



ALASKA BAR ASSOCIATION

Real Estate Law Section Meeting

Wednesday, February 27, 2013
12 noon – 1 p.m.
Anchorage, Alaska

**Easements: Ten Years after Alaska Almost
Abolished Adverse Possession**

Presenters: Chair Joan Travostino of K&L Gates
and Gordon Schadt, Schadt Law Office

1 General CLE Credit

AN ACT

1 Relating to limitations on actions to quiet title to, eject a person from, or recover real property
2 or the possession of it; relating to adverse possession; and providing for an effective date.

3

4 * Section 1. AS 09.10.030 is amended to read:

5 **Sec. 09.10.030. Actions to recover real property [IN 10 YEARS]. Except**
6 **as provided in (b) of this section,** a [A] person may not bring an action for the
7 recovery of real property [,] or for the recovery of the possession of it unless the action
8 is commenced within 10 years. An action may not be maintained under this
9 subsection for the recovery unless it appears that the plaintiff, an ancestor, a
10 predecessor, or the grantor of the plaintiff was seized or possessed of the premises in
11 question within 10 years before the commencement of the action.

12 * Sec. 2. AS 09.10.030 is amended by adding a new subsection to read:

13 (b) An action may be brought at any time by a person who was seized or

1 possessed of the real property in question at some time before the commencement of
2 the action or whose grantor or predecessor was seized or possessed of the real property
3 in question at some time before commencement of the action, and whose ownership
4 interest in the real property is recorded under AS 40.17, in order to

5 (1) quiet title to that real property; or

6 (2) eject a person from that real property.

7 * Sec. 3. AS 09.45.052(a) is amended to read:

8 (a) The uninterrupted adverse notorious possession of real property under
9 color and claim of title for seven years or more, or the uninterrupted adverse
10 notorious possession of real property for 10 years or more because of a good faith
11 but mistaken belief that the real property lies within the boundaries of adjacent
12 real property owned by the adverse claimant, is conclusively presumed to give title
13 to the property except as against the state or the United States. For the purpose of this
14 section, land that is in the trust established by the Alaska Mental Health Enabling Act
15 of 1956, P.L. 84-830, 70 Stat. 709, is land owned by the state.

16 * Sec. 4. AS 09.45.052 is amended by adding new subsections to read:

17 (c) Notwithstanding AS 09.10.030, the uninterrupted adverse notorious use of
18 real property by a public utility for utility purposes for a period of 10 years or more
19 vests in that utility an easement in that property for that purpose.

20 (d) Notwithstanding AS 09.10.030, the uninterrupted adverse notorious use,
21 including construction, management, operation, or maintenance, of private land for
22 public transportation or public access purposes, including highways, streets, roads, or
23 trails, by the public, the state, or a political subdivision of the state, for a period of 10
24 years or more, vests an appropriate interest in that land in the state or a political
25 subdivision of the state. This subsection does not limit or expand the rights of a state
26 or political subdivision under adverse possession or prescription as the law existed on
27 the day before the effective date of this subsection.

28 * Sec. 5. The uncodified law of the State of Alaska is amended by adding a new section to
29 read:

30 APPLICABILITY. AS 09.10.030, as amended in secs. 1 and 2 of this Act, applies to
31 actions that have not been barred before the effective date of this Act by AS 09.10.030 as it

1 read before the effective date of this Act.

2 * Sec. 6. This Act takes effect immediately under AS 01.10.070(c).

Information for legislative research for SB 93- which eliminated adverse possession

Chapter 147 SLA 03

The effective date is July 18, 2003.

The codification appears in AS 09.10.030 and AS 09.45.052.

Hearing dates:

March 11, 2003 Senate Labor and Commerce

April 1, 2003 Senate Labor and Commerce

April 16, 2003 Senate Judiciary

April 30, 2003 Senate Judiciary

May 2, 2003 Senate Judiciary

May 18, 2003 House Judiciary

SB 93 introduced 2/28/2003

CS for SB 93 (L & C)-- offered April 2, 2003

CS for SB 93 (JUD)-- offered May 7, 2003

CS for SB 93 (JUD) am-- offered May 7, 2003

CS for SB 93 (JUD) am H --amended May 19, 2003

The theme for passage was that State and Federal government have protection from adverse possession, so private landowners should also have protection. Jonathan Tillinghast, April 16, 2003. Another theme was the purpose of adverse possession was outdated.

Sealaska is the only native regional corporation providing testimony to either the House or Senate, yet Sealaska said that the bill was of benefit to all regional corporations and needed by regional corporations because of the vast amount of land held by regional corporations and the lack of resources to police the lands. Russell Dick, March 11, 2003; Albert Kookesh, May 18, 2003; Jonathan Tillinghast, May 6, 2003

Alaska would be the first state to undo adverse possession. Jonathan Tillinghast, April 16, 2003. Tillinghast refers to Justice Brandeis statement that states were to server as laboratories for improvement of our laws.

EASEMENTS: Selective comments from testimony in front of Committees. (Comments were made based on the version of the bill at the time of the comment.)

DOT expressed concern on March 11, 2003 that DOT needed to rely on adverse possession to confirm its title in roads in Alaska that had existed for many years and did not have all of the deeds recorded.

Legislative Affairs attorney, Amy Seitz, stated her understanding that the bill intended also to apply to prescriptive easements. March 11, 2003.

Shirley Schollenberg from Anchor Point stated that prescriptive easements were needed to support trails. March 11, 2003.

Tom Scarborough, a registered land surveyor from Fairbanks explained the need for adverse possession/prescriptive easements for many drive situations in Fairbanks Northstar Borough. April 16, 2003

Jim Butler, an attorney representing Homer Electric Assoc. said that utilities have the need to obtain rights by prescriptive easements. April 16, 2003

Tillinghast said that good faith boundary disputes in which one side claims adverse possession is not to be extinguished by this bill. April 16, 2003 and April 30, 2003

Tillinghast said the new version of the bill continued the right to establish public access or trails by adverse possession. May 18, 2003

Ron Baird pointed out that the bill eliminated a common tool to fix the driveway that uses part of a neighbor's property. May 18, 2003

John Clover explained that access to land in the State of Alaska can be a problem when one has to cross many parcels to get to a piece of property. SB 93 only excepts a claim to the adjacent property. May 18, 2003.

Ron Baird took the view that an easement by necessity is not eliminated by SB 93. May 18, 2003.

PREPARED by Joan Travostino, K & L Gates LLP, Feb. 26, 2013

SENATE BILL NO. 93

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY SENATOR WAGONER

Introduced: 2/28/03

Referred: Labor and Commerce, Judiciary

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to limitations on actions to quiet title to, eject a person from, or recover
2 real property or the possession of it; and providing for an effective date."

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 * Section 1. AS 09.10.030 is amended to read:

5 **Sec. 09.10.030. Actions to recover real property [IN 10 YEARS]. (a)**
6 **Except as provided in (b) of this section, a** [A] person may not bring an action for
7 the recovery of real property [,] or for the recovery of the possession of it unless the
8 action is commenced within 10 years.

9 **(b) An action may be brought at any time by a person whose ownership**
10 **interest in real property is recorded under AS 40.17 to**

11 **(1) quiet title to that real property; or**

12 **(2) eject a person from that real property.**

13 **(c) An action may not be maintained under this section** [FOR THE
14 RECOVERY] unless it appears that the plaintiff, an ancestor, a predecessor, or the

1 grantor of the plaintiff was seized or possessed of the premises in question at some
2 time [WITHIN 10 YEARS] before the commencement of the action.

3 * **Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to
4 read:

5 APPLICABILITY. AS 09.10.030, as amended in sec. 1 of this Act, applies to actions
6 that have not been barred before the effective date of this Act by AS 09.10.030 as it read
7 before the effective date of this Act.

8 * **Sec. 3.** This Act takes effect immediately under AS 01.10.070(c).

CS FOR SENATE BILL NO. 93(L&C)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE SENATE LABOR AND COMMERCE COMMITTEE

Offered: 4/2/03

Referred: Judiciary

Sponsor(s): SENATOR WAGONER

A BILL

FOR AN ACT ENTITLED

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2 grantor of the plaintiff was seized or possessed of the premises in question at some
3 time [WITHIN 10 YEARS] before the commencement of the action.

4 * **Sec. 2.** AS 09.45.052 is amended by adding a new subsection to read:

5 (c) Notwithstanding AS 09.10.030, the uninterrupted adverse notorious
6 possession by the state or a political subdivision of the state of a public transportation
7 or public access right-of-way for a period of 10 or more years is conclusively
8 presumed to give title to the right-of-way to the state or the political subdivision, as
9 appropriate, except as against the United States.

10 * **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to
11 read:

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13 that have not been barred before the effective date of this Act by AS 09.10.030 as it read
14 before the effective date of this Act.

15 * **Sec. 4.** This Act takes effect immediately under AS 01.10.070(c).

CS FOR SENATE BILL NO. 93(JUD)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered: 5/7/03

Referred: Today's Calendar

Sponsor(s): SENATOR WAGONER

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8 but mistaken belief that the real property lies within the boundaries of adjacent
9 real property owned by the adverse claimant, is conclusively presumed to give title
10 to the property except as against the state or the United States. For the purpose of this
11 section, land that is in the trust established by the Alaska Mental Health Enabling Act
12 of 1956, P.L. 84-830, 70 Stat. 709, is land owned by the state.

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15 real property by a public utility for utility purposes for a period of 10 years or more
16 vests in that utility an easement in that property for that purpose.

17 (d) Notwithstanding AS 09.10.030, the uninterrupted adverse notorious use,
18 including construction, management, operation, or maintenance, of private land for
19 public transportation or public access purposes, including highways, streets, roads, or
20 trails, by the public, the state, or a political subdivision of the state, for a period of 10
21 years or more, vests an appropriate interest in that land in the state or a political
22 subdivision of the state.

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26 that have not been barred before the effective date of this Act by AS 09.10.030 as it read
27 before the effective date of this Act.

28 * **Sec. 5.** This Act takes effect immediately under AS 01.10.070(c).

CS FOR SENATE BILL NO. 93(JUD) am
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Amended: 5/9/03

Offered: 5/7/03

Sponsor(s): SENATOR WAGONER

A BILL

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 30 read before the effective date of this Act.

31 * **Sec. 6.** This Act takes effect immediately under AS 01.10.070(c).

RECENT ALASKA PRESCRIPTIVE EASEMENT CASES

by

Gordon F. Schadt

February 27, 2013

Hansen v. Davis, 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 use 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 use 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.

Cowan v. Yeisley, 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.

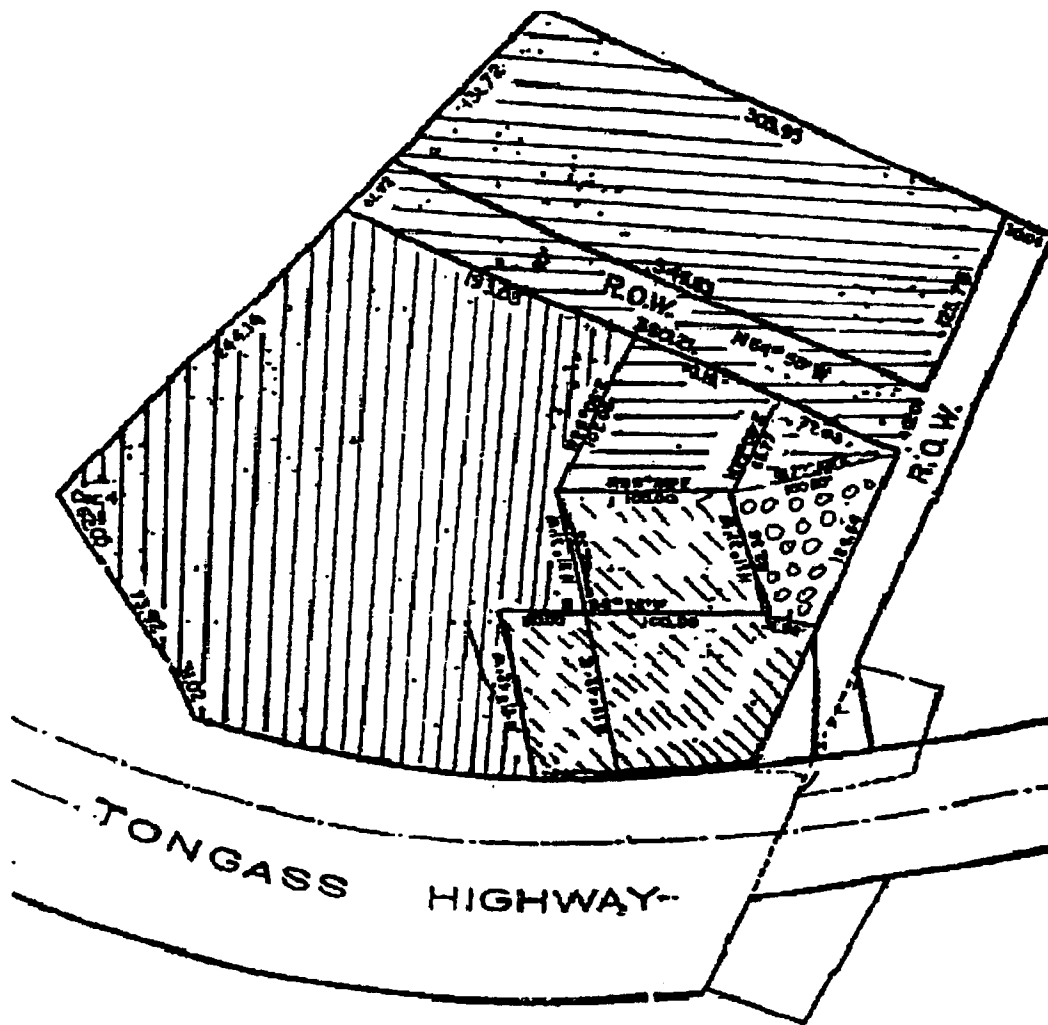
The Cowans also argued that it was error to apply the 2003 version of AS 09.10.030 to their adverse possession claim because the Cowans were vested with title to the disputed land before the statute was changed, the legislative history indicates that the changes were not intended to be applied to vested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



	1973 Deed
	1971 Deed
	1960/63 Deeds to Smiths
	1956 Deed to Cowans