

Adverse Possession V. Prescriptive Easements

by Dale S. Alberstone

The difference between the acquisition of title by adverse possession and acquisition of title to a prescriptive easement on another's land is troublesome to many. I make this observation based on numerous recurring questions I receive from AOA members, so I will try to now clarify it for all.

Adverse Possession Explained

Adverse possession is a legal doctrine by which title to one person's land is transferred by a court judgment to another. To establish title by adverse possession, the claimant must prove that he occupied the subject land in an open and notorious fashion, that his possession was hostile to the owner's title, that the claimant claimed the property as his own, that possession was continuous and uninterrupted for 5 years, and that he paid all of the real property taxes and assessments levied against the property during those years.

The requirement of open and notorious occupation simply means that the claimant's use of the land would have been visible to the true owner had the owner chosen to look.

For example, in the recent case of Nielsen v. Gibson, decided by the California Court of Appeal on October 13, 2009, one aspect of the owner's defense was that she was in Ireland throughout the five years and therefore did not have reasonable notice of the occupation. The Appellate Court disagreed by colorfully writing: "An adverse user must unfurl his flag on the land, and keep it flying, so that the owner may see it, if he will, that the enemy has invaded his domains, and planted the standard of conquest. ... The owner [who] none the less fails to look in the direction of the flag, or is not in the area to observe it, will not undermine its effect."

The Nielsen case arose out of facts where the claimant was given a deed to certain property by the father of his incompetent daughter who was living in Ireland. The daughter was the owner of the real estate. Evidently, the claimant believed that the deed was valid and began occupying and improving the property.

Those acts included blockage of the access road from the public road, posting no trespassing signs, irrigating the property, planting gardens, repairing the perimeter fencing, maintaining the vegetation, building a go-cart track on the property, and allowing his children to use the cabin on the property for sleepovers and a play area. The property was located in Granite Bay, California.

The claimant also paid the real property taxes and assessments against the property.

The Court of Appeal held that the claimant had acquired title by adverse possession.

Had the claimant in Nielson not paid the taxes on the property, then regardless of whether he complied with the other requisite elements to procure title, he would not have obtained the land by adverse possession. Nielson is unusual in the sense that claimants rarely pay the taxes on the property they are claiming. Ordinarily the taxes are paid by the true owner and the claimant merely uses the property for five years in a visible fashion.

Thus, adverse possession cases are rare because one seldom encounters a party who is willing to pay property taxes on property which he does not own. Conversely, the true owner of the property would typically pay the taxes himself. In the Nielson case, the reason the claimant paid the taxes is that he mistakenly believed that the deed he received conveyed title to him.

One adverse possession is established (which can only officially occur by a court decree), the claimant can exclude the former owner from the property.

Prescriptive Easements Explained

Acquiring a prescriptive easement on a property requires proof of substantially the same elements as adverse possession, with the exception that payment of the property taxes is unnecessary. The distinguishing end result between a prescriptive easement and adverse possession is that a prescriptive easement does not transfer legal ownership title to the claimant, but merely confers upon the claimant a right to use the property in conjunction with the true owner.

Indeed, except for cases where public policy is involved (such as acquisition of an easement by a water district), our courts have held that exclusive use of a property by the claimant prevents the acquisition of a prescriptive easement. That determination is based on the recognition that an easement is traditionally involves shared usage, rather than a dispossession of the true owner. While adverse possession will dispossess the owner, a prescriptive easement does not.

Thus, if a claimant erects a fence which physically prevents the true owner from using his land, courts typically hold that a prescriptive easement cannot be obtained. Instead, courts require the claimant who exclusively occupied some else's property to prove that he paid the real estate taxes (in which case he will acquire title by adverse possession as per Silacci v. Abramson), or prove that he has acquired a right to possession by the balancing of hardships (as per Hirshfield v. Schwartz).

In the arena of prescriptive easements, the claimant always starts off as a trespasser and virtually never attempts to pay the property taxes.

Defenses to Property Claims

The principal defense to any claim for adverse possession or a prescriptive easement is for the owner to establish that he consented to the use during the five-year period of occupancy. California law is clear that if the true owner gives his permission to the use that the claimant (who is usually the next door neighbor) makes of the owner's land, one of the elements of

adverse possession and prescriptive easement can never be satisfied. The use would not be “hostile” because the owner approved of it.

Importantly, if the use is truly acceptable to the owner, the owner should document the same in writing and ask the other person to sign and acknowledge the consent.

Conversely, the worst action the owner can take is to constantly, or even occasionally, object to the use, shake his fist, and demand that the user stay off the owner’s land. Though perhaps counter-intuitive, such action helps solidify the adverse user’s claim for a prescriptive easement, or adverse possession if he also pays the taxes.

Conclusion

So there you have it, adverse possession is the transfer of title by court order from one person to another. A prescriptive easement is the acquisition, confirmed by a court order, of the right of one person to shared usage of another’s land. Once such an easement is acquired, it may remain in perpetuity unless the claimant (or his successor) ceases using the land for the statutory period of five years.

Rights acquired by a claimant under adverse possession or by satisfying the elements of a prescriptive easement are ordinarily (and automatically) transferred to his successors-in-interest, and continue to burden the servient tenement (i.e., the true owner’s property) even after the owner conveys it to a successor.

For Attorneys Only

Citations for important recent cases dealing with prescriptive and equitable easements may be found at 91 C.A.4th 749, 159 C.A.4th 1593, 121 C.A.4th 445, and 172 C.A.4th 1112. Also see, Civil Code §1104 concerning the automatic transfer of an easement.

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The foregoing discussion is intended as a general overview of the law and may not apply to the reader’s particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.

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