DIRT Periodic Development for Monday, September 16, 2013
*Clifton v. Wilkinson*

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***Clifton v. Wilkinson,*** Supreme Court of Virginia, 2013 WL 4854351 (September 12, 2013)
Link to Opinion: http://www.courts.state.va.us/opinions/opnscvwp/1121232.pdf

**SYNOPSIS:** Supreme Court of Virginia reaffirms the classic standard governing implication of an easement of necessity, concluding that no implied easement arose over neighboring lands when part of an owner's parcel was landlocked by the exercise of eminent domain.

**FACTS:** Prior to 1961, C.T. Wilkinson acquired an 18 acre parcel of land in Washington County, Virginia, which bordered a public highway (Rt. 704). In 1961, the State Highway Commissioner condemned a strip of land through the middle of this parcel for a portion of the highway corridor for Interstate 81. As a result, Wilkinson was left with two parcels: a 5-acre parcel north of the I-81 corridor (which retained access onto Rt. 704), and a 10-acre parcel that was landlocked. In the condemnation, Wilkinson received an award of $1,450 for the land taken and $2,450 for damages to the landlocked 10-acre parcel.

After the condemnation, Wilkinson gained access to farm the 10-acre parcel by renting a neighboring 18–acre parcel from a predecessor of the Cliftons. [This parcel had access to Route 704.] With the permission of the owner of that parcel, Wilkinson used an unpaved lane across that parcel to access the landlocked 10-acre parcel. This arrangement continued until 2006, when Wilkinson discontinued farming and ceased to rent the Clifton property. Wilkinson died in 2007, and title to his property passed to his widow. In 2008, the Cliftons, having failed to reach an agreement with the widow for purchase of the 10-acre parcel, terminated her permissive use of the lane and blocked it. The widow then sued in the circuit court, seeking a declaratory judgment that she was entitled to use of the access lane by an easement by necessity. The circuit court ruled that the widow was entitled to an easement by necessity over the access lane. The Cliftons appealed.

**HOLDING AND ANALYSIS**: The Supreme Court of Virginia reversed. It noted that for an easement of necessity to arise, it was necessary that: (1) the dominant and servient tracts had to have been under common ownership and some time in the past, (2) the easement must be "reasonably necessary" to the enjoyment of the dominant land, by clear and convincing evidence, (3) there must be no alternate means of legal access to the landlocked parcel, and (4) the necessity for the easement had to exist at the time the

dominant and servient tracts were severed from common ownership. The Supreme Court ruled that there was no evidence in the record to support the finding that the Clifton parcel (the would-be servient parcel) and the landlocked parcel (the would-be dominant parcel) were ever under common ownership. Further, the Court ruled that "[t]he issue whether such unity of title ever existed, however, is immaterial in this case because the necessity for an easement of ingress and egress did not arise when any such unity of title was severed." As the court noted:

> Vast tracts of land in Virginia were at some time in the past held by a single individual, and historic common ownership underlies many, if not most, adjoining parcels today. That fact alone is not sufficient to justify an easement by necessity over neighboring lands to the owner of a parcel that becomes landlocked by the exercise of the power of eminent domain.

The Supreme Court noted that Wilkinson was entitled to, and received, an award of compensation for the damages to the landlocked parcel occasioned by the condemnation:

> Because the ten-acre tract did not become landlocked by a conveyance from a former owner severing a former unity of title, no implied grant of a right of ingress and egress arose. Therefore, a former common ownership of the dominant and servient tracts, if such unity existed in the past, is immaterial. The ten-acre tract suffered damages by the taking of its access rights by eminent domain. Those damages were compensable in the condemnation proceeding in 1961, but did not give rise to any implied grant of access rights over the lands of others.

**COMMENT:** The court's conclusion confirms the traditional understanding of the extremely narrow scope of the implied easement of necessity. The condemnation may have split Wilkinson's parcel into two separate parcels, landlocking one of them, but that would not justify the implication of an easement over the land of a neighboring landowner who was not a party to the condemnation. Certainly, the court's application of the traditional rule is sound.

The situation does demonstrate a critical practical point: in advising a client like Wilkinson (facing a condemnation that would leave him with a landlocked residual parcel), one must stress the need for the client not only to negotiate the cost of obtaining an access easement over another neighboring parcel while the condemnation is proceeding (when that cost can be taken into account in calculating the damages) — but also to go ahead and acquire the easement at that point. In this case, it appears that Wilkinson got paid $2,450 for the reduced value of the residual landlocked parcel, and then pocketed the money (rather than actually using it to acquire the easement) once he obtained access to the parcel via permission from the neighboring owner. This was a gamble, and years later, after the permission was revoked — and the value of the

neighboring land had probably increased significantly with increased development along the I-81 corridor — the gamble didn't pay off and the widow is now stuck. Good lawyering at the time might have encouraged Wilkinson to appreciate the need to obtain the legal means of access at the time of the original condemnation.

Now the neighbors have Wilkinson's widow over the proverbial barrel. In this instance, many states have cartway easement statutes that would permit the widow to obtain an access easement over the neighboring parcel, but with a requirement to pay compensation to the neighboring parcel owner. There's no mention of this possibility by the court. [Virginia DIRT members: does Virginia have such a statute?]