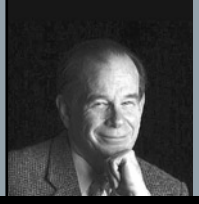


By James J. Demma, LS, Esq

Jim Demma is a Maryland licensed professional land surveyor and has practiced law in both the State of Maryland and the District of Columbia for more than 30 years. His extensive practice has included land use & development, real estate contracts and titles, condominiums, easements, land patents, boundary disputes, and all matters that touch and concern the land.

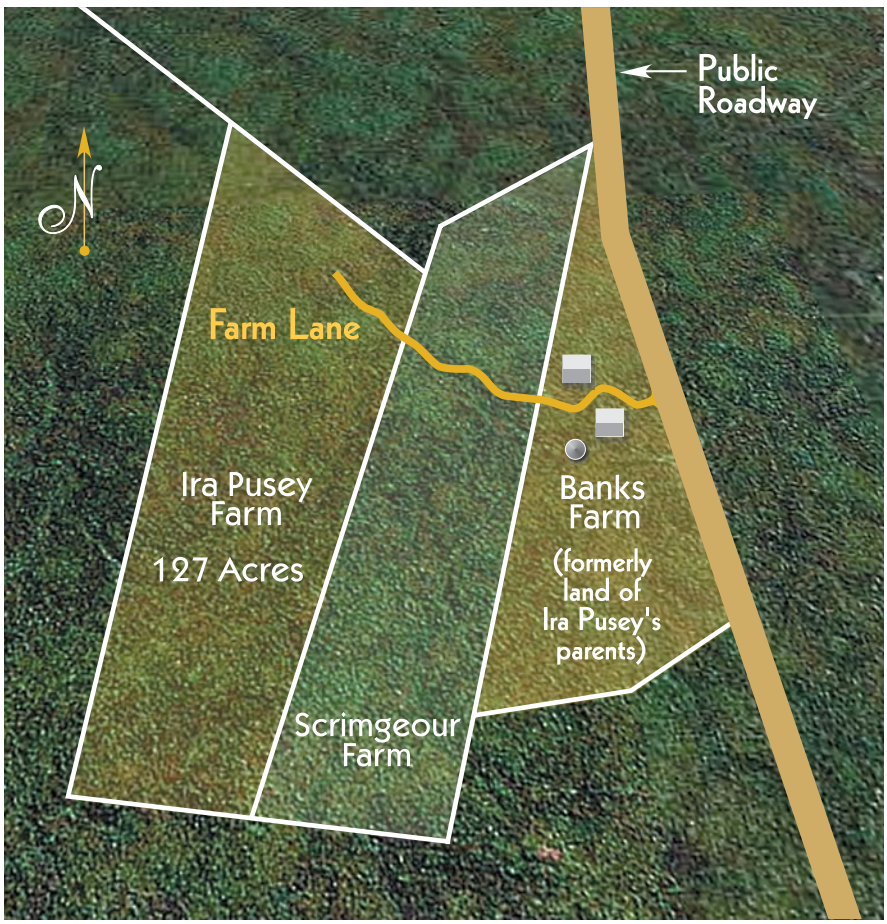
A Prescriptive Easement – A Family Affair

One of the more fascinating aspects of surveying is how the law and the practice of surveying intersect with one another so often. I guess that this is why I have traveled a long path from being a land surveyor to the study of law. One case that I recently reviewed was decided in my home state of Maryland and is cited as *Banks v. Pusey*, 393 Md. 688, 904 A.2d 448 (2006). This case concerned a prescriptive easement, which I believe is one of the more interesting areas of the law for surveyors and lawyers alike.

The land surveyor plays a large role in the legal transfer of property from one person to another. One can examine the record title to a parcel of land, but without a land survey of the subject property it can never be determined whether or not the title is truly "marketable".

But what is "marketable title"? Generally this term means that the title to the land and its improvements are free from any *reasonable doubt* as to its validity, and such as a reasonable, intelligent person would accept in the exercise of ordinary business prudence. But then what is a "prescriptive easement"? That term generally means that an easement has been acquired – not by a written document, but by a party having made adverse and uninterrupted use of another's land for a long period of time.

What the ALTA/ACSM Minimum Standards require (just like most of the State Standards probably require, in one fashion or another), is that "observable evidence of easements and/or servitudes of all kinds, such as those created by roads; rights-of-way…" be shown on the land title survey, if they appear to affect the surveyed property.



By this quoted portion of the Standards, it is implied that if there is observable evidence of an easement, that situation could affect the marketability of the title, and it is only the land surveyor who has the expertise and experience to make the determination that an easement *may* exist, but that same surveyor cannot make the determination of whether such evidence proves that a prescriptive (an unrecorded easement) does in fact exist. As I have so many times asked both rhetorically and facetiously, in order to emphasize how difficult it is to prove a prescriptive easement: How is adultery and prescription (or adverse possession) alike? The answer is: They are both very easy to allege, but very difficult to prove.

The *Banks v. Pusey* case is only one example, along with many other cases, as

to why a prescriptive easement is so difficult to prove, and how the mere existence of a roadway across a parcel of land may affect the marketability of the title.

This case arose from a dispute between two land owners, in which Ira Pusey contended that he had an easement by prescription over Banks' property. The trial court found that such an easement had been established; however, on appeal this decision was reversed. The alleged easement pertained to a farm lane (a dirt road) which runs from the Pusey Farm (a 127- acre tract of land), across a neighboring property owned by Scrimgeour, and across the Banks Farm to a public roadway. From 1949 to 1954 Marion, Ira Pusey's father, owned both of these farms that were at issue in this case. Ira lived with his family on the parcel which is referred to as Banks Farm from 1939 until 1995. Ira and Marion farmed the land together, and in March of 1954 Marion deeded to Ira Pusey the 127-acre farm.

Marion passed away in 1979, at which time Banks Farm was deeded by Marion's personal representative, to Marion's second wife Eva, for life, with the remainder to Marion's grandchildren. Ira continued to live on the Banks Farm, along with his stepmother Eva until she died in 1995. At that point, Banks Farm passed to Marion's grandchildren, with Ira continuing to reside in the dwelling and using the farm lane with their consent. In May of 1998 Banks purchased the Banks Farm from Marion's grandchildren, and Ira moved and, though no longer residing on the property, continued using the farm lane to cross over the Banks Farm to access his 127-acre parcel. Throughout Ira's ownership of his 127-acre farm (from 1954 on) numerous third-parties invitees (farm laborers, timber and power companies, hunters, and others) used the farm lane to access Ira's farm, to and from the public roadway.

The trial court judge found that Ira lived on the Banks Farm pursuant to the acquiescence of his family members. Ira testified about his living arrangements there, stating: "Never asked them. Weren't nothing said about it." When asked as to whether he had permission to stay in the house, he stated: "Wasn't nothing said about it. I just stayed." Ira never had an actual ownership interest in the Banks Farm. When Banks purchased his property, Ira told Banks that he had a right-of way to access his 127-acre farm via the farm lane, although no recorded right-of-way could be found. Subsequently, Banks revoked his consent to Ira to use the farm lane and erected obstacles to prevent Ira's access. Ira removed the obstacles and continued to use the farm lane, resulting in this case being brought before the court.

The trial court found that Ira's use of the farm lane had been uninterrupted and exclusive for more than the prescriptive period (in Maryland, that being a 20-year period of time). The issue on appeal was whether a presumption of adverse use arising in favor of a person who uses a farm lane for ingress and egress to the residence which he first occupied as a minor and continues to occupy jointly with his parents so as to establish – as against the parents and their successors in title – a basis for a prescriptive easement.

Surveyors can determine if an easement *may* exist, but not, in fact, if it *does* exist.

The appeals court reviewed that basic law of prescriptive easements by stating that *"an easement is a nonpossessory interest in the real property of another… an easement can be created expressly or by implication… One type of easement by implication is an easement by prescription, which arises when a party makes an adverse, exclusive, and uninterrupted use of another's real property [for a certain period of time]… For the party's use to be considered adverse, it must occur without license or permission."*

What was primarily disputed in this case was whether Ira's use of the farm lane was adverse during the period of time that he resided with his parents on what is referred to as the Banks Farm; and the appeals court wrote that "presumption of adverse use will not arise in a prescriptive easement action if the use of the land appears to have been by permission." This case shows that in prescriptive easement cases, where an individual resides on his parents' property from the time he or she is a minor, his use of the property shall be deemed permissive absent any affirmative evidence of a change in circumstances to adverse use, which Ira could not show. This proposition is supported by the general rule that the creation of an easement by prescription is not favored by the law.

The appeals court ruled, contrary to the holdings by the lower court, that Ira's use of the farm lane was permissive when he was a minor and there was no affirmative evidence that it ever ceased to be permissive during the course of his subsequent residence upon the property and his use of it.

In this Banks case, the appeals court at the end of its opinion went on to explain its well-reasoned policy behind its decision and the impact that a contrary ruling may have on the marketability of title – getting back to that doctrine that I mentioned earlier. What the appeals court wrote was that a contrary ruling:

"... might cause serious problems for elderly farmers who have farmed their lands including their children in their farming operations and in their family life. Such a farmer's ability to sell his land, could be, under the positions taken in the lower courts, severely compromised by children who allege that they have lived with their parents not by permission, but by mere acquiescence. Were the positions taken below affirmed, no title examiner could warrant that any farmer who permits, or has permitted his children to live with him or her for the prescriptive period… has valid title, free and clear of encumbrances such as easements and right-of ways. It would seriously impair the marketability of farm titles (and perhaps other forms of property owned by parents, with their children involved in the operation of the family business)…"

In closing, I reiterate to surveyors how complex this law of easements by prescription can be. A surveyor can never be of the opinion, without the intervention of the courts, that some roadway (or a farm lane like in this case), no matter how long it has been used for travel by persons who have no formal title interest therein, is in law and in fact a prescriptive easement.