

IN THE COURT OF APPEALS OF IOWA

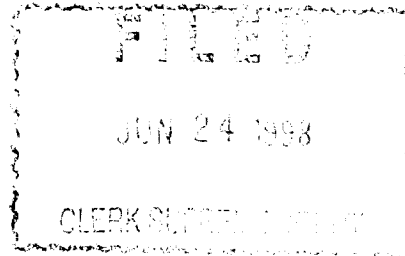
No. 8-127 / 96-1943

Filed June 24, 1998

**SHIRLEY LINCOLN, WAYNE
LINCOLN and JOHN LINCOLN,**
Appellees,

vs.

**MARC GEORGE PAULSON and
RAMONA L. PAULSON,**
Appellants.



Appeal from the Iowa District Court for Mills County, Leo F. Connolly, Judge.

The defendants appeal from the district court decree finding an easement over their property. **AFFIRMED.**

Robert V. Rodenburg of Rodenburg Law Offices, P.C., Council Bluffs, for appellants.

Richard B. Maher, Glenwood, for appellees.

Heard by Cady, C.J., and Huitink and Vogel, JJ.

HUITINK, J.

Marc G. and Ramona L. Paulson appeal from the district court decree declaring their real estate was subject to an easement in favor of the Lincolns. We affirm.

I. Background Facts and Proceedings.

A decree partitioning land in Sections 12 and 13 of Township 72 in Mills County was entered in 1935. The decree included the following easement, established by a referee's report, for adjoining landowners:

[A] strip of ground thirty-three feet wide shown on the plat as a private road commencing at the South center line of Section 12 and running South one-half mile for the purpose of giving ingress and egress to the lands allotted to the different parties, and for the further purpose of reaching the lands in the North Half of the Northwest Quarter of Section 13, still owned, at this time, by the Estate of B.E. Lincoln, deceased.

Surveyors marked the private road and owners of land adjacent to the road used it to access their property.¹ The land surrounding the road remained in the Lincoln family until a portion of a tract adjacent to the private road was sold to George Paulson in 1972. George sold the property to his son, Marc Paulson, in 1983.

In 1993, a dispute regarding the location of the easement arose between the parties. Marc erected a gate to prohibit travel across the road. He asserted the road was really his driveway, and not the easement described in the 1935 partition decree.

Shirley Lincoln, Wayne Lincoln, and John Lincoln (the Lincolns) sought injunctive relief against Marc Paulson and his wife, Ramona, (the Paulsons) to regain

¹ This practice continued without incident until 1993.

access to the road and a declaratory judgment to determine the extent and validity of their easement.

The district court held the road was the easement established in the 1935 referee's report. The court declared the Lincolns owned an easement appurtenant for ingress and egress to their property based on theories of express grant, implication, and prescription. The court also enjoined the Paulsons from interfering with the use of the road.

On appeal the Paulsons argue the Lincolns failed to establish an easement under any theory.

II. Standard of Review.

This action was tried in equity; therefore, we review de novo. Iowa R. App. P. 4. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

III. Easement by Express Grant.

The Paulsons argue the Lincolns are not entitled to an easement by express grant over the existing road, because the location of the easement established in the 1935 referee's report and described in the partition decree is different than the road actually used by the Lincolns to access their property.²

² There is no dispute the 1935 decree granted an easement over the property now belonging to the Paulsons.

The district court held, in part:

The Court finds that the existing road which has been used by the parties is hereby established as the road prescribed by the 1935 referee's report and the Court enters declaratory judgment to that effect. These plaintiffs [the Lincolns] are granted an easement which shall run with this land over the present road for purposes of ingress and egress.

In support of its conclusion, the court cited the adjacent landowners' continuous use of the road from 1935 to 1993 with notice to all landowners. The court found the Lincolns' use of the road as a means of accessing their surrounding property is in accord with the intent of the 1935 partition decree.

We, like the district court, find the easement established in the 1935 referee's report and described in the partition decree is the same road the Lincoln family has used since 1935 to access their property. The language in the partition decree, stated above, unambiguously grants an express easement over the road on the property now owned by the Paulsons for the purposes of ingress and egress to the other landowners' surrounding property. *See* 25 Am. Jur.2d, Easements, § 18 (stating "[t]he intent to grant an easement, however, must be so manifest on the face of the instrument that no other construction can be placed on it.")

The Paulsons correctly assert the location of the easement granted in the partition decree is not the same as the right of way used by the Lincoln family since 1935. However, this fact is not fatal to the Lincolns' right to use the road. "In construing an express grant or reservation of an easement, as in the construction of written contracts, the cardinal principle is that the intention of the parties must

control.” *Riverton Farms, Inc. v. Castle*, 441 N.W.2d 405, 407 (Iowa App. 1989).

We find ample evidence the parties intended the existing road be used as the easement prescribed in the partition decree. Ernest Lincoln, B.E. Lincoln’s grandson, testified he observed the surrounding landowners use the road to access their property continuously for forty years beginning in 1935. John Osborne, an owner of land adjacent to the road, testified he has observed surrounding landowners use the road for the past twenty years.

Additionally, the intent the existing road be used to carry out the easement set forth in the partition decree may be inferred from the continued use and acquiescence of the parties. *See Dickinson v. Crowell*, 94 N.W.495, 120 Iowa 254 (Iowa 1903)(holding an easement granted by a partition decree did not fail despite the parties’ failure to designate the easement’s exact location where a right of way was used and acquiesced in by the parties “for so long a time that this should be treated as equivalent to an agreement”); *see also Bagley v. Petermeier*, 233 Iowa 505, 10 N.W.2d 1 (Iowa 1943)(the location of an easement established by grant may be changed by mutual consent of the parties, and such consent may be implied by their acts and acquiescence). Surrounding landowners have used the existing road to access their property for fifty-eight years. At trial, Marc admitted he was aware of the Lincolns’ use of the road since his father acquired the property in 1972; however, he did not object to the Lincolns’ right of way until twenty-one years later.

We find the Lincolns have established the existing road as the express easement granted in the 1935 partition decree. The parties' actions since the 1935 decree clearly establish the intent the existing road be used to carry out the purpose of the easement. *See Northern Natural Gas Co. v. Knop*, 524 N.W.2d 668 (Iowa App. 1994)("[i]f there were ambiguity in the language of the easement, the manner in which the parties themselves have construed them is presumptive evidence of their intention.") Our conclusion on this issue obviates the need to address whether the Lincolns established an easement by prescription or implication. We have considered the Paulsons' remaining arguments on appeal and find them to be without merit. The decision of the district court is affirmed.

AFFIRMED.