THE NC CONNECTION

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Deans v Mansfield

Co-Tenancy, Prescriptive Appurtenant Easements, and Succession

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INNOVATIVE BY INSTINCT

Deans v. Mansfield[i] involves the infamous old soil road and a prescriptive easement, a very technical fact specific conundrum which is often the subject of appellate cases. Adverse possession of a right of way or a prescriptive easement is difficult to prove, difficult to do away with, and equally difficult to try in court. In the Deans case, the plaintiffs had already sued and settled their access issue in mediation. Yet, despite the previous settlement, the Deans had to bring a second lawsuit to enforce their easement, which was lost on a summary judgment motion. The Deans case concerns a prescriptive appurtenant easement by one co-tenant and permissive use by a fellow co-tenant. It also brings attention to a seldom addressed issue in an adverse possession case -- succession.

> **"Access to the home place was across the dirt road."**

The plaintiffs in this case, the Deans, were heirs of some of the children who inherited interests in their father's farm, the "home place," in 1941. The Deans inherited several co-tenant portions of the home place and obtained the last co-tenant portion in a partition action. Access to the home place was across the dirt road which had been historically maintained by two of the co-tenants, Howard and Vardell. The two brothers lived on the farm with their mother, Alice, and had used the dirt road since 1941. Vardell died in 1972 in an accident, but Alice and Howard continued to live on the home place.

In 1998, Mace and Edwards purchased about 1500 acres of land and developed Grand Pines Subdivision. Several of their lots were crossed by the dirt road used to access the home place. Mace spoke to Howard and convinced him to sign an agreement releasing all his rights in the soil road and stating that his use had been intermittent and permissive. At some point thereafter, the dirt road was blocked by a gate, felled trees, and plowed soil.

In December 2000, the Deans and the Williams, another neighbor who used the road, filed a lawsuit against Mace and Edwards which asserted the existence of a soil road across the lots in the subdivision. Eventually, the lawsuit was settled in mediation; "...Mace executed restrictive covenants that noted the equestrian easements in the subdivision were subject to the rights of third parties for ingress, egress, and regress as a result of a settlement of a claim for prescriptive rights to the use of existing soil road."[ii]

In December 2006, Mace requested that the plaintiffs voluntarily quit using their access. In January 2007, the Deans filed another lawsuit alleging that they had established a prescriptive easement to use the soil road for ingress and egress, against the developer, six new owners, and the HOA. Some of the lot owners filed for summary judgment, and the motion was granted. Plaintiffs appeal.[iii]

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[i] *Deans v. Mansfield*, 707 S.E.2d 658, NC.App., 2011.
[ii] *Id.*at 661
[iii] *Id.*

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The Deans are appealing a summary judgment motion that there was a lack of sufficient evidence of a genuine issue of material fact as to whether a prescriptive easement was established in 1972. The Court of Appeals starts its analysis by citing Potts v. Burnette[iv] and the requirements necessary to establish an easement by prescription:

> a plaintiff must prove the following elements by the greater weight of the evidence: (1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty year period.

The court found that sufficient evidence had been presented showing that Vardell's use of the road had been "open and notorious,"[v] and that his conduct maintaining the road and his use thereof while residing at the home place would have placed a true owner on notice of his claim. The court stated that "[n]otice of a claim of right may be given in a number of ways, including… by open and visible acts such as repairing or maintaining the way over another's land."[vi]

"The court found that sufficient evidence had been presented showing… use of the road had been "open and notorious…"

The court found that Vardell's use of the road was for an uninterrupted period of 20 years, and that a witness averred that he used the road from 1850 until his death in 1972. The court also found that there was sufficient evidence of the identity of the road. "To establish a private way by prescription, the user for twenty years must be confined to a definite and specific line. While there may be a slight deviation in the line of travel there must be a substantial identity of the thing enjoyed."[vii] There were aerial photographs taken over a 54 year period and the 2002 settlement stated that the 14 foot road would be defined by an easement of the existing road.

"There were aerial photographs taken over a 54 year period…"

In North Carolina, the presumption is that any use of another's land is permissive or with the owners' consent and such permissive use will never "ripen" into adverse possession.[viii] To establish a hostile use, however, it does not require a heated controversy or manifestation of ill will. Hostile use can be of "such nature and exercised under circumstances as to manifest and give notice that the use is being made under a claim of right."[ix]

The Supreme Court has held the following sufficient to rebut a presumption of permissive use:

> "the road way had been used by the plaintiff and other members of the public to reach plaintiff's

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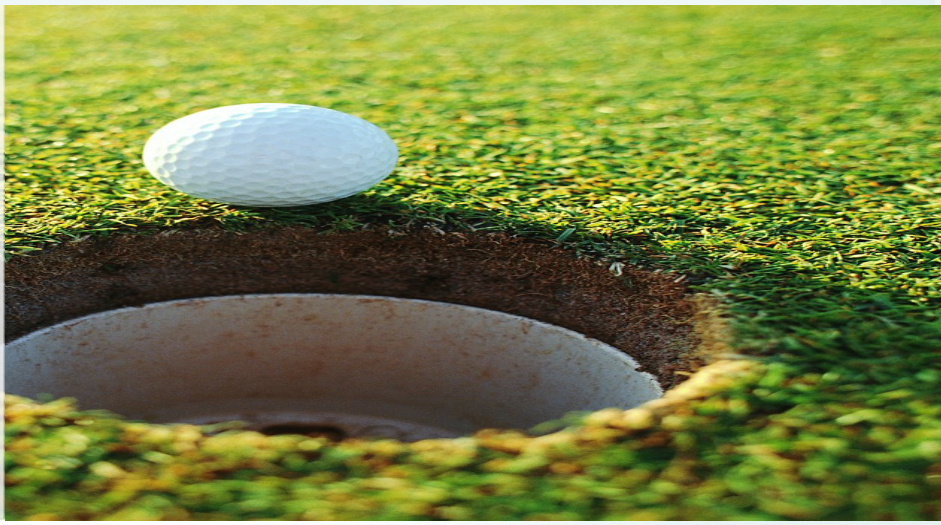
[iv] 301 N.C. 663, 666, 273 S.E.2d 285, 287-88 (1981)
[v] *Deans* at 663, .
[vi] *Id.*
[vii] *Id.*
[viii] *Id* at 662, ,citing, *Dickinson v. Pate,* 284 N.C. 576, 580, 201 S.E.2d 897, 900 (1974).
[ix] *Id*

NC FUN FACTS

In 1916, James Barber of Pinehurst, North Carolina, designed Thistle Dhu, the first quintessential miniature golf course. Word has it, that after having seen his finished course, Barber declared to his designer "This'll do!" and an American icon was born (Margolies 14). The plan resembles the preeminent source of neo-classical landscape design, the Tuileries Garden at the Louvre. Geometric shapes are coupled with symmetric walkways, fountains, and planters.

Margolies, John. "Miniature Golf." New York: Abbeville Press, 1987
Source: http://www.terrastories.com/bearings/miniature-golf



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property; the plaintiffs had performed the maintenance necessary to keep the road passable; permission to use the road had neither been sought nor given; and the plaintiffs testified they considered the road to be their own and had always had the right to use it."[x]

In the case at hand, however, one of the co-tenants of the home place, Howard, had already signed a release and permissive use agreement that characterized his use of the road as intermittent and permissive. If one co-tenant's use is permissive, how could the others use be different?

The court reasoned that even though Howard signed a document stating that his use was permissive, there were two other co-tenants living at the dwelling located on the home place and evidence shows their use to be similar to the use in *Dickenson v. Pate*. "They always acted like they were certain that they had a right to use it and needed no one's permission to do so."[xi]

The court did not rule that despite permissive use by one co-tenant, the other co-tenants use of a dirt road was adverse; it merely held that there is sufficient evidence to rebut the presumption of permissive use.[xii] The plaintiff's became owners of all the different co-tenant interests, succeeding to Howard's interest as well as the other owner occupiers. It appears that some of the co-tenants never lived on the premises and thus arguably never adversely possessed an easement.

"Some of the co-tenants never lived on the premises and thus arguably never adversely possessed an easement."

When a party acquires an easement by adverse possession, their use defines the scope of the easement.[xiii] Thus, an adverse use by a homeowner for farming and a residence results in an easement for the same. Such use will never ripen into an easement to subdivide and develop a subdivision, though such an easement could be eventually adversely possessed if used as such for the required time period.

It makes sense that if one acquires an easement by prescriptive use, one gets what one uses. In the Deans case, they have, at best, a right of way for residential and farming purposes for accessing several co-tenants' shares in the farm. An interesting issue not raised by the court is whether or not a co-tenant who adversely possessed an easement for use of accessing a co-tenants share can use that easement to access the whole parcel when another co-tenants use was agreed to be permissive? The answer may be found in the basic foundations of the law of co-tenancy.

"There is privity when the adverse possessor leaves the property by will."

The owner of a fractional share, with an easement, should be allowed to access the home place for 100 percent use. This would be the case even when the other co-tenants did not have an easement and the easement adversely possessed is limited to that co-tenant's share. The ¼ co-tenant has a right to use the whole property, subject to the rights of the other co-tenants. A co-tenant's use could and would include enjoyment of the whole parcel including the residence, not just an undivided interest.[xiv]

The Deans, however, purchased or inherited all the interest in the property, including the shares that may have the easement. Would that not be an increase in the burden over the servient easement tract? Probably not, as the Deans could already use their co-tenant easement to access the whole parcel. The increased ownership interests did not change the actual use of the easement as the burden stayed the same.

Adverse possession is a strange area of the law and one of its attributes is the transfer of land without a written instrument. A basic tenet of NC law is that one transfers land in writing and that the writing is not good as to third parties until it is recorded in the county wherein the land is located.[xv] That general principal includes land acquired by adverse possession and land being acquired by adverse possession.[xvi] The Deans never had a written transfer of the easement

[x] *Id.* at _____, _____, citing, *Dickinson v. Pate,* 284 N.C. 576, 582-4, 201 S.E.2d 897, 901-02 (1974).
[xi] *Deans* at 663, .
[xii] *Id.*
[xiii] Webster's Real Estate Law in North Carolina, 5th Edition 1999, Section 15-18f
[xiv] Webster's Section 7-8
[xv] NCGS § 47-18.
[xvi] See Generally, Webster's § 14-9

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to them as successor in title, but there are, of course, exceptions to every rule.

Tacking is "the legal principle whereby successive adverse users in privity with prior adverse users can tack successive adverse possessions of land so as to aggregate the prescriptive period of twenty years."[xvii] There is privity of possession between family members when the initial adverse possessor dies and his heirs take possession of the property by descent.[xviii] There is privity when the adverse possessor leaves the property by will. If a deed is drafted and the description does not include the property that is or has been adversely possessed, the grantee in that deed is not able to tack to the previous possession, because the grantor and grantee are deemed to not be in privity.[xx]

The court, however, ignored tacking even though arguably applicable and reasoned that (taken in the light most favorable to plaintiffs) the evidence is sufficient to permit a finding by the jury that Varnell used the dirt road without interruption, openly, notoriously and adversely, under claim of right, from 1941 until his death in 1972, a period of approximately thirty one years. His adverse use of the road for more than twenty years ripened into an easement by prescription, and the applicable legal principle is not tacking but succession.[xxi] The court cited *Dickenson,* ". . .because an appurtenant easement is incidental to the possession of the dominant tenement, every succeeding possessor is entitled to the benefit of it while it continues to exist as such an easement and he remains in possession."[xxii]

The explanatory notes to this section of the Restatement explain this principle of succession as follows:

> An easement appurtenant is not a normal incident of possession but must at some time have been effectively created as incidental to the possession of the dominant tenement. . . . The possessor of the dominant tenement who claims the benefit of such an easement must prove the manner and the circumstances of its creation. . . . An easement appurtenant, once created, so long as it exists, attaches to the possession of the dominant land and follows it into whosesoever hands it may come.[xxiii]

"…make it a rule to never certify to access when it is an easement by prescription…"

Since an easement appurtenant is incidental to the possession of the dominant tenement, every succeeding possessor is entitled to the benefit of it while it continues to exist as such an easement and he remains in possession. It is immaterial how he comes into possession, whether by conveyance or by operation of law, whether rightfully or wrongfully. Even one who comes into possession of a dominant tenement wrongfully will be entitled, as against the possessor of the servient tenement, to the benefit of all easements appurtenant to the dominant tenement.[xxiv]

Succession makes perfect sense in the context of appurtenant easements, and as such does away with the need of a written transfer or privity for tacking. The court felt that if adverse possession could be proved, the… "Deans would be entitled to the benefits of a prescriptive easement as a successor in interest.[xxv] The Deans ultimately won their appeal, but are now tasked with proving their case in trial court.

The Deans case illustrates several interesting points of law, but, despite both sides' best efforts, the case remains in litigation. We all know access is essential, but we need to remember that adverse possession is really a chose in action until it is reduced to writing. Real property attorneys need to make it a rule to never certify access when it is an easement by prescription, unless they get the easement reduced to a recorded agreement. The reverse is true as well if you are trying to clear title; never discount the soil road that shows up on the survey or tax map, it is probably somebody's access.

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[xvii] *Deans* at 664, , citing Dickenson 284 N.C. at 585, 201 S.E.2d at 903.
[xviii] Webster's Real Estate Law in North Carolina, Volume 1, Section 14-9, Page 654 (5th ed. 1999)
[xix] *Price v. Thomrich Corp.*, 275 N.C.385, 167 S.E.2d 766 (1969).
[xx] *Ramsey v. Ramsey,* 229 N.C. 270, 49 S.E.2d 476 (1948).
[xxi] *Deans* at 664, , citing *Dickenson*, 284 N.C. at 586, 201 S.E.2d at 903.3 R. Powell, Real Property, para. 418 (1973).
[xxii] *Deans* at 664, .
[xxiii] 5 Restatement of Property, Explanatory Notes s 487, comment A at 3029-30 (1944); See Boyden v. Achenbach, 86 N.C. 397 (1882).
[xxiv] 5 Restatement of Property, Explanatory Notes s 487, comment E at 3033 (1944).
[xxv] *Deans* at 664, .

Whoa! Slow Down: Many Claims are Preventable

By Michael Kelley, Senior Claims Counsel

Depending on the year, the percentage of claims related to the failure to perform a thorough review of all closing documents can reach as high as 33 percent of all claims opened. Taking a moment to slow down and take a second look at the closing documents, may eliminate up to one third of all claims.

The single largest source of claims involves errors with the legal description. One example of a legal description error is the lack of a legal description altogether (the infamous "see attached exhibit" when in a rush to the courthouse where no attachment is made to the deed or deed of trust). Other common legal description errors are the attempted conveyance of the wrong lot or unit number, incomplete legal descriptions, and errors within the legal description such as missing calls or incorrect plat book references. Errors in legal descriptions account for nearly one half of all preventable claims.

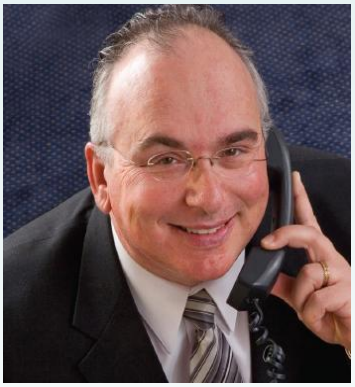
The silver medal of preventable claims goes to problems with the notary and/or attestation of closing documents. Notary problems range from the lack of a notary, to the improper type of certificate form, to the incomplete attestation (failure to recite who actually appeared before the notary or omitting their capacity). A review of the deed or deed of trust prior to recording would catch most of these obvious errors.

It is true that corrective documents, re-certifications, or reformation actions are available to cure these common errors, but, in a bankruptcy situation, these simple errors can lead to a total loss. The failure to perform a thorough review of closing documents accounts for 20 percent of all direct losses incurred each year.

There are two types of preventable claims that share third place for frequently occurring preventable errors. The failure to execute and incorrect grantor/grantee claims often arise when the lending institution prepares the deed of trust. The cause of this tendency appears to be an institutional mind-set in which the lender is focused on the borrower and not the people or entity in title. An example is where an LLC is the borrower, but the individuals are in title. A quick look at the title work would catch this error before it happens.

As the lead time for the delivery of closing packages continues to dissipate, it is still incumbent on the attorney to prevent these simple, but all too often occurring errors within the closing documents. Reliance on printed check lists or the best practice outlines developed by RELANC (http://www.relanc.com/standards-of-practice.htm) should greatly eliminate closing document errors. If your name appears on the closing documents, you owe it to yourself and to your clients to take a second look as claims can be costly for all involved.

MEET OUR TITLE ATTORNEYS



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Drew was born in Kittery, Maine, but grew up outside of Creedmoor, North Carolina. He attended the University of North Carolina in Chapel Hill where he earned a Bachelor of Arts in Political Science in 1985. Drew continued his education at North Carolina Central University School of Law where he received a Juris Doctor cum laude in 1989. He then went on to receive his L.L.M. from the University of Miami in Real Property Finance and Development in 1991. Drew served as an Adjunct Professor at North Carolina Central University School of Law and taught Real Property Finance and Land Transfer from 1991-1992. In 1992, Drew joined a Burlington, North Carolina law firm as a staff attorney heading up their Residential Real Estate Department. In 1994, Drew opened up his own practice in Mebane, NC, concentrating in residential and commercial real property law. Drew joined Investors Title as a Title Attorney in 1998. He is a board-certified specialist in Real Property Law (residential transactions), has been a speaker at continuing education seminars for attorneys and realtors, and is a contributing author to the real property section of *North Carolina Lawyers Weekly*.

When a will fails to provide compensation for a decedent's executor, state law dictates that the county court clerk has discretion to award an appropriate fee and, absent an abuse of discretion, that award will not be disturbed, according to the North Carolina Court of Appeals. That ruling came in a case that developed after Earl F. Slick, a Winston-Salem resident, died in May 2007. In his Will, Slick named four individual executors, including Caroline Gamble. Gamble was a vice president of Slick Enterprises until she was terminated in October 2008, when she was simultaneously asked to resign as one of Slick's executors. Six months later, Gamble filed a petition with the county clerk asking to resign and requesting executor fees of roughly $142,000. Slick's widow and one of the other executors objected to Gamble's fee arguing, *inter alia*, that she had already been paid for her services because her salary at Slick Enterprises had been increased from $350,000 to $500,000 annually. Following a hearing, the Assistant Clerk awarded Gamble $71,000 in fees, and both parties initially appealed to the superior court, which affirmed the award. That decision prompted an appeal to the North Carolina Court of Appeals, which also affirmed the award. In reaching that outcome, the appellate court said the clerk's order indicated that the clerk had considered all of the relevant factors, as required by state law. Among those factors were the four million dollars of professional fees that the estate had already incurred. According to state law, those fees may be considered in awarding executor fees, and the evidence supports a holding that they were—any assertion to the contrary, the court said, "is wholly without merit."

--*In re Slick,* No. COA10-774, N.C. Ct. App. 4/5/11

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