IN THE COURT OF APPEALS OF IOWA

No. 1-114 / 00-0750
Filed September 12, 2001

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CLERK SUPREME COURT

NATHAN WITT and MELVA M. WITT,
Plaintiffs-Appellees,

vs.

TARRY A. HEMPEL and JANICE M. SHANAHAN,
Defendants-Appellants,

FRANCENA MARIE SELL, as Executor of the Estate of GLADYS M. WILSON, and SANDRA LAYNE RICE,
Defendants.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

Defendants Hempel and Shanahan appeal from the district court ruling granting the plaintiffs' petition to establish an easement by necessity over a vacated county road. **REVERSED.**

Curtis J. Heithoff, Council Bluffs, for appellants.

Lloyd Bergantzel, Council Bluffs, for appellees.

Considered by Mahan, P.J., and Hecht and Vaitheswaran, JJ.

HECHT, J.

Appellants appeal a district court ruling which granted plaintiffs an easement by necessity over a vacated county road. Appellants claim: (1) an easement by necessity cannot be established without any previous unity of title; (2) plaintiffs failed to show they were entitled to an easement by necessity; and (3) the court should not have considered hearsay evidence. We reverse the district court decision.

In 1977, some neighbors in rural Pottawattamie County asked the county to vacate an unpaved road. They were concerned because people were dumping trash and shooting guns on the road. The unpaved road was about one-quarter mile in length and about forty feet wide. It ran north and south between two farms. At the north end of the road was a third farm. The south end of the road connected to a paved county road. The Rices owned the property to the west of the road, the Wilsons owned the property to the east, and the Adkins owned the property to the north.

On July 21, 1997, the county vacated the road. The neighbors agreed to place gates at the north and south ends of the vacated road. They exchanged keys and shared access to the road. Once the road was vacated, the rights of the public were relinquished. *See Schaller v. State,* 537 N.W.2d 738, 742 (Iowa 1995). The Rices became the owners of the west half of the road, and the Wilsons became the owners of the east half. *See id.*

Nathan and Marva Witt purchased the Adkins farm in 1987. They and their farm tenant, Kirk Vorthmann, used the vacated road to access the southern

portion of their farm. The Witt farm is bisected by Pony Creek running diagonally from the northeast to the southwest. The eastern portion of the Witt farm is quite hilly, and it is impractical to take farm machinery across the Witt farm to the portion south of Pony Creek. In addition, there is no practical way to take machinery over Pony Creek. While there is an old wooden bridge over Pony Creek on the Witt farm, it is too old and dilapidated to accommodate modern farm equipment.

In 1994, Tarry Hempel and Janice Shanahan (Hempels), husband and wife, purchased the Wilson farm. They established a pumpkin farm on the property and gave hay rides on the vacated road in the fall. After a few years, the Hempels installed a new lock on the southern gate to the vacated road. Vorthmann was required to obtain the key every time he needed to access the southern portion of the Witt farm, which he was renting. In 1998, the Witts approached the Hempels about voluntarily signing a written easement, but they refused.

On October 21, 1998, the Witts filed a petition to establish an easement. Nathan Witt testified he had no other access to the southern portion of his farm except by the vacated road. Vorthmann testified he would not be interested in renting the Witt farm if he did not have access through the vacated road. Tarry Hempel testified he would continue to allow Vorthmann access, but would deny access to any subsequent tenants.

The district court determined the Witts had established an easement by necessity. The court found the Witts had proven "by clear and convincing

evidence that use of the disputed road is reasonably necessary to access their fields." The court granted the Witts an easement, forty feet wide, which encompassed the abandoned road. The easement was limited, "in that the road may be used only to access the Witt fields for agricultural purposes, including moving machinery for use in planting, harvesting and maintaining crops in the Witt fields laying south of Pony Creek."

The Hempels filed a motion pursuant to Iowa Rule of Civil Procedure 179(b). They claimed the court had improperly granted an easement by necessity because there was no previous unity of title between the Witt farm and the Hempel farm. The court denied the motion, stating while ordinarily unity of title is necessary, in this case equity required a different result. The court stated:

> Given the specific facts in this case, the abandonment of a public road, the historical use of the tracts of land among current and prior owners, and the limited access of plaintiffs to portions of their fields, the equities in the case warrant an easement by necessity in favor of plaintiffs.

The Hempels appeal.

This case was brought in equity, and therefore, our review is de novo. Iowa R. App. P. 4. In equity cases, especially when considering the credibility of witnesses, we give weight to the fact findings of the trial court, but are not bound by them. Iowa R. App. P. 14(f)(7).

Easements may be established in various ways: (1) by written grant; (2) by prescription; (3) by necessity; and (4) by implication. *Webb v. Arterburn,* 246 Iowa 363, 376, 67 N.W.2d 504, 513 (1954). The court granted the Witts a common law easement by necessity, and this is the only type of easement before

us on appeal.[1] While necessity is an element to be considered in an easement by implication, an easement by necessity is a separate doctrine. *Schwob v. Green,* 215 N.W.2d 240, 244 (Iowa 1974); *Bray v. Hardy,* 248 Iowa 794, 799, 82 N.W.2d 671, 674 (1957).

The Hempels claim an easement is improper in this case because there was no unity of title between their property and that of the Witts. They state in order to establish an easement by necessity, the Witts needed to show a previous common ownership, and a conveyance, of the affected properties. They claim an easement by necessity may only be established by such a conveyance.

There are three elements required for the creation of a common law easement by necessity:

> First, for an easement of necessity to arise, there must have been a unity of ownership of the dominant and servient estates. Second, the unity of title must have been severed by a conveyance of one of the tracts, resulting in the grantor or grantee owning a parcel which is landlocked. The third essential element of an easement by necessity is that the use of the servient estate by the dominant estate must be necessary.

28A C.J.S. *Easements* § 95, p. 277 (1996) (footnotes omitted). Other authorities agree there must be a former unity of ownership and a subsequent conveyance for there to be an easement by necessity. *See* Restatement (Third) of Property § 2.15 cmt. c (1998); 25 Am. Jur. 2d *Easements and Licenses* § 39, p. 609-10 (1996).

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[1] We also note this case was not brought pursuant to Iowa Code section 6A.4(2), which provides a statutory remedy for owners of land without a way to the land.

In Iowa, also, there is a requirement of unity of ownership. Our supreme court has stated there was no easement by necessity where "the record shows the respective lands of the parties were never owned by one party nor operated as a unit." *Webb,* 246 Iowa at 379, 67 N.W.2d at 513. The court has stated, "An easement by necessity ordinarily may not be claimed by any except the immediate parties to the transaction." *Schwob,* 215 N.W.2d at 244 (presupposing a conveyance). In addition, in considering easements by necessity the court has stated:

> Generally speaking, they arise only in favor of a grantee, as against his grantor, and consist of a right to the grantee of an outlet over the lands of his grantor, if the grantee has no other outlet.

Black v. Whitacre, 206 Iowa 1084, 1087, 221 N.W. 825, 827 (1928) (citation omitted) (finding no easement by necessity because the appellant was not the grantee of the appellee). *See also Feilhaber v. Swiler,* 203 Iowa 1133, 1136-38, 212 N.W. 417, 418-19 (1927) (discussing whether easement by necessity arose due to conveyance of land).

In the present case, there was no evidence of unity of ownership. No evidence was presented to show the Witt and Hempel lands had ever been owned by the same person. Because there was no evidence of unity of ownership, there was also no evidence one parcel had been conveyed by the owner of the other parcel. Thus, there is no evidence to support the first two elements required to prove an easement by necessity. For this reason, we determine the district court improperly granted an easement by necessity in this case.

Because we have concluded the easement by necessity was improperly granted, we do not need to address the other issues raised by appellant. We reverse the decision of the district court.

REVERSED.