

RENDERED: NOVEMBER 4, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001571-MR

TIMOTHY D. ISON AND
KAREN E. ISON, HIS WIFE

APPELLANTS

v. APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 02-CI-00212

HAROLD TUSSEY AND
SHERLYN TUSSEY, HIS WIFE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MINTON AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Harold and Sherlyn Tussey brought this action to establish an easement across a tract of land owned by Timothy D. Ison and Karen E. Ison. The circuit court found an easement by necessity entitling the Tusseys to a right-of-way across the Ison property. We affirm.

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In 1998, the Isons purchased a 200-acre tract of land in Greenup County from Walter Arnn and Teresa Arnn; in 2001, the Tusseys purchased an adjoining 115-acre tract from William and Helen Worley. Both tracts were originally part of a larger 9,531-acre tract from which a 750-acre tract was deeded to William Sowards in 1898. It is that deed which contains both the Ison and the Tussey tract. In 1907, William and his wife conveyed the Ison tract to Travis R. Horton and Mattie L. Horton, and in 1909, conveyed the Tussey tract to M.S. Greathouse. The deed conveying the Tussey tract expressly states that the "party of the first part binds themselves to keep open a sufficient road-way up and down the Tarklin (sic) Branch to afford ingress and egress to and from the above described land." The Horton deed, which is in the Ison chain of title, does not contain an express easement. The circuit court found that the absence of the easement in the Ison chain of title precludes the existence of an express easement. The Tusseys have not filed a cross-appeal leaving this finding unchallenged.² The sole issue to be considered by this court is whether the circuit court properly found that the Tusseys are entitled to an easement by necessity across the Ison property.

² For reasons not relevant to this appeal, the circuit court also rejected the Tussey's claim that there is a prescriptive easement. The Tusseys have not challenged this finding.

Under CR³ 52.01 our standard of review on factual issues is clearly erroneous; questions of law, however, are reviewed de novo. We find there is ample evidence to support the circuit court's findings, and that in its well written judgment, it properly applied the law.

An easement by necessity is one based on the policy favoring beneficial use of property and exists in favor of the dominant estate, whether used or not, if necessary for access.⁴ The prerequisites to its creation are "(1) unity of ownership of the dominant and servient estates; (2) severance of the unity of title by a conveyance of one of the tracts; and (3) necessity of the use of the servient estate at the time of the division and ownership to provide access to the dominant estate."⁵ Under the "strict necessity" standard, mere inconvenience of an alternate access will not support an easement by necessity and, when any portion of the claimant's property abuts or has direct access to a public road, the courts have rejected the creation of an easement.⁶

In this case, prerequisites one and two are clearly met. Both tracts are from a larger tract conveyed by a common

³ Kentucky Rules of Civil Procedure.

⁴ Carroll v. Meredith, 59 S.W.3d 484 (Ky.App. 2001).

⁵ Id. at 492.

⁶ Id.

grantor to the Isons' and the Tusseys' predecessors in title. The issue of necessity, however, requires a finding of fact that must be supported by the record.

Harold Tussey testified that absent the right-of-way he claims, there is no other access to his property and it is landlocked. He recalled that there has been an established roadway across the Ison property to that which he now owns for the past thirty-five years.

In addition to its own viewing of the property, the circuit court heard testimony from others who lived in the area, including Thurman and James Archey whose father, Pete Archey, once owned the Ison property. They recalled that the family and general public used the right-of-way claimed across the Ison property to access the Tussey property.

Ronald Queen owned the Ison tract from 1982 to 1987 and recalled that Pete Archey built the road leading up Tarkiln Creek and beyond the Ison tract. When he owned the property, he believed there to be a right-of-way across his property leading to the Tussey property and that hunters and others occasionally used the road to access the Tussey tract.

Richard Howerton, Jr., a professional surveyor, examined both tracts and reviewed USGS topographic maps dating from 1953, and revised in 1978, and aerial photographs taken in 1960. Based on his review and expertise, he testified that

there is a road extending along the left side of Tarkiln Creek through the Ison tract to the Tussey tract. He further testified that there is no other public road leading to the Tussey tract and there exists a four-hundred foot drop bordering one side of the tract. Construction of any type of a roadway leading to the Tussey tract on property other than on the Ison tract would require a 33% grade, generally considered unacceptable for residential purposes

We agree with the circuit court's conclusion that an easement by necessity exists. At the time the Tussey tract was conveyed to M.S. Greathouse the parties to the deed recognized that there was no access to the property except for a right-of-way across what is now the Ison tract. Although any claim of an express easement must fail because it is not in the Ison chain of title, it is clear that there was a need for the right-of-way at the time of the severance of the unity of title and the right-of-way has been used as the sole means of access by past owners of, and visitors to, the Tussey tract.

The judgment is affirmed.

ALL CONCUR.

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