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Property Law - Acquiring Access to Private Landlocked Tracts: Wyoming's Statutory Right-of-Way - Walton v. Dana

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PROPERTY LAW—Acquiring Access to Private Landlocked Tracts: Wyoming's Statutory Right-of-Way. Walton v. Dana, 609 P.2d 461 (Wyo. 1980).

Dennis and Joan Dana acquired a 3.75 acre tract of land as a gift from Dennis Dana's parents.[1] Dana's parents retained a tract of land that bordered both the 3.75 acres that they had given away and the Muddy String Road, a public road.[2] For Dennis and Joan to obtain access to the Muddy String Road, they would need a road approximately one and one-half miles long across the land of their grantors, Dennis' parents.[3]

Instead of proceeding to enforce a common law way of necessity[4] against their grantors, however, the Danas initiated a statutory proceeding[5] for the establishment of a private road across the adjacent land of Alfred and Carol Jean Walton.[6] To obtain access to U.S. Highway 89 the Danas, pursuant to the statute, petitioned the Board of County Commissioners of Lincoln County for a road approximately one-quarter mile long through the Waltons' land. This road that the Danas sought to establish was already in existence and had been used by their predecessors in possession.[7] The commissioners denied the petition. On appeal the district court reversed "and directed that a road be established for the Danas across the land of the Waltons."[8] The Wyoming Supreme Court affirmed the district court. The court found that the Danas met their burden of proof of showing necessity as required by Section 24-9-101 of the Wyoming Statutes.[9] They held, contrary to the Waltons' argument,[10] "that the availability of a common law way of necessity is not a factor to be considered" in a proceeding to establish a private road.[11]

Walton v. Dana is the most recent Wyoming Supreme Court case interpreting Section 24-9-101. With the rapid

1. Walton v. Dana, 609 P.2d 461, 462 (Wyo. 1980).
2. Brief for Appellees at 3, Walton v. Dana, 609 P.2d 461 (Wyo. 1980).
3. Walton v. Dana, *supra* note 1, at 462.
4. A discussion of the common-law way of necessity is found in Snell v. Ruppert, 541 P.2d 1042, 1045 (Wyo. 1975).
5. WYO. STAT. § 24-9-101 (1977).
6. Walton v. Dana, *supra* note 1, at 462.
7. *Id.*
8. *Id.*
9. WYO. STAT. § 24-9-101 (1977) [hereinafter cited in text and notes as Section 24-9-101], cited in Walton v. Dana, *supra* note 1, at 464.
10. Brief for Appellants at 4, Walton v. Dana, 609 P.2d 461 (Wyo. 1980).
11. Walton v. Dana, *supra* note 1, at 464.

growth in population taking place in Wyoming,[12] the use of this procedure for establishing a private road will probably increase as real estate transactions and development increase. The purpose of this case note is to examine Section 24-9-101 as it has been interpreted in *Walton v. Dana* and three earlier Wyoming Supreme Court decisions. Particular attention is given to the standard of "necessity" that the law requires a petitioner to show before he is entitled to a private road across the land of someone who was not the petitioner's grantor. Generally, the court has treated applicants under the statute favorably by employing a standard of necessity that is easily met. Because of the favorable treatment accorded those seeking a statutory right-of-way, the possible adverse effects on adjacent landowners—the ones whose land is subject to this private eminent domain proceeding—warrant discussion.[13]

WYOMING'S PRIVATE EMINENT DOMAIN PROCEEDING FOR THE ESTABLISHMENT OF PRIVATE ROADS—SECTION 24-9-101 OF THE WYOMING STATUTES

In a recent opinion the Wyoming Supreme Court stated that Section 24-9-101 "is quite simple and must be followed."[14] The statute provides in part that

> [a]ny person whose land shall be so situated that it has no outlet to, nor connection with a public road, may make application in writing to the board of county commissioners of his county at a regular session, for a private road leading from his premises to some convenient public road.[15]

The statute further requires that the applicant notify interested parties including the owner, resident agent, or occupant of the lands that may be subject to the private road. The court has read another important procedural requirement into the statute; it has held that "applicants

12. For statistics documenting and projecting Wyoming's growth in population see WYOMING POPULATION AND EMPLOYMENT FORECAST REPORT, 7 (June 1979).
13. The Wyoming Supreme Court characterizes what is now Section 24-9-101 as a private "eminent domain proceeding" in Snell v. Ruppert, 541 P.2d 1042, 1046 (Wyo. 1975).
14. McGuire v. McGuire, 608 P.2d 1278, 1286 (Wyo. 1980).
15. WYO. STAT. § 24-9-101 (1977).

must initially propose a road by some adequate description."[16] The only restriction on the choice of routes is that "it must be simply *a* reasonable and convenient route."[17]

Upon hearing the application, the county commissioners determine whether the petitioner has complied with the procedural requirements and whether the road is necessary. If the commissioners find that these two requirements have been met, they appoint viewers and appraisers to locate and mark out a private road and to assess the damage sustained by the landowner.

THE DEVELOPMENT OF THE STANDARD OF NECESSITY APPLIED IN A PROCEEDING TO ESTABLISH A PRIVATE ROAD

Although Section 24-9-101 is essentially older than statehood, few early cases interpret or apply the statute.[18] In *McIlquham v. Anthony Wilkinson Live Stock Co.*, decided in 1909, the Wyoming Supreme Court first considered the question of what degree of necessity "will entitle a party to a way of necessity over the lands of another."[19] The court in *McIlquham* defined "necessity" negatively by stating that "where a party has one way by which he can reach a public highway, and which affords him reasonable facilities for possessing, using and enjoying his own premises, he is not entitled to another way as a way of necessity."[20] The facts in *McIlquham* did not demand that the court address the hard question now receiving so much attention: whether a party wanting access to a landlocked parcel must bring an action against his grantor for an implied easement or way of necessity before he is entitled to a statutory right-of-way across the lands of others. In finding that necessity is present only if a landowner does not have a way by which he can reach a public highway, the court had not provided clear guidelines for later decisions on the issue of necessity. But recently the court has commented that in *McIlquham* "this

16. McGuire v. McGuire, *supra* note 14.
17. *Id.*
18. *Id.* at 1288.
19. McIlquham v. Anthony Wilkinson Live Stock Co., 18 Wyo. 53, 104 P. 20, 22 (1909) [hereinafter cited in text as *McIlquham*].
20. *Id.*

court implicitly found that the statute was an alternative remedy and it was not intended to supplant the common-law right of a grantee to a means of access to his land over the lands of his grantor."[21] This recent, 1980, reading of *McIlquham* clearly demonstrates that, regardless of the court's interpretation of Section 24-9-101, this law does not abolish the common-law action for a way of necessity.

Not until the case of *Snell v. Ruppert* in 1975 did the court address in detail the problem of the statutory right-of-way.[22] The factual situation in *Snell* was similar to the one in *Walton v. Dana* five years later. The petitioner in *Snell* purchased a two and one-half acre lot in a subdivision.[23] This lot had no access to a public road because a creek and other lots in the subdivision intervened. The petitioner attempted to purchase a road easement from the respondent. When the respondent refused, petitioner Ruppert initiated a proceeding for a private road as provided in Section 24-92 of the Wyoming Statutes.[24] The county commissioners ordered the establishment of a private road; the district court and the Wyoming Supreme Court affirmed.[25]

In protesting the establishment of a private road across their land, the respondents argued that there was no need for Ruppert to take their land because he had a common law way of necessity across the intervening lots in the subdivision.[26] Thus in *Snell* the court confronted one of the major issues later presented in *Walton v. Dana*: whether the landlocked owner is

> confined to the common-law remedy of forcing a way of necessity across the lots . . . having a common origin of unity of title with his or whether he has available to him the right to take a private road across the lands of a stranger to his title.[27]

21. McGuire v. McGuire, *supra* note 14, at 1288.
22. Snell v. Ruppert, 541 P.2d 1042 (Wyo. 1975) [hereinafter cited in text and notes as *Snell*].
23. *Id.* at 1044.
24. WYO. STAT. § 24-92 (1957); this statute was the predecessor to Section 24-9-101 and was essentially the same as the later statute.
25. Snell v. Ruppert, *supra* note 22, at 1045, 1049.
26. *Id.* at 1045.
27. *Id.*

The Wyoming Supreme Court concluded that it was not a condition precedent to proceeding under the statute that Ruppert bring an earlier action to enforce a common-law way of necessity.[28] They reached this conclusion by interpreting the statute literally. The statute imposes "no such condition" of first pursuing a common-law remedy, and the justices could not "stretch, extend, enlarge nor amend what the legislature has clearly said."[29] The holding in *Snell* clearly indicated that the test of statutory necessity for a private road would not be rigorous.

Although the decision was grounded on a literal reading of the statute, the facts in *Snell* also supported the landlocked party's position. The court noted that while it was not necessary to their holding, "there may be a practical reason why a civil action would not lie" and why a statutory remedy was appropriate.[30] Because more than 50 years had passed since the creation of the subdivision, "the intervening lot owners could probably successfully raise the shield of the 10-year statute of limitations."[31] They also noted that the "best way" to gain access was over the respondent's land, not over the other lots sharing unity of title with the landlocked tract.[32] The statutory right-of-way was the "best way" because it was the least expensive way, and it preserved land values. To proceed across the other lots in the subdivision would necessitate cutting down trees and would disrupt improvements. Unsatisfactory terrain was also mentioned.[33] So the court's holding, although expressly resting on what they found to be the clear meaning of the statute, was strongly supported by factors of convenience and economy.

No specific standard of necessity was stated in *Snell.* The court made clear, however, that a petitioner would not have to seek first a common-law way of necessity. They also suggested the importance of convenience factors in determining the necessity for a particular right-of-way.

28. *Id.* at 1046.
29. *Id.*
30. *Id.*
31. *Id.* The court refers here to WYO. STAT. § 1-13 (1957); this statute now appears in identical form as WYO. STAT. § 1-3-103 (1977).
32. Snell v. Ruppert, *supra* note 22, at 1044.
33. *Id.*

In the 1980 case of *McGuire v. McGuire*,[34] decided five years after *Snell*, the Wyoming Supreme Court articulated for the first time a test for necessity under Section 24-9-101. Simply applying the statutory language, the court held that "any person whose land is so situated that it has *no* outlet—no legally enforceable means by which he can gain access—has demonstrated necessity, as a matter of law."[35] At first glance this test appears to reopen a question apparently settled in *Snell*: whether a petitioner for a private road first has to pursue any possible common-law remedy. A respondent might argue that since a common-law way of necessity was a "legally enforceable means" of gaining access, the proposed road was not necessary. The court removed this ambiguity less than a month later. In *Walton v. Dana* the court stated that the word "necessary" in the statute means there is no legally enforceable, "existing" outlet to a public road.[36] Thus, in line with *Snell*, *McGuire* does not require the petitioner to first seek a common-law way of necessity in order to show necessity for a private road.

After *McGuire* the isolated landowner, as long as he has not already obtained a common-law way of necessity or some other right of way, apparently satisfies the necessity requirement of Section 24-9-101 automatically. The court in *McGuire* clarifies just how low the necessity hurdle is. After a petitioner demonstrates that he has no legally enforceable, existing outlet from his land, the following considerations are irrelevant to a determination of statutory necessity: whether or not the petitioner lives on the land; whether or not the land is, or will be, used for some specific purpose; what the impact of the road will be on adjacent landowners; what financial interest the petitioner has in acquiring a private road; and whether or not petitioner had been denied permissive access.[37] Once an applicant has met the mere formality of showing necessity and has complied with procedural requirements, he is technically entitled to a statutory right-of-way.

34. McGuire v. McGuire, *supra* note 14 [hereinafter cited in text as *McGuire*].
35. *Id.*
36. Walton v. Dana, *supra* note 1, at 463 n. 1.
37. McGuire v. McGuire, *supra* note 14.

APPLYING THE NECESSITY STANDARD AND RECOGNIZING (SUGGESTING?) ITS LIMITS

Walton v. Dana is the first Wyoming Supreme Court case to apply the standard of necessity set forth, but not actually applied, in *McGuire*. In holding that the Danas were entitled to a private road across the Waltons' land, the Court employed this simple statutory test as follows:

> The evidence is undisputed that the Danas have no presently existing "outlet to, nor connection with a public road." In *McGuire*, we held such facts to establish necessity as a matter of law.[38]

As in the *Snell* case five years earlier, however, factors of convenience and economy were used both to bolster a finding that the private road was necessary and to suggest the inappropriateness of requiring petitioner Dana to first pursue a common-law way of necessity. In *Snell* the factors considered were trees, improvements, and unsatisfactory terrain; in *Walton v. Dana* the convenience factors mentioned were swamps, a canal, and disproportionate distance. The distance across the grantors' land was one and one-half miles as compared to a distance across the Waltons' land, using a pre-existing road at that, of only one-quarter mile.[39]

By recognizing economic and convenience considerations the court appears to be emphasizing that the petitioner's right to a private road, even after he has shown necessity, is limited to a right to a *convenient* public road. Just because the isolated landowner has met the necessity test of having no legally enforceable, existing outlet to a public road, Section 24-9-101 does not give him total freedom in choosing the locations of the private road. Although "the applicants must initially propose a road by some adequate description," the viewers appointed by the county commissioners have the "ultimate power to locate the road."[40]

As suggested by the opinions in *Snell* and *Walton v. Dana*, the Wyoming Supreme Court appears willing to

38. Walton v. Dana, *supra* note 1, at 463-464.
39. *Id.* at 464.
40. McGuire v. McGuire, *supra* note 14.

review the initial determination of convenience. The court has not reviewed the convenience element in absolute terms. Despite their statement that the route chosen by the applicant "must be simply *a* reasonable and convenient route" and need not "be the *most* convenient and reasonable route," the court establishes convenience relative to possible routes across the land of the grantor or the successor in interest to the grantor.[41] As stated in *Walton v. Dana*, the facts spoke "for themselves in the matter of convenience," so there was no need for the court to examine closely the element of convenience.[42] In certain situations likely to arise, particularly situations involving large tracts of land in developing areas, the court will be, or should be, forced to look more carefully at the relative convenience of various routes.

LITIGATING A CLAIM FOR A STATUTORY RIGHT-OF-WAY IN WYOMING

The Petitioner's Obstacle

Because the necessity requirement under Section 24-9-101 has become largely a formality, the more severe test of the petitioner's claim for a private road will probably occur over the issue of convenience.

The court's statement that Section 24-9-101 "offers complete relief to the landowner who has no outlet from his land" may be misleading.[43] The fact that the court considers economy and convenience factors suggests that it is willing to engage in a balancing process aimed at securing a relatively convenient right-of-way. In stating that a petitioner need not "overcome every obstacle . . . regardless of the expense and practicality if he has a common law way of necessity he can claim," the court implies that in some cases a petitioner may have to overcome *some* obstacles and claim a right-of-way across his grantor's land, not the land of a stranger to his title. Important in this context is the availability of the remedy of the common-law way of neces-

41. *Id.*
42. Walton v. Dana, *supra* note 1, at 464.
43. *Id.*

sity.[44] Although the court has said that this remedy is enforceable at the option of the isolated landowner, it is unlikely, given the court's concern for economy and convenience, that an applicant would be granted a statutory right-of-way when a significantly more convenient right-of-way is possible across the land of his grantor.

In both *Snell* and *Walton v. Dana*, the two cases where the court reached the merits of a Section 24-9-101 claim, this problem of relative convenience did not arise. In these cases the most convenient access to the landlocked tract was obviously not across the remaining land of the grantor or his successor in interest. But where there is a real question as to which parcel of land provides a more convenient right-of-way, the court may not permit a statutory right-of-way across the land of a stranger to the applicant's title. What determines convenience in a particular setting is a relative matter. A potential right-of-way is only convenient and reasonable to the extent that it is preferable to other locations. Thus the availability of a common-law way of necessity could, as a practical matter, be a factor in future determinations of a party's right to a private road under Section 24-9-101. A petitioner is well advised to prepare a strong case for the convenience of the route he has chosen.

The Respondent's Case

Viewed from the perspective of a landowner who may lose his land in a statutory right-of-way proceeding, the recent decisions do not look encouraging. The argument that the applicant has a common-law way of necessity will not negate statutory necessity. Thus the party opposing the right-of-way, the respondent, must concentrate on the convenience element. If he can show that a right-of-way across the grantor's land would be more convenient or economical, he should have a strong case. But even if the respondent is not able to argue convenience persuasively in his favor, he may still have other arguments.

44. In Leo Sheep Co. v. United States, 440 U.S. 668, 680 (1979), the United States Supreme Court misinterprets the holding in *Snell* as to the continued recognition of the common law way of necessity in Wyoming.

One possible point of attack for the respondent is the requirement of good faith that the court has read into Section 24-9-101.[45] In *Walton v. Dana* the respondents offered this argument both on a policy level and on the facts of the case. They pointed to the possibility of "collusive abuse" of the statute by the applicant and his grantor.[46] If the common-law way of necessity is ignored, the Waltons argued, "parties could convey away parcels and fabricate the necessity required by statutes such as [Section 24-9-101]."[47] The respondents argued further that since the grantors and grantees were closely related, "no more obvious fabrication of necessity could exist than that found in the instant case."[48] Judging from the holding against the Waltons, the court was not persuaded by this type of good faith argument. Concern for convenience and economy apparently outweighed concern for the possibility of collusion or lack of good faith. In a case where the convenience factors are not so clearly against the respondent, however, the court may be more receptive to a good faith argument.

THE POSSIBLE EXTENT OF ADVERSE EFFECTS ON ADJACENT LANDOWNERS

The Wyoming Supreme Court has recognized the important public policy basis underlying eminent domain proceedings.

> There is a public interest in giving access by individuals to the road and highway network of the state as a part and an extension thereof for economic reasons and the development of land as a resource for the common good, whether residential or otherwise.[49]

The court's apparent desire to facilitate such policies in a convenient and economical manner is laudable. The property rights of a fully compensated landowner may indeed

45. McGuire v. McGuire, *supra* note 14, at 1286 n. 10.
46. Brief for Appellants, *supra* note 10, at 15.
47. *Id.*
48. *Id.*
49. Snell v. Ruppert, *supra* note 22, at 1046 n. 5. Similar policy reasons are behind the common-law way of necessity. *See*, Glenn, *Implied Easements in the North Carolina Courts: An Essay on the Meaning of Necessity*, 58 N.C. L. REV. 223, 227-228 (1980).

be less important than the larger societal interest in natural resource conservation and development. But even if one accepts the practicality and progressiveness of the court's view of Section 24-9-101, cause for concern still exists.

As discussed in the previous section of this note, the court has not foreclosed the possibility of successful litigation for either party. But at this early stage in the application of Section 24-9-101, the case for the petitioner appears more favorable. In the few cases decided by the court, a good faith request for a reasonable and convenient route was all that the court has expressly required of a landlocked property owner who had no legally enforceable, existing outlet to a public road. The only possible case for respondents appears to lie in convenience and good faith arguments, arguments that have not helped respondents thus far. In their concern for executing the letter of the statutory right-of-way and the policy behind it, the court may have lost sight of a potentially serious threat to owners of land that is taken for a private road. This threat arises from the failure of the statute to place any specific limitation on the use of the private road other than a maximum width of thirty feet.[50] Section 24-9-101 also makes no provision for additional compensation in the event of alteration of use or increased use.

Apparently no Wyoming case law exists concerning this specific question of the use of a private road established by a statutory proceeding. It is probably a safe assumption, however, that common-law easement principles would govern the use of rights-of-way created under Section 24-9-101. Thus a person whose land is made, in effect, a servient tenement by operation of Section 24-9-101 would probably have to look to common law for protection against significant changes in the use of the "easement" created by statute. Of course there may be a legal question as to whether the private road is an easement at all and therefore subject to common-law restrictions on use of easements.

50. WYO. STAT. § 24-9-101 (1977).

What protection the common law affords the respondent may be inappropriate in some cases. In *Bard Ranch Co. v. Weber*[51] the Wyoming Supreme Court discusses common-law restrictions on the use of easements. The owner of a servient tenement appears to be protected by the principle "that the owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden."[52] This principle does not, however, freeze the use of the easement. Citing an Oregon case,[53] the court noted the rule that "in the absence of a contrary intent both the uses of the dominant and servient owners are subject to adjustment consistent with the normal development of their respective lands."[54] Perhaps the most serious potential danger to the servient owner deriving from this second principle is the increased use resulting from subdivision of a large tract. The general rule is that "where there is an easement of way appurtenant to a tenement, . . . the subsequent owner of a part of such tenement has the right to use the way as appurtenant to his particular part of the land."[55] When a common-law way of necessity is available to the isolated landowner, a court should not impose on adjacent landowners, other than the grantor, the risk of an easement, or private road, that could undergo greatly increased use.

In the cases that have come before the court thus far, this factor of the possibility of heavy use of the easement has not arisen. The landlocked acreages involved in these cases have been relatively small. But in a developing area where a large tract is involved, the unexpected harm to an adjacent landowner could be devastating. If subdivision is occurring in the area and could be considered a normal use of the landlocked tract, the statutory right-of-way may be subjected to greatly increased use. The subsequent development may enhance the monetary value of the respondent's land, but this may be of little consolation for someone whose land was acquired with the expectation of enjoying solitude,

51. Bard Ranch Company v. Weber, 557 P.2d 722 (Wyo. 1976).
52. *Id.* at 731.
53. Jones v. Edwards, 219 Or. 429, 347 P.2d 846, 848 (1959).
54. Bard Ranch Company v. Weber, *supra* note 51, at 731.
55. Annot., 34 A.L.R. 972 (1925).

recreation, or some form of aesthetic benefit. The argument here is not that the court's policy of encouraging land use in an economical way is improper. The point is that if someone need suffer a significant alteration of or increase in the use of his land, the burden should fall on the person who made the statutory right-of-way possible in the first place—the grantor. The burden should not fall on the innocent adjacent landowner.

CONCLUSION

In *Walton v. Dana* the Wyoming Supreme Court did not have to consider the possible adverse effects on the respondent in order to reach what seems a just and practical result. Possible future cases, particularly those involving large tracts of land in developing areas, however, may demand a closer examination of the adverse effects on the respondent and the good faith of the petitioner. The approach outlined by the court in *Walton v. Dana* and the earlier decisions is broad enough to enable this more strict examination in appropriate cases.

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