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## **California Prescriptive Easements and Adverse Possession -How They Are Created, & When You Cannot Get An Exclusive Easement**

California prescriptive easement adverse possession and law has evolved evolution in California since its rural beginnings. Once applied primarily to acreage, farm and forest, it is now commonly addressed in urban areas. The courts have also evolved in their approach.

**Prescriptive easement** is the process by which one acquires only the right to use the land of another. To establish an easement by prescription, the claimant must meet the following four tests:

(1) The claimant must occupy or utilize the land in a way (actual, open, and notorious) that gives reasonable notice to the owner.

(2) The occupancy or use must be continuous and uninterrupted for five years. The period for both is established in the Code of Civil Procedure §318. (Occasional use of a road, e.g. on weekends, would create a right to use it with the same frequency.)

(3) The use must be under *color of title* (a written or deeded easement, though it may be incorrect or in the wrong location) or *claim of right* (claiming a right to use the property, though not founded on a written instrument; the claim need not be based on a good faith belief in the title.)

(4) The claimant's use must be exclusive and "hostile" to the owner's title (not in the common sense of hostility, but rather unaccompanied by recognition of the right of the true owner to bar the claimant from use.) *Mehdizadeh v. Mincer* 46 Cal App 4<sup>th</sup> 1296 @ 1305.

**Adverse possession** is the process in which someone acquires ownership of another's land. The claimant must prove:

(1) possession under *claim of right* (claiming a right to use the property, though not founded on a written instrument; the claim need not be based on a good faith belief in the title), or *color of title* (a written or deeded easement, though it may be incorrect or in the wrong location) ;

(2) The claimant must occupy or utilize the land in a way (actual, open, and notorious) that constituting reasonable notice to the true owner;

(3) possession which is adverse and hostile to the true owner;

(4) continuous possession for at least five years; and

(5) payment of all taxes assessed against the property during the five-year period. *Mehdizadeh v. Mincer* 46 Cal App 4<sup>th</sup> 1296 @ 1305

The big difference between the two is that, for adverse possession, the claimant must pay the taxes, and also must possess the property in a more exclusive way.

Experienced real estate attorneys often see the problem arising in the case of residential neighbors with a fence between them. For some reason, one party, we'll call the surprised neighbor, finds that the fence encroaches on their side of the property line- the encroacher has gained another foot or two in their backyard. The encroacher has had a garden in this area, or a driveway, for twenty years. The sad neighbor complains, the neighbors are at arms, and someone files suit.

The encroacher claims an exclusive prescriptive easement; after all, it's fenced, he has had 100% use for more then five years. But California courts do not agree. An exclusive prescriptive easement, which as a practical matter completely prohibits the true owner from using his land, has no application to a simple backyard dispute. As stated in *Silacci v. Abramson* (45 Cal.App.4th 558), an easement is merely the right to use the land of another for a specific purpose--most often, the right to cross the land of another. An easement acquired by prescription is one acquired by adverse use for a certain period. An easement, however, is not an ownership interest, and certainly does not amount to a fee simple estate.

Thus, the courts are not inclined to grant exclusive rights in the usual case. However, they do have the power to reach an "equitable" or fair solution that is technically different from a prescriptive easement. It can grant the trespasser some legal rights, and also require them to pay for them.