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Franklin County Legal Journal
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Frank A. O'Donnell and Georgia P. O'Donnell, husband and wife, Frank W. O'Donnell and Monica C. O'Donnell, Husband and wife, and Georgia Horst and Jan O. Horst, wife and husband, Plaintiffs

v. Jerry A. O'Donnell, and John Doe #1, John Doe #2 … John Doe # X, and Jane Doe #1, Jane Doe #2 … Jane Doe # X, fictitious names, being all of the unknown heirs and grantees of Albert J. Piper, deceased, Defendants

Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Civil Action – Law No. 2018-3980 Quiet Title

HOLDING: Defendant raised preliminary objections to Plaintiffs' amended complaint on the basis of misjoinder of causes of action for quiet title action against Defendant and Unknown Defendants, demurrer to quiet title action, and demurrer to prescriptive easement claim over the right-of-way. Court overruled misjoinder of cause of action preliminary objection because fact that Defendant's and Unknown Defendant's respective claims to title of the disputed property derived from different stages did not warrant separate proceedings, where the purpose of a quiet title action is to settle competing claims to interests in property. Court overruled the demurrer to the quiet title action where will seemingly created a trust instrument that expressly stated that certain real property was to be held in a trust for decedent's grandson until grandson reached the age of majority and grandson allegedly reached such age, despite no conveyance from the estate of decedent to grandson, the predecessor-in-title to Plaintiffs. Court overruled the demurrer to the prescriptive easement claim where Court found that familial relationship that gives rise to the presumption of permissive use is a rebuttable one and where Plaintiffs alleged use of alleged easement before and after obtaining title in adjoining land, the total of which exceeded the statutory time-period requirement.

HEADNOTES

Preliminary Objections

1. Court declines to consider Defendant's argument raised for first time in brief in support of preliminary objections when Defendant did not raise argument in its preliminary objections as mandated by Pa.R.C.P. No. 1028(b). *See* Pa.R.C.P. No. 1028(b); Commonwealth v. Peoples Benefit Services, Inc., 895 A.2d 683, 690 n.13 (Pa. Commw. Ct. 2006).

Misjoinder of Cause of Action

2. Where Defendant's and Unknown Defendants' purported respective claims to title of disputed property derived from different sources, Plaintiffs' quiet title claim against both was proper at preliminary objections stage because "[t]he purpose of a quiet title action is to settle competing claims to interests in property or to determine right or title or the validity of any deed affecting any interest in land." Cornwall Mountain Investments, L.P. v. Thomas E. Proctor Heirs Trust, 158 A.3d 148, 160 (Pa. Super. Ct. 2017).

3. To the extent that Pa.R.C.P. No. 2229 is relevant in court's analysis of misjoinder of cause of action under Pa.R.C.P. No. 1028(a)(5), Pa.R.C.P. No. 2229(e) is the particular provision that controls over Pa.R.C.P. No. 2229(b) in a quiet title cause of action because Pa.R.C.P. No. 132 provides that the particular provision prevails over the general one when the two are in conflict.

Standard of Review of Demurrer

4. The Court's standard of a review of a demurrer on preliminary objections is as follows: "Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections." American Interior Construction & Blinds Inc. v. Benjamin's Desk, LLC, 206 A.3d 509, 512 (Pa. Super. Ct. 2019) (citing Khawaja v. RE/MAX Central, 151 A.3d 626, 630 (Pa. Super. Ct. 2016)). In addition, the Court need not accept—"legal conclusions, unwarranted factual inferences, argumentative allegations, or expressions of opinion[]"—as true. C.S. v. Commonwealth Dep't of Human Services, Bureau of Hearings and Appeals, 184 A.3d 600, (Pa. Commw. Ct. 2018) (citing Armstrong Cty. Mem'l Hosp. v. Dep't of Pub. Welfare, 67 A.3d 160, 170 (Pa. Commw. Ct. 2013)). The Court is limited to an examination of the "averments in the complaint, together with the documents and exhibits attached thereto... in order to evaluate the sufficiency of the facts averred." Denlinger, Inc. v. Agresta, 714 A.2d 1048, 1050 (Pa. Super. Ct. 1998).

Standards for Prevailing in a Quiet Title Action

5. To prevail in a quiet title action, a plaintiff must first bring a cognizable quiet title claim under Pa.R.C.P. No. 1061(b).

6. The purpose in bringing a quiet title action claim is to "to settle competing claims to interests in property or to determine right or title or the validity of any deed affecting any interest in land." Cornwall Mountain Investments, L.P., 158 A.3d at 160.

7. The standard for prevailing in a quiet title action is "demonstrat[ing] title by a fair preponderance of the evidence[] . . . . that places upon the plaintiff the burden of proving a prima facie title, which proof is sufficient until a better title is shown in the adverse party." Poffenberger v. Goldstein, 776 A.2d 1037, 1041 (Pa. Commw. Ct. 2001) (internal citations and quotation marks omitted). *Cf.* Moore v. Dep't of Envtl. Resources, 566 A.2d 905, 908 (Pa. Commw. Ct. 1989) ("The Board [of Property] mistakenly assigned to plaintiff-petitioner the duty to show his title by clear and convincing evidence.").

Standard for Prevailing in a Prescriptive Easement Claim

8. The standard governing a prescriptive easement claim is as follows: "A prescriptive easement is created by (1) adverse, (2) open, (3) notorious, (4) continuous and uninterrupted use for a period of twenty-one (21) years. Moreover, the party asserting the easement must demonstrate 'clear and positive' proof. Permissive use defeats a claim of a prescriptive easement. The landowner has the burden of proving consent, but only after the alleged easement holder proves the use was adverse, open, notorious, and continuous for 21 uninterrupted years." Village of Four Seasons Ass'n, Inc. v. Elk Mountain Ski Resort, Inc., 103 A.3d 814, 822 (Pa. Super. Ct. 2014) (citations and some quotation marks omitted).

9. "A principal objective of the law concerning prescription is the protection of long established positions." Brouse v. Hauck, 478 A.2d 1348, 1352 (Pa. Super. Ct. 1984) (citing Restatement Property (Introductory Note, Chap. 38, p. 2923) (1944)).

Prescriptive Easement Claim – Permissive Use

10. "Whether a use is adverse or permissive is a question of fact." Gehres v. Falls Twp., 948 A.2d 249, 251 (Pa. Commw. Ct. 2008) (citing Keefer v. Jones, 359 A.2d 735, 739 (Pa. 1976)).

11. Typically, the "servient owners[] bear the burden of showing use began on a permissive rather than an adverse basis." Gehres, 948 A.2d at at 252 (citations omitted). A servient owner's failure to object is not deemed the equivalent of giving permission. Orth v. Werkeiser, 451 A.2d 1026, 1028 (Pa. Super. Ct. 1982) (citing Tarrity v. Pittston Sch. District, 328 A.2d 205, 207 (Pa. Commw. Ct. 1974)).

12. However, "[w]here a familial or fiduciary relationship exists, permissive use will be presumed." Sterner v. Freed, 570 A.2d 1079, 1082 (Pa. Super. Ct. 1990) (citing Waltimyer v. Smith, 556 A.2d 912, 914 (Pa. Super. Ct. 1989)).

13. "[W]hen no special relationship exists between the parties, a sufficiently notorious use will be presumed to be enough to alert the owner of the land to an adverse claim, and it will be incumbent upon the owner of the land to establish the alleged permissive use." Waltimyer, 556 A.2d at 914 (citations omitted).

14. The presumption that gives rise to permissive use when a familial relationship exists between the parties is rebuttable.

15. When a special relationship exists between the landowner and the alleged easement holder giving rise to a presumption of permissive use, the burden is on the alleged easement holder to establish that the use is adverse without permission.

16. A showing that rebuts the presumption that use of an alleged easement was not adverse or hostile owing to an existing familial relationship between the landowner and alleged easement holder has the effect of providing the landowner with the alleged easement holder's intention to adversely use the alleged easement.

Easements

17. An easement in gross is "a personal right in the property of another because it is not appurtenant to other land owned by the grantee." Morning Call, Inc. v. Bell Atlantic-Pennsylvania, Inc., 761 A.2d 139, 142 n.6 (Pa. Super. Ct. 2000).

18. An easement in gross "must be created by written grant." Morning Call, Inc., 761 A.2d at 142 n.6 (citing 1 *Ladner on Conveyancing in Pennsylvania* §§ 11.01, 11.02 (4th Ed.1979)).

19. An easement appurtenant attaches to the dominant tenement. Percy A. Brown & Co. v. Raub, 54 A.2d 35, 46 (Pa. 1947).

20. A prerequisite to the creation of an easement appurtenant is the "'[e]xistence of a servient tenement for the beneficial use of a dominant tenement[.]'" Riverwatch Condominium Owners Ass'n v. Restoration Development Corp., 980 A.2d 674, 686 (Pa. Commw. Ct. 2009) (quoting Brady v. Yodanza, 425 A.2d 726, 727 (Pa. 1981)). *But see* Joiner v. Southwest Cent. Rural Elec. Co-op Corp., 786 A.2d 349, 351 (Pa. Commw. Ct. 2001). *But see* Joiner v. Southwest Cent. Rural Elec. Co-op Corp., 786 A.2d 349, 351 (Pa. Commw. Ct. 2001).

21. With respect to an easement appurtenant, "the benefit of a particular piece of land cannot be enlarged to other parcels of land, whether adjoining or distinct tracts, to which the right is not attached." Percy A. Brown & Co., 54 A.2d at 46 (emphasis added) (citations and internal quotation marks omitted).

22. There is "[n]o definite rule" as to what constitutes "proper and reasonable use as distinguished from an unreasonable and improper use[]" of an easement for determining whether the use is for the purpose of the dominant tenement and not "for any purpose unconnected with the enjoyment of [that dominant tenement]." Percy A. Brown & Co., 54

A.2d at 46. This determination is "usually left to the jury or the trial court as one of fact." Id.

23. The owner of an easement or "right of way is not limited to its use by himself." Percy A. Brown & Co., 54 A.2d at 46. Additionally, "[w]here a way is appurtenant to an estate it may be used by those who own or lawfully occupy any part thereof, and by all persons lawfully going to or from such premises, whether they are mentioned in the grant or not." Id.

Preliminary Objections

24. For the Court to "sustain preliminary objections, it *must appear with certainty* that the law will not permit recovery, and[] . . . any doubt must be resolved in favor of overruling the preliminary objections." Commonwealth, Pa. Game Commission v. Senaca Resources Corp., 84 A.3d 1098, 1103 (Pa. Commw. Ct. 2014) (emphasis added).

25. When ruling on preliminary objections, the Court cannot "[s]urmise [or] conjecture[.]" Schuykill Navy v. Langboard, 728 A.2d 964, 968 (Pa. Super. Ct. 1999).

Appearances:

Joseph A. Macaluso, Esquire, *Counsel for the Plaintiffs*

J. McDowell Sharpe, Esquire, *Counsel for Defendants*

Alexander Sharpe, Esquire, *Counsel for Defendants*

OPINION OF COURT

Before Meyers, P.J.

Before the Court are Defendant Jerry A. O'Donnell's ("Defendant") *Preliminary Objections* to Plaintiffs' *Amended Complaint* that seeks to quiet title of certain property as well as establish a prescriptive easement over a right-of-way, both the property and the right-of-way located in Franklin County. Defendant challenges the *Amended Complaint* on the basis of (1) misjoinder of causes of action for Plaintiffs' quiet title action against both Jerry and Unknown Defendants[1], and legal insufficiency with respect to (2) the quiet title action for the Disputed Property and the (3) prescriptive easement claim over the right-of-way. The Court overrules Defendant's preliminary objections for the reasons that follow. Defendant will be permitted to plead over within twenty (20) days from the date of service of this Order and Opinion.

PROCEDURAL & FACTUAL HISTORY

Procedural History

Plaintiffs filed their original quiet title *Complaint* on September

1 *I.e.*, John Doe #1, John Doe #2 through John Doe # X and Jane Doe #1, Jane Doe #2 through Jane Doe # X, fictitious names, being all of the unknown heirs and grantees of Albert J. Piper, deceased.

26, 2018, which preceded a series of procedural starts and stops spanning almost 14 months,[2] including the filing of Plaintiffs' *Amended Complaint* and Defendant's corresponding *Preliminary Objections*, the matter before the Court. Following this, the Court held oral argument on Defendant's *Preliminary Objections* to Plaintiffs' *Amended Complaint* on November 7, 2019. Subsequently, the parties filed a *Stipulation* and *Praecipe to Attach* on January 16, 2020 and January 23, 2020, respectively, that formally entered on the record a series of land documents that governed a portion of the alleged Private Right-of-Way, none of which were previously alleged or plead in Plaintiffs' *Amended Complaint* or otherwise made part of the record.[3]

Factual History

This case concerns ownership of certain property and use of a right-of-way among family members[4] of farm land situated in Franklin County.[5]

Disputed Property:

Specifically, the certain property is a 1.2368 acre lot, triangular in shape, more particularly described in the January 10, 2003 and March 25, 2015 deeds[6] (the "Disputed Property"). The Disputed Property abuts:

2 On November 19, 2018, Plaintiffs filed and served a 10-day default notice on Defendant for failure to enter a written appearance or file in writing objections or defenses to the claims set forth against Defendant in the *Complaint* pursuant to Pa.R.C.P. No. 237.1(a)(2). Defendant filed *Preliminary Objections* to Plaintiffs' original *Complaint* on November 29, 2018. Plaintiffs then filed their *Answer to Preliminary Objections to Complaint* on December 20, 2018. Next, the Court scheduled oral argument on the preliminary objections for February 7, 2019. By stipulation of the parties, argument was continued to April 4, 2019 when it took place.

Prior to the Court's ruling on Defendant's *Preliminary Objections*, Plaintiffs filed on June 18, 2019 another complaint, captioned *Complaint*, without leave of court or consent of Defendant, due to a misunderstanding by Plaintiffs' Counsel with Defendant's Counsel (the "*Amended Complaint*"). Subsequently, by Order of Court dated July 8, 2019, the Court granted Plaintiffs leave to file the *Amended Complaint*, dismissed Defendant's original *Preliminary Objections*, and permitted Defendant to file preliminary objections to the *Amended Complaint*. Defendant then filed *Preliminary Objections* to Plaintiffs' *Amended Complaint* on July 29, 2019, the preliminary objections currently before the Court and which the Court refers to in this Opinion. The Court scheduled oral argument on these preliminary objections for October 3, 2019. However, on Defendant's August 26, 2019 *Motion to Continue Oral Argument*, the Court continued oral argument to November 7, 2019.

Plaintiffs filed their *Answer to Preliminary Objections of Defendant to Amended Complaint* on August 30, 2019, and the parties exchanged briefs in October of 2019.

3 On October 21, 2019, after the parties filed their respective briefs, but before oral argument, Plaintiffs' Counsel wrote to the Court informing the Court that there existed: a *Petition for Appointment of Viewers to Vacate Road From a Point at Lane Leading to The Premise of Hughey Duncan Thence Eastward Over and Across the Mountain to Amberson Valley at Private Road Leading to Joe Eckenrod's Residence*, dated November 7, 1931; a *Report of Road Viewers* filed November 24, 1931; and an *Order of Court* dated March 22, 1932. On January 15, 2020, The Court issued upon the parties to show cause why the Court should not include the before referenced documents in the record. The parties' *Stipulation* and *Praecipe to Attach* resulted.

4 Defendant Jerry A. O'Donnell is the nephew of Plaintiffs Frank A. O'Donnell and Georgia P. O'Donnell. Plaintiffs Frank A. O'Donnell and Georgia P. O'Donnell are the parents of Frank W. O'Donnell and Georgiana Horst. Monica C. O'Donnell, wife of Frank W. O'Donnell, is their daughter-in-law, and Jan O. Horst, husband of Georgiana Horst, is their son-in-law. *Amended Complaint* ¶ 2-4.

5 None of the property at issue or referenced is unenclosed woodlands. *Amended Complaint* ¶ 47.

6 The January 10, 2003 Deed is recorded in the Franklin County Office of the Recorder of Deeds in Deed Book

(1) property jointly owned by Plaintiffs Frank A. O'Donnell and Georgia P. O'Donnell, as tenants by the entireties, and Frank. W. O'Donnell, as a tenant in common, more particularly described in the July 13, 1989 Deed[7] (the "Farm"); and (2) property owned by Defendant Jerry A. O'Donnell, more particularly described in the August 2, 1990 Deed[8] ("Defendant's Lot").

The alleged chain of title of the Disputed Property is as follows. *See Amended Complaint* ⁋ 56 a)-g).

1. Hugh Duncan to A.J. Piper (or, sometimes, "Albert J. Piper") by deed dated August 28, 1944.[9]

2. A.J. Piper died testate on January 11, 1949, and his will was probated on February 2, 1949 in the Franklin County Office of the Register of Wills (the "Will").[10] A.J. Piper's Will read, in part:

I give and bequeath to Robert W. Crouse of Dry Run, Pa. the sum of $4,000.00 in trust to invest and reinvest the same and to apply the net income arising therefrom to the maintenance, education and support of my grandson, Donald E. Piper, or for any other needs of my said grandson which to my Trustee may seem proper or appropriate. Said trust shall continue during the minority of my said grandson and the principal of said trust fund, with any accrued and unexpected income, shall be paid to my said grandson when he arrives at the age of 21 years.

I give and devise to Robert W. Crouse of Dry Run, Pa., also as Trustee for my grandson, Donald E. Piper, during his minority, the following tracts of mountain land, namely:

. . . .

[**The Disputed Property**] 2. A tract of mountain land bounded by lands of Mrs. Edith Fegan, the mountain road and other lands owned by me and containing 2 acres, more or less, the same having been recently purchased by me from Hugh Duncan and the deed for which has been recorded.

. . . .

Volume 2037, Page 632. *See Amended Complaint* ⁋ 18 & Exhibit E. The March 25, 2015 Deed is recorded in the Franklin County Office of the Recorder of Deeds in Instrument Number 201505504. *See Amended Complaint* ⁋ 55 & Exhibit G (⁋55 incorrectly refers to this Deed as Exhibit F rather than Exhibit G).

7 This July 13, 1989 Deed is recorded in the Franklin County Office of the Recorder of Deeds in Deed Book Volume 1056, Page 504. *See Amended Complaint* ⁋ 56 a) & Exhibits A, O.

8 This August 2, 1990 Deed is recorded in the Franklin County Office of the Recorder of Deeds in Deed Book Volume 1090, Page 438. *See Amended Complaint* ⁋ 13 & Exhibit D.

9 This August 28, 1944 Deed is recorded in the Franklin County Office of the Recorder of Deeds in Deed Book Volume 339, Page 195. *See Amended Complaint* ⁋ 56 a) & Exhibit O.

10 A.J. Piper's Will is recorded in the Franklin County Office of the Register of Wills in Will Book 44, Page 521. *See Amended Complaint* ⁋ 56 b) & Exhibit P.

Said Trustee shall manage said tracts of mountain land during the minority of my grandson, Donald E. Piper, and he shall have the right to sell timber therefrom, in which case any proceeds from the sale of timber shall be added to the $4,000.00 trust fund hereinbefore created for mysaid [sic] grandson during his minority. Also, if in the judgment of my said Trustee it shall seem expedient or desirable, my said Trustee shall have full power and authority to sell said real estate or any interest which I may have therein, at either public or private sale, and to make good and sufficient deeds to the purchasers thereof as fully as I could do if living, and any proceeds from the sale of said real estate or any interest therein shall be added to the said $4,000.00 trust fund hereinbefore created for my said grandson during his minority. **Said trust of real estate shall terminate when my said grandson arrives at the age of 21 and the legal title to said real estate, free from the trust, shallthereupon [sic] vest in my grandson without any further act on the part of said Trustee.**

. . . .

And lastly, I nominate, constitute and appoint my wife, Nellie E. Piper, and my friend, Robert W. Crouse of Dry Run, Pa., or the survivor of them, to be Executors of this my last will and testament.

Amended Complaint Exhibit O (emphasis added).

3. When A.J. Piper died, Donald E. Piper had already reached age 21.

4. No deed of record for the Disputed Property was recorded from either the Estate of A.J. Piper or the trustee to Donald E. Piper.

5. Donald E. Piper conveyed the Disputed Property to himself by Confirmatory Deed dated November 5, 2001.[11] This Confirmatory Deed included the language that:

Albert J. Piper . . . died January 11, 1949, testate. Letters Testamentary were issued to Nellie E. Piper, his widow, and Robert W. Crouse, a friend on February 2, 1949, by the Register of Wills, Franklin County, Pennsylvania, being Administration No. 30990 of 1949. The above-described tracts of real estate were specifically devised to Robert W. Crouse, as Trustee for Albert J. Piper's grandson, Donald E. Piper, the Grantor herein, during his minority. **Said trust of said real estate was to terminate when said grandson arrived at the age of 21 and the legal title to said real estate, free from the trust, should thereupon vest in said grandson, Donald E. Piper, without any further act on the part of said Trustee. At the time of Albert J. Piper's death, Donald E. Piper was already 21; so no trust was created.** No deed was ever recorded transferring the said real estate out of the Estate of Albert J. Piper and into the name of Donald E. Piper.

11 This Confirmatory Deed is recorded in the Franklin County Office of the Recorder of Deeds in Deed Book Volume 1758, Page 160. *See Amended Complaint* ¶ 56 e) & Exhibit Q.

Thus, this Confirmatory Deed is to establish a chain of title for the above-described real estate.

Amended Complaint Exhibit Q (emphasis added).

> 6. Donald E. Piper and Mildred Ann Piper, Donald E. Piper's wife, to Plaintiffs Frank A. O'Donnell, Georgia P. O'Donnell, and Frank W. O'Donnell by deed dated January 10, 2003.[12]
>
> 7. Plaintiffs Frank A. O'Donnell, Georgia P. O'Donnell, and Frank W. O'Donnell to Plaintiffs Frank W. O'Donnell and Monica C. O'Donnell by deed dated March 25, 2015.[13]

Private ROW:[14]

Serving the Farm, the right-of-way at issue (the "Private ROW") is twenty-five feet wide and runs from where the road designated as the Mountain Rd. Twp. Rte. 587 (in Curfman & Zullinger Surveying, Inc's Sketch Plan of Properties dated May 31, 2019, *Amended Complaint* Exhibit N) (the "Sketch Plan") first divides at the northernly tip of Defendant's Lot and travels south along the westerly boundary of Defendant's Lot towards Plaintiffs' Georgiana Horst and Jan O. Horst's property, their property more particularly described in the April 29, 1996 Deed[15] (the "Horst Lot"). *See Amended Complaint* ¶ 11, 38; *Stipulation*.

Before Defendant acquired Defendant's Lot on August 2, 1990 from Betty Jane O'Donnell—a non-party who is Defendant's grandmother and Plaintiff Frank A. O'Donnell's mother—Plaintiffs permissively[16] used the Private ROW. *Amended Complaint* ¶ 6, 13, 74. Previously, on July 13, 1989, Plaintiffs Frank A. O'Donnell, Georgia P. O'Donnell, and Frank W. O'Donnell acquired the Farm. *Amended Complaint* ¶ 12 & Exhibit B. Therefore, the focus of Plaintiffs' alleged use of the Private ROW for purposes of their prescriptive easement claim is for the time period that begins when Defendant acquired Defendant's Lot in 1990, the treatment of

12 This January 10, 2003 Deed is recorded in the Franklin County Office of the Recorder of Deeds in Deed Book Volume 2037, Page 632. *See Amended Complaint* ⁋ 18, 56 f) & Exhibit E.

13 This March 25, 2015 Deed is recorded in the Franklin County Office of the Recorder of Deeds in Instrument No. 201505504. *See Amended Complaint* ⁋ 30, 56 g) & Exhibit G.

14 Plaintiffs' *Amended Complaint* described the right-of-way at issue to, incorrectly, include what is in fact a public road vacated and kept open, by Order of Court dated March 22, 1932 (entered in Road Book 5, Pages 68 through 74), as a private road for the use and benefit of abutting landowners. *See Amended Complaint* ¶ 11; *Stipulation* ¶ 2; *Praecipe* filed January 23, 2020. The parties have since entered this Order of Court into the record, along with the attendant Report of Viewers and Draft of Road, and stipulated that this Order does not govern the portion of the right-of-way described immediately *infra* as the Private ROW. *Stipulation* ¶ 7.

15 This April 29, 1996 Deed is recorded in the Franklin County Office of the Recorder of Deeds in Deed Book Volume 1295, Page 178. *See Amended Complaint* ⁋ 36 & Exhibit L.

16 *See* Pa.R.C.P. No. 1029; *Plaintiffs' Answer to Preliminary Objections of Defendant to Amended Complaint* ¶ 36.

which the Court takes up in Section III of this Opinion, *infra*. Notably, as stated earlier, Plaintiffs and Defendant are all related. *Amended Complaint* ¶ 77. *See* fn. 4 of this Opinion, *supra*.

All Plaintiffs "used the Private ROW over and across Defendant's Lot" since the time Defendant acquired Defendant's Lot in 1990 until 2018. *Amended Complaint* ¶ 74; *Plaintiffs' Answer to Preliminary Objections of Defendant to Amended Complaint* ¶ 36. Subsequent to Defendant acquiring Defendant's Lot, Plaintiffs Georgiana Horst and Jan O. Horst, on April 29, 1996, acquired the Horst Lot. *Amended Complaint* ¶ 76. At no point prior to March 25, 2015 did Plaintiff Monica C. O'Donnell have an ownership interest in property common to the Private ROW. *Id.* ⁋ 30, 56 g) & Exhibit G.

In 2014, Defendant posted "no trespassing" signs along the Private ROW where it crossed Defendant's Lot and directed Plaintiffs to stay off the that portion of the Private ROW. *Id*. ¶ 20. Later, in 2018, Defendant placed stacked tires at the same portion of the Private ROW, therefore blocking Plaintiffs passage to the Horst Lot, which Plaintiff Jan O. Horst then removed in order to gain access to the Horst Lot. *Id*. ¶ 43. In June of 2018, Nathan Kerstetter—a non-party who is the grandson of Frank A. O'Donnell and Georgia P. O'Donnell—attempted to use the Private ROW to reach the Horst Lot to mow the grass there, as Plaintiffs Georgiana Horst and Jan O. Horst had instructed. *Id*. ¶ 45. Defendant confronted Kerstetter at that time, accusing him of removing the tires and telling Kerstetter that he could no longer use the Private ROW. *Id*. ¶ 45-46. No one other than Defendant has attempted to block Plaintiffs' use of the Private ROW. *Id*. ¶ 50.

DISCUSSION & ANALYSIS

Defendant filed *Preliminary Objections*[17] to Plaintiffs' *Amended Complaint* for (I) misjoinder of cause of action for Plaintiffs' quiet title action against both Jerry and Unknown Defendants, and legal insufficiency with respect to (II) the quiet title action the Disputed Property and (III) the prescriptive easement claim over the Private ROW. The Court takes each in turn.

I. Misjoinder of Cause of Action - Count I (Disputed Property)

A party may file preliminary objections for "misjoinder of a cause of action[.]" Pa.R.C.P. No. 1028(a)(5). Count I of Plaintiffs' *Amended Complaint* seeks to quiet title of the Disputed Property in favor of Frank

17 Defendant waived his first preliminary objection that Plaintiffs failed to join Charles McGhee and Frances McGhee as indispensable party as to Counts II, III, and IV of the *Amended Complaint*. *See Stipulation* filed January 16, 2020 ⁋ 6 ("The parties further stipulate and agree that Charles and Frances McGhee are not indispensable parties to this action . . .."); *Praecipe to Attach* filed January 23, 2020.

W. O'Donnell and Monica C. O'Donnell against Defendant and Unknown Defendants. Defendant argues that Plaintiffs' claim against Unknown Defendants and claim against Defendant as to the Disputed Property "are based on completely separate and distinct factual predicates[]" that warrants the Court either removing Unknown Defendants as a party or dismissing Plaintiffs' Count I. *Preliminary Objections* ¶ 8-15; *Brief in Support of Preliminary Objections to Amended Complaint*, page 10-11.[18]

The Court finds Defendant's argument to be without merit. A quiet title action may be brought:

> (1) to compel an adverse party to commence an action of ejectment;
>
> (2) where an action of ejectment will not lie, to determine any right, lien, title or interest in the land or determine the validity or discharge of any document, obligation or deed affecting any right, lien, title or interest in land;
>
> (3) to compel an adverse party to file, record, cancel, surrender or satisfy of record, or admit the validity, invalidity or discharge of, any document, obligation or deed affecting any right, lien, title or interest in land; or
>
> (4) to obtain possession of land sold at a judicial or tax sale.

Pa.R.C.P. No. 1061(b). "The purpose of a quiet title action is to settle competing claims to interests in property or to determine right or title or the validity of any deed affecting any interest in land." Cornwall Mountain Investments, L.P. v. Thomas E. Proctor Heirs Trust, 158 A.3d 148, 160 (Pa. Super. Ct. 2017).

Here, Plaintiffs seek to settle competing claims of Defendant and Unknown Defendants as to the Disputed Property, pursuant to Pa.R.C.P. No. 1061(b)(2)-(3). That Defendant's and Unknown Defendants' purported respective claims to title in the Disputed Property derive from different sources does not mean that an action brought to quiet title in the Disputed Property against both is a misjoinder of cause of action warranting separate proceedings. Indeed, a plaintiff may bring a quiet title action "to determine any right, lien, title or interest in the land or determine the validity or discharge of any document, obligation or deed affecting any right, lien, title, or interest in land[,]" Pa.R.C.P. No. 1061(b)(2), as the Plaintiffs seek to do in the present case. Moreover, the "purpose of a quiet title action is to settle *competing claims* to interests in property[,]" Cornwall Mountain

18 Defendant also argues that "[t]he claim against the Unknown Defendants . . . have no overlapping facts, or points of law related to Counts II through IV of the Amended Complaint." *Brief in Support of Preliminary Objections to Amended Complaint*, page 10. However, because Defendant makes *this* argument for the first time in its brief, and not in its preliminary objections as mandated by Pa.R.C.P. No. 1028(b), the Court declines to consider it further. *See* Pa.R.C.P. No. 1028(b); Commonwealth v. Peoples Benefit Services, Inc., 895 A.2d 683, 690 n.13 (Pa. Commw. Ct. 2006). This argument is in contrast to Defendant's argument concerning Plaintiffs' claim against Defendant and Unknown Defendants as to the Disputed Property.

Investments, L.P., 158 A.3d at 160 (emphasis added), which, here, are the competing claims in the Disputed Property between the Plaintiffs, the Defendant, and the Unknown Defendants.

Finally, in Defendant's brief, Defendant cites to Pa.R.C.P. No. 2229, concerning permissive joinder rules, relying on subparagraph (b), which provides that:

> [a] plaintiff may join as defendants persons against whom the plaintiff asserts any right to relief jointly, severally, separately or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any common question of law or fact affecting the liabilities of all such persons will arise in the action.

Pa.R.C.P. 2229(b). Defendant relies on subparagraph (b) to argue that the sources of Defendant's and Unknown Defendant's claim to title in the Disputed Property are "based on different sets of operative facts[.]"

The problem with Defendant's argument is two-fold. First, Pa.R.C.P. No. 2229 deals with permissive joinder rules for parties, not causes of action. Second, to the extent that Pa.R.C.P. No. 2229 is applicable to misjoinder of cause of action under Pa.R.C.P. No. 1028(a)(5), subparagraph (e) of Pa.R.C.P. No. 2229 is the controlling provision. Subparagraph (e) specifically governs actions "to adjudicate title to or an interest in real or personal property[,]" the action here, and provides, in relevant part, that "any person whose claim is adverse to that of the plaintiff *may be joined as defendant*." Pa.R.C.P. No. 2229(e) (emphasis added). Additionally, Pa.R.C.P. No. 132, titled Particular Controls General, provides, in part, that "[w] henever a general provision in a rule shall be in conflict with a particular provision in the same or another rule . . . . the particular provisions shall prevail and shall be construed as an exception to the general provision[.]" Here, the general provision in Pa.R.C.P. No. 2229 is subparagraph (b) while the particular provision is subparagraph (e). Therefore, subparagraph (e) controls, and Plaintiffs joining of Defendant and Unknown Defendants as to the quiet title action in the Disputed Property is permissive.

Thus, Defendant's second preliminary objection is **OVERRULED**.

II. Demurer to Quiet Title - Count I (Disputed Property)

A. Standard of Review of Demurrer

A party may file preliminary objections for "legal insufficiency of a pleading (demurrer)[.]" Pa. R.C.P. No. 1028(a)(4). The Court's standard of review is as follows:

> Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

American Interior Construction & Blinds Inc. v. Benjamin's Desk, LLC, 206 A.3d 509, 512 (Pa. Super. Ct. 2019) (citing Khawaja v. RE/MAX Central, 151 A.3d 626, 630 (Pa. Super. Ct. 2016)). In addition, the Court need not accept—"legal conclusions, unwarranted factual inferences, argumentative allegations, or expressions of opinion[]"—as true. C.S. v. Commonwealth Dep't of Human Services, Bureau of Hearings and Appeals, 184 A.3d 600, (Pa. Commw. Ct. 2018) (citing Armstrong Cty. Mem'l Hosp. v. Dep't of Pub. Welfare, 67 A.3d 160, 170 (Pa. Commw. Ct. 2013)). The Court is limited to an examination of the "averments in the complaint, together with the documents and exhibits attached thereto . . . in order to evaluate the sufficiency of the facts averred." Denlinger, Inc. v. Agresta, 714 A.2d 1048, 1050 (Pa. Super. Ct. 1998).

B. Standard for Prevailing in a Quiet Title Action

To prevail in a quiet title action, a plaintiff must first bring a cognizable quiet title claim. As stated before, a plaintiff may bring a quiet title action:

> (1) to compel an adverse party to commence an action of ejectment;
>
> (2) where an action of ejectment will not lie, to determine any right, lien, title or interest in the land or determine the validity or discharge of any document, obligation or deed affecting any right, lien, title or interest in land;
>
> (3) to compel an adverse party to file, record, cancel, surrender or satisfy of record, or admit the validity, invalidity or discharge of, any document, obligation or deed affecting any right, lien, title or interest in land; or
>
> (4) to obtain possession of land sold at a judicial or tax sale.

Pa.R.C.P. No. 1061(b). The purpose in bringing such a claim is "to settle

competing claims to interests in property or to determine right or title or the validity of any deed affecting any interest in land." Cornwall Mountain Investments, L.P., 158 A.3d at 160 (emphasis added).

The standard for prevailing in a quiet title action is "demonstrat[ing] title by a fair preponderance of the evidence[] . . . . that places upon the plaintiff the burden of proving a prima facie title, which proof is sufficient until a better title is shown in the adverse party." Poffenberger v. Goldstein, 776 A.2d 1037, 1041 (Pa. Commw. Ct. 2001) (internal citations and quotation marks omitted). *Cf*. Moore v. Dep't of Envtl. Resources, 566 A.2d 905, 908 (Pa. Commw. Ct. 1989) ("The Board [of Property] mistakenly assigned to plaintiff-petitioner the duty to show his title by clear and convincing evidence.").

C. Analysis

Defendant takes issue with the connection in Plaintiffs' alleged chain of title from A.J. Piper to his grandson, Donald L. Piper, previously outlined by the Court—

> 2. A.J. Piper died testate on January 11, 1949, and his will was probated on February 2, 1949 in the Franklin County Office of the Register of Wills (the "Will").
>
> 3. When Albert J. Piper died, Donald E. Piper had already reached age 21.
>
> 4. No deed of record for the Disputed Property was recorded from either the Estate of Albert J. Piper or the trustee to Donald E. Piper.
>
> 5. Donald E. Piper conveyed the Disputed Property to himself by Confirmatory Deed dated November 5, 2001.
>
> 6. Donald E. Piper and Mildred Ann Piper, Donald E. Piper's wife, to Plaintiffs Frank A. O'Donnell, Georgia P. O'Donnell, and Frank W. O'Donnell by deed dated January 10, 2003.

Defendant asserts that Plaintiffs' quiet title cause of action is legally insufficient because of a "failure to state a claim of ownership to the Disputed Property." *Preliminary Objections* ¶ 26 and Wherefore paragraph. That is, Defendant argues, "Donald E. Piper had no title to the Disputed Property to 'confirm' by his [C]onfirmatory [D]eed [dated November 5, 2001]" because "title . . . [to the Disputed Property] remains vested in the Estate of A.J. Piper[]" "[u]ntil there is a proper conveyance from the Estate of A.J. Piper to Donald E. Piper (or someone else)[.]" *Preliminary Objections* ¶ 22; *Brief in Support of Preliminary Objections to Amended Complaint*, page 7. Thus, Defendant concludes, although Donald E. Piper "may have

a claim to the Disputed [Property] by virtue of the bequest under A.J. Piper's will[,] . . . . his claim alone does not ripen into *title* in the Disputed [Property] in Donald E. Piper simply by execution of [the] Confirmatory Deed." *Brief in Support of Preliminary Objections to Amended Complaint*, page 7 (emphasis in original).

Plaintiffs acknowledge that although "no deed was recorded from the Estate of Albert J. Piper to Donald E. Piper[]" "[i]t is clear from the will that Donald E. Piper, and no other person, was the intended devisee of the Disputed Property." *Brief of Plaintiffs in Opposition to Defendant's Preliminary Objections to the Amended Complaint*, page 14. The Confirmatory Deed, Plaintiffs contend, "assert[s] a full explanation that the property described therein was specifically devised to Donald E. Piper by the will of Albert J. Piper, the last record owner[.]" *Id*., page 16.[19] Plaintiffs, citing to the plaintiff's burden for prevailing in a quiet title action set forth in Poffenberger—*i.e.*, "proving a *prima facie* title, which proof is sufficient until a better title is shown in the adverse party[,]" 776 A.2d at 1041—argue that Black's Law Dictionary defines *prima facie* as "sufficient to establish a fact or raise a presumption unless disproved or rebutted." *Brief of Plaintiffs in Opposition to Defendant's Preliminary Objections to the Amended Complaint*, page 15. Therefore, Plaintiffs conclude, Plaintiffs "must rely on the recorded deed of Donald E. Piper and his wife as sufficient unless and until Defendant or an Unknown Defendant can show a better title." *Id*. page 16.

The Court agrees with Plaintiffs. The basis of Defendant's argument, as the Court understands it, is that Plaintiffs' chain of title to the Disputed Property is clouded or void because of the lack of a conveyance from the Estate of Albert J. Piper to Donald E. Piper. Thus, Defendant asserts, Donald E. Piper does not have ownership of the Disputed Property. Therefore, Defendant concludes that Plaintiffs' quiet title action must fail. However, Defendant cites to no authority, and the Court has found none, for the proposition that Plaintiffs must have clear title or undisputed ownership to bring a quiet title action.[20]

19 We are told that a "'a *deed of confirmation* is so called because its purpose is generally to correct an error in a previous deed and thus confirm the grantee's title as originally intended.'" *Brief of Plaintiffs in Opposition to Defendant's Preliminary Objections to the Amended Complaint*, page 15 (quoting *Ladner, Pennsylvania Real Estate Law, Sixth Edition*, Vol. 1, § 1603, page 16-7).

20 Were Plaintiffs to lack *possession* of the Disputed Property, an argument that Defendant does not make at present, the Court would be required to determine possession as a jurisdictional prerequisite. *See* Siskos v. Britz, 790 A.2d 1000, 1008 (Pa. 2002). Furthermore, the Court's standard of review on preliminary objections is admitting as true "all material facts set forth in the challenged pleadings . . . as well as all inferences reasonably deducible therefrom." American Interior Construction & Blinds Inc., 206 A.3d at 512 (citing Khawaja, 151 A.3d at 630). Here, the material facts set forth in Plaintiffs' *Amended Complaint* is that Plaintiffs "Frank W. O'Donnell and Monica C. O'Donnell have been in sole and exclusive possession and control of the Disputed Property." *Amended Complaint* ¶ 31. Thus, for purposes of disposing of Defendant's *Preliminary Objections*, the Court admits as true that Plaintiffs are in possession of the Disputed Property.

Statutorily, a quiet title action may be brought "to determine any right, lien, title or interest in the land or determine the validity or discharge of any document, obligation or deed affecting any right, lien, title or interest in land[]" or "to compel an adverse party to file, record, cancel, surrender or satisfy of record, or admit the validity, invalidity or discharge of, any document, obligation or deed affecting any right, lien, title or interest in land[.]" Pa.R.C.P. No. 1061(b)(2)-(3). This presupposes that there exists some document, deed, or otherwise that ostensibly controls the land in dispute, the validity of which must be determined for purposes of quieting title. Moreover, a rule that a plaintiff fails to state a quiet title cause of action warranting dismissal of her complaint when she fails to show clear title or undisputed ownership of disputed property in her complaint at the preliminary objections stage runs counter to the purpose of bringing a quiet title action—"to settle *competing claims* to interests in property or to determine right or title or the validity of any deed affecting any interest in land." Cornwall Mountain Investments, L.P., 158 A.3d at 160 (emphasis added). Additionally, a court should only sustain preliminary objections when it is "clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections." American Interior Construction & Blinds Inc., 206 A.3d at 512 (citing Khawaja, 151 A.3d at 630).

Here, the Court cannot find that it is "clear and free from doubt" that Plaintiffs will be "unable to prove facts legally sufficient to establish the right to relief." Id. The Will, or "trust instrument,"[21] on which the Confirmatory Deed is based on expressly states that A.J. Piper devised the Disputed Property to Robert W. Crouse as Trustee for his grandson Donald E. Piper during Donald E. Piper's minority and that "[s]aid trust of real estate shall terminate when my said grandson arrives at the age of 21 and the legal title to said real estate, free from the trust, shallthereupon [sic] vest in my grandson without any further act on the part of said Trustee." *Amended Complaint* Exhibit O. "A trust terminates to the extent it is revoked or expires pursuant to its terms[.]" 20 Pa.C.S. § 7740(a). Therefore, the implication here is that when Donald E. Piper reached the age of majority, the Disputed Property passed and vested in him. Whether that is determinative of the issue for quieting title is not before the Court now on preliminary objections. This is especially true when the standard for prevailing in a quiet title action is "title by a fair preponderance of the evidence[,]" Poffenberger, 776 A.2d at 1041, and not "clear and convincing evidence." Moore, 566 A.2d at 908. It is enough to say simply that the issue is not "clear and free from doubt."

21 The Uniform Trust Act, 20 Pa.C.S. §§ 7701 to 7799.3, defines "trust instrument" as "[a] will or other written instrument executed by the settlor that contains trust provisions, including any amendments thereto." 20 Pa.C.S. § 7703.

Thus, Defendant's third preliminary objection is **OVERRULED**.

III. Demurrer to Prescriptive Easement - Count III (Private ROW)

A. Standard of Review of Demurrer

The Court's standard of review for Defendant's demurrer to Plaintiffs' prescriptive claim is articulated above and the same as in Section II.A of this Opinion, *supra*.

B. Standard for Prevailing in a Prescriptive Easement Claim

The standard governing a prescriptive easement claim is as follows:

> A prescriptive easement is created by (1) adverse, (2) open, (3) notorious, (4) continuous and uninterrupted use for a period of twenty-one (21) years. Moreover, the party asserting the easement must demonstrate "clear and positive" proof. Permissive use defeats a claim of a prescriptive easement. The landowner has the burden of proving consent, but only after the alleged easement holder proves the use was adverse, open, notorious, and continuous for 21 uninterrupted years.

Village of Four Seasons Ass'n, Inc. v. Elk Mountain Ski Resort, Inc., 103 A.3d 814, 822 (Pa. Super. Ct. 2014) (citations and some quotation marks omitted). "A principal objective of the law concerning prescription is the protection of long established positions." Brouse v. Hauck, 478 A.2d 1348, 1352 (Pa. Super. Ct. 1984) (citing Restatement Property (Introductory Note, Chap. 38, p. 2923) (1944)).

C. Analysis

Defendant makes two arguments why Plaintiffs' prescriptive easement claims fail. First, that because the parties are related, a familial relationship exists that gives rise to the presumption that the Plaintiffs' use of the Private ROW is permissive and not adverse, therefore defeating Plaintiffs' prescriptive easement claim. *Preliminary Objections* ¶ 33-34. Second, that Plaintiffs Frank W. O'Donnell and Monica C. O'Donnell fail the twenty-one-year time-period requirement because "they have not held title for more than . . . 21 years." *Id.* ⁋ 30. The Court understands Defendant's first argument to concern the alleged prescriptive easement for the benefit of the Farm because the predecessor in title to the Farm was Betty Jane O'Donnell and Plaintiffs admit that at no time was their use of the Private

ROW adverse to her. *Plaintiffs' Answer to Preliminary Objections of Defendant to Amended Complaint* ¶ 36. The Court additionally understands Defendant's second argument to concern the alleged prescriptive easement for the benefit of the Disputed Property and its alleged current owners Frank W. O'Donnell and Monica C. O'Donnell because all other Plaintiffs have held title for at least twenty-one years. The Court is unpersuaded by either argument.

1. Permissive Use

Defendant's first argument is that the parties familial relationship gives rise to a presumption that the Plaintiffs' use of the Private ROW was permissive and the Plaintiffs have failed to plead facts that would establish *at what point* Plaintiffs brought to Defendant their "'intention to make an adverse use without recognizing the rights of [Defendant].'" *Brief in Support of Preliminary Objections to Amended Complaint*, page 8 (quoting Gehres v. Falls Twp., 948 A.2d 249, 252 n.2 (Pa. Commw. Ct. 2008)). The Court addresses the presumption issue first before turning to the intention issue.

a. Presumption

"Whether a use is adverse or permissive is a question of fact." Gehres v. Falls Twp., 948 A.2d 249, 251 (Pa. Commw. Ct. 2008) (citing Keefer, 359 A.2d at 739). Typically, the "servient owners[] bear the burden of showing use began on a permissive rather than an adverse basis." Id. at 252 (citations omitted). A servient owner's failure to object is not deemed the equivalent of giving permission. Orth v. Werkeiser, 451 A.2d 1026, 1028 (Pa. Super. Ct. 1982) (citing Tarrity v. Pittston Sch. District, 328 A.2d 205, 207 (Pa. Commw. Ct. 1974)). However, "[w]here a familial or fiduciary relationship exists, permissive use will be presumed." Sterner v. Freed, 570 A.2d 1079, 1082 (Pa. Super. Ct. 1990) (citing Waltimyer v. Smith, 556 A.2d 912, 914 (Pa. Super. Ct. 1989)). "[W]hen no special relationship exists between the parties, a sufficiently notorious use will be presumed to be enough to alert the owner of the land to an adverse claim, and it will be incumbent upon the owner of the land to establish the alleged permissive use." Waltimyer, 556 A.2d at 914 (citations omitted).

Here, there is no question whether a familial relationship exists between Plaintiffs and Defendant, and that such relationship gives rise to the presumption of permissive use. *See Preliminary Objections* ¶ 32; *Plaintiffs' Answer to Preliminary Objections of Defendant to Amended Complaint* ¶ 32. What the parties disagree on is the effect of the presumption that arises. Defendant argues that the presumption of permissive use "continue[s] to be permissive unless and until the party seeking adverse possession can demonstrate a manifest intention to make an adverse claim." *Preliminary Objections* ¶ 34. Plaintiffs contend that "a familial relationship *per se* should

not automatically mean that the use of land cannot be hostile between related parties[]" where the parties do not have a history of a spirit of cooperation between them. *Brief of Plaintiffs in Opposition to Defendant's Preliminary Objections to the Amended Complaint*, page 16-17.

The Court finds that this presumption is a rebuttable one, and therefore, Plaintiffs will have the opportunity to present evidence rebutting the presumption of permissive use. It is evident that burden shifting exists in the law with respect to prescriptive easements. The Court looks no further than the burden shifting scheme for permissive use itself. When no special relationship exists between the parties, "a sufficiently notorious use will be presumed to be enough to alert the owner of the land to an adverse claim, and it will be incumbent upon the owner of the land to establish the alleged permissive use." Waltimyer, 556 A.2d at 914. *See also* Gehres, 948 A.2d at 252. That is, when there is no special relationship, a sufficiently notorious use gives rise to the presumption that the use is adverse without permission. Thus, the burden is on the landowner to establish permissive use. Likewise, when a special relationship does exist, as is the case here, the relationship gives rise to the presumption of permissive use. Therefore, the Court similarly finds that the burden is on the alleged easement holder to establish that the use is adverse without permission. *See also* Blue Ridge Textile Co. v. Travelers Indem. Co., 181 A.2d 295, 299 (Pa. 1962) ("[A] status once established continues *until the contrary appears*[.]") (emphasis added)); Hostetter v. Pennsylvania Public Utility Commission, 49 A.2d 862, 864 (Pa. Super. Ct. 1946) ("It is only an application of a familiar and elementary common law principle, the so-called presumption of continuance doctrine, by which a condition of a continuous nature once established may be assumed to continue *until the contrary is shown*.") (emphasis added)).

b. Intention

Defendant's next argument is that Plaintiffs have failed to plead facts that would establish *at what point* Plaintiffs brought to Defendant their "'intention to make an adverse use without recognizing the rights of [Defendant].'" *Brief in Support of Preliminary Objections to Amended Complaint*, page 8 (quoting Gehres, 948 A.2d at 252 n.2). The Superior Court considered and rejected a similar argument in Orth.

The landowners in Orth argued that "there was no proof that they were given notice that the use of the lane across their tract was hostile[.]" Orth, 451 A.2d at 2018. In Orth, the landowner had given the alleged easement holder's predecessor-in-title permission to use the lane across the landowner's tract. Id. at 1027. A successor-in-title, the alleged easement holder, subsequently brought an easement by prescription claim against the

landowner. Id. The landowner argued that because he had originally given the predecessor-in-title permission to use his land, use of the same "could never ripen into a prescription[]" where "there was no proof that they [the landowners] were given notice that the use of the lane across their tract was hostile[.]" Id. at 1028. The court was not persuaded by this argument, stating:

> [this argument] is based on the premise that the only event that could start the prescriptive period running was an express statement by a [successor-in-title] that he was making a hostile use of the [alleged easement]. This premise, in our opinion, is mistaken.

Id. The court found that the landowner's permission to the predecessor-in-title was personal to him, and therefore that the predecessor-in-title's sale of his land had the effect of revoking that permission. Id. Thus, subsequent use of the lane was hostile and not permissive. Id.

Moreover, the court stated that it saw:

> no reason to hold that [landowners] could preclude prescription . . . by sitting back and silently watching the use continue uninterrupted, and then later assert that the use had proceeded with [landowner's] 'obvious permission.'

Id. at 1029. The court concluded that "[i]f [the landowners] wished to preclude prescription, they had to do something, as, for example, notify [the] successors-in-title that they were not to use the lane, and then, if the use continued, block the lane or obtain an injunction against its use." Id.

Here, Plaintiffs' use of the Private ROW is presumed permissive given the parties' familial relationship. This presumption, however, the Court found to be rebuttable. Rebutting that presumption would have the same effect, the Court finds, as a revocation of permission, which is consistent with the rationale underlying the court's decision in Orth. Consider that the court there found that the landowner's grant of permission to the predecessor-in-title was personal to him and was later revoked when the predecessor-in-title sold his own land. Id. at 1029. Thus, the court found that subsequent use of the lane was hostile when the landowner knew of the sale and of the continued use of the lane. Id. The court reasoned that if the landowners wished to stop the prescriptive period from running, they had to take appropriate action to do so. Id.

Similarly, here, the Court finds that the familial relationship that gives rise to the presumption of permissive use is personal, in a sense, and subject to revocation by a sufficient showing that the presumption is inappropriate given the parties' feelings (or lack thereof) with one another.

Because use of an alleged easement under these circumstances is not adverse or hostile until such time that the presumption is rebutted, it follows then that a showing that would rebut this presumption would also have the effect of providing the landowner with the alleged easement holder's intention to adversely use the alleged easement. *Cf.* Waltimyer, 556 A.2d at 914 ("[A] sufficiently notorious use will be presumed to be enough to alert the owner of the land to an adverse claim[.]"). In other words, because the burden is on the alleged easement holder to show that use is adverse and not permissive in order to rebut the presumption of permissive use, satisfying that burden would also serve as the alleged easement holder's intention to the landowner that the easement holder sought to make hostile use of the landowner's property. At that point, then, the landowner would have to take such action as to preclude the prescriptive period from running. Id. at 1029. As Plaintiffs have the opportunity to present evidence rebutting the presumption of permissive use, there is no need for them to have plead at exactly what point their notice of intention to adversely use the Private ROW began. *See also* Steel v. Yocum, 151 A.2d 815, 816 (Pa. Super. Ct. 1959) ("The prescriptive right is based upon the presumption of a lost grant . . . it would ordinarily be unnecessary to go further and *establish the exact date of the beginning of the adverse use*.") (emphasis added)); Id. at 816-17 (rejecting landowner's argument that alleged easement holder had to prove exact date that prescriptive period started where "a close family relationship existed between the owners of the dominant and servient estates 'at the time of the beginning of the alleged adverse user,' which relationship showed that the user was not adverse but permissive[]" when alleged easement holder established adverse use for over twenty-one years).

2. 21 Years

Defendant's second argument is that because Plaintiffs Frank W. O'Donnell and Monica C. O'Donnell have not held title to property for at least 21 years[22] and have not alleged any facts supporting the "tacking" of use of the Private ROW by its predecessor in title, Plaintiffs fail the twenty-one year period requirement necessary to establish a prescriptive easement. *Preliminary Objections* ¶ 30-31; *Brief in Support of Preliminary Objections to Amended Complaint*, page 8-9. Plaintiffs concede that they have not alleged any facts supporting "tacking" but contend that holding title is not necessary to establish a prescriptive easement because Plaintiffs "all own property in proximity to each other and have used the Private ROW for the requisite time period." *Plaintiffs' Answer to Preliminary Objections of Defendant to Amended Complaint* ¶ 30; *Brief of Plaintiffs in Opposition*

22 The Court notes that Plaintiff Frank W. O'Donnell has had an ownership interest in the Farm property since 1989. *See Amended Complaint* ⁋ 56 a) & Exhibits A, O.

to Defendant's Preliminary Objections to the Amended Complaint, page 15. The Court finds, for the reasons below, that the issue is not "clear and free from doubt[,]" and therefore, the Court cannot sustain Defendant's argument. American Interior Construction & Blinds Inc., 206 A.3d at 512 (citing Khawaja, 151 A.3d at 630). Setting out some general principles of easements properly frames the issue.

First, as an initial matter, Plaintiffs make no claim that the alleged prescriptive easement is an easement in gross, an easement in gross being "a personal right in the property of another because it is not appurtenant to other land owned by the grantee." Morning Call, Inc. v. Bell Atlantic-Pennsylvania, Inc., 761 A.2d 139, 142 n.6 (Pa. Super. Ct. 2000). Nor could Plaintiffs, as Plaintiffs do not plead that the alleged easement with respect to Plaintiffs Frank W. O'Donnell and Monica C. O'Donnell was "created by written grant[,]" as is required for an easement in gross. Id. (citing 1 *Ladner on Conveyancing in Pennsylvania* §§ 11.01, 11.02 (4th Ed.1979)). Thus, the alleged prescriptive easement at issue here is an easement appurtenant.

The distinction between an easement in gross and an easement appurtenant is significant because an easement in gross is a personal right whereas an easement appurtenant attaches to the dominant tenement. Percy A. Brown & Co. v. Raub, 54 A.2d 35, 46 (Pa. 1947). Furthermore, a prerequisite to the creation of an easement appurtenant is the "'[e]xistence of a servient tenement for the beneficial use of a dominant tenement[.]'" Riverwatch Condominium Owners Ass'n v. Restoration Development Corp., 980 A.2d 674, 686 (Pa. Commw. Ct. 2009) (quoting Brady v. Yodanza, 425 A.2d 726, 727 (Pa. 1981)). *But see* Joiner v. Southwest Cent. Rural Elec. Co-op Corp., 786 A.2d 349, 351 (Pa. Commw. Ct. 2001) (holding that trial court's two-step analysis pursuant to Comment B. of § 4.11 of the Restatement (Third) of Property (Servitudes)—first determining whether easement or profit was appurtenant or gross and, second, if appurtenant, what was the identity of the dominant estate—had not been adopted by any other Pennsylvania court). What this means for an easement appurtenant is that:

> the benefit of a particular piece of land *cannot be enlarged and extended to other parcels of land, whether adjoining or distinct tracts, to which the right is not attached*. In other words, an easement appurtenant to a dominant tenement can be used only for the purposes of that tenement; it is not a personal right, and cannot be used, even by the dominant owner, for any purpose unconnected with the enjoyment of his estate. The purpose of this rule is to prevent an increase of the burden upon the servient estate,

> and it applies whether the easement is created by grant, reservation, *prescription*, or implication.

Percy A. Brown & Co. v. Raub, 54 A.2d at 46 (emphasis added) (citations and internal quotation marks omitted). *See also* Kanefsky v. Dratch Construction Co., 101 A.2d 923, 926 (Pa. 1954) ("It is elementary law that an easement cannot be extended by the owner of the dominant tenement to other land owned by him adjacent to or beyond the land to which it is appurtenant[.]") (citing cases)); Owens v. Holzheid, 484 A.2d 107, 112 (Pa. Super. Ct. 1984) ("It has long been held that an easement which benefits a particular piece of land cannot be enlarged and extended to the other parcels of land to which the right is not attached.") (citing Percy A. Brown & Co. v. Raub, 54 A.2d at 46)). For example, if "[Person] A was given the right to transport over certain land coal mined from tract X it did not give him the right to transport over the same right of way coal mined from tract Y, both tracts being owned by him." Percy A. Brown & Co. v. Raub, 54 A.2d at 42 (citing and describing facts of Vogel v. Webber, 28 A. 226, 244 (Pa. 1893)).

Second, there is "[n]o definite rule" as to what constitutes "proper and reasonable use as distinguished from an unreasonable and improper use[]" of an easement for determining whether the use is for the purpose of the dominant tenement and not "for any purpose unconnected with the enjoyment of [that dominant tenement]." Id. at 46 (citation and internal quotation marks omitted). In addition, this determination is "usually left to the jury or the trial court as one of fact." Id. (citation and internal quotation marks omitted). *See also* Biber v. Duquesne Light Co., 344 A.2d 628, 630 (Pa. Super. Ct. 1975) (quoting same).

Finally, third, the owner of an easement or "right of way is not limited to its use by himself." Percy A. Brown & Co. v. Raub, 54 A.2d at 46 (citation and internal quotation marks omitted). Rather, the right of way may be used by the owner's:

> family; by tenants occupying the land with his authority; by his servants, agents or employees in conducting his business; by persons transacting business with him; or by guests for social purposes; except in cases where the right of way is created by express agreement and the user is restricted by the terms of the agreement.

Id. (citation and internal quotation marks omitted). Additionally, "[w]here a way is appurtenant to an estate it may be used by those who own or lawfully occupy any part thereof, and by all persons lawfully going to or from such premises, whether they are mentioned in the grant or not." Id. (citation and internal quotation marks omitted). For example, "a right of way appurtenant to a house includes not only the right of the lessee to the use of it, but also

the right of its use by any other person who with the permission of the tenant visits the house for any lawful purpose." Id. (citing and describing facts of Commonwealth v. Burford, 73 A. 1064 (Pa. 1909)).

Applying these principles to the present case, it seems clear that the use of the Private ROW for the benefit of the Disputed Property by Plaintiffs Frank W. O'Donnell and Monica C. O'Donnell is less than twenty-one years, and therefore, falls short of the twenty-one-year time-period requirement. Plaintiffs acquired the Disputed Property from Donald E. Piper and Mildred Ann Piper in 2003 and plead use of the Private ROW until 2018, which is less than twenty-one years. Moreover, Plaintiffs concede that they have not plead any facts that would establish any "tacking" of use of the Private ROW for the benefit of the Disputed Property by Plaintiffs' predecessor in title. That notwithstanding, Plaintiffs have also plead non-permissive use of the Private ROW generally since 1990. *Amended Complaint* ¶ 74; *Plaintiffs' Answer to Preliminary Objections of Defendant to Amended Complaint* ¶ 36.

Plaintiffs additionally contend that Plaintiffs "all own property in proximity to each other and have used the Private ROW for the requisite time period[.]" *Plaintiffs' Answer to Preliminary Objections of Defendant to Amended Complaint* ¶ 30. Plaintiffs, however, do not cite to any authority, nor has the Court found any controlling[23] authority, for the proposition that prior use of an alleged easement for the benefit of land other than the dominant tenement at issue (say, X) can be combined with subsequent use of the alleged easement for the benefit of the dominant tenement (say, Y), where the use with respect to Y is less than twenty-one years. In other words, the Court understands Plaintiffs' argument to be that because Plaintiffs used the Private ROW prior to acquiring the Disputed Property, presumably, use for the benefit of the Farm, (so, X), that prior use can be combined with the subsequent use of the Private ROW for the benefit of the Disputed Property (so, Y), where use of the Private ROW for the benefit of the Disputed Property is less than twenty-one years.

Because the right that is the easement attaches to the dominant tenement and not the person, an easement holder who subsequently acquires adjoining land cannot then use the easement for the benefit of that

23 Comment b. to § 4.11 of the Restatement (Third) of Property (Servitudes) provides, in part, that:

> Unless the easement or profit was intended to benefit land to be acquired in the future, the easement beneficiary is not entitled to use it to serve land that is subsequently acquired even if no additional use of the easement or burden on the servient estate would ensue. In exceptional situations, however, courts occasionally permit a landowner to extend use of an appurtenant easement to property adjacent to the dominant estate by awarding the servient owner damages , rather than an injunction, for the unauthorized use, using the court's power to select a remedy appropriate to the circumstances (see § 8.3). Ordinarily monetary relief should be substituted for coercive relief only if extension of the easement does not increase the burden on the servient estate, and if future use of the easement is restricted to limit the risk of future increases in the burden on the servient estate.

However, the Pennsylvania Supreme Court has not adopted these provisions. Joiner, 786 A.2d at 351.

nondominant, adjoining land. Percy A. Brown & Co. v. Raub, 54 A.2d at 42. A similar line of reasoning would lead to the conclusion that use of an alleged easement for the benefit of land other than the dominant tenement at issue cannot be added to later use of an alleged easement for the benefit of the dominant tenement to establish an easement for the benefit of a different, dominant tenement.

This conclusion, however, is not clear as a matter of law, where the easement at issue is an alleged one and not one already established. *Compare* Percy A. Brown & Co. v. Raub, 54 A.2d at 42 ("[Person] A was given the right to transport over certain land coal mined from tract X it did not give him the right to transport over the same right of way coal mined from tract Y, both tracts being owned by him.") *with* Joiner, 786 A.2d at 351 (questioning trial court's use of the two-step analysis articulated in Comment B. of § 4.11 of the Restatement (Third) of Property (Servitudes) of ultimately identifying a dominant tenement). Further counseling against reaching this conclusion at this stage of the litigation is that, one, the determination of "what may be considered a proper and reasonable use as distinguished from an unreasonable and improper use[] . . . . is usually left to the jury or the trial court as one of fact[.]" Percy A. Brown & Co. v. Raub, 54 A.2d at 42 (citation and internal quotation marks omitted). Two, persons other than the owner of the easement may use such easement with the owner's permission. Percy A. Brown & Co. v. Raub, 54 A.2d at 46. And, three, "[a] principal objective of the law concerning prescription is the protection of long established positions." Brouse, 478 A.2d at 1352 (citing Restatement Property (Introductory Note, Chap. 38, p. 2923) (1944)).

For the Court to "sustain preliminary objections, it *must appear with certainty* that the law will not permit recovery, and[] . . . any doubt must be resolved in favor of overruling the preliminary objections." Commonwealth, Pa. Game Commission v. Senaca Resources Corp., 84 A.3d 1098, 1103 (Pa. Commw. Ct. 2014) (emphasis added). When ruling on preliminary objections, the Court cannot "[s]urmise [or] conjecture[.]" Schuykill Navy v. Langboard, 728 A.2d 964, 968 (Pa. Super. Ct. 1999). Whether Plaintiffs Frank W. O'Donnell and Monica C. O'Donnell may add their use of the Private ROW that occurred prior to allegedly acquiring ownership of the Disputed Property to their use after the same in order to establish a prescriptive easement over the Private ROW for the benefit of the Disputed Property is a question of fact and law that will be better developed for disposition following additional evidence and briefing on the issue.

Therefore, the Court concludes that the issue is not "clear and free from doubt[.]" American Interior Construction & Blinds Inc., 206 A.3d at 512 (citing Khawaja, 151 A.3d at 630)

Thus, Defendant's fourth preliminary objection is **OVERRULED**.

CONCLUSION

Defendant's first preliminary objection is **DENIED** as moot. Defendant's second, third, and fourth objections are **OVERRULED**.

Defendant has the right to plead over within twenty (20) days from the date of this Order and Opinion. Pa. R.C.P. No. 1028(d); *City of Philadelphia v. Berman*, 863 A.2d 156, 162 (Pa. Commw. Ct. 2004) ("The cases that have construed [Pa.R.C.P. No. 1028(d)] have held uniformly that a defendant's right to file an answer is absolute.") (citations and internal quotation marks omitted). An appropriate Order follows.

ORDER OF COURT

AND NOW THIS 14th day of April, 2020, upon review of Defendant Jerry A. O'Donnell's *Preliminary Objections*, filed on July 29, 2019, the record, oral argument, and the applicable law,

THE COURT HEREBY ORDERS that: Defendant's—first preliminary objection is **DENIED** as moot, second preliminary objection is **OVERRULED**, third preliminary objection is **OVERRULED**, and fourth preliminary objection is **OVERRULED**. Defendant shall have **twenty (20) days from the date of service of this Order** to plead over and file a responsive pleading.

This Order is pursuant to the attached Opinion.

Pursuant to Pa.R.C.P. 236, the Prothonotary shall give written notice of the entry of this Order, including a copy of this Order, to each party, and shall note in the docket the giving of such notice and the time and manner thereof.