RECENT ALASKA PRESCRIPTIVE EASEMENT CASES

by

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<u>Hansen v. Davis</u>, 220 P.3d 911 (November 6, 2009)

When William Rodgers sold Lot 53-A in Ketchikan to Marvin and Arlene Lani Davis in 1984 he reserved an easement across it to adjoining Lot 52, which he apparently hoped to buy at a future date. In 2006 Harvey and Annette Hansen purchased Lot 52 and subsequently bought the rights to the easement across Lot 53-A from Rodgers's widow in June 2007. The Hansens then cleared the easement, built a road, and almost completed installing water and sewer lines. In July 2007 the Davises sued the Hansens for trespass, alleging that their adverse us of the easement had extinguished it and that, alternatively, Rodgers's widow had ineffectively transferred title to the easement to the Hansens for failure to comply with the Alaska Probate Code. The Hansens counterclaimed asking that title to the easement be quieted in them. Following a two day trial, the trial court determined that the easement had been extinguished by the Davises' adverse use before the Hansens purchase the adjacent property.

The Supreme Court first holds that an easement can be extinguished by prescription and that the prescriptive period commences when the conduct of the servient estate owner unreasonably interferes with the current or prospective use of the easement by the easement holder. The Court discusses the legislative amendments of 2003 which curtailed adverse possession by requiring color of title or a good faith but mistaken belief that the claimed property is within the boundaries of the adjacent property of the claimant. Ch. 147, §3, SLA 2003. Hansens had argued that the legislation meant that termination of an easement by prescription was against public policy. This argument was rejected and that Court held that an easement can be extinguished by prescription.

The court further held that a party claiming that an easement was extinguished by prescription must prove continuous and open and notorious use of the easement area for a ten year period by clear and convincing evidence. The nature of the use of the easement must unreasonably interfere with the current or prospective us of the easement by the easement holder. The Court gives the general guideline that temporary improvements to an unused easement area that are easily and cheaply removed will not trigger the prescriptive period; permanent and expensive improvement that are difficult and damaging to remove will trigger the prescriptive period. As a matter of law, the maintenance of a garden on the easement area did not constitute an improvement

sufficiently adverse to commence the prescriptive period although it had existed for more than ten years. The Court declined to decide whether the construction of a greenhouse triggered the prescriptive period since ten years had not yet elapsed.

Since the trial court did not address the quiet title issue of whether the widow's deed was invalid, the Court remanded for further hearing noting that chain of title issues are often fact intensive.

<u>Cowan v. Yeisley</u>, 255 P.3d 966 (May 27, 2011)

The Cowans were deeded a portion of a larger tract of land in Ketchikan including a thirty foot "right of way" for access to it. Other portions of the tract were later deeded out which did not mention the right of way or attempt to convey the portion of the tract upon which it was located. All of the tract except the Cowans' portion was later subjected to two plat which dedicated the right of way to the Borough which approved the plats. The Cowans did not sign the plats.

In 2006 the Cowans filed suit against the Yeisleys, other owners of property in the tract, and the Borough seeking ownership of the thirty foot strip either as part of the original conveyance to them or by adverse possession. The trial court ruled that the original deed did not convey a fee interest in the property and that they did not meet the requirements of the 2003 legislative amendments to the adverse possession statute, AS 09.45.052, requiring color of title or a "good faith but mistaken belief" that the disputed land was within the boundaries of their property.

The Cowans appealed arguing that the original deed must have intended them to be the owners of the right of way since the grantor never deeded the disputed portion to anyone else and it would be illogical that he intended to keep it for himself after deeding away the rest of the tract. The Court pointed out that the general rule is that the term "right of way" is synonymous with "easement." Therefore, the deed is unambiguous and there is no need to seek to determine intent.

The Cowans also argued that it was error to apply the 2003 version of AS 09.10.030 to their adverse possession claim because the Cowans were vested with title to the disputed land before the statute was changed, the legislative history indicates that the changes were not intended to be applied to vested adverse possession rights, and the Legislature did not indicate that the law changing AS 09.10.030 was retrospective.

The Court points out that AS 01.10.090 states that "[n]o statute is retrospective unless expressly declared therein." The 2003 amendments to AS 09.10.030 specifically stated that the amended version "applie[d] to actions that have not been barred before [July 18, 2003] by AS 09.10.030 as it read before [July 18, 2003]. Its application here

would be retrospective since it would prevent a claim for adverse possession that could have been ripe prior to the time of the statute. The Cowans claimed they had adversely possessed the disputed land for more than ten years before 1980. Since title automatically vests in the adverse possessor at the end of the statutory period, the Cowans would be deprived of a valid claim, if they proved their case.

Since the factual disputes regarding the elements of adverse possession had not been determined, the case was remanded for further factual findings, particularly on the hostility element. The trial court's finding that the disputed land was validly dedicated to the Borough was vacated. If the Cowans are found to be owners at the time the plats were approved, their signatures would be required while the signatures of easement holders are not required.

The Supreme Court does not address the issue of Claude Yeisley's or his heirs possible retained ownership of the disputed right of way parcel, noting in footnote 18 that neither the parties nor the trial court raised the question and the record was silent on when Yeisley died and who his successors are.