

Adverse Possession and a “Fence of Convenience”

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Overview

When land is possessed by someone that knows the possession violates the ownership rights of someone else, the concept of adverse possession can come into play. It's a legal principle that says a person without legal title to a tract of land may acquire legal ownership based on continuous possession absent the true owner's permission. If the true owner does not exercise their right to eject the violator after a certain period of time, the true owner will be prevented from excluding the violator and a new title to the tract at issue could be issued to the violator who then would be the actual owner of the tract. But there are elements that must be established to successfully assert an adverse possession claim. In addition, certain facts can defeat an adverse possession claim - one of those is that a fence that is not on the actual legal boundary is not a "fence of convenience."

Adverse possession and a "fence of convenience" – it's the topic of today's post.

Background

Each state has its own adverse possession statute and associated timeframe after which adverse possession can be claimed. The elements of an adverse possession claim also vary from state to state. One common requirement is that the party claiming adverse possession must assert a claim that is "hostile" to the true owner's rights. That certainly means that the permission for the usage must not have been granted. It also means that the adverse possessor knows that their asserted possession is against the true owner's rights.

Here's a sampling of cases involving adverse possession and a brief description of the court's holding:

- *Gibbons v. Lettow*, 42 P.3d 925 (Or. Ct. App. 2002) (no acquisition by adverse possession because continuous use of land not made for statutory period).
- *Ebenhoh v. Hodgman*, 642 N.W.2d 104 (Minn. Ct. App. 2002) (acquisition of adverse possession occurred because planting of crops on disputed strip for over 40 years demonstrated sufficient continuous use exclusive of any other party).
- *Davis v. Chadwick*, 55 P.3d 1267 (Wyo. 2002) (fence used continuously for over 50 years for grazing of cattle and horses; survey revealed that fence not on boundary, but fence held to be boundary under theory of adverse possession; fence not fence of convenience);
- *Kosok v. Fitzpatrick*, No. 2008AP2351, 2009 Wisc. App. LEXIS 883 (Wisc. Ct. App. Nov. 17, 2009) (plaintiff established statutory elements of adverse possession of disputed strip of land for 20 years; fence remnants were sufficient to "raise a flag of hostility" and were, in fact, treated as the boundary between the properties).



- *Wallace v. Pack, et al., No. 12-0277, 2013 W. Va. LEXIS 1012 (W. Va. Sup. Ct. Oct. 3, 2013)*(trial court properly determined that defendants acquired 28 acres via adverse possession; uses of disputed tract included enclosing portions with fencing, keeping livestock, picking berries, picnicking, etc.).

Fence of “Convenience”

Sometimes a fence is not located on the actual border (partition) between adjacent parcels simply because it is not convenient to construct it there because of the terrain or natural obstructions that make it practically impossible to locate the fence on the actual property boundary. A fence that the adjoining landowners know is not on the actual surveyed line can give rise to a comparable concept – the “doctrine of practical location.” The usage of a particular line by the adjoining owners for the statutory timeframe (the same length of time that applies to adverse possession), can lead to that line becoming the actual legal boundary. The question in this situation is whether the fence is a “fence of convenience.” The fence is simply placed where it is convenient for the adjoining landowners. In that situation, adverse possession cannot apply in states that have a "hostility" requirement as part of an adverse possession statute or the common law. This precise issue came up in a recent court opinion from Wyoming.

Lyman v. Childs, 2023 WY 16 (2023)

The defendants asserted that the plaintiffs were trespassing and took action to eject them. In response, the plaintiffs filed an adverse possession claim against the defendant for approximately 100 acres of property deeded to the defendant, but on the plaintiffs’ side of a fence. The trial court found the fence was not built in accordance with the surveys because it was a fence of convenience - it was the best place to build the fence given the terrain. It was not meant to delineate the property line.

Note: When a fence is one of convenience then it is presumptively permissive, so an adverse possession claim will fail.

The trial court ruled in favor of the defendants and the plaintiffs appealed. The Supreme Court of Wyoming began by noting that the plaintiffs had presented a prima facie case for adverse possession – they had actual possession of the property on their side of the fence; the use was notorious (open and obvious to the defendant) given their use of the property and the no trespass signs they posted; the no trespass signs were enough to show an exclusive use; and the combination of the fencing, signs, and use showed hostility towards the true owner; and the use had been continuous and uninterrupted for the required 10 years needed to establish adverse possession. Once the plaintiffs showed a prima facie case of adverse possession, the burden of disproving adverse possession falls on the defendants.

The showing that a fence is one of convenience establishes permissive use, which defeats the hostility requirement for adverse possession. The Supreme Court explained that several factors are considered when determining if a fence is one of convenience including: the fence’s physical appearance; whether the fence meanders; whether the fence avoids natural barriers and obstacles; whether trees or bushes are used as fencing material; changes in elevation on the deeded boundary compared to the fence line; and the type of land the fence is dividing, among other things. The trial court found the fence did not run-in straight lines, avoided natural barriers, and changed direction for no reason other than



terrain. The fence often used trees or bushes as posts and the irregularity showed it was not meant to depict the property line. The trial court gave more credit to the defendants' expert who stated that the fence was likely built in this manner to reduce costs of building along the actual boundary line, because the easier the fence was to build the cheaper it would be. It would have been cheaper to just follow the easiest path than to require the builders to try to build the fence on along the rough terrain.

The Supreme Court noted that the trial court is to be given considerable deference when weighing testimony and found no reason to interfere with the trial court's decision to provide more weight to the defendants' expert. The plaintiffs asserted that if the fence was one of convenience, then the defendant needed to prove that each disputed parcel was enclosed by a fence of convenience rather than a boundary fence. The Supreme Court rejected this argument because the plaintiffs had relied on a case which contained differing facts than this one where the fence was all used for the same purpose of blocking ground and not used to be a boundary for a homeplace. The plaintiffs could not prove any parcel was used differently than the next. The plaintiffs also claimed that the trial court allowed a layman's testimony to be utilized as expert testimony when it should not have been because the layman had not been to the site in over 30 years. However, the Supreme Court noted that the fence had not moved over that 30-year timeframe and, as a result, the layman's testimony was valid. Finally, the plaintiffs claimed that they used the property in such a manner that the use had to be seen as hostile. The Supreme Court held the plaintiffs failed to record any deeds that showed they owned the property, so there was no notice to the defendants on the record. Further, using the ground for grazing or recreational purposes is not a hostile use in Wyoming.

The Supreme Court affirmed the trial court's decision that the defendants had lawfully ejected the plaintiffs off the property because the plaintiffs did not own the property and held the plaintiffs did trespass. The plaintiffs began to trespass once they were aware of the defendants' notice to not come onto the disputed property any longer, but they continued to do.

Conclusion

A fence that is not actually on the surveyed property boundary may give rise to a quiet title action either under an adverse possession theory or the theory of boundary by acquiescence. However, those theories will not apply if the fence is merely a fence of convenience. That determination will be based on the particular facts of each situation.

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