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Property Owners: Only you can prevent prescriptive easements.

By Ronald L. Richman

Attention Property Owners: The owner of real property has the legal burden to protect his or her property against a trespasser trying to establish a prescriptive easement.

The California Court of Appeal, Fourth District, in *Connelly v. Trabue* (2012) 204 Cal. App. 4th 1154 makes clear the burden is on the owner of the property, *not the trespasser*, to take swift legal action to determine whether a prescriptive easement has attached to the property.

A prescriptive easement is the right to use the land of another, not an ownership interest in the land of another. In order to acquire a prescriptive easement over another's property, the following elements must be met: (1) actual use of the property; (2) open and notorious use of the property; (3) use that is hostile and adverse to the original owner; (4) continuous and uninterrupted use of the property; (5) use of the property under a claim of right to the property; and (6) use for the statutory period of five years.

In the *Connelly* case, for more than 11 years, the Connellys, without permission of the owners, fenced-in and used a portion of a rural piece of land for cattle and ranching. The property at issue was re-sold several times. In the meantime, the Connellys continued to use the fenced-in portion of the land without permission from the owners.

In 2009, after failing to come to an agreement with new owners regarding the disputed fenced-in portion of the land, the Connellys filed a quiet title lawsuit seeking a determination that they acquired a prescriptive easement over the disputed portion of the land after having fenced-in and continuously used the disputed portion of the land since 1998.

Although the trial court decided the Connellys met all the legal requirements to establish a prescriptive easement, the court refused to grant the prescriptive easement on the ground the Connellys simply waited too long to file their lawsuit and therefore waived their right to the prescriptive easement.

The Court of Appeal reversed, granting the Connellys the prescriptive easement on the grounds that once a trespasser has met all the requirements to establish a prescriptive easement, the prescriptive easement automatically attaches to the property. The trespasser may, but is not required, to bring a lawsuit to perfect his or her claim of a prescriptive easement. Instead, *it is the owner*, not the trespasser, who must file a legal action within five years after the adverse possession by the trespasser commences, in order to claim the property back from the trespasser. If the owner waits longer than five years, he or she loses the right to "claim back" their property and the property is thereafter burdened by the prescriptive easement.

The owner has to be aware of any adverse use of his or her property and at the first notice of adverse use, take affirmative action to protect the property. If negotiations with the trespasser regarding use the property fails or if negotiation is not an option, the owner must file a quiet title lawsuit to claim back his or her property within five years after the adverse possession by the trespasser commences or the owner risks having the property burdened by the prescriptive easement.

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