FILED
SEP 16 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-342 / 93-1275

BRUCE L. RATCLIFF and ELLAMAE RATCLIFF,

Appellees,

vs.

H. FRANK MARTIN and CLAIRE MARTIN,

Appellants.

Appeal from the Iowa District Court for Muscatine County, Max R. Werling, Senior Judge.

The Martins appeal a district court judgment which determined the Ratcliffs own an easement across the Martins' property and enjoined the Martins from obstructing the easement. **AFFIRMED AS MODIFIED.**

William F. Creasey of Goedken & Creasey, Muscatine, for appellants.

Gregory A. Johnston, Muscatine, for appellees.

Considered by Donielson, C.J., and Hayden and Huitink, JJ.

HUITINK, J.

The Martins appeal a district court judgment which determined the Ratcliffs own an easement across the Martins' property and enjoined the Martins from obstructing the easement. We affirm as modified.

The Ratcliffs and the Martins own adjoining properties bordering upon Park Avenue in Muscatine. The Ratcliffs purchased lot five, the corner lot, in 1973. The Martins purchased lot six in 1990. The Ratcliffs' lot is south of the Martins'. The Ratcliffs' driveway and garage are located on Park Avenue and are accessible from their home by steps due to the steep grade of their lot.

The Ratcliffs' predecessor in interest once owned all of what are now lots five, six and seven. In May 1907 he parceled off and conveyed what is now the Martins' lot. The original deed contained the following reservation: "A right of way to ten (10) feet in width across west end thereof for the use of the grantors, his heirs and assigns for passage to and from the ground south of the land hereby conveyed." The Ratcliffs' deed to lot five includes an easement over the western ten feet of lots six and seven. Lot seven is owned by Timm, who is not involved in this action.

The Martins' immediate predecessors in interest, Sloats, purchased lot six in 1976. The deed conveying the property to Sloats reserved the above ten-foot easement. When Sloats sold the property to the Martins in 1990,

however, the easement was not reserved. The Martins purchased the property without knowledge of the easement.

At some time Mr. Ratcliff underwent open heart surgery. After this occurred, he needed to use the easement to take advantage of level access to his home by way of the easement. The easement is directly behind the Martins' home, and there is evidence their home encroaches several inches into the easement. When the Martins placed a picnic table and small fence across the easement, the Ratcliffs objected as the fence prevented them from driving across the easement into their back yard.

Ratcliffs then filed a petition in equity seeking to enjoin the Martins from obstructing the easement. The parties filed a stipulation of uncontested facts covering most areas of the dispute with the exception of the Ratcliffs' former use of the easement. The Martins claimed Iowa Code section 614.24 (1993) bars the Ratcliffs' claim because the easement is not obvious from the physical terrain and the Ratcliffs failed to file a claim to the easement within one year after July 4, 1965. The Martins also sought permission to maintain a fence with gates over the easement area.

The district court concluded section 614.24 did not apply since an easement is not a use restriction or reversion. The court also determined that even if the section did apply, the deed to the Sloats in 1976 reserved the easement, and gave the Ratcliffs until July 4, 1997, to

file their claim. The court also concluded that allowing a fence with gates across the easement would place an undue burden on the easement. The court enjoined Martins from obstructing the easement and directed them to remove any existing obstructions.

We review equity actions de novo. Iowa R. App. P. 4.

Martins argue section 614.24 of the Iowa Code (1993) bars any claim Ratcliffs have to a right of way over their (Martins') property. We disagree.

An easement created by express written grant is, if recorded, operative against subsequent purchasers for value, without notice. McKeon v. Brammer, 238 Iowa 1113, 1119, 29 N.W.2d 518, 522 (1947). Compliance with recording statutes provides constructive notice of the existence of the easement. Id.

The easement in question was reserved by Ratcliffs' predecessor in title at the time lot six was created in 1907. It was properly included in each conveyance up until the execution of the warranty deed between Martins and their immediate predecessors in title, Sloats, in 1990. The title opinion prepared for the Martins failed to include the easement.

An easement is a liberty, privilege, or advantage in land without profit, existing distinct from ownership. Hawk v. Rice, 325 N.W.2d 97, 98 (Iowa 1982). A nonuser does not forfeit rights granted under a written easement unless it is for such period and under such conditions as

to constitute adverse possession. Krough v. Clark, 213 N.W.2d 503, 505 (Iowa 1973) (citations omitted). The record indicates the Ratcliffs have used the easement, albeit infrequently, since they purchased lot five. There is no evidence of abandonment, and the Martins cannot establish adverse possession of the easement.

Iowa Code section 614.24 is not applicable to easement rights. Johnson v. Burlington Northern, Inc., 294 N.W.2d 63, 66 (Iowa App. 1980); Iowa Land Title Standards § 10.6 cmt. (7th ed. 1993). Therefore, the Ratcliffs were under no obligation to make claim to the easement prior to July 1966. It is also unnecessary for the Ratcliffs to make claim to the easement before July 4, 1997. The district court is affirmed as modified on this issue.

It is clear that the Ratcliffs have a ten-foot-wide easement over the west edge of the Martins' lot. In this case, the Martins contend they have a right to fence their lot if gates are made to allow crossing of the easement. Ratcliffs argue they are entitled to free and unrestricted access across the easement.

Neither party to an easement may interfere with the rights of the other. The dominant estate owner has the right to reasonable use of the right-of-way in the manner and for the purpose it was intended to serve, but must not use it in a way imposing additional or undue burdens of the servient estate. Wiegmann v. Baier, 203 N.W.2d 204, 209 (Iowa 1972) (citing Schwartz v. Grossman, 173 N.W.2d 57, 60

(Iowa 1969)). Likewise, the servient estate owner must not interfere with the rights conferred. Krough v. Clark, 213 N.W.2d at 505.

Testimony at trial, affidavits, and other evidence indicate the original purpose for the easement was to allow coal trucks access to the coal door of the home on lot five. The photographs admitted into evidence show the presence of a coal door on the Ratcliffs home in line with the ten-foot-wide easement.

Additional evidence revealed the Ratcliffs used the easement on occasion to move furniture or other large items to and from their home. They also walked their lawnmower along the easement so they could mow their front parking without having to carry the mower down the steps in front of their home. The Ratcliffs testified they now intend to use the easement as their sole access to and from their home, driving down the easement so they can park in their back yard.

The Martins wish to erect a fence, with gates, across the easement. There is evidence in the record which indicates the Martins erected their first fence for the sole purpose of blocking all use of the easement by the Ratcliffs. The easement has not been obstructed by gates or fencing previously.

Based on our de novo review, we agree with the trial court and find that allowing the Martins to erect a fence would unreasonably interfere with the Ratcliffs' right of

passage across the easement. While gates would not "deprive [Ratcliffs] of the full use of their land", granting the Martins the right to obstruct the easement would rather effectively destroy Ratcliffs' easement. McDonnell v. Sheets, 234 Iowa 1148, 1156, 15 N.W.2d 252, 256 (1944). We affirm on this issue.

However, we also find the Ratcliffs will, by their increased use of the easement, exceed their rights both in the manner and extent of the easement's use. Ordinarily an increase in the frequency of use, alone, will not constitute an additional burden. See Schwob v. Green, 215 N.W.2d 240, 243-44 (Iowa 1974). But in this instance the Ratcliffs' use of the easement as their primary motor vehicle access also will exceed the original purpose of the easement. The increased use coupled with the expanded purpose of the easement creates an additional and undue burden on the servient estate. See id.; Halsrud v. Brodale, 247 Iowa 273, 278, 72 N.W.2d 94, 97 (1955). We therefore conclude that this easement does not permit them to use it as a primary vehicular access to their residence. The district court's decree is modified accordingly to provide for this limitation.

We determine any other issues the parties may have raised are either covered by this opinion or are without merit. Both parties shall pay their respective attorney fees. Costs are assessed to the Martins.

AFFIRMED AS MODIFIED.