Prescriptive Easements in Colorado

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An easement is a non-possessory right to use or enter onto the property of another (***Matoush v. Lovingood***, 177 P.3d 1262, 1265 (Colo. 2008)). Easements can be created expressly or by implication. Implied easements are easements that are implied in fact property rights based upon the conduct and conveyances of the parties or their predecessors. Many theories can be used by litigants to establish an implied easement. One theory that is frequently used in Colorado is the easement by prescription.

In ***Lobato v. Taylor***, 71 P.3d 938 (Colo. 2002), the Colorado Supreme Court found two forms of prescriptive easements holding that the easement can be established when the prescriptive use is: 1) open or notorious, 2) continued without effective interruption for eighteen years, and 3) the use was either a) adverse or b) pursuant to an attempted, but ineffective grant (***Id.*** at 950; ***see also*** C.R.S. § 38-41-101).

"Prescriptive use" can be a use that is adverse to the owner of the land or the interest in land against which the servitude is claimed, or a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude (***Id.*** at 954). Using an easement for more than eighteen years entitles the claimant to a presumption that his use was "adverse." That said, this presumption can be rebutted by proving that the use was "permissive" (***Weisiger v. Harbour***, 62 P.3d 1069, 1072 (Colo. App. 2002)). A use in connection with the acquiescence of the servient estate is not necessarily "permissive" (***Westpac Aspen Invs., LLC v. Residence at Little Nell Dev., LLC***, 284 P.3d 131, 136 (Colo. App. 2011).

To be "open and notorious"—the use of the easement must be sufficiently obvious to the owner of the servient estate, although actual knowledge by the servient owner is unnecessary. The claimant's use does not have to be continuous, but must be as frequently as he desires. Intermittent use on a long term basis is sufficient to establish a prescriptive easement (***Weisiger***, 62 P.3d at 1073).

If a use is considered "permissive" and not "adverse" and the easement is not an "intended but ineffective grant"—a litigant is not entitled to a prescriptive easement. A recent case that discussed "permissive use" is ***Maralex Resources, Inc. v. Chamberlain***, 2014 COA 5, 320 P.3d 399 (Colo. App. 2014). In Maralex, the Court of Appeals held that a plaintiff's use of roads on adjacent property was "permissive" insofar as the plaintiff and its predecessors had been given keys by the adjacent property owner to locked gates on the adjacent property. Courts have also held that a use is not "permissive" if permission was never explicitly sought or received (***Westpac Aspen Invs., LLC***, 284 P.3d at 136).

The "continuous" nature of the prescriptive use can also be interrupted. A recent case that discusses interruption of the prescriptive period is ***Trask v. Nozisko***, 134 P.3d 544 (Colo. App. 2006). Trask involved a dispute between adjacent land owners over the use of a mountain driveway. During the prescriptive period, the defendant property owner constructed a large dirt berm and trench across the

driveway that prevented use of the easement. A week later, the claimant removed the obstruction and continued his use. The Trask Court held that the claimant's use was interrupted by installation of the berm, citing Justice Oliver Wendell Holmes in doing so: "[a] landowner, in order to prevent that result [easement by prescription], is not required to battle successfully for his rights. It is enough if he asserts them to the other party by an overt act, which, if the easement existed, would be a cause of action" (Id. at 552).

The ineffective grant prong is used when a person attempts to convey an easement but, because of an oversight, ineffectively does so. In ***Elk Falls Property Owners' Association v. Dunwody***, 12CA0653 (Colo. App. May 2, 2013), the Colorado Court of Appeals, in an unpublished opinion, covered the elements of a claim for a prescriptive easement based on an attempted but ineffective grant. The case involved the platting of a mountain subdivision. Several easements were shown on the subdivision plat: two were described as "50 Foot Right(s) of Way" and one was styled "Existing County Road—Proposed 60 Foot R/W." The primary problem with the subdivider's attempted easement grant was that she did not own the land upon which the easements sat. Her husband did. Here, the Court of Appeals affirmed the trial court's finding of implied easements, specifically holding that the term "right-of-way" "when used to described an ownership interest in real property, is traditionally construed to be an easement" and that the subdivider attempted to, but imperfectly, granted easements when describing these right(s)-of-way on the plat (***see also Hutson v. Agric. Ditch & Reservoir Co.***, 723 P.2d 736, 739 (Colo. 1986); ***Bijou Irrigation Dist. v. Empire Club***, 804 P.2d 175, 182 n.14 (Colo. 1991)).

After prevailing on a prescriptive easement claim, the extent of the prescriptive easement is fixed by the use through which it was created (***Wright v. Horse Creek Ranches***, 697 P.2d 384, 388-389 (Colo. 1985)). The rationale here is that by not protesting the adverse use, the servient property owner is presumed to have agreed to burden his property to the degree the easement was historically used (***Id.*** at 388-389).

As a practice tip, an attorney can greatly assist their prescriptive easement case by reaching out to the witnesses early and often and by conducting thorough historical research. Indeed, the litigant who refreshes a witnesses' memory first about the historical facts, likely has a better chance of eliciting favorable testimony at trial. When used carefully, the prescriptive easement theory is a useful tool that can help a client achieve desired results.

Also be sure to read Mr. Osborn's article on Implied Easements in the December issue of ***The Colorado Lawyer***.

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