Don’t Go There!
High Burden to Establish a Prescriptive Easement in Alabama
Cindy Williams, Partner


The burden to establish a prescriptive easement in Alabama is onerous and, from a practical standpoint, it is unlikely that the course of normal relations between neighbors would meet the standard required. In Hanks, coterminous property owners whose properties were divided by an old logging road brought action against a property owner at the end of the road asking the court to enjoin the defendant from using the road. The defendant prevailed at the trial court and the plaintiffs appealed. The case was reversed and remanded on appeal. On remand, the trial court determined that the defendant had a prescriptive easement over the road. The plaintiff appealed a second time. The appellant court reversed a second time failing to find facts to support a prescriptive easement.

On remand, the trial court determined that the plaintiff’s property line was the center line of the road and, therefore, the road was co-owned by the two plaintiffs. According to the undisputed evidence, the road ran over unimproved farm and timber land and that for more than 20 years the defendant, as well as other nearby property owners, had used the road without objection from the plaintiffs or their predecessors in title. The defendant presented nine witnesses who testified they had used the road for many years without receiving specific permission from anyone. One witness, 75 years old, testified that she had used the road all of her life and remembered specifically someone stopping her on the road to tell her that President Franklin D. Roosevelt had died. Another witness, a 74 year old farmer, testified that he had used the road to haul corn and cotton from his fields and that if anyone minded his using the road, they didn’t say anything about it.

The plaintiffs testified that they knew others had used the road for years and that they did not mind the use since most had been confined to recreation or agricultural purposes. In the 1990s, the defendant had timber cut on his property and put down gravel to improve the road so he could haul his timber out. Again, the plaintiffs had no objection to that use once the defendant assured them he intended to maintain the road. However, recently the defendant had begun to sell top soil from a dirt pit on his property and had used the road to haul dirt. The plaintiffs did object to that use.

It is settled law in Alabama that private road use is presumed to be permissive. An easement cannot be established merely by the use of the road for a period of twenty years or more but must be adverse to the owner, under claim of right by the party using the road, exclusive, continuous and uninterrupted, with actual or presumptive knowledge of the owner. A permissive use does not ripen into a prescriptive or adverse use unless there had been a repudiation of the permissive use. Express permission by the owner is not required for permissive use. Rather, permission is presumed absent evidence to the contrary. There must be actual notice of a hostile claim by the party using the road, or acts or declaration of hostility so manifest and notorious that actual notice is presumed, in order to change the presumed permissive use into one that is hostile.

In summary, use of a private road for twenty years without express permission of the owner does not establish a prescriptive easement. The use is presumed to be permissive. Even if you were using the road during Roosevelt’s time, your use of the road today is by license that can be withdrawn by the owner at any time.