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Adverse Possession

Instructor: Thomas Strong, P.L.S.

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5272 Meadow Estates Drive
Fairfax, VA 22030-6658
Phone: 703-988-0088
www.PDHonline.com

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Course Content

DEFINITIONS

As previously mentioned the definition of "adverse possession" involves legal "terms of art" - words which have a special legal meaning that may differ from their standard definitions. The elements of "adverse possession" are that possession of the real estate is actual, open, notorious, exclusive, hostile, under cover of claim or right, and continuous and uninterrupted for the statutory period.

Actual - You actually acted in the manner of an owner of the property.

Open & Notorious - You engage in acts of possession consistent with the property at issue in a manner, which was capable of being seen. (This does not mean that you must have been observed in your acts of ownership but, had the actual owner or members of the public been in a position to see you, your acts must have been observable). You need not use the property in a manner that exceeds that which would be expected of the actual owner - that is, it may be possible to claim adverse possession of a vacation property on the basis of use only during the vacation season, or to claim adverse possession of a vacant parcel of land by engaging in typical acts of maintenance for the parcel.

Exclusive - The adverse possessor does not occupy the land concurrent with the true owner or share possession in common with the public. One does not have to exclude others from the land in order to claim "exclusive" use, but during the statutory period the person claiming title by adverse possession must have been the only person to treat the land in the manner of an owner.

Hostile - Hostility exists where a person possesses the land of another intending to hold to a particular recognizable boundary regardless of the true boundary line. That is, possession is "hostile" to the title owner's interest in the property. If possession was not hostile, it may still be possible to advance a claim of ownership under a theory of "acquiescence". You cannot claim "adverse possession" if you are engaged in the permissive use of somebody else's land.

Under Cover of Claim or Right - Either when the person claiming the property makes the claim based upon constructive possession under color of title (e.g., there is an error in the legal description in their deed leading them to believe they own part of a neighboring property), **or** makes the claim based upon actual use and possession of the area of land at issue for the statutory period

Continuous & Uninterrupted - All elements of adverse possession must be met at all times through the statutory period in order for a claim to be successful. It may be possible to claim adverse possession even if there is a transfer of ownership through the principle of "tacking" - for example, a former owner's twelve years of adverse possession can be "tacked" to the present owner's eight years, for a cumulative twenty years of adverse possession.

The Statutory Period - The statutory period, or "statute of limitations", is the amount of time the claimant must hold the land in order to successfully claim "adverse possession".

Common Defenses to Adverse Possession
While the following list is far from exhaustive, these defenses are very often brought in adverse possession actions:

Permissive Use - If the actual owner has granted the claimant permission to use the property, the claim of "adverse possession" cannot be deemed "hostile" and thus fails.

Public Lands - Government-owned land may be exempt from adverse possession.

Insufficient Acts - Although it is conceded that the claimant engaged in some use of the property, it is alleged that these acts were not sufficient to amount to acts suggesting a claim of ownership.

Non-Exclusive Use - Although it is conceded that the claimant engaged in some use of the property, it is alleged that others (usually the property owner) *also* used the property in a manner consistent with that of the landowner.

Insufficient Time - Even if various elements of adverse possession were met, it is alleged that the adverse possession did not last for the full statutory period, or that the adverse possession was interrupted by a period of non-use.

Many landowners are surprised to learn that under certain circumstances, a trespasser can come onto land, occupy it and gain legal ownership of it. The trespasser may acquire a few feet of property or whole acres in this way. If someone is using your property, even a small strip on the edge, you should be alert to the risk.

A trespasser may also gain a legal right to use part of someone else's property; this is called a prescriptive easement. See "Easements" below.

The legal doctrine that allows trespassers to become owners is called "adverse possession." Although the name sounds nasty (and the results can be), the trespasser is not necessarily an intentional evildoer—far from it. The trespasser may simply have made a mistake--relying on a faulty property description in a deed, for example. In rural areas, the person who moves in and occupies several acres may believe he owned it, having purchased it from a scoundrel who sold someone else part of the Brooklyn Bridge.

Questions about ownership often wind up in court after an absent owner of rural property discovers that someone is living on his land or, when a piece of urban property is sold, a title insurance company refuses to issue insurance because the neighbor's garage is found to be standing squarely on the property. If the people involved can't work something out, the property owner may sue the trespasser, or the trespasser may bring a lawsuit to quiet title--a request for the court to settle who owns what.

REQUIREMENTS FOR OBTAINING LAND BY ADVERSE POSSESSION

A trespasser is entitled to legal ownership of property if his occupation of the property is hostile, actual, open and notorious, exclusive and continuous for a period of years set by state statute. Some states, such as California, also require the trespasser to have paid the local property taxes on the land.(1) The time required, which varies from state to state, is usually twenty years. It can be as short as five years when the trespasser pays the property taxes.

HOSTILE CLAIM

The word "hostile" does not mean that the trespasser barricades himself on the land with a shotgun. Most courts follow one of two legal definitions of hostile. One is called the "Maine rule" and requires that the person be aware that he is trespassing.(2) For example, a man in Nebraska, a state which follows this rule, gained ownership of the Neighboring eight acres by using them for years. He knew the property was not his, and a court characterized his action as hostile.(3)

The other popular definition, the "Connecticut rule," defines hostile simply as occupation of the land.(4) The trespasser doesn't have to know that the land belongs to someone else. The Connecticut rule, kinder to the innocent trespasser, is followed by most states today.(5)

Example: Jesse isn't sure where his property line is, but he thinks an old fence marks the boundary. When he builds his new garage, he builds up to the fence line, which is actually ten feet over on his neighbor's property. Under the Connecticut rule, Jesse's intention doesn't matter, and his occupation is hostile even though he thinks he is on his own land.

A few states follow a third rule, which is directly opposite the Maine rule of requiring intentional trespass. The trespasser must be completely innocent and must have made a good faith mistake, such as relying on an invalid or incorrect deed. For example, in Iowa, which follows this good faith rule, a woman attempted to claim a strip of her neighbor's land by adverse possession. The court denied her claim because she knew it was not her property, even though she had treated the property as her own for thirty years.(6)

The chart below lists how each state has interpreted the requirement of hostile claim.

STATE LAW ON HOSTILE CLAIMS

MUST INTEND TO TAKE THE LAND

Arkansas	Maine	Michigan
Missouri	Montana	Nevada
South Carolina	Texas	Virginia
Vermont	Wyoming	

MUST BELIEVE LAND IS OWN

Georgia	Iowa	Louisiana

-- Possession alone has shown hostility in all other states.

ACTUAL, OPEN AND NOTORIOUS POSSESSION

The trespasser must actually be in possession of the property and treat it as if he were an owner. This means there must be a physical presence on the land. It's not enough for someone just to make a claim, orally or in writing, of ownership.

The words "open and notorious" simply mean that it must be obvious to anyone, including an owner who investigates, that a trespasser is on the land. Actual (physical) possession is usually open and notorious.
Someone out in the field harvesting crops is obvious, as is a person pruning the rose garden that she planted on a strip of the neighbor's back yard. Similarly, a neighbor who just put a fence up slightly on the next-door property is obvious. So is the one who just poured a concrete driveway two feet over the boundary line.

The point of this requirement is to let the owner know someone is occupying the land, so something can be done about it. An owner, who allows someone to trespass for years without giving permission, complaining or taking action, the theory goes, loses the rights to the land.

EXCLUSIVE AND CONTINUOUS POSSESSION

The trespasser must possess the land exclusively and without interruption for the statutory time period. You can find how many years are required in your state from the chart below.

A trespasser can't give up the use of the property in such a way that he no longer acts as an owner, and then return to it and count the time that it was abandoned - that wouldn't be continuous possession for the whole time.

The person trespassing must be the only one occupying the property – he can't share possession with strangers or the owner. (By contrast, a trespasser can gain the right to use a certain part of another's property, a prescriptive easement, even if possession or use is shared with others. See "Easements" below.)

If one person uses the property for a while and leaves, and another shows up for a while, the times can't be combined - the possession hasn't been exclusive by one person.

If, however, the trespasser actually sells or gives the property to someone else, the recipient becomes the adverse possessor and the years that the first trespasser spent occupying the land count for the new one's claim. This is called "tacking." When one trespasser passes the land to the next, then that person's claim is tacked on to the previous one.

Example: Joe occupied part of someone else's land for ten years. He then sold his land (including the part that was not legally his) to Adam, who stayed for ten years. If his state's adverse possession statute requires twenty years of occupancy, Adam has met the twenty-year requirement through tacking. On the other hand, if Joe stopped trespassing before Adam bought the property and started his own trespassing, the ten years of Joe's trespass don't count for Adam.

PAYMENT OF PROPERTY TAXES

Some states require the trespasser to have paid the taxes on the property for the statutory time period. If all the other requirements are met except the tax payment, a court will usually grant a prescriptive easement to use the property to the trespasser, instead of ownership through adverse possession. (See "Easements" below).

WAYS TO PREVENT ADVESE POSSESSION

A landowner who doesn't keep an eye on his property can lose it. Nobody should allow the boundaries to be redrawn by inattention and inaction --in a city, a loss of even twenty feet could be devastating to a property investment.

If you become seriously concerned that someone has a possible claim to your land, check the local property tax records to see if anyone has made tax payments for the property. Paying taxes always bolsters an adverse possession claim, even when it is not required for a successful claim.

There are several steps owners can take to prevent a trespasser from gaining a legal claim to the ownership.

POST SIGNS AND BLOCK ENTRY

Some people put up "Posted" or "No Trespassing" signs to keep people off their properties. Signs can alert a trespasser that the land belongs to someone else, but are not

protection against adverse possession unless state law requires the trespasser to believe that he is on his own land to make a claim (see "Hostile Claim," above). Signs are never a substitute for periodic inspection of the property. It is easy to imagine someone tacking up a few signs and returning 25 years later -- or never, a new buyer returning instead. By that time, the signs are long gone and a neighbor may have shifted over onto the land.

Signs that don't tell trespassers to stay off, but instead grant permission to use the property may actually protect an owner from losing a property interest to the public as a whole (See "Easements" below).

Locked gates at entry points to the property when the land is enclosed, or across an access that is being used, will stop most trespassers. But you should routinely check to be sure someone is not ignoring them, or worse, removing them.

GIVE WRITTEN PERMISSION

One effective way to thwart a possible claim is by giving permission to use your land. If Bill is out planting a garden in your backyard, treating it as his own land, step over and say "Hello, you are on my property by a few feet, but that's okay." You don't have to throw him off your property; simply claim it. Then put the permission in writing and obtain an acknowledgment from Bill. The chain has been broken. He can tend that garden for forty years and still never acquire a legal claim to your property if he has your permission.

An example of written permission is shown below.

Agreement Granting Permission to Use Property

I, James Brown, owner of the property located at 123 Maple Terrace, Newark, N.J. give my permission to Bill Warner to plant and tend a garden located on a five-foot strip of my property bordering the east side of the property line. I reserve the right to revoke this permission at any time.

_____ _____
James Brown date

I, Bill Warner, acknowledge that my use of this strip of land belonging to James Brown is by permission only, and that the permission may be revoked at any time.

_____ _____
Bill Warner date

This type of agreement can be used to grant permission for parking, using a shortcut across property or even growing crops. It not only can defeat adverse possession claims, but also a claim to an easement across your property (See "Easements" below). When you use such a written permission, be absolutely sure that the portion of your land being used is described in enough detail so that it is easily identifiable.

If the neighbor refuses to acknowledge the permissive use, you are then on the alert of a possible claim that is adverse to your interest, and you should take steps to prevent further use of your property.

OFFER TO RENT THE PROPERTY TO THE TRESPASSER

If someone wants to remain on your property, you can always offer to rent it to them. In fact, the presentation of a rental agreement can be very effective in getting some trespassers to immediately leave on their own.

CALL THE POLICE

If someone refuses to acknowledge permission, and ignores your requests to stay off your property, you can call the police or notify the sheriff and have the person removed or arrested.

When the trespasser is a next-door neighbor, you may be understandably reluctant to bring in the police. But sometimes it is necessary to protect your property.

HIRE A LAWYER

Any time it appears that a trespasser may be entertaining the idea of claiming your property under an adverse possession theory, see a lawyer. You may need to file a lawsuit to eject the trespasser from the land. Or you may want to ask a court to order a structure removed or a person to stay away. You must act before the trespasser has been on your land long enough, under your state's law, to make a successful adverse possession claim.

EASEMENTS

An easement is a legal right to use someone else's land for a particular purpose. For example, the municipal water company may have an easement to run water pipes under your property. Your name is on the deed (you're the title holder) and you still own the property, but the water company has the right to use a part of it, for its pipes. Easements are sometimes in writing and referred to in property deeds or title papers prepared by a title insurance company or attorney.

Easements are part and parcel of the land they affect. They don't change when the property changes hands. Subsequent owners are obliged to let whoever owns the easement use the property.

Whoever owns the property may not interfere with the purpose of a legal easement. If, for example, the electric company has wires strung across its right of way, you cannot take them down or block their path. A property owner who does interfere with an easement can be liable to the easement owner for any damage he causes.

For example, the city of New York was found liable for damage caused to privately owned water pipes, which were located on city property under the terms of an easement. Oak trees that the city had planted caused the damage. When the pipes broke and the property owner sued, the court said the city should have known that roots from oak trees would cause damage, and held it liable.(7)

UTILITY EASEMENTS

Probably the most common kind of easement is the one that has been given in writing to a utility company or a city. Utility easements are sometimes described in a property deed or certificate of title as "those certain utility easements as set out and shown on the map and plat of record in such-and-such a book on page something-or-other."

The existence of these easements doesn't have much day-to-day effect. You can plant on the property, live on it, and even build on it, as long as you don't interfere with the utility's use of the easement.

When an easement is underground--for instance, a water pipe easement (and increasingly, electric and phone line easements) -- the land above it may be used. But again, you may not interfere with the purpose of the underground easement. An example of interference would be placing too much weight on the property if pipes were not built to withstand it. A man in Los Angeles, for instance, found himself having to spend an extra $32,000 when he erected a heavy building over a sewer. The building had to be designed so that the weight straddled the easement.(8)

Utility companies rarely bother property owners. If an occasional nightmare comes along, such as the property dug up for underground repair, the work is usually done with care. And if a utility company comes in and harms your property unnecessarily, you may be able to sue the company if it won't pay for the damages.

The existence of utility easements across your property (and your neighbor's) can sometimes even be an advantage. For example, when trees are encroaching on power lines or are diseased, the utility company or city is usually quite helpful, trimming and removing dangerous branches.

If you want to know where these easements are located on your property, call the utility company. Or you can go to the county land records office or city hall and ask a clerk to show you a map of the easement locations. A survey of the property will also show the location of utility easements.

OTHER WRITTEN EASEMENTS

In addition to utility easements, property may be subject to another kind of written easement, an easement that an owner sells to someone else for use as a path or driveway or for sewer or solar access, for example. Private easements across another's property are

not uncommon, but they are easily overlooked. If you see an easement mentioned in your deed or title certificate and assume it is a utility company easement, you could be wrong.

Especially in hillside communities, where the fall angle (degree of slant or fall) can be essential for water pipes, private sewer easements are often sold when the uphill house is being built, so the pipe from the house to the street can slant properly--sometimes right under your property.

EASEMENTS BY NECESSITY

Even if it isn't written down, a legal easement usually exists if it's absolutely necessary to cross someone's land for a legitimate purpose. The law grants people a right of access to their homes, for example. So if the only access to a piece of land is by crossing through a neighbor's property, the law recognizes an easement allowing access over the neighbor's land. This is called an "easement by necessity." When land is subject to such an easement, the landowner may not interfere with the neighbor's legal right.

It's easy for a dispute to arise between neighbors when someone buys property without knowing about this kind of easement across it. For example, a new owner may discover that the neighbor is using his private drive for access to her own property. The new buyer puts up a locked gate and soon finds himself in court.

In fact, if you become embroiled in any escalating easement problem that appears to be headed for the courthouse, consult a local attorney who has experience with real estate problems. The doctrines of unwritten easements that are created by people's actions and certain circumstances can be very complicated. The laws vary slightly from state to state, and you may need more tailor-made advice than can be given here.

EASEMENTS ACQUIRED BY USE OF PROPERTY

Someone can acquire an easement over another's land for a particular purpose if he uses the land hostilely, openly, and continuously for a set period of time. These terms are explained in "Requirements for Obtaining Land by Adverse Possession," above. The length of use required varies from state to state and is often the same--ten or twenty years-- as that for adverse possession (acquiring ownership of land by occupying it). An easement acquired in this way is called a "prescriptive easement."

COMPARING PRESCRIPTIVE EASEMENTS AND ADVERSE POSSESSION

Depending on the circumstances and on state law, someone who uses another's property may eventually gain ownership of the property (by adverse possession) or gain the right to use part of the property for a particular purpose (prescriptive easement).

To gain ownership of someone else's land, a trespasser must occupy it hostilely, openly, exclusively and continuously for a certain period of time set by state law. Some states require that the trespasser also pay the property taxes on the land during the period.

The requirements are much the same for a prescriptive easement: For instance, if the trespasser abandons the use for several years and then goes back to it, the element of continuity is missing, and no easement will have been created. If a prescriptive easement is challenged in court, and one of the elements is missing, there is no easement.

But there are also important differences. First, payment of property taxes is never necessary for a successful prescriptive easement claim. In states that require the payment of property taxes to obtain ownership by a trespasser, courts will grant the trespasser a prescriptive easement, but not ownership, when all requirements have been met except paying the taxes.

Also, to acquire a prescriptive easement a trespasser does not need to be the only one using the land. A trespasser can gain the easement when others are also using the property--even the owner. It follows that more than one person can acquire a prescriptive easement in the same portion of land.

Example: One of the most common ways in which several neighbors gain a prescriptive easement is by using a driveway or road on another's land for many years without being challenged by the owner. This was the result in a Washington state case when neighbors treated a driveway as their own for 40 years, finally expanding it into a road. When the owner tried to reclaim the area, the court ruled in favor of the neighbors-- they had established a legal right to the road by prescriptive easement.(9)

Courts sometimes appear more willing to grant a prescriptive easement than actual ownership (through adverse possession) to a trespasser. The results are far less drastic for the owner. The easement does not take away the ownership of the property; it only requires the owner to allow the particular use of the property by somebody else.

ESTABLISHING A PRESCRIPTIVE EASEMENT

Typically, a prescriptive easement is created when someone uses land for access, such as a driveway or beach path or shortcut. But many times, a neighbor has simply begun using a part of the adjoining property. He may have farmed it or even have built on it. After the time requirement is met, the trespasser gains a legal right to use the property.

When the public does the trespassing, a public right to use property can be created. It is often called an "implied dedication" instead of a prescriptive easement. A public dedication is often created if an owner allows the city or county to make improvements or maintain a portion of his land.(10) For example, the owner of beachfront property may let the county pave her private drive, which is used by many people for access to the beach. The public would then gain a right to use the drive.

When disputes over prescriptive easements find their way into court, judges vary on what kind of use of someone's property justifies creation of an easement. Some courts find that simply using a strip of land regularly for a shortcut is enough for a prescriptive easement. But some are very reluctant to grant rights on someone else's land and require the use to be substantial.

Example: In a lawsuit over a garage built partly on a neighbor's land in Indiana, a court gave the garage owner a prescriptive easement allowing him to use the three feet of garage on the neighbor's property. But it denied one for the grass and strip beside it, even though the trespasser had mowed it and treated it as his own for over forty years.(11) The building of a structure, in this case the garage, was a substantial enough use to create a prescriptive easement, but just mowing the strip of grass was not.

BLOCKING ACQUISITION OF A PRESCRIPTIVE EASEMENT

Methods of removing intruders from property are discussed above. But if you don't mind someone using part of your property, the simplest way to prevent a prescriptive easement is to grant the person permission to use the property.

Permission of the owner to use property cancels a trespasser's claim to a prescriptive easement. If your neighbor is parking his car on a small strip of your property and you give him permission to do so, he is no longer a trespasser, and he can't try to claim an easement by prescription. Giving permission to a current user also prevents neighbors who move in later from claiming they have inherited a prescriptive easement.

Sometimes, your permission can even be implied. For example, if you allow a neighbor to use your property because you are on friendly terms, your implied permission is called "neighborly accommodation." This implied consent based on a friendly relationship is only between you and that neighbor--not anyone else, including later owners.

For example, a new owner of property in Washington, D.C. went to court and tried to claim an easement across a neighbor's yard because the former owner had been allowed to cross the property. The court ruled that he had no right to use the property because the friendship between the previous owner and the neighbor created a limited implied permission.(12)

Another court in Ohio found an implied permission from neighborly accommodation when the neighbor had used a private road for access for over 40 years. When the property was sold, the new owner had no right to the road.

Depending on implied permission, or even oral permission, however, is not a wise idea for protection in the future. You could still end up in court having to let a judge interpret your intentions.

The safest way to protect your property interest when you do give someone permission is to put the terms in writing. The sample agreement above can be used for easements. If

several neighbors use a strip of your property, you should draw up a permission agreement for each one to sign.

When the public is using a private strip, you can post signs granting permission. In some states, such as California, posting these signs at every entrance and at certain intervals protects the owner from claims of a prescriptive easement.(13)

Depending on posted signs alone for protection, however, is always risky. If possible, take a further step, putting your permission for the public in writing, taking it down to the courthouse and recording it (filing a copy) in the county land records. California has a statute providing for this procedure.(14) Check at your local courthouse to see it's allowed in your area. Recording it makes the permission part of the public record and available for anyone to check.

REFERENCE

(1) Cal. Civ. Proc. Code Section 749.
(2) Preble v. Maine Cent. R.R., 85 Me. 260, 27 A. 149 (1893).
(3) Pettis v. Lozier, 205 Neb. 802, 290 N.W.2d 215 (1980).
(4) French v. Pierce, 8 Conn. 439 (1831).
(5) Helmholz, Adverse Possession and Subjective Intent, 61 Wash. U.L.Q. 331, at 339 (1983).
(6) Carpenter v. Ruperto, 315 N.W.2d 782 (Iowa 1982).
(7) Norwood v. City of New York, 95 Misc. 2d 55, 406 N.Y.S.2d 256 (1978).
(8) McCann v. City of Los Angeles, 79 Cal. 3d 112, 144 Cal. Rptr. 696 (1978).
(9) Curtis v. Zuch, 829 P.2d 187 (Wash. App. 1992).
(10) For examples of the public gaining a right to use private property, see Gion v. City of Santa Cruz, 2 Cal. 3d 29, 84 Cal. Rptr. 162, 465 P.2d 50 (1970); County of Los Angeles v. Berk, 26 Cal. 3d 201, 161 Cal. Rptr. 742, 605 P.2d 381, cert. denied, 101 S. Ct. 111, 449 U.S. 836, 66 L. Ed. 2d 43 (1980); Brumbaugh v. Imperial County, 134 Cal. 3d 556, 184 Cal. Rptr. 11 (1982).
(11) McCarty v. Sheets, 423 N.E.2d 297 (Ind. 1981).
(12) Chaconas v. Meyers, 465 A.2d 379 (D.C. App. 1983).
(13) McCune v. Brandon, 621 N.E.2d 434 (Ohio App. 1993).
(14) Cal. Civ. Code Section 813. The California statutes encourage owners of beach-front property to allow others access to the beach, without fear of claims of a prescriptive easement.