# VIRGINIA:

**IN THE CIRCUIT COURT OF LOUDOUN COUNTY**

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| **TIMOTHY EATON, *et als,*** | ) | |
| | ) | |
| **Plaintiffs** | ) | |
| | ) | |
| **v.** | ) | **CASE NO. CL 82643** |
| | ) | |
| **CARLA BAER, *et als,*** | ) | |
| | ) | |
| **Defendants.** | ) | |

## MEMORANDUM OPINION

The parties to this action own adjoining parcels of land north of Hillsboro, on the eastern slope of the Short Hill in Loudoun County. The plaintiffs are members of the Eaton family[1] (herein "the Eatons") who own three contiguous lots (herein "the Eaton Lots") located to the west of a lot belonging to defendant Carla Baer. Neither the Eaton Lots nor the Baer lot front on a public road, however the Baer lot lies between the Eaton Lots and the closest public road, Route 690, which runs in a generally north-south direction. It should be noted that Mark and Suzanne Eaton, the parents of Timothy, Andrew and Julie, own a lot (PIN 441-35-7119) contiguous to the parties' lots.[2]

Although the Eatons have obtained recorded access easements from the lot owners to the east of Baer, granting them the right to use the roadway which runs from Route 690 towards Baer and the Eaton Lots,[3] the Eatons cannot connect to this roadway because they lack an easement

[1] Timothy and Jade Eaton own PIN 476-30-6861, Andrew Eaton owns 441-35-1336, and Julie [nee' Eaton] Adamson and Zachary Adamson, her husband, own 441-35-1223.
[2] A copy of Plaintiffs' Exhibit 18 is attached to and made a part of this opinion. The Eaton Lots are outlined in green, the Baer is one of the lots outlined in blue, and the Mark & Suzanne Eaton lot is outlined in red.
[3] Plaintiffs' Exhibit 6. Deed of Easement and Restrictive Covenants, Instrument # 20081003-0060079.

across the Baer lot. Consequently, the Eatons filed the subject action seeking to establish an easement by necessity across the Baer lot.[4]

Baer's 10-acre lot was previously part of a 62-acre tract, fronting on State Route 690. This tract was divided in 1976[5] and the Baer lot-- PIN 441-35-8155-- is shown as Lot 1 on the subdivision plat. The 62-acre tract and the Eaton Lots were owned by John J. Arnold from 1939-41.[6] When Arnold sold the 62 acres in 1941, the deed of conveyance failed to reserve an access easement across the 62 acres for the benefit of the three lots which Arnold retained, and are now owned by the Eatons.[7]

The Eatons argue that, upon the 1941 severance of Arnold's unity of ownership of the 62-acre tract and the three Eaton Lots without any explicit reservation of access for the Eaton Lots, an easement by necessity was created as a matter of law.

> A right of way by necessity arises from an implied grant or implied reservation. Stated differently, it is an easement implied upon a conveyance of real estate. To establish such a right, the alleged dominant and servient tracts must have belonged to the same person at some time in the past. The right is based upon the idea that whenever one conveys property, he conveys that which is necessary for the beneficial use of the land and retains that which is necessary for the beneficial use of the property he still possesses.

Thus, in the case of an implied grant, an easement is acquired by a grantee over the grantor's property when the land conveyed is either entirely surrounded by property of the grantor or else is bordered in part by the land of a stranger and in part by lands of the grantor. Under either situation, the grantee obtains a way of necessity over the grantor's property because otherwise the land

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[4] Count II of the Complaint contained a claim for establishment of an easement implied from prior use, however the plaintiffs abandoned this theory at the beginning of the *ore tenus* hearing.

[5] The Lowry & Frye Subdivision plat is recorded at Deed Book 644, Page 5, and was attached as Exhibit 5 to the Complaint. The lots in this subdivision are outlined in blue on Plaintiffs' Exhibit 18 which is attached to and made a part of this opinion.

[6] See Plaintiffs' Exhibit 14.

[7] This deed recorded at Deed Book 11-N, Page 307 is Plaintiffs' Exhibit 3.

conveyed would be inaccessible and useless. *Clifton v. Wilkinson*, 286 Va. 205, 210 (2013) (citing *Middleton v. Johnston*, 221 Va. 797, 802-03 (1981).)

It therefore follows that, in the case of an implied **reservation**, an easement is acquired by a grantor over a grantee's property when the land retained is either entirely surrounded by property of the grantee or else is bordered, in part, by the land of a stranger, and, in part, by lands of the grantee, provided certain conditions are met. When Arnold conveyed the 62 acres in 1941 and retained the three Eaton Lots, these lots were either entirely surrounded by property of the grantee or else was bordered in part by the land of a stranger and in part by lands of the grantee. This, however, is not sufficient to establish the implied reservation of an easement by necessity. The Eatons must establish by clear and convincing evidence not only that their lots and the Baer lot were under common ownership, but that the severance of this unity of title must have given rise to the need for this access easement. *See Clifton*, 286 Va. at 211.

*Common Ownership*

John J. Arnold acquired the Eaton Lots in 1925[8] and the 62-acre parent tract in 1939[9]. Arnold conveyed the 62 acres in 1941 by a deed in which the grantors were identified as "John J. Arnold and Carrie L. Arnold, his wife."[10] Counsel for Baer argues that Mrs Arnold's joinder in this conveyance evidences that she had acquired "some sort of interest, regardless of its nature, in the sixty-two acres, but none in the eight acres, and thus there could be no unity [of title] to sever..."

Jeffrey Ball, plaintiffs' expert title examiner did not report any recorded instrument in the chain of title which granted her an interest in the 62 acres. Under Virginia law in effect in 1941,

[8] Deed Book 9-V, Page 285.
[9] Deed Book 11-F, Page 18.
[10] Plaintiffs' Exhibit 3.

Mrs. Arnold had a dower interest in any real estate acquired by her husband during the marriage. Section 5117 VA. CODE (1919)[11] provided, in pertinent part, that "[a] widow shall be endowed of one-third of all the real estate whereof her husband... at any time during the coverture, seized of an estate of inheritance, unless her right to such dower shall have been lawfully... relinquished..."[12] This means that Carrie Arnold acquired a dower interest in all lands acquired by her husband during the marriage such an interest remained attached to any lands he might transfer unless she relinquished her interest. See *Higginbotham v. Cornwell*, 49 Va. (8 Gratt.) 83 (1851).

The standard process for relinquishing dower upon the sale of land was the wife's joinder in the conveyance. "When a husband and his wife have signed and delivered a writing purporting to convey any estate, real or personal, such writing, whether admitted to record or not, shall operate to convey from the wife her right of dower in the real estate embraced therein, and pass from her and her representatives all right, title and interest of every nature which at the date of such writing she may have in any estate conveyed thereby." § 5211 VA. CODE (1919).

In light of the absence of any instruments of record during the 1939-41 period which granted Carrie Arnold an interest in the 62 acres, it is reasonable to infer—which I do-- that she was a party to the deed of conveyance in order to relinquish her dower interest. I therefore find that the 62 acre parent tract and the Eaton lots belonged to the same person, *viz.* John J. Arnold during 1939-41.

*Severance as the Cause of the Necessity*

Quoting *Clifton* for the proposition that "[i]t is essential to this theory [of easement by necessity] that the necessity arise simultaneously with the conveyance...," Baer's counsel argues

[11] As amended in the 1924 Acts of Assembly, chap. 304.
[12] Dower was not abolished until 1976.

that the severance of two tracts must **cause** the necessity to come into being, and that the Eatons failed to meet their burden to prove by clear and convincing evidence that the "severance caused the necessity and that it arose simultaneously with it." During 1939-41 John J. Arnold owned the Eaton lots as well as the contiguous 62 acres which fronted on Route 690. Arnold's 1941 conveyance of the 62 acres resulted in the Eaton Lots-- which he continued to own-- becoming entirely surrounded by property of Arnold's grantee and strangers. Consequently, the Eaton Lots "became landlocked by a conveyance from a former owner severing unity of title..." *Clifton*, 286 Va. at 211. And because the severance rendered the Eaton Lots landlocked, this requirement for establishing an easement by necessity is met, unless there was other alternative access existing at that time.

Title examiner Ball testified that he had not found any recorded access to a public road for the Eaton Lots. Mark Eaton, the owner of a lot contiguous to the Eaton and Baer lots, and, in fact, a former owner of the Eaton Lots,[13] testified that he had owned land in the area for about 20 years and that he was unaware of any access for the Eaton Lots. None of the plats offered into evidence revealed any access for the Eaton Lots to a public road.

Baer's counsel noted that the lot belonging to Mark and Suzanne Eaton (PIN 441-35-7119) had been the subject of a suit concerning access from this lot to Route 690, which resulted in a consent decree[14] by which the parties acknowledged that the right of access was the product of a deed which had granted access for only this Mark and Suzanne Eaton lot, and not the Eaton Lots.

No evidence was offered by the defendant of other access available to the Eaton Lots to a public road. I therefore find that the plaintiffs have met their burden of proving by clear and convincing evidence the lack of other access as required under the rule set forth in *Middleton v.*

[13] He conveyed them to his children-- Timothy, Andrew and Julie—and their spouses.
[14] Defendant's Exhibit 2, Decree in Chancery # 14610.

*Johnston*, 221 Va. 797, 803 (1981) ("a way of necessity will not be established if there is another way of access").

*Must Severance Be Effected by the Subdivision of a Parent Tract?*

Baer argues, however, that the necessity must have arisen at the time of severance and that:

> It would defy logic and common sense to say that two separate parcels, clearly distinct from each other, with distinguishable property lines and boundaries, have not already been severed from each other. *They are not one.* It follows, then, at least for easement-by-necessity purposes, that if there are two parcels already distinct from each other, that there has already been a severance. And unless the necessity arose at the time the parcels became distinct, and was caused by that division, easement by necessity simply cannot later arise, regardless of who may later come to own them or sell them. Perhaps, for some other purposes, selling one of several already-distinct parcels might be some sort of 'severance;' but it is clearly not a severance for the purposes of establishing an easement by necessity.

This is an intriguing argument. The Eaton Lots were part of an original grant to John Colville of the Shannondale tract in 1739, while the Baer lot was part of a grant to Catesby Cocke in the same year, 1739, with the boundary between these two grants encompassing the boundary between the Eatons' and Baer's lots.[15]

I have found no reported case in Virginia which explicitly addresses the argument that "severance," for the purpose of establishing an easement by necessity, is limited to occasions where a lot is landlocked by the subdivision of a parent tract and a subsequent out-conveyance of one of its lots. The Supreme Court of Virginia upheld the creation of an easement by necessity in in *Davis v. Henning,* 250 Va. 271 (1995) where a grantor, who owned two parcels which were not the product of the same division, conveyed one of the parcels to another without provision having been made for access. However, no argument was made, and the court did not address, that the implication of an easement by necessity

[15] See the out-conveyances from these tracts of record at Deed Book 2-F, Pages 3 & 172.

is limited to situations where the division of land and a subsequent lot transfer land-locks one of the subdivision lots.

Canvasing other jurisdictions, I found the Supreme Court of Texas adopting this requirement in *Koonce v. J.E. Brite Estate*, 663 S.W.2d 451 (Tex. 1984), but the Montana federal district court did not in *McFarland v. Kempthorne*, 464 F. Supp. 2d 1014 (D. Mont. 2006). The Restatement of Property adopts the broader view that easements by necessity will be implied in situations where a person comes into ownership of two distinct, contiguous parcels, one of which has road frontage and the other is without, and thereafter sells one without explicitly providing for access to the lot without road frontage. "Servitudes by necessity arise only on severance of rights held in a unity of ownership. This severance can take place when a grantor, who owns several parcels, conveys one or more to others." RESTATE. 3rd of PROP: *Servitudes*, § 2.15.

Our Supreme Court said in *Keen v. Paragon Jewel Coal Corp.*, 203 Va. 175, 178 (1961), because "it would be contrary to public policy to permit... [a landlocked] tract to remain forever useless and unproductive, it will be assumed that the parties intended that the grantor should reserve a way by necessity over the lands conveyed..." (Quoting 1 MINOR ON REAL PROPERTY (Second Edition, Ribble) § 98, p. 132).

Based on *Davis v. Henning,* the authority of the Restatement and Virginia's announced public policy, I find that the subject severance in the sale of one of two distinct, pre-existing contiguous lots is such a severance that will support the implication of an easement by necessity.

*Baer's Lot Purchase Without Actual Notice of the Claim*

The severance on which the Eatons base their claim occurred in 1941, however the instant suit was not filed until 2013. In the interim, Carla Baer purchased her lot in 2010[16] without actual

[16] Instrument # 20101014-0064210.

notice that the Eatons might have a claim for an easement by necessity across her land. She argues that this should bar their claim.

This *bona fide* purchaser defense is an affirmative defense[17] that should have been pleaded if it was to be relied upon. "Every litigant is entitled to be told by his adversary in plain and explicit language what is his ground of... defense." *Ted Lansing Supply v. Royal Alum*, 221 Va. 1139, 1141 (1981).

However, it is not at all clear that a *bona fide*-purchaser defense would defeat a claim for easement by necessity. In *Keen v. Paragon Jewel Coal Corp. supra.,* which was decided in 1961, the severance giving rise to the claim of easement by necessity occurred in 1895. Opposing Paragon's claim for an easement by necessity, Keen argued he was a purchaser for value and without notice. Notwithstanding the passage of over 60 years since the division of the parent tract without a land-locked lot owner seeking establishment of an easement by necessity, the court said that the "contention that he was a purchaser for value and without notice..." could not be justified because the necessity

> was plainly visible and apparent to any person. A casual inspection would have shown that such lands were completely landlocked... Moreover, Keen was charged with notice from the recorded title that defendant's land was surrounded on all sides by the lands of strangers...

203 Va. at 180.

*Conclusion*

I therefore find that the Eatons are entitled to an easement by necessity across the lot belonging to Baer. Counsel for the Eatons may prepare a decree which memorializes this ruling.[18] I contemplate that a further and final decree will be thereafter entered which includes a plat

[17] *Nelms v. Nelms*, 236 Va. 281 (1988).
[18] Such a decree is appealable under § 8.01-670.B.3 VA. CODE should Ms. Baer be so advised.

showing the precise location of the easement. It may be necessary to have a further hearing on the specifics of the easement to be granted should there be disagreement as to its location, although the parties are encouraged to collaborate on this issue and other details.

*The Easement to be Granted and Other Conditions*

Because the first leg of the easement to be used by the Eatons already exists across PINs 441-37-1827 and 441-36-6251 with a width of 30 feet, the easement to be granted across the Baer lot will be 30 feet wide as well. In locating the easement, the following must be taken into account:

- The desires of Ms Baer.
- The Eatons' evidence was that any easement across the Baer lot did not need to run its entire length but could quickly cross over onto the lot owned by Mark and Suzanne Eaton (PIN 441-35-7119) who are willing to grant their children an easement to reach the Eaton Lots. Steven Chen, the Eatons' engineer, testified that the topography at the western end of PIN 441-35-7119 was steep and that the easement might reasonably need to cross back over onto the Baer lot. This will be permitted to the minimum extent necessary.
- The usefulness of such an easement on the Baer lot is dependent on the Eatons traversing the lot owned by Mark and Suzanne Eaton (PIN 441-35-7119). At such time as a final decree with an attached plat locating the easement is presented to the court for entry, the Eatons must tender a deed of easement whereby they are granted an access easement across PIN 441-35-7119 which links up with the easement to be established on the Baer lot.
- In laying out the easement on the Baer lot, the Eatons' engineer shall take care to minimize any negative impact on her land as much as possible, and shall be guided by her desires as much as possible.

- The roadway to be constructed in this easement must be built in a fashion that meets accepted engineering standards so as to prevent damage to the Baer lot through erosion or otherwise.

20 August 2015

Stephen C. Price, Judge *pro tempore*
V.S.B. No. 14190
McCandlish & Lillard, P.C.
201 Loudoun Street, SE, Suite 201
Leesburg, Virginia 20175
Telephone: 703.934.1134
Facsimile: 703.737.0165
Email: sprice@mccandlishlawyers.com

EXHIBIT

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