

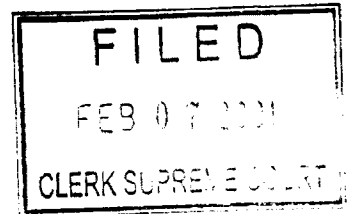
**IN THE COURT OF APPEALS OF IOWA**

No. 0-733 / 00-0183  
Filed February 7, 2001

**BOB KLEINSCHMIDT,**  
**Plaintiff-Appellant,**

**Vs.**

**TIM KINNEY and NANCY KINNEY,**  
**Defendants-Appellees.**



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Appeal from the Iowa District Court for Johnson County, Larry Conmey,  
Judge.

Plaintiff-Appellant appeals the trial court's decision declining to impose a  
prescriptive easement across a portion of Defendants' property. **AFFIRMED.**

John T. Nolan, Iowa City, for appellant.

Patricia C. Kamath, Iowa City, for appellee.

Considered by Vogel, P.J., and Hecht, J.J., and Honsell, S.J.\*

Senior judge assigned by order pursuant to Iowa Code Section 602.9206 (2001).

**HONSELL, S.J.**

Mr. Kleinschmidt appeals from the trial court's decision declaring that he failed to prove his claim asserting an easement by prescription and ordering the case dismissed at his expense. We affirm.

**I. Background Facts and Proceedings.**

Mr. Kleinschmidt owns land in Oxford, Iowa, adjacent to land owned by the Kinneys. The Kleinschmidt property is a rectangle, 172 feet long by 122 feet wide. At the northeast corner of the property is a garage. Access to the garage is a paved driveway from Center Street. A house is located forty-seven feet east of the west boundary line of the property and twenty-one feet south of the north boundary line. Mr. Kleinschmidt and his mother and father owned the property before Mr. Kleinschmidt's mother deeded him a portion of the property in 1989 and the rest in 1997. In 1982 Mr. Kleinschmidt erected a pole building on the southerly portion of the Kleinschmidt property. It is thirty feet wide and forty-eight feet long and located approximately nine and one-half feet from the south boundary line of the property and sixteen feet west of the east line. The entry to it faces west. The cost of the building was approximately \$6,000. Additionally he paid \$754 for river stone, seventy percent of which was used for the floor of the building and rest was spread on the pathway that was used to access the pole building from an alley that ran parallel to south boundary line and ended at the imaginary line arrived at by extending the east boundary line of the property now owned by the Kinneys. Some additional stone has been spread over the pathway in succeeding years. The cost was minimal. The pathway, which crosses the southerly portion of the property now owned by Kinneys, had

previously been used on infrequent occasions to gain access to the southern portion of the Kleinschmidt property from the alley so that a recreational vehicle could be parked at the southerly end of the property. Access to the pole building can be from the Center Street entrance to the property as well as from the alley. The Kinneys have owned their property since 1985. When they first occupied their property there was infrequent use of the pathway by Mr. Kleinschmidt. Ms. Kinney stated that Mr. Kleinschmidt continued to live with his mother for about ten years after they, the Kinneys, occupied their property; and that after Mr. Kleinschmidt's mother moved to a retirement home, the traffic across the pathway increased.

Immediately prior to the building of the pole building, Mr. Kleinschmidt spoke with Mr. Murphy who was then an owner to the property later purchased by the Kinneys. The conversation was a result of the city council informing Mr. Kleinschmidt that he would have to talk with his neighbors and get their input before he could construct the pole building. During the conversation with Mr. Murphy, Mr. Kleinschmidt indicated that he intended to continue to use the pathway. Mr. Murphy responded that he didn't care as there would be less to mow.

During 1999 the Kinneys decided to fence their property. They had a survey done to confirm the boundaries to their property. When they informed Mr. Kleinschmidt of their intention, he brought the lawsuit to establish an easement.

On our de novo review we agree with the trial court that: plaintiff/appellant did not meet his burden of proof and show that the defendants/appellees had the statutorily required "express notice" of the claimed easement, nor did the

evidence support a finding of claim of right based on a declaration or acts of open, notorious, continuous and hostile use of the land by plaintiff/appellant.

### **I. Standard of Review.**

Our scope of review in this equity action is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact, especially in matters of credibility, but are not bound by them. Iowa R. App. P. 14(f)(7). The appeal in an equity case is not a trial de novo, but is limited to de novo review of identified and preserved error. *Hylar v. Garner*, 548 N.W.2d 864, 870 (Iowa 1996).

### **II. Merits.**

Section 564.1, the Iowa Code states:

In all actions hereafter brought, in which title to any easement in real estate shall be claimed by virtue of adverse possession thereof for the period of ten years, the use of the same shall not be admitted as evidence that the party claimed the easement as the party's right, but the fact of adverse possession shall be established by evidence distinct from and independent of its use, and that the party against whom the claim is made had express notice thereof; and these provisions shall apply to public as well as private claims.

One recognized method to establish an easement is by prescription. *Mensch v. Netty*, 408 N.W.2d 383, 387 (Iowa 1987); see also 25 Am. Jur. 2d Easements and Highways § 45, at 615 (1996). An easement by prescription is created under Iowa law when a person uses another's land under a claim of right or color of title, openly, notoriously, continuously, and hostilely for ten years or more. *Larman v. State*, 552 N.W.2d 158, 161 (Iowa 1996); *Simonsen v. Todd*, 261 Iowa 485, 489, 154 N.W.2d 730, 732 (1967); see also Iowa Code § 564.1 (1997). It is based on the principle of estoppel and is similar to the concept of adverse possession. *Webb v. Arterburn*, 246 Iowa 363, 378, 67 N.W.2d 504,

513 (1954) (easement by prescription is based on the principle of estoppel); *Tamm, Inc. v. Tildis*, 249 N.W.2d 823, 838 (Iowa 1975) (adverse possession is analogous to easement by prescription). In fact, we apply the principles of adverse possession to establish a prescriptive easement and use adverse possession to describe an easement by prescription. *Larman*, 552 N.W.2d at 162 (principles of adverse possession are used to establish an easement in real property); *Prymek v. Washington County*, 229 Iowa 1249, 1254-55, 296 N.W. 467, 471 (1941) (easement by prescription is easement by adverse possession). The fundamental distinction between the two doctrines is an easement by prescription concerns the use of property, while adverse possession deals with the acquisition of title to property by possession. *Collins Trust v. Allamakee County Board of Sup'rs*, 599 N.W.2d 460, 463, 464 (Iowa 1999); See also *Heald v. Glentzer* 491 N.W.2d 191 (App. 1992).

The hostility and claim of right requirements of a prescriptive easement are closely related. See *Burgess v. Leverett & Assocs.*, 252 Iowa 31, 36 105 N.W.2d 703, 706 (1960) (conduct which shows intention to hold title exclusive of others shows hostile possession). Hostility does not impute ill-will, but refers to declarations or acts revealing a claim of exclusive right to the land. 3 Am. Jur. 2d, Adverse Possession § 50, at 143 (1986). Similarly, a claim of right requires evidence showing an easement is claimed as a right. Iowa Code § 564.1; *Larman*, 552 N.W.2d at 162; see also *Evert v. Turner*, 184 Iowa 1253, 1254, 169 N.W. 625, 626 (1918) (claim of right cannot rest on possession, but needs declaration or acts of hostility to the true owner). Thus, mere use of land does not, by lapse of time, ripen into an easement. *Schaller v. State*, 537 N.W.2d 738,

742 (Iowa 1995); *Merritt v. Peet*, 237 Iowa 1200, 1207, 24 N.W.2d 757, 761 (1946). A party claiming an easement by prescription must prove, independent of use, the easement was claimed as a matter of right. Iowa Code § 564.1; *Simonsen*, 261 Iowa at 496, 154 N.W.2d at 736. *Collins Trust*, 599 N.W.2d at 463 and 464.

Permissive use, however, may ripen into a prescriptive easement where “the party claiming the easement has expended substantial amounts of labor or money in reliance upon the servient owner’s consent or his oral agreement to the use.” *Simonsen*, 261 Iowa at 489, 154 N.W.2d at 733. *Collins Trust*, 599 N.W.2d at 466.

The open and notorious requirements of a prescriptive easement exist to help place the true owner of land on notice of the adverse use of the land by another. See 3 Am. Jur. 2d Adverse Possession § 69, at 165-66. Under Iowa law the owner is required to have “express notice” of any claim of adverse possession. Iowa Code § 564.1. In *Larman*, the supreme court determined:

These requirements ensure the landowner knows another’s use of the property is claimed as a right hostile to the landowner’s interest in the land. Otherwise, the landowner may incorrectly assume the other’s use results merely from the landowner’s willingness to accommodate the other’s desire or need to use the land.

*Larman*, 552 N.W.2d at 162. *Collins Trust*, 599 N.W.2d at 465.

The notice must either be actual or “from known facts of such nature as to impose a duty to make inquiry which would reveal the existence of an easement.” *Anderson v. Yearous*, 249 N.W.2d 855, 861 (Iowa 1977); see also *Wright v. Wright*, 512 S.E.2d 618, 620 (Ga. 1999) (provides a similar test for “express notice”). *Collins Trust*, 599 N.W.2d at 465.

When the Kinneys bought their property in 1985, they were unaware of any portion of it being used for access to the Kleinschmidt property. At that time there was infrequent use of the pathway from the alley to the pole building. In 1997, after Mr. Kleinschmidt's mother moved from the property, the use of the pathway become relatively frequent, including bigger and heavier vehicles, with some of them belonging to Mr. Kleinschmidt's friends and acquaintances. There is and has been access to the pole building from Center Street. Mr. Kleinschmidt can have full use of his pole building without driving across any portion of someone else's property. The trial court correctly determined that Mr. Kleinschmidt is not entitled to an easement across the southerly portion of the property owned by the Kinneys.

**AFFIRMED.**