STATE OF IDAHO)
County of KOOTENAI)ss

FILED____________________

AT__________ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

JOHN W. HENTGES, et ux, *Plaintiffs*, vs. **THOMAS GETZFRID, et ux, et al.** *Defendants*.	Case No. **CV 1999 7568** **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

FINDINGS OF FACT

1. The Hentges and Getzfrid properties are located exclusively within the Terrace Addition to the Rockford Bay Summer Homes, which plat was lawfully recorded at the Kootenai County Recorder's Office in 1957 or 1958. Exhibit 2. The Hentges and Getzfrid properties are adjacent to each other, Getzfrids own lot 9 which borders lot A, and Hentges own lot A and lot 10. In 1958, Roy T. Smythe and Thelma M. Smythe platted property known as TERRACE ADDITION TO ROCKFORD BAY HOMES. Plaintiff's Exhibit 2 and Defendants' Exhibit PP. At the time of platting said property, twelve lots were created together with a parcel designated on the plat as "Lot A PRIVATE ROAD". At the time of platting said parcel a roadway or driveway existed essentially in the same area as designated on the plat as Lot A Private Road. Deposition of Judy (Sherwin) Progreba, P. 18, L.19 – P.19, L. 20. Judy (Sherwin)Progreba and her husband Dick Sherwin, were the predecessors in interest and were the owners of Lot 10 prior to deeding it to

the Hentges in 1985. Plaintiffs' Exhibit 4. Prior to the Sherwins acquiring ownership of Lot 10, a cabin existed on Lot 9, the Getzfrid lot. Deposition of Progreba, p. 17, L. 20 – p. 18, L. 13. Lot A, designated as "Private Road" on the subdivision map was conveyed by the developers, Roy T. Smythe and Thelma M. Smythe, husband and wife, to Richard and Gerrell Sherwin, on April 14, 1966, with language in the Quticlaim Deed indicating that the property was for a temporary road, and is not being used and is being vacated and reannexed to said lot 10. Exhibit 3. Gerrell L. Sherwin is Leah G. Sherwin, Hentges predecessor in title. In 1985, Sherwins (Progreba) deeded lot 10 and lot "A" to the Hentges. Exhibit 4.

2. Plaintiffs John William Hentges and Betty Louise Hentges are husband and wife, are residents of Spokane County, Washington, and own lot 10, lot A and part of lot 11 shown as tax # 5518 on Plaintiff's Exhibit 1. The road in dispute is on lot A. Lot 10 was deeded from Smythes to Richard and Judy Sherwin in the late 1950's. The Sherwins were the first to develop in the area, or were certainly one of the first, purchasing in 1957 or 1958. Pogreba deposition, p. 7, Ll. 13-23. Sherwins built a year around residence on Lot 10 in about 1960, and apparently the roadway was already in existence at that time. Pogreba deposition, p. 9, L. 1 – p. 10, L. 2. The evidence was conflicting as to whether Sherwins built the road (Pogreba deposition, p. 16, L. 23 – p. 17, L. 5), or whether it existed in some form at the time Sherwins bought the property, though Mrs. Pogreba appeared more certain of the latter. Pogreba deposition, p. 18, L. 19 – p. 20, L. 5. Sherwins modified the roadway shortly after they began living on lot 10, but we are not certain as to how. Pogreba deposition, p. 19, Ll. 11-23. At the time they built the home, no one else was using the road, as no one had been living in the structure built on the Getzfrid property for a long time. Pogreba deposition, p. 10, Ll. 3-12. The structure on lot 9 was only a "shack", and the owners never came out the entire time Sherwins lived on lot 10. Pogreba deposition, p. 17, L. 6 – p. 18, L. 13; p. 20, Ll. 4-11. Mrs. Sherwin (Pogreba) has no idea how these people accessed their shack, as

they never used it. Pogreba deposition, p. 20, Ll. 4-11. Sherwins used this road the entire time they lived there. Pogreba deposition, p. 15, L. 13 – p. 16, L. 6. In April 1966, Smythes deeded lot "A" to Sherwins, attaching this parcel with Lot 10. Pogreba deposition, p. 32, Ll. 10-21. In the early 1980's the Sherwins sold the properties but later repossessed. In December 1984, the Sherwins sold the property to the plaintiffs Hentges, who have remained the owners since that time.

Defendants Thomas Getzfrid and Lois Getzfrid are husband and wife, are residents of California, and own Lot 9. They obtained Lot 9 through an inheritance from Mrs. Lois Getzfrid's parents on July 12, 1988 (Answer & Counterclaim, p. 3, ¶ 3), the Gitzfrids received a Warranty Deed executed by Marvin L. Streeter and Mildred E. Streeter, husband and wife. Exhibit AA. Lois Getzfrid's parents, Mr. and Mrs. Streeter, purchased their property on October 12, 1974 from John and Elizabeth Snyder. Exhibit BB. According to Mrs. Sherwin (Pogreba), Streeters purchased in 1974 from the Snyders. Pogreba deposition, p. 17, Ll. 6-19.

3. Sherwins were close friends of the Streeters, and Hentges were close friends of the Streeters. The relationship between Hentges and Getzfrid was apparently amicable until 1999. Perhaps it began unraveling when Hentges realigned the southern portion of this road as it intersects with Tribal Camp Lane, but in any event, Tom Getzfid requested of Betty Hentges a deeded easement over the roadway, which was denied and Betty Hentges then advised Getzfrids in writing on June 22, 1999 that their use was a permissive use or by license. Exhibit 5. Hentges were then told by Getzfrids' attorney that the Getzfrids' use of the roadway was by dedication on the plat as a "private road." Exhibit A. Thus, Hentges filed this quiet title action. Getzfrids counterclaimed seeking establishment of an easement by prescription or by express grant.

4. The only evidence is that there was no use of the roadway by an owner of lot 9, until after the Streeters purchased lot 9. The only evidence is that the Streeters began using the roadway with the permission of Sherwins. Mrs. Sherwin (Pogreba) testified that Streeters parked a motor

home on the roadway, to which Mr. Sherwin (Dick) objected, and informed Streeters that they were the landowners of the land upon which the road was located. Pogreba deposition, p. 21, L. 90 – p. 22, L. 23. The uncontoverted testimony is that from that point on, the Sherwins "let them" (the Streeters) use the road, no written permission was given as "We were very good friends." Pogreba deposition, p. 29, L. 1 – p. 31, L. 10. After the property lines were pointed out, there were no further discussions between the Sherwins and the Streeters, and they apparently remained good friends and the Streeters were allowed to use the road located upon Sherwins' land. Pogreba deposition, p. 42, Ll. 14-24.

5. Certainly this sounds to the Court like verbal permission was granted to the Streeters by the Sherwins. Most certainly, there is no evidence of the record, that Streeters at any time claimed any right, or in any way were hostile toward Sherwins. Streeters had no legal "claim of right", and there was no evidence presented that the owners of lot 9, up until the time of this lawsuit, used the roadway other than by permission. Betty Hentges testified that shortly after they purchased Lot 10 back in 1984, she told Mr. Streeter that the Streeters could continue using the roadway under the same arrangement they had with the Sherwins (Hentges' predecessors), that being by permission. Tr. p. 59, L. 20 – p. 61, L. 22.

6. Even if the evidence was unclear as to how the use of the roadway began, the Court concludes that no part of the roadway on the Hentges' property was use exclusively by either party. The roadway, in its entirety, was used by both Getzfrid and Hentges, although different portions of the roadway were used to different extents by the parties. For example, Getzfrids rarely used the northern portion of the road and Hentges frequently used that portion. The Hentges used the southern portion of the road less than they used the northern portion (Tr. p. 33, L. 20 – p. 34, L. 2), and Getzfrids frequently used that southern portion. Most importantly, although Getzfrids used the portion between the roadway and the driveway located upon their (Getzfrids') land, hereafter

referred to as the "approach" area, that use was not exclusive.

7. Both parties testified that they used the "approach" area. As depicted by the parties drawings admitted into evidence, the roadway connects to the Getzfrids' driveway located upon their property via this "approach" area. Obviously, during the summer months, the use of this approach area is more frequent by the Getzfrids, when their home at Coeur d'Alene Lake is their home base, the rest of the year they live in California. Use of the roadway by Hentges is year around, but sporadic, as they live in Spokane, Washington. Betty Hentges testified that they use the "approach" area for turning around, to pull the boat out in the fall and "when we have a lot of people we use it for parking." Tr. p. 34, Ll. 3-16. Later, she testified that she parked cars on this "approach" area when the Getzfrids were gone, and that they wouldn't park cars on the approach area when Getzfrids were there as that would interfere with Getzfrids ability to get to their house and it would have been "most rude as neighbors to do that" since Hentges had given Getzfrids use of that portion of their property. Tr. p. 238, L. 7 – p. 239, L. 17. William Helbig, Betty Hentges' brother, testified that he owns a home a couple hundred feet away from the Hentges (Tr. p. 252, Ll. 5-18), that he purchased his place in 1981 before his sister purchased her place (Tr. p. 254, Ll. 3-8), that when he visits his sister by car in the summer, he drives up the southern portion of the roadway, and if he was going to drive back to his home, he would back into the "approach at Tom and Lois' [Gitzfrieds'] place." Tr. p. 253, Ll. 2-22. Robert Hentges, son of the plaintiffs Hentges, testified that his family used the "approach" area "as a turnaround, as I think numerous people have testified to, as a U-turn route, as one of the reasons Mr. Getzfrid claimed to be putting the planters in place, and pulling boats in and out, boat trailers, backing cars in and out, depending on where you're headed around the lake." Tr. p. 247, Ll. 1-10. He testified he and visitors used the approach area to back trailers holding tandem Sea-Doos about 5-6 times per summer, and that visitors to his parents place would come up the southern portion of the road to visit, then back out onto the

approach area to leave, and that would happen "fairly frequently." Tr. p. 247, L. 11 – p. 248, L. 12. Robert Hentges testified that a guest of his, an employee, had a ski boat which scraped and dug up the gravel in this approach area in September 2001. Tr. p. 248, L. 13 – p. 249, L. 6. He raked the pine needles off of the approach area over the years. Tr. p. 249, Ll. 7-14. While Tom Getzfrid testified that he never saw anyone from the Hentges family use the approach area, Getzfrids admittedly were not present at their cabin all year around. Furthermore, until this lawsuit arose, there would have been no reason for the Getzfeids to note if and when any member of the Hentges family used the approach area.

8. While Getzfrids claim that they had a right to use this approach area and deny that they were given or needed any permission to use this approach area, the fact that Tom Getzfrid asked permission to build a planter bordering the approach area on Hentges' land cuts against such a claim by Getzfrid. Tr. p. 43, L. 16 – p. 45, L. 15. Betty Hentges testified that as to the approach area, Tom Getzfrid told her he was going to improve that area when he put his garage in, and Betty Hentges told him "that was fine." Tr. p. 81, L. 8 – p. 82, L. 17. Tom Getzfrid testified that when Betty Hentges told him they were going to modify the southern part of the roadway as it intersects the county maintained road (Indian Camp Trail/Sanders Road), all he said was "It's a nice quaint little road in there" and "Well, just remember if you modify it, that I have a motor home and I need access." Tr. p. 135, L. 20 – p. 136, L. 7. Those are hardly the words of anyone who is claiming a property right (either by dedication or prescription). If Getzfrids felt that they had a dedicated or prescriptive right to the southern portion of the roadway, they certainly would have objected to any modification without prior approval of the proposed plan. Asking Hentges to keep in mind Getzfrids use of a motor home, sounds like a plea of someone who has access by permission.

9. Lois Getzfrid testified that her parents first thought the roadway was on their property until they were told that it wasn't, and the next year Lois Getzfrid's parents had the land surveyed

the year after they purchased, which had no effect on how Lois Getzfrid's parents used the road. Tr. p. 210, L. 7 – p. 211, L. 14. This tends to prove that the usage started with permission, permission granted by one family which had a good relationship with another family, their next door neighbors.

10. Much testimony was devoted to who paid for improvements to the southern half of the roadway, the approach, and the relocation of the roadway with Tribal Camp Lane/Sanders Drive. Betty Hentges admitted that the Getzfrids maintained the approach area. Tr. p. 83, L. 16 – p. 84,L. 3. However, that testimony is not relevant, as the Court finds the Getzfrids' use of the "approach" area and the southern portion of the roadway, was not exclusive to the Hentges. In other words, the Hentges used that approach area as well, albeit infrequently. Likewise, it is not relevant how many people used the roadway before these parties or whether there was any use by the public as a shortcut.

11. In their Counterclaim, Getzfrids claim an easement by dedication on the plat as well as a prescriptive easement. The extent of this easement is not set forth in their Counterclaim, but at trial it became clear that they seek and easement over both ends of the roadway through the Hentges' property, as well as over this "approach" area on Hentges' property between the roadway and Getzfrids' property, as well as a prescriptive easement to continue to run their riding mower over the Hentges' property as access to the northerly end on the Getzfrids' property, and a prescriptive easement to travel over the the Hentges' property to an area on the north end of the Getzfrids' property for purposes of parking the Getzfrids' boat trailer.

12. Hentges seek quite title, having the Court affirm that the use of the roadway and Hentges property for all other purposes by Getzfrids, is by license or by permission.

13. This Court finds that the use of Hentges' (and their predecessors) land by the Getzfrids (and their predecessors) was by permission. The general rule that the burden of proof shifts to the servient landowner is not applicable, as the Court concludes that no part of the roadway or the

approach on Hentges' land, or any other portion of Hentges' land, was used exclusively by the Getzfrids. The roadway and the approach area was used by both the Getzfrids and the Hentges.

14. The use of the Hentges' property by Getzfrids, including the roadway, the approach area, lawn mower access, access to parking of the boat trailer to the north, and the placing of the flower boxes, all show the nature of the use was without interference with Hentges use and with Hentges tacit permission in some cases and express permission in other cases. The nature and use of these portions of Hentges property was consensual, cooperation between neighbors that got along, and quite the opposite of adverse or hostile use. There was no act by the Getzfrids that would have put the Hentges on notice that the Getzfrids' use was hostile and under claim of right. Finally, any use by Getzfrids (and their predecessors) over these areas was joint with the Hentges (and their predecessors) and not exclusive.

CONCLUSIONS OF LAW

1. The Court has both subject matter and personal jurisdiction over the parties, as this action relates to real properties located in Kootenai County, Idaho.

2. Getzfrids' claim for easement by dedication on the plat fails for two reasons. First, the plat of the subdivision fails to contain any dedication language. The wording "private road" is not sufficient to show intent to dedicate the roadway for any lot owner. Second, the subsequent deed from Smythe to Sherwin shows accurately the intent of the developer of the plat, that the road was intended as a temporary road and is vacated and re-annexed to Lot 10.

3. As to Getzfrid's claim for easement by prescription, the Court finds that the use by Getzfrids (and their predecessors) of Hentges' (and their predecessors) land, most likely began as permissive, and continued on a tacit permission or express permission basis. Mere proof that the owner "acquiesced" in the use is not proof that the use was with the owner's consent or permission.

Melendez v. Hintz, 111 Idaho 401, 405, 724 P.2d 137, 141 (Ct.App. 1986), *citing West v. Smith,* 95 Idaho 550, 511 P.2d 1326 (1973). However, in this case there is evidence of permissive use. There is evidence of more than mere acquiescence, or tacit approval. The parties predecessors were both good friends and good neighbors. There is no evidence to indicate anything other than Gitzfrids' predecessors used with permission from Hentges' predecessors. They got along fabulously, and never worried about it. In more modern times, the use of the Hentges' property by Getzfrids, including the roadway, the approach area, lawn mower access, access to parking of the boat trailer to the north, and the placing of the flower boxes, all show the nature of the use was without interference with Hentges use and with Hentges tacit permission in some cases and express permission in other cases. The nature and use of these portions of Hentges property was consensual, cooperation between neighbors that got along, and quite the opposite of adverse or hostile use. There was no act by the Getzfrids that would have put the Hentges on notice that the Getzfrids' use was hostile and under claim of right. Accordingly, Getzfrids' claim for prescriptive easement fails.

4. Even if it is unclear as to how the use began, the general rule that the burden of proof then shifts to the servient landowner (as stated in *West v. Smith*) is not applicable, as the Court concludes that no part of the roadway or the approach on Hentges' land, or any other portion of Hentges' land, was used exclusively by the Getzfrids. Thus, general rule (that in the absence of proof as to how the use began there is a presumption that the use was adverse and under claim of right) has an exception that applies to the facts of this case. The exception is when:

> … where the owner of real property constructs a way over it for his own use and convenience, the mere use thereof by others which in no way interferes with his use will be presumed to be by way of license or permission.
>
> Where a roadway is established or maintained by a landowner for his own use, the fact that his neighbor also makes use of it, under circumstances which in no way interfere with use by the landowner himself, does not create a presumption of adverseness. The presumption is that the neighbor's use is not adverse but is permissive and the result of neighborly

accommodation on the part of the landowner.

Melendez v. Hintz, 111 Idaho 401, 404, 724 P.2d 137, 140 (Ct.App. 1986). There is nothing about Gitzfrids' use of the southern portion of the driveway or the approach which interferes with Hentges' use of their land, as Hentges put on evidence that they use the southern portion of the driveway and the approach. The facts of this case are different than the facts of *Melendez*, where the neighbor "created their own driveway system which branches off the Hintz driveway". 111 Idaho at 405. That branch was "not in common with the owners" of the servient estate, and the branch "was an additional burden on the [servient] property which had no benefit to [the servient property]". *Id.* The Court of Appeals found the neighbors had appropriated the land of the servient estate "for their own purposes." *Id.* Here, the roadway and the approach area have been used by both the Getzfrids and the Hentges. There was "common" usage by both owners. There was no additional burden on Hentges land and there was benefit to the Hentges in that they used the approach area to turn around[1] and occasionally park cars. The Getzfrids did not appropriate Hentges land for their own exclusive purposes. The exception stated above, is referred to as the "joint use exception" and the Court of Appeals stated in *Chen v. Conway,* 121 Idaho 1006, 1010, 829 P.2d 1355, 1359 (Ct.App. 1991), that Getzfrids have the burden to prove that their use of the driveway and approach "was not in common or joint with the [Hentges] but infringed or burdened [Hentges'] possessory right." *Id.* Getzfrids have failed to meet that burden of proof. One additional fact separates this case from *Melendez.* The Court of Appeals noted that there was evidence that the neighbors infringement on the servient estate "occurred at the outset." 111 Idaho at 406. In the present case, at the time Sherwins (Hentges' predecessor on lot 10) built their home, no one else was using the road, as no one had been living in the structure built on the Getzfrid

[1] The fact that cars were turned around on the area sought to be adversely possessed was a key factor in the Court of Appeals concluding that Conway's use of the driveway is in common with the Chens' and is permissive, not adverse. 121 Idaho at 1010.

property for a long time. Pogreba deposition, p. 10, Ll. 3-12. The structure on lot 9 was only a "shack", and the owners never came out the entire time Sherwins lived on lot 10. Pogreba deposition, p. 17, L. 6 – p. 18, L. 13; p. 20, Ll. 4-11. Mrs. Sherwin (Pogreba) has no idea how these people accessed their shack, as they never used it. Pogreba deposition, p. 20, Ll. 4-11. Sherwins used this road the entire time they lived there. Pogreba deposition, p. 15, L. 13 – p. 16, L. 6. On this basis too, Getzfrids' claim for prescriptive easement fails.

5. Hentges' claim for quiet title is granted, as Getzfrids have failed on their claim for prescriptive easement and easement by dedication.

6. Betty Hentges testified that they had no intention of shutting off Getzfrids' access, as they are "excellent responsible users". Tr. p. 62, Ll. 15-24. A license could certainly be granted by Hentges, and the Court would hope such would be granted, though the Hentges are not bound to do so.

IT IS SO ORDERED; that Hentges' claim for quiet title is GRANTED and Getzfrids' counterclaim is DISMISSED. Plaintiff is directed to prepare a Judgment consistent with these findings and conclusions.

Entered this ____28th_______ day of November, 2002.

____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _______ day of November, 2002, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
Craig R. Wise	667-0435	Kenneth T. Jacobsen	667-9631

____
Merri Thorne, Deputy Clerk