IN THE COURT OF APPEALS OF IOWA

No 5-040 / 94-0368

CHARLES W. RASMUSSEN AND EVELYN E. RASMUSSEN,

Appellants.

VS

NORM THOMAS,

Appellee.

Appeal from the Iowa District Court for Pottawattamie County, James M. Richardson, Judge.

Rasmussens appeal a judgment of the district court declining to issue a temporary or permanent injunction preventing defendant from condemning certain portions of plaintiffs' property in order to obtain adequate access to his land.

AFFIRMED.

Deborah L. Petersen of Perkins, Sacks, Hanna, Reilly and Petersen, Council Bluffs, for appellants.

Bill Bracker, Council Bluffs, for appellee.

Considered by Hayden, P.J., and Sackett and Cady, JJ.

PER CURIAM

Charles and Evelyn Rasmussen own land immediately to the south of land owned by Norm Thomas in rural Pottawattamie County. Thomas's land is "L" shaped, with the widest strip going east and west, and the smaller strip jutting south from the western part of the upper strip. Rasmussens' land is immediately south of this smaller strip.

Thomas's land is bordered on the eastern side by a county highway. A stream, which runs north and south, bisects his land. This stream has produced a ravine which is twenty feet deep and thirty-two feet wide. The ravine constructively divides the Thomas property. Only the eastern tract abuts the roadway. The western tract, including the part which juts south, has no access to the roadway.

Thomas proposed to transfer title to the parcel of property which constitutes the southern part of the "L." This parcel has no access to any roadway. Thomas obtained an engineering report which stated he would need to construct a driveway of at least 800 feet, and such a driveway would have a very steep grade. The engineering firm recommended a less steep grade, which would extend the driveway to 1300 feet. The driveway would also need a means of crossing the stream. Thomas obtained estimates the work would cost at least $50,000.

The nearest roadway to the western part of Thomas's property is a road which abuts Rasmussens' property to the west. Near the line where the Rasmussen and

Thomas properties meet, this road turns to the west, and thus, the Thomas property does not actually meet the road.

Thomas filed an application for condemnation by reason of necessity seeking to condemn a strip of Rasmussens' property forty feet by 200 feet to use as an access to his property. On September 14, 1993, the district court approved this application

Rasmussens filed the present suit against Thomas seeking a declaratory judgment Thomas had adequate access to his property and an injunction enjoining him from condemning their property. At the hearing, Thomas presented evidence to show it would cost at least $50,000 to build a bridge over the stream and put in a driveway which would allow him access to the western tract from the east. He also testified his neighbor to the north has a tube across the same stream and this tube has required constant repair because of wash out after heavy rains.

The district court determined the construction of a bridge was not a viable alternative for Thomas to gain access to the western tract of land. The court found the western tract was landlocked within the meaning of Iowa Code section 6A.4(2) (1993) (previously section 471.4(2)), because it did not have reasonable access to a public or private way. The court concluded Thomas had no reasonable way to his western tract of land and the condemnation procedures should proceed.

Rasmussens filed a motion pursuant to Iowa Rule of Civil Procedure 179(b) and a motion for new trial. The district court denied these motions. Rasmussens now appeal.

This case was tried in equity, and our review is de novo. Iowa R. App. P. 4.

Rasmussens contend Thomas did have access to his land They claim he should not be able to condemn a portion of their property merely because it is inconvenient for him to get from the eastern part of his property to the western part. Rasmussens believe Thomas has no right to condemnation under section 6A.4(2) unless he can show he has no means of access to any part of his property from a public or private road.

To justify condemnation proceedings under section 6A.4(2) to secure a public way over the land of another, it must appear the condemnor has no public or private way from his or her land to a public road. *Lichty v. Luloff*, 512 N.W.2d 267, 271 (Iowa 1994). Section 6A.4 provides, in pertinent part:

> The right to take private property for public use is hereby conferred:
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> * * *
>
> 2. *Owners of land without a way to the land.* Upon the owner or lessee of lands, which have no public or private way to the lands, for the purpose of providing a public way, not exceeding forty feet in width, which will connect with an existing public road.

Whether a person has a public or private way is a fact question. *Strawberry Point Dist. Fair Soc'y v. Ball*, 189 Iowa 605, 609, 177 N.W. 697, 698 (1920). An

action for condemnation will be defeated only if the person has an existing means of access *Lichty*, 512 N.W.2d at 271 This means a public or private way which is unobstructed and unquestioned. *Carter v. Barkley*, 137 Iowa 510,515, 115 N.W 21, 23 (1908).

Additionally, the right of a farm owner to condemn a way to and from his premises implies the right to have a way which is reasonably sufficient for that purpose. *Anderson v. Lee*, 191 Iowa 248, 250, 182 N.W. 380, 381 (1921). Thus, a means of access is not considered an existing public or private way unless it is reasonably adequate for the intended purpose. *Lichty*, 512 N.W.2d at 271.

In *Strawberry Point*, the court stated where one owns land from which there is a private way to other land owned by him, and it is made to appear the other lands are on a public highway, it would seem not to be within the spirit of the statute to permit him to relieve his own land of the burden of a public highway, and place the burden upon his neighbor. *Strawberry Point*, 189 Iowa at 611, 177 N.W. at 699. However, this proposition, like all general rules, must be given reasonable construction and application. ***Anderson***, 191 Iowa at 250, 182 N.W. at 381.

In ***Anderson***, the condemnor had a way to a public highway; he had been granted a strip of land ten feet wide which was to allow him access to the public road. *Id.* at 249, 182 N.W. at 381. The court determined the statute meant a land owner has the right to have a way which is reasonably sufficient for that purpose. *Id.* at 250, 182

N.W. at 381. The court concluded the natural character of the ten-foot strip rendered its use impractical *Id.* at 251, 182 N.W. at 382. Aside from the width of the strip, the strip covered steep terrain, part of the strip was in a slough, and the strip was intersected by a stream and large ditch. *Id.* at 251, 182 N.W. at 381. For this reason, the condemnor was allowed to proceed with condemnation proceedings to gain a way over the land of another. *Id.* at 252, 182 N.W. at 382.

We conclude a similar situation is present in this case. While Thomas has a way across his own land to the public roadway, this course is not practical. As in *Anderson*, a way across Thomas's property would involve crossing a stream and large ditch and traversing steep terrain. It would cost him at least $50,000 to install a means of access to the western part of his property, and in order to be safe, the driveway would need to be 1300 feet long.

We believe we may balance the relative burden to each property a proposed driveway would cause. *See Strawberry Point*, 189 Iowa at 614, 177 N.W. at 700. (The court found the defendants' proposed road would cause irreparable injury to the plaintiffs). Here, the proposed driveway would cause little damage to Rasmussens. As the district court found ,the land had previously been used for grazing and was not near to the buildings occupied by the Rasmussens.

We affirm the district court's decision dismissing plaintiffs' petition.

Plaintiffs have also raised an issue claiming the district court erred in denying their motion for a new trial. Rasmussens claim there is new evidence which would materially and substantially affect the decree. They state Thomas transferred the land in question on October 28, 1993, by a deed which was recorded on November 1, 1993. However, the county auditor did not enter the transfer on the books until January 13, 1994, which was the same day the decision was entered in this case. Plaintiffs claim Thomas did not own the land and did not have the right to proceed with the case.

The district court, by a calendar entry, denied the motion for new trial. We find the district court correctly denied the motion. Thomas clearly owned the land at the time the petition was filed. The question of ownership was addressed at the trial, and Thomas testified he still owned the land. We find the issue of the ownership of the land had been addressed at the trial and a new trial was not necessary.

We affirm the district court on all issues raised in this appeal. Costs of this appeal are assessed to Rasmussens.

AFFIRMED.