

## **UNWRITTEN TITLE TRANSFERS**

by Peter R. Olson  
JENKINS & OLSON, P.C.  
Cartersville, Georgia  
770/387-1373

### A. ADVERSE POSSESSION

#### 1. General

Adverse possession is a form of prescriptive title. It means the acquisition of title by essentially occupying it for a term of time. There are a number of requirements: there must be a claim of right of the possessor and not of another; the claim must not have originated in fraud except as provided in O.C.G.A. § 44-5-162; the occupation must be public, continuous, exclusive, uninterrupted, and peaceable; and the claim cannot be based on permissive possession. O.C.G.A. § 4-5-161.

#### 2. Possession

Adverse possession can arise after twenty years possession, under O.C.G.A. § 44-5-163; or after seven years possession with color of title, under O.C.G.A. § 44-5-164. Possession can be actual or constructive.

##### a. Actual

Actual possession of lands may be evidenced by enclosure, cultivation, or any use and occupation of the lands which is so notorious as to attract the attention of every adverse claimant and so exclusive as to prevent actual occupation by another. O.C.G.A. § 44-5-165.

Actual possession includes enclosing property with a fence or other barrier marking the property. Lyons v. Bassford, 242 Ga. 466, 249 S.E.2d 255 (1978). Cultivation is also another excellent indication of possession. Cheek v. Wainwright, 246 Ga. 171, 269 S.E.2d 443 (1980).

Allowing cattle to graze is not sufficient for possession, nor is posting signs and driving away trespassers. Rowland v. McLain, 86 Ga. App. 140, 70 S.E.2d 918 (1952). Squatters do not acquire title, no matter how long they remain.

b. Constructive

Constructive possession of lands exists where a person who has paper title to a tract of land is in actual possession of only a part of the tract. In such a case, his possession shall be construed to extend to the boundary of the tract. O.C.G.A. § 44-5-166. One who occupies part

of a property under a colorable title, which title extends to the entire property, can be found to have constructively possessed the entire property as described in the deed. Campbell v. Gregory, 200 Ga. 684, 38 S.E.2d 295 (1946); Lyons v. Bassford, 242 Ga. 466, 249 S.E.2d 255 (1978). On the other hand, without colorable title, possession only extends to the actual lands possessed. If the boundary line is not well defined, it would be impossible to show adverse possession of the entire tract.

c. Continuous

Generally, possession must be continuous. That does not mean every day, but there must be generally continuous indication of the intent to possess the property. This is a question of fact. Patellis v. Tanner, 199 Ga. 304, 34 S.E.2d 84 (1945).

d. Tacking of Possession

Tacking of possession refers to one adverse possessor adding his claim to a prior adverse possessor. O.C.G.A. § 44-5-172. This may seem illogical, that an “inchoate prescriptive title” may transfer, but it makes sense from the true owners point of view: to him, adverse possession by one is the same as another. All the other

requirements must be satisfied, including a claim of right. Olsen v. Noble, 209 Ga. 899, 76 S.E.2d 775 (1953).

Continuity may as effectively be shown by the successive bona fide possessions of several persons, provided the requisite privity exists between them, so as to thus permit attacking of their unbroken successive possessions. Blalock v. Redwine, 191 Ga. 169, 12 S.E.2d 639 (1940).

### 3. Ownership Indications

Generally, the question of whether a possessor has shown ownership is a mixed question of law and fact. There are a great variety of actions that can evince ownership. The possessor must have acted in such a way as to advise the true owner of his adverse claim. Entry, even repeated entry, is not sufficient. The marking of the boundaries in some fashion is not sufficient. Poss v. Guy, 212 Ga. 393, 93 S.E.2d 565 (1956). While regular cultivation is sufficient, cutting timber is not sufficient. The payment of taxes is not sufficient. Mitchell v. Gunter, 170 Ga. 135, 152 S.E.2d 466 (1930).

The building of a residence is excellent evidence, as is the construction of other improvements that are permanently occupied. Carter v. Becton, 250 Ga. 617, 300 S.E.2d 152 (1983).

#### 4. Fraud, Good Faith

Possession must be under a claim of right. In order for fraud to prevent the possession of property from being the foundation of prescription, such fraud must be actual or positive and not merely constructive or legal. When actual or positive fraud prevents or deters another party from acting, prescription shall not run until such fraud is discovered. O.C.G.A. § 44-5-162.

Actual fraud cannot be founded on presumptive notice, on that sort of notice which is based upon a record, or which is presumed from lack of diligence. Baxter v. Phillips, 150 Ga. 498, 104 S.E. 196 (1920). The cases refer to moral fraud, and require actual intent. If the adverse possessor should have known, or could have know if he checked, is not relevant. He must actually know. Hence, this requires a sort of bad faith, that can be hard to prove.

#### 5. Exceptions

##### a. Disabilities

Adverse possession does not run against a minor during his minority, a person incompetent by reason of mental illness or

retardation as long as the mental illness or retardation lasts, or a person imprisoned during his imprisonment. After any such disability is removed, prescription shall run against the person holding a claim to realty or personalty. O.C.G.A. § 44-5-170. Miles v. Blanton, 211 Ga. 754, 88 S.E.2d 273 (1955).

Disabilities that arise halt the claim, but once they are removed, the period afterwards tacks on to the period before. O.C.G.A. § 44-5-171.

b. Property Not Subject to Adverse Possession

Generally, if actual possession is impossible, adverse possession is impossible. An example would be the deep sea bed, or the peaks of mountains. Lands held by the public also cannot be taken by adverse possession. However, adverse possession by a government agency can ripen title with the public. DOT v. Howard, 245 Ga. 96, 263 S.E.2d 135 (1980).

c. Permission

If the party is occupying the property with the permission of the owner, no claim for adverse possession can arise. This is because such use is not adverse. With notice of an adverse intent, the claim

can begin to ripen.

## B. ACQUIESCENCE

### 1. General

Boundaries can be determined by the principle of acquiescence.

Acquiescence is a form of adverse possession relating specifically to boundary lines. By statute in this state, acquiescence for seven years, either by the acts of the adjoining landowners or by declarations, is sufficient to establish a boundary. Possession up to a boundary line, even if wrong, for seven years, can establish that boundary line by adverse possession.

O.C.G.A. § 44-4-6; Browne v. Johnson, 204 Ga. 634, 51 S.E.2d 416 (1949).

Once established by this method, the boundary line become binding on successors.

### 2. Disputed Boundary Required

The boundary line must be in dispute, for this principal to work. An undisputed boundary line cannot be changed by this method. Acquiescence also cannot be passive. The other owner has to know of the dispute and the claim. There must be some act to acquiesce.

The owners must also be adjacent owners on both sides of the line.

Agreement between two owners separated will not work.

### 3. Mistake in Boundary Line

A mistaken marking of the boundary line can ripen into adverse possession and become the correct boundary, after twenty years. Lockwood v. Daniel, 193 Ga. 122, 17 S.E.2d 542 (1941).

### 4. Exceptions

If the line has never been in dispute, acquiescence change the line. If there is no title on one side, acquiescence cannot confer title. It only sets boundary lines. Gauker v. Eubanks, 230 Ga. 893, 199 S.E.2d 771 (1973);

### 5. Oral Agreement

An unascertained or disputed boundary line between coterminous proprietors may be established by oral agreement, provided such agreement is accompanied by actual possession to the agreed line or is otherwise executed. For example, an oral agreement combined with seven years actual possession would be sufficient, as would the erection of a fence in the wrong place, for seven years. Lockwood v. Daniel, 193 Ga. 122, 17 S.E.2d 542 (1941).

## C. ESTOPPEL

### 1. General

Estoppel is the general principle that a party cannot stand by and benefit from inactivity without objection when another party takes action that affects his rights.

There can be no estoppel where party claiming estoppel had notice or knowledge of the facts, or when the matters were equally known to both parties, or the means of knowledge were equally open. Ingram v. Smith, 57 Ga.App. 438, 195 S.E. 882 (1938).

## 2. Estoppel by Deed

Estoppel by deed refers to not being able to make a claim against the necessary implications of a grant of property. For example, if a property owner gives a street or way as a boundary, he will be estopped by his deed from denying the existence of the street or way. This estoppel results from the effect to be given to his deed; for every grant is so construed so as to give the grantee the benefits intended to be conferred by the grant, and the grantor will not be permitted to close up the way or do anything that will defeat or essentially impair this grant. When a way is given as a boundary, the implication of a grant of an easement is dependent upon the grantor's ownership of the servient fee; nevertheless he is estopped by his deed from contesting with his grantee the latter's right to use the way, whether the

ownership of the servient fee be in him or in another. Wimpey v. Smart, 137 Ga. 325, 73 S.E. 586 (1912).

### 3. No Estoppel Unless Unambiguous

If the deed creates some ambiguity, there can be no estoppel of that ambiguity. This is based on the principle cited above that no estoppel can arise if the facts are not known. For example, if there is a conflict between the courses in a deed and the landmarks described in the deed, that inherent conflict and uncertainty prevents estoppel from arising. Hill v. Neely, 151 Ga. 276, 106 S.E. 729 (1920).

In other words, this principle can be expressed as follows: for an estoppel to operate against a party signing a deed as to a boundary line between two adjacent tracts of land, the description included in the deed of the boundary line in question must be sufficiently definite and accurate to put the party signing the deed, and who it is claimed is estopped, on notice as to the definite boundary line between the tracts of land in question. Hill v. Neely, supra.

## D. PAROL AGREEMENT

### 1. Parol Agreement to Transfer Land

In regard to land transfers, the statute of frauds requires that contracts

for the sale of land be in writing. O.C.G.A. § 13-5-30. This rule is not applicable when there has been full or part performance that has been accepted.

For example, where a father under a parol agreement between him and his son gave to the latter a tract of land as an advancement in full of his prospective share in his estate at and after his death, and where the son under such agreement accepts and takes possession of such land in full of his prospective share as heir at law in the estate of his father, such agreement, after full performance, is a valid and binding contract. Home Mixture Guano Co. v. McKoone, 168 Ga. 317, 147 S.E. 711 (1929).

## 2. Parol Evidence to Clarify Deed

When a boundary is definitely stated in a deed or other instrument, parol evidence is not admissible, unless there is fraud or mistake. Parol evidence can be admitted to explain or interpret descriptive terms, understand what monument was referred to, and so forth. As is the case in other areas of contract interpretation, if there are ambiguities, parol evidence can be admitted to clear up an ambiguity. The legal description present must contain sufficient information to be a key. In other words, were a deed is uncertain in some aspects, if the deed provides enough “keys” within the

four corners of the instrument, it might be possible by the introduction of parol evidence to save the description. Wisener v. Gullede, 251 Ga. 419, 306 S.E.2d 642 (1983).

When property description in written contract is ambiguous, in that it can be interpreted as referring to more than one piece of property, parol evidence is admissible to explain ambiguity.

### 3. Parol Evidence to Alter Clear Language

Parol evidence may not add to, enlarge or any way change description of property contained in deed. When subsequent words in deed are of doubtful import, they cannot be construed so as to contradict preceding words which are certain.

For example, parol evidence will not be admitted to clear up a portion of a deed, if the main portion is intelligible without it. In one case, a transferor attempted to transfer a fifty acre tract and leave out a thirty acre exception. However, the Court found that the purported reservation of the 30-acre tract, out of conveyance of 50-acre tract, was too vague so as to allow for identification of 30-acre tract, and that resulted in the conveyance of the entire 50-acre tract. Durden v. Reynolds, 264 Ga. 34, 440 S.E.2d 170 (1994).

Hence, when a grantor excepts a portion of land conveyed in his own favor, the reserved portion of land must be definitely identified, or effect of vagueness will be to make the conveyance effective on the entire tract.