

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0815

KEVIN SCOTT SHARP

VERSUS

**ST. TAMMANY PARISH, THROUGH ITS DEPARTMENT
OF PUBLIC WORKS, SAUNDRA RUSHING COOKE, LISA
KROGSGARD SOWERWINE, AND JEFFREY D.
SOWERWINE**

Judgment Rendered: FEB 14 2007

On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 2003-10741, Division "C"

Honorable Patricia T. Hedges, Judge Presiding

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

HUGHES, J.

Plaintiff Kevin Scott Sharp appeals a December 22, 2005 judgment of the 22nd Judicial District Court. The judgment declared that a passage along a portion of Mr. Sharp's property was a private drive subject to a predial servitude of passage in favor of defendants Sandra R. Cooke, Jeffrey D. Sowerwine, and Lisa K. Sowerwine; authorized Mr. Sharp to relocate the servitude subject to defendants' rights of passage; and ordered Mr. Sharp to maintain the servitude at his expense. Mr. Sharp appeals the portion of the judgment ordering him to maintain the servitude at his own expense. For the reasons that follow, we affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

The property in question, formerly a single parcel originally owned by appellant's father, Herman Sharp, is currently divided into three parcels owned by Kevin Scott Sharp, defendants Jeffrey D. and Lisa K. Sowerwine, and defendant Sandra R. Cooke. When the parcel was divided in 1978, the tract acquired by defendants' ancestor-in-title, James Hackney, did not have access to a public road, so Mr. Sharp's father created a predial servitude of passage along the Sharp tract in favor of the Hackney tract. The servitude is set forth in a grant of right of way, a copy of which was filed in the St. Tammany Parish conveyance records.

When Mr. Sharp acquired the property from his father in 1979, the servitude remained in effect and was enhanced when Mr. Sharp built, at his own expense, a gravel roadway along the servitude. In time, the servitude's location became burdensome on Mr. Sharp, who notified defendants of his intention to relocate the servitude in accordance with Louisiana Civil Code

article 695.¹ When defendants objected, Mr. Sharp brought this declaratory action.²

The trial court heard the matter and issued its ruling from the bench on October 31, 2005; this ruling was solemnized in the trial court's December 22, 2005 judgment, which declared that the passage in question was a private drive subject to defendants' rights of passage, that Mr. Sharp could relocate the passage as long as defendants' rights of passage were not altered, and that the passage was to be maintained at Mr. Sharp's expense. Mr. Sharp appeals the portion of the judgment declaring that he is to maintain the servitude at his own expense.

LAW AND DISCUSSION

This dispute requires consideration of the following Louisiana Civil Code articles that treat predial servitudes and the respective duties and rights of the owner of the servient estate (here, Mr. Sharp) and the owner of the dominant estate (here, Mr. and Mrs. Sowerwine and Ms. Cooke):

The owner of the servient estate is not required to do anything. His obligation is to abstain from doing something on his estate or to permit something to be done on it. He may be required by convention or by law to keep his estate in suitable condition for the exercise of the servitude due to the dominant estate.

La. C.C. art. 651

The owner of the servient estate has the right to demand relocation of the servitude to a more convenient place at his own expense, provided that it affords the same facility to the owner of the enclosed estate.

La. C.C. art. 695 (in pertinent part)

¹ "The owner of the enclosed estate has no right to the relocation of this servitude after it is fixed. The owner of the servient estate has the right to demand relocation of the servitude to a more convenient place at his own expense, provided that it affords the same facility to the owner of the enclosed estate."

² In addition to the individual defendants, St. Tammany Parish is a named defendant in this action as a result of its claims that the passage in question had become public parish property by virtue of tacit dedication. The district court resolved this issue in Mr. Sharp's favor when it declared the passage a private drive.

The owner of the dominant estate has the right to make at his expense all the works that are necessary for the use and preservation of the servitude.

La. C.C. art. 744

The owner of the dominant estate has the right to enter with his workmen and equipment into the part of the servient estate that is needed for the construction or repair of works required for the use and preservation of the servitude. He may deposit materials to be used for the works and the debris that may result, under the obligation of causing the least possible damage and of removing them as soon as possible.

La. C.C. art. 745

Mr. Sharp does not dispute that the *relocation* of the passage must be done at his expense, as required by Article 695. But he does argue that the owner of a servient estate bears no affirmative burden or obligation to *maintain* a predial servitude beyond the duty to keep the estate in “suitable condition” for exercise of the servitude by the dominant estate’s owner. The expenses related to maintenance of the servitude clearly fall, Mr. Sharp argues, on the part of the owner of the dominant estate, here the individual defendants. While Mr. Sharp has indeed maintained the gravel roadway at his own expense over the years, he argues that this action has been a gratuity on his part that cannot legally be converted into an obligation, as the trial court has done. Finally, Mr. Sharp cites Louisiana Civil Code article 730: “Doubt as to the existence, extent, or **manner of exercise** of a predial servitude shall be resolved in favor of the servient estate.” (emphasis Mr. Sharp’s).

Our research has revealed little on-point caselaw for this issue, perhaps because the language of the code articles is indeed quite clear. Article 695 assigns the expense of a relocation desired by the servient estate owner on that owner, but Article 651 clearly states that beyond maintaining the estate in condition for exercise of the servitude, “[t]he owner of the

servient estate is not required to do anything.” Expenses such as maintenance of the servitude may only be assigned to the servient owner by contractual agreement and the “right of way” document in the record does not contain any assumption by Mr. Sharp’s ancestor-in-title (his father) to assume maintenance costs for the servitude.³ By contrast, Articles 744 and 745 clearly place responsibility for any affirmative acts or constructions that may be necessary for “the use and preservation of the servitude” on the owner of the dominant estate.

CONCLUSION

For the above and foregoing reasons, the portion of the trial court’s order assigning the cost of maintaining the right of way to Mr. Sharp is reversed. The judgment is affirmed in all other respects. Each party is to bear its own share of the costs of this appeal.

AFFIRMED IN PART; REVERSED IN PART.

³ Even if the original right of way document had included such a provision, comment “c” to Article 651 notes that such an obligation would likely be personal rather than predial: “The owner of the servient estate may bind himself by a personal obligation to perform certain affirmative duties in connection with a predial servitude. These obligations may be heritable, but they are not transferred to successors by particular title without express stipulation to that effect.”