

Summary of Estate of Welliver v. Alberts

278 Ill.App.3d 1028, 663 N.E.2d 1094, 215 Ill.Dec. 580 (1996)

by

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Note: The principles discussed may not apply to all states. The reader is encouraged to research the law in their own state.

This was an action to quiet and confirm title to a parcel of land. It dealt with adverse possession, prescription, and implied easements.

In 1964, the Welliver's acquired two separate parcels of land. The first consisted of approximately 18 acres (property "A"). It was located on the Kishwaukee River and was intended to be the site for the Welliver home. The second consisted of a 50-foot strip of property (property "B"), which connected property A with Rotary Road, to the south of property A and the river, and was intended to be the site for a private road to the Welliver home. However, the record reveals that Welliver could not lay the entire road on property B, as they had intended, due to the topographical features of property B. As a result of the road problem, Welliver bought a third parcel, property C, from Baxter in 1964. Property C was approximately 610 feet, east to west, and adjoined property A to the south and property B to the east. The land in dispute lies adjacent to the south boundary of property C and the east boundary of property B and was included in the legal description of the property purchased by the defendant in May 1993. As a consequence both parties believed they owned the property - each exercising acts of ownership on the property. The property was used for hunting, hikes, motorcycle competitions, and other recreation activities. In the end, the appellate court found the possessors failed to prove the necessary elements to gain title to the disputed strip.

The court discussed several aspects of Illinois law of interest to surveyors.

1. The appellate court discussed at some length the requirements of adverse possession. The court stated that to establish title under the adverse possession doctrine, incorporated in section 13-101 of the Limitations Act, the asserted adverse possessors must possess the disputed land for 20 years. Furthermore, the 20 years of possession must have been: (1) continuous; (2) hostile or adverse; (3) actual; (4) open, notorious, and exclusive; and (5) under claim of title inconsistent with that of the true owner. The possession must be to a defined tract. In such cases the possessor bears the burden of establishing by clear and convincing proof the location of the boundary.

The court went on to state that the mere permission to use land cannot ripen into a prescriptive right. All presumptions are in favor of the title owner, and the burden of proof upon the adverse possessor requires that each element be proved by clear and

unequivocal evidence. The element of “open, notorious, and exclusive” requires improvements or acts of dominion over the land as will indicate to persons residing in the immediate neighborhood that exclusive management and control of the land are present. The "actual" requirement to adverse possession requires proof that the possessor make "improvements or performed acts of dominion sufficient to provide the reasonably diligent owner with visible evidence of another's exercise of dominion and control. While, the intent to take control of wild and undeveloped land requires a lesser exercise of actual ownership by affirmative act than with other property, the actual ownership must still be more than “mere mental enclosure.” Further, it is well established that recreation use of vacant or wild and undeveloped and unoccupied land is presumed to be permissive and not adverse.

The adverse possessor's actual possession must indicate to persons residing in the immediate neighborhood who has the exclusive management and control of the land. The possession must also be of such open and visible character as to apprise the world that the property has been appropriated, and is occupied. The adverse possessor must figuratively "unfurl his flag on the land, and keep it flying.”

The [adverse] occupancy must be exclusive. If the possession is only used and enjoyed in common with others, or the public in general, it cannot be regarded as hostile to other persons claiming title. The rightful owner cannot be deprived of his title by the possession of another if the rightful owner is also in possession during the same time the adverse claimant is in possession. Any sort of joint possession with the owner is not sufficient to support title by adverse possession. The owner must be wholly excluded from possession by such claimant for the stated period.

In such cases where concurrent use of the contested area is disputed, it is important that the location of the boundary of the land be definitely located.

For the surveyor, the court's discussion of adverse possession should quickly dispel any thought that adverse possession is favored or easily reached. A surveyor should note when the elements necessary for adverse possession are or may be present. However, a determination that adverse possession has occurred should be left to the court. The questions surrounding adverse possession are difficult to answer and often answered incorrectly as shown by the differing opinion at the trial court and appellate court. The surveyor would be wise to locate the record boundary and evidence of adverse possession but leave the ultimate question of title by adverse possession to the courts.

It should be noted from this case that a surveyor will be required from time to time to survey a possession claim and locate a possession boundary with certainty. The surveyor must take on such services with caution to avoid ethical violations. The surveyor must clearly state the lines described or located are possession lines and avoid marking them so as to confuse markings with record lines or ownership lines. To do so would cause the surveyor to become an advocate for the client and displace the

favorable trust and confidence ordinarily held by the public in regard to the surveyor's work and opinion.

2. A prescriptive easement was also discussed and rejected by the court. The court noted that the right to a prescriptive easement, just like the right to acquire title by adverse possession, does not arise from permissive acts. An agreement to use a road will deny a prescriptive claim later.

This statement by the court shows the dangers of relying on long use alone to determine adverse possession or prescription. Continuous, actual, open, notorious, and exclusive use or possession for the statutory period will not give rise to title or rights where the use or possession was predicated on permission. While the surveyor is often in a position to see and arrive at the opinion that use was continuous, actual, open, notorious, and exclusive for the statutory period based on the evidence at the site — the surveyor is seldom in a position to determine if historical parol agreements initiated such use.

3. The court discussed implied easements. The court stated there are two types of implied easements: an easement by necessity and an easement implied from a preexisting use. One of the elements required for establishing an easement implied from a preexisting use requires that before the separation of the property, the use which would give rise to an easement must have been long continued, obvious, or manifest. Proof of prior use is not required for an easement by necessity. An easement by necessity arises when the land at the time of conveyance could not be used, absent the easement, or could not be used without disproportionate effort and expense. Where available alternatives exist that afford reasonable means of ingress and egress, easements by implication should not be sanctioned.

As the only professional to both examine the records and visit the site, the surveyor is often in a unique position to discover possible implied easements. The surveyor's knowledge of the site coupled with research of the client and neighbor's records often reveal parcels that are "landlocked" or uses that were present before a division and conveyance of the property. Seldom will a title search alone reveal the possible presence of implied easements. Consequently, whether justified or not, attorneys and others dealing with property often expect the surveyor has the necessary knowledge to discover the possibilities of implied easements.