

**STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS**

**Irene Elena D’Amico, Power of Attorney  
for mother Irene D’Amico,  
Plaintiff below, Petitioner**

**vs) No. 101298** (Kanawha County 09-C-1919)

**Robert D. Short and Carolyn L. Short,  
Defendants below, Respondents**

**FILED**  
February 25, 2011  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

Petitioner Irene Elena D’Amico holds a power of attorney from her mother Irene D’Amico (hereinafter, the mother is referred to as “Mrs. D’Amico”). Petitioner appeals the circuit court’s order after a bench trial in a prescriptive easement case. Respondents Robert D. and Carolyn L. Short have filed a timely response brief.

This Court has considered the parties’ briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties’ written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Mrs. D’Amico and the Shorts are next-door neighbors. The Shorts own a two-foot wide strip of land that runs parallel and contiguous to the property line and to Mrs. D’Amico’s driveway. Petitioner asserts that Mrs. D’Amico acquired a right by prescriptive easement to use the strip of land as she continuously used and maintained this strip of land as early as 1958. Petitioner asserts that the Shorts have now erected a fence that interferes with Mrs. D’Amico’s use of this strip of land and the use of her driveway. The Shorts acquired their property from the Estate of Mrs. Short’s mother, Imogene Lee, who purchased the property in 1966. The Shorts deny that Mrs. D’Amico ever maintained the strip of land and deny that the fence, installed entirely on their property, interferes with D’Amico’s use of her driveway.

The Shorts assert that through the years, Mrs. D’Amico made occasional use of this strip of land with the permission of Mrs. Short’s mother.

The circuit court heard testimony at a bench trial and viewed the property in question. The court concluded that Mrs. D’Amico enjoyed casual, permissive use of an undefined area of Mrs. Lee’s property that was given in a neighborly way to Mrs. D’Amico, thus petitioner failed to establish a right by prescriptive easement.

As the person claiming a prescriptive easement, petitioner had the burden to establish every element by clear and convincing evidence. Syl. Pt. 2, *Beckley National Exchange Bank v. Lilly*, 116 W.Va. 608, 182 S.E.2d 767 (1935); Syl. Pts. 2 and 3, *O’Dell v. Stegall*, \_\_\_ W.Va. \_\_\_, 703 S.E.2d 561 (2010). Petitioner argues that the circuit court’s order is contrary to the evidence presented. As this was a bench trial, the circuit court sat as the trier of fact. “In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court’s underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review.” Syl. Pt. 1, *Public Citizen, Inc. v. First National Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996). Upon a review of the briefs and record on appeal, we do not find clear error in the circuit court’s findings of fact regarding Mrs. D’Amico’s use of the property. Mrs. D’Amico failed to prove by clear and convincing evidence that the use was adverse.

For the foregoing reasons, we affirm.

Affirmed.

**ISSUED:** February 25, 2011

**CONCURRED IN BY:**

Chief Justice Margaret L. Workman  
Justice Robin Jean Davis  
Justice Brent D. Benjamin  
Justice Menis E. Ketchum  
Justice Thomas E. McHugh