DETERMINING BOUNDARIES AND ACCESS TO REAL PROPERTY:

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I. DETERMINING BOUNDARIES

A. ADVERSE POSSESSION: KNOWING YOUR BOUNDARIES AND OTHER LIMITATIONS.

INTRODUCTION

Generally, cases involving claims of adverse possession or boundary by practical location will be tried to the Court sitting without a Jury. Many trial judges have not had significant experience in adverse possession cases. Trial judges come from a diverse background and arrive on the bench with a wealth and variety of education and experience which does not consistently include the niceties of esoteric real property law.

Adverse possession is a "common law" action; no statute creates the right to adverse possession. Instead, a statute of limitation terminates one's right to defend such claims after 15 years. A word about the common law; there is nothing common about it. The common law consists of judge created rights which are based on what judges before them ruled in various cases dating back to Old England.

For a quick summary of the elements of adverse possession written in a "user friendly" approach, also see my article: "(Not a) Learned Treatise on Adverse Possession", The Hennepin Lawyer, Vol. 68, No. 8, Aug. 1999.

The two theories are distinct, not interchangeable, and at least one case hints that lawyers had better plead both theories and present proof under both if they wish to maintain both theories through trial. In one case, the Court of Appeals discussed the failure of one party to plead boundary by practical location and suggested that they could have waived their right to proceed under that theory.

("Although the doctrine of practical location, at least in effect, is similar to acquiring title by adverse possession, the two theories are distinct and require proof of different elements"). Denman v. Gans**,** 607 N.W.2d 788, 796 (Minn.App. 2000) see also Engquist v. Wirtjes, 243 Minn. 502, 507, 68 N.W.2d 412, 417 (1955) (stating practical location is "independent of adverse possession").

STATUTE OF LIMITATION TO RECOVER TITLE & POSSESSION OF REAL PROPERTY

Minn. Stat. § 541.02 sets forth the statutory limitation of time for bringing an action to recover real estate. It states:

> "No action for the recovery of real estate or the possession thereof shall be maintained unless it appears that the plaintiff, the plaintiff's ancestor, predecessor, or grantor, was seized or possessed of the premises in question within 15 years before the beginning of the action.
>
> Such limitations shall not be a bar to an action for the recovery of real estate assessed as tracts or parcels separate from other real estate, unless it appears that the party claiming title by adverse possession or the party's ancestor, predecessor, or grantor, or all of them together, shall have paid taxes on the real estate in question at least five consecutive years of the time during which the party claims these lands to have been occupied adversely.
>
> The provisions of paragraph two shall not apply to actions relating to the boundary line of lands, which boundary lines are established by adverse possession, or to actions concerning lands included between the government or platted line and the line established by such adverse possession, or to lands not assessed for taxation."

BASIC ELEMENTS OF ADVERSE POSSESSION

There are five basic elements of possession which a claimant must establish in order to obtain legal confirmation of ownership of land. The claimant must show he had actual, exclusive, open, continuous and hostile possession of the real property in question for a period greater than 15 years. If he has, he has become the owner of the property involved and the court confirms that ownership.

The courts often also mention "notorious" possession which makes one presume that Jesse James is involved somewhere. In one recent case, the Court of Appeals again used the term apparently interchanging it with the requirement of "open" possession.

> Once it is established that the use is actual, notorious, exclusive, and continuous, a presumption is established that the use was hostile, and it is the burden of the party opposing the prescriptive right to show that the use was permissive.

Ebenhoh v. Hodgman, 642 N.W.2d 104, 112 (Minn.App. 2002)

SURVEY VERSUS ADVERSE POSSESSION/PRACTICAL LOCATION

Boundaries established by adverse possession or by practical location of boundary will supersede the outcome of an indisputably correct survey.

> It is clear that "(a) boundary clearly and convincingly established by practical location may still prevail over the contrary result of survey."

Phillips v. Blowers, 281 Minn. 267, 274, 161 N.W.2d 524, 529 (1968). Wojahn v. Johnson, 297 N.W.2d 298, 304 (Minn. 1980). It is routine that adverse possession cases

and practical location cases start when someone decides to get a survey and discovers that the surveyed line is other than where everyone thought.

ACTUAL POSSESSION-POSSESSION IS 9/10'S OF THE LAW

The claimant must have been in possession of the property for the statutory period. Duh. Possession is 9/10 of the Law. You could look it up somewhere, no doubt.

The claimant must have some domination and control over the property. The degree of possession will vary based on the type of property. If it's crop land and the claimant tills it for 15 years, and lets it lie fallow during the winter months, this is sufficient possession even though the claimant is not on the property for months at a time. See for example, Voegele v. Mahoney, 54 N.W.2d 15, 18, 237 Minn. 43, (Minn. 1952).

In a recent case, "substantive and frequent" agricultural and homestead-related uses of the land, including mowing the lawn, was sufficient. Schauer v. Zellman, 2001 WL 1530630, *3 (Minn.App. 2001). But bear in mind a friend of mine who told me about the witness she deposed who testified, to her chagrin, that he'd been mowing the disputed area in question, not claiming the property by adverse possession but just because he was "ambitious".

If the property is lakeshore recreational property, then summertime only possession may be sufficient. However, see below.

SPORADIC USE IS NOT ENOUGH

BUT: sporadic use of lake property to store play equipment, mowing the grass and allowing children to play on property has been held to be insufficient by itself. The construction of a utility shed was sufficient to start the running of the statutory period, but that wasn't done more than 15 years before the suit so adverse possession failed.

Standard v. Urban, 453 N.W.2d 733, 735 (Minn.App. 1990). The Court continued in a footnote to offer some explanation, as follows:

> (FN1.) This decision is not meant to state that, as a matter of law, adverse possession cannot start until one puts up a building or other permanent or semi-permanent structure. We only find that on these facts the irregular and minimal use by the Urbans of the land at issue was, with the exception of building the shed, nowhere near the level of hostile possession under a claim of right necessary to trigger the start of the required 15-year unbroken period.

In another decision, the court stated this:

> Occasional and sporadic trespasses for temporary purposes, because they do not indicate permanent occupation and appropriation of land, do not satisfy the requirements of hostility and continuity, and do not constitute adverse possession, even where they continue throughout the statutory period. Krueger v. Market, 124 Minn. 393, 145 N.W. 30; Bazille v. Murray, 40 Minn. 48, 41 N.W. 238; 2 C.J.S., Adverse Possession, §§ 24, 125b. This is especially true where, as here,

> there is nothing about each separate trespass to indicate that it is anything but a trespass, much less an assertion of adverse right likely to be persisted in.

Romans v. Nadler, 14 N.W.2d 482, 485, 217 Minn. 174 (Minn. 1944)

In a case I tried which was affirmed by the Court of Appeals, my client claimed ownership by way of adverse possession up to a fence line. Ronning vs. Nikolai, 2001 WL 799681 (Minn. Ct. App. 2001). The appellant Tungseth argued that the claimed area was wild, natural, not maintained, and therefore not possessed. We argued successfully that the claimant's possession was appropriate to the area. Owners had gone for walks in the wooded area, children had ridden BMX bikes, and horses had been ridden in this area. Photos depicted a fairly dense underbrush in areas. The property was bounded by a fence. The Trial Court and Court of Appeals held the possession was sufficient and appropriate to the area. The presence of the fence undoubtedly helped immeasurably in winning this lawsuit.

OPEN POSSESSION

This basic tenet may seem obvious. The purpose is logical. Where a statute of limitations is operating to bar his rights, the record "legal" owner should be on notice through the claimant's open possession that his property is being seized. It doesn't matter whether he sees it or not, just that the possession is visible. I've written that a moonshine still parked out in the woods may constitute open use if the use is appropriate to the site.

> The Hickersons argue that the improvements were not "open, notorious, and hostile" because the improvements may not have been visible to their predecessors in title from adjoining Green Gables Road. We construe "open," however, to mean visible from the surroundings, or visible to one seeking to exercise his rights.

Hickerson v. Bender, 500 N.W.2d 169, 171 (Minn.App. 1993).

Minnesota has never required the affirmative denial of the true owner's title by "no trespassing" signs. Although such signs might signal that the adverse-possession requirement of *openness* of possession was satisfied, there is no requirement under Minnesota law that mandates use of no trespassing signs.

Ganje v. Schuler, 659 N.W.2d 261, 269 (Minn.App. 2003).

EXCLUSIVE POSSESSION

I tried really hard to think of a good example dealing with exclusive possession; maybe this seems too obvious. I have written in the past that if I otherwise adversely possessed a public beach in the company of a thousand others, my claim would not succeed because not exclusive (oh, and because of the public property exception. However, see Magnuson v. City of White Bear Lake, 203 N.W.2d 848, 851, 295 Minn. 193 (Minn. 1973): holding

that adverse possession claimants may prevail enforcing a boundary determination agreed to by a city in a settlement discussed below.)

The Court of Appeals addressed the exclusive possession element in a recent unpublished opinion, Morris vs. Smith, 2002 WL 31654983 (November 26, 2002): "The possession was exclusive; no one except Morris used or cared for the Morris driveway and the rest of the land on the south side of the historic fence."

I could imagine one of a group of hunters claiming that he had acquired land by adverse possession (setting aside for a moment whether that use is sufficiently continuous); but if he used the land as one of a group of ten hunters, his use is probably not exclusive.

HOSTILE POSSESSION

There is plenty of hostility to go around once these cases get into suit; tempers flare, nothing seems more personal than a piece of ground in my backyard. But this is not what is meant by use of the term.

> ...the requirement of 'hostile' possession does not refer to personal animosity or physical overt acts against the record owner of the property but to the intention of the disseizor to claim exclusive ownership as against the world and to treat the property in dispute in a manner generally associated with the ownership of similar type property in the particular area involved.

Norgong v. Whitehead, 225 Minn. 379, 31 N.W.2d 267 (1948); Thomas v. Mrkonich, 247 Minn. 481, 78 N.W.2d 386 (1956); Ehle v. Prosser, 293 Minn. 183, 188, 197 N.W.2d 458, 462 (Minn. 1972).

> Adverse possession sufficient to form the basis for title to land must be hostile as to the title of the owner. A claimant under such title must have intended to occupy the land under the exercise of exclusive ownership as against the world. See 1 Dunnell, Dig. & Supp. s 114, and cases cited.
>
> Under this doctrine, we have frequently held that where an occupant's original possession of land was permissive the statute of limitations did not commence to run against the owner until the occupant had subsequently declared or otherwise manifested an adverse holding and notice thereof had been brought to the attention of the owner.

Beitz v. Buendiger, 144 Minn. 52, 174 N.W. 440; Cameron v. Chicago, M. & St. P. Ry. Co., 60 Minn. 100, 61 N.W. 814; > Backus v. Burke, 63 Minn. 272, 65 N.W. 459; > Junes v. Junes, 158 Minn. 53, 196 N.W. 806.

Norgong v. Whitehead, 225 Minn. 379, 31 N.W.2d 267 (Minn. 1948)-- Excerpt from page 31 N.W.2d 269

The disseizor's use of a gate and road after replacing a previously permitted lock with his own lock on the chain triggered the presumption of hostility. The burden of demonstrating that use was permissive therefore shifted to the owner. Anderson v. Olson, 2002 WL 1545642, *4 (Minn.App. 2002).

Good or bad faith on the part of the claimant is irrelevant although I've tried one such case to a jury with good success questioning the good faith of the claimant. Legally, it is irrelevant that Mr. Jones went out of his way to steal your land, or that he sat on it inadvertently with pure heart and a gentle soul thinking he was within his very own legal description.

In Cool v. Kelly, 78 Minn. 102, 104, 80 N.W. 861 (1899), this court said:

> '* * * An adverse intent to oust the owner and possess for [293 Minn. 190] himself may be generally evidenced by the character of the possession and the acts of ownership of the occupant. His good or bad faith in the premises is not material.'

Ehle v. Prosser, 197 N.W.2d 458, 293 Minn. 183 (Minn. 1972)
---------- Excerpt from page 197 N.W.2d 462

ACKNOWLEDGMENT OF TITLE DEFEATS HOSTILE ELEMENT
The Supreme Court notes that a claimant defeats his own claim where he admits the ownership of his neighbor.

> An acknowledgment by the adverse claimant of the owner's title before the statute has run in his favor breaks the continuity of his adverse possession, and it cannot be tacked to any subsequent adverse possession.

Olson v. Burk, 103 N.W. 335, 94 Minn. 456 (Minn. 1905). In another decision, the claimant defending against an ejectment action admitted he had contracted with the legal owner to purchase the property. This acknowledgment of ownership defeated his claim. See also, Lambert v. Bongard, 648 N.W.2d 712, 714 (Minn.App. 2002), where the claimants acknowledged they held permissive possession under a valid contract for deed.

CONSENT
In order for possession to be adverse, it cannot be commenced or continued with the consent of the legal owner. His consent makes the possession non-hostile.

> Under this doctrine, we have frequently held that where an occupant's original possession of land was permissive the statute of limitations did not commence to run against the owner until the occupant had subsequently declared or otherwise manifested an adverse holding and notice thereof had been brought to the attention of the owner. > Beitz v. Buendiger, 144 Minn. 52, 174 N.W. 440; >

> Cameron v. Chicago, M. & St. P. Ry. Co., 60 Minn. 100, 61 N.W. 814; > Backus v. Burke, 63 Minn. 272, 65 N.W. 459; > Junes v. Junes, 158 Minn. 53, 196 N.W. 806.

Norgong v. Whitehead, 31 N.W.2d 267, 269, 225 Minn. 379 (Minn. 1948);

INFERRED CONSENT

The Court has inferred consent where there was a close family relationship:

> We have likewise held that the existence of a close family relationship between the claimant of land and the record owner, such as existed in the instant case, created the inference, if not the presumption, that the original possession by the claimant of the other's land was permissive and not adverse; > Lustmann v. Lustmann, 204 Minn. 228, 283 N.W. 387; > O'Boyle v. McHugh, 66 Minn. 390, 69 N.W. 37; > Collins v. Colleran, 86 Minn. 199, 90 N.W. 364; and that when such original use was thus permissive it would be presumed to continue as permissive, rather than hostile, until the contrary was affirmatively shown. > Omodt v. Chicago, M. & St. P. Ry. Co., 106 Minn. 205, 118 N.W. 798.

Norgong v. Whitehead, 31 N.W.2d 267, 225 Minn. 379 (Minn. 1948)
---------- Excerpt from page 31 N.W.2d 269

This inference has been carried forward recently and remains the law:

> See Beitz v. Buendiger, 144 Minn. 52, 54, 174 N.W. 440, 441 (1919) (explaining the impact of a close familial relationship in an adverse possession case). In these situations, the presence of the close familial relationship gives rise to "the inference, if not the presumption" that the use is permissive.

Boldt v. Roth, 618 N.W.2d 393, 397 (Minn. 2000).

CONTINUOUS POSSESSION

That possession must be continuous seems fairly obvious but there are a couple nuances. It must be uninterrupted in any way. Application of Stein, 256 Minn. 485, 99 N.W.2d 204 (Minn. 1959). 1904. He must “keep his flag flying”, Romans v. Nadler, 14 N.W.2d 482, 485, 217 Minn. 174 (Minn. 1944). An interruption of possession is fatal to the adverse possessor’s claim, Simms v. William Simms Hardware, 216 Minn. 283, 12 N.W.2d 783 (Minn. 1943). Further, though the possession is subsequently interrupted, if it had continued for 15 years before the period of interruption, title has ripened and should be established.

> To maintain a title, acquired by adverse possession, it is not necessary to continue the adverse possession beyond the time when title is acquired. The title once

> acquired is a new title; a legal title though not a record title is not lost by a cessation of possession, and continued possession is not necessary to maintain it.

Fredericksen v. Henke, 167 Minn. 356, 209 N.W.257 (Minn. 1926).

However, the possession can be continuous even though it is interrupted for some period of time. A party was absent from the state for a four month period. This did not interrupt his otherwise "continuous" possession over a 15 year period.

Nygren v. Patrin, 179 N.W.2d 76, 288 Minn. 54 (Minn. 1970)

A bright-line test for how much activity constitutes continuous possession of a property for adverse-possession purposes does not exist. Instead, the rule of thumb used is that the disseizor must be using the property as his or her own, i.e., regularly and matched to the land's intended use.

Ganje v. Schuler, 659 N.W.2d 261, 268 (Minn.App. 2003).

CONTINUOUS POSSESSION-TACKING OF OWNERSHIPS

The claimant of adverse possession does not need to show that she or he held possession of the property for 15 years if their predecessors in title can be shown to have possessed the property.

> But since the record fails to disclose how long the quarry had been in operation prior to its acquisition by the Plachecki brothers in 1924, Delano must tack to this prior user the subsequent use by the brothers in order to establish the 15-year period required to raise this presumption of adverseness.

Burns v. Plachecki, 223 N.W.2d 133, 136, 301 Minn. 445 (Minn. 1974).

> In order that adverse possession of land may ripen into title, there must be continuity of the adverse possession for the full statutory period.
>
> An acknowledgment by the adverse claimant of the owner's title before the statute has run in his favor breaks the continuity of his adverse possession, and it cannot be tacked to any subsequent adverse possession.

Syllabus by the Supreme Court, Olson v. Burk, 94 Minn. 456, 103 N.W. 335 (Minn. 1905).

> But since appellant's predecessor in title was a corporation, and there was no showing that corporate officers or agents used the land, Kroiss and appellant are not in privity. Thus, Kroiss's ownership cannot be tacked to appellant's to satisfy the requirements for adverse possession.

Forbes v. Kociscak, 2002 WL 264576 (Minn.App. 2002).

INTENT; MISTAKEN BELIEF
A claimant under such title must have intended to occupy the land under the exercise of exclusive ownership as against the world.

Norgong v. Whitehead, 31 N.W.2d 267, 269, 225 Minn. 379 (Minn. 1948).

Mistaken Possessor: That he thought his legal boundary was elsewhere and is mistaken about its "true" surveyed location is not a defense to a claim of adverse possession.

> In order to establish title by adverse possession, the disseizor must show, by clear and convincing evidence, an actual, open, hostile, continuous, and exclusive possession for the requisite period of time which, under our statute, is 15 years. Subjective intent to take land adversely is not essential in this state and title by adverse possession may be obtained even though the disseizor does not intend to take land not belonging to him so long as he does intend to exclude all others. Engquist v. Wirtjes, 243 Minn. 502, 504, 68 N.W.2d 412, 415 (1955). It is sufficient that the land is occupied by mistake. In a recent case, though the claimants did not intend to take property that did not belong to them, their use was more than the subject of a "neighborly forbearance". Owens v. Kelly, 2002 WL 31247096, 2-3 (Minn.App. 2002).

Mellenthin v. Brantman, 211 Minn. 336, 341, 1 N.W.2d 141, 143; Skala v. Lindbeck, 171 Minn. 410, 214 N.W. 271 (Minn. 1927).
Ehle v. Prosser, 197 N.W.2d 458, 462, 293 Minn. 183 (Minn. 1972)

> So in Kelley v. Green, 142 Minn. 82, 86, 170 N.W. 922, 923, a case similar in its controlling facts to those here presented, in that there also the respondent and his predecessors in title had mistakenly occupied a greater area than that within the true line, the holding in the Carli case was reaffirmed and the applicable rule restated as follows: 'Where one of two adjoining owners takes and holds actual possession of land beyond the boundary of his own [lot or] tract, under a claim of title thereto as being a part of his own land, though under a mistake as to the location of the boundary line, such possession, for the purposes of the statute, is to be deemed adverse to the true owner and a disseizin.'
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Mellenthin v. Brantman, 1 N.W.2d 141, 143, 211 Minn. 336 (Minn. 1941)

INTENT TO EXCLUDE OTHERS
Subjective intent to take land adversely is not essential in this state and title by adverse possession may be obtained even though the disseizor does not intend to take land not

belonging to him so long as he does intend to exclude all others. > Engquist v. Wirtjes, 243 Minn. 502, 504, 68 N.W.2d 412, 415 (1955). It is sufficient that the land is occupied by mistake. > Mellenthin v. Brantman, 211 Minn. 336, 341, 1 N.W.2d 141, 143; Skala v. Lindbeck, 171 Minn. 410, 214 N.W. 271 (Minn. 1927).
Ehle v. Prosser, 197 N.W.2d 458, 462, 293 Minn. 183 (Minn. 1972).

APPROPRIATE USE
This topic probably belongs under the "actual possession" element. You don't actually have to live on the property which is the subject of the claim. Even though the claimant is not in constant possession of the property, if his "possession" is appropriate to the property, courts will consider this possession for the purpose of establishing ownership:

> "To the same effect is Fredericksen v. Henke, 167 Minn. 356, 359, 209 N.W. 257, 258, 46 A.L.R. 785, where the court held: 'To constitute adverse possession, it is not essential that the adverse possessor actually live upon the land which he claims. It is enough that it is occupied and applied to the uses for which it is fit.' "

Mellenthin v. Brantman, 211 Minn. 336, 340-41, 1 N.W.2d 141, 143 (Minn. 1941).

PUBLIC PROPERTY MAY NOT BE ADVERSELY POSSESSED
A private citizen may not adversely possess adjoining public lands even though he would otherwise meet all the tests:

> ...Such limitation shall apply to actions by or in behalf of the state and the several political subdivisions thereof; provided that no occupant of a public way, levee, square, or other ground dedicated or appropriated to public use shall acquire, by reason of occupancy, any title thereto.
>
> No occupant of the land of a public or private cemetery shall acquire any title to the cemetery land by reason of the occupancy.

The statute prohibits establishment of a prescriptive easement as well. Heuer v. County of Aitkin, 645 N.W.2d 753, 757-58 (Minn.App. 2002); Claussen vs. City of Lauderdale, 681 N.W. 2d 722 (Minn. App. 2004).

MSA § 541.01, Application to state and other states; exceptions

YOU MAY NOT ADVERSELY POSSESS PUBLIC SWAMPLAND, SORRY
Sadly, this means a Minnesotan may not acquire a state swamp, Scofield v. Schaeffer, 104 Minn. 123, 116 N.W. 210 (Minn. 1908).

AND, YOU MAY NOT ADVERSELY POSSESS YOUR KIDS' SCHOOL
It's also been held that a parent may not adversely possess school ground, Junes v. Junes, 158 Minn. 53, 196 N.W. 806 (1924); Scofield v. Schaeffer, 104 Minn. 123, 116 N.W. 210 (1908); Op.Atty.Gen., 50, July 25, 1946.

PUBLIC LAND EXCEPTIONS:
I have two neighbors whose gardens, yards, etc. encroach on park land. They won't be able to claim ownership of that land and can always be removed.

Though a private person generally cannot adversely possess public lands, there still are some limited exceptions. A municipality can compromise a disputed boundary location and later be forced to honor it.

> "A municipality can settle a dispute as to a boundary line as well as can an individual. County of Houston v. Burns, 126 Minn. 206, 148 N.W. 115 (1914); > City of Rochester v. North Side Corp., 211 Minn. 276, 1 N.W.2d 361 (1941). In the latter case we held that where a municipality permits a landowner to build and make improvements on property once dedicated as a street, and makes no objection--in that case for 83 years--, the municipality is estopped to deny that the landowner owns the land."

Magnuson v. City of White Bear Lake, 295 Minn. 193, 197-98, 203 N.W.2d 848, 851 (Minn. 1973), see also, Jennen v. County of Aitkin, 2003 WL 21152491 (Minn.App. 2003).

Nonuse and failure to remove improvements or obstructions placed by the private party (acquiescence) alone are not enough to constitute abandonment by the municipality. Stadtherr v. City of Sauk Center, 180 Minn. 496, 231 N.W. 210 (Minn. 1930). There must be some affirmative or unequivocal acts of the municipality representing intent to abandon the public property. Rein v. Town of Spring Lake, 275 Minn. 79, 83, 145 N.W.2d 537, 540 (Minn. 1966).

See also Denman vs. Gans, 607 N.W.2d 788 (Minn.App 2000), where the Court recently held that waterfront property which was dedicated to the use of a small, defined group of property owners was not properly dedicated to a public use, and therefore not insulated against a claim of adverse possession by another.

But a public entity may adversely possess the property of a private citizen if other tests are met.

PAYMENT OF REAL ESTATE TAXES NOT PREREQUISITE (USUALLY)
The basic rule regarding payment of real estate taxes on claimed property is that the fact that the claimant did not pay the real estate taxes on the parcel is irrelevant. Specifically, it is not required in instances where the claim simply involves settlement of the location of a boundary; nor is it required in claims not involving an entire parcel which is taxed as a separate parcel with its own property identification number.

> It is next contended that, since plaintiff did not pay any taxes upon the disputed area, § 9187 bars his right of recovery. In making this claim appellants wholly ignore or overlook that part of the statute which reads: 'Providing, further, that

> the provisions of the foregoing proviso [relating to payment of taxes] shall not apply to actions relating to the boundary line of lands, which boundary lines are established by adverse possession, or to actions concerning lands included between the government or platted line and the line established by such adverse possession, or to lands not assessed for taxation.'

Mellenthin v. Brantman, 1 N.W.2d 141, 211 Minn. 336 (Minn. 1941)
---------- Excerpt from page 1 N.W.2d 144.

If the adverse possessor has paid taxes on the disputed property as physically occupied, even if the property's legal description on the assessment roll is inconsistent with the physical occupation, the requirement of M.S.A. 541.02 is satisfied.

LeGro v. Saterdalen, 607 N.W.2d 173, 175-76 (Minn. 2000).

> Claims relating to boundary lines of lands and claims to lands not assessed for taxation as separate tracts--both of which are presented in this case--are clearly exempt from the statutory provisions requiring the payment of taxes. Mellenthin v. Brantman, 211 Minn. 336, 1 N.W.2d 141 (1941); Skala v. Lindbeck, 171 Minn. 410, 214 N.W. 271 (1927); Riley v. Kump, 170 Minn. 58, 212 N.W. 13 (1927); > Fredericksen v. Henke, 167 Minn. 356, 209 N.W. 257, 46 A.L.R. 785 (1926); > Kelley v. Green, 142 Minn. 82, 170 N.W. 922 (1919).

Ehle v. Prosser, 197 N.W.2d 458, 293 Minn. 183 (Minn. 1972)
---------- Excerpt from page 197 N.W.2d 462

Where the owner of a lot claims title by adverse possession to an adjoining area held and claimed by him as being included under his title deed and where such disputed area is not separately assessed, it is not necessary that he should have paid taxes on such disputed area under the provisions of Mason St.1927, § 9187.

Mellenthin v. Brantman, 1 N.W.2d 141, 211 Minn. 336 (Minn. 1941)

SHORT OF ENGAGING IN A SHOOTING WAR, WAYS TO TERMINATE AN ADVERSE POSSESSOR BEFORE IT'S TOO LATE:

TRESPASS, ACTIONS IN EJECTMENT, CONVERSION, DAMAGES CLAIMS
If a property owner learns of a conflicting claim to property, I would counsel that action must be taken but would leaven that advice with some common sense. Where a fence or structure has been put in place, I would not generally start by burning it to the ground or destroying the building. This allows the offended party at trial to comment on your destruction of the evidence, seldom a good thing. District Judges are unimpressed by combatants who must be separated by gendarmes.

However, after fair warning is given stating the claim must be resolved or action will taken, and if use continues, you have to act (and/or sue). You cannot stand by while another's possession ripens into title.

One can sue to eject the other from the property, chain off a driveway (though I would still counsel caution in taking this action), or otherwise interrupt the possession. Another approach is to announce your consent to the claimant's permissive use. The problem here is that he may fire back that it's his property to use as he sees fit, or worse he just ignores you leaving the consent in limbo.

Short of property owners getting into violent confrontations guaranteed to make settlement an impossibility, I submit a timely lawsuit for ejectment before the running of the statute of limitations is an effective way to toll (stop the running of) the 15 year statute. A motion in the alternative to remove the offending fence or structure, or alternatively, for an Order that the fence may stay but that the operative date interrupting any claim is set by filing of the suit should suffice. But the lawsuit must then press ahead and not be forgotten.

ACTIONS FOR DAMAGES

You may bring an action for damages for trespass if you can show you have genuinely been hurt, or lost something. Often, there may be little proof of actual damages. The fact that another has occupied my property along a 10 foot wide strip for five years may not cause any concrete damages. A creative sort might come up with a rental or "unjust enrichment" theory. Here is what the Supreme Court has said about damages for trespass:

> The general rule is that damages in an action for trespass upon real property may be such as are appropriate to the tenure by which the plaintiff holds. Possession alone will entitle him to recover damages for any injury solely affecting it. If he seeks to recover for the future, he must show that his title gives him an interest in the damages claimed, and he can recover none except such as affect his own right, unless he holds in such relation to other parties interested that his recovery will bar their claim.

Williams v. Lynd Tp., 312 N.W.2d 110, 113 (Minn. 1981)

Although the Court commented above regarding future trespass damages, often the remedy would be the removal of the trespass rather than the award of future damages. Damages may not be based on speculation or guess,

> Here, the district court first instructed the jury: "a party asking for damages must prove the nature, extent, duration, and consequences of his or her injury." See 4A Minnesota District Judges Association, Minnesota Practice, Jury Instruction Guides--Civil, JIG 90.15 (4th ed.1999). Next, the court told the jury that it "must not decide damages based on speculation or guess"

Morlock v. St. Paul Guardian Ins. Co., 650 N.W.2d 154, 159 (Minn. 2002)**;** Peters v. Independent School Dist. No. 657, Morristown, 477 N.W.2d 757, 760, (Minn.App. 1991)**.**

NOMINAL DAMAGES

Without actual provable damages, a claimant may be limited to nominal damages. Lake Mille Lacs Inv., Inc. v. Payne, 401 N.W.2d 387, 391 (Minn.App. 1987)**.** Lake Mille Lacs Investment holds that one who commits a trespass must pay at least nominal damages even though no actual damages are shown. However, no punitive damages can be awarded for a trespass if there were no actual damages. Meixner v. Buecksler, 216 Minn. 586, 591, 13 N.W.2d 754, 757 (1944).

IS A COURT RULING NECESSARY?

Technically, when 15 years have elapsed with the claimant having maintained actual, open, continuous, hostile, exclusive possession of a property, it is the claimant's property. His/her rights are established. A court is merely confirming those rights acquired by way of adverse possession. Hypothetically at least, one could take no court action for 50 years. If the possessor's rights are later challenged, there is no statute of limitations preventing the claimant from establishing that her Grandfather acquired the disputed property in 1940.

IS A COURT RULING HIGHLY RECOMMENDED?

Witnesses die, memories fade; I tried a case with photos and memos dating back into the 1930's and Deeds going back to the early 1900's. But it is obviously becoming heavy lifting for your attorney the longer it waits. Moreover, you hand the other side many opportunities by delay. A building permit application references the surveyed legal description only without any mention of a claim of ownership of the disputed parcel. A mortgage loan application, an appraisal and any other documents which the claimant might join in or obtain might be used to argue the claimant did not intend to claim the disputed property.

NECESSITY OF PLEADING BOTH THEORIES

In one decision, the Court of Appeals recently inferred that it might bar a party from establishing practical location of a boundary if the party had proceeded solely on an adverse possession theory through the trial without ever mentioning the practical location theory. Though similar, the two theories are not identical and may require different proof. The Court goes on to state: Generally, "relief cannot be based on issues that are neither pleaded nor voluntarily litigated." Roberge v. Cambridge Co-op. Creamery Co., 243 Minn. 230, 234, 67 N.W.2d 400, 403 (1954).

Quast v. Brose 2001 WL 1035039, *2 (Minn.App.,2001)

THE 40 YEAR RULE, FERTILE OCTOGENARIANS; RULE AGAINST PERPETUITIES AND OTHER ODDITIES

The so called "Forty Year rule" does not apply against adverse possession claims, end of story. Do not ask me to explain the 40 year rule; it is beyond the scope of this seminar, and beyond my limited capabilities of understanding, sort of like the Rule in Shelley's Case, the "Fertile Octogenarian" Rule and the Rule against Perpetuities.

Seriously, the 40 year rule, Minn. Stat. 541.023, roughly provides that no claim limiting a fee owner's rights or use may be made based on a recorded instrument over 40 years old where no one has recorded an instrument to preserve that claim. It's designed to prevent the effect of ancient conditions subsequent and limiting restrictions, for example. I brought a claim of adverse possession based on possession going back over 60 years to the construction of an ancient fence. A defendant raised the 40 year rule as a defense. The trial court ruled in our favor determining we had proven title by both adverse possession and by practical location of boundary; the Court of Appeals affirmed in an unpublished opinion, Ronning vs. Tungseth, 2001 WL 799681, Case No. C8-01-116 (Minn.App. 2001) and the Supreme Court declined to hear a Petition for Review. See also Wichelman v. Messner, 83 N.W.2d 800, 250 Minn. 88,, (Minn. 1957) where the Supreme Court stated:

> (1) the party desiring to invoke the act for his own benefit must have a requisite claim of title based on a source of title, which source has been of record at least 40 years; and that (2) the person against whom the act is invoked is one who is conclusively presumed to have abandoned all right, claim, and interest in the property, and that there are three classes of persons against whom no one can invoke the act: (1) those persons who seek to enforce any right, claim, interest, encumbrance, or lien founded on any instrument, event, or transaction which was executed or which occurred within 40 years prior to commencement of the action; (2) those persons who seek to enforce a claim founded on any such instrument or event which was executed or which occurred over 40 years prior to commencement of the action, who have filed proper notice within 40 years of the execution or occurrence of the instrument, event, or transaction on which it is founded; and (3) those excepted by the sixth subdivision of the act, which includes persons in possession.

THE REVERSE ADVERSE POSSESSION CASE-: "I DON'T WANT IT, YOU CAN HAVE IT. . ."

Representing a Mortgage company, I saw a neighbor bring a reverse adverse possession lawsuit trying to clear his title. The bad guy's garage was one foot over on plaintiff's lot, and Plaintiff just wanted to give up the foot. A title insurer took it over from my hapless Mortgage lender so they did not have to pay me to "defend" the lawsuit. I know of no authority which would prevent a court decision under the Declaratory Judgment Act, Minn. Stat.555.01 et seq.

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be

> claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

MSA § 555.01, Courts to construe rights

BURDEN OF PROOF: CLEAR & CONVINCING PROOF

You are familiar with the burden of proof in civil actions. One side or the other has the burden of proof on every question in civil and in criminal cases. Lower standards of proof are used in most civil cases. The short explanation is that in most civil cases, a claim is proven simply by a "preponderance of the evidence"; another way of putting it is that if fact A is more probably true than not true, then a jury is entitled to find that A is a fact. Adverse possession requires proof by clear and convincing evidence.

The clear and convincing standard is basically something less than the "beyond a reasonable doubt" standard and something greater than the "preponderance of the evidence" standard.

> In order to establish title by adverse possession the disseizor (the disseizor is the person making the claim for title against the legal owner) must show by clear and convincing evidence an actual, open, hostile, continuous, and exclusive possession of the property for 15 years. > Ehle v. Prosser, 293 Minn. 183, 189, 197 N.W.2d 458, 462 (1972); > Minn.Stat. § 541.02 (1988). The burden rests upon the disseizor to come forward with the essential facts establishing the elements of adverse possession. > Simpson v. Sheridan, 231 Minn. 118, 120, 42 N.W.2d 402, 403 (1950). The evidence must be strictly construed and amount to clear and positive proof before title by adverse possession will be granted. > Id.

Standard v. Urban, 453 N.W.2d 733, 735 (Minn.App. 1990).

STRICT CONSTRUCTION OF EVIDENCE

But the courts are not done making it hard for the claimant. The evidence they offer is also "strictly construed", i.e., looked at more closely than ordinary evidence.

> Evidence tending to establish adverse possession must be strictly construed, "without resort to any inference or presumption in favor of the disseizor, but with the indulgence of every presumption against him."

Ebenhoh v. Hodgman, 642 N.W.2d 104, 108 (Minn.App. 2002).

STANDARD OF REVIEW ON APPEAL (FOR LOSERS ONLY)

Of course, you have never lost, and will never lose a case so you can skip this material. Nor have I ever lost one. Ahem. For everyone else in the room, I note the following: Usually, the Trial Court sits as the finder of fact (juries in exceptional cases). The trial

judge's decision on the facts is given wide berth but the appellate courts look at the legal rulings anew. They do not defer to the trial judge on her/his rulings on the law. The trial judge (or jury in rare cases) sitting as finder of fact is presumed to be the best one to judge credibility of witnesses. This is a truism. Having sat through many trials, depositions, etc., the printed page cannot ever reveal all that actually goes on in the courtroom, and just how believable a particular witness is, for example.

> In boundary-line cases, the findings of the district court will not be disturbed unless "the evidence taken as a whole furnishes no substantial support for them or where it is manifestly or palpably contrary to the findings." Engquist v. Wirtjes, 243 Minn. 502, 506, 68 N.W.2d 412, 416 (1955) (quotation omitted). But whether the findings of fact support a district court's conclusions of law and judgment is a question of law, which we review de novo. Donovan v. Dixon, 261 Minn. 455, 460, 113 N.W.2d 432, 435 (1962) (noting that "it is for this court to determine whether the findings support the conclusions of law and the judgment").

Ebenhoh v. Hodgman, 642 N.W.2d 104, 108 (Minn.App. 2002).

CONFLICTING SURVEYS: QUESTION OF FACT

The trial judge's decision as to the correctness of two surveyors whose opinions are in conflict is a question of fact: Erickson v. Turnquist, 247 Minn. 529, 531-32, 77 N.W.2d 740, 742 (1956); Wojahn v. Johnson, 297 N.W.2d 298, 303 (Minn. 1980).

> Thus, for instance, when two competent surveyors disagree as to where a boundary line should be, the trial court's determination as to which surveyor is correct depends mainly on each surveyor's credibility and will not be reversed if there is reasonable support in the evidence for such a determination.

Donaldson v. Kohner, 264 Minn. 230, 233, 118 N.W.2d 446, 448 (1962).

TREES EXTENDING OVER BOUNDARIES

Another favorite boundary topic is trees which are located "on" the boundary line, and the overhanging branches of trees on another's property. The general rule is that if a tree grows in my backyard, my next door neighbor can trim branches which overhang his home, outbuildings, and yard. CAVEAT: one cannot so trim a tree as to destroy or harm it and the neighbor can be liable for significant damages because of a triple damage provision in state statute:

> The legislature supplied a statutory remedy for the wrongful removal of trees in Minn.Stat. § 561.04, which provides:
>
> Whoever without lawful authority cuts down or carries off any wood, underwood, tree, or timber, or girdles or otherwise injures any tree, timber, or shrub, on the land of another person, or in the street or highway in front of any person's house, city lot, or cultivated grounds, or on the commons or public grounds of any city or

> town, or in the street or highway in front thereof, is liable in a civil action to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor * * *.

Miller-Lagro v. Northern States Power Co., 566 N.W.2d 94, 97 (Minn.App. 1997). Affirmed in part and reversed in part Miller-Lagro v. Northern States Power, Co., 582 N.W.2d 550 (Minn. 1998). Municipalities and public utilities generally will not be liable under the statute. Miller-Lagro v. Northern States Power, Co., 582 N.W.2d 550, 553-54 (Minn. 1998).

B. BOUNDARY BY PRACTICAL LOCATION

Another means of establishment of a boundary is "practical location". These two separate theories are often confused because they are used somewhat interchangeably both by litigants and by the courts in boundary line cases. This theory looks to the neighbors' actions and understanding respecting a boundary which may be inferred often through circumstantial evidence.

According to the Supreme Court, there are three ways to establish a boundary by practical location:

> Ordinarily, in order to establish a practical location of a boundary line it must appear (1) the location relied on was acquiesced in for the full period of the statute of limitations; or (2) the line was expressly agreed upon by the parties and afterwards acquiesced in; or (3) the party barred acquiesced in the encroachment by the other, who subjected himself to expense which he would not have done if there had been a dispute as to the line.

Romanchuk v. Plotkin, 9 N.W.2d 421, 427, 215 Minn. 156 (Minn. 1943).

The Courts say there are three separate ways to establish a boundary by practical location; they look a lot alike, and all three require that the defendant sits back on his porch not objecting to the claimant's use for the same 15 year period. Basically, the first theory requires that the defendant stands by silently while the other acts as though the boundary line is the actual line; the second theory requires that there is evidence of an agreement as to the boundary followed by the stand by, stand back period; the third theory injects that the claimant spends some money (like building a fence) that he otherwise would not had he not believed in the parties' mutual understanding of the line, sort of an "estoppel" theory for the lawyers.

PRACTICAL LOCATION DISTINCT FROM ADVERSE POSSESSION

While this theory looks similar to adverse possession (for instance, it carries the same statute of limitation period), the Courts state that the two theories are distinct:

> Engquist v. Wirtjes, 243 Minn. 502, 507, 68 N.W.2d 412, 417 (1955) (stating practical location is "independent of adverse possession").

Pratt Inv. Co. v. Kennedy, 636 N.W.2d 844, 848 (Minn.App. 2001); Quast, supra.

DOES PRACTICAL LOCATION REQUIRE SOMETHING AFFIRMATIVE?
It does get muddy, our Court has, on occasion, said that practical location requires some act like possession, building a fence or something:

> While case law does not say that "possession" is an element of establishing a boundary by practical location, "[a]cquiescence entails affirmative or tacit consent to an action by the alleged disseizor, such as construction of a physical boundary or other use * * *." > LeeJoice v. Harris, 404 N.W.2d 4, 7 (Minn.App.1987). Implicit in the case law is the notion that the disseizor has claimed, by way of some action, that a boundary has existed for the statutory period, and the disseized has acquiesced to that boundary.

Pratt Investment Company v. Kennedy, 636 N.W.2d 844, 849 (Minn.App. 2001).

However, acquiescence by definition is inaction. Webster's defines acquiesce as to "grow quiet, to consent without protest". Pratt Investment Co. talks of affirmative or tacit consent. In other words, where consent can be inferred through inaction where action would be expected. The Pratt Investment court points to the "non-action" by the party losing title to the property. Sheep rearing may not be enough, LeeJoice v. Harris, 404 N.W.2d 4, 7 (Minn.App.1987). Where the land is vacant and heavily wooded, there is then no possession sufficient to establish a boundary by practical location, Pratt Investment . Some use is required, see the following:

> In addition, if appellant or his predecessor never substantially used or possessed the disputed territory, appellant can hardly claim that he has "relied" upon any supposed boundary for purposes of the practical location doctrine.

Fishman v. Nielsen, 237 Minn. 1, 6, 53 N.W.2d 553, 556 (1952) cited in Pratt Investment.

One of the more concrete, easy to understand examples is found in Fishman:

> Acquiescence exists when adjoining landowners, for example, mutually construct a fence with the intention that the fence represents an adequate reflection of the property line. Fishman, 237 Minn. at 7-8, 53 N.W.2d at 555-56 (finding practical location by acquiescence when parties and their predecessors in title built dividing fence as close as possible to actual boundary and remained satisfied with fence's location for statutory period);

as quoted in Pratt Inv. Co. v. Kennedy, 636 N.W.2d 844, 850 (Minn.App. 2001).
And in a recent case with the same factual scenario as above, the court held "although the aid of a survey may often be useful in determining the location of a boundary, one is not

required here" because of the existence of the fence which established the boundary. Bickhardt v. Gerwerth, 2002 WL 31109381, 2 (Minn.App. 2002).

PRACTICAL LOCATION BY AGREEMENT

A principal method for establishing a boundary by practical location is for the neighbors to come to an agreement followed by acquiescence for the statutory period. Insufficient evidence was found in Wojahn v. Johnson, 297 N.W.2d 298, 305 (Minn. 1980) to support a finding of practical location.

LACK OF CONDUCT VERSUS PASSIVE CONSENT!

One of my favorite quotes on this topic comes from Engquist: 243 Minn. at 507-08, 68 N.W.2d at 417

> *It must be kept in mind that the acquiescence required is not [243 Minn. 508] merely passive consent to the existence of a fence or sod strip, but rather is conduct or lack thereof from which assent to the fence or sod strip as a boundary line may be reasonably inferred*.

Engquist v. Wirtjes, 68 N.W.2d 412, 417, 243 Minn. 502 (Minn. 1955). You may be asking yourself what "lack of conduct" means, and how one could distinguish it from mere "passive consent". Best to look to surrounding circumstances.

The holding in Engquist has been reaffirmed recently in Pratt Investment Co. v. Kennedy, 636 N.W.2d 844, 849 (Minn.App. 2001) so remains good law. I have cited Engquist in support of my plaintiff's claim of practical location while my opponent has cited it just as earnestly in opposition to my claim.

It is action or inaction from which consent to a fence as a boundary line can be inferred, it is not mere silent consent to the fence. An illustration from a case I tried is in order. A fence existed within about 6 to 10 feet of the "true" boundary for over fifty years. What courts really look at in these situations are surrounding circumstances to try to figure out whether the fence was thought of as the boundary. In our case, some strong evidence was found in the testimony of a tree cutter. A survey done recently showed the legal line was off the fence by as much as ten feet at some points. While the neighbor tried to claim he had always thought of the additional ten feet as his, he was damned by his conversation with the tree cutter where he told him to send the bill for cutting a tree in the disputed area over to my client since it "is his tree".

In a truly rare instance, one neighbor just conceded honestly that he did recognize the fence as his boundary and even though liable to his buyer for breach of warranty of title continued to assert the truth he'd always believed the fence was the line. Such testimony clearly makes it easier for a trial court.

One major dispute I've litigated pertained to whether or not the claimant's predecessor built a fence intending that it represent the boundary line. Obviously, with an ancient fence, this is very hard to prove directly. We spent significant time in trial talking about whether the fence was constructed to keep marauding sheep away from pine trees, how

big those boughs were, whether sheep like pine needles (or not). One witness claimed he recalled a fifty year old conversation indicating just that.

> When a fence is claimed to represent a boundary line under an acquiescence theory, one of the most important factors is whether the parties attempted and intended to place the fence as near the dividing line as possible. > Id. at 508, 68 N.W.2d at 417; see > Fishman v. Nielsen, 237 Minn. 1, 53 N.W.2d 553 (1952).

Wojahn v. Johnson, 297 N.W.2d 298, 305 (Minn. 1980).

RESOLUTION OF AN OVERLAP VIA PRACTICAL LOCATION

Practical location may resolve an overlap problem. See Matter of Zahradka, 472 N.W.2d 153, 154 (Minn.App. 1991) where the court commented in the syllabus:

> Where certificates of title issued to adjoining landowners include legal descriptions which overlap, the doctrine of practical location of boundary may be applied to resolve disputed ownership.

The claiming owner had constructed a parking lot which then remained without objection.

TORRENS TITLES PROTECTED AGAINST ADVERSE POSSESSION & BOUNDARY BY PRACTICAL LOCATION

I recently had a perfect adverse possession and/or practical location case in a western suburb but was chagrined to find that the claimed property was within a Torrens certificate. The applicable statute reads:

> Registered land shall be subject to the same burdens and incidents which attach by law to unregistered land. This chapter shall not operate to relieve registered land or the owners thereof from any rights, duties, or obligations incident to or growing out of the marriage relation, or from liability to attachment on mesne process, or levy on execution, or from liability to any lien or charge of any description, created or established by law upon the land or the buildings situated thereon, or the interest of the owner in such land or buildings. It shall not operate to change the laws of descent or the rights of partition between cotenants, or the right to take the land by eminent domain. It shall not operate to relieve such land from liability to be taken or recovered by any assignee or receiver under any provision of law relative thereto, and shall not operate to change or affect any other rights, burdens, liabilities, or obligations created by law and applicable to unregistered land except as otherwise expressly provided herein. No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession.

MSA § 508.02, Registered land; same incidents as unregistered; no adverse possession
---------- Excerpt from page 80042

See also Minn. Stat. 508.25 specifying a certificate holder's rights against adverse claims.

A recent court case holds:

> By affording a method of acquiring a decree of registration and a certificate of title free from all adverse claims and encumbrances not noted on the certificate, the torrens law confers a conclusive title on the holder of a certificate. Moore, 282 Minn. at 519, 165 N.W.2d at 217; see also In re Petition of Alchemedes/Brookwood, Ltd. Partnership, 546 N.W.2d 41, 42 (Minn.App.1996) (concluding persons dealing with registered property need look no further than certificate of title for any transactions that might affect land), review denied (Minn. June 7, 1996).

Petition of Geis, 576 N.W.2d 747, 749 (Minn.App. 1998).

JUDICIAL DETERMINATION OF TORRENS BOUNDARIES

The Torrens Act contemplates judicial determination of boundaries. A portion of the statute states:

> An owner of registered land may apply by a duly verified petition to the court to have all or some of the boundary lines judicially determined.

MSA § 508.671, Determination of boundaries

However, a Court may not rule in such a way as to alter the boundaries set out in a Torrens certificate:

> Moreover, a court may not, in a proceeding subsequent to initial registration of land, determine boundary lines, if that determination alters the legal description of the land as stated in the certificate of title, and thereby attacks the torrens certificate.

Petition of Geis, 576 N.W.2d 747, 750 (Minn.App. 1998).

The doctrine of practical location of boundaries does not apply to registered property absent an ambiguous certificate of title or a dispute as to the location of boundaries at the time the property was registered.

Petition of Building D, Inc. 502 N.W.2d 406 (Minn.App.,1993).

Why should torrens title property be treated differently? The Court of Appeals has answered the questions squarely:

> The purpose of the Torrens law is to establish an indefeasible title which is immune from adverse claims not registered with the registrar of titles and to assure that the property can become encumbered only with registered rights and claims.

Petition of McGinnis, 536 N.W.2d 33, 35 (Minn.App. 1995).

PRESCRIPTIVE EASEMENTS
Prescriptive easements are established in the same manner as are claims of adverse possession.

("A prescriptive easement claim involves the same elements of proof as an adverse possession claim, subject to the inherent differences between such claims.");

Ebenhoh v. Hodgman, 642 N.W.2d 104, 112 (Minn.App. 2002). Mehrkens v. Ryan, 2003 WL 21694568 (Minn.App. 2003); Heuer v. County of Aitkin, 645 N.W.2d 753 (Minn.App. 2002).

ADVERSE POSSESSION CURING DEFECTIVE MORTGAGE FORECLOSURE
While I would not count on this when you are doing a foreclosure, the Supreme Court held that Mortgagors could not attack the validity of a foreclosure where the mortgagee had gone into possession of the real property and held it for the requisite statutory period.

> Furthermore, the court's decision in this case is based on a finding that plaintiff has acquired title by adverse possession. It is clear, at least, that from the time plaintiff acquired possession in 1933 by her action in ejectment she was in possession under a claim of ownership hostile to that of the former owners.

Voegele v. Mahoney, 54 N.W.2d 15, 18, 237 Minn. 43 (Minn. 1952).

EXPERT AND LAY WITNESS TESTIMONY
In boundary line litigation, there is often testimony from both experts and non-expert lay witnesses. The Rules of Evidence specify when opinion testimony may be used as opposed to direct observation of facts (e.g. I saw the car hit the boy; the fence started running east from the old sugar maple):

> If the witness is not testifying as an expert, the witness' testimony in the form of opinion or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

MSA REV Rule 701, OPINION TESTIMONY BY LAY WITNESS

The rule for admission of expert witness testimony is:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

MSA REV Rule 702, TESTIMONY BY EXPERTS

Rule 703 states what surveyors, engineers, etc. may base their opinions on.

> (a) The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
>
> (b) Underlying expert data must be independently admissible in order to be received upon direct examination; provided that when good cause is shown in civil cases and the underlying data is particularly trustworthy, the court may admit the data under this rule for the limited purpose of showing the basis for the expert's opinion. Nothing in this rule restricts admissibility of underlying expert data when inquired into on cross-examination.

MSA REV Rule 703, BASES OF OPINION TESTIMONY BY EXPERTS

Sometimes persons other than surveyors may be permitted to testify to expert opinions concerning boundary line issues. An expert is basically anyone who by education, training or experience is qualified to render opinion evidence which may be helpful to the finder of fact. A mine engineer technician was allowed to testify although not a surveyor:

> James Rossi, an Eveleth Taconite Company employee for 20 years, was a mine engineering technician whose job included making maps and doing volumetric surveys. The maps are made daily. He testified that in drawing up the maps of Eveleth's property, he had to become familiar with the general boundaries of its property. Over objection, Rossi testified that a map he prepared was from an aerial photograph of the dock and general area where the bushings were stolen. He also testified that the "Spolarich Farm" was owned by Eveleth.
>
> Appellant contends that Rossi was not qualified to testify about whether the farm was on Eveleth's property because Rossi was neither an attorney nor a qualified land surveyor. The trial court ruled that he was a qualified witness based on his job responsibilities and lengthy experience in the mine engineering department. This ruling was proper.

State v. Larson, 393 N.W.2d 238, 242 (Minn.App. 1986).

It is important to note that ultimately a judge (who presumably is not a surveyor) will rule on the correctness of disputed, competing surveys. Judges (and juries) often resolve

hotly contested claims of a variety of experts when they have no previous background in the science or other field of study. This is simply a fact of life in our judicial system for parties to deal with.

There are some limitations on a surveyor's qualifications to testify. The following example relates more to the failure to establish a proper foundation for an opinion. A surveyor was called to testify in an accident case and did successfully identify a highway survey reflecting the contour of the highway and the elevation in 100 foot increments down the road. He showed the road rose by 4 ½ feet. Then the attorney tried to establish "sight distance":

> Objection was again sustained for lack of foundation. The question as asked clearly lacked foundation. Sight distance is meaningless unless the circumstances are explained showing at what height the sight is taken, from and to what point. The question as asked not only lacked foundation, but it is difficult to see how it could be answered at all.

Jallen v. Agre, 119 N.W.2d 739, 744, 264 Minn. 369 (Minn. 1963).

Foundation simply looks at whether a witness has a reasonable basis to be qualified to state the opinion he is about to relate.

As stated earlier, a survey line may be overridden by proof of adverse possession or practical location of boundary. Nevertheless, survey testimony is often involved, to show the proper location, and to show where the line should be moved for two examples.

A good discussion of competing survey testimony is found in Wojahn v. Johnson involving attempts to relocate lost government corner lot markers, and claims of adverse possession and practical location. The county surveyor was held to have used proper survey techniques in first determining that he could not relocate the old monuments. The court stated:

> The plaintiffs attack the methodology of the Johnson survey on essentially three grounds, contending that the survey illegally deviated from the original government survey in angles and distances between corners, that the county surveyor did not adequately investigate before determining that certain corners were "lost," and that the surveyor inappropriately used proportionate measurement techniques.

The county surveyor located three of eight government corners but could not find the other five, though he did not speak to neighbors. The Plaintiff's surveyor criticized this failure. He did, however, follow the old field notes and drawings and relied on other old records of the government survey in establishing his opinion of the correct location of the missing corners. The surveyor admitted the boundary line established by the located corners did not jibe with certain existing and older fence lines.

Because the trial court accepted the county surveyor's testimony of his methodology, the Supreme Court deferred to its findings of fact. They also commented:

> When a resurvey is made of sections, quarter-sections, etc., originally established by United States Government Survey, the aim of the resurvey must be to retrace and relocate the lines and corners of the original survey. Even when an original section corner is erroneously placed by an original government surveyor, it cannot be corrected by the courts or a subsequent surveyor.

Wojahn v. Johnson, 297 N.W.2d 298, 303 (Minn. 1980).

TITLE INSURANCE ISSUES

Title insurance may be available to cover possible boundary disputes. Beware the standard exclusion from many standard form title insurance policies for "facts which would be disclosed by an accurate survey". Because a survey could reveal an encroachment of a fence or other structure, it may not be covered by the policy. Buyers may request and obtain survey coverage and waiver of this exclusion.

Claims should be reported to the insurer who may elect to pick up coverage because the so-called "duty to defend" is broader than the "duty to indemnify" meaning that the insurance company is supposed to defend its insured's title to the extent of their legal description against "colorable claims". These are claims that sound as though they may be covered, even if it's a close call.

Insurers have the burden of proof to establish they are entitled to the protection of an exclusion from coverage. Henning Nelson Const. Co. v. Fireman's Fund American Life Ins. Co., 383 N.W.2d 645, 652 (Minn. 1986):

> An insurer has the burden of proving that a policy exclusion applies. Caledonia Community Hosp. v. St. Paul Fire & Marine Ins. Co., 307 Minn. 352, 354, 239 N.W.2d 768, 770 (1976). In interpreting a policy exclusion, any ambiguity in the language of the policy must be construed in favor of the insured. Id.; Bobich v. Oja, 258 Minn. 287, 294, 104 N.W.2d 19, 24 (1960).

An insurer has a duty to defend if "any part of the claim is arguably within the scope of coverage afforded by the policy * * * ."; Brown v. State Auto. & Cas. Underwriters, 293 N.W.2d 822, 825 (Minn.1980).

I once represented a client whose insurer refused them a defense when a neighboring church's surveyed line turned out to be several feet into their backyard. Problem was that the fence and garden which made up part of their yard were actually outside their legal description. However, the policy stated that insurance was afforded for structures (excluding fences) located outside their legal description. The insurer disputed whether a garden made up of railroad tie timbers constituted a structure.

I settled the dispute with the Church correcting my clients' legal description to take in the garden and fence; then sued the title insurer who refused coverage for damages and attorney's fees. See below for the outcome.

The court has specifically held that legal fees incurred by an insured after the insurer improperly refuses to undertake the defense are recoverable by the insured. "...if insurer refuses to defend, party may recover attorneys' fees from time defense was tendered" Franklin v. Western Nat. Mut. Ins. Co., 558 N.W.2d 277, 279, (Minn. App. 1997). See SCSC Corp. v. Allied Mut. Ins. Co., 536 N.W.2d 305, 316 (Minn. 1995) citing Jostens, Inc. v. Mission Ins. Co., 387 N.W.2d 161, 167 (Minn.1986), as amended on denial of reh'g (Minn., May 12, 1986):

> An insured may recover from its insurer attorney fees that the insured has incurred defending itself against claims by a third party when the insurer has a contractual duty to defend the insured, but has refused to do so.

The kicker in my case was that the trial court ruled the garden ties did not constitute a structure, but that the call was close enough that the insurer should have provided my clients a defense. As a result, my clients recovered their entire legal bill. (O'Donahue and Krienke vs. Universal Title, Hennepin County District Court, Case No. 98-017876).

ETHICAL CONSIDERATIONS

I believe there is a responsibility on the part of attorneys and other professionals working for land owners to counsel them concerning prosecution and defense of adverse possession and practical location claims. Reasonable efforts ought to be made toward settlement. This does not mean that claimants should not pursue legitimate claims; just that thought needs to be given not only to survey and legal fees and other costs to be incurred which can be very substantial but also to the emotional cost of litigation, the distraction from the business of life, and the outcomes involved when neighbor is pitted against neighbor. Long after the lawyers and surveyors leave, the property owners will remain. Attorneys are required to be "zealous advocates" for their clients, but they also are obligated to employ candor in their dealings with the court and others, particularly with unrepresented parties. When claims involve inches I've recommended strongly that some compromise be sought.

An excerpt from the Lawyer's Code of Professional Responsibility follows:

> As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.
>
> 52 M.S.A., Rules of Prof. Conduct, Preamble A LAWYER'S RESPONSIBILITIES

CLAUSSEN V. CITY OF LAUDERDALE

681 N.W.2D 722 2004

NO ADVERSE POSSESSION OF PUBLIC LAND

NO EASEMENT ON PUBLIC LAND, EITHER. CONTRARY TO PUBLIC POLICY

MCGINNIS PETITION, 536 N.W. 2D 33 1995

PURPOSE OF TORRENS TO ESTABLISH INDEFEASIBLE TITLE---508.02

BOUNDARY BY PRACTICAL LOCATION MAY BE USED IN LIMITED SITUATIONS INVOLVING REGISTERED PROPERTY

SEE PETITION OF ZAHRADKA, 472 N.W.2D 153 1991

CAN USE DOCTRINE WHERE REGISTRATION DID NOT REGISTER BOUNDARIES, DISPUTE EXISTED AT TIME OF REGISTRATION, AND IS NOT AN ATTACK ON CERTIFICATE OF TITLE.

SUMMARY

This is just a cursory summary of the variety of issues which can surface in cases involving boundary line claims. As I have noted, disputed boundary lines may be resolved by way of claims of adverse possession and practical location lawsuits which may take precedence over the result of a survey. Because of the risk of expenditure of buckets of money, and accompanying acrimony, I generally recommend compromise. When that fails, and if litigation can be justified, then suit is appropriate.

II DETERMINING ACCESS

A. PRESCRIPTIVE EASEMENTS

INTRODUCTION

A "prescriptive easement" is not an easement drafted by a lawyer based on a surveyor's carefully prepared legal description. A prescriptive easement is only "confirmed" by a trial judge's verdict which determines that such an easement has been created by the action and inaction of various land owners over an extended period of years. As is the case with adverse possession and boundary by practical location, a prescriptive easement is created because someone takes and begins using land in some fashion and continues

that usage for years (at least 15 years); and thereby gains a right to continue that usage, and to prevent others from barring his use.

In Block v. Sexton, 577 N. W. 2d 521 (Minn. App. 1998), the Court of Appeals quoted the general rule from Burns v. Plachecki, 301 Minn. 445, 448, 223 N.W.2d 133, 136 (1974):

> To establish an easement by prescription, a claimant must prove he or she used the easement for the prescriptive period of 15 years and that such use was hostile, actual, open, continuous, and exclusive.

The Court of Appeals stated it this way in Rogers vs. Moore, 603 N.W.2d 650 (Minn.,1999):

> A prescriptive easement is based on prior continuous use and grants a right to use the property of another. See Romans v. Nadler, 217 Minn. 174, 181, 14 N.W.2d 482, 486-87 (1944). As such, a prescriptive easement is a "servitude imposed upon corporeal property." Id. A prescriptive easement grants only a right of use and does not carry with it title or a right of possession in the land itself. See Id.; see also Lustmann v. Lustmann, 204 Minn. 228, 231; 283 N.W.2d 387, 388 (1939). The purpose of prescriptive easements has been to encourage the prompt resolution of disputes before evidence is destroyed or relevant events pass out of memory and thereby stabilize long-continued property uses. *See* Richard R. Powell, 3 THE LAW OF REAL PROPERTY 413, at 34-103 to 34-105 (1989).

One early summary of prescriptive easements is found in the 1929 decision, Naporra vs.Weckwerth, 226 N. W. 569 (Minn. 1929) which happens to relate to a drainage easement created by prescription. This statement is taken from the Supreme Court's own syllabus, which is a summary of its decision:

> The character of the usage of drainage which will ripen into an easement by prescription is the same as is required to gain title to land by adverse possession. As a basis for an easement by prescription, the inceptive entry must arise from an invasion of the rights of the other for which he might have maintained an action. License or permission from the landowner is evidence that the claimant did not have the right; while acquiescence is evidence that he did. The law is jealous of a claim to an easement, and strict proof thereof is required. If the entry is permissive and without a subsequent, distinct, and positive assertion of a hostile right, it will never ripen into an easement by prescription, no matter how long continued. If claimant's entry is hostile and adverse, the owner's unsought consent, distinguished from permission, is immaterial. In making an adverse entry, it is not necessary that claimant have color of title or claim to have a legal right to enter. It is sufficient if he enters with the intention of holding possession for himself to the exclusion of the true owner.

The Supreme Court talks of "adverse possession." The same basic rules apply to prescriptive easements and should be understood; see below.

STATUTE OF LIMITATIONS
Minn. State. 541.02, which governs adverse possession, applies.

THE FIVE "ELEMENTS" OF A PRESCRIPTIVE EASEMENT
- **ACTUAL USE**
- **OPEN USE**
- **CONTINUOUS USE**
- **EXCLUSIVE USE**
- **HOSTILE USE**

ACTUAL USE
What constitutes actual use or possession will generally be obvious. Driving a car over a path routinely will constitute "actual use." Apparently, the noise of gunfire will not constitute actual use to qualify: Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc. 624 N. W. 2d 796 (Minn. App. 2001). However, use of a gravel driveway may constitute actual use, Nordin vs. Kuno, 287 N.W. 2d 923 (Minn. 1980); as will use of a farm road, Block v. Sexton, 577 N. W. 2d 521 (Minn. App. 1998); use of a footpath, Mehrkens v. Ryan, 2003 WL 21694568 (Minn.App. 2003); and drainage flow, Naporra v. Weckwirth, 178 Minn. 203, 226 N.W. 569 (1929).

HOW DOES A PRESCRIPTIVE EASEMENT COMMENCE?

Although you might intuitively think the opposite, in order to begin the period of actual use, entry onto the land of another must be without the neighbor's permission. It must violate their rights. The use must be of a type that would give the neighbor the right to sue for a trespass and/or eviction.

> The strictest proof of hostile inception of the possession is required. Such possession becomes adverse only upon a notorious assertion of right.

Omodt v. Chicago, Mpls. & St. Paul Ry. Co., 106 Minn. 205, 118 N.W. 798 (1908). Clear and convincing evidence is required to meet the burden of proof in a prescriptive easement case. Rogers v. Moore, 603 N. W. 2d 650 (Minn. 1999).

OPEN USE

In order to establish a prescriptive easement, the use must be "open", Nordin v. Kuno, 287 N.W.2d 923 (Minn. 1980). One cannot deprive another of property without notice to him, or at least without there being an opportunity for that notice to come to him if he were reasonably diligent.

> Actual and open possession requires unconcealed, visible possessory acts upon the land such that the owner might be apprised that another is claiming rights in the land.

Hickerson v. Bender, 500 N.W.2d 169, 171 (Minn. App. 1993).

In Nordin, a storeowner routinely drove over a driveway on a neighboring property in order to make deliveries. The use was visible and well known to the property owner. In such a case, the proof of "open use" is relatively easy. What about a use which takes place in a more rural or secluded setting? In Hickerson v. Bender, the Court of Appeals discussed it this way:

> The Hickersons argue that the improvements were not "open, notorious, and hostile" because the improvements may not have been visible to their predecessors in title from adjoining Green Gables Road. We construe "open," however, to mean visible from the surroundings, or visible to one seeking to exercise his rights. See, e.g., Grubb v. State, 433 N.W.2d 915, 918 (Minn. App. 1988) (open use of otherwise hidden property shown by posting "no trespassing" signs, eviction of trespassers, and granting permission to enter upon and view land) . . . The Hickersons' argument tends to concede that the easement and obstructions were disregarded by the Hickersons' predecessors. Moreover, their argument is refuted by the trial court's finding that "the improvements were obvious obstructions [of] which anyone who claimed rights adverse to the interest of the [Benders] would have been aware."

Id. One can conclude that even though a use may not go on in front of the 1000's on the Nicollet Mall, if it is a type of use which would be visible to someone who occasionally monitors his/her property, then it should be considered to be an "open" use.

HOSTILE USE: PERMISSION VERSUS ACQUIESCENCE

A requirement to establish an easement by practical location is that the initial entry onto the land must have been hostile. This reference to hostility has nothing to do with anger or harsh feelings. (That comes later when one side sues).

Hostile use does not refer to personal animosity or physical overt acts against the property owner. Grubb v. State, 433 N.W.2d 915, 918 (Minn. App. 1998). Here, hostility simply refers to one claiming the property "as of right", or as his own. And, this does not mean either that the claimant must have believed he owned it rightfully, i.e., that claimant believed it was part of claimant's deeded legal description. It also does not mean that he actually knows the claimed property or easement area is on the neighbor's property. It does not matter whether the claimant asserts ownership mistakenly believing the property is within his own surveyed boundaries, or that he knows he is trespassing on another's land. Good faith, innocent mistake, or cold hearted calculation with felonious intent, it does not matter -- what matters is that the use goes on without any consent or permission.

CONSENT PREVENTS A USE FROM BEING HOSTILE (USUALLY)

When a neighboring owner consents to someone using his property for access, drainage, etc., that consent defeats the hostile or notorious requirement which must exist in order to establish a prescriptive easement. Distinguishing between consent and acquiescence is the truly hard part. Like obscenity to Justice Byron White, you know it when you see it.

> License or permissive use on the part of the landowner must be distinguished from mere acquiescence. The one is evidence that claimant did not have the drainage right in the absence of the permission; while the other is evidence that he did.

Naporra v. Weckwirth, 178 Minn. 203, 206, 226 N.W. 569, 571 (1929).

Distinguishing one from the other is the trick. If you can consistently determine this, you should mortgage your home and invest all available funds on the Powerball. The discussion which follows deals with the related concept of practical location of a boundary, but the same concept is involved. If you can comprehend what the Court means when it refers to a "lack of conduct" then you are to be congratulated:

> When the practical location of a boundary is established by acquiescence in a fence line, [t]he acquiescence required is not merely passive consent to the existence of a fence * * *, but rather is conduct or lack thereof from which assent to the fence * * * as a boundary line may be reasonably inferred.

Allred, 362 N.W.2d at 376 (citing Enquist v. Wirties, 243 Minn. 502, 507-08, 68 N.W.2d 412, 427 (1955)).

In an unpublished decision, Piotrowski v. Bretz, 1998 WL 613857 (1998), the Court of Appeals wrote:

> In order to be hostile, possession cannot be permissive, but an owner's passive acquiescence and failure to assert paramount possessory rights do not constitute permission.

The Supreme Court in Dozier v. Krmpotich, 35 N.W.2d 696, (Minn. 1949) distinguished acquiescence from permission as follows:

> 'Acquiescence,' regardless of what it might mean otherwise, means, when used in this connection, passive conduct on the part of the owner of the servient estate consisting of failure on his part to assert his paramount rights against the invasion thereof by the adverse user. 'Permission' means more than mere acquiescence; it denotes the grant of a permission in fact or a license.

35 N.W.2d at 699.

It appears, then, that if the claimant has used property in a way that is open and obvious, so that the servient estate owner can readily see it, and if the average person would stop the other person if the activity bothered him, then the subservient owner is acquiescing in the claimant's use.

Some people look for a way to prevent an ongoing use from becoming (or ripening as the courts like to say) into a prescriptive easement. Therefore, they may try to give some consent after the use is under way. However, in Naporra, the Supreme Court indicated that a belated consent where the original entry on the land is hostile won't defeat the hostile character of the use. If an attempt at consent is rejected or ignored, it may be ineffective and the landowner is probably wise to bring suit to oust the user from the claimed area; otherwise, he may lose it.

CONTINUOUS USE

One who seeks to establish a prescriptive easement must show that his or her use was continuous. No case requires that one stand on a square foot of turf night and day in order to claim either adverse possession or a prescriptive easement. The level of use necessary is that appropriate to the area. The general rule as it is stated in an adverse possession context is found in Romans vs. Nadler, 14 N. W. 2d 482 (Minn. 1944), as follows:

> Occasional and sporadic trespasses for temporary purposes, because they do not indicate permanent occupation and appropriation of land, do not satisfy the requirements of hostility and continuity, and do not constitute adverse possession, even where they continue throughout the statutory period. . . This is especially true where, as here, there is nothing about each separate trespass to indicate that it

> is anything but a trespass, much less an assertion of adverse right likely to be persisted in.

14 N.W.2d at 485 (citations omitted).

The level of usage or occupation, though, is difficult to state precisely. Sporadic use is generally considered not to be sufficient. However, in Romans, seasonal use occurring about 10-12 times per summer was sufficient.

> In rural or undeveloped areas, occasional and sporadic use may give rise to a prescriptive easement.

Block v. Sexton, 577 N. W. 2d 521 (Minn. App. 1998). And, greater use is probably required for urban areas: See Skala v. Lindbeck, 171 Minn. 410, 413, 214 N.W. 271, 272 (1927) (holding that actual and visible occupation is more imperative with developed land).

Back to Romans where the Court reasoned that the continuity of use is construed based on its nature, i.e., what amount of use would be appropriate:

> In cases of easements, the requirement of continuity depends upon the nature and character of the right claimed. It is sometimes said that there must be such continuity of user as the right claimed permits. This statement of the rule, like the one governing cases of title by adverse possession, does not mean that the right can be acquired by occasional and sporadic acts for temporary purposes.

14 N.W.2d at 486.

However, use may be interrupted and a prescriptive easement defeated. Continuous possession requires that the occupation of the land be ongoing and without cessation or interruption. See Rice v. Miller, 306 Minn. 523, 525, 238 N.W.2d 609, 611 (1976) (holding that, where the landowner owner took affirmative steps to prohibit use by others, he broke the continuity of adverse use).

In an adverse possession case tried by Tom Olson, the Court of Appeals agreed that occasional crossing through a gate in a fence and feeding deer on a disputed strip was not sufficient use to interrupt the continuous use by his client. Ronning v. Nikolai, 2001 WL 799681 (Minn. App. 2001).

TACKING-CONTINUOUS USE

A claimant may tack on, or add to, the continuous use of previous owners, as is the case with adverse possession (see above).

EXCLUSIVE USE

Generally, the claimant must demonstrate that the use was exclusive, i.e., not in common with others. This rule is hard and fast in adverse possession cases. However, it may be

less rigid in a claim for a prescriptive easement. In Nordin v. Kuno, the Supreme Court noted that the requirement of exclusivity is not as strict as for the establishment of adverse possession. In that case, a grocery store owner claimed a prescriptive easement over part of a neighboring parcel which the store owner had used as a driveway for many years. The defendant argued that others also used the driveway so that the claimant's use was not exclusive. That contention was not sufficient to defeat the claim. The Nordin court held, in pertinent part:

> Minnesota law is clear, however, that exclusivity for a prescriptive easement is not as strictly construed as for adverse possession . . . The use need not be exclusive in the sense that it must be used by one person only . . . Rather, the right must not depend upon a similar right in others; it must be exclusive against the community at large.

Nordin v. Kuno, 287 N.W.2d 923, 926 (Minn. 1980).

In this case, the claimant's continuing use of the driveway for grocery deliveries was sufficiently exclusive and continuous to establish a claim. The court speaks of exclusive use being sufficient if it is "exclusive against the community at large," id., which seems to suggest that if everyone in town uses a driveway to go from point A to point B, the use would not be exclusive and therefore the claim to a prescriptive easement would fail.

PUBLIC LAND

Generally, one cannot obtain a prescriptive easement over any public lands, Minn. Stat. 541.01. In Heuer vs. County of Aitkin, the Minnesota Court of Appeals held that the same rule which had been held to apply to adverse possession cases will apply to prescriptive easements:

> The prohibition against acquiring title to public land by adverse possession was added to the Minnesota statutes by 1899 Minn. Laws ch. 65. Murtaugh [v. Chicago, Milwaukee & St. Paul Ry], 102 Minn. [52], 54, 112 N.W. [860] 861[(1907)]; See, e.g., State ex. Rel. Anderson v. Dist. Court of Kandiyohi County, 119 Minn. 132, 136, 137 N.W.2 298, 300 (1912) (land within high water mark of navigable lake cannot be acquired by adverse possession); Murtaugh, 102 Minn. at 55, 112 N.W. at 862 (legislature did not intend to provide for acquisition of title to school lands by adverse possession).

645 N. W. 2d 753, 757 (Minn. App. 2002).

However, if the claimant can show that a prescriptive easement arose before the property was acquired by the public body, he may be entitled to impose the prescriptive easement. Heuer, supra (reversing a summary judgment and remanding for trial on that basis).

It does not matter whether the public land is held in a governmental capacity or in a proprietary one. Fischer v. City of Sauk Rapids, 325 N. W. 2d 816 (Minn. 1982).

EXCEPTIONS

A claimant may acquire a prescriptive easement over formerly public property where a street has been vacated:

> Claimants were entitled to prescriptive easement to access route crossing adjoining owners' property, notwithstanding fact that 60 feet of access route crossed over land which was dedicated as public street but later vacated, where vast majority of access route lay exclusively within boundaries of adjoining owners' property, continuous use of route by claimants and their predecessors for prescriptive period was hostile, and adjoining owners or their predecessors could have taken steps to prohibit or limit use, but chose not to do so.

Lindquist v. Weber, 404 N.W.2d 884 (Minn. App. 1987). The public can also obtain an easement by prescription. See Quist v. Fuller, 300 Minn. 365, 220 N.W.2d 296 (1974).

A claimant may even be able to show the property is not properly public property and thereby overcome the public property exception:

> Assuming the waterfront is properly characterized as "quasi-public," there is no authority for the proposition that it cannot be adversely possessed . . . the plain language of Minn. Stat. sec. 541.01 limits the prohibition on adverse possession to property dedicated to public, not quasi-public, use.

Denman v. Gans, 607 N.W.2d 788, 794 (Minn. App. 2000).

PRESUMPTIONS

Various presumptions apply in the litigation of prescriptive easements. Often proof of the character of the original entry into the property is problematic because it occurred fifty years ago or more. If all the other elements are proven clearly, then the claimant will have the benefit of the doubt on the original entry (being hostile, or without consent).

> The general rule is that where the claimant of an easement by prescription shows open, visible, continuous and unmolested use for the statutory period, inconsistent with the rights of the owner and under circumstances from which the owners' acquiescence may be inferred, the use is presumed to be adverse or hostile.

Nordin v. Kuno, 287 N.W.2d 923, 926 (Minn. 1980).

This presumption can always be rebutted, if the property owner of the subservient estate has evidence that demonstrates that the original entry was with consent. Some cases in the adverse possession arena have inferred consent where the property was owned by family members. It does seem logical, then, to presume there was consent at the outset in those instances. As the Minnesota Supreme Court has held,

> We have recognized that this general rule of presumed hostility is modified in cases in which family members own both the dominant and servient estates. *See* *Wojahn v. Johnson*, 297 N.W.2d 298, 306 (Minn.1980). The reason for this

> modification is that the nature of close familial relationships is such that mere actual, open, exclusive, and continuous possession is not enough to give notice to a family member that a use is hostile. *See* *Beitz v. Buendiger*, 144 Minn. 52, 54, 174 N.W. 440, 441 (1919) (explaining the impact of a close familial relationship in an adverse possession case). In these situations, the presence of the close familial relationship gives rise to "the inference, if not the presumption" that the use is permissive. *See* *Wojahn*, 297 N.W.2d at 306.

Boldt v. Roth, 618 N.W.2d 393, 396-97 (Minn., 2000.). Boldt also makes it clear, however, that consent can be withdrawn and a prescriptive easement can eventually become established after a sale occurs outside the original family. It is also true that a family member having sufficient proof could overcome the presumption of original consent; the presumption is a rebuttable one.

How close must the family tie be to allow inference of consent? In Nordin vs. Kuno, the Court held that parties who were first cousins "once removed" were too distant for the inference of consent to arise. In other cases, the courts have broken as follows:

> The defendants claim that the presumption should instead be one of permission due to the family relationship between the Kunos. This court has inferred permission where a close family relationship exists. Burns v. Plachecki, 301 Minn. 445, 223 N.W.2d 133 (1974) (parent and child); Lustmann v. Lustmann, 204 Minn. 228, 283 N.W. 387 (1939) (close brothers); Collins v. Colleran, 86 Minn. 199, 90 N.W. 364 (1902) (parent and child). However, the court has refused to infer permission between three unfriendly sisters, Beitz v. Buendiger, 144 Minn. 52, 174 N.W. 440 (1919), and friendly neighbors, Alstad v. Boyer, 228 Minn. 307, 37 N.W.2d 372 (1949).

Nordin v. Kuno, 287 N. W. 2d at 927.

The next question is what conduct is sufficient to change a consensual use to an adverse or hostile use. There is no doubt that some event must occur that interrupts the presumption of consent. In Boldt, the Supreme Court held that a sale of the property outside the family will be the kind of event that ends consent. If the use then continues for a new fifteen year period, a prescriptive easement may be established:

> But the Roths argue that we have previously stated that once a use is established as permissive, it can become adverse only if there is a "notorious assertion of right." *Lustmann v. Lustmann*, 204 Minn. 228, 231, 283 N.W. 387, 389 (1939) (quoting *Collins v. Colleran*, 86 Minn. 199, 205, 90 N.W. 364, 366 (1902)). The Roths maintain that the mere transfer of property is not enough to qualify as such a notorious assertion. They assert that, without more, Boldt's use of the driveway continued to be permissive until the date of the survey.

Boldt v. Roth, 618 N.W.2d at 397. The Court then held:

> They have notice of the boundaries to their property and that the use is actual and open. We now extend our *Wojahn* analysis to hold that, absent evidence of continued permission, the transfer of the servient estate to a stranger renders hostile a use previously considered permissive due to a close familial relationship and such transfer will commence the 15-year prescriptive easement time period.

Id., 618 N.W.2d at 398.

BURDEN OF PROOF

Generally, to establish a prescriptive easement, the claimant must show "clear and convincing" evidence of all the elements necessary to establish the existence of the easement.

> The effect of the presumption articulated in *Dozier* is that once a claimant to a prescriptive easement has established actual, open, continuous, and exclusive use for the required length of time, the burden of proof shifts to the owner of the servient estate to prove permission.

Id., 618 N.W.2d at 396. If the servient estate proves permission, then the use was not hostile and a prescriptive easement is not established.

TYPES OF PROOF

Like adverse possession, proof of the existence of a prescriptive easement may be made via direct or circumstantial evidence.

> Under clear and convincing standard, as applied to elements of proof required for a prescriptive easement, circumstantial evidence is entitled to as much weight as any other evidence.

Rogers v. Moore, 603 N. W. 2d 650 (Minn. 1999)

EFFECT OF FORECLOSURE ON PRESCRIPTIVE EASEMENT

The fact that an owner loses the property through foreclosure does not change the validity of a prescriptive easement once it is established by use.

> It is of course the rule that a purchaser of land at a mortgage foreclosure sale is charged with the rights of parties in possession of the mortgaged land, at least where, as here, they are plainly visible to anyone viewing it, and he purchases subject thereto.

4 DUNNELL DIG. ss 6365, 6381

Prescriptive easements will be acquired by a subsequent purchaser even though there is no legal record of the easement yet.

> Once a prescriptive easement comes into existence, it passes to subsequent owners of the property. *Swedish-American Nat'l Bank of Minneapolis v. Connecticut Mut. Life Ins. Co.*, 83 Minn. 377, 382, 86 N.W. 420, 422 (1901).

Block v. Sexton, 577 N.W.2d 521, 523 (Minn. App. 1998)

ABANDONMENT

An easement may also be abandoned where nonuse is accompanied by affirmative and unequivocal acts indicative of an intent to abandon. Richards Asphalt Co. v. Bunge Corp., 399 N.W.2d 188, 192 (Minn.App. 1987).

Hickerson also discusses the proof level for abandonment this way:

> Abandonment of an easement is generally a question of fact. *Simms v. William Simms Hardware, Inc.*, 216 Minn. 283, 293, 12 N.W.2d 783, 788 (1943).
> To have the effect of divesting title and reinvesting the same in the grantor of the easement, the abandonment must amount to something more than mere [nonuse], for there must appear to have been an intentional relinquishment of the rights granted. * * *. This intention need not appear by express declaration, but may be shown by acts and conduct clearly inconsistent with an intention to continue the use of the property for the purposes for which it was acquired.
> *Norton v. Duluth Transfer Ry.*, 129 Minn. 126, 131-32, 151 N.W. 907, 909 (1915).

Hickerson v. Bender, 500 N.W.2d 169, 170-71 (Minn.App. 1993).

APPEALS IN PRESCRIPTIVE EASEMENT CASES

While an appeal is available to the losing party in a lawsuit over a prescriptive easement, the barriers are high. These suits are often tried in a bench trial. The judge is the "trier of fact" as well as the one who applies the law. The Court of Appeals and Supreme Court are deferential towards the trial court.

> The decision of a district court should not be reversed merely because the appellate court views the evidence differently; rather, to warrant reversal, the findings must be manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.

Rogers v. Moore, 603 N. W. 2d 650, 655 (Minn. 1999).

What the Supreme Court is saying in this case is that even though they might have decided the case differently than the trial judge, if there is any reasonable evidence to support the trial judge's decision, they will let it stand.

THE FORTY YEAR RULE

It has been held that the so called forty year rule won't bar an easement even though no notice is filed under Minn. Stat. 541.023 in order to retain the easement, provided that the possession is sufficient to place persons on notice of the existence of the use,

> A factual determination is needed as to whether the use of the easement would constitute adequate notice to put a prudent person on notice of Lindberg's claim of possession. One obvious problem in this evaluation is that when a modest easement is claimed, its use may not be adequate to give a prudent person warning of its existence. However, the trier of fact should not be too demanding of the use required of a more limited easement that has been a matter of record and should expect the prudent person to be quicker to make inquiry of the easement. The trier of fact should consider whether the use of the limited easement would place the prudent owner or prudent purchaser on inquiry.

Lindberg v. Fasching, 667 N.W.2d 481, 488 (Minn.App.,2003).

ETHICAL CONSIDERATIONS

It seems there are few things in life any more contentious than struggles over the use and occupancy of land. A question for those of us who deal with clients and customers in this realm is whether we can help them resolve these topics with minimal conflict and difficulty. When we remember that these people often will reside in relatively close proximity for perhaps years to come, I'd advocate that we discourage exacerbating the conflict by urging the hardest line possible be taken, or by suing first and asking questions later. (Obviously, there are times when suit must be lodged if a statute of limitations will expire, or if there is a need for immediate injunctive relief to halt someone blocking a road, or tearing down a fence). Often, though people are confronted with a new survey showing that certain improvements are located on, or off their property. That's the time to recommend they count to ten before they blast off, counsel with appropriate professional help, and talk to the neighbors first before initiating action. It may go a long way to resolve a conflict for far less cost, and may win you repeat business as one who gets things done without having first "torched the village in order to save it".

B. IMPLIED EASEMENTS

INTRODUCTION

Implied easements occur where an owner of land separates it into two parcels, and the use of one parcel is required for the benefit of the other. Creation of easements through implication is not only an exception to the Statute of Frauds – which, of course, requires a writing to transfer an interest in real property – but also has the effect of modifying the legal description of two properties:

> It could be argued that no easement should ever be implied because this allows the creation of an interest in land without the writing demanded by the Statute of Frauds. However, the courts have consistently treated such easements as

> exceptions to the legislative ban and *have rationalized the result by interpreting the [legal] description of the land conveyed to include the easement as an appurtenance* [i.e., an appendage].

John E. Cribbet, PRINCIPLES OF THE LAW OF PROPERTY, 337-38 (2nd. Ed. 1975)[emphasis added].

RATIONALE: WHAT IS BEING IMPLIED? *INTENT*.

Implied easements occur where property is originally under common ownership, and some part of it is sold off, so that an easement – such as an easement of ingress and egress – is necessary for "beneficial enjoyment" of the property, but is not actually created by the parties. The court will infer that the easement exists, finding in the process that creation of the easement was what the parties *meant*, but *failed*, to do. What is being *implied*, then, is the *intention* to create an easement:

> Thus, A owns Black Acre and has a house and farm dwellings on the north half, with a clearly defined road across the south half to a major highway. There is also a highway to the north so that A could have access by that route, but the highway itself is a poor one and the hilly, rocky soil makes such a way difficult. A cannot be said to have an easement across the south half of his own land, but he does have a quasi-easement and the north half is quasi-dominant land, the south half quasi-servient, i.e. the facts showing interest in the nature of an easement. *If B buys the north half, he would undoubtedly expect to have the same access A had to the buildings. He should require A to make an express grant of such an easement across the retained half, but if the parties fail to do so, a Court will imply the easement by way of grant, unless the parties negative any intent to create such an interest*.

Cribbet, page 338 [emphasis added].

The Restatement of Property sets forth this principle as follows:

> *An easement created by implication arises as an inference of the intention of the parties to a conveyance of land*. The inference is drawn from the circumstances under which the conveyance was made rather than from the language of the conveyance. To draw an inference of intention from such circumstances, they must be or must be assumed to be within the knowledge of the parties. *The inference drawn represents an attempt to ascribe an intention to parties who had not thought or had not bothered to put the intention into words*, or perhaps more often, to parties who actually had formed no intention conscious to themselves. In the latter aspect, the implication approaches in fact, if not in theory, *crediting the parties with an intention which they did not have, but which they probably would have had had they actually foreseen what they might have foreseen* from information available at the time of the conveyance.

Bode v. Bode, 494 N.W.2d 301, 304 (Minn.App.1992) (emphasis added).

In this situation, the court is kind of like the person who is in a parking lot, and sees that someone has parked their car, leaving their headlights on. Surely, the owner meant to turn the lights off, but forgot to. Now, if the lights aren't shut off, the owner won't be able to start the car later. So, one can infer the owner's intention and turn off the lights for them.

TYPES OF IMPLIED EASEMENTS

The two types of implied easements are "quasi-easements" and "easements by necessity." One court has noted that the terms are often used "interchangeably," at least "in dicta." Bode v. Bode, 494 N.W.2d 301, 304 (Minn.App. 1992).

Further, at least one case has questioned whether this distinction is universally made, and noted that its relevance may be limited to the parties to the transaction in which the property was divided:

> The language in *Bode suggests a distinction, recognized by some jurisdictions and commentators, between implied easements and easements of necessity*. *See* Bode, 494 N.W.2d at 303-04 & n. 1. *However, any distinction in Bode was limited to the parties to the severing transaction*. "[W]hen a landowner conveys a portion of land that has no access * * * the owner of the purchased portion has a right of access across the retained lands of the grantor unless the conveying document explicitly disclaims any right of access." *Id.* at 303-04 (emphasis added); *accord Pine Tree Lumber Co. v. McKinley*, 83 Minn. 419, 420, 86 N.W. 414, 415 (1901) (defendant's grant to plaintiff of right to enter defendants land and remove pine "included whatever was reasonably necessary to make it effective" including right to construct and use logging road across land retained by defendant); 28A C.J.S. § 91a (easement by necessity for access may be claimed only by immediate parties to transaction). *Compare* 4 Richard Powell & Patrick Rohan, *Powell on Real Property* § 34.07 (easement may be found despite many intervening conveyances); *Pencader Assoc., Inc. v. Glasgow Trust, 446 A.2d 1097, 1100 (Del.Super.1982)* (easement of necessity cannot be terminated by mere nonuse, remanding to determine fact issue of existence of easement of necessity 170 years after severance of property).

Lake George Park, LLC, v. IMB Mid America Employees, 576 N.W.2d 463, 466 (Minn. App. 1998) (emphasis added, former emphasis deleted).

QUASI EASEMENT:

Quasi-easements occur where the easement location is determined by use prior to the time of the severance:

> The general rule may be expressed that where during the unity of title, an apparent and obvious, permanent, continuous and actual servitude or use is imposed on one part of an estate in favor of another, *which at the time of severance of unity is in use and is reasonably necessary for the fair enjoyment of*

> *the other*, then upon a severance of such unity of ownership there arises by implication of law a grant of the right to continue such use even though such grant is not reserved or specified in the deed.

Cribbet p. 338, citing to Deisenroth v. Dodge, 7 Ill.2d 340, 346, 131 N.E.2d 17, 21 (1955) (emphasis added).

In a quasi-easement situation, the court is trying to keep an easement in place that already existed, in a practical manner, prior to the time the parcels were split:

> In holding that an implied easement in a quasi-easement situation exists the Court is trying to implement the intention of the parties.

Ralph E. Boyer, SURVEY OF THE LAW OF PROPERTY 593-95 (3RD ED. 1981).

The name "quasi-easement" comes from the common law rule against having an easement against property one owns in fee simple.

> One cannot have an easement in his own property so when he uses one piece of his property for the purpose of serving another piece of his property, there is said to exist a quasi-easement.

Id., p. 593.

EASEMENT BY NECESSITY:
An Easement by Necessity occurs where the easement did not exist at the time of the severance of title, but was necessary (at the time of severance) to the use of the property it serves.

> Easements may be implied by necessity *regardless of the prior use of the land*, although such prior use may also be involved in the facts….easements implied by necessity are based upon the presumed intention of the parties and the implication will not be invoked unless both the dominant and servient tracts were once under common ownership.

Boyer, p. 597

REQUIREMENTS TO CREATE A QUASI-EASEMENT.
Separation of Title : Separation of title occurs where both parcels – the one that will benefit from the easement, and the one that will be burdened by it – were originally owned by the same owner, who sells at least one of them. Note that an implied easement can be found even if there have been subsequent sales of the property:

> Regarding the first factor, the two parcels *were once owned by one party* and that common ownership was severed when Link conveyed the house to the Biseks.

Rosendahl v. Nelson, 408 N.W.2d 609, 610 (Minn.App., 1987) (emphasis added).

Continued and Apparent Use. The use must be continued, and apparent, for a long enough period to show that it was intended to be permanent. Note, however, that for purposes of quasi-easements, "apparent" doesn't mean "visible;" rather, it means that the use can be discovered upon a reasonable inquiry, including the existence, for example, of a sewer line.

> The quasi-easement is continuous for the sewer pipe and the easement is permanently adapted to use in the service of White Acre. The quasi-easement is apparent in that a reasonably prudent investigation and inspection of the premises would have disclosed the existence of the quasi-easement. Finally, it is strictly necessary for the purposes of law which typically requires only that the use be reasonably necessary. Here, reasonable necessity is defined by the fact that the sewer pipe would have to be extended around the boundary line to be run to the main line which is a pretty heavy burden on the dominant parcel.

Boyer, p. 595.

The Use Must Be Necessary: If the easement runs across the property owned by the seller, it must be reasonably necessary for the use of the property. If it is to run across the property to be owned by the buyer, in order to benefit the seller's property it must be strictly necessary; the common law disfavors grants of title that are less than fee simple.

> The quasi easement must be (a) "reasonably necessary" to the convenient enjoyment to the quasi-dominant tenement if that tract is the property conveyed to the grantee, and (b) "strictly necessary" to the enjoyment of the quasi-dominant tenement if that tract is retained by the grantor.

Boyer, pp. 593-95.

Examples of Reasonable Necessity:

> In *Rosendahl v. Nelson* . . . an implied easement was granted for a driveway due to physical obstructions, a steep slope and a tree on the plaintiff's property. . . In *Romachuk* an implied easement was granted for sewer drainage across defendant's adjacent property, though the easement was not mentioned in the deed. The court held there could be no serious dispute that the use of the drain pipe was reasonably necessary for the convenient and comfortable enjoyment of the property.

Clark v. Galaxy Apartments, 427 N.W.2d 723, 726 (Minn. App. 1988).

All Are Three Factors Required In Each Case? One quasi-easement case, *Rosendahl v. Nelson,* listed the above-referenced factors, then stated that "[e]xcept the necessity

requirement, these factors are only aids in determining whether an implied easement existed." *Rosendahl*, 408 N.W.2d at 611. However, previous common ownership supplies the rationale for the doctrine of implied easements:

> An easement by implication arises from the circumstances surrounding the dividing by the owner of a piece of land into two pieces and conveying one of the two pieces to another.

Boyer, p. 570. And, necessity is examined as of the time of separation of ownership. Therefore, it would appear that prior unity of title and necessity are both strictly required to establish an quasi-easement, but continued and apparent use is not.

REQUIREMENTS TO CREATE AN EASEMENT BY NECESSITY.
Four factors are required**:**

> There are four elements required for creation of an easement by necessity: 1) a common title at the time of the use of the easement; 2) a later separation of the properties; 3) the use which gives right to the easement must have been so long continued and so apparent as to show it was intended to be permanent; and 4) the easement or use must be necessary to the beneficial enjoyment of the land.

Nunnelee v. Schuna, 431 N.W.2d 144, 147 (Minn.App.1988).

Common Title and Separation of Title: This is the same as was the case for implied easements where a quasi-easement existed.

Continued and Apparent Use: Unless the party claiming an implied easement is claiming against the person who was the owner at the time of severance, the use must be continuous and apparent as is the case with a quasi-easement:

> Appellant cites no Minnesota case where an easement of necessity was implied for the benefit of a party remote to the severing transaction without a showing of apparent and continued use. This court, as an error correcting court, is without authority to change the law.

Lake George Park, L.L.C. v. IBM Mid America Employees, 576 N.W.2d 463, 466 (Minn.App.,1998).

The Use Must Be Reasonably Necessary:

> "Necessary" does not require that the use be indispensable; rather a reasonable necessity is sufficient. Olson v. Mullen, 244 Minn. 31, 68 N.W.2d 640, 647 (1955). The party attempting to establish the easement bears the burden of proving necessity. Id. The current inconvenience, or cost, involved with the property carries no weight in determining necessity, as *necessity at the time of severance governs.* Niehaus, 529 N.W.2d at 412."

Pederson v. Smith, 2000 WL 821682 (Minn.App. 2000) [emphasis added].

Are All Three Factors Required? As is the case with quasi-easements, there is case law standing for the proposition that necessity is the only actual requirement:

> Except for the essential factor of necessity, the other elements are merely aids which are used to determine whether an implied easement exists.

Barnes v. Cowgill, 1989 WL 145414. Minn.App. 1989, citing Olson v. Mullin, 68 N.W. 2d 640, 647 (Minn., 1955)

However, prior unified ownership would also appear to be necessary. The easement is inferred based on the parties intentions at the time of severance, and necessity is examined as of time of severance, as well.

DURATION OF AN IMPLIED EASEMENT

An implied easement is permanent, unless it is expressly released, or unless the title for the two parcels is joined again (in which case you have a quasi-easement!).

> An easement by implication, whether an implied grant in favor of the Grantee or an implied reservation in favor of the Grantor, is a true easement having permanence of duration and should be distinguished from a way of necessity which is only as long as the necessity continues.

Boyer, p. 597.

What happens if the necessity ceases to exist? It doesn't matter. Remember, the analysis of necessity is made as of the time of separation of title:

> The district court's factual finding, that appellants could access the property by boat or by land with neighbors' permission or over their culvert when the water is low, is supported by the evidence. But this finding does not support the court's conclusion that this evidence was insufficient to establish an implied easement by necessity because appellants had other modes of accessing the property. *The correct analysis is as of the time of severance, and the court instead analyzed current necessity*.

Pederson v. Smith 2000 WL 821682 (Minn.App. 2000).

Note, however, that if the easement was granted under the rule of law stated in *Bode* (see Types of Easements section, above), it will cease to exist when the necessity ceases to exist:

> 'An easement by necessity lasts only as long as the necessity' and ceases when the owner of the dominant estate obtains a permanent right of public access to his or her property.

Holmes v. DeGrote, 2000 WL 1146745, (Minn.App.,2000) citing to Bode, 494 N.W.2d at 304.

LOCATION OF EASEMENT

Quasi-Easement: Because of the requirement of apparency, referenced above, the location is that location which was used when the easement was a quasi-easement.

Easement Implied from Necessity: Usually, this is determined by the apparent prior use, which would be the same standard applied for a quasi-easement. However, where it is the owner who made severance that is attempting to establish the easement, the owner of the land over which the easement is to run selects the location of the easement. If that owner fails to do so, then the user of the easement gets to choose:

> Where there is no agreement, the location of the easement is established in this manner: 'When no prior use of the way has been made, and the same is to be located for the first time, the owner of the land over which the same is to pass has the right to choose it, provided he does so in a reasonable manner, having due regard to the rights and interests of the owner of the dominant estate. But, if the owner of the land fail to select such way when requested, the party who has the right thereto may select a suitable route for the same, having due regard to the convenience of the owner of the servient estate."

Bode v. Bode, 494 N.W.2d 301, 304-05 (Minn.App. 1992), *quoting from McMillan v. McKee*, 129 Tenn. 39, 164 S.W. 1197, 1198 (Tenn.1914); *accord Ritchey v. Welsh*, 149 Ind. 214, 48 N.E. 1031, 1033 (Ind.1898); *Oliver v. Ernul*, 277 N.C. 591, 178 S.E.2d 393 (1971).

Even where the user of the easement gets to select its location, the easement does have to be on the land of the parcel previously owned in common:

> Under the common law, an easement by necessity must be located on the retained land of the grantor and nowhere else.

Bode, 494 N.W.2d at 304-05.

USES FOR WHICH IMPLIED EASEMENTS MAY BE CREATED.

Basically, the any type of easement can be implied – including for lateral support of land. Swedish-American Nat. Bank of Minneapolis v. Connecticut Mut. Life Ins. Co., 83 Minn. 377, 86 N.W. 420 (Minn., 1901).

EXCEPTIONS TO THE DOCTRINE
When the parties indicate in writing at the time of severance of ownership that the parties do not intend to create an easement, the courts will not infer an easement later:

> Where a land owner conveys a portion of land that is landlocked and has no access to the road, the owner of the purchased portion has a right to access across the retained lands of the Grantor unless the conveying document explicitly provides that they will not.

Bode v. Bode 494 NW at 304.

IMPLIED EASEMENTS DISTINGUISHED FROM ADVERSE POSSESSION OR EASEMENT BY PRESCRIPTION.
Significantly, while possession or use must be maintained for a minimum statutory period in order for said possession or use to give rise to a claim of adverse possession, no such minimum period is required to establish an implied easement.

> In any event, this question of fact, length of use, is not essential to the creation of the easement and therefore not material for purposes of the summary judgment motion.

Clark v. Galaxy Apartments, 427 N.W.2d 723, 726 (Minn.App.1988).

CONCLUSION.
Remember to analyze whether an implied easement exists using the three following factors:

1) Common title at the time of the use of the easement, and later, severance of title;
2) A use which is apparent and continuing so as to show it was intended to be permanent; and
3) The use is necessary to the beneficial enjoyment of the land.

Remember also that the "apparent and continuing use" factor is not strictly required. And, remember that necessity is determined at the time of the easement.

C. CARTWAYS

INTRODUCTION
The owner of land-locked acreage in a township may petition the township to establish a cartway. Said owner must to pay for the value of it to the township prior to the opening of the cartway; that value will be paid to the owner of the land over which it runs.

STATUTE

Minn. Stat. § 164.08 (West, 2003) provides in pertinent part:

> Subdivision 1. Permitted establishment; conditions. The town board by resolution may establish a cartway two rods wide and not more than one-half mile in length upon petition presented to the town board signed by at least five voters, landowners of the town, requesting the cartway on a section line to serve a tract or tracts of land consisting of at least 150 acres of which at least 100 acres are tillable. If the petition is granted the proceedings of the town board shall be in accordance with section 164.07.
>
> Subd. 2. Mandatory establishment; conditions. (a) Upon petition presented to the town board by the owner of a tract of land containing at least five acres, who has no access thereto except **a navigable waterway** or over the lands of others, or whose access thereto is less than two rods in width, the town board by resolution shall establish a cartway at least two rods wide connecting the petitioner's land with a public road. A town board shall establish a cartway upon a petition of an owner of a tract of land that, as of January 1, 1998, was on record as a separate parcel, contained at least two but less than five acres, and has no access thereto except **a navigable waterway** over the lands of others. The town board may select an alternative route other than that petitioned for if the alternative is deemed by the town board to be less disruptive and damaging to the affected landowners and in the public's best interest.
>
> (b) In an unorganized territory, the board of county commissioners of the county in which the tract is located shall act as the town board. The proceedings of the town board shall be in accordance with section 164.07.
>
> (c) The amount of damages shall be paid by the petitioner to the town before such cartway is opened. For the purposes of this subdivision damages shall mean the compensation, if any, awarded to the owner of the land upon which the cartway is established together with the cost of professional and other services, hearing costs, administrative costs, recording costs, and other costs and expenses which the town may incur in connection with the proceedings for the establishment of the cartway. The town board may by resolution require the petitioner to post a bond or other security acceptable to the board for the total estimated damages before the board takes action on the petition.
>
> (d) Town road and bridge funds shall not be expended on the cartway unless the town board, or the county board acting as the town board in the case of a cartway established in an unorganized territory, by resolution determines that an expenditure is in the public interest. If no resolution is adopted to that effect, the grading or other construction work and the maintenance of the cartway is the responsibility of the petitioner, subject to the provisions of section 164.10.
>
> (e) After the cartway has been constructed the town board, or the county board in the case of unorganized territory, may by resolution designate the cartway as a private driveway with the written consent of the affected landowner in which case from the effective date of the resolution no town road and bridge funds shall be expended for maintenance of the driveway; provided that the cartway shall not be vacated without following the vacation proceedings established under section

164.07.

Subd. 3. Maintenance costs. When a cartway is not maintained by the town, one or more of the private property owners who own land adjacent to a cartway or one or more of the private property owners who has no access to the owner's land except by way of the cartway may maintain the cartway. The cost of maintenance shall be equitably divided among all of the private property owners who own land adjacent to the cartway and all of the private property owners who have no access to their land except by way of the cartway. The following factors may be taken into consideration when determining an equitable share of maintenance expenses: the frequency of use, the type and weight of the vehicles or equipment, and the distance traveled on the cartway to the individual's property. The town board may determine the maintenance costs to be apportioned to each private property owner if the private property owners cannot agree on the division of the costs. The town board's decision may be appealed within 30 days to the district court of the county in which the cartway is located. Private property owners who pay the cost of maintenance shall have a civil cause of action against any of the private property owners who refuse to pay their share of the maintenance cost.

RECENT CHANGE TO THE STATUTE:

The underlined, bold text has been recently changed. The changes regarding navigable waterways were made in response to *In re Daniel,* in which the Minnesota Supreme Court held that one who had access to his land via a navigable waterway had access so as to be unable to establish a cartway through use of this statute. In Re Daniel, 656 N.W.2d 543 (Minn, 2003).

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