

MEMORANDUM

TO: Lawyer
FROM: Lexadigm Solutions LLC
DATE: April 11, 2005

RE: **Defenses for Adverse Possession, Prescriptive Easement and Acquiescence**

I. ISSUES

A. What defenses does a property owner (“client”) have to a claim of adverse possession or prescriptive easement?

B. What are the requirements for “acquiescence” and does the client have a valid defense?

II. BRIEF ANSWERS

A. The client does not appear to have a strong defense if a claim for the portion of land is made by way of adverse possession or prescriptive easement, unless the client can show that use of the property was permissive.

B. With the standard of proof being less stringent for “acquiescence,” the client does not appear to have a strong defense to such a claim.

III. FACTS

Owner of Lot 22 has for more than fifteen years used a 6.5 foot wedge shaped piece of property, which is a part of Lot 23. Lot 23 is owned by the client, X. Predecessor owner of Lot 23 allegedly agreed with the then-owner of Lot 22 that he could use the path that encroaches on Lot 23 and plant a hedge on his property. The owners of Lot 22 have since refused to sign an acknowledgement sent to them in 1995.

IV. ANALYSIS

A. *Adverse Possession/Prescriptive Easement*

To establish adverse possession, a person must show that its possession is actual, visible, open, notorious, exclusive, hostile, under cover of claim or right, and continuous and uninterrupted for a statutory period of fifteen years. *Thomas v. Rex A. Wilcox Trust*, 463 N.W.2d 190, 192 (Mich. Ct. App. 1990); *see also, Kipka v. Fountain*, 499 N.W.2d 363, 365 (Mich. Ct. App. 1993). The possession must be hostile to the title of the true owner. *Burns v. Foster*, 81 N.W.2d 386, 389 (Mich. 1957). It is not necessary that adverse possession for more than fifteen years should be based upon a claim of title and claim of right; either is sufficient. *Sanscrainte v. Torongo*, 49 N.W. 497, 501 (Mich. 1891). It is sufficient if the acts of ownership are of such a

character as to openly and publicly indicate an assumed control or use, such as are consistent with the character of the premises in question. *Whitaker v. Erie Shooting Club*, 60 N.W. 983, 984 (Mich. 1894). The use should be such as to notify and warn the owner that a person is in possession under a hostile claim. *Id.* at 984.

A party may “tack” on the possessory periods of predecessors in interest to achieve this fifteen year period by showing privity of estate. *Dubois v. Karazin*, 24 N.W.2d 414, 417 (Mich. 1946). This privity may be shown in one of the two ways, by (1) including a description of the disputed acreage in the deed, *Arduino v. City of Detroit*, 228 N.W. 694 (Mich. 1930), or (2) an actual transfer or conveyance of possession of the disputed acreage by parol statements made at the time of the conveyance. *Sheldon v. Mich. Central R. Co.*, 126 N.W. 1056, 1058-59 (Mich. 1910).

In the case at hand, if the owner of Lot 22 asserts a claim by adverse possession it would be difficult for the client to raise an adequate defense. The only ground on which the client can apparently refute such a claim is by showing that there was never a claim hostile to it and that the use of such land was permissive.

An easement is a right to use the land of another for a specific purpose. *Bowen v. Buck & Fur Hunting Club*, 550 N.W.2d 850, 851 (Mich. Ct. App. 1996). An easement by prescription requires similar elements as adverse possession, except exclusivity. *W. Mich. Dock & Mkt Corp. v. Lakeland Inv.*, 534 N.W.2d 212, 215 (Mich. Ct. App. 1995), citing, *St. Cecelia Soc’y v. Universal Car & Serv. Co.*, 182 N.W.161 (Mich. 1921). Permissive use of property, regardless of the length of the use will not result in an easement by prescription. *Banach v. Lawera*, 47 N.W.2d 679, 680 (1951).

Again, if the client is able to show that use of the land was permissive, he will have a valid defense to an easement by prescription since “[p]ermissive use of property, regardless of the length of the use will not result in an easement by prescription.” *Banach*, 47 N.W.2d at 680.

B. Doctrine of Acquiescence

There are three theories of acquiescence: they include (1) acquiescence for statutory period; (2) acquiescence following a dispute and agreement; and (3) acquiescence arising from intention to deed to a marked boundary. *Pyne v. Elliot*, 220 N.W.2d 54, 58-59 (Mich. Ct. App. 1974). The doctrine of acquiescence provides that, where the adjoining property owner acquiesces to a boundary line for a period of at least fifteen years, that line becomes the actual boundary line. *McQueen v. Black*, 425 N.W.2d 203, 204 (Mich. Ct. App. 1988), *see also*, *W. Mich. Dock & Mkt Corp. v. Lakeland Inv.*, 534 N.W.2d 212 (Mich. Ct. App. 1995). The underlying reason for the rule of acquiescence is the promotion of peaceful resolution of boundary disputes. *Shields v. Collins*, 268 N.W.2d 371, 373 (Mich. Ct. App. 1978). The proper standard applicable to a claim of acquiescence is proof by preponderance of the evidence. *Walters v. Snyder*, 608 N.W.2d 97, 99-100 (Mich. Ct. App. 2000). This is less stringent than the clear and cogent evidence standard used in adverse possession and prescriptive easement cases. *Id.*, *McQueen*, 425 N.W.2d at 205. Unlike a claim based on adverse possession, an assertion of acquiescence does not require that the possession be hostile or without permission. *Id.* at 204-

05; *Walters*, 608 N.W.2d at 99. The acquiescence of predecessors in title can be tacked onto that of the parties in order to establish the mandated period of fifteen years. *Jackson v. Deemar*, 127 N.W.2d 856, 857 (Mich. 1964). No proof of parol transfer is required to establish tacking. *Siegel v. Renkiewicz Estate*, 129 N.W.2d 876, 879 (Mich. 1964).

In *Killips v. Mannisto*, 624 N.W.2d 224 (Mich. Ct. App. 2001), the Court of Appeals while affirming the trial court's finding that the plaintiffs had acquired property by acquiescence, held:

Here, plaintiffs and their predecessors actively used the driveway since approximately 1975. During that time the defendant did nothing to stop usage.... In fact, defendant approached her neighbor in 1982 about moving the driveway and the neighbor asserted that the right to use the driveway was permanent. From 1982 forward, defendant did nothing to stop plaintiffs or their predecessors from using the driveway. While defendant marked the boundary with markers, these survey stakes did not block the driveway or otherwise interfere with plaintiffs' use. Plaintiffs and their predecessors used and apparently maintained the driveway during this entire ... period. The trial court did not err in finding that plaintiffs had acquired the property by acquiescence.

Id. at 226-227. Similarly, in *Sackett v. Atyeo*, 552 N.W.2d 536 (Mich. Ct. App. 1996), the owners of adjoining property shared a driveway and mistakenly treated the center of the driveway as their common boundary when it was not the recorded property line. The Court of Appeals held that although there was no hostile act or dispute giving rise to title under the theory of adverse possession, plaintiffs satisfied the requirements for obtaining title as a result of acquiescence in a boundary line for the 15-year statutory period. *Id.* at 539. The court reached its holding despite that fact that a survey showed that the driveway was actually located solely on the property of defendant's predecessor in title and that the center of the driveway was not the actual property line.

It is evident from the cases cited above that the standard of proof for proving acquiescence is less stringent for a claim based on this doctrine. It will be difficult for the client to raise a valid defense to a claim of acquiescence for the statutory period since not only does the doctrine allow tacking of a predecessor's acquiescence, it also allows permissive possession. The fact that the owner of Lot 22 planted shrubbery on Lot 23 in line with the path that also encroaches on Lot 23 gives rise to the inference (arguably by a preponderance of the evidence) that the client's predecessors in title acquiesced to the boundary line at issue.

V. CONCLUSION

The client does not have a strong defense to a claim by way of adverse possession or prescriptive easement, unless the client can proffer evidence that use of the portion of Lot 23 was permissive. The client does not appear to have a valid defense to a claim by acquiescence for the statutory period since such a claim does not require hostile possession.

Lexadigm Solutions LLC