IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION

NEIL A. CRAIG AND ROSALIE T. CRAIG, Plaintiffs	:	
vs.	:	NO: 09-1880
JAMES DULCEY AND KATHLEEN DULCEY, Defendants	:	

James A. Schneider, Esquire — Counsel for Plaintiffs
Gretchen D. Sterns, Esquire — Counsel for Defendants

Nanovic, P.J. – April 27, 2011

MEMORANDUM OPINION

FACTUAL AND PROCEDURAL BACKGROUND

The Defendants, James Dulcey and Kathleen Dulcey, have appealed from our Final Order dated February 22, 2011, granting the Plaintiffs, Neil A. Craig and Rosalie T. Craig, the right to maintain a portion of their driveway on a former railroad bed and denying the Dulceys' counterclaim for ejectment. In their appeal, the Dulceys raise one issue: that we erred in determining that title to the portion of the railroad bed in question on which the Craigs' driveway is located is held by the Craigs and not the Dulceys.

The Craigs are the owners of a 20.150 acre tract of ground in Packer Township upon which their home is constructed and which is bisected by the former railroad bed. The railroad bed similarly divides two other lots in the subdivision plan of

which the Craigs' property is a part and serves as an access route to all three properties. Because of the steep terrain of the Craigs' property, sloping downward from their home towards the railroad bed, the Craigs' driveway is approximately eight feet above the surface of the railroad bed at the point within the boundary lines of the Craigs' property where the two intersect and gradually tapers to the level of the railroad bed. Because of this height differential, that portion of the railroad bed on which the driveway is located is impassable to motor vehicles.[1]

The Dulceys claim we erred in denying their claim for ejectment in that they own title to the railroad bed. It is the Dulceys' position that this title was acquired by way of a separate and distinct chain of title from that through which the Craigs' predecessors in title acquired ownership of what is now the Craigs' property and that, consequently, having never held title, the Craigs' predecessors in title were unable to convey ownership of the railroad bed to the Craigs.

Previously, in our Memorandum Opinion of February 1, 2011, we explained the basis for our decision. A copy of that opinion may be found at 18 Carbon L.J. 417. As to the precise

[1] **This does not affect access to the other two lots in the subdivision which are to the west of the Craigs' property, the direction from which access is obtained, but does affect, to a certain extent, the Dulceys' access to other property they own east of the Craigs. The railroad bed is approximately fifty feet wide and the driveway, at its furthest intrusion into the width of the railroad bed, extends approximately halfway to the center, leaving an unobstructed width for travel of more than twenty-five feet.**

issue the Dulceys intend to raise on appeal, its success depends on the introduction of evidence which was not presented at the time of trial but which the Dulceys requested be judicially noticed in a post-trial motion.

DISCUSSION

The Craigs' property is part of a three-lot subdivision prepared in 1979 by Mark Gerhard. What is now the Craigs' property was first conveyed by Mr. Gerhard to Michael Boves and Helen L. Jacobs (the "Boves") by deed dated May 14, 1979. (Plaintiffs' Exhibit 1). The recital in this deed states that the premises being conveyed is a part of the same premises "which Bessie E. Gerhard, individually, and as Executrix of the Last Will and Testament of Wallace O. Gerhard, Jr., by Deed dated September 15, 1977, and recorded in the office for the recording of deeds in and for the County of Carbon in Deed Book 384, Page 555, granted and conveyed to Mark J. Gerhard, Grantor herein." Encompassed within the legal description of the Boves' deed, now the Craigs' property, is the area where the disputed railroad bed is located.

The deed upon which the Dulceys base their claim to ownership of the railroad bed is that dated October 12, 2007, from Mark J. Gerhard, as Executor of the Estate of Bessie K. Gerhard, Deceased to the Dulceys. (Plaintiffs' Exhibit 16). The recital in this deed identifies the source of title in the

grantor as "being a part of the same premises conveyed to Wallace O. Gerhard and Bessie K. Gerhard, his wife, by deed from Hazleton City Authority dated February 1972 and recorded February 13, 1980, in Carbon County Deed Book 370 at Page 496 and Deed Book 410, Page 850. The said Bessie K. Gerhard died on July 23, 2000 and her estate is filed to No. 01-9033 in the Office of the Register of Wills of Carbon County. The said Mark J. Gerhard was appointed as the Executor of the estate."

From the foregoing, we concluded that since title to the railroad bed was conveyed to Bessie Gerhard and her husband by deed dated February 1972, at the time Bessie Gerhard conveyed the premises of which the Craigs' property is a part to her son, Mark Gerhard, on September 15, 1977, she was the sole owner of the portion of the railroad bed in dispute, her husband (as evidenced in the recital of the Boves' deed) having died sometime prior to this date. Consequently, at the time of the September 15, 1977 conveyance, Bessie Gerhard in her individual capacity had the power to convey title of the railroad bed to her son.

The September 15, 1977, deed was never placed in evidence by either of the parties. However, the legal description which appears in the Boves' deed not only encompasses the section of the railroad bed now in dispute but further excepts and reserves to Mr. Gerhard, his heirs,

successors, and assigns, an easement interest in this same railroad bed, thus implying that Mr. Gerhard was the owner of the railroad bed at the time of conveyance.[2] It should also be noted that the deed making the conveyance from Mr. Gerhard to the Boves was executed by Bessie Gerhard on her son's behalf as his attorney-in-fact. The foregoing facts clearly support the inference that the Craigs, as the successors in interest to the Boves, are the owners of that portion of the railroad bed upon which their driveway is located, subject to the easement interest reserved by Mr. Gerhard.

In their proposed findings of fact and conclusions of law submitted to the Court after the non-jury trial was concluded, the Dulceys erroneously represented that the source of title of the property conveyed from Bessie Gerhard to her

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[2] **While an exception is distinct from a reservation, both imply ownership in the grantor. *See* Ladnor Pennsylvania Real Estate Law, Section 16.05 (k) (5th Edition 2006) which states:**

> **There is a fundamental distinction between a reservation and an exception. An exception is always a part of the thing which, but for the exception, would have been conveyed with the grant. *Mandle v. Gharing*, 256 Pa. 121 (1917); *Whitaker v. Brown*, 46 Pa. 197 (1863); *Bicking v. Florey's Brick Works*, 53 Pa.Super. 358 (1913). It is the withholding from the operation of the deed something in existence that otherwise the deed would pass to the grantee. *Lacy v. Montgomery*, 181 Pa.Super. 640 (1956). On the other hand, a reservation in a deed is the creation of a right or interest that had no prior existence as such in the thing or part of the thing granted. *Lauderbach-Zerby Co. v. Lewis*, 283 Pa. 250 (1925); *Mandle v. Gharing*, 256 Pa. 121 (1917). It follows that an exception requires no words of inheritance, because title to the excepted part is already in the grantor and never passes from him. But a reservation does require words of inheritance, since it creates a new right or interest that had no previous existence; and without words of inheritance the reservation is personal to the grantor and ceases upon his death. *Mandle v. Gharing*, 256 Pa. 121 (1917); *Hobaugh v. Philadelphia* Co., 67 Pa.Super. 407 (1917).**

***See also* Herr v. Herr, 957 A.2d 1280 (Pa.Super. 2008).**

son, Mark Gerhard, was solely that in her capacity as Executrix of the Estate of Wallace Gerhard when, as previously stated, the recital in the May 14, 1979 deed from Mark Gerhard to the Boves indicates the source of title to be from Bessie Gerhard both individually and in her capacity as Executrix of the Estate of Wallace Gerhard. (Defendants' Proposed Findings of Fact, paragraph 3, footnote 1). In this same submission, the Dulceys inappropriately sought to rely upon evidence not of record, namely the contents of the 1977 deed from Bessie Gerhard, individually and as Executrix of the Estate of Wallace Gerhard to Mark Gerhard.

Additionally, in their Post-Trial Motion filed on February 11, 2011, the Dulceys again sought to rely upon the contents of the 1977 deed. (Defendants' Post-Trial Motion, Paragraph 10, Exhibit "C"). In doing so, the Dulceys for the first time asked that we take judicial notice of the contents of this deed, citing as authority Penstan Supply v. Traditions of American L.P., 9 Pa. D.&C.5th 567 (Pa.C.P. 2010). (Defendants' Post-Trial Motion, paragraph 11).

We have not taken judicial notice, as requested by the Dulceys, for two reasons. First, the request was belated: our decision had already been rendered and was a matter of record. Ownership of the railroad bed was a disputed issue of fact at the time of trial and it was incumbent upon the Dulceys at that

time to either present evidence in support of their position or to request the taking of judicial notice. (N.T., 5/7/10, pp. 63-69). In effect, the Dulceys impermissibly seek to open the trial record to admit documentary evidence available to them but which they elected not to produce. The risk of failing to do so, falls upon the Dulceys.

Second, we do not believe the information which the Dulceys ask to be judicially noted can stand on its own as a statement of undisputed fact for the purposes proffered. To be sure, the existence of the deed itself is not in question. But whether its effect is what the Dulceys contend – that title to the railroad bed was not conveyed to Mark Gerhard in the 1977 deed from his mother – requires reference to even other documents not in evidence (*e.g.*, the deed from James Dietrich to Wallace O. Gerhard, Jr., referred to in the recital of this deed). (See Defendants' Post-Trial Motion, paragraph 10, Exhibit "C").

Pa.R.E. 201(b) governs judicial notice of adjudicative facts:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

While we do not disagree that the court may take judicial notice of public documents, Bykowski v. Chesed, Co., 625 A.2d 1256, 1258 n. 1 (Pa.Super. 1993), whether it should do so, depends, at least in part, upon the object of and purpose for the request. This is especially true when the purpose for which judicial notice is sought cannot be determined simply by examining the document which is the object of the request but must, by necessity, be determined by an examination of other documents bearing on the subject at issue.[3]

To grant the Dulceys' request would literally open up a can of worms requiring review of innumerable other documents of public record – in effect, a title search which neither party has apparently done – in order to ascertain record ownership of the railroad bed. The burden of proving ownership of this property was upon the Dulceys by virtue of their counterclaim in ejectment. This burden was not met by the Dulceys at the time of trial and cannot be met, after the fact, by a request for judicial notice unaccompanied by the information necessary to make the request self-evident given the tenor of the matter to be noticed. *See* Pa.R.E. 201 (d) ("A court shall take judicial

[3] **This is further complicated in this case by the discrepancies between the boundary description of the railroad bed described in the Dulceys' deed (Plaintiffs' Exhibit 16; Defendants' Exhibit 2) and the survey provided by their surveyor, Dennis Evans. (Defendants' Exhibit 1; *see also* Plaintiffs' Exhibit 15 and N.T., 5/7/10, pp. 115-116, 124-125).**

notice if requested by a party and supplied with the necessary information.").

CONCLUSION

The decision from which the Dulceys appeal is based upon the evidence of record and, we believe, is supported by that evidence. Accordingly, for the foregoing reasons, we respectfully ask the Superior Court to affirm that decision and deny the appeal.

BY THE COURT:

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P.J.