

To: Supervising Attorney Michelle Quist
From: Hoan Khanh Doan
Re: MacDonald vs. McGillvary; Adverse Possession

Question Presented

Under Utah law, did McGillvary acquire adverse possession when a fence was built open and notoriously along the divided property, and when McGillvary maintained the property continuously for seven years by Utah statutory law exclusively until a survey was performed and the property was disputed in this matter?

Brief Answer

Most likely yes, the fact of the matter is it would most likely be in favor of McGillvary due the fact he had resided at the location for more than twenty years and made use of the land in the belief that the portion of the land was his property, without any disputes from McDonald. With no dispute from McDonald for seven years, the time frame that was allowed for McDonald to conveyance of any stipulations had passed, according to the State of Utah. The fact that the fence does not exist does not matter, the portion that McGillvary apparently assumed was his, belongs to him, and it was continuous before the ownership was discovered. Due to the fact presented, the State of Utah must follow the guidelines that cover boundary lines in relation to real estate as well as the statute of limitations.

Facts

McDonald ordered a survey to be conducted in 1966, and it was discovered, prior to the fence collapsing, that a portion of McGillvary's land belonged to McDonald. The assumption of the ownership of the land had carried on for several years. In 1970 the fence had fallen, and that caused the desire to put up a chain link fence, which initiated the survey McDonald requested. Each party maintained their land, raking leaves and mowing of the grass as every season came upon them. The survey had brought the issue to both owners' attention.

The dispute is now presented to the judicial system, in 1989. McDonald files a complaint making the allegations of the matters of Adverse Possession, and requesting for the fence to be removed. McGillvary denies the accusations and disputes the request made and makes a counter claim against McDonald. In this case Adverse Possession would considerable be the issue in the matter but the fence had become a stipulation.

Discussion

Under Utah law did McGillvary acquire adverse possession when a fence was built open and notoriously along the divided property and when McGillvary maintained the property continuously for seven years by Utah statutory law exclusively until a survey was performed and the property was disputed in this matter?

The requirement of adverse possession must meet and exceed each element to be considered as an establishment upon the land and that would entail occupancy for seven years and to claim the land as your own for seven years. The four elements are as follows; it must be continuous, which means the property was maintained with no interruptions. The property must be in actual possession and that would be defined as the ownership of the land. The property must be open and notorious in the matter of adverse possession and that would entail the knowledge of how the property lays must be known of without out any stipulations. The aspect of adverse must be incorporated as well and that would entail without owners acknowledgement.

A. Continuous

McGillvary resided on the property continuously due to the fact he had maintained the property for seven years without any type of stipulation would establish his residency upon that portion of the property. The time frame he has resided upon the property exceeds the time frame required. This case has a continuous aspect due to the fact had maintained the property as his own.

According to Utah law 78B-2-214. Adverse possession is not applied unless the land has been in occupied for no less than seven years as in *Welner v. Stearns*,⁴⁰ Utah 185, 120 P. 490, Am. Ann. Cas. 1914C, 1175, Utah, December 28, 1911 this would entail the occupancy to be a continuing fact to where you must reside upon the land within the time frame stated in the statute like as in *Larocque v. O'Conner*, 90 Conn. App. 156 – Conn: Appellate Court 2005 alleging adverse possession by equity, which proves he was in ownership for some extensive time because he accumulated equity as in our present case.

McGillvary had met the requirements of the statute; he had maintained the property and exceeded the time frame of seven years uninterrupted upon the property. Utah law 78B-2-214, would establish the continuous aspect of adverse possession. The survey that was conducted distinguished the perimeter of the two properties and designates the boundary that is owned by both owners; unlike a predecessor that does not attend to his portion of the property continuously like a predecessor of that land would more than likely be obligate to.

B. Adverse

McGillvary was adverse when the dispute occurred after the falling of the fence. The altercation between the two individuals initiated the survey to be conducted by the discretion of McDonald. Actual possession must be determined in order distinguish the factor of adverse. The property must be in this state for at least seven years and be in subordination to the title. The adverse aspect relates to this case because if McDonald acknowledge the situation, this case would have occurred at a sooner date.

According to Utah law 78B-2-208: To acquire adverse possession a person must be attempting to recover ownership of property like in the case Scott v. Hansen No. 10580. Supreme Court of Utah. 422 P.2d 525, 18 Utah 2d 303 Dec. 29, 1966., where Scott was attempting to regain his property. The person that is attempting to gain the ownership must be in possession presently. Park West Village, Inc. v. Avise, 714 P.2d 1137 Utah, February 20, 1986 (NO. 18720). Any occupancy that entails the aspects of subordination of a title would fall in the category of adverse possession. As in Schoenfeld v. Pritzker 257 Cal. App. 2d 117. To adversely possess property you must be in possession of the property for 7 years.

Utah Law states there must be some type of a dispute amongst property owners like in the matter of the McGillvary v. McDonald. The altercation commenced when there was a dispute regarding branches and the dispute about the wooden fence occurred in which initiated the survey to be conducted on the perimeter of the land. The boundaries of each side of the properties were divided by the wooden fence that raised the issue at hand like the law states, in order for the possession to be adverse one must be attempting to recover the land and in this care that would pertain to both parties.

C. Open and Notorious

When the fence was built it was built open and notoriously, McGillvary maintained a residence uninterrupted prior to the dispute of the property. When fence was built it was with the knowledge of both land owners. Until recently the matter was undisputed for over the required amount of time. In order for the property to be considered as open and notorious both processors must have knowledge upon the land and what occurs. In this case this aspect of open and notorious applies due to the fact that the fence was built at both property owners discretion.

According to Utah Law 78-12-7. Adverse possession -- Possession presumed in owner. In order to actually be considered as open and notorious on the subject of adverse possession,

there must be knowledge by both property owners of anything applying to the land oppose to (Otter Creek v. New Escalante). The party must have ownership for no less the 7 years uninterrupted like in (Salt Lake City v. Silver Fork Pipeline, No. 980203 Filed January 7, 2000). Adverse Possession would acquire a proven fact of the boundaries of the land belonging to one or both of the parties, if no dispute has occurred within the seven years, adverse possession applies as in (Edgell v. Canning et al. Filed March 9, 1999).

In regards to Utah law, to be open and notorious upon the subject of adverse possession the party involved must be uninterrupted, like a typical predecessor would be upon his own property. The parties in this case had built the fence where they on the land with knowledge of the fact. Utah law, in regards to adverse possession, states if the land is in possession for seven years, like what is occurring in the case of McGillvary v Mcdonald, that would fall in the category of being open and notorious, due the fact that the was no secretive gesture or acts of subordination against the title to the possess the portion of the property disputed.

D. Exclusively

In regards to being Exclusive in the matter of Adverse Possession, one must have interest in the property upon the date of purchase. In this matter, McGillvary had in mind that the property was in his possession prior to the subject of removing the fence, which lead to the survey being conducted. For the initial aspect of this matter to be exclusive, one must prove the interest of the property to be in good faith which McGillvary did.

According to Utah Law 2006 Utah Code - 78-12-7, the interest of the land must be established upon purchase as in (Patterson v. Patterson). The purchaser must reside upon the land uninterrupted of any disputes regarding boundaries. The right of possession must be in mind of the purchaser with the enjoyment of the ownership of the property like in (Bahr v. Imus). Conveying interest in the property is vital to perceive it as being exclusive as in MINING COMPANY v. TAYLOR. 100 U.S. 37 (, 25 L.Ed. 541). The law states that it must be visible to an observer that the individual has the right of ownership of the land.

The laws of Utah on adverse possession focus on the statute of limitation, and that pertains the time frame like one's knowledge of where exactly the boundary lays, as the wooden fence existed upon all those years. The McGillvarys had no knowledge of the matter at hand and had every intention, towards the property, as if they were the actual owners themselves. However, if the McGillvarys acted in good faith towards the property in the duration of seven years with no disputes like a purchaser would intend to upon his or her property, that would establish the aspect of being exclusive in this matter, upon the purchase of the property.

E. Statutory Period

In this case McGillvary, the statutory period is vital in this situation. In order for him to meet the criteria of the statute of limitation on the subject of adverse possession, he must exceed the time frame of seven years to obtain the property. McGillvary must exceed the statutory period in good faith in all five elements to prevail and obtain the portion of the property disputed.

According to Utah law 78B-2-209, Adverse possession -- Presumption -- Proviso -- Tax title, one must meet the criteria of the 5 elements to meet the criteria of the 7 year statutory period like in (Salt Lake County v. Metro West Ready Mix, Inc). Within the 7 years, it must be undisputed and uninterrupted enjoyment of the property purchased as in (STACEY & MARILYN TITUS v. SANDRA CHAPMAN). Within the duration of the period, one or both parties must be attempting to recover the disputed property like (Bryant v. Blevins (1994) 9 Cal. 4th 47 [36 Cal. Rptr. 2d 86, 884 P.2d). Utah law will determine the adverse possessions based upon the statutory period upon the property. All aspects must meet the guidelines of the Utah law.

In the event of these disputes that pertain to property, and the boundaries that separate the ownership of the land, that are as close as a boundary line would be considered in scenarios like McGillvary v. McDonald, it would could be easily misunderstood as to where the line would lay. This is the reason why one would claim adverse possession, Utah law enacts this statute with such reason as to set the guidelines and the timeframes to structure these situations that are not visible to the naked eye, but like the boundary line it is impossible to know of someone else's intent. Therefore, it would be determined on the individual's actions upon the land, like how McGillvary was maintaining his land and how there was no dispute until the altercation occurred amongst the two parties. Nevertheless, the statute is the divider in this matter, not the wooden fence.

The Statutory period is seven years to obtain property by adverse possession and that should be ample time to assume that it's your portion of land when you are purchasing the property. The property has perimeters that are visible upon the documents. The statutory period was well over-exceeded in the matter.

Conclusion

According to Utah Code 78B-2-208. Adverse possession -- Possession presumed in owner. This law requires the occupancy of seven years to obtain the property with the five elements of adverse possession intact to obtain the disputed property.

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Memorandum/Final Draft

Real Estate Law

