Landownership

Fences and Adverse Possession

According to the Texas Real Estate Licensing Act, a licensee must advise prospective buyers in writing of the need for title assurance when the earnest money contract is signed. This is required for a commission. Perhaps the need for a survey should be required as well because every land transaction may reveal the possible loss of land.

The land loss occurs through a legal concept known as adverse possession. A person who possesses and uses another's land without permission eventually may become the owner. No consideration is required. Because the adverse use of another's property is marked—usually by fence lines—a survey is needed to determine if the fence placement conforms to the legal description.

The statutory rules governing adverse possession are codified in Sections 16.021 through 16.034 of the Texas Civil Practices and Remedies Code. Section 16.021 defines adverse possession as the "actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person."

Adverse possession is, in fact, a combination of conduct (or activity) on the part of the adverse possessor and the owner's inactivity or failure to oust the intruder. The adverse possessor must enter the land without consent (adversely) and stay openly, obviously and continuously in peaceable possession for a given number of years. The term peaceable possession is statutorily defined as "possession of real property that is continuous and is not interrupted by an adverse suit to recover the property." The owner fails to act by not filing a lawsuit or using other legal means to remove the intruder within the statutes of limitation.

Four periods (or statutes of limitation) govern adverse possession. Under the three-year statute, the intruder must enter the land either under title or color of title as defined by the statute. Title means the chain of title from the sovereignty. Color of title refers to a claim based on a land right, land warrant, land scrip or an irregular chain of title "that does not want of intrinsic fairness or honesty." Thereafter, the owner fails to file suit to recover the property within three years.

The three-year statute generates the least controversy. If a buyer purchases land from the presumed owner as indicated by the chain of title, in all probability, the grantee received title. Adverse possession is not an issue.

Under the five-year statute, the owner must file suit to recover the property before an intruder:
- cultivates, uses or enjoys the property;
- pays the property taxes for five consecutive years before they become delinquent; and
- claims the property under a duly registered warranty deed.

The adverse possessor may not claim the land based on a forged deed, a deed executed under a forged power of attorney or under a quit-claim deed.

The mere payment of the property taxes can not cause adverse possession under the five-year statute. For this reason, one cotenant who pays all the property taxes for five consecutive years can never acquire the other cotenants' interests under this statute.

The ten-year statute is sometimes referred to as true adverse possession. No incidence of title or deed is required for entry. No payment of property taxes is mandated after entry. According to Section 16.026, the adverse possessor simply cultivates, uses or enjoys the property for ten continuous years.

Some restrictions apply to the amount of land claimed. If the person enters without title, and if the land is not enclosed, the claim is limited to 160 acres. If the land is enclosed, the person may claim all the enclosed acreage that is adversely and peaceably possessed. If the person enters under a registered deed or other memorandum of title, however, the possessor's claim extends to the specified boundaries after ten years.

The concept of tolling alters the number of years actually applied toward the three-, five- and ten-year statutes. According to Section 16.022, if an owner suffers from a legal disability when the possessor enters, the three-, five- and ten-year statutes of limitation will not begin running until the disability is removed. The
statute lists the following as legal disabilities:

- younger than 18 years old, regardless of marriage,
- being of unsound mind or
- serving in the U.S. armed forces during war.

For example, if a person enters and uses land owned by a 15-year-old, the statutes toll (suspend) until the owner reaches 18. Then, the adverse possessor must stay on the land another ten years.

Federal law also affects tolling. The Soldiers’ and Sailors’ Civil Relief Act of 1940 found in 50 USC, Section 525, tolls any limitation from running against a person in the U.S. armed services while on active duty. Unlike the state law, the owner need not be on active duty when the possessor enters for tolling to occur.

Unlike the federal law, the state statute places a 25-year limit on tolling. According to Section 16.027, a person, regardless of legal disability, must bring suit within 25 years to recover real property held in peaceable and adverse possession by another who cultivates, uses or enjoys the property. Thus, the fourth statute of limitations in Texas is the 25-year statute. It limits tolling to 25 years under the three-, five- and ten-year statutes.

The same person need not physically possess the land for the entire period. Successive adverse possessors may add (or tack) their periods of possession to accumulate the necessary times. According to Section 16.023, to satisfy any limitations period (three, five, ten or 25), peaceable and adverse possession need not continue in the same person. However, privity of estate must exist between the possessor and each successor. Privity may be established by an agreement, gift, devise or inheritance. Dale v. Stringer, 570.5 S. W. 2d 414.

In addition to privity of the estates, tacking requires each possessor to satisfy the requisites for the particular limitations statute. For instance, each intruder must pay the property taxes under the five-year statute. Finally, no gap, break or interruption in the physical possession of the land may occur between the successive possessors.

Once title is perfected through adverse possession, the statutes confer “full title, precluding all claims.” Basically the adverse possessor acquires fee simple title.

A pre-closing survey assures the buyer that the full measure of land described in the deed is conveyed. A fence not conforming to the legal description should be scrutinized. If the fence has been in place for more than ten years, and if the parties on either side of the fence have used and claimed the land to the fence as their own, a land loss (or gain) is possible.

Title policies exclude assurances that the fences and boundary lines coincide. The exception can be waived, however, for an additional fee and a survey by a surveyor chosen by the title company. Prospective buyers may wish to pursue this option.

Not all misplaced fences indicate adverse possession. When the terrain bars correct placement, adverse possession is prevented. For example, in Cox v. Olivard, 482 S. W. 2d 682, the placement of a fence on one side of a creek, out of physical necessity, prevented the neighbor on the other side from claiming the land. (In this case, the property line was the middle of the stream.) These are sometimes referred to as fences of convenience.

Finally, anyone claiming land by virtue of grazing must be aware of the cases involving casual enclosures (McDonald v. Weinacht, 465 S. W. 2d 136). Claims based on grazing livestock must arise from the adverse possessor fencing the cattle in, not the neighbors fencing them out.

Prospective buyers who discover a misplaced fence have several options. If the placement occurred within the previous ten years, the prospective buyer either may require the fence to be correctly located as a condition for closing or grant the neighbors the right to use the land on the other side. Permission to use the land stops adverse possession. The permission should be filed in the deed records.

If the fence has been misplaced to the buyer’s disadvantage for more than ten years, the prospective buyer may request proper placement and a release from the neighbor for any claim to the land. If not granted, renegotiation of the purchase price to reflect the shortage is a possibility.

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