

## *Adverse Possession and Maine's Tradition of Permissive Use*

**Casenote:** Weeks v. Krysa (2008)

In a case that shows that the finer points of adverse possession law in Maine are still evolving, the Maine Supreme Court overturned the lower court that had found for the party claiming adverse possession. The lower court had found that the claimants had met the requirements of adverse possession based on their seasonal use of the lot in question (the “disputed lot”), and granted them title to the land.

### **Facts**

The issue before the court was whether or not the type and scope of the use of the disputed lot by the claimants was adequate to establish the elements of adverse possession under Maine law. The claimants’ use of the disputed lot consisted of summer-time use only. The claimants’ activities included allowing their children to play on the lot and crossing over the lot to visit other friends and to go to a nearby store. They also crossed the lot to access the lake that the lot bordered on.

The claimants also cut and cleared trees from the disputed lot, and had planted a garden that extended from their own land onto the disputed lot (although the claimants were uncertain as to the location of the property line). The owners of the disputed lot were only seen once in over 30 years. For many years the claimants even paid the taxes on the lot, but that had not continued most recently.

### **Elements of Adverse Possession**

The court began its analysis by stating the law of an adverse possession case in Maine. A party claiming title by adverse possession has the burden of proving, by a preponderance of the evidence, that possession and use of the property was:

- (1) actual;
- (2) open;
- (3) visible;
- (4) notorious;
- (5) hostile;
- (6) under a claim of right;
- (7) continuous;
- (8) exclusive; and
- (9) for a duration exceeding the twenty-year limitations period.

The court explained, “[F]or adverse possession, to create title, does not consist alone of mental intentions but must also be based on the existence of physical facts which openly evince a

purpose to hold dominion over the land in hostility to the title of the real owner, and such as will give notice of such hostile intent.”

The issue in the case came down to the fifth element - whether or not the use was in fact “hostile”. To negate the element of hostility, the landowner can show that the use of the land was done with their permission. In this case there was no evidence of *explicit* permission for the claimants to use the lot.

### **Maine’s Tradition of Permissive Use**

The Court ruled that Maine's tradition of permissive land use negated the claim that the claimant use of the property could be considered hostile. The court explained how Maine has an "open lands tradition, [where] recreational use of unposted open fields or woodlands and any ways through them are presumed permissive and do not diminish the rights of the owner in the land." ([Lyons v. Baptist School of Christian Training](#)) The Lyons case, from 2002, established that public *recreational* use of private land is presumed permissive, and therefore negates the establishment of a prescriptive easement.

The Court also pointed to a case from 1882, [Barrows v. McDermott](#), where the Court explained that traditionally the crossing over of fields and woodlands to access “great ponds”<sup>1</sup> is permissive, and not considered trespassing. This tradition dates back to when Maine was still a part of Massachusetts. Because part of the use of the lot by the claimants was to access the lake, that usage was deemed permissive.

Maine tradition of permissive use is also supported by legislation that protects landowners from liability when they allow the public to use their land. This law is known as the [Recreational Use Statute](#).

### **Gardening and Clearing Land**

The other activities that the claimants in the case argued for in support of their claim was the gardening and clearing of trees on the disputed lot. These types of activities are more traditionally thought of the acts that establish the elements of adverse possession. Unlike simply crossing over the lot, the cutting of trees and planting the garden show the intent of the claimant to take control of the land in question. A key part of adverse possession is that the claimant uses the land as if it was their own.

The court rejected this argument because of the extent of the use of the land did not rise to the level of an intent to displace the owners. The court explained that because the clearing of trees was only done occasionally, it was not a sufficient act to claim ownership. The planting of

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<sup>1</sup> Ponds and lakes over 10 acres.

the garden that went onto the lot was not considered done under a claim of right or hostile because the claimant was not certain where the property line in fact was.

### **Conclusion**

As with all cases, the facts as applied to the law ultimately determine the outcome. With adverse possession cases, as well as [prescriptive easement cases](#), the claimant has a high burden to meet to prove their case. Here the extent and type of use of the land by the claimants could not overcome Maine's tradition of permissive use. The level of use was determined to be more of a recreational use, as opposed to evidence of a claim of ownership. And even though the lot in question appeared to be abandoned, the court noted that lack of use by the owner has no relevance to a case of adverse possession.