

ESSAY QUESTION NO. 9

Answer this question in booklet No. 9

In 1990, the State of Alaska held a number of land auctions for state-owned lots in various locations throughout the state. Bill and his brother Paul bought two forty-acre lots, A and B, respectively, in one such auction. At the time, Lots A and B shared a boundary. The State recorded proper deeds in favor of Bill and Paul for their respective lots.

A year after the land auction, the State condemned a one hundred foot swath of land for a proposed new road along the entire boundary between Lots A and B, fifty feet on each side of the boundary. It completed the taking of the land by paying fair value for fee simple title. The State did not ever develop the road. It did not clear any part of the land nor do any other work.

In 1995, Bill developed Lot A. He built his home there and fenced the Lot to run livestock. Bill's fence did not exactly follow the boundaries of Lot A and he fenced in a good portion of the State's right-of-way and a small part of Paul's Lot B. In 2000, Bill built a small equipment shed on the part of the fenced-in area that lay on Paul's Lot B.

In 2009, Paul visited Lot B for the first time in at least ten years as he was preparing to sell the Lot. In his reconnaissance, he discovered Bill's fence and shed were over the property line. He asked Bill to move his shed and fence, but Bill refused.

Paul filed a quiet title and ejectment action against his brother Bill. In response, Bill asserted the defense of adverse possession.

1. Analyze and discuss how the State's condemnation of the right-of-way affects Bill's defense of adverse possession.
2. Discuss any other aspects of Bill's defense of adverse possession and whether the defense is likely to be successful in this case.

GRADER'S GUIDE

***** QUESTION NO. 9 *****

SUBJECT: REAL PROPERTY

Adverse Possession Background

In Alaska, the doctrine of adverse possession is governed by two statutes: AS 09.10.030 and 09.45.052.

AS 09.10.030 is a statute of limitations statute and provides:

(a) Except as provided in (b) of this section, a person may not bring an action for the recovery of real property or for the recovery of the possession of it unless the action is commenced within 10 years. An action may not be maintained under this subsection for the recovery unless it appears that the plaintiff, an ancestor, a predecessor, or the grantor of the plaintiff was seized or possessed of the premises in question within 10 years before the commencement of the action.

(b) An action may be brought at any time by a person who was seized or possessed of the real property in question at some time before the commencement of the action or whose grantor or predecessor was seized or possessed of the real property in question at some time before commencement of the action, and whose ownership interest in the real property is recorded under AS 40.17, in order to

- (1) quiet title to that real property; or
- (2) eject a person from that real property.

AS 09.45.052(a) provides:

The uninterrupted adverse notorious possession of real property under color and claim of title for seven years or more, or the uninterrupted adverse notorious possession of real property for 10 years or more because of a good faith but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant, is conclusively presumed to give title to the property except as against the state or the United States.

Notably, the Legislature in 2003 amended these statutes to severely restrict the applicability of the doctrine of adverse possession in Alaska. Whereas previously an adverse possession claim could be made by any person who held uninterrupted adverse notorious possession of real property for more than ten years, AS 09.45.052 now limits such a claimant to an adjacent real property owner with a good faith but mistaken belief that the real property at issue lies within the boundaries of the adjacent real property. Here, the law changed after Bill built his fence and shed but before ten years had elapsed with such use. As such, the 2003 law applies to Bill's defense of adverse possession.

1. Analyze and discuss how the State's condemnation of the right-of-way affects Bill's defense of adverse possession.

AS 09.45.052(a) provides in relevant part that:

the uninterrupted adverse notorious possession of real property for 10 years or more because of a good faith but mistaken belief that the real property lies within the boundaries of **adjacent real property** owned by the adverse claimant, is conclusively presumed to give title to the property except as against the state or the United States.

(Emphasis added). Here, one question is whether Lots A and B are adjacent for purposes of AS 09.45.052(a). It is clear that when Bill and Paul first purchased the two lots, that the lots shared a boundary and were adjacent. But a year later the State condemned a one hundred foot wide right-of-way separating the two Lots.

a. Did the State abandon or vacate the right-of-way?

The facts state that although the State took title to the land, it has never developed the right-of-way or performed any work on the right-of-way. Some applicants may argue that the State has abandoned the right-of-way and that Bill has regained ownership of the portion of Lot A taken for the road. AS 19.05.070 governs the State's disposal of land acquired for highway or road purposes:

(a) The department may vacate land, or part of it, or rights in land acquired for highway purposes, by executing and filing a deed in the appropriate recording district. Upon filing, title to the vacated land or interest in land inures to the owners of the adjacent real property in the manner and proportion considered equitable by the commissioner and set out in the deed.

Here, there are no facts to support the argument that Bill has regained ownership of the fifty feet of right-of-way that was formerly a part of Lot A, as the State has not gone through the formal process of vacating the right-of-way. AS 19.05.070.

b. Can Bill assert adverse possession against the State's right-of-way?

The argument that Bill has adversely possessed the State's right-of-way will fail. AS 09.45.052(a) provides that adverse possession is not effective against the State or the federal government:

the uninterrupted adverse notorious possession of real property for 10 years or more because of a good faith but mistaken belief that the real property lies within the boundaries of adjacent real property owned by the adverse claimant, is conclusively presumed to give title to the property except **as against the state or the United States.**

(Emphasis added). In sum, the State's condemnation of the right-of-way has doomed Bill's claim of adverse possession under the revised 2003 statute. Given that the State has owned the right-of-way since 1991, the act of the condemnation has separated Lots A and B making impossible one necessary element of a current defense or claim of adverse possession.

2. Discuss any other aspects of Bill's defense of adverse possession and whether the defense is likely to be successful in this case.

a. Did Bill have uninterrupted notorious possession of the portion of Paul's Lot for ten years or more?

The standard factors in the statutory test for adverse possession include whether Bill had uninterrupted, notorious possession of the portion of Paul's Lot for at least ten years. Here, the facts provide that Bill fenced the disputed portion of Lot B in 1995. He used the entire fenced area, including both his Lot A and the disputed portion of Lot B, to run livestock. Bill also built an equipment shed on the disputed portion of Lot B in 2000.

Here, Bill's strongest argument that he had uninterrupted notorious possession of part of Paul's Lot was his fencing of the disputed portion in 1995. The Alaska Supreme Court has stated that: "It is well recognized that a fence, as a matter of law, is 'one of

the strongest indications of adverse possession.” *Penn v. Ivey*, 615 P.2d 1, _ n.4 (Alaska 1980) (quoting *Albert v. Declue*, 526 S.W.2d 39, 40 (Mo.App.1975)).

Bill’s construction of the shed is further evidence of possession. However, that use does not extend back more than ten years.

b. Was Bill’s possession of Lot B in good faith?

The legislature amended AS 09.45.052(a) in 2003 to require that an adverse possession claimant like Bill have a mistaken but good faith belief that the property he adversely possessed was within his own property boundaries. Here, the facts do not provide much information regarding this issue. Applicants may argue that the State’s condemnation process creating a one-hundred foot wide separation between Lots A and B make it unlikely that Bill would not have known that he was encroaching on Paul’s Lot B when he erected his fence and shed because the condemnation process would have required Bill to be a defendant in a formal condemnation case and he would have received payment for the portion of his lot the State condemned.