Chapter Thirteen

Litigating Adverse Claims Based on Possession

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§ 13.1 ADVERSE POSSESSION AND PRESCRIPTIVE EASEMENTS – ABSTRACT PROPERTY ONLY

A. Introduction

When presented with a scenario where the use and possession of property does not coincide with paper title (i.e., the legal description in the written deed), adverse possession is a mechanism that can be used where the possession and use of real property has matured into title. The right to claim title by adverse possession arises under the common law; no statute expressly creates the right to adverse possession. However, the length of time needed to acquire title by adverse possession is governed by statute. Adverse possession is available against abstract property but not against Torrens property. MINN. STAT. § 508.02.

B. Statute of Limitations to Recover Title

Minnesota Statutes section 541.02 sets forth the statutory limitation of time for bringing an action to recover real estate. A record landowner's right to defend against an adverse possession claim terminates after 15 years, and it is the expiration of this statutory deadline that gives rise to ownership for the claimant:

> **RECOVERY OF REAL ESTATE, 15 YEARS.**
>
> 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 the preceding paragraph 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.

MINN. STAT. § 541.02. Said another way, the record owner has 15 years from the start of possession by another to bring an action to eject the possessor.

The second paragraph of section 541.02 establishes a requirement that the claimant must show that they paid taxes on the parcel being claimed for at least five years, subject to the exceptions in the third paragraph. For many years, Minnesota courts applied the rule from *Grubb v. State*, 433 N.W.2d 915, 919 (Minn. Ct. App. 1988) that "the legislature intended the tax-payment requirement to apply to actions where the disseizor claims *all or substantially all* of an assessed tract or parcel" because "if such were not the legislative intent, a disseizor could always avoid the tax-payment requirement and consequent notice to the owner by claiming anything less than all of the assessed tract or parcel." (Emphasis added.) *See also Compart v. Wolfstellar*, 906 N.W.2d 598, 609 (Minn. Ct. App. 2018). In *St. Paul Park Refining Co. LLC v. Domeier*, 938 N.W.2d 288 (Minn. Ct. App. 2020), the Minnesota Court of Appeals concluded that where a claimant claimed approximately five percent of a parcel (east parcel), payment of property taxes was not required; as to another parcel where claimant claimed approximately 52 percent of the parcel (west parcel), the payment of property taxes was required.

However, in Domeier's petition for review only as to west parcel, the Minnesota Supreme Court affirmed but on different grounds, ruling that "a claim of adverse possession to *any* portion of a separately assessed parcel requires the adverse claimant to pay taxes for at least five consecutive years unless a statutory exemption under [the third paragraph of Minnesota Statutes section 541.02] applies." *St. Paul Park Ref. Co. v. Domeier*, 950 N.W.2d 547, 547–48 (Minn. 2020) (emphasis added). The court's decision effectively ended the "all or substantially all" standard from *Grubb*.

PRACTICE TIP

If the adverse claimant is seeking to establish ownership of a separately assessed tax parcel by adverse possession and the claimed land potentially consists of more than half of the parcel, the lawyer should obtain a survey of the property that includes a calculation of the percentage of the parcel being claimed.

COMMENT

The payment of real estate taxes requirement in the second paragraph of Minnesota Statutes section 541.02 is rarely a factor in adverse possession cases due to the exception in the third paragraph, as most adverse possession claims relate to the boundary line.

Another statute, Minnesota Statutes section 559.23, anticipates courts establishing legal boundaries:

> An action may be brought by any person owning land or any interest therein against the owner, or persons interested in adjoining land, to have the boundary lines established; and when the boundary lines of two or more tracts depend upon any common point, line, or landmark, an action may be brought by the owner or any person interested in any of such tracts, against the owners or persons interested in the other tracts, to have all the boundary lines established. The court shall determine any adverse claims in respect to any portion of the land involved which it may be necessary to determine for a complete settlement of the boundary lines, and shall make such order respecting costs and disbursements as it shall deem just....

A private citizen may not adversely possess adjoining public lands even though they would otherwise meet all the tests. MINN. STAT. § 541.01.

C. Basic Elements of Adverse Possession

To establish ownership of land by adverse possession, a claimant must establish that the possession was:

1. actual;
2. open;
3. hostile;

4. continuous; and
5. exclusive over a period of 15 years.

Ehle v. Prosser, 197 N.W.2d 458, 462 (Minn. 1972).

Whether the adverse possession elements have been established is a question of fact. *Wortman v. Siedow*, 216 N.W. 782, 783 (Minn. 1927); *Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. Ct. App. 2003).

It is the adverse claimant's burden to come forward with the essential facts establishing the elements of adverse possession. *Stanard v. Urban*, 453 N.W.2d 733, 735 (Minn. Ct. App. 1990) (internal citation omitted), *rev. denied* (Minn. June 15, 1990). The claimant's burden of proof is the clear and convincing standard. *Engquist v. Wirtjes*, 68 N.W.2d 412, 415 (Minn. 1955).

In *Village of Newport v. Taylor*, 30 N.W.2d 588, 591 (Minn. 1948), the Minnesota Supreme Court articulated a standard of review for adverse possession cases, stating that 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."

However, the holding of *Taylor* has since been limited by the supreme court. *See Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn. 1999) (citing *Alstad v. Boyer*, 37 N.W.2d 372, 375 (Minn. 1949) ("The rule of the Newport case is limited by its facts, and that is true of the rule as applied in certain prior decisions.")). Minnesota courts use the standard articulated in *Rogers*—that the claimant must prove the elements of adverse possession by clear and convincing evidence. *Rogers*, 603 N.W.2d at 657.

1. Actual Possession

One requirement to establish adverse possession is the claimant must have been in actual possession of the property for the 15-year statutory period. This means the claimant must have physically entered on the land, constructed an improvement, or generated some literal, tangible presence on the land. Common examples of actual possession include landscaping, mowing, paving, construction of a building, and recreational use.

Whether a claimant "actually" possessed disputed land is not controlled by any precise test. *Aydt v. Hensel*, No. A17-0448, 2017 WL 6418083, at *2 (Minn. Ct. App. Dec. 18, 2017).

> Which uses establish actual use will depend on the purpose for which the land "may be ordinarily fit and adapted, and reasonably used." [*Dean v. Goddard*, 56 N.W. 1060, 1063 (Minn. 1893)]. For example, a portion of an agricultural field might be actually possessed by someone who is farming the land. *See* [*Dean*, 56 N.W. at 1063]. By contrast, a small wooded area in the corner of a residential yard might be actually possessed by someone removing wood, dumping compost, and planting wildflowers. *See Ganje*, 659 N.W.2d at 264, 267–68. Another component to actual possession is the constancy of the use, as uses that are merely sporadic or occasional do not satisfy the element. [*Romans v. Nadler*, 14 N.W.2d 482, 485–86 (Minn. 1944)].

Id.

PRACTICE TIP

If the disseizor is seeking to establish ownership by adverse possession, it is recommended that the lawyer first get a survey of the property and obtain a legal description of the specific land being claimed by adverse possession before bringing suit. A legal description of the claimed land will be necessary for recording the final court order with the county recorder.

The circumstances of possession must preclude a belief by the owner that a mere trespass was being committed, but actual residence on the land is not necessary. Noise of gunfire, *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796 (Minn. Ct. App. 2001), and natural water flow, *Kral v. Boesch*, 557 N.W.2d 597 (Minn. Ct. App. 1996), were found not to satisfy the actual possession requirement.

COMMENT

Some of the cases mentioned above involved prescriptive easement claims as opposed to adverse possession but are still instructive given that the elements for each cause of action are analogous, except that prescriptive easements look at use as opposed to possession. Courts have at times looked to prescriptive easement cases when deciding adverse possession cases, and vice versa.

2. Open Possession

Open possession usually means *visible* possession. While the law does not prescribe any particular manner by which an adverse possessor must possess a disputed tract of property, the possession must give "unequivocal notice to the true owner that someone is in possession in hostility to his title." *Ganje*, 659 N.W.2d at 266 (citing *Skala v. Lindbeck*, 214 N.W. 271, 272 (Minn. 1927)). That said, it does not matter whether the owner actually sees the possession or not, just that the possession is technically visible:

> 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. Ct. App. 1993). Or, "[a]s one case put it, the disseizor must not only possess the property, he or she must make that fact known by keeping their 'flag flying.'" *Ganje*, 659 N.W.2d at 266 (quoting *Romans v. Nadler*, 14 N.W.2d 482, 485 (Minn. 1944)).

Sporadic and limited use of the land is not sufficient to constitute visible and notorious acts of ownership over land. *Stevenson v. Brodt*, No. A09-2222, 2010 WL 4068727, at *1 (Minn. Ct. App. Oct. 19, 2010). In this case the adverse possessor's use was trimming overgrown bushes, digging a trench, installing tubing, and maintaining roof overhang, which was not enough to establish adverse possession. *Id.* In *Stanard v. Urban*, 453 N.W.2d 733, 735 (Minn. Ct. App. 1990), use of disputed property for storing lake equipment every winter, mowing and maintaining

property every summer, and allowing children to play on the property did not establish adverse possession because it was occasional and sporadic.

PRACTICE TIP

The lawyer should consider visiting the property in person. Though a picture is worth 1,000 words, a site visit is even more valuable. The lawyer can then verify that the possession is visible.

3. Hostile Possession

Hostile possession does not mean that the possession was made with malice or with hard feelings toward a neighbor. It simply refers to an intention to claim the property, a use that goes on *without the permission* of the record owner:

> [T]he 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.

Ehle, 197 N.W.2d at 462. "Hostility contemplates the disseizor entering and taking possession of the land as if it were the disseizor's and owning it with the intention of excluding all others." *Ganje*, 659 N.W.2d at 268.

PRACTICE TIP

The proof of the character of the original entry into the property can be problematic if it occurred many years ago. Memories fade and prior owners and neighbors move or pass away. The lawyer should interview potential witnesses early in the case and obtain sworn statements if possible.

In a dispute between co-tenants, permissive possession is presumed unless and until the claimant can prove acts providing notice of claimant's hostile possession:

> [W]here the property dispute is between cotenants, it is presumed that the disseizor possesses the lands with the implicit permission of his cotenants. In order to overcome the presumption, the disseizor must establish an ouster of the other cotenants "consisting of acts or declarations of hostility sufficient to indicate a truly adverse possession and to start the statute of limitations running." *Adams v. Johnson*, 271 Minn. 439, 442, 136 N.W.2d 78, 81 (1965). The adverse possessor must present clear and unequivocal proof of the inception of hostile possession. *Burns v. Plachecki*, 301 Minn. 445, 449, 223 N.W.2d 133, 136 (1974).

Denman v. Gans, 607 N.W.2d 788, 795 (Minn. Ct. App. 2000). In *Denman*, hostility was not found: "Although there was evidence that appellants constructed docks, boathouses and even a fence on the waterfront, that construction was not entirely inconsistent with their property interest in the waterfront. And, more importantly, the record supports the finding that respondents had not been 'ousted.'" *Id.*

However, hostility was found in *Adams v. Johnson*, 136 N.W.2d 78, 81 (Minn. 1965), where co-tenants were in sole possession of the land, and improved it as if it was their own:

> [T]he trial court reasoned that the many improvements and repairs on the property constructed by [the claimants] were overt and unequivocal acts usually associated with exclusive ownership. It also indicated that the distant family relationship would not raise an inference of permissive occupation. Coupling these aspects, the court concluded that defendants had notice that possession was hostile, not permissive, and that the statute of limitations had run. [the claimants] were openly occupying the land as if they were sole owners. They so occupied the property for almost 50 years. They should not now be penalized for failing to make an explicit claim to seemingly uninterested relatives when the obvious interpretation of their actions was that they were using the land for their sole benefit … Not every undisturbed occupancy by a cotenant will result in a finding of ownership by adverse possession. But we think that finding is correct when the acts of ownership are overt and unambiguous and the relationship of the cotenants is such as not to raise an inference of permissive occupation.

In *Compart*, the adverse claimants argued that their use of a particular strip of land was hostile because their use exceeded an express grant of an easement running in their favor, which was "for ingress and egress and utility purposes over, under and across" the claimed parcel. *Compart v. Wolfstellar*, 906 N.W.2d 598, 603 (Minn. Ct. App. 2018). The claimants proved that they farmed the property consistently for over a 15-year period and because farming is a use other than entering and exiting property, and is not a "utility purpose," the use was hostile. *Id.* (citing *Ebenhoh*, 642 N.W.2d at 111–12 (holding that cultivating crops and grazing cattle was hostile because it constituted entering "the disputed tract and [taking] possession as if the tract was their own")); *cf. Nordin v. Kuno*, 287 N.W.2d 923, 927 (Minn. 1980) (noting that "an easement for ingress and egress … is not an easement for parking or picnicking").

In order for possession to be adverse, it cannot be commenced or continued with the consent of the legal owner. Said owner's consent makes the possession non-hostile. "[W]here 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." *Norgong v. Whitehead*, 31 N.W.2d 267, 269 (Minn. 1948).

PRACTICE TIP

A disseized owner can defeat hostility, and thus adverse possession, if they can prove that the possession was permissive. The owner granting permission should do so in writing and retain copies; otherwise, permission can be difficult to prove.

An acknowledgment by the adverse claimant of the owner's title before the statute has run in their favor breaks the continuity of their adverse possession, and it cannot be tacked to any subsequent adverse possession. *Olson v. Burk*, 103 N.W. 335 (Minn. 1905). An offer to purchase can be a factor defeating a claim of adverse possession. *Siegel v. Nagel*, No. A07-0324, 2008 WL 668131, at *2–3 (Minn. Ct. App. Mar. 11, 2008). An attempt to purchase property from the record owner can be deemed an acknowledgment that superior title rests with the record owner and interrupts adverse claimant's continuous, hostile possession because they are no longer holding the real property out as their own. *Compart*, 906 N.W.2d at 604.

A lease defeated a claim in *Sage v. Rudnick*, 69 N.W. 1096 (Minn. 1897). *But see Winfield v. Kasel*, No. A08-0812, 2009 WL 174211 (Minn. Ct. App. Jan. 27, 2009) (an adverse claimant first executed a lease for the disputed land, then prosecuted this suit successfully claiming he owned up to a fence by virtue of adverse possession. The court relied on the fact the statute of limitations had already expired). And, in one old case, the court also recognized that a tenant's possession may actually become adverse to a landlord where the tenant attorns to and pays rent to another. *Hanson v. Sommers*, 117 N.W. 842, 843 (Minn. 1908).

While acknowledgment of the owner's title defeats a claim of adverse possession, "[t]he continuity of adverse possession is not broken by the adverse claimant's taking a written conveyance of the interest claimed by him from parties claiming ownership of the property or some interest therein." *Dozier v. Krmpotich*, 35 N.W.2d 696, 700 (Minn. 1949). If the adverse claimant merely accepts a written conveyance, instead of attempting to purchase the land, accepting that conveyance is not an acknowledgement of superior title and the adverse possession claim continues to run. *Compart*, 906 N.W.2d at 604. The question is whether the adverse claimant obtained title as a way "to get rid of the outstanding title and unite it to the one under which he has been holding," or if instead he attempted a "purchase of the land from the owner." *Id.* (quoting *Dozier*, 35 N.W.2d at 700).

PRACTICE TIP

The lawyer should carefully denominate any offer of settlement to purchase, take an easement, etc., as protected under Minnesota Rule of Evidence 408 pertaining to offers of compromise. For disputes that are in suit, the lawyer should discuss with the client any past conversations or communications with the adverse party. Often times, there are discussions between property owners about the property dispute prior to attorneys being retained or lawsuits being filed in which a property owner may offer to purchase the portion of land in dispute. An offer made to purchase can be detrimental to a later claim, especially in the context of adverse possession. The lawyer should be prepared in case those communications are used as a defense to a claim of adverse possession.

4. Continuous Possession

To acquire title by adverse possession requires continuity of use for a period of 15 years. *Ganje v. Schuler*, 659 N.W.2d 261, 268 (Minn. Ct. App. 2003). An interruption of possession is fatal to the adverse possessor's claim. *Simms v. William Simms Hardware*, 12 N.W.2d 783 (Minn. 1943). Occasional and sporadic trespasses for temporary purposes will not satisfy the continuous element. *Romans v. Nadler*, 14 N.W.2d 482, 485 (Minn. 1944).

Even so, a brief absence by the landowner from the property for a trip can occur without causing a break in the continuity of possession: "Mrs. Martin's possession for a time as tenant may properly be taken into account in determining the period of adverse possession … Her temporary absence for 3 months on a trip to California did not break the continuity of her possession." *Kelley v. Green*, 170 N.W. 922, 923 (Minn. 1919).

Even if 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, 209 N.W. 257, 259 (Minn. 1926).

If a claimant has not personally held possession of the property for 15 years, they can "tack" the possession of their predecessor(s) in title to construct a 15-year period of possession. *Burns v. Plachecki*, 223 N.W.2d 133, 136 (Minn. 1974). Of course, the claimant must still prove that the predecessor(s) satisfied all five of the adverse possession elements.

Tacking requires privity between successive owners. *Fredericksen*, 209 N.W. at 259. In *Hanson v. Sommers*, 117 N.W. 842 (Minn. 1908), a case following foreclosures on both sides of a tangled chain of title, Hanson remained in possession, followed by his tenant for the statutory period: "No doubt can arise that there was here a privity of estate between the successive wrongful holders requisite to enable allowance of the privilege of tacking."

It is well settled that a foreclosure sale does not interrupt the continuity of adverse possession of one not a party to the proceedings, and the purchaser takes title to the property subject to the adverse possession. *Dozier*, 35 N.W.2d at 700; *see also Compart v. Wolfstellar*, 906 N.W.2d 598, 607–08 (Minn. Ct. App. 2018).

5. Exclusive Possession

To meet the exclusive element, the claimant must exhibit possession of the subject property consistent with a claim of ownership: "The exclusivity requirement of adverse possession is satisfied if the disseizor possesses the land as if it were his own with the intention of using it to the exclusion of others." *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 108 (Minn. Ct. App. 2002) (internal quotation omitted); *Ganje*, 659 N.W.2d at 267. Brief entries into the claimed land by the true owner were insufficient to defeat the plaintiff's claim of exclusive possession. *Ebenhoh*, 642 N.W.2d at 109.

D. Prescriptive Easements

A prescriptive easement operates in much the same way as adverse possession but with one important distinction: a prescriptive easement is based on *use* of real property as opposed to *possession*. Thus, while a successful adverse possession claim results in the transfer of fee ownership of the land to the claimant, a successful prescriptive easement claim gives the claimant an easement over the land and fee title remains in the record owner.

The required elements of a prescriptive easement claim are facially identical to adverse possession; a claimant must prove that the use was actual, open, hostile, continuous, and exclusive for 15 years. Establishing rights based on prescription are pursued through a legal action whereby all potentially impacted parties are named in a lawsuit seeking to establish a prescriptive easement. The purpose of prescriptive easements is "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." *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). Like adverse possession, a prescriptive easement is available against abstract property but not against Torrens property. MINN. STAT. § 508.02.

Generally, if a prescriptive easement claimant proves actual, open, continuous, and exclusive use, then hostility of the use is presumed. The Minnesota Supreme Court in *Dozier* held:

> Where the claimant of an easement by prescription has shown open, visible, continuous, and unmolested use for the statutory period, inconsistent with the rights of the owner of the servient estate … the use will be presumed to be under claim of right and adverse, so as to place on the owner of the servient estate the burden of rebutting the presumption by evidence that the use was permissive.

Dozier v. Krmpotich, 35 N.W.2d 696, 699 (Minn. 1949). The effect of the presumption is that once a claimant 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. *Boldt v. Roth*, 618 N.W.2d 393, 396 (Minn. 2000).

Minnesota law recognizes, however, that the general rule of presumed hostility is modified in cases where family members own both the benefited parcel and the burdened parcel. *See Wojahn v. Johnson*, 297 N.W.2d 298, 306 (Minn. 1980). In cases involving parcels owned by family members, the presence of a close familial relationship gives rise to the inference, if not the presumption, that the use is permissive. *Boldt*, 618 N.W.2d at 397. 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. *Id.* at 396–97. *See Beitz v. Buendiger*, 174 N.W. 440, 441 (Minn. 1919) (explaining the impact of a familial relationship in an adverse possession case). If use is permissive, it is not hostile and, therefore, this necessary element is missing from what is needed to prove a prescriptive easement.

Courts will review the existence of a close family relationship in evaluating whether the presumption applies. *See Nordin v. Kuno*, 287 N.W.2d 923, 927 (Minn. 1980) (citing *Burns v. Plachecki*, 223 N.W.2d 133 (Minn. 1974) (permission inferred between parent and child); *Lustmann v. Lustmann*, 283 N.W. 387 (Minn. 1939) (permission inferred between close brothers); *Collins v. Colleran*, 90 N.W. 364 (Minn. 1902) (permission inferred between parent and child); *cf. Beitz v. Buendiger*, 174 N.W. 440 (Minn. 1919) (permission not inferred between three unfriendly sisters); *Alstad v. Boyer*, 37 N.W.2d 372 (Minn. 1949) (permission not inferred between friendly neighbors)). A sale of the property outside the family will end the presumption of consent. *Boldt v. Roth*, 618 N.W.2d 393, 398 (Minn. 2000).

The holder of an easement is not limited to the particular method of use in vogue when the easement was acquired, and other methods of use in the aid of the general purpose for which the easement was acquired are permissible. *In re Application of Mahoney*, No. A16-0760, 2017 WL 164429, at *4 (Minn. Ct. App. Jan. 17, 2017), *rev. denied* (Minn. Apr. 18, 2017) (citing *Wash. Wildlife Pres., Inc. v. State*, 329 N.W.2d 543, 546 (Minn. 1983)).

Therefore, in prescriptive easement cases, if the claimant can prove all of the other elements clearly, then the claimant will have the benefit of the doubt on the original entry being hostile, i.e., without consent. *Nordin*, 287 N.W.2d at 926. Whether the presumption of hostility at original entry rule applies to adverse possession cases, however, is unclear. *Ebenhoh*, 642 N.W.2d at 110 n.2.

PRACTICE TIP

When bringing a lawsuit for adverse possession, the lawyer should consider pleading a claim for a prescriptive easement in the alternative. The lawyer should also consider whether the client needs or wants fee title to the land, or if an easement would be sufficient.

E. Implied Easement by Necessity

Another method of establishing easement rights by use is an implied easement, or easement by necessity. The elements of establishing an easement by necessity are:

- unity of title;
- a separation of title;
- the use which gives rise to the easement shall have been so long continued and apparent as to show that it was intended to be permanent; and
- that the easement is necessary to the beneficial enjoyment of the land granted.

Except the necessity requirement, these factors are only aids in determining whether an implied easement existed. Courts use the terms "easement by implication" and "easement by necessity" interchangeably. *Wilderness Resort Villas, LLC v. Miller*, No. A07-0557, 2008 WL 2726953, at *1 (Minn. Ct. App. July 15, 2008).

"'Necessary' does not mean indispensable, but reasonably necessary or convenient to the beneficial use of the property." *Romanchuk v. Plotkin*, 9 N.W.2d 421, 426 (Minn. 1943). To be "necessary," an easement must be more than a mere convenience. *Id.* But "[t]he easement need not have been indispensable to be necessary; rather, a reasonable necessity at the time of severance is sufficient." *Id.* (quoting *Clark v. Galaxy Apartments*, 427 N.W.2d 723, 727 (Minn. Ct. App. 1988)). "The party asserting the easement has the burden of proving necessity." *Clark*, N.W.2d at 726. Obstacles such as topography, houses, trees, zoning ordinances, or the need for extensive paving may create conditions where an easement is necessary. The easement need not have been indispensable to be necessary; rather, a reasonable necessity at the time of severance is sufficient. The burden of proving necessity is on the party claiming the easement.

In analyzing a claim for an easement by implication, courts consider the use giving rise to an easement by implication of necessity *at the time of the severance*. *Niehaus v. City of Litchfield*, 529 N.W.2d 410, 412 (Minn. Ct. App. 1995). The use giving rise to an easement by implication must be apparent and long-continued as of the time of the separation of title. *Rosendahl v. Nelson*, 408 N.W.2d 609, 611 (Minn. Ct. App. 1987).

§ 13.2 BOUNDARY BY PRACTICAL LOCATION

A. Introduction

Though boundary by practical location (BPL), especially by acquiescence, looks similar to adverse possession (for instance, it generally carries the same statute of limitation period), the two theories are distinct and not

interchangeable. More than one decision indicates that lawyers had better plead and present proof under both legal doctrines if they wish to maintain both theories. Some cases will better fit adverse possession, and though they are similar, other cases will better meet the practical location rules. *Denman v. Gans*, 607 N.W.2d 788, 796 (Minn. Ct. App. 2000) ("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"); *see also Engquist v. Wirtjes*, 68 N.W.2d 412, 417 (Minn. 1955) (stating practical location is "independent of adverse possession"). Unlike adverse possession, boundary by practical location claims can be made against Torrens property. MINN. STAT. § 508.02.

BPL can be established via:

- acquiescence;
- agreement; or
- estoppel.

B. Boundary by Practical Location – by Acquiescence

BPL can be established by acquiescence when adjoining landowners occupy their respective premises up to a certain line that they both recognize and acquiesce in for the statutory period, which is 15 years per Minnesota Statutes section 541.02. Acquiescence requires actual or implied consent to some action by the disseizor, such as construction of a boundary or other use of the disputed property and acknowledgment of that boundary for an extended period of time. *Engquist*, 68 N.W.2d at 417; *LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn. Ct. App. 1987).

A classic example of BPL by acquiescence is when adjoining landowners mutually construct a fence with the intention that the fence represents an adequate reflection of the understood boundary line. *See Fishman v. Nielsen*, 53 N.W.2d 553, 556–57 (Minn. 1952) (finding practical location by acquiescence when parties and their predecessors in title made a conscientious effort to build dividing fence as close as possible to actual boundary and remained satisfied with fence's location for the statutory period).

The acquiescence required is not merely passing consent but conduct from which assent may be reasonably inferred. *Britney v. Swan Lake Cabin Corp.*, 795 N.W.2d 867 (Minn. Ct. App. 2011). However, acquiescence by definition is inaction. Webster's defines acquiesce as to "grow quiet, to consent without protest". In *Pratt Investment Co.*, the court held that consent can be affirmative or tacit; in other words, consent can be inferred through inaction where action would be expected:

> 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 * * *." 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 Inv. Co. v. Kennedy, 636 N.W.2d 844, 849 (Minn. Ct. App. 2001) (internal citations omitted). *Fishman v. Nielsen*, cited in *Pratt Investment*, held that "[i]n 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*, 53 N.W.2d at 556. So while possession is not technically an element of BPL by acquiescence, it can serve as evidence pointing to acquiescence.

C. Boundary by Practical Location – by Agreement

To establish BPL by agreement, the claimant must prove that an express agreement between the landowners set an "exact, precise line" between their properties and that the agreement had been acquiesced to "for a considerable time." *Beardsley v. Crane*, 54 N.W. 740, 742 (Minn. 1893). In other words, at some point the owners on both sides of the boundary line expressly agreed to the location of the line and then treated it as such.

The express agreement theory requires clear proof of an agreement: "We hold that an 'express agreement' requires more than unilaterally assumed, unspoken and unwritten 'mutual agreements' corroborated by neither word nor act." *Slindee v. Fritch Invs., LLC*, 760 N.W.2d 903, 909 (Minn. Ct. App. 2009).

There is no strict 15-year rule as with BPL by acquiescence—the precise amount of time required is up to the court's discretion as to what constitutes "for a considerable time."

D. Boundary by Practical Location – by Estoppel

To establish BPL by estoppel, the deseized owner must have silently looked on with knowledge of the true boundary line while the claimant encroached on the owner's property or subjected themselves to an expense they would not have incurred had the boundary line been in dispute. Estoppel requires knowing silence on the part of the party to be charged and unknowing detriment by the other. *Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn. 1977). For example, a claimant spends money building a fence in a certain location that he otherwise would not have built, while the owner knowingly looks on but stays silent.

PRACTICE TIP

In boundary line litigation, there is often testimony from both experts and non-expert lay witnesses. The Minnesota 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). 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.

§ 13.3 STATUTORY DEDICATION AND COMMON LAW DEDICATION

A. Introduction

The public can obtain ownership of land—for roadway purposes—by possession via statutory dedication or common law dedication.

PRACTICE TIP

Statutory dedication and common law dedication are often plead in the alternative. A private landowner can also seek dedication even where the government opposes it. *Rixmann v. City of Prior Lake*, 723 N.W.2d 493 (Minn. Ct. App. 2006).

B. Statutory Dedication

Statutory dedication, as the name implies, is a creation of statute:

> When any road or portion of a road has been used and kept in repair and worked for at least six years continuously as a public highway by a road authority, it shall be deemed dedicated to the public to the width of the actual use and be and remain, until lawfully vacated, a public highway whether it has ever been established as a public highway or not.

MINN. STAT. § 160.05, SUBD. 1. The effect of statutory dedication is to "declare public those roads which have been used and kept in repair for a period of 6 years continuously." *Leeper v. Hampton Hills, Inc.*, 187 N.W.2d 765, 767 (Minn. 1971).

The essential requirements of statutory dedication are: (1) use by the public; (2) maintenance at the expense of an appropriate agency of government over a continuous period of at least six years; and (3) notice of the maintenance or repairs of the private road.

1. Use by the Public

Public use is established if the road was open to members of the public for use. Use may be by a comparatively small number of persons and still be "public use." *Anderson v. Birkeland*, 38 N.W.2d 215, 219 (Minn. 1949). Continuous use by as few as three people may constitute public use. *Foster v. Bergstrom*, 515 N.W.2d 581, 586 (Minn. Ct. App. 1994). It is the right of travel by all the world, and not the exercise of the right, which constitutes a road as a public highway, and the user by the public is sufficient if those members of the public—even though they be limited in number and even if some are accommodated more than others—who would naturally be expected to enjoy it do, or have done so, at their pleasure and convenience. *Anderson*, 38 N.W.2d at 219.

Only the property actually used will be dedicated: "Ownership of only that property actually used will pass to the governmental entity by the process of statutory dedication. This will include land used for the roadway, and also the land used for shoulders and ditches." *Barfnecht v. Town Bd. of Hollywood Twp.*, 232 N.W.2d 420, 423 (Minn. 1975).

Public use must be shown by clear and convincing evidence. *Town of Wells v. Sullivan*, 147 N.W. 244, 245, 246 (Minn. 1914).

2. Maintenance

Statutory dedication also requires clear and convincing evidence of continuous government maintenance for six years. To satisfy the maintenance requirement, the maintenance must be of a quality and character

appropriate to an already existing public road. *Shinneman v. Arago Twp.*, 288 N.W.2d 239, 242 (Minn. 1980). For example:

> A trial court's finding of sufficient maintenance was affirmed where a city laid gravel, leveled, graded, removed weeds, and installed culverts within an eight-year period . . . . A finding of sufficient maintenance was also affirmed where the city dragged a road every year in the spring.

Foster, 515 N.W.2d at 586 (internal citations omitted).

In contrast, sporadic maintenance may be insufficient:

> The supreme court reversed a trial court's finding of sufficient maintenance where a city engaged in four instances of grading and graveling in 24 years. *Ravenna Township v. Grunseth*, 314 N.W.2d 214, 218 (Minn. 1981). The court found maintenance "substantially less" than that required by Minn. Stat. § 160.05. *Id.*

Id. In *Foster*, the court ultimately concluded that the maintenance was not sufficient to support statutory dedication:

> Pine City performed some maintenance on the disputed road. Gravel and sweeping material were deposited on at least one occasion. The city laid blacktop on the disputed road at least once and patched the road upon request. The city regularly removed snow from the road, but plowed between the Bergstrom vehicles rather than issuing citations or towing the vehicles, as is customary practice on other city streets. The evidence is ambiguous as to whether Pine City pushes snow beyond the disputed portion of Third Avenue to maintain the road, or merely as a convenience for the city and the Bergstroms. The trial court could properly find that the quality and nature of city maintenance on the disputed road falls short of that done on already existing public roads. The trial court did not clearly err in denying the Fosters' statutory dedication claim.

Id.

3. Notice

For statutory dedication to apply and before a road authority may make any repairs or conduct work on a private road, the road authority must provide written notice to notify the owner of the road, specifying the segment of the road that is being repaired and the duration of the repair work; the notice must also include the language prescribed in Minnesota Statutes section 160.05, subdivision 1(b). The notice requirement applies to any repairs started on or after August 1, 2020 but does not apply to a road segment for which: (1) repair or work started before August 1, 2020; or (2) a road authority has continuously maintained since before August 1, 2020.

4. Exceptions

Statutory dedication does not apply to platted streets within cities. MINN. STAT. § 160.05, SUBD. 1. Statutory dedication also cannot be claimed against Torrens property, "because statutory dedication operates fundamentally similar to adverse possession, we conclude that statutory dedication is prohibited by the Torrens Act." *Hebert v. City of Fifty Lakes*, 784 N.W.2d 848, 855 (Minn. Ct. App. 2010).

C. Common Law Dedication

Common law dedication occurs where a landowner expresses an intent to dedicate property to a governmental entity, and the entity accepts. Unlike statutory dedication, there is no specific "waiting" period required. *Sackett v. Storem*, 480 N.W.2d 377, 380 (Minn. Ct. App. 1992). The required elements are: (1) intent to dedicate; and (2) public acceptance. *Wojahn*, 297 N.W.2d at 306–07.

1. Intent to Dedicate

The owner's intention to dedicate can be inferred from the owner's conduct:

> For example, intent may be inferred from the owner's long assent to, and acts in furtherance of, the public use, from the owner's recognition of the public's need for the use, and from the owner's recognition that the public has a valid claim to the property after using it.

Sackett, 480 N.W.2d at 380. "'Both intent and acceptance can be inferred from longstanding acquiescence in the right of the public' to use the land and 'from acts of public maintenance.'" *Barth v. Stenwick*, 761 N.W.2d 502, 511 (Minn. Ct. App. 2009) (quoting *Wojahn*, 297 N.W.2d at 307).

But there is a high standard of evidence required for such a showing—such actions must "*unequivocally* and *convincingly* indicate an intent to dedicate." *Sec. Fed. Sav. & Loan Ass'n v. C & C Invs., Inc.*, 448 N.W.2d 83, 87 (Minn. 1990) (emphasis in original).

2. Public Acceptance

Public acceptance can also be inferred from the conduct of the parties. It may be established by public use or by public maintenance. "Common user by the public 'is the very highest kind of evidence' of public acceptance of a dedication." *Keiter v. Berge*, 18 N.W.2d 35, 38 (Minn. 1945).

Acceptance may also be inferred from the "acts of public officers in improving and maintaining the dedicated property, although the maintenance need not be publicly funded." *Sackett*, 480 N.W.2d at 380–81.

Once the roadway is accepted by the public, the common law dedication is effective immediately. Where the purpose for which the dedication is made is restricted, the dedicated property must be used for the purpose for which it was dedicated. And the width of the right-of-way will be the width of the historically traveled road.

3. Exceptions

As with statutory dedication, the Minnesota Court of Appeals has ruled that common law dedication is a form of adverse possession, where the intent to dedicate is inferred, "if statutory dedication is tantamount to adverse possession, common-law dedication based on implied intent to dedicate is prohibited under the Torrens Act as well." *Hebert*, 784 N.W.2d at 855.

§ 13.4 CARTWAYS

A cartway is a form of condemnation whereby, upon the application of another landowner, a governmental entity takes privately-owned property and converts it to public use. The procedure to establish a cartway has three main components: the petition, the notice, and the hearing. In the classic scenario, the owner of a landlocked parcel petitions to the township, county, or city for the establishment of a cartway over another owner's land in order to allow

access to the landlocked parcel. The precise process for establishing a cartway depends on whether the land is in a township or a city.

A. Establishing a Cartway in a Township

The process for establishing a cartway in a township is provided in Minnesota Statutes section 164.08. There are two possible approaches under the statute:

1. Subdivision 1 *permits* establishment of cartway two rods wide and not more than one-half mile in length if: (1) a petition is signed by at least five voting landowners of the town; (2) the requested cartway is on a section line; and (3) the benefitting land is at least 150 acres, of which at least 100 acres are tillable.

2. Subdivision 2 provides for the *mandatory* establishment of cartway by a town board, which cartway is to be at least two rods wide, if:

   a. The benefitting land is at least five acres; or at least two acres if the tract was on record as of January 1, 1998 as a separate parcel. Note, however, that multiple landowners may aggregate parcels to meet the five-acre requirement. *Watson v. Bd. of Supervisors of Town of S. Side*, 239 N.W. 913 (Minn. 1931). Additionally, submerged land is counted toward acreage requirement. *Slayton Gun Club v. Town of Shetek, Murray Cnty.*, 176 N.W.2d 544 (Minn. 1970); and

   b. There is lack of access to said land except over water, the land of others, or access is less than two rods wide. Note that *In re Daniel*, 656 N.W.2d 543 (Minn. 2003) held that access by navigable water was sufficient access to land, and the owner did not qualify for a cartway. The legislature changed this result by amending the statute in 2004 to clarify that water access *did not* make an owner ineligible for a cartway.

   Owners with only impractical access to their property (e.g., steep terrain) may also be eligible for a cartway. *State ex. rel. Rose v. Town of Greenwood*, 20 N.W.2d 345 (Minn. 1945); *Schacht v. Town of Hyde Park*, No. C9-97-1754, 1998 WL 202655 (Minn. Ct. App. Apr. 28, 1998).

PRACTICE TIP

The lawyer should personally visit the client's property. If the client's property is less than five acres, the lawyer should determine whether neighboring parcels would benefit from the cartway so that the land can be aggregated to meet the five-acre requirement. The lawyer should also observe the terrain to determine whether any existing access to the land is impractical.

Damages must be paid by petitioner to the town *before* the cartway is opened. Damages include compensation to servient landowner(s), cost of professional and other services, and administrative costs and fees (e.g., board's attorneys' fees, surveys, appraisals, recording fees). The board may require the petitioner to post bond before it acts on the petition.

Regarding construction and maintenance, no town road or bridge funds may be used on the cartway unless the board determines that the expenditure is in the public interest. MINN. STAT. § 164.08. Where a cartway is not maintained by the town, it is maintained by the landowner(s). Where multiple property owners are benefitted, the town board may determine the maintenance costs to be apportioned to each private property owner if the owners cannot agree on the division of the costs.

B. Establishing a Cartway in a City

Minnesota Statutes section 435.37 permits cities to establish cartways. The conditions are similar to Minnesota Statutes section 164.08, subdivision 2, with some distinctions, including that there is no exception for two-acre parcels—the petitioning property must be at least five acres.

PRACTICE TIP

The lawyer should look for local ordinances that give further instructions and guidance regarding the cartway petition procedure in that particular locale.

C. Restrictions

A cartway cannot be established over state-owned land. *Silver v. Ridgeway*, 733 N.W.2d 165 (Minn. Ct. App. 2007). A landowner who has an express easement is not entitled to a cartway. *Roemer v. Bd. of Supervisors of Elysian Twp.*, 167 N.W.2d 497 (Minn. 1969).

D. Appeals

There are two main categories of appeals for cartway decisions: damage awards (including challenges to the public purpose or necessity of the cartway) and appeals of the board/council's refusal to establish the cartway. The statutes set out the appeal deadlines. Appeals are filed at district court.

PRACTICE TIP

When challenging the public purpose or necessity of the cartway, the lawyer should file the appeal within 10 days of the filing of the damage award in order to delay construction of the roadway. Otherwise, the board/council is authorized by statute to commence construction.

§ 13.5 EJECTMENT OF TRESPASSERS

One can sue to eject another from property one claims the right to possess. Said disseized owner can bring claims for ejectment and trespass damages against a disseizor either in a lawsuit initiated by the disseized owner, or in an answer and counterclaim to a lawsuit brought by the disseizor. MINN. STAT. §§ 559.07; 559.08.

The 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. In other words, before the expiration of the statutory period of adverse possession, a property owner holds the right to eject parties in possession. *See Levine v. Twin City Red Barn No. 2, Inc.*, 207 N.W.2d 739, 741 (Minn. 1973) ("Ejectment can be maintained only against a person in possession by one having a present exclusive right to possession."). If the adverse claimant adversely possessed the property for 15 years, they acquired title to the property and the owner of record title no longer has the right to eject them. *See Ross v. Cale*, 103 N.W. 561, 561 (Minn. 1905) ("[T]itle acquired by adverse possession is a title in fee simple, and is as perfect as a title by deed.").

Lawyers and surveyors advising clients need to counsel the landowner to think before they act to remove someone else's property or improvements. An owner may bring an action for damages for trespass if they can show they have genuinely been hurt or lost something. Often, there may be little proof of actual damages. The fact that another has occupied property along a 10-foot wide strip for five years may entitle the claimant to some nominal damages. Here is what the Minnesota 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 Twp., 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. Indep. Sch. Dist. No. 657, Morristown*, 477 N.W.2d 757, 760 (Minn. Ct. App. 1991).

Minnesota Statutes section 561.02 provides: "Any fence, or any other structure, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property shall be deemed a private nuisance." Therefore, a trespass may be enjoined and damages could be available, but there is little case law on the enforcement of this statute.