

## **Alaska Bar Association Review – 10/31/2013**

### **McCarrey v. Kaylor, 301 P.3d 559 (March 29, 2013)**

Two couples own adjoining lots in Anchorage, located directly north and south of each other. Title to the southern lot owned by the McCarreys originated from a federal patent, which reserved a 50 foot right-of-way “for roadway and public utilities” across the northern boundary of the lot. A road currently runs through the right-of-way. The McCarreys proposed building a fence with a locked gate on the north side of the road, along the northern boundary of their lot; the fence would have impeded access to a cleared area on the Kaylor’s lot to the north that they used for parking and storage. The Kaylor’s were informed that if they wanted to use the gate in the fence they would have to give the McCarreys a 72-hour notice.

Kaylor’s filed suit to establish a prescriptive easement in the right-of-way and to get an injunction preventing the McCarreys from building the fence. A hearing was held at which testimony was presented about the use of the right-of-way. The superior court held that as a matter of law pursuant to the 50 foot right-of-way reservation in the patent it was open to public access stating it was “there to benefit the world.” The McCarreys appealed.

The Supreme Court first held that termination in 1976 of the Small Tract Act, under which the patent and right-of-way had been granted, did not terminate the right-of-way. It further held that the patent was an express offer of common law dedication to the public which was not complete until the offer has been accepted either by formal official action or public use consistent with the offer. Since the superior court had not made factual finding and ruled as a matter of law, the case was remanded for factual findings as to whether the dedication had been accepted. This also applied to the issue of whether a public road had been established through prescriptive use. It instructed that the superior court could make its factual findings on the record already before or hold another hearing.