



2006

Recent Developments: Banks v. Pusey: A Person Living on His Parent's Property Does Not Create a Presumption of Adverse Use and Will Not Give Rise to a Prescriptive Easement without Clear and Convincing Evidence That He Was Living There and Using the Land without His Parents' Permission

Joel Carter

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Recommended Citation

Carter, Joel (2006) "Recent Developments: Banks v. Pusey: A Person Living on His Parent's Property Does Not Create a Presumption of Adverse Use and Will Not Give Rise to a Prescriptive Easement without Clear and Convincing Evidence That He Was Living There and Using the Land without His Parents' Permission," *University of Baltimore Law Forum*: Vol. 37 : No. 1 , Article 5.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol37/iss1/5>

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RECENT DEVELOPMENT

BANKS V. PUSEY: A PERSON LIVING ON HIS PARENT'S PROPERTY DOES NOT CREATE A PRESUMPTION OF ADVERSE USE AND WILL NOT GIVE RISE TO A PRESCRIPTIVE EASEMENT WITHOUT CLEAR AND CONVINCING EVIDENCE THAT HE WAS LIVING THERE AND USING THE LAND WITHOUT HIS PARENTS' PERMISSION.

By: Joel Carter

The Court of Appeals of Maryland held that when a person lives on his parent's property, a presumption of adverse use does not arise unless there is clear and convincing evidence that the use was against his parent's will. *Banks v. Pusey*, 393 Md. 688, 693, 904 A.2d 448, 451 (2006). Furthermore, the Court held that when third party invitees use a farm lane with permission, the use does not constitute adverse use for purposes of establishing a prescriptive easement. *Id.*

The Pusey family lived on a large piece of land in Worcester County. Before Marion Pusey's death in 1979, he deeded a large portion of the land to his son Ira, who lived on the property with his step mother until her death in 1995. In 1998, part of the land was sold to the Banks family, but Ira continued to use a farm lane across the Banks' land to access the remainder of his property. The Banks later asked Ira to discontinue his use, but he insisted that he had a right-of-way over their land.

On October 26, 2004, the Circuit Court for Worcester County ruled that Ira had an easement by prescription. The Banks appealed the verdict to the Court of Special Appeals of Maryland, which affirmed the circuit court's ruling on December 13, 2005. The Court of Appeals of Maryland granted certiorari to the Banks to consider two issues. First, whether a presumption of adverse use arises when a driveway is used to access property by a person who lives on it with his parents in order to create a prescriptive easement. Second, whether use of a driveway by third party invitees with permission is considered adverse use so that a person living on the property with permission can claim adverse use.

The Court of Appeals of Maryland began its analysis by reviewing the elements of a prescriptive easement. *Id.* at 698-99, 904 A.2d at 454. The Court explained that to create a prescriptive easement, a person must have adverse, exclusive, and uninterrupted use of another's property for twenty years. *Id.* The Court stated that a presumption of adverse use would only arise if there was evidence that Ira did not have his parents' permission to use the farm lane to access his land. *Id.* at 699, 904 A.2d at 455. Ira claimed that his parents acquiesced to his use of the farm lane but did not give him permission. *Id.* at 701, 904 A.2d 456. The Banks argued that because Ira lived on the property with his parents for many years and his father had deeded the land to him, Ira's use of the farm lane was permissive. *Id.* at 702, 904 A.2d at 456.

The Court went on to distinguish the cases upon which the trial court had relied. *Id.* Adverse use was found in a case of sisters inheriting land from their father, but adverse use arose after the property was partitioned into three individual portions. *Id.* at 704, 904 A.2d at 458 (citing *Dalton v. Real Estate and Improvement Co. of Baltimore City*, 201 Md. 34, 92 A.2d 585 (1952)). In *Banks*, Ira was trying to claim adverse use while living on the land and having no separate ownership in the property. *Banks*, 393 Md. at 705, 904 A.2d at 458. In *Phillips v. Phillips*, 215 Md. 28, 135 A.2d 849 (1957), the Court stated that a family relationship did not preclude adverse use. *Banks*, 393 Md. at 705, 904 A.2d at 458. However, the adverse use in *Phillips* occurred after the children moved off their parents' land, while Ira lived on the property with his parents during the time period he claimed adverse use. *Banks*, 393 Md. at 706, 904 A.2d at 459.

The Court also distinguished *Totman v. Malloy*, 431 Mass. 143, 725 N.E.2d 1045 (2000). *Banks*, 393 Md. at 708, 904 A.2d at 459. In *Totman*, the Court rejected a presumption of permissiveness based on a family relationship. *Banks*, 393 Md. at 706, 904 A.2d at 460. In *Totman*, the party claiming adverse use did not live on the property with his parents. *Banks*, 393 Md. at 708, 904 A.2d at 460. The Court rejected a comparison to *Banks*, stating that *Banks* was different because Ira had lived jointly with his family while claiming adverse use. *Id.* Therefore, his use was joint and not exclusive, and did not meet the requirements of an easement by prescription. *Id.*

The Court emphasized that during the time Ira lived on the property there was never any change in the circumstances of his use of the farm lane. *Id.* Ira was never ousted from the property, which would have changed his use from permissive to adverse. *Id.* The Court stated that

permissive use is presumed to continue without affirmative evidence that it has changed to adverse use. *Id.* at 709, 904 A.2d at 460 (citing *Feldstein v. Segall*, 198 Md. 285, 81 A.2d 610 (1951)). The Court relied on *Hungerford v. Hungerford*, 235 Md. 338, 199 A.2d 209 (1964) to show that in order to satisfy the hostility element of adverse use, there had to be notice that the claimant was making an adverse claim. *Banks*, 393 Md. at 709-10, 904 A.2d at 461. In *Banks*, there was no evidence that Ira's use had changed to adverse, nor was there any evidence of notice. *Id.* at 710, 904 A.2d at 461.

Additionally, the Court found that the record of Ira's testimony indicated that his parents' gave him permission to use the farm lane. *Id.* at 710-11, 904 A.2d at 461. The Court stated that a minor living with his parents is strong evidence of permissiveness and usually creates a presumption of permissiveness. *Id.* at 711, 904 A.2d at 462. Furthermore, Ira never denied that he had permission from his parents to use the farm lane; he simply testified at trial that he had never asked them. *Id.* at 712, 904 A.2d at 462. The Court explained that such an arrangement is usually how a parent-child relationship works. *Id.* Children do not usually have to ask for permission when they know they are allowed to do something. *Id.* It is logical to assume that Ira had permission to use the farm lane, so he had no need to ask for permission. *Id.* at 712-13, 904 A.2d at 462-63.

The Court of Appeals of Maryland reversed the findings of the circuit court and the Court of Special Appeals of Maryland, and determined that Ira had not created a prescriptive easement in the farm lane. *Id.* at 713, 904 A.2d at 463. The Court stated that a presumption of permissiveness had been created when Ira moved onto the property with his parents and used the farm lane across what is now the Banks' property. *Id.* There was insufficient evidence to suggest that Ira's use of the farm lane had ever changed to adverse use. *Id.* Furthermore, the Court pointed out that there are public policy reasons to discourage the allowance of such easements. *Id.*, 904 A.2d at 463. Public policy dictates that a landowner, whose children live with him for the twenty year statutory period, should be able to sell his land free of encumbrances. *Id.* The Court was concerned that farming families who keep land in their families for generations should be able to keep good title to the land. *Id.*

Finally, the Court briefly considered Ira's argument that the use of the farm lane by third party invitees such as laborers, hunters, and timber and power companies created an easement by prescription. *Id.* The Court rejected this argument, stating that the third party invitees'

use of the farm land was subject to the same conditions as Ira's use. *Id.* Therefore, the third party invitees' use was also permissive and could not create a prescriptive easement. *Id.* at 714-15, 904 A.2d at 448.

The Court of Appeal's decision in *Banks* reinforces the law that use must clearly be adverse in order to create an easement by prescription. The Court wisely emphasized that the law does not favor easements by prescription, and it should not be easy for children living on their parents' property to create easements simply by living on the land and using it as normal children would. The *Banks* decision was crucial in ensuring that children could not usurp their parent's marketable title simply by living on family land.