use although a right of way is not strictly a subject of continuous, exclusive, and adverse possession. It is sufficient if the use exercised by the owner of the dominant tenement is unobstructed, open, peaceable, continuous, and as of right for the prescribed statutory period.

Id. (quoting *Pickel v. Cornett*, 285 Ky. 189, 147 S.W.2d 381 (1941)). Further, if the right to use a passway is permissive, then the existence of a prescriptive easement “does not arise unless there has been some distinct and positive act of assertion of right made clearly known to the owner of the servient tenement.” *Id.* at 476.

The trial court made the following findings in concluding the Appellees had obtained a prescriptive easement:

The roadway in question leading to the Hall family cemetery has been in continuous use since the interring of David Hall in 1949. The road has been used since 1949 for burials, visitations and memorial services, and to clean and maintain the gravesites. The roadway has been traveled by the hearse, trucks to deliver the headstones, cars, trucks and a bulldozer on occasions.

This pattern of use continued through and until May 10, 1965 when the property was acquired by the Defendants, and then continued through and until the Defendant blocked the road in 1997. Throughout this entire time, the road was used with a frequency consistent with that to be expected of a road to a family cemetery. Such a road would not be expected to be used on a daily basis, but rather would be used as needed for funeral processions, visitations and maintenance. The Court finds that during this time the Plaintiffs [sic] family maintained the road and kept it clear for travel.

There was testimony offered regarding dogs running loose in the roadway, and game chickens kept in the roadway. The Court finds that the Plaintiffs nevertheless continued to use the roadway to get to the cemetery, and therefore the dogs and chickens in the roadway did not alter the character or use of the roadway. A prescriptive easement does not change the ownership of the land, rather [it] provides the right to the easement holder to pass over the land. Therefore, the fact that the Defendants [sic] dogs and chickens were in the roadway did not mean that [the] Plaintiffs has [sic] abandoned their easement as long as Plaintiffs continued to use the roadway to access the cemetery, and the Court specifically finds that the Plaintiffs did continue to use the roadway in

a manner consistent with travel to and from a cemetery.

The Court finds that the first time that the Defendants objected to the Plaintiff's use of the roadway was when the trailer was placed on the roadway in 1997. The Court therefore finds that the Plaintiffs used the easement in an unobstructed, open, peaceable and continuous manner beginning in 1949 until 1997. The Court therefore finds that the Plaintiffs obtained a prescriptive easement by the end of 1965, and have continued to use the roadway and therefore maintain the right to a prescriptive easement through and including 1997. By filing this action in a timely manner, the Plaintiffs have rightfully asserted their legal title to a prescriptive easement to use the roadway to access the private cemetery.

While the trial court makes ample findings to conclude that the Appellees' use of the roadway was unobstructed, open, peaceable, and continuous for the fifteen plus years, it does not, as Appellants contend, make findings that establish the Appellees used the road under a claim of right. We therefore conclude that it is necessary to remand this case to the trial court to make additional findings of fact and conclusions of law concerning the nature of the roadway's use.

For the foregoing reasons, the judgment of the Knott Circuit Court is reversed and remanded for proceedings consistent with this opinion.

On remand, the trial court summarized its prior findings of fact before finding that appellees' testimony and conduct showed they had used the road between 1949 and 1997 in the belief that they owned it and that the Littles had never objected to appellees' use of the road before blocking it with a mobile home in May 1997. The court concluded appellees had established their claim of right to

the road through their testimony and conduct, including the burial of loved ones “in a site accessible only by the roadway[.]” Further, appellees had used the road “in an unobstructed, open, peaceable and continuous manner, as of right,” for fifteen years before and fifteen years after the Littles acquired the property. Thus, appellees had “acquired a prescriptive easement to use the roadway” to access their family cemetery, and the court permanently enjoined the Littles from preventing such use. This appeal followed.

On appeal, the sole issue is whether the trial court erred by finding appellees used the road under a claim of right so as to acquire a prescriptive easement across the property. We find no error.

Although the elements are similar, different estates are established by adverse possession and easement by prescription. *Lyle v. Holman*, 238 S.W.2d 157, 159 (Ky. 1951). While adverse possession may allow one to obtain perfect title to the exclusion of others, easement by prescription may be conditional and restricted to particular uses and purposes, and the passage of time will not cause it to ripen into a greater estate. *Id.* A claim of adverse possession requires exclusive, continuous and hostile possession for every day of the fifteen-year statutory period. *Id.* at 160. A claim of easement by prescription, by contrast, may be established if the holder of the dominant tenement, to whom the easement right belongs, exercises use that is “unobstructed, open, peaceable, continuous and as of right for the prescribed statutory period.” *Id.* at 159-60 (quoting *Pickel v. Cornett*, 285 Ky. 189, 147 S.W.2d 381, 382 (1941)). Such a continuous and uninterrupted use of a

passway for at least fifteen years gives rise to the presumption that the use was under a claim of right. *Cole v. Gilvin*, 59 S.W.3d 468, 475 (Ky.App. 2001). See also *Ward v. Stewart*, 435 S.W.2d 73, 75 (Ky. 1968); *Lyle*, 238 S.W.2d at 160.

The burden of showing that the use instead was merely permissive falls upon the owner of the underlying servient estate. *Lyle*, 238 S.W.2d at 160 (citing *Pickel*, 147 S.W.2d at 382 (1941)); *Cole*, 59 S.W.3d at 475; *Ward*, 435 S.W.2d at 75.

Finally, if the easement right has extended over many years, “very slight evidence” is sufficient to show the existence of a claim of right. *Lyle*, 238 S.W.2d at 160 (citing *Smith v. Fairfax*, 180 Ky. 12, 201 S.W. 454, 455 (1918)).

Here, the Littles offered no affirmative evidence to support their burden of proving that appellees used the road by permission rather than under a claim of right. Appellees, by contrast, satisfied the “very slight evidence” standard by producing evidence that they continued using the road in a manner consistent with a belief that they were entitled to do so indefinitely. From David Hall’s burial in 1949 until the road was blocked by the Littles in May 1997, appellees maintained and kept the road clear for travel. Even after appellants acquired the property in 1965, appellees continued to use the road to access the cemetery, bury their dead, and maintain and visit the gravesites. Appellee Forest Dean Hall testified that he believed appellees “owned” the road after more than forty years of traveling it.

Appellees thus used the road in an unobstructed, open, peaceable and continuous manner, under a claim of right, for approximately sixteen years before,

and thirty-two years after, appellants obtained the property. By acquiring land traversed by a road, appellants were chargeable with knowing that the road was used under a claim of right. *Blue v. Haner*, 395 S.W.2d 762, 763 (Ky. 1965); *Cox v. Blaydes*, 246 Ky. 121, 54 S.W.2d 622, 624 (1932); *Wright v. Willis*, 23 Ky. L. Rptr. 565, 63 S.W. 991, 993 (1901). The trial court did not err by finding on remand that appellees used the road under a claim of right and acquired a prescriptive easement across the property.

The Knott Circuit Court's judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEES:

William Lewis Collins
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