STATE OF VERMONT
WASHINGTON COUNTY, SS.

FILED
2002 DEC -2 A 10:

SUPERIOR COURT
VT

HOWARD FLETCHER	)	
	)	
v.	)	**Washington Superior Court**
	)	**Docket No. S 376-7-01 Wncv**
	)	
HENRY W. FERRY	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the court for a hearing on the merits on September 19 and 23, 2002. Plaintiff is represented by Edward Kenney, Esq. Defendant is represented by Robert Bent, Esq. A view of the property at issue was taken on September 23, 2002. Based on the evidence admitted and after consideration of the arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law.

The parties own adjoining properties on and off the Moscow Woods Road in East Calais. The claims and counterclaims relate to whether or not Henry Ferry (hereinafter Ferry) holds an easement for a right of way across the parcel of Howard Fletcher (hereinafter Fletcher), and the proper location of their common boundary at the east, or "back" end, of Fletcher's land. An additional issue that has arisen during the course of this litigation is whether Fletcher holds an easement across Ferry's land at Fletcher's point of access on to the Moscow Woods Road.

Findings of Fact

Fletcher owns a one-half acre parcel with a dwelling on it that was formerly a camp and is now his residence. All parties believed that Fletcher's parcel had narrow frontage on Moscow Woods Road where his driveway is, although a survey has subsequently revealed that the parcel does not front directly on Moscow Woods Road, but is set back approximately 20-30 feet from the road such that it is necessary to cross a short stretch of the land of Ferry (the so-called "Davis front lot" of Ferry described in more detail below) to access it on Fletcher's driveway. Ferry does not dispute that Fletcher and his predecessors have used this access to the Fletcher parcel without permission for a period well in excess of 15 years.

Ferry owns two different parcels that adjoin Fletcher's land. The one primarily at issue in this case, the so-called "Scribner woodlot," was at one time held in common ownership with the Fletcher parcel. It consists of 35.5 acres, more or less, and has no road frontage. It is located "behind" (in relation to the Moscow Woods Road) and beside the Fletcher parcel, along the east

and southern sides of the Fletcher parcel. The exact location of the common boundary between the 'Scribner woodlot' and Fletcher's east (back) line is disputed in this case. The 'Scribner woodlot' has many old logging roads criss-crossing it. It is divided down the middle by a steep gully that splits it into a north portion and a south portion.

Ferry's other parcel is the "Davis front lot," which consists of 15 acres in a triangular shape with 1,177.3 feet of frontage on Moscow Woods Road. It is located south of the Fletcher parcel and west of Ferry's 'Scribner woodlot.' It is across the northern tip of the triangle of the 'Davis front lot' that Fletcher has access to his parcel. The portion along Moscow Woods Road is low and swampy. Toward the southern end the land is sufficiently dry that a vehicle can drive across it to Ferry's 'Scribner woodlot.'

Fletcher acquired his parcel on November 19, 1998. Ferry acquired the 'Davis front lot' on January 5, 2000 and the 'Scribner woodlot' on May 25, 2000.

The Fletcher parcel and the 'Scribner woodlot' were held in common ownership in 1934 by Kimball B. Blodgett. He sold a parcel described as 36 acres to Ellen Scribner by warranty deed dated May 22, 1934. In that deed he reserved "all four foot wood now cut on the premises, about 50 wood logs now cut, all trees now marked on said premises and small lumberman's shack now on said premises."

On November 1, 1935, Ellen Scribner conveyed the parcel that Fletcher now owns to Lew Leonard and Ruth Leonard by warranty deed. Also conveyed were the right to a spring of water about 3 rods northeast of the lot, with a right of way to repair the aqueduct to said spring. In the deed, Ellen Scribner reserved the right to cross the lot conveyed "in the road to reach the remainder of the lot which I own." The conveyance of the Fletcher parcel to Leonard cut the remainder, which is the 'Scribner woodlot,' off from having any frontage on the town road. Additionally, the deed required "said Leonards to build and maintain all fences around the within conveyed lot." Ellen Scribner continued to own the remainder, the 'Scribner woodlot,' together with the right of way access she had reserved, until her death on May 21, 1966.

The Fletcher parcel remained in the ownership of Lew and Ruth Leonard from November 1, 1935 until June 13, 1961, when it was conveyed to Charles W. Scribner and Ellen K. Scribner, husband and wife, together with all spring water rights and privileges belonging with the property.

On May 21, 1966, when Ellen Scribner died, her husband Charles became sole owner of the Fletcher parcel. On June 4, 1966, Charles Scribner conveyed title of it to himself and his son Franklin C. Scribner through a straw transfer. Thus, the Fletcher parcel was owned by Charles and Franklin C. Scribner as joint tenants with rights of survivorship beginning on June 4, 1966.

The 'Scribner woodlot,' which had been held by Ellen Scribner in her name alone from 1934 until her death in 1966, had no changes made to its title for several years after her death.

Ellen Scribner's two heirs were her husband Charles Scribner and her son Franklin C. Scribner, but no estate was probated for her.

On January 12, 1972, Charles Scribner died. At this time his son, Franklin C. Scribner, became sole owner of the Fletcher parcel as surviving tenant of the joint tenancy with right of survivorship.

Title of record to the 'Scribner woodlot' remained unchanged, and was still in the name of Ellen Scribner, although she had died six years earlier. As of January 12, 1972, Franklin C. Scribner was heir to a one-half interest in the 'Scribner woodlot' as heir of his mother, and heir to a one-half interest as heir of his father, subject to administration expenses and claims of creditors in each of their estates. No estate was probated for either of his parents, at least as reflected in documents of record related to the 'Scribner woodlot.'

On May 26, 1973, Franklin Scribner conveyed title to the Fletcher parcel through a straw transfer to himself, his wife Frieda Scribner, and their son Charles F. Scribner as joint tenants with right of survivorship. In the straw deeds from Franklin Scribner to the straw person (M. Wesley Benjamin) and from the straw person to Franklin, his wife Frieda, and their son Charles F. Scribner, no mention is made of the Fletcher parcel being conveyed subject to an easement benefitting the 'Scribner woodlot.'

In April of 1974, a Decree of Distribution in the Estate of Ellen Scribner decreed a one-half interest in the 'Scribner woodlot' to her husband Charles Scribner (already deceased), and a one-half interest to Franklin Scribner.

On June 15, 1974, Franklin and Frieda Scribner and their son Charles, who owned the Fletcher parcel, conveyed it to Franklin's cousin Harriet Ross, and Jo Ann Ross. The warranty deed does not specify that the conveyance is subject to an easement benefitting the 'Scribner woodlot,' but it was described as all and the same land with buildings thereon that were conveyed to Charles W. Scribner and Ellen K. Scribner by warranty deed of Lew W. Leonard, with the same spring rights and privileges belonging thereto, all as described in said deed. Reference was made to all former deeds for a more complete description.

The Rosses owned the Fletcher parcel from June of 1974 until November 19, 1989. During that time essentially no use was made of the 'Scribner woodlot,' which the Scribner family considered to be of little value. Harriet Ross knew that there was a right of way across the Fletcher parcel to the 'Scribner woodlot,' but she did not know where it was at the back, although she figured that at the front part of the lot, it was where the driveway was. On November 19, 1989, the Rosses sold the Fletcher parcel to Plaintiff Howard Fletcher. The warranty deed from Harriet Ross and Jo Ann Ross to Howard Fletcher does not specify that the conveyance is subject to an easement benefitting the 'Scribner woodlot.'

No changes to record title of the 'Scribner woodlot' took place until July 15, 1998, the

date of recording of an Amended Decree of Distribution in the Estate of Charles W. Scribner, which decreed the parcel to the Estate of C. Franklin Scribner (also known as Franklin C. Scribner, and the son of Ellen and Charles Scribner), who had died. The same day, July 15, 1998, the 'Scribner woodlot' was decreed by Decree of Distribution in the Estate of C. Franklin Scribner to the Estate of Frieda B. Scribner (1/3 share) and to Charles F. Scribner, Patricia L. Bouchard, and Diane E. Scribner, jointly (2/3 share). The following year, on July 6, 1999, a 1/3 share was decreed by Decree of Distribution in the Estate of Frieda B. Scribner to Charles F. Scribner, Patricia L. Bouchard, and Diane E. Scribner, who thereby acquired ownership of all interests in the 'Scribner woodlot.' They sold the parcel to Defendant Henry Ferry on May 25, 2000. The deed to Henry Ferry specifically conveys a right of way across the Fletcher parcel, which is the same right of way as was reserved by Ellen K. Scribner in the deed to the Leonards dated November 1, 1935.

On June 20, 2000, after an on-site meeting between Henry Ferry and Howard Fletcher, Mr. Ferry wrote to Mr. Fletcher and advised that he intended to use the right of way, although he did not do so in 2000. Mr. Fletcher did not respond. Mr. Fletcher did not recognize the existence of the right of way, as the deed to him had not mentioned it. In late 2000, Henry Ferry arranged for a survey of the property by licensed surveyor Lisa Ginett. The surveyor attempted to locate the right of way on the ground. From the Moscow Woods Road, there is only one route possible on the Fletcher parcel for the first third of the length of the Fletcher parcel. It was visible on the ground to the surveyor, and corresponded to the length of the driveway that passes to the right of the dwelling on the Fletcher residence. Beyond the dwelling, the surveyor could no longer locate a right of way on the ground.

There is a logical route that joins up with one of the logging roads that criss-crosses Ferry's 'Scribner woodlot,' but its exact course is no longer clear on the ground. There are trees toward the back of the Fletcher parcel with no clear path or old logging road through them. Nonetheless, it is possible to pass through the trees easily, and an access road could have existed there. The location claimed by Mr. Ferry is the most logical route because it is the place where a brook can be crossed without a bridge or other structure, which would be needed at any other location. In 2001 Henry Ferry cut two trees growing in this route, trimmed some branches from trees alongside it, and drove his small farm tractor across the Fletcher parcel along its course. The tractor left tire track patterns in the soft wet earth that is a small portion of where Henry Ferry believes the right of way is located. His surveyor has shown this route as "Proposed ROW Route" on the survey map she prepared for Mr. Ferry.

Mr. Fletcher disputed Mr. Ferry's right to cross his land, and brought this action, seeking declaratory and injunctive relief and damages for trespass as well as punitive damages. Mr. Ferry claims a legal right to cross the Fletcher parcel for access to his 'Scribner woodlot,' and seeks a declaration of the location of the common boundary at the rear (east) end of the Fletcher parcel. After the dispute had developed, Mr. Ferry located more fragments of barbed wire than his surveyor had, as well as a looped piece that could have been part of a gate. These pieces of wire are located closer to Mr. Fletcher's dwelling than the surveyor has located Mr. Fletcher's rear

(east) boundary line. Mr. Ferry seeks a declaration that the fragments of wire show the boundary line, based on an argument that this was the boundary used by the parties after the 1935 deed from Ellen Scribner to the Leonards in which the Leonards were obligated to fence the lot. He wishes to establish ownership along the barbed wire fragments line rather than where his surveyor has located his property line. Such a result would increase the size of the 'Scribner woodlot' and decrease the size of the Fletcher parcel. The boundary as located by his surveyor results in a portion of one of the woods roads that criss-crosses the 'Scribner woodlot' encroaching on the Fletcher parcel, whereas a boundary line based on the barbed wire fragments would not.

Mr. Ferry claims that he is concerned for his personal safety as a result of an incident between Mr. Fletcher and Mr. Ferry when the issue of the right of way across Mr. Fletcher's land first came up. The incident took place about 11:00 am in the morning. Mr. Ferry says that Mr. Fletcher raised a knife to 9-12 inches from his face during a conversation that lasted 20-30 minutes. Mr. Ferry was 70 years old at the time, and Mr. Fletcher is 5-6" taller. Mr. Ferry also claims that once when he drove by during hunting season, Mr. Fletcher held a deer rifle up in his direction. Mr. Ferry's testimony that Mr. Fletcher's conduct was assaultive is an exaggeration based on his emotional involvement and is not credible, although a preponderance of the evidence establishes that there was an emotional conversation that took place between the two men when the issue of the right of way first emerged. Two other people were present. The police were notified, but no charges were brought.

Mr. Fletcher says that Mr. Ferry has stood and stared in the Moscow Woods Road looking up his yard, causing concern and discomfort, when Mr. Fletcher is minding his own business on his own property. In any event, the difficult issue of the right of way has since been addressed in a civil manner between the parties and their attorneys. Mr. Fletcher and Mr. Ferry have recently met jointly, without others present, to attempt to work out a resolution, without physical incident or intimidation. There is no proof by a preponderance of the evidence that at present either party represents a risk to the personal safety of the other.

Conclusions of Law

Fletcher has styled his claims into seven counts as follows: I) trespass for entering the disputed easement area, cutting trees, and leaving ruts; II) punitive damages based on the count I trespass; III) a request for injunctive relief based on the count I trespass; IV) extinguishment of the alleged easement by abandonment or as a limited easement in gross; V) adverse possession of Fletcher's entire lot; VI) adverse possession extinguishing the alleged easement benefitting Ferry; and VII) extinguishment of the alleged easement by merger. Additionally, Fletcher claims a prescriptive easement where his driveway crosses the Davis front lot. Ferry seeks declaratory judgment with regard to his claimed easement and the disputed eastern boundary of the Fletcher lot, and an injunction against Fletcher to restrain physical intimidation.

I. Existence of Easement Burdening the Fletcher lot and benefitting the Scribner Woodlot

The predominant issue in this case is whether Ferry holds an easement across the Fletcher lot allowing access to the Scribner woodlot. Fletcher does not dispute that such an easement was created expressly in deed language at the time Ellen Scriber divided the Blodgett lot. Fletcher argues that this easement is now extinguished and a new easement was never created.

Fletcher raises several arguments to support his claim that the easement no longer burdens his land as a matter of law. In Count IV, he argues that the easement was in gross and therefore did not pass in the chain of title to Ferry; and alternatively that the easement was abandoned. Neither of these arguments has merit. An easement in gross is a "personal easement" intended to benefit a holder rather than the parcel. "Because a personal easement exists apart from a holder's ownership of land, there is no dominant tenement, and the easement expires when the property is conveyed unless specifically reserved." Barrett v. Kunz, 158 Vt. 15, 18 (1992). Appurtenant easements, on the other hand, benefit the land and pass to a new owner "even if the specific language of the right-of-way is not repeated." Id. In this case, nothing in the deed language suggests an intent to limit the easement to Ellen Scribner's personal benefit and exclude benefits to subsequent owners of the Scribner woodlot. Without an appurtenant easement, Ellen Scriber's division of the Blodgett parcel necessarily would have given rise to a landlocked parcel when it was conveyed out of her possession. The easement is appurtenant and its benefit runs with the land, even if the deed language was not repeated.

Fletcher also argues that the benefit of the easement was abandoned somewhere in the chain of title. "The burden on the party claiming an abandonment of an easement is a heavy one: Such an abandonment may be established only by 'acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence.'" Lague, Inc. v. Royea, 152 Vt. 499, 503 (1989). The record supports no more than periods of nonuse, which alone are not sufficient to demonstrate abandonment.

Fletcher claims in Counts V and VI that the easement was extinguished by adverse possession. "To extinguish an easement by adverse possession, [Plaintiff] must show an ouster of the dominant owner of the easement by open, notorious, continuous, hostile and adverse possession of the [easement] for the statutory period of fifteen years." 12 V.S.A. § 501, Okemo Mt., Inc. v. Town of Ludlow Zoning Bd. of Adjustment, 164 Vt. 447, 452 (1995). Harriet Ross, one of the owners of the Fletcher lot from 1974 until November 19, 1989, agreed that an easement existed, and no other evidence suggests any "hostile" possession by the Rosses. Fletcher's sole claim of adversity is use of the easement area as a lawn, which is insufficient to show adversity because the lawn did not preclude use of the easement area for access to the Scribner woodlot: the lawn on this property is simply an open area over which vehicles may pass. The record in this case is devoid of the sort of evidence that would show an ouster, such as construction of a building or barrier. Okemo at 453.

In Count VII, Fletcher claims that the easement was extinguished by a merger. In appropriate circumstances, the acquisition of two adjacent parcels, resulting in the "unity of ownership and possession" of adjoining parcels, extinguishes a right of way over one benefitting the other. Capital Candy Co. v. Savard, 135 Vt. 14, 15 (1976). See also Restatement (Third) of Property, §7.5 ("A servitude is terminated when all the benefits and burdens come into a single ownership."). The easement terminates because it "ceases to serve any function, and because no one else has an interest in enforcing the servitude." Id. Merger does not take place if there are any outstanding interests in the property or estate benefitted. Id., Comment d. The merger of estates is a question of intent. Ellis v. McClung, 683 N.E.2d 911, 918 (Ill.App. 1997). "The party asserting merger has the burden of proving a merger at trial." Id..

Fletcher claims that a merger occurred on January 12, 1972. On that date, Charles Scribner died, and Franklin Scribner, who had co-owned the Fletcher parcel as joint tenant with rights of survivorship, became the sole owner of the Fletcher parcel. Ellen Scribner had died intestate on May 21, 1966. At the time of her death, she was the sole owner of the Scribner woodlot. On May 26, 1973, Franklin Scribner deeded through a straw transfer the Fletcher parcel to himself, Frieda Scribner, and their son Charles F. Scribner. No estate was probated for Ellen Scribner at the time of her death, and a Decree of Distribution was not issued until April, 1974, at which time half of the Scribner woodlot was decreed to Charles Scribner, already deceased at the time, and the other half was decreed to Franklin Scribner. Plaintiff reasons that during the period from January 12, 1972 to May 26, 1973, Franklin Scribner was the sole owner of the Ferry parcel because by the rules of descent ownership of the entire Scribner woodlot vested in him. Fletcher urges the conclusion that despite the fact that the Decree of Distribution in the Estate of Ellen Scribner had yet to be issued, Franklin Scribner had unity of title, merging away the disputed easement.

The record is devoid, however, of any intent on the part of Franklin Scribner to join the two parcels in his ownership. In fact, between January 12, 1972 and May 26, 1973, his conduct shows the opposite. Even though he may have been the equitable owner by virtue of the laws of descent and distribution, he did nothing to put title to the Scribner woodlot in his name, and in fact changed the status of title of the Fletcher lot without doing anything to claim title to the Scribner woodlot. Moreover, prior to the Decrees of Distribution in the Estates of Ellen Scribner and Charles Scribner, the Scribner woodlot was subject to claims of creditors. Fletcher has not shown that there were no creditors, and at a minimum, the estate property would have been subject to property tax obligations. Franklin Scribner had an anticipatory interest in the Scribner woodlot, subject to claims of creditors, which is not the same quality of title as full legal title.[1]

Moreover, "[t]he merger of estates is a question of intent." Ellis v. McClung, 683 N.E.2d 911, 918 (Ill.App. 1997). No evidence in this case suggests any intent to merge estates. Franklin

---

[1]The fact that the real estate was ultimately decreed in both estates, rather than sold to pay debts, does not prove that there were no debts against the property, as relatives could have paid those debts to avoid sale of the property in the estate.

Scribner's conduct does not manifest an intent to acquire ownership of the two parcels and use them as one. He acquired his interests in both properties passively, through operation of law, rather than through assembling them by purchase. The parcels came to him through two different chains of title, and he maintained the separation of title. He transferred title of the Fletcher lot to himself and his wife and son before any estate was probated for his mother, and he allowed the Scribner lot to remain partially in the name of his father's estate for the rest of his life, even though his father had died. He did not seek to confirm record ownership in his own name. This undercuts any argument that he intended to merge the properties and use them as one.

Plaintiff has failed to prove that the easement was extinguished by merger. Therefore, there is no reason to address Plaintiff's secondary, alternative argument that no easement was recreated by implication, which was raised only as an affirmative defense to Ferry's claim that even if the easement was extinguished by merger, it was recreated by implication. For the foregoing reasons, the court concludes that the easement that was created by Ellen Scribner on November 1, 1935 reserving an easement for access to the Scribner woodlot from Moscow Woods Road continues to burden the Fletcher lot in the location of the surveyed "Proposed ROW Route." Fletcher's claims in Counts I, II, and III for trespass and various types of relief are predicated on the extinguishment of the easement, and therefore fail.

The deed language creating the easement creates a general right of way without express description or limitation. "In such a case the owner of the easement is 'entitled to a convenient, reasonable, and accessible way, having regard to the interest and convenience of the owner of the land as well as their own.'" Patch v. Baird, 140 Vt. 60, 66 (1981) (quoting Lafleur v. Zelenko, 101 Vt. 64, 70 (1928)). The language creating the easement is: "Reserving the right to cross the lot herein conveyed in the road to reach the remainder of the lot which I own." This language provides for general access for all purposes. As to width, the language refers to "the road" in existence at the time. The court concludes that the driveway on the Fletcher lot is part of this road. Thus, the width along the full course of the easement is the same as the width of the driveway on the Fletcher lot where it joins the Moscow Woods Road.

The "owner of an easement cannot materially increase the burden of it upon the servient estate, nor impose a new or additional burden thereon." Dennis v. French, 135 Vt. 77, 79-80 (1977). Thus, while Ferry has the right to access the Scribner woodlot via the easement over the Fletcher parcel, he may not enlarge the use of the easement to use it for access to his other adjoining parcel, the Davis front lot. To do so would impose a burden on the servient estate beyond the scope of the existing burden of the easement.

II. Easement Burdening the Davis Front Lot and Benefitting the Fletcher Lot

Fletcher claims a prescriptive easement allowing access to his lot in the location of the portion of his driveway extending across Ferry's Davis front lot. Ferry does not dispute that Fletcher and his predecessors have used this access to the Fletcher parcel without permission for a period well in excess of 15 years. Fletcher and his predecessors in interest used the driveway in

an open, notorious, continuous, and hostile manner under a claim of right sufficient to support a prescriptive easement. See Community Feed Store, Inc. v. Northeastern Culvert Corp., 151 Vt. 152, 155-56 (1989). Fletcher has thereby acquired an easement by prescription providing access to his lot in the location of his driveway where it crosses the Davis front lot.

III. Eastern Boundary of the Fletcher Lot

Ferry seeks a declaratory judgment establishing the location of the eastern boundary of the Fletcher lot. Defendant claims that the location of the eastern boundary corresponds to where he found some pieces of fence, ostensibly constructed sometime in the past, perhaps after the deed to Leonard, to demarcate the boundary. The existence of fence fragments is insufficient evidence to prove by a preponderance of the evidence that Fletcher's predecessor in title acquiesced to the fence line as the common eastern boundary. Fences serve a variety of purposes, and are not always boundary fences. The evidence does not support the conclusion that the pieces of fencing found were intended as a boundary fence, and used as such by abutting owners. The evidence is similarly insufficient to prove adverse possession or any other right of Ferry to the portion of the Fletcher lot at issue. The common boundary of the parties along Fletcher's east line is as shown on the survey prepared by Ferry's surveyor.

IV. Injunction Against Physical Intimidation

Ferry alleges that Fletcher intentionally intimidated him with assaultive behavior on more than one occasion and seeks an injunction preventing future similar behavior. However hostile the relationship between the parties has been in the past, their behavior in the recent past has been courteous. Because the dispute between the parties is now resolved, and Ferry has not shown by a preponderance of the evidence that Fletcher poses a present threat to Ferry, no injunction is warranted.

Order

Defendant's attorney shall prepare an Order in accordance with the foregoing Findings and Conclusions, and Plaintiff's attorney shall have five days to object to the form of the Order.

Dated at Montpelier, Vermont this 27th day of November, 2002.

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge