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Minnesota Real Estate Research

INTRODUCTION

A. Building A and Building B, both located at Minneapolis, Minnesota, are adjacent. Both have storefronts at street level and residential apartments in the upper stories. For at least the past 50 years, the residents of Building A have been able to exit their units by doors opening to a common deck running across the rear of Building A, then continuing onto a deck running across the rear of Building B, from which there are stairs descending to the ground. The owner of Building B is proposing to construct a barrier that would prevent the occupants of Building A from using the described route. There is no other route from the ground to the rear exits in Building A.

B. Brothers C and D owned adjacent tracts. In 1975, the State of Minnesota took part of C's property for highway purposes. Since then D (and his successors in interest) has allowed road access to and from C's property over D's property. There is no road other access to C's property (which is surrounded by lands owned by others who have not previously permitted C to access public roads over

their respective properties). In the interval, C has become incompetent and in need of a conservator, and D conveyed his interest to a family holding company.

QUESTIONS PRESENTED

A. Is the owner of Building B required to allow the occupants of Building A to use the deck at the rear of Building B to reach the ground?

B. Are the owners of D's land required to allow road access to and from C's adjacent parcel?

SHORT ANSWERS

A. Possibly yes. The owner of building B may be required to allow the occupants of building A to use the deck at the rear of building B to reach the ground. If the owners of building A are able to show open, visible, continuous, and unmolested use for the statutory period that is inconsistent with the owner's rights, such a use will be presumed to be hostile. The owners of building A will prevail unless the presumption is successfully rebutted by the owner of building B.

B. Possibly No. If the family holding company is construed to be a stranger, C may claim prescriptive easement provided that he has been holding the property for 15 years or more from the date of conveyance of D's property to the Company. C may not have any right of equitable estoppel.

DISCUSSION

A. Is the owner of Building B required to allow the occupants of Building A to use the deck at the rear of Building B to reach the ground?

The owner of building B may be required to allow the occupants of building A to use the deck at the rear of building B to reach the ground. This route has been in existence for the past 50 years. The very fact that both the buildings have a common deck and exit would go to show that there is a common right of exit for residents of building A.

In Minnesota, the Supreme Court in *Swan v. Munch* 65 Minn. 500, 67 N.W. 1022 (1896). established the general rule that if a claimant proves open, visible, continuous, and exclusive use for the required length of time, the use will be presumed to be under a claim of right and hostile or adverse to the rights of the landowner. *Id*. at 504. In Swan, the defendant constructed a dam and at various times of the year blocked up the dam to flood land owned by the plaintiffs for the purpose of floating logs down river to sawmills. *Id*. at 502-503. Defendant engaged in this practice for twenty years during which time the plaintiffs did not object. *Id.* at 504. The Minnesota Supreme Court held that because there was no trick behind the defendant's actions, the act of flooding the plaintiffs' land was a sufficient open and notorious act to put the plaintiffs on notice that the defendant was occupying their land under a claim of right. *Id.* at 503-04. Once the claimant has established open, notorious, continuous, and unexplained use, it was sufficient in law to presume a grant and the burden shifted to the other party to contradict or explain the events. *Id.*

This concept of presumed hostility is well accepted in Minnesota courts. In *Block v. Sexton*, 577 N.W.2d 521 (Minn. Ct. App. 1998), the claimants' tract of land was initially part of a family farm. *Id*. The farm family and the claimants' predecessor in interest used the field road to travel between the tract and a highway. *Id*. The farm family used the road between May and October of each year, but had other access to their farm. *Id*. The road was the claimants' predecessor's only access to the tract for more than a decade until she purchased an easement that provided access to another highway. *Id*. When a gate was installed on the road, the farm family and the claimants' predecessor continued to use the road by opening the gate. *Id*. The Court concluded that there is an easement right and held:

> Use of an easement is presumed to be adverse or hostile when the easement claimant shows open, visible, continuous, and unmolested use for the statutory period that is inconsistent with the owner's rights, under circumstances from which the owner's acquiescence may be inferred. *Nordin v. Kuno*, 287 N.W.2d 923, 926 (Minn. 1980); *Hartman v. Blanding's, Inc.*, 288 Minn. 415, 419, 181 N.W.2d 466, 468 (1970). Unless the defendant successfully rebuts this presumption, the claimant prevails. *Hartman*, 288 Minn. at 419, 181 N.W.2d at 468. Without the aid of this presumption, the adverse character of the original user is an issue of fact, and the easement claimant must present "clear and unequivocal proof of inception of hostility." *Burns*, 301 Minn. at 449, 223 N.W.2d at 136.

Id. at 524

Where the claimant has shown an open, visible, continuous and unmolested use' for the required period inconsistent with the owner's rights and under circumstances from which may be inferred his knowledge and acquiescence, the use will be presumed to be under claim of right and adverse so as to place upon the owner the burden of rebutting

this presumption by showing that the use was permissive. *Schmidt v. Koecher*, 196 Minn. 178, 181-182 (Minn. 1936).

To establish a prescriptive easement, a claimant must prove use of the property that is actual, open, continuous, exclusive, and hostile for the prescriptive period of 15 years. A claimant's use is presumed to be hostile upon a showing of open, visible, continuous, and unchallenged use for the prescriptive period under circumstances in which the owner's acquiescence may be inferred. If the presumption of hostility applies, the claimant prevails unless the presumption is successfully rebutted. *Grannes v. Red Cedar of Yellow Med., Inc*., 2005 Minn. App. LEXIS 427 (Minn. Ct. App. 2005). *See also Anderson v. Olson*, 2002 Minn. App. LEXIS 827 (Minn. Ct. App. 2002); *Erickson v. Grand Marais PUC*, 2004 Minn. App. LEXIS 736 (Minn. Ct. App. 2004)

The important factor here is that there should be an open, visible, continuous, and unmolested use for the statutory period. In our case the owners of building A can definitely show that they were using the deck for their exit without any objection from the owner of building A. Their use was open, continuous and unmolested. Under this rule, once the person claiming the prescriptive easement has proven the above four elements, the burden shifts to the servient landowner who may rebut the claim and provide evidence that the use was permissive and not adverse.

Courts have differentiated between permission and acquiescence. In *Naporra v. Weckwerth*, 178 Minn. 203 (Minn. 1929), the plaintiff's predecessor in title constructed a drainage ditch across defendant's property and subsequently when the plaintiff purchased the property, the defendant interfered with the ditch so that it was no longer draining

water from plaintiff's property. Plaintiff filed an action against defendant that sought a determination that plaintiff had a prescriptive right over defendant's land for purposes of the drainage ditch and to enjoin defendant from interfering with the use of the ditch. In this case the original entry and construction of the ditch on defendant's land was without permission and was a sufficient declaration of hostility. *Id.* at 206. If the people who constructed the ditch on the defendants land exceeded their legal right, such an action was an infringement of the rights of the defendant and was of necessity adverse. *Id.* The Court held:

> **The claim of right must be exercised with the knowledge of the owner of the servient estate, i.e. actual knowledge or a user on the part of the claimant of such character that knowledge will be presumed. Failure of the owner to object to such user is an acquiescence therein.**
>
> License or permissive use on the part of the landowner must be distinguished from mere acquiescence. The one is evidence that claimant did not have the drainage right in the absence of the permission; while the other is evidence that he did.

Id. at 206 (emphasis added)

In *Hartman v. Blanding's, Inc.*, 288 Minn. 415 (Minn. 1970), the defendant originally purchased property including the driveway in dispute and later sold a portion to a grocery company who then sold the property to the Plaintiff. The grocery company utilized a warehouse on the property and only access to the grocery company's warehouse was through the disputed driveway. After plaintiff purchased the property, the warehouse was rented out to various persons and firms and they continued to use the driveway until defendant attempted to block it and shut off plaintiff's continued use. This Court further discussed the issue of acquiescence and permissive use and held:

> The very foundation of the establishment of a right to an easement by prescription is the acquiescence by the owner of the servient tenement in the acts relied upon to establish such prescriptive right. 17 Am. Jur., Easements, § 66. It is also the rule that, where the user is permissive on the part of the owner, there can be no prescriptive right, and that, if the user was permissive in its inception, it must become adverse to the knowledge of the owner of the servient estate before any prescriptive rights can arise. *Aldrich v. Dunn, 217 Minn. 255, 14 N.W. (2d) 489.* It must be apparent, therefore, that 'acquiescence' and 'permission' as used in this connection are not synonymous. **'Acquiescence,' regardless of what it might mean otherwise, means, when used in this connection, passive conduct on the part of the owner of the servient estate consisting of failure on his part to assert his paramount rights against the invasion thereof by the adverse user. 'Permission' means more than mere acquiescence; it denotes the grant of a permission in fact or a license**. *Naporra v. Weckwerth, 178 Minn. 203, 226 N.W. 569, 65 A.L.R. 124.* See, *Dartnell v. Bidwell, 115 Me. 227, 98 A. 743, 5 A.L.R. 1320; Davis v. Wilkinson, 140 Va. 672, 125 S.E. 700.*

Id. at 421, 422 (emphasis added)

In *Merrick v. Schleuder*, 179 Minn. 228 (Minn. 1930), the owners of the property erected a wall across a lot, which cut off the building owners' access to the alley and the building owners brought an action for an injunction to prevent interference with an easement they claimed over the land belonging to the property owners. *Id.* From the time the building was erected, there had been continuous use by the building owners to constitute an easement by prescriptive use. *Id.* The court held that the fact that others had used the lot did not prevent the building owners from acquiring the right for themselves. *Id.* The evidence proved that the building owners had openly appropriated the lot for their own peculiar uses and predecessors in interest. *Id*. The evidence was that from the time the building was erected the rear entrances, one to the main floor and one to the basement, have been continuously used by occupants as a means of ingress and egress for themselves, their employees and customers, and for delivery of incoming goods, including their unpacking and temporary storage. *Id.* at 230. The plaintiffs' building projected onto defendants' property. Here there was an appropriation of the

ground, necessarily adverse, hostile and exclusive. And the purpose may well have been to use and acquire the right of way necessary to make that end of plaintiffs' building accessible for the usual purposes of ingress and egress, both of persons and goods. *Id.* at 231.

The essential issue would be the issue of evidence. Once open, obvious, continuous and unmolested use has been proven by building A dwellers, there is a presumption of hostility and the burden shifts on the building B owner to show that there is only permissive. The presumption of hostility has to be defeated by building B owner. To defeat a prescriptive easement claim, the servient landowner may try to establish permissive use by demonstrating the existence of an oral agreement (*See Alstad v. Boyer*, 228 Minn. 307, 311 (Minn. 1949)), by demonstrating evidence of mitigating circumstances between the parties, by showing the claimant asked permission to use land (*See Block*, 577 N.W.2d at 525), or by providing evidence of a conservation between the parties. On the other hand if building A owners are able to show that such a right has been acquired by acquiesce where owner of building B remains silent and fails to assert his right, then building A owners would have a claim for prescriptive easement. Each case would stand on its particular facts and circumstances.

B. Are the owners of D's land required to allow road access to and from C's adjacent parcel?

This requires a discussion on prescriptive easements and easements by equitable estoppel.

Prescriptive Easements

The owners of D may not be required to allow road access to and from C's adjacent parcel. C has not acquired any easement rights over D's Property. As held in *Alstad v. Boyer*, 228 Minn. 307, 314 (1944) for an easement to be enforceable, it generally must be in writing because it falls within the Statute of Frauds. However common law allows an exception to the writing requirement with the doctrine of prescription that allows the rights of an easement to be acquired through the passage of time and the operation of law. To gain an easement by prescription, the claimant must prove actual, open, continuous, and exclusive use that is hostile or adverse to the actual landowner and under a claim of right for fifteen years. *Burns v. Plachecki*, 301 Minn. 445, 448 (1974).

C was granted permission by D his brother for using his property. The Courts in Minnesota make a distinction between permissive uses becoming adverse especially in the context of family relationships. In *O'Boyle v. McHugh*, 66 Minn. 390 (1896), the parties were parent and child. The mother was in possession of the property and the children held the record legal title. She was in possession of the land and the land was cultivated by her for her exclusive benefit. There was a relation of parent and child existing between the parties during all the time the mother claimed to have been in adverse possession. The Court held:

> As between those sustaining parental and filial relations, the possession of the land of the one by the other is presumed to be permissive, and not adverse. To make such possession adverse, there must be some open assertion of hostile title, and knowledge thereof brought home to the owner of the land.

Id. at 391.

In *O'Boyle*, the court established that a close family relationship between landowners presumed the use to be permissive. This presumption was adopted in other decisions. *See Collins v. Colleran*, 86 Minn. 199, 205 (1902) (father and son relationship); *Lustmann v. Lustmann*, 204 Minn. 228, 232 (1939) (brothers). The existence of a close family relationship between the claimant of land and the record owner creates the inference, if not the presumption, that the original possession by the claimant of the other's land was permissive and not adverse and that when such original use was thus permissive it would be presumed to continue as permissive, rather than hostile, until the contrary was affirmatively shown. *Ebenhoh v. Hodgman,* 642 N.W.2d 104, 111 (Minn. Ct. App. 2002).

Over the years, the Minnesota Supreme Court has refined the O'Boyle rule to state that a family relationship between the dominant and servient landowner creates "an inference, if not a presumption" that the use is permissive. *Burns,* 301 Minn. 445, 449 (1974). Therefore there is a presumption in Minnesota that a use is permissive in the context of a family relationship.

In the case at hand D has conveyed his interest to a family holding company. The company would be comprised of family members. Hence it is possible that the above rationale would apply in such a case and C may not claim any prescriptive easement.

However if the holding company is not construed to be a family relationship then the holding in *Boldt v. Roth*, 618 N.W.2d 393, 394 (Minn. 2000) would apply. This case gives an in-depth discussion on permissive use becoming adverse in the context of transfer to a non family member. May Boldt owned a parcel of land in Crow Wing

County, Minnesota. In 1966, she conveyed part of her property to Dorothy and James Boldt (Boldt Property) creating two adjacent parcels of land. After the conveyance in 1966, the Boldts constructed a house on their property with access by a circular driveway. Part of the circular driveway existed on the remaining May Boldt property. Dorothy and James Boldt did not obtain May Boldt's express permission to construct the circular driveway on the May Boldt property because they were family members. In 1979, May Boldt conveyed her portion of the property to a non-family member. Through subsequent conveyances, Kenneth and Mary Roth acquired the property (Roth property). There were no arguments concerning the use or location of the circular driveway until 1997. Dorothy Boldt hired a survey crew to determine the exact location of the boundary line because of a disagreement with the Roths over the location of landscape rock she was placing near the lakeshore. The survey revealed that the circular driveway existed almost entirely on the Roth property. Subsequent quarrelling over the boundary line resulted in Dorothy Boldt commencing an action to obtain a prescriptive easement for the use of the circular driveway that was located on the Roth Property. The trial court denied the prescriptive easement claim because Dorothy Boldt had not established an affirmative showing of hostile use, while the court of appeals denied the prescriptive easement claim because she had not proven that the Roths had the required knowledge of the adverse use.

The Minnesota Supreme Court determined the critical issue to analyze was whether the permissive use based on the presumption of a close family relationship between original landowners can be changed to hostile simply by the conveyance of the servient estate to a non-family member.

The court stated that the general rule is that when family members own adjoining parcels of real property and one is using a part of the other's property for her own benefit, such use gives rise to an inference, if not a presumption, that the use is permissive due to the familial relationship. *Id*. at 398. The reason for such designation is that the family member whose property is being used would not know, without some other assertion, that the use by the relative was hostile. *Id*. When the owners of adjoining parcels of real property are strangers, there is no need for the permissive inference or presumption because the servient estate owner should know simply by the actual and open use by the dominant estate claimant that the use is hostile. *Id*. The Court further held that once the owner of the servient estate is no longer a family member, actual and open use would be sufficient to notify the owner that the use is hostile and they have no reason to presume that a use is not an assertion of a claim of right. *Id*. The servient owners have notice of the boundaries to their property and that the use is actual and open and absent evidence of continued permission, the transfer of the servient estate to a stranger renders hostile a use previously considered permissive due to a close familial relationship and such transfer will commence the 15-year prescriptive easement time period. *Id.*

In the case at hand if the family holding company, if construed to be a stranger, C may claim prescriptive easement provided that he has been holding the property for 15 years or more from the date of conveyance of D's property to the Company.

Estoppel

In the case at hand D has allowed road access to and from C's property over D's property. This is an oral arrangement between D and C. This arrangement could be

construed as granting a license absent any written agreement. Under such circumstances D's land owners are may not be required to allow road access to and from C's adjacent parcel and C may not claim an easement under the doctrine of equitable estoppel.

In *Munsch v. Stelter*, 109 Minn. 403 (Minn. 1910), the parties entered into an oral agreement to construct a drainage ditch extending to both their properties and under the agreement they agreed to pay an equal share for the construction cost. The ditch started in Plaintiffs property and continued to the defendant's property. After two years the defendants blocked the ditch extending to their land without the Plaintiffs consent and this obstructed the flow of water from plaintiff's land but did not interfere with the drainage of defendants' land. Plaintiff sued for an injunction and the defendants claimed that the oral easement was unenforceable because it violated the statute of frauds. The Court held that the easement was enforceable. The Court held:

> It is elementary that a verbal contract for an easement over the real estate of another, unexecuted and unaccompanied by any other circumstances, is contrary to the statute of frauds, and does not convey any interest in the real estate. But there is a wise exception, founded on the accepted rules of conduct, and where an entry is made under a license, and the conduct of the licensor is such that it would be a fraud on the licensee to permit the licensor to revoke it, the doctrine of equitable estoppel applies.

Id. at 404, 405

The courts reasoning was based on the fact that the defendants gave plaintiff the right to construct the ditch and joined in the enterprise and accepted the benefits of plaintiff's labor and expense in completing the drainage system. The court further stated:

> An after attempt to exercise the right of revocation by damming up the ditch, thus depriving respondent of all benefits from its construction while they retain it for their own use, operated as a fraud upon him, and a court of equity will interfere to restrain it.

Id. at 406 407

It is evident from the above that the Courts will interfere only in exceptional circumstances. This has been further reiterated in *Hutchinson v. Wegner*, 157 Minn. 41 (Minn. 1923). In this case, in 1894, the city began acquiring water from a well on certain land. There was an agreement with the previous owner at that time that the city would have perpetual use of the well so long as it provided water to a mill on the property. Relying on this the city built a water works. The previous owner sold the property in 1920 and the new owner in 1922 made a demand on the city for payment for all of the water taken after he acquired the land. An action was brought by the city to enjoin the landowner from shutting off the water. The court found that all that the city received from the prior owner was a license to make use of the well, not an easement.

An easement would have been void under the statute of frauds because it was not in writing. It would be so unless there was performance by the respondent to such an extent that it would be a fraud upon it to set up the invalidity of the grant. *Id*. at 44. There was only a permission to use the well and no time period was prescribed for this. Further, the court held that the license was revocable. The Court held:

> This court has said that an easement always implies an interest in the land upon which it is imposed, and, therefore, lies only in grant, while a license carries no such estate and is generally revocable at the will of the licensor, Minneapolis Western Ry. Co. v. Minneapolis & St. L. Ry. Co. 58 Minn. 128, 59 N.W. 983; that the right to revoke a license is not affected by the fact that the licensee expended money on the faith thereof; that whether an easement or a license was created depends largely on the intent of the parties, and that the law is jealous of a claim to an easement, and, if such a claim is asserted, it must be proved clearly. Johnson v. Skillman, 29 Minn. 95, 12 N.W. 149, 43 Am. Rep. 192; Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co. 51 Minn. 304, 53 N.W. 639. But, in connection with these general statements, it has also been said that HN3the nature of a parol agreement may be such as to indicate an intention to give an interest in

> the land, with a permanent right of occupancy entitling the licensee to equitable relief by showing improvements and expenditures made in reliance upon the license. This thought was expressed in Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co. supra, in the following language:
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> "The principle upon which courts of equity sometimes apply the doctrine of equitable estoppel to cases where the entry has been under a license is that the conduct of the licensor has been such that it would be a fraud on the licensee to permit the licensor to deny that there was a contract for an interest in the land, and hence they treat the case as one of a parol contract partly performed, which the court will enforce."

Id. at 44, 45.

The city relied on *Munsch* 109 Minn. 403 wherein it was held that a revocation of the license would not be permitted because it would operate as a fraud upon the licensor. The Court further held that the revocability of a license is not affected by the fact that a consideration was paid for it, although it is a circumstance tending to show that the grant of an easement and not a bare license was intended. *Id.* at 46. The Court reasoned that the city had saved a lot of money by not sinking a well on its own land. *Id.* at 46. Though the city contended that it constructed its system of waterworks and expended $20,000 on the faith of the offer, the court held that it made no substantial improvements it would not have made had it known that all it was getting was a revocable license. *Id.* at 46. It adopted the easiest, cheapest and most natural way of getting water. *Id.* at 46. The duration of the arrangement agreed upon was not mentioned and hence is not unreasonable to suppose that it was intended to be temporary. *Id.* at 46. The best guide to a conclusion with respect to the nature of the right created is the intention of the parties as evidenced by their words and acts. *Id.* at 46. There was no formal arrangement. If it had been a perpetual right it would have been reduced to writing. *Id.* at 47.

In the case at hand there is no mutual benefit derived by the parties. It is just a

permission to use the road and may amount to a revocable license. Even after such a long time there is no formal agreement between the parties which may indicate that there is no perpetual right. No substantial improvements were made on the C's property relying on the arrangement made with D.

Again in *Larson v. Amundson,* 414 N.W.2d 413 (Minn. Ct. App. 1987), the Court held that a license is revocable at the will of the licensor. A license remains revocable even if granted for valuable consideration, and the mere fact that the licensor permitted the licensee to expend large sums of money in building or improving the land does not justify an estoppel. A licensee is conclusively presumed, as a matter of law, to know that a license is revocable at the licensor's pleasure; and if the licensee expends money in connection with his entry upon the licensor's land, he does so at his own peril. *Id.* at 419.

Even if substantial improvements were made on the property C still may not have any legal or equitable right over D's property.

CONCLUSION

A. The owner of building A may be required to allow the occupants of building A to use the deck at the rear of building B to reach the ground. The dwellers in building A should demonstrate an open, obvious, continuous and unmolested use for the prescribed statutory period that is inconsistent with the owner's rights. Upon demonstrating this, there is a presumption of hostility and the burden of proof would be on the owner of building A to demonstrate that the use was permissive and not adverse. Permissive use may become adverse on the open assertion of hostile title and knowledge thereof brought home to the owner of the land. *O'Boyle* 66 Minn. 390, 391 (1896).

B. The owners of D may not be required to allow road access to and from C's adjacent parcel. C has not acquired any easement rights over D's Property. The use is merely permissive and not hostile or adverse. Permission was given by his brother who subsequently transferred it to a family holding company. However if the family holding company, is construed to be a stranger, C may claim prescriptive easement provided that he has been holding the property for 15 years or more from the date of conveyance of D's property to the Company. Even under the doctrine of equitable estoppel, C may not have a right as Minnesota Courts have refused to recognize such rights except under exceptional circumstances.