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FEATURE ARTICLE

ADVERSE POSSESSION AND PRESCRIPTIVE EASEMENTS— GET OFF OF MY PROPERTY! CAN'T YOU READ THE SIGN?

By Ronald L. Richman

Adverse possession of disputed real property is a means to acquire title to real property, a "hostile takeover," so to speak. To acquire title by adverse possession, the following elements must be met: (1) actual possession; (2) open and notorious use; (3) continuous and uninterrupted use for five years; (4) use and possession hostile and adverse to the true owner's title; (5) under color of title or claim of right; and (6) payment of taxes. *California Maryland Funding, Inc. v. Lowe* (1995) 37 Cal.App.4th 1798, 1803.

Adverse possession takes on a new twist when you have two parties who own adjoining parcels of land as tenants in common, and one tenant in common tries to wrestle title away from the other. Because each tenant in common has a right to occupy all the property owned, exclusive possession of the property (ies) by one co-tenant is just not enough to meet the threshold standard for adverse possession of the property or properties.

Get Off of My Property Ms. Co-Tenant!

What to do? Two co-tenants fight over their respective rights to two adjoining pieces of land. One co-tenant, by his or her exclusive possession of the property, tries to take title to the property by adverse possession. Real property owned by tenants in common can pose difficult problems, especially when one-cotenant tries to kick the other off the property. Recognizing that there are unique problems when a property is owned by tenants in common, courts tighten up the standard for one co-tenant to acquire his or her co-tenant's title by adverse possession.

A tenancy in common is defined as follows:

> Each tenant in common has a right to occupy the whole of the property. The possession of one is deemed the possession of all; each may assume that another in exclusive possession is possessing for all and not adverse to the others…(Citation omitted).

Preciado v. Wilde, 139 Cal.App.4th 321, 42 Cal. Rptr.3d 792, 795 (2006),

In *Preciado*, the court recognized that when dealing with tenants in common, a much stronger standard is required for one tenant in common to acquire title by adverse possession over the other tenant(s) in common:

> Before title may be acquired by adverse possession as between co-tenants, the occupying tenant must bring home or impart notice to the tenant out of possession, by acts of ownership of the most open, notorious and unequivocal character, *that he intends to oust the latter of his interest in the common property*. (Citation)…Such evidence must be stronger than that which would be required to establish a title by adverse possession in a stranger. (Citation)…In short, one tenant in common cannot by mere exclusive possession acquire the title of his cotenant.

In *Preciado*, there were two parcels of property owned by the tenants in common. The Preciados are one of the co-tenants. The Preciados contended that they met all the elements to establish adverse possession: they demolished a home on the second lot;

they fenced in the second lot; they planted crops on a portion of the second lot; and years later, they paid taxes on the second lot.

As it turned out, however, the Preciados tried to buy out the other co-tenant's interest in the two lots (demonstrating that the Preciados recognized the other co-tenant's interest in the lot—negating any "claim of right or title" argument); the demolition of the house on the second lot was with the permission of the co-tenant; the Preciados never limited the co-tenant's ability to access the second lot (negating the "hostile use" element); and any fencing erected was not to exclude the other co-tenant.

The Preciados' exclusive possession of both lots was simply not enough to establish adverse possession over the two parcels of land.

Under the theory of adverse possession, one can acquire title to the property owned by another. However, a lesser right, as opposed to title, can be acquired under the theory of prescriptive easement. A prescriptive easement does not grant a party title to another's property, instead, it grants the right to use all or a portion of another's property. In order to establish a prescriptive easement, a right to use another's property, all of the requirements for adverse possession must be met except for the payment of taxes. *See, Otay Water District v. Beckwith*, 1 Cal. App.4th 1041, 1045 (1991).

How do you allow access to your property, on the one hand, and prevent the use or access to ripen into a prescriptive easement? One way is to establish that the use or access is by permission—a sign on your property granting permission to pass.

Can't You Read the Sign?

The right to pass by permission is a right recognized in the California Civil Code.

Cal. Civ. Code § 1008 governs the "right to pass by permission" sign. Section 1008 states that:

> No use by any person or persons, no matter how long continued, of any land, shall ever ripen into an easement by prescription, if the *owner* of such property posts at each entrance to the property or at intervals of not more than 200 feet along the boundary a sign reading substantially as follows: 'Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code.' (Emphasis added).

What happens when the sign is posted by someone other than the owner of the property, such as a tenant? It's not just the sign that operates to preclude the acquisition of an easement. Just who posted the sign is equally as important. Quite simply, the plain language of the statute requires that the sign be posted by the owner of the property or, at the very least, the authorized agent of the owner. *See, Richard Aaron v. Dallas Dunham*, 137 Cal.App.4th 1244 (2006).

In *Aaron*, in June 2000, plaintiffs Richard and Lilia Aaron purchased a parcel of real property, known as the "Tompkins Hill property," adjacent to property owned by defendants Dallas and Patricia Dunham, known as the "Graham Way property". Although a driveway existed on the Tompkins Hill property, which could be used to access the property, use of the driveway had been discontinued because a more convenient way to access the property was via a private road constructed on the Graham Way property. Texaco, Inc., a tenant of the Graham Way property under an oil and gas lease, built the private roadway on the Graham Way property in 1982 and thereafter maintained it.

For nearly 20 years, owners of the Tompkins Hill property continuously used the private roadway on the Graham Way property. In particular, the Fullertons, who owned the Tompkins Hill property between 1989 and 2000, when they sold it to the Aarons, continuously used the private roadway.

Sometime between 1990 and 1993 Texaco posted on the Graham Way property a "right to pass by permission" sign pursuant to Cal. Civ. Code § 1008. Section 1008 provides that the use of another's land shall not create an easement by prescription if a "right to pass by permission" sign is posted by the owner of the property at each entrance of the property or at intervals of not more than 200 feet along the property boundary.

In 1999, the Dunhams posted their own "Section 1008" sign. One month after moving into the Tompkins Hill property, the Aarons filed a declaratory relief action seeking a judicial determination that based on the *prior owner's* adverse, open and notorious and continuous use of the private roadway, the Aarons, as the new owners, had a prescriptive easement over the private roadway on the Graham Way property. The Dunhams filed a cross-complaint to quiet title.

The quiet title action went to a jury. The jury found the following: the initial use of the private

roadway by owners of the Tompkins Hill property was by permission but that the subsequent owners' use was adverse, open and notorious and continuous; continuous, uninterrupted non-permissive use of the private roadway occurred from at least 1990-1995; the "right to pass by permission" sign was erected by Texaco in 1992; and a "right to pass by permission sign" was erected by the Dunhams in 1999. Based on these findings, the trial court concluded that the Aarons had acquired a prescriptive easement over the private roadway.

The Dunhams appealed, contending that that the § 1008 "right to pass by permission sign" posted by Texaco precluded the acquisition of a prescriptive easement over the private roadway and further, that the prior owners' use of the private roadway was not adverse.

The Court of Appeal held that a § 1008 "right to pass by permission" sign is only valid and operative when the sign is posted by the landowner. The court's decision and rationale is quite straightforward. The court simply looked to the literal language of the code section.

The Court of Appeal recognized that a posting of the sign pursuant to § 1008 defeats any claim of adverse use, thus insulating the landowner from prescriptive claims. *See, Applegate v. Ota*, 146 Cal. App.3d 702, 710 (1983). However, the Court of Appeal, construing the literal language of the statute, held that the code section is only operative if the actual owner of the land, or authorized agent of the owner, not a lessee, posts the sign:

The court further reasoned that:

> …[t]he function of a sign erected pursuant to section 1008 is to give notice to the public that permissive use of the property has been granted. Because the owner of the property is presumptively the sole person or entity with legal authority to grant such permission, it is reasonable to require that the sign have been posted by the owner. A sign posted by a person or entity other than the owner is of dubious value, since the party posting the sign is not the party vested with the legal authority to grant that permission.

Ibid. This is a case in point. Although Texaco posted a sign pursuant to § 1008, Texaco was a mere lessee.

The court rejected the Dunhams' claim that Texaco was acting as their agent. Although the court recognized that § 1008 would apply to an authorized agent of the owner, there was no evidence in the record to establish that Texaco posted the sign on behalf of the Dunhams.

The court also rejected the Dunhams' argument that the Fullertons' (the predecessors to the Aarons) use of the private roadway was not adverse. [Although applicable to the case, the court did not discuss the concept of "tacking" as it relates to a claim of adverse possession or prescriptive easement. To acquire a right or title to property through adverse possession or prescriptive easement, one of the elements is that there be continuous and uninterrupted use of the property upon which the easement is situated for five years. Cal. Code Civ. P. § 321; *See, California Maryland Funding, Inc. v. Lowe,* 37 Cal.App.4th 1798, 1803 (1995). For a period of five years, the owner(s) of the "dominant tenement," the property that is using the easement, must have maintained a continuous and uninterrupted use of the "servient tenement," the property upon which the easement is situated. However, under the concept of "tacking," the five-year period does not have to come from the same owner of the dominant tenement as long as the use of the easement is continuous for a period of at least five years. For example, if owner "A" lives on the dominant tenement for three years, uses the easement continuously for three years, sells the property to owner "B," and owner "B" uses the easement continuously for at least two years, then owner "B," under the concept of "tacking," can acquire a prescriptive easement, even though owner "B" has used the easement for less than five years. In addition, if owner "A" used the easement for the statutory five-year period and then sells the property to owner "B," even though owner "B" has yet to use the easement, by under the concept of "tacking," owner "B" can acquire a prescriptive easement. *See, Sorenson v. Costa*, 32 Cal.2d 453, 464 (1948). In the case at hand, since title passed directly from the Fullertons to the Aarons and the Fullertons satisfied the five-year period, the Aarons' claim of a prescriptive easement over the roadway was based upon the concept of "tacking" onto the Fullerton's continuous, uninterrupted and adverse use of the private roadway.]

In rejecting the Dunhams' contention that the Fullerton's use of the private roadway was not adverse,

the Court of Appeal defined "adverse" as follows:

> 'Adverse use' means only that the claimant's use of the property was made without the explicit or implicit permission of the landowner…"Claim of right does not require a belief or claim that the use is legally justified. [Citation]. It simply means that the property was used without permission of the owner of the land. [Citation]. As the American Law of Property states in the context of adverse possession: 'In most of the cases asserting [the requirement of a claim of right], it means no more than that possession must be hostile, which in turn means only that the owner has not expressly consented to it by lease or license or has not been led into acquiescing in it by the denial of adverse claim on the part of the possessor…continuous use of an easement over a long period of time without the landowner's interference is presumptive evidence of its existence and in the absence of evidence of [express] permissive use it will be sufficient to sustain a judgment].

Applying the law to the facts, the Court of Appeal found that the Fullertons' testimony established conclusively that they never spoke to the owners of the Graham Way property regarding the use of the private roadway until the end of their ownership of the Tompkins Hill property, when the Fullertons were preparing to sell the Tompkins Hill property and after their continuous and uninterrupted use of the private roadway for a period in excess of five years. Because the Fullerton's use of the private roadway was made without the express or implied permission of the Dunhams for the statutory five-year period, the Fullerton's use of the private roadway developed into a prescriptive easement, which then passed by the transfer of title to the Aarons.

In order to be effective and to preclude the establishment of a prescriptive easement over property, a "right to pass by permission" sign must be posted by the landowner, or authorized agent of the landowner, at each entrance to the property or at intervals of not more than 200 feet along the property boundary and further, state substantially the following: "Right to pass by permission, and subject to control, of owner: Section 1008 Civil Code."

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