ADVERSE POSSESSION 101

Clay M. Steely
Porter Hedges LLP
1000 Main St., 36th Floor
Fax: 713-226-6269
Telephone: 713-226-6669

South Texas College of Law
Real Estate Conference
June 5, 2014

II. ADVERSE POSSESSION

A. Generally

Adverse possession is defined by statute as an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person. TEX. CIV. PRAC. & REM. CODE ANN. §16.021 (1)(West 2002) (the "Code"). The concept of adverse possession allows a person to claim title to real property presently owned by another. *Frazier v. Donovan*, 420 S.W.3d 463, 467 (Tex.App.- Tyler 2014, no pet.). A "claim of right" is defined as the claimant's intention to appropriate or claim the land as his or her own. *See Calfee v. Duke*, 544 S.W.2d 640, 642 (Tex. 1976). This claim is necessarily hostile or adverse to any claims to the land by other parties. A claim of right may be established by a public declaration of the claim or by open and visible acts. Verbal assertion of a claim is unnecessary. *See Ramirez v. Wood*, 577 S.W.2d 278 (Tex. Civ. App.—Corpus Christi 1978, no writ). However, the Texas Supreme Court has made it clear that "there must be adverse possession, not just adverse beliefs." *Tran v. Macha*, 213 S.W.3d 913, 914 (Tex. 2006). Entry and possession of land without a claim of right is a trespass and does not support a claim for title by adverse possession. *City of Houston v. Church*, 554 S.W.2d 242, 245 (Civ. App.-Houston [1st Dist.] 1977, writ ref'd. n.r.e). The key is to intend to claim the property as the adverse possessor's own. *Kasmir v. Benavides*, 288 S.W.3d 557, 564 (Tex. App.- Houston [14th Dist.] 2009, no pet.).

To establish title through adverse possession, the adverse possessor must assert a claim of *exclusive* ownership. *Bynum v. Lewis*, 393 S.W.3d 916, 918 (Tex.App.- Tyler 2013, no pet). There must be an intention to claim property as one's own to the exclusion of all others, and mere occupancy of land without the intention to appropriate it will not support a claim of adverse possession. *Ellis v. Jasing*, 620 S.W.2d 569, 571 (Tex. 1981). Mere use of land is not normally enough. Exclusive possession, a claim of exclusive ownership and excluding others are key to an adverse possession claim. In short, in the world of adverse possession there is truth in the old adage "good fences make good neighbors" if a party plans on making a claim. *See Tran*, 213 S.W.3d at 915.

B. Pleading

If an adverse possession claim is made as a defensive matter (i.e., as a defense to a trespass to try title suit), it must be specifically pled (as title by

limitation or adverse possession). TEX. R. CIV. P. 789; *Mayers v. Paxton*, 78 Tex. 196, 199 14 S.W. 568 (1890). Obviously, if it is an affirmative claim it must be asserted.

C. Fact Question?

Adverse possession normally is a question of fact, and only in rare instances is a court justified in holding that adverse possession has been established as a matter of law. *Rhodes v. Cahill*, 802 S.W.2d 643, 645 (Tex. 1990); *Bywaters v. Gannon*, 686 S.W.2d 593, 595 (Tex. 1985); see also *Dickson v. Dickson*, 993 S.W.2d 735, 737-739 (Tex. App.-Houston [14th Dist.] 1999, no pet.). However, as in any case, if the material facts are undisputed or otherwise established conclusively, a claim of adverse possession may be determined as a matter of law. See *Natural Gas Co. v. Pool*, 65 S.W.3d 121 (Tex. App.-Amarillo 2001) pet. denied, 124 S.W.3d 188 (Tex. 2003).

D. Burden of Proof

The claimant must establish the elements of adverse possession. *Rhodes v. Cahill*, 802 S.W.2d 643, 645 (Tex. 1990) (holding that claimant did not prove each element as matter of law). *Spiratus v Guthrie Trust*, 712 S.W.2d 177, 178-180 (Tex. App.—San Antonio 1986, writ ref. n.r.e.). The claimant has the burden of proving the location of the tract over which it claims adverse possession. *Stafford v. Jackson*, 687 S.W.2d 784, 786 (Tex. App.-Houston [14th Dist.] 1985, no writ).

E. Jurisdiction and Venue

Jurisdiction in land title cases normally lies in the district court, except for statutory county courts as authorized in Chapter 25, TEX. GOV'T. CODE. Venue is in the county where the land (or where at least part of the land) is located. TEX. CIV. PRAC. & REM. CODE §15.01

F. Attorney Fees

Section 16.034 of the Code provides that in a suit for possession, attorney's fees and costs (a) shall be awarded to the prevailing party if the person unlawfully in possession made a claim of adverse possession that was groundless and made in bad faith and (b) may be awarded if there is no groundless or bad faith claim present. Regardless of (a) or (b), to recover attorney's fees, the person seeking possession must give the unlawful possessor a written demand to leave/vacate by registered or certified mail at least ten days *before filing* the claim for recovery of possession. The demand must state that, if the person unlawfully in possession does not vacate the premises within ten days the court may enter a judgment against him or her for costs and attorney's fees in an amount deemed reasonable as determined by the court. Other than provided in Section 16.034, attorney's fees and costs are not available in an adverse possession

lawsuit. Unfortunately, fees and costs are not available when the prevailing party is the party in lawful possession at the time of suit. *Smith v. Brooks*, 825 S.W.2d 208, 211 (Tex. App.—Texarkana 1992, no writ).

G. Accrual

Where the statutes refer to "the cause of action accrues", this language refers to the record owner's cause of action to recover adversely possessed land, not to the adverse possessor's claim nor any other claim of the record owner. *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 63 (Tex. 2011). Thus, limitations begins to run/accrue on the date the adverse possessor first actually and visibly appropriates the claimed land. *Id.*

H. Common Elements

Generally, the elements of an adverse possession claim depend on the statute upon which the claim is based. Under any adverse possession claim (3, 5, 10 or 25 year statutes- see below), Texas law requires that the claimant prove the "common elements":

1. a visible appropriation and possession of the land, sufficient to give notice to the record title holder that is
2. peaceable,
3. under a claim of right hostile to the title holder's claim, and
4. that continues for the duration specified in the applicable statute.

Stafford v. Jackson, 687 S.W.2d 784, 786 (Tex. App.-Houston [14th Dist.] 1985, no writ).

After these elements are satisfied, the court must then determine which limitations period applies and whether it can be satisfied. There are 3, 5, 10 and 25 years statutes and each has its particular brand of adverse possession.

I. The Tree-Year Statute: Title or Color of Title

Section 16.024 of the Code provides that "[a] person must bring suit to recover real property held by another in a peaceable and adverse possession under title or color of title not later than three years after the day the cause of action accrues." *See Rogers v. Ricane Eriten*, 772 S.W.2d 76, 80 (Tex. 1989). Color of title means a consecutive chain of transfers to the person in possession that is not regular due to (a) something not being recorded or recorded correctly, but that does not want "of intrinsic fairness or honesty", or (b) is based on a certificate of headright, land warrant, or land script. This statute is seldom used and normally seen when a deed is not recorded or executed in the manner prescribed by law and title is granted to the claimant as long as the deed and transfer would otherwise be proper. *Oncale v. Veyna*, 789 S.W.2d 802, 805 (Tex.App.-

Houston [14th Dist.] 1990, no writ). Note that use of the property is not required under this statute.

J. The Five-Year Statute: Recorded Deed and Taxes

Section 16.025 of the Code provides:

> "[a] person must bring suit no later than five years after the day the cause of action accrues to recover real property held in a peaceable and adverse possession by another who; (1) cultivates, uses or enjoys the property; (2) pays the applicable taxes on the property; and (3) claims the property under a duly registered deed."

The adverse possessor under the five year statute must prove the common elements as well as these particular elements existed continuously during 5 consecutive years for this statute to apply- any gap will result in a failure. *Pinchback v. Hockless*, 158 S.W.2d 997, 998 (Tex. 1942), but see *Keels v. Keels*, 427 S.W.2d 913, 917 (Civ.App.- Tyler 1968, no writ).

Also, in order to rely on a recorded deed to satisfy the "registered deed" requirement, the land described in the deed must be the same as the land held in possession. *Brokel v. McKechnie*, 6 S.W.623, 624 (Tex. 1887); *Cullins v. Foster*, 171 S.W.3d 521, 530 (Tex.App.- Houston [14th Dist.] 2005, pet denied).

And while any claims based on forged deeds or deeds executed under a forged power of attorney are excluded under the statute [Tex.Civ.Prac. & Rem.Code 16.025(b)], the requirement of a recorded deed can be satisfied if the deed purports to convey the land in question and appears to be valid on its face, even if the grantor had no title to convey. See *W. End API Ltd. v. Rothpletz*, 732 S.W.2d 371, 375 (Tex.App.-Dallas 1987, ref. n.r.e.).

Finally, to satisfy the payment of taxes requirement, the taxes must be paid before they are delinquent. *Thomas v. Rhodes*, 701 S.W.2d 943, 947 (Tex.App.- Fort Worth, 1986, writ ref'd n.r.e.). In short, you cannot let years of taxes go unpaid, pay them all at once and then claim adverse possession.

K. The Ten-Year Statute- Bare Possession

Section 16.026 of the Code provides:

> "[a] person must bring suit no later than 10 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property. Actual and visible appropriation must exist during the

> entire ten-year period for an adverse possession claim to be successful."

see also Cherokee Water Co. v. Freeman, 145 S.W.3d 809, 817 (Tex. App.—Texarkana 2004, pet. denied). Thus, the record owner of a parcel of real property must sue a person who adversely possesses and continuously cultivates, uses or enjoyed the property. For example, a farmer who has farmed a tract of land for 24 years, but allows portions to lie fallow every fourth year cannot establish adverse possession under this section. *Parker v. McGinnes*, 809 S.W.2d 752, 753 (Tex. App.—Houston 1st Dist. 1991, no writ).

Also, there is a qualified size limitation on what can be adversely possessed by bare possession. For example, your uncle has been using 500 acres of your Texas cattle ranch to raise free range chickens for eleven (11) years, and you were asleep at the wheel. What do you do? Do not give up all hope. Section 16.026 provides that, without a title instrument (no deed), peaceable and adverse possession is limited to 160 acres including improvements, *unless* the number of acres actually enclosed exceeds that amount. So if your uncle raises the chickens and does not enclose all 500 acres (but otherwise satisfies the "visible appropriation" element), he is limited to 160 acres. However, if he encloses the 500 acres, then you may lose 500 acres because when the number of enclosed acres exceeds 160, the adverse possession will extend to the real property actually enclosed. Even with the fence the uncle must establish he built the fence, for the purpose of enclosing the disputed tract ("designed enclosure" rule). If the fence existed before he took possession and he just took advantage of it, then adverse possession under the ten year statute probably does not apply. See *Terrill v. Tuckness*, 985 S.W.2d 97, 108 (Tex.App.- San Antonio 1998, no pet.).

Further, if claiming under a duly registered deed or other memorandum of title that fixes the boundaries of the claimed land, then the claim will only extend to the boundary specified in the instrument. *Sun Oper. LP v. Oatman*, 911 S.W.2d 749, 758 (Tex.App.- San Antonio 1995, writ denied).

The fact that the ten-year adverse possessor claimants may be unaware of the exact location of the boundary lines and include lands in controversy by mistake will not defeat a claim of limitation title. *King v. Inwood N. Assocs.*, 563 S.W.2d 309, 313 (Tex. Civ. App.-Houston [1st Dist.] 1978, no writ), *but see Tran*, 2l3 S.W.3d at 913. Nevertheless, the limitation claimant must plead and prove the identity of the land claimed by establishing its location and by showing the extent of his or her interest in such land. *Benavides*, 655 S.W.2d at

300; *Ramirez v. Wood*, 577 S.W.2d 278, 282 (Tex. Civ. App.—Corpus Christi 1978, no writ).

Obviously, payment of taxes on the land is not necessary to perfect a ten-year limitation title. *Gotoskey v. Grawunder*, 158 S.W. 249, 251 (Tex. Civ. App.-Galveston 1913, no writ).

L. The Twenty-Five Year Statute- Bare Possession

Section 16.027 of the Code provides:

> "[a] person, regardless of whether the person is or has been under a legal disability, must bring suit not later than 25 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses or enjoys the property."

This is another "bare possession" statute, except that it applies notwithstanding any legal disabilities (see below) which might extend the ten-year statute. The limitation period is the twenty-five-year period following the accrual of the cause of action. A claim accrues on the date the adverse possessor can satisfy all of the common elements.

M. The Twenty-Five Year Statute - Recorded Instrument

Section 16.028 of the Code provides:

> "person, regardless of whether the person is or has been under a legal disability, may not maintain an action for the recovery of real property held for 25 years before commencement of the action in peaceable and adverse possession by another who holds the property in good faith and under a deed or other instrument purporting to convey the property that is recorded in the county where any part of the real property is located."

A claim under this provision hinges on a recorded deed which conveys title. The statute applies even if the instrument is void. *Cortina v. P.I. Corp.*, 385 S.W.3d 613, 617-618 (Tex.App.- Corpus Christi 2012, no pet). This statute applies even if the "rightful" owner was under a disability.

The good faith requirement may be open to various interpretations. The 5th Circuit has found it means lack of fraud, artifice, or intrinsically unfair practices. *Chapman v. Moser*, 532 F.2d 426, 430 (5th Cir.- Tex. 1976).

Note that use of the property is not required in this provision. Also note that the deed and good faith requirements are not found in Section 16.027. Also, note limitations under Section 16.027 are 25 years following accrual of the cause of action. Limitations under Section 16.028 begins 25 years before the action is filed.

N. Prima Facie Evidence of Title- Record Title for 25 Years

Section 16.029 provides an evidentiary note that is worth pointing out:

> "[in] a suit involving title to real property that is not claimed by this state, it is *prima facie evidence* that the title to the property has passed from the person holding apparent record title to an opposing party if it is shown that (1) for one or more years during the 25 years preceding the filing of the suit, the person holding apparent record title to the property did not exercise dominion over or pay taxes on the property; and (2) during that period the opposing parties and those whose estate they own have openly exercised dominion over and have asserted a claim to the land and have paid taxes on it annually before becoming delinquent for as long as 25 years."

Moral of the story – pay your taxes at least once every twenty-five years. This is merely an evidentiary provision, and the prima facie evidence of ownership of land may be overcome under the various statutes noted above.

O. Tacking of Successive Interests

Tacking is the theory that the applicable limitation period can be passed from one adverse possessor to another as long as privity exists between each holder and his or her successor. The limitations claimant may combine or "tack" the periods of possession of two or more adverse claimants in the same property for purposes of satisfying a limitations claim. *Boyle v. Burk*, 749 S.W.2d 264, 266 (Tex. App.—Fort Worth 1988, writ denied); *Fish v. Bannister*, 759 S.W.2d 714, 717 (Tex. App.—San Antonio 1988, no writ); *Dale v. Stringer*, 570 S.W.2d 414, 416 (Tex. Civ. App.—Texarkana 1978, writ ref d, n.r.e.). To prove privity, the adverse claimant merely has to show a transfer and delivery of possession from one possessor to the next. *Trevino v. Trevino*, 64 S.W. 3d 166, 172 (Tex.App.- San Antonio 2001, no pet.). In short, an adverse claimant need not adversely use and possess the property for the

full limitations period if the claimant tacks his time onto that of a prior adverse possessor which time added together satisfies the test above.

P. Effect of Disability

"If a person entitled to sue for the recovery of real property or entitled to make a defense based on the title to real property is under a legal disability at the time title to the property vests or adverse possession commences, the time of disability is not included in a limitations period." TEX. CIV. PRAC. & REM. CODE ANN. §16.022(b). Disability applies to the 3, 5 and 10 year statutes.

Legal disabilities include persons "(1) younger than 18 years of age, regardless of whether the person is married; (2) of unsound mind; [or] (3) serving in the United States Armed Forces during time of war." TEX. CIV. PRAC. & REM. CODE ANN. §16.022 (a). "Except as provided in Sections 16.027 and 16.028, after the termination of the legal disability, a person has the same time to present a claim that is allowed to others under this chapter." TEX. CIV. PRAC. & REM. CODE ANN. §16.022 (c). Recurrence of a disability after it is interrupted does not toll the time limitation. *Holt v. Hedberg*, 316 S.W.2d 955, 957 (Tex. Civ. App.-Fort Worth 1958, no writ).

Q. Examples

1. Shared Use

Shared use of a strip of land between two adjacent property owners defeats a claim of adverse possession as the use is not inconsistent or hostile to the legal owner. *Tran v. Macha*, 213 S.W.3d 913, 914 (Tex. 2006). This is true even when the owners are ignorant of the actual boundary line. *Id.* Same result occurs with a claim by an easement grantee's use against a grantor. *See Brooks v. Jones*, 578 S.W.2d 669, 673 (Tex. 1979).

2. Planting Crops

A claim of adverse possession cannot be based on sporadic, irregular use. However, where yearly crops are raised, actual occupancy between seasons is not always required. For example, if the land use is apparent, full time occupancy may not be necessary (i.e. not "using" during non-growing season.) See *Hardy v. Bumpstead*, 41 S.W.2d 226, 227 (Tex. Comm. App. 1931, judgment adopted). However, if a planting is skipped (i.e., the land is allowed to sit fallow), then the chain is probably broken. See *Parker v. McGinnes*, 809 S.W.2d 752, 753 (Tex. App.—Houston 1st Dist. 1991, no writ).

Here is another example. A claimant entered land to remove brush, grass, and weeds from the property. He planted crops in succeeding years, but

during that period would have been willing to pay rent to the owner if the owner had so demanded. The claimant did not assert a claim of ownership until after 11 years had passed. The court denied the claim of by adverse possession and held that mere possession by the claimant, without an intention to appropriate the land, does not support an adverse possession claim. *Hensz v. Linnstaedt*, 501 S.W.2d463, 465-466 (Civ. App.-Corpus Christi 1973, no writ).

3. Cutting Weeds

Mere cutting of weeds or grass does not satisfy the notice requirement for an adverse possession claim. *Id.*; *McDonnold v. Weinacht*, 465 S.W.2d 136, 144 (Tex. 1971).

4. Recreational Use

Camping on land for purposes of hunting and fishing does not satisfy the notice requirement for an adverse possession claim. *W T. Carter & Bros. v. Ruth*, 275 S.W.2d 126, 131 (Tex. Civ. App.—Beaumont 1955, no writ).

5. Grazing Livestock

Grazing livestock can be sufficient if coupled with enclosure of the property. *Rhodes*, 802 S.W.2d at 646; *Welch v. Matthews*. 642 S.W.2d 829, 834 (Tex. App.—Tyler 1982, no writ); *Butler v. Hanson*, 455 S.W.2d 942, 945-46 (Tex. 1970). Running live stock on an open range in common with others is not sufficient possession. *Walker v. Maynard*, 31 S.W.2d 168, 170 (Tex. Civ. App.-Austin 1938, no writ).

6. Cotenants/Joint Possession

A "tenancy in common" is a tenancy by two or more persons, in equal or unequal, undivided shares, where each person has the right to possess the whole but with no right of survivorship. *Frazier v. Donovan*, 420 S.W.3d at 467. A co-tenant seeking to establish title by adverse possession must, in addition to the common elements and applicable year limit statute, establish an ouster of the co-tenant. *Id.*; *Dyer v. Cotton*, 333 S.W.3d 703, 712 (Tex.App.-Houston [1st Dist.] 2010, no pet.). In short, any recognized joint or common possession by the claimant and another party should defeat any adverse possession. *See W. End API Ltd. v. Rothpletz*, 732 S.W.2d 371, 375-376 (Tex. App.-Dallas 1987, ref. n.r.e.); *Tran*, 213 S. W.3d at 914-15; *Rick v. Grubbs*, 214 S.W.2d 925, 927 (Tex. 1948). The statute requires that such possession be "inconsistent with" and "hostile to" the claims of all others. Joint use is not enough because 'possession must be of such character as to indicate an assertion of a claim of exclusive ownership in the occupant. *Tran*, 213 S.W.3d at 914 (cited cases omitted). The adverse possession claimant must prove ouster - unequivocal, unmistakable and hostile acts the

possessor took to disseize the other co-tenants. *See King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 756 (Tex. 2003). So if a co-tenant conducts acts that are consistent with its right of co-tenancy, it may not be considered unmistakably hostile. *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 72 (Tex. 2011). In an oil and gas context, the simple act of paying a royalty rather than a co-tenant's full share, when coupled with other factors establishing this type of relationship (division orders, deed records, annual review of production records) has been found to be sufficiently hostile and notice of an adverse claim for purposes of an adverse possession claim. *Id.* at 72.

7. Mineral Interest

A mineral estate, even when severed from the surface estate, may be adversely possessed under the various statutes. *Natural Gas Pipeline Co. v. Pool*, 124 S.W.3d 188, 193 (Tex. 2003). Yet possession of the surface alone is not sufficient; to mature title by limitations to a mineral estate, actual possession of the minerals must occur. *Id.* at 193; *Sarandos v. Blanton*, 25 S.W.3d 811, 815 (Tex.App.- Waco 2000, pet. Denied).; *Taub v. Houston Pipeline Co.*, 75 S.W.3d 606, 625 (Tex.App.- Texarkana 2002, pet. Denied). In the case of oil and gas, that means drilling and production of oil and gas. *Pool* at 193. For example, holding over after a mineral lease expired, continuing production, and paying a small royalty while at the same time drilling new wells may be considered adverse possession as the resources are being depleted, and thus the use is adverse and hostile. *Id*. at 196.

8. Pre-existing Fence

If a fence existed prior to the adverse claimants use or possession, then the adverse claimant must establish its purpose was to claim possession or it will be construed as a casual fence. *Blankenship v. Carpenter*, 741 S.W.2d 578, 580 (Tex. App.—Waco 1987, den.) (holding that a designed enclosure and continuous use for grazing purposes for statutory period gives sufficient notice of hostile claim to support claim of adverse possession).

9. Public Dedication

A person may not acquire title through adverse possession or right of title to real property dedicated to public use. TEX. CIV. PRAC. & REM. CODE ANN. §16.030; *Ellis v. Jansing*, 620 S.W.2d 569, 570 (Tex. 1981).

CASE INDEX

Page(s)

CASES

STATUTES

OTHER AUTHORITIES