

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 02-5031-H

FREDERICK L. PUGLIESE and JULIE A.M. AHERN,
Plaintiffs,

vs.

THE TOWN OF EASTHAM, et al.,
Defendants.

**ORDER OF
JUDGMENT**

After a trial without jury and based upon the credible evidence, the Court, in accordance with the requirements of Rule 52(a), states its findings of fact and conclusions of law.

FINDINGS OF FACT

Plaintiffs Julie A.M. Ahern and Frederick L. Pugliese are the owners of the property on 580 Campground Road, Eastham, Massachusetts. Defendant Lola M. Galvin ("Galvin") is the owner of the property on 600 Campground Road. Both properties derive from land deeded to Harry P. Townsend in 1923. A private way 25 feet in width, now known as Lisa's Way, was established by Townsend when he recorded his subdivision plan in 1929. Lisa's Way runs between the Galvin property and the Pugliese/Ahern property from Campground Road on the south to what is now known as Griffin Road on the north. There is no dispute that as a matter of record title and operation of law that the western boundary of plaintiff's property and the eastern boundary of Galvin's property is the centerline of Lisa's Way and that, unless Galvin is successful in her claim of adverse possession and/or abandonment of the right to use Lisa's Way for passage, plaintiffs and Galvin had

a right of way over the entirety of Lisa's Way in common with all other abutters of Lisa's Way.

The first two calls in the deed to John and Lola Galvin, dated and recorded on August 22, 1985, were as follows:

BEGINNING at the Southeast corner of the premises at the intersection of Camp Ground Road and a proposed road;

THENCE running Northerly along the East line of said proposed road, a distance of 120.00 feet;

A deed which purported to convey to the Galvins property to whose eastern boundary extended beyond the centerline of Lisa's Way would not reflect true record title and would be ineffective in conveying to the Galvins any interest beyond the centerline.

At the time the Galvins were deeded 600 Campground Road, the dwelling on the property occupied a portion of the western half of Lisa's Way determined to be four (4) feet at the southwest corner of the dwelling to approximately two (2) feet at the northeast corner of the dwelling. That dwelling was razed in the spring/summer of 2004 and Galvin constructed a new house the foundation of which does not occupy any part of Lisa's Way.

When Galvin acquired 600 Campground Road, Lisa's Way was an established Way. Not only was Lisa's Way shown on recorded plans and the assessor's map, but there also existed survey monuments, observed by members of the Galvin family, which delineated certain of its limits, as well as a recognition of its existence by neighbors and members of the Galvin family (although the Galvin family believed the way to be located further from the easterly side of the Galvin dwelling).

Also when the Galvins acquired their property there was a large and majestic oak tree opposite the easterly side of the dwelling which straddled the centerline and a smaller oak tree also existed in Lisa's Way closer to Campground Road. Although most of Lisa's Way had not been tended or maintained when the Galvins obtained the property, there was an area east of the dwelling

in Lisa's Way which had been cleared, tended and mowed. A cesspool which serviced 600 Campground Road had been installed within Lisa's Way in 1966 but the top of the cesspool was below grade.

After the Galvins obtained 600 Campground Road, the Galvin family since August 1985 have regularly used the property with its dwelling for summer weekend and longer stay vacations. The Galvin family members used portions of Lisa's Way for a number of purposes. The area under and around the large oak tree was their dining room. Until the old house was razed they would generally eat their meals at a picnic table under the tree. Portable lawn chairs would also be located in the same vicinity. The location of the picnic table would sometimes be placed to the east side of the oak tree and therefore east of the centerline of Lisa's Way. At other times the table would be closer to the house in an area west of the centerline of Lisa's Way. The table and lawn furniture were moved from time to time so that the underlying grass would not be damaged or stressed as severely as it would if the table and furniture remained in a single spot. The Galvin family dried clothes on a rope clothesline affixed to trees to the rear of the dwelling. The clothesline, tied some 5 feet above ground, stretched across portions of Lisa's Way east of the centerline but not across the entire eastern half of Lisa's Way. The clothesline was hardly visible from Campground Road unless clothes were actually hanging from the line.

A small sunfish sailboat was stored by the Galvin family on the northeast portion of the property occupying a portion of the Lisa's Way east of the centerline. The sunfish had been obtained from the immediate predecessor owner of 600 Campground Road, Geoffrey Guild. The sunfish was stored by the Galvins until sometime in the year 2000. A powerboat had also been stored on the eastern half of Lisa's Way by the Galvins for perhaps 6 years followed by occasional storage of a Jet Ski on a trailer for just a few years in the same location.

The Galvin family kept and regularly used a portable barbecue grill on the easterly portion of Lisa's Way but stored it off season behind the dwelling. Children used cleared portions of Lisa's Way as a play area.

The Galvins also stored bicycles and car-top carriers in the northeasterly portion of Lisa's Way when they visited the property as well as lawn chairs when not in use. They also dumped wood debris and branch clippings on Lisa's Way to the north of their dwelling.

During the Galvins' ownership until a new septic system was recently installed, the Galvins would dig in the area of the cesspool to repair clogged wastelines and for pumping. Each time they did so the cesspool would remain open for a few days for Town of Eastham inspection. Surveyor ribbons were placed around the dug up area to identify the area and to prevent people from falling into the cesspool.

The Galvin family mowed and maintained the area east of their dwelling to the brush line which began only a short distance before the easterly edge of Lisa's Way. In this area closer to Campground Road defendant Katherine Sclafani (daughter-in-law of Lola Galvin) would regularly sit and read with some privacy and out of the sight of their neighbor, the Durantes.

The immediate predecessors in title to the Galvins of 600 Campground Road were Geoffrey and Joyce Guild who bought the property in 1984. Before then, the property was owned by Bruce and Patricia Crane who bought it in 1978. The only uses that the Guilds made of Lisa's Way was to store the Sunfish on the easterly part of the way, sitting on chairs or at a picnic table both on the easterly and westerly portions of the Way. They also mowed and maintained the area of Lisa's Way east of their dwelling. Absent boat storage, the Cranes' activity in Lisa's Way were the same as the Guilds'.

Before and after they took title to 580 Campground Road in December 2000, the plaintiffs

walked Lisa's Way at its easterly side a number of times. In September 2002 plaintiff Pugliese appeared at hearings of the Eastham Planning Board and wrote to the Planning Board asserting ownership and easement rights in Lisa's Way. Defendants Galvin and the Sclafanis were aware at the time of plaintiffs' positions. On November 29, 2002 plaintiffs filed this lawsuit putting the title and easement rights in Lisa's Way at issue.

Defendants' Position

Defendants Lola Galvin, Louis and Katherine Sclafani assert that their and their predecessors' continuous use of the easterly one-half portion of Lisa's Way for over 20 years under color of title, or even without, entitles them to ownership of the entirety of Lisa's Way by adverse possession. Defendants also claim this same use as well as their use of the westerly portion of Lisa's Way has extinguished plaintiffs' easement rights in Lisa's Way. Lastly, defendants claim that the plaintiffs abandoned their right to travel on Lisa's Way.

CONCLUSIONS OF LAW

In order to prove title by adverse possession of land within Lisa's Way, defendant Galvin had to establish occupation of the land openly, notoriously, adversely, without interruption for more than twenty years and in a manner irreconcilable with its use as a way. *Brennan v. DeCosta*, 24 Mass. App. Ct. 968, 969 (1987).

Defendant Galvin had the same burden in order to establish that plaintiffs and other abutters of Lisa's Way lost their easement rights to travel the length of Lisa's Way as a result of her or her family's activities on Lisa's Way. *Lemieux v. Rex Leather Finishing Corp.*, 7 Mass. App. Ct. 417, 421-422 (1979).

The Court finds that defendant Galvin has fallen short of her burden in several respects. None of the actions by the Galvin family on Lisa's Way are irreconcilable with usage as a way.

Mowing and maintaining a grassy area in the Way is not at all inconsistent with its usage as a way. Apart from the cesspool and oak trees the items used, placed, stored or located on the Way were not permanent structures but rather portable items which could easily be moved into and from the Way. The cesspool cannot be regarded as irreconcilable with using Lisa's Way as a way. Not only is it below ground and therefore presenting no obstacle to travel, but under G.L. c. 187, § 5, owners of real estate on a private way who have by deed rights of ingress or egress have a right to put sanitary services under the Way. As to the oak trees, the evidence reveals them as naturally occurring and as such cannot be used as an action or statement by defendant Galvin of adverse possession. None of defendant's uses nor even the presence of the oak trees and cesspool blocked the entire or even easterly portion of that Way and, for whatever period they were present in the Way, they could be walked around by anyone seeking to navigate the Way.

Additionally, since at least September of 2002 defendant Galvin knew that the plaintiffs were asserting rights of ownership and passage in Lisa's Way. Therefore, continuous irreconcilable uses by the Galvin family and their predecessors must reach back 20 years to September 1982. This would include the Guilds' entire period of ownership and a portion of Cranes'. Neither the Guilds nor Cranes testified in this case. The only arguable occupation or uses that spanned the entire 20 years were mowing and maintaining the grassy area next to the dwelling on 580 Campground Road and sitting at the picnic table and around it in lawn chairs.¹ Any such occupation or use of Lisa's Way would clearly not block passage on Lisa's Way or be irreconcilable with its use as a Way. The Court therefore rules that defendant Galvin has not sustained her burden of proving either title to the

¹ The location of the picnic table was not constant. Sometimes it was on the easterly side of Lisa's Way and sometimes on the westerly side. There was no continuous use for 20 years on the easterly side of Lisa's Way and, indeed, the Court finds that defendant Galvin has not established that a picnic table was in use by the Guilds or by the Cranes on any continuous basis.

easterly side of Lisa's Way by adverse possession² or the extinguishment of plaintiffs' travel rights over the entire Way.

Defendant Galvin further argues that Lisa's Way was abandoned for use as a way. The Court finds this was not the case. At best, defendant Galvin points to evidence of periods of non-use of Lisa's Way. However, even long term non-use coupled with a failure to clear the right of way of brush and trees or maintain the way is insufficient to establish an intent to abandon an easement. *Desotell v. Szczygiel*, 338 Mass. 153, 159 (1958). There was certainly nothing in the conduct of plaintiffs to suggest any intent to abandon their rights in Lisa's Way. To the contrary, they have been very aggressive in pursuing all their rights in Lisa's Way.

ORDER OF JUDGMENT

IT IS ORDERED AND ADJUDGED:

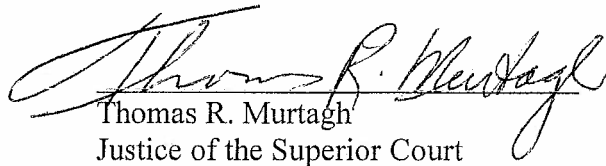
1. The plaintiffs, Frederick L. Pugliese and Julia A.M. Ahern, husband and wife as tenants by the entirety, are the owners in fee simple of the land known as 580 Campground Road, Barnstable County, Massachusetts, including to the midpoint of the private way bounding on the west, shown on a plan recorded in the Barnstable Registry of Deeds in Plan Book 51, Plan 85, now sometimes known as Lisa's Way, together with the right to use, enjoy, pass and repass over said Way with the others entitled thereto, over its entire length and width, excepting to the extent the plaintiffs' easement rights have been extinguished over that portion of the westerly half of the Way over which the defendant Galvin's prior cottage encroached as shown as the "Existing Dwelling" on Septic System Upgrade Plan prepared by J.C. Ellis Design dated December 18, 2001 and revised March 26, 2003 (Trial Exhibit 7).

² The color of title doctrine would not bolster defendant Galvin's title claims since the facts do not establish a sufficient adverse use of even a portion of the easterly one-half of Lisa's Way.

2. The defendants have not established adverse possession of the Way or otherwise caused plaintiffs to lose their fee title ownership in said Way.

3. The defendants have not established that they extinguished plaintiffs' easement over the Way excepting to the extent the plaintiffs' easement rights have been extinguished over that portion of the westerly half of the Way over which the defendant Galvin's prior cottage encroached as shown as the "Existing Dwelling" on Septic System Upgrade Plan prepared by J.C. Ellis Design dated December 18, 2001 and revised March 26, 2003 (Trial Exhibit 7).

4. The defendant, Lola Galvin, as surviving spouse, is the owner in fee simple of the land known as 600 Campground Road, Eastham, Barnstable County, Massachusetts including to the midpoint of the private way bounding on the east to the extent the property at 600 Campground Road abuts the Way, shown on a plan recorded in Barnstable Registry of Deeds in Plan Book 51, Page 85, now sometimes known as Lisa's Way, together with the right to use, enjoy, pass and repass over such Way with the others entitled thereto, over its entire length and width.


Thomas R. Murtagh
Justice of the Superior Court

Dated: May³⁰, 2006.