STATE OF VERMONT
WASHINGTON COUNTY, SS.

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SUPERIOR COURT
WASHINGTON COUNTY

HOWARD FLETCHER	)	
	)	
v.	)	**Washington Superior Court**
	)	**Docket No. S 376-7-01 Wncv**
	)	
HENRY W. FERRY	)	

After a hearing on the merits on September 19 and 23, 2002, written findings of fact and conclusions of law were issued on November 27. The court concluded that an easement created by reservation in a 1935 deed benefits the Ferry parcel and burdens the Fletcher parcel. Defendant was ordered to prepare a final judgment order, and Plaintiff was permitted five days to object thereto.

The preparation of the proposed order highlighted a new issue which had not been the subject of focus of the case prior to the court's decision. Ferry's proposed final judgment order fixes the location of the easement where he would like it to be and as shown as "Proposed ROW Route" on a survey he commissioned. Plaintiff objects to that location of the easement as not supported by the court's findings and conclusions, and as unreasonably infringing on his use and enjoyment of his property. The court held a hearing to address the legal standards to be applied by the court in determining how to fix the exact location of the easement, and both attorneys presented arguments.

Fletcher cites to Patch v. Baird, 140 Vt. 60 (1981) as authority for the proposition that the owner of the property burdened by an easement not otherwise set out has the right, in the first instance, to designate its location. Fletcher argues that since the location is presently undesignated, he should be able to do so now. Ferry also relies on Patch v. Baird, but claims that since Fletcher refused to fix an exact location (as demonstrated by his objection to the existence of the easement at all), the right to fix the location has shifted to Ferry.

The following facts from the findings and conclusions are pertinent to this issue. When Ellen Scribner created the easement by reservation, she referred to a road apparently in existence: "Reserving the right to cross the lot herein conveyed *in the road* to reach the remainder of the lot which I own." (Emphasis added.) Therefore, this was not a situation in which the instrument of conveyance left undefined the location of the right of way. The location was defined with reference to what existed on the ground at the time. Secondly, the court found that Ferry proved the location on the ground of the easement from the Moscow Woods Road to Fletcher's dwelling, but did not prove its location from Fletcher's dwelling to the parties' common boundary. (Fletcher presented evidence in support of his position, but the court did not find that

his evidence was sufficient to meet the burden of proof on this issue.) Third, the evidence showed that the location of the road beyond the dwelling had become undefined over time: Harriet Ross, owner of the Fletcher parcel from 1974 to 1989, knew that an easement existed, and that its front portion was on the existing driveway, but did not know the location of the easement at the back.

In Patch, the Defendants claimed a specified easement, already in use, on several grounds, one of which was a 1916 grant of an easement in an undefined location. See id. at 66. After concluding that Defendants proved the right to the same easement by adverse possession, the Court addressed Defendants' separate claim based on an undefined easement. In the course of concluding that Defendants, as claimants, had not met their burden of proving that the undefined, general easement differed from the defined easement acquired by adverse use, the Patch Court summarized part of the legal discussion in LaFleur v. Zelenko, 101 Vt. 64 (1928) as follows:

> In such a case the owner of the easement is 'entitled to a convenient, reasonable, and accessible way, having regard to the interest and convenience of the owner of the land as well as their own. The owner of the servient estate initially has the right to designate the location of the easement. 'If he fails to do so, the person entitled to the right of way may select a suitable route, having regard for the interest and convenience of the owner of the servient estate.'

Patch, 140 Vt. at 66 (citations omitted). However, the facts in Patch are unlike those in this case: in Patch, the court ruled that the Defendants had simply failed to meet their burden of proof to show that the second undefined easement was different from and in addition to the first one they proved by adverse possession. Moreover, the holding in LaFleur is not on point either. In LaFleur, the holding was that where a right of way is granted without fixing a location, and there is preexisting or subsequent use, the location of use reflects an implied agreement as to location.

This case presents a different situation: at the time of the creation of the easement, there was a fixed location, which has been subsequently incapable of being determined. Ferry met his burden of proof to show where it previously existed only to a partial extent (the front part, as shown on his survey). To that extent, the location of the right of way will be incorporated in the order. To the extent he did not meet his burden (i.e., the part beyond the dwelling), the evidence does not support a finding as to any specific location, and the question before the court is what principle of law or methodology to use to fix the location of a portion of the right of way when the prior location has been erased by time and growth. In this context, neither the Patch nor LaFleur holdings govern this case, even though they deal with related issues, as they confirmed the location of rights of way already in use on the ground.

Another case in which a related issue was addressed was Stevens v. Macrae, 97 Vt. 76 (1923). That was also a case in which an easement was granted without a fixed location. The servient owner sought to establish a specific route, but the dominant owner objected because he had made a considerable investment in developing an apple orchard at that site after the creation

of the easement and without any notice from the easement holder that he intended to fix the easement there. The court was faced with a situation with some similarity to the facts in this case, in that each owner claimed the right to be the one to fix the location, and each was motivated to fix it in a manner conducive to his own interests and detrimental to the other's. The Court determined that under these circumstances, in the absence of agreement, the chancery court must decide: "the decree in this case should establish the route affimatively and specifically within the limits of the grant, under the principles stated above and according to the reasonable convenience of both parties." Id. at 81-82. Those principles include the fact that the easement holder is entitled "to a convenient, reasonable, and accessible way. . . . But he has no right to an arbitrary location, without regarding the interest and convenience of the owner of the land. . . . The way must be a reasonable one as to both parties in view of all the circumstances, and such as will not unreasonably interfere with the enjoyment of the servient estate." Id.

Stevens v. Macrae was described in the LaFleur opinion, and not overruled but apparently deemed to address a different problem. It is a problem similar to the facts of this case, in which Ferry's predecessors allowed the location of the right of way to become undefined through lack of maintenance; in the meantime, Fletcher invested in converting his parcel from a camp to a full time residence. Now, Fletcher would like the easement to be located in a manner that minimizes detrimental impact on his own full time residential use of his property, while Ferry would like a right of way that minimizes the expense and complication of dealing with topographical features in reaching his woodlot.

All three cases cited above reflect a judicial policy that if the parties are able to agree on a location, their agreement will govern. Therefore, the court will give them an opportunity to attempt to do so. In the event they cannot, Stevens v. Macrae makes it the responsibility of the court to fix a location in the exercise of its equity powers, without giving either party the right to make a unilateral selection. Prior to the court exercising those powers, the parties should have an opportunity to agree to an alternate process, such as attempting to reach a resolution through mediation, submitting the matter to binding arbitration, or submitting the case to a master by agreement under V.R.C.P. 53(b)(1). In the event the parties do not agree as to a process, the court may consider whether this case qualifies to be submitted to a master under V.R.C.P. 53(b)(2) in the absence of the parties' agreement.

Therefore, the parties and their attorneys shall consult in an attempt to reach an agreement, either as to the location of a route that maximizes reasonable accommodation to the interests of both parties under the circumstances, or to a methodology for establishing the terms of a decree. The court will schedule a status conference to determine how to proceed.

Date at Montpelier, Vermont this 25th day of February, 2003.

Mary Miles Teachout

Hon. Mary Miles Teachout
Presiding Judge