STATE OF VERMONT
WINDSOR COUNTY, SS

In re Petition of J. Michel Guité	WINDSOR SUPERIOR COURT Docket No. 232-4-09 Wrcv

DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

There is a farm in Hartland, Vermont, that has existed for more than two hundred years. It was settled for purposes of modern history by Isaiah Aldrich in approximately 1775, and his family lived on the farm for nearly eighty years. During that time, they established a small cemetery on a hilltop and buried several of their family members there.

The farm was later purchased by the King family in 1950, and they owned and lived upon the farm for more than thirty years. After the Kings passed away, their son, Jerome King, buried their cremated remains in the small hilltop cemetery. The family then sold the farm, but recorded an easement in their favor obligating subsequent purchasers to maintain the cemetery in a "neat and orderly condition," and to permit members of the King family to access the graves in the future.

In addition, at common law, "the establishment of a family burial plot create[s] an easement against the fee." *In re Estate of Harding*, 2005 VT 24, ¶ 11, 178 Vt. 139. The easement benefits the descendants of the person who established the family plot, and entitles them to visit and maintain the graves, to bury additional family members there if space permits, and "to protect the grave by taking legal action against anyone, including the owner of the fee, who would knowingly and wantonly disturb the grave without right to do so." *Id.*; *Johnson v. Kentucky-Virginia Stone Co.*, 149 S.W.2d 496, 498 (Ky. 1941); *Heiligman v. Chambers*, 338 P.2d 144, 148 (Okla. 1959); *Hines v. State*, 149 S.W. 1058, 1059–60 (Tenn. 1911). It is not necessary to record this easement in a deed. The common law implies these rights in order to enable the living to preserve and protect the memories of the dead.

Yet in the present lawsuit, the current owner of the property—petitioner J. Michel Guité—seeks a declaration that the deeded easement is void, and that the descendants of the King parents have none of the common-law rights described above. Petitioner takes the view that the Kings had no right to bury their parents on the hilltop because they did not obtain a town burial permit, and because the cemetery plot actually belonged in fee simple to the modern-day descendants of the Aldrich family that settled the farm in 1775. Petitioner seeks a ruling that the King graves are a continuing trespass, which must be removed.

It must be noted that petitioner's motivation in this case is to remove all of the graves from the hilltop cemetery so that he may build a new house in the same location. He has already succeeded in obtaining approval for removal of at least some of the Aldrich family graves through proceedings in the probate court under 18 V.S.A. § 5212. He now seeks rulings in this court that would, in effect, authorize removal of the King graves and clear the way for construction of his house.

In response to the petition, Mr. King, representing himself, has filed a counterclaim for declaratory and injunctive relief. He seeks confirmation of the common-law rights of his parents' descendants, including the rights to visit and maintain the cemetery without first seeking prior permission from the current owner of the farm, and to access the cemetery from the public road by means of the most commonly-used path. He also seeks an order requiring petitioner to restore the cemetery to the condition it was in prior to his purchase of the property in September 2008. It is apparent from the record that petitioner has removed some of the other headstones in the cemetery as well as the fence that once surrounded it.

Both parties have filed motions for summary judgment. The central issue is whether the King family owned the hilltop cemetery at the time of the burials of their parents. It is undisputed that they were the owners of the surrounding lands at that time, but petitioner contends that the cemetery lot was excepted out from the surrounding land by an 1853 deed, and that fee simple title to the cemetery belongs to the descendants of the Aldrich family. Mr. King contends that the 1853 deed merely created an easement in favor of the Aldrich family, and that the King family owned the fee underlying the cemetery at the time of the burials.

In assessing the cross-motions for summary judgment, the court evaluates each motion separately and views all of the evidence in the light most favorable to the non-moving party. 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2720. The non-moving party is entitled to the benefits of all reasonable doubts and inferences. *Price v. Leland*, 149 Vt. 518, 521 (1988). Summary judgment is appropriate when there are no genuine issues of material fact for trial, and the record shows that either party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3).

Petitioner argues at the outset that Mr. King's motion for summary judgment is procedurally defective because it does not contain a separate statement of the undisputed facts supporting the motion as required by Vermont Civil Procedure Rule 56(c)(2). It is true that Mr. King's motion does not contain a separate factual statement, but it does not appear to the court that petitioner has been prejudiced as a result. Mr. King's memorandum makes it clear that he is challenging petitioner's ability to adduce sufficient evidence to support the interpretation that the 1853 deed excepted a fee simple estate rather than merely an easement. Petitioner has not only responded by opposing the motion, but has also filed a cross-motion for summary judgment on the same issue. In the process, petitioner has filed a statement of facts supporting his contention that the deed excepted a fee simple estate. Mr. King has not opposed those facts; they are accordingly taken as true herein. In short, the disputes here are legal, rather than factual.

The court finds no prejudice in adjudicating the cross-motions for summary judgment on the basis of the undisputed factual record. *State v. Great Northeast Productions, Inc.*, 2008 VT 13, ¶¶ 6–8, 183 Vt. 579 (mem.).

I.

The following facts are established for purposes of summary judgment and set forth in the light most favorable to petitioner. The farm was settled in approximately 1775, and the Aldrich family thereafter owned and operated the farm for nearly eighty years. During that time, several family members came to be buried in a small hilltop cemetery on the farm. At least three family members were buried there, and perhaps more. The farm remained within the family until 1853, when the remaining family members dispersed westward after selling the farm to one Avery Colston.

The hilltop cemetery was mentioned in the 1853 deed. The deed conveyed "all the land" that the family owned in the town, consisting of approximately one hundred and twenty acres, "[e]xcepting out of the above described premises 41 feet of ground by 27 feet which is the burying ground on said premises." The deed does not elaborate on whether the family meant to retain fee simple title to the cemetery or rather an easement. Yet there is no evidence in the record that the family ever recorded a separate deed to the cemetery plot, nor is there any evidence that the family ever paid property taxes on the cemetery.

The cemetery exception was noted in all of the subsequent deeds transferring the farm. Mr. King's parents eventually purchased the farm in 1950 and evidently lived there with their family for many years. After they passed away, Mr. King buried both of their cremated remains in the cemetery in approximately 1981. He did not obtain burial permits from the town before he did this, and he did not seek out permission from any remaining members of the Aldrich family, wherever they might have been.

Mr. King thereafter sold the property on behalf of the family trust in 1983 to one Stacey Sevano. In the deed conveying the property, Mr. King included some additional language pertaining to the cemetery:

> The reservation in fee of the cemetery "41 feet of ground by 27 feet which is the burying ground on said premises" appears at Volume 16, Page 240 of the Hartland Land Records. It is the mutual wish of the Grantors and the Grantee that the burial ground be maintained; by acceptance of this deed the Grantee for herself and her heirs and assigns agrees to keep the burial ground in a neat and orderly condition permitting such reasonable access to the cemetery as may be desired by the Grantors and their successors and assigns . . . .

The farm thereafter passed through several different owners, and came to be purchased by petitioner in September 2008. Petitioner knew that the cemetery was there when he bought the property, and his purchase-and-sale agreement was conditioned on petitioner's ability to relocate the cemetery so that he might build a house in the same location.

II.

The primary question is whether the grantors of the 1853 deed retained a fee simple interest in the cemetery, or whether the grantors instead meant to retain an easement benefitting the descendants of those buried in the cemetery. The role of the court in answering this question is to consider the deed as a whole and attempt to ascertain the intent of the grantor so far as possible under the circumstances. *Kipp v. Chips Estate*, 169 Vt. 102, 105 (1999).

Petitioner contends that the language of the 1853 deed is enough to identify the interest retained by the Aldrich family. He notes that they used the verb "excepting" rather than the verb "reserving," and argues that exceptions are generally used to take fee simple interests out of conveyances that would otherwise pass, whereas reservations are used to create easements in the property conveyed. Yet recent case law makes clear that these terms have been used interchangeably and synonymously over the years, *In re Estate of Harding*, 2005 VT 24, ¶¶ 8–12, 178 Vt. 139, and there are many examples of cases in which grantors have excepted easements from property conveyances. E.g., *Sargent v. Gagne*, 121 Vt. 1, 9–10 (1958); *Nelson v. Bacon*, 113 Vt. 161, 169 (1943); *Haldiman v. Overton*, 95 Vt. 478, 481–82 (1922). On its own, therefore, the verb "excepting" is ambiguous, and is not enough to identify the property interest retained by the family. The court must therefore look beyond the language of the deed and attempt to discern the intent of the grantor from the surrounding circumstances. *Estate of Harding*, 2005 VT 24, ¶ 8.

Here, all of the available evidence points towards the conclusion that the Aldrich family meant to retain an easement in the burial plot. Of paramount importance is that there is no evidence that the family ever recorded a separate deed to the cemetery lot or paid taxes on it. As Mr. King points out, "[i]f they had intended to pass the cemetery along from generation to generation among Aldrich descendants there would surely be a document or other deed somewhere to indicate this." Moreover, the family already had an easement under the common law that gave them the rights to visit and maintain the graves, and to conduct future burials there. It makes sense that they would have wanted to record that easement so that future owners would be aware of it.

It is also noteworthy that the family dispersed westward after selling the farm; it is unlikely that they would have wanted to keep fee simple title to land in Vermont, especially where an easement would have protected their interests in the property. Fee simple interests become complicated to manage as they are passed down through generations in ever-decreasing fractional proportions, and they can be lost through nonpayment of property taxes. Given these circumstances, an easement in fee makes

much more sense, since it would have guaranteed the descendants the rights to visit and maintain the graves without the administrative burdens associated with fee ownership.

Petitioner points to the 1983 King-to-Sevano deed, which described the cemetery as having been "reserv[ed] in fee" by the Aldrich family. This, however, is not evidence of what the Aldrich family intended.

Petitioner also contends that there are factual differences between this case and *Estate of Harding*. It is true that the deed here was generally more descriptive as to the size of the cemetery lot than the one prepared by Caleb Harding. It is also true that the cemetery here can be located on the ground with some precision. But the court is not persuaded that these factual differences show that the Aldrich family meant to retain a fee simple interest in the cemetery, or that they show that the family ever treated the cemetery as their own at any time between 1853 and present. For these reasons, the court concludes that the Aldrich family intended to retain an easement in the cemetery through the 1853 deed.

III.

The question then becomes identifying the ownership interests in the cemetery at the time of the King burials. The common-law rules are that the fee ownership of the cemetery passes along with the surrounding property in the event of a conveyance, but that the owner takes the property subject to the rights of the easement-holders to visit and maintain the grave and to conduct further burials in the cemetery if there is room. *Estate of Harding*, 2005 VT 24, ¶ 11; *Aldridge v. Puckett*, 278 So.2d 364, 366 (Ala. 1973); *Heiligman v. Chambers*, 338 P.2d 144, 148 (Okla. 1959). Cemetery easements are essentially a way of reserving ground for future family burials, and of ensuring that descendants will be able to preserve "for their loved ones who passed on before [them] a proper resting place, that their memory might be preserved as a comfort and pleasure throughout the remaining life of the survivor." *In re Wilson's Estate*, 15 P.2d 825, 827–28 (Okla. 1932) (dissenting opinion).

Here, therefore, the King family owned the cemetery in fee at the time of the burials, subject only to the easement rights held by the descendants of the Aldrich family.

It may be questioned whether the burial of the King parents infringed upon the rights of the Aldrich family to maintain the cemetery for themselves, and to conduct further burials there. But it does not appear from the present record that the Aldrich family has engaged in any such dispute. They have not exercised their right to burial in more than a century. More importantly, they are not parties to this case, and even if they were, there would be legitimate issues surrounding the fact that the King parents have been laid at rest in the cemetery for nearly thirty years at this point. The purposes of the statutes of limitation in promoting finality and repose would be well-served under these circumstances.

As a subsequent purchaser of the farm, petitioner took the farm subject to the easements that were established before him. This makes sense, given that the Kings had owned the farm for more than thirty years at the time they buried their parents. Their rights under the common law to establish a family burial plot on their property were first in time as against any rights belonging to subsequent purchasers. And the family's choice to bury their parents on the farm embodied the deeply-held and shared human impulse to preserve and protect the memories of the dead in a peaceful resting place—an ideal that has been woven into the cultural fabric since at least the writing of the Old Testament,[1] and which demands reverence and respect. Common decency requires that the final resting place they chose "be held to be paramount as against all persons except any who can show a superior title or right of easement." See *Turner v. Joiner*, 48 S.E.2d 907, 913 (Ga. Ct. App. 1948) (discussing standing to maintain an action for desecration of a grave).

Petitioner has made no such showing here. Neither law nor equity supports the assertion that a subsequent purchaser has a better claim to the land than those who were laid to rest there by the owners before him. And it is disingenuous for petitioner to claim the mantle of the Aldrich family in attempting to accomplish his goals. His aim is not to protect the graves and the memories of the dead by preserving the spot the Aldrich family ancestors chose as their final resting place, but rather to remove them entirely from the hilltop so that he may build a house there.

In short, petitioner has no standing to contest the legitimacy of the King burials. Actions for trespass, and assertions of similar rights in petitions for declaratory judgment, require the petitioner to establish an invasion of *his* right to immediate possession. *Dessureau v. Maurice Memorials, Inc.*, 132 Vt. 350, 351–52 (1974); *Huntley v. Houghton*, 85 Vt. 200, 205 (1911). Any rights that petitioner has to immediate possession of the cemetery are subject to the superior easement rights held by the Aldrich family and the King family. Petitioner therefore has not established a claim in his own right, and he has no standing to assert rights on behalf of the Aldrich family. *Bischoff v. Bletz*, 2008 VT 16, ¶¶ 15–16, 183 Vt. 235.

Petitioner also has no standing to challenge whether the King family obtained the proper burial permits from the town, and whether the King family followed prescribed burial procedures. Title 18, V.S.A. does provide some procedures for burials, but it does

[1] Genesis recounts that Abraham and Sarah were in the land of Canaan when Sarah died. Although offered the opportunity to bury Sarah for free, Abraham insisted on buying a cave near Mechpaleh and burying her with his own hands, according to his own customs. Abraham himself was later buried in the same cave by his sons, and his descendants were buried there after him. His grandson Jacob later expressed his own final wish to be buried in the cave, after speaking with each of his twelve sons upon his deathbed: "I am to be gathered unto my people; bury me with my fathers in the cave that is in the field of Mechpaleh . . . there they buried Abraham and Sarah his wife; there they buried Isaac and Rebekah his wife; and there I buried Leah." Jacob's last wish to be "gathered unto his people" was honored. See Genesis 23:17–20; 25:9; 35:29; 49:29–33. This story is recounted in a number of the early common law cases in this country as an example of the revered custom of family burials. See, e.g., *Town of Chatham v. Brainerd*, 11 Conn. 60 (1835); *In re Wilson's Estate*, 15 P.2d 825, 827–28 (Okla. 1932) (dissenting opinion); *Ritter v. Couch*, 76 S.E. 428 (W. Va. 1912) ("If relatives of blood may not defend the graves of their departed, who may?").

not create a private cause of action enabling subsequent landowners to capitalize upon irregularities in the burial practices of their predecessors.

Petitioner also suggests that overeager cemetery enthusiasts explored the cemetery a few years ago looking for ancient graves, and that in the process they punctured the King urns and perhaps scattered some or all of the King ashes to the four winds. The court finds the suggestion to be wholly immaterial. It is undisputed that Mr. King actually buried his parents' remains in the graveyard and there is no indication that the Kings have ever consented to removal of the same. There is no support for a finding of abandonment here, and no reason to believe that the cemetery rights bestowed by the common law might be erased, in effect, by vandalism.

For the foregoing reasons, the court holds that the Kings established their own family burial plot within the hilltop cemetery during their ownership of the farm. As such, there is an implied easement that benefits the descendants of the King parents,[2] and a recorded easement that places subsequent owners of the farm on notice of their obligation to "keep the burial ground in a neat and orderly condition permitting such reasonable access to the cemetery as may be desired by the King family." Any interest that petitioner now owns in the property is subject to those easements.

IV.

The scope of the rights afforded by the common-law easement include the rights to visit and maintain the cemetery "at seasonable times and in a reasonable manner," to access the cemetery from the public road, to future burials within the family plot as space permits, to reasonable memorial services, to maintain headstones or other such markers as are customary in the community, and to enclose the cemetery with a reasonable fence or wall. *Estate of Harding*, 2005 VT 24, ¶ 11; *Hines v. State*, 149 S.W. 1058, 1059 (Tenn. 1911); *Mingledorff v. Crum*, 388 So.2d 632, 636–37 (Fla. Ct. App. 1980). It is not necessary for the easement holders to call ahead to schedule visits, to limit themselves to some specific number of visits per year, or to abide by specifications as to the dimensions and manufacture of any memorial objects that might be placed within the cemetery, but it can be safely said that the scope of the easement does not include the right to conduct other social events within the confines of the cemetery. The touchstone is reasonableness. Each of the common-law rights must be exercised in a dignified manner consistent with the traditional uses of a cemetery.

Mr. King's counterclaim requests a declaration that the descendants of his parents are entitled to the common-law rights described above. For the foregoing reasons, the request is granted.

Mr. King is also entitled to an injunction requiring petitioner to restore the property to the condition it was in prior to petitioner's purchase of the cemetery. Petitioner must at the very least restore the fence, or some other reasonable enclosure,

[2] Since it is clear that the common-law easement benefits the descendants of those interred in the cemetery, the court finds it unnecessary to consider whether the recorded easement is inheritable or not.

and refrain from further damaging the King burial grounds. The "neat and orderly" standard referenced in the deed appears to the court to contemplate essentially that the cemetery be left alone and to its own peace, other than routine maintenance, so that it is preserved both for the benefit of those at rest and those descendants still living.

The King family does not have standing to protect the Aldrich graves or assert rights on behalf of that family. The injunction accordingly does not require petitioner to restore any Aldrich headstones or human remains that have already been removed from the cemetery; nor does it prevent petitioner from removing the same from the Aldrich family burial plot in the future. But it does require petitioner to otherwise restore and maintain the rest of the cemetery itself in a neat and orderly fashion.

Mr. King's motion for alternative relief is denied. The court will not appoint a historical society to preserve the cemetery. It is the responsibility of the easement-holders to assert the rights they have reserved for themselves.

Finally, petitioner's motion for default judgment against respondent Nathalia King is denied under Rule 55(b)(3), since petitioner has not established that he is entitled to the relief he seeks.

ORDER

(1) Petitioner's Motion for Default Judgment Re: Nathalia King (MPR #2), filed July 16, 2009, is ***denied***;

(2) Respondent Jerome King's Motion for Summary Judgment (MPR #3), filed December 1, 2009, is ***granted***;

(3) Respondent Jerome King's Motion for Alternative Relief (MPR #5), filed December 30, 2009, is ***denied***;

(4) Petitioner's Cross-Motion for Summary Judgment (MPR #6), filed January 4, 2010, is ***denied***; and

(5) A final judgment order shall issue separately.

Dated at Woodstock, Vermont this 21 day of May, 2010.

Hon. Harold E. Eaton, Jr.
Presiding Judge

STATE OF VERMONT
WINDSOR COUNTY, SS

In re Petition of J. Michel Guité	WINDSOR SUPERIOR COURT Docket No. 232-4-09 Wrcv

FINAL JUDGMENT ORDER

Based upon rulings of court of even date, it is ORDERED and ADJUDGED that:

(1) The descendants of Robert and Dorothy King, including respondents Jerome King and Nathalia King, are entitled to the cemetery rights afforded by the common law, including the rights to visit and maintain the cemetery at seasonable times and in a reasonable manner, to access the cemetery from the public road across the lands currently owned by Guité, to future burials within the family plot as space permits, to reasonable memorial services, to maintain headstones or other such markers as are customary in the community, to enclose the cemetery with a reasonable fence or wall, and to protect the grave. Each of these rights must be exercised in a reasonable and dignified manner consistent with the traditional uses of cemeteries.

(2) Petitioner J. Michel Guité must not interfere with the reasonable exercise of the aforementioned rights.

(3) Petitioner J. Michel Guité must restore the cemetery to the condition it was in prior to his purchase of the cemetery. This means, at the very least, that he must restore the fence, or some other reasonable enclosure, surrounding the cemetery. He must also maintain the cemetery in a "neat and orderly" condition, which means to leave the cemetery to its own peace, other than routine maintenance.

Dated at Woodstock, Vermont this 21 day of May, 2010.

Hon. Harold E. Eaton, Jr.
Presiding Judge