

# Adverse Possession

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WHOSE LAND IS IT ANYWAY?

# Elements

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- ❖ For the statutory period of ten (10) years, possession of the disputed property must be:
  - 1) Open and notorious;
  - 2) Actual and uninterrupted;
  - 3) Exclusive; and
  - 4) Hostile. <sup>1</sup>
  
- ❖ Burden of proof is on the party making the adverse possession claim.

# Open and Notorious

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- ❖ Requires a showing of use consistent with ownership.<sup>2</sup>
- ❖ The use and occupancy required is that of a true owner, considering the land's nature and location.<sup>3</sup>
- ❖ The purpose of this element is to ensure that the user makes such use of the land that *any reasonable person would assume he is the owner*.<sup>4</sup>

# Open and Notorious - continued

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- ❖ When the true title owner knows of the possessor's adverse use throughout the statutory period, the element of open and notorious is satisfied.<sup>5</sup>
- ❖ If the claimant makes such use of the land that any reasonable person would assume he is the owner, the title owner is held to have constructive notice of the possession.<sup>6</sup>

# Actual and uninterrupted

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- ❖ An act is only considered an interruption of use if there is an *actual cessation* of the possession.<sup>7</sup>
- ❖ Whether a cessation of use rises to the level of interruption depends on the success of the act in actually causing a cessation of use, rather than its form or manner.<sup>8</sup>

# Exclusive

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- ❖ Exclusive dominion is the essence of possession.<sup>9</sup>
- ❖ Exclusive possession can exist in unused land if others have been excluded therefrom.<sup>10</sup>
- ❖ A fence is the usual means relied upon to exclude strangers and establish the dominion and control characteristic of ownership.<sup>11</sup>

# Hostile

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- ❖ Does not import enmity or ill-will but rather imports that the claimant is in possession as the owner.<sup>12</sup>
- ❖ Requires only that the claimant treat the land as his own as against the world throughout the statutory period.<sup>13</sup>
- ❖ The nature of the possession is determined solely on the basis of the manner in which the claimant treats the property.<sup>14</sup>
- ❖ The possessor's subjective belief whether the land possessed is or is not his own and his intent to dispossess or not dispossess another are irrelevant to a finding of hostility.<sup>15</sup>

# Effect of a fence on hostility

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- ❖ Important to distinguish whether the fence was maintained as a matter of convenience or under a claim of ownership.<sup>16</sup>
- ❖ The controlling factor is the nature of the actual use, rather than the original purpose for constructing the fence.<sup>17</sup>
- ❖ Where a fence purports to be a line fence, rather than a random one, and when the fence is effective in excluding an adjacent owner from the unused part of the property otherwise generally in use, it constitutes *prima facie evidence of hostile possession up to the fence*.<sup>18</sup>

# 10 year statutory period

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## ❖ RCW 4.16.020

- The period prescribed for the commencement of actions shall be as follows:
  - Within ten years:
    - (1) For actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appears that the plaintiff, his or her ancestor, predecessor or grantor was seized or possessed of the premises in question within ten years before the commencement of the action.

- ❖ Tacking is permitted to compute the ten-year period so long as there is privity between successive occupants holding continuously and adversely to the true owner.<sup>19</sup>

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# COMMON OWNERSHIP

# Common ownership

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- ❖ Concept dates back to 1909.
- ❖ *Spaulding v. Collins*, 51 Wash. 488 (1909).
  - Generally, when a person executes and delivers a deed of land to another, the entire legal interest in the premises vests in the grantee.
  - As such, if the grantor remains in possession of the property, his or her possession is that of either a tenant or trustee of the grantee.
  - Two recognized exceptions:
    - Explicit disclaim and notorious assertion of right
    - Mistaken belief

# Spaulding: Explicit disclaimer and notorious assertion of right

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- ❖ The general rule of subservience to the grantee can be defeated by an “explicit disclaimer of such relation and a notorious assertion of right in himself. . .”
  - Facts:
    - Married couple executed a deed conveying their property to another in order to protect it from the husband’s creditors.
    - Husband left and wife remained on the land rent-free, making no improvements herself to the land for over twenty years.
    - Husband came back over twenty years later and sued to declare the deed a trust deed.

# *Spaulding* - continued

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- ❖ Mere continued possession, without more, of the granted property in and of itself is typically insufficient.
- ❖ However, *Spaulding* did not clarify what was enough to constitute an explicit disclaimer and notorious assertion of right.

# *Stockwell:* Mistaken belief

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- ❖ If the grantor gives up possession of the majority of the conveyed property but remains in possession of a portion of it under the mistaken belief it was not conveyed, the grantor can adversely possess the mistaken portion.
  - Facts:
    - The common grantor divided the original lot into two lots, with the disputed property being a fifty-foot strip in between.
    - In this disputed area existed an old, dilapidated fence, which the trial court held was not the true boundary line and therefore adverse possession did not apply.

# *Stockwell* - continued

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- ❖ Washington Supreme Court held the trial court erred in applying the general rule of subservience and noted the mistaken belief exception.
  - Reason for the exception: under such facts, there is no validity to the assumption, upon which the general rule is based, that the grantor remains in possession permissively under the grantee.
- ❖ Cited the *Wood v. Nelson* case regarding fences as consideration for the trial court upon remand.

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**WHAT IF THE TITLE OWNER WINS?**

# Property rule v. Liability rule

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- ❖ Property rule = a property owner has an absolute right to eject trespassers and to require them to remove encroaching structure, even if the trespassers believed in good faith that the land was theirs.
- ❖ Liability rule = the exchange of damages for a transfer of a legal right.
  - General power of the court to afford equitable relief
- ❖ Ordinarily a mandatory injunction will issue to compel the removal of an encroaching structure, however it is not to be issued as a matter of course.<sup>20</sup>

# Arnold Test

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- ❖ Set forth the “test for when a court may substitute a liability rule for the traditional property rule in encroachment cases.”
  - [A] mandatory injunction can be withheld as oppressive when, as here, it appears . . . that:
    - (1) The encroacher did not simply take a calculated risk, act in bad faith, or negligently, willfully or indifferently locate the encroaching structure;
    - (2) the damage to the landowner was slight and the benefit of removal equally small;
    - (3) there was ample remaining room for a structure suitable for the area and no real limitation on the property’s future use;
    - (4) it is impractical to move the structure as built; and
    - (5) there is an enormous disparity in resulting hardships.<sup>21</sup>

# *Arnold* Test - continued

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- ❖ Due to its equitable nature, the question of whether each element has been met should be analyzed using the “inherently flexible and fact-specific” equitable power of the court to fashion remedies that do equity.<sup>22</sup>
- ❖ The court must reason through the *Arnold* elements as part of its duty to achieve fairness between the parties.<sup>23</sup>
- ❖ Burden of proof is on the encroacher to prove the *Arnold* elements clearly and convincingly.<sup>24</sup>

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**WHAT IF THE ADVERSE POSSESSOR WINS?**

# Title

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- ❖ Title vests automatically in the adverse possessor if all the elements are fulfilled throughout the statutory period.<sup>25</sup>
- ❖ Title so acquired by the adverse possessor cannot be divested by acts other than those required where title was acquired by deed.<sup>26</sup>

# Potential payments

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## ❖ Addressed in RCW 7.28.083

- Provides that a party who prevails against a record title holder for adverse possession may be required to:
  - Reimburse the title holder for part or all of the taxes or assessment levied on the property during the period of the adverse possession and which have been proven to have been paid by the holder by competent evidence; and
  - Pay the county treasurer part or all of the taxes or assessments levied on the property after the adverse possession claim is filed and which are due and unpaid at the time judgment is entered.

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WHAT ABOUT ATTORNEY FEES AND COSTS?

# Attorney fees and costs

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- ❖ Addressed in RCW 7.28.083(3)
  - The prevailing party in an action asserting title to real property by adverse possession may request the court to award costs and reasonable attorneys' fees.
  - The court may award all or a portion of costs and reasonable attorneys' fees to the prevailing party if, after considering all the facts, the court determines such an award is equitable and just.
- ❖ An award of attorney fees are upheld unless the appellate court finds the trial court manifestly abused its discretion.<sup>27</sup>

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# Questions?

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# Citations

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1. *ITT Rayonier, Inc. v. Bell*, 112 Wn.2d 754, 757 (1989).
2. *Acord v. Pettit*, 174 Wn.App. 95 (Ct.App. 2013).
3. *Id.*
4. *Chaplin v. Sanders*, 100 Wn.2d 853, 862 (1984).
5. *Id.* at 855.
6. *Id.* at 862.
7. *Ofuasia v. Smurr*, 198 Wash.App. 133, 144 (Ct.App. 2017).
8. *Huff v. Northern Pac. Ry. Co.*, 38 Wn.2d 103, 113-14 (1951).
9. *Wood v. Nelson*, 57 Wn.2d 539, 540 (1961).
10. *Id.*

# Citations - continued

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11. *Id.*
12. *Chaplin v. Sanders*, 100 Wn.2d 853, 857-58 (1984).
13. *Id.* at 860-61.
14. *Id.*
15. *Id.* at 855.
16. *Roy v. Cunningham*, 46 Wn.App. 409,412 (Ct.app. 1986).
17. *Id.*
18. *Wood v. Nelson*, 57 Wn.2d 539, 541 (1961).
19. *Roy v. Cunningham*, 46 Wn.App. 409, 412 (Ct.App. 1986).
20. *Arnold v. Melani*, 75 Wn.2d 143, 152 (1968).

# Citations - continued

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21. *Arnold v. Melani*, 75 Wn.2d 143, 152 (1968).
22. *Proctor v. Huntington*, 169 Wn.2d 491, 503 (2010).
23. *Id.*
24. *Garcia v. Henley*, 190 Wn.2d 539, 545 (2018).
25. *Gorman v. City of Woodinville*, 175 Wn.2d 68, 72 (2012).
26. *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 855 (1962).
27. *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 528 (2007).