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## ADVERSE POSSESSION IN TEXAS

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Adverse possession refers to the circumstances under which one may lawfully lay claim to ownership of property not originally one's own. The statute governing the rules of adverse possession is Texas Civil Practices & Remedies Code Sec.16.021 *et seq.* The statute defines adverse possession as "an 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." Case law adds that it must be true that the possessor of the property *actually does* possess it (the belief of entitlement to possess is not enough), possesses it *continuously* (sporadic possession is not sufficient), and that he *peaceably* and *intentionally* asserts a claim of right to the exclusion of *all others*. It is not enough to be merely holding the property or caring for it temporarily until the owner reappears. Possession shared with the original owner is not enough. Further, the location of the tract of land must be determinable with reasonable certainty. It must have boundaries. All of these issues are questions of fact to be decided by a court of law.

The statute is structured in such a way as to require an affirmative act by the original owner to reclaim the property within certain periods of time, referred to as statutes of limitation. If he is prevented from doing so by physically recapturing possession, then he must file a trespass to try title suit in order to reclaim possession and establish legal ownership. If the original owner does not take either action, then his claim is barred, and the adverse possessor prevails. Note that the doctrine of adverse possession does not apply to public lands.

The rules are specific for a reason. As the Texas Supreme Court stated, the adverse possession "doctrine itself is a harsh one, taking real estate from a record owner without express consent or compensation." *Tran v. Macha*, 213 W.W.3d 913,914 (Tex. 2006). The statute sets forth rules and conditions under which the doctrine applies. These must be conclusively met. Close enough is not good enough.

The law of adverse possession is based on notice. The statutes of limitation begin to run when circumstances are such that it is visible to others that the possessor is asserting a claim of right. Should an owner wish to rid himself of an adverse possessor, three main statutes apply:

### *Sec. 16.024 - The Three-Year Statute*

**A person [ie., the original owner] must bring suit to recover real property held by**

**another in peaceable and adverse possession under title or color title not later than three years after the day the cause of action accrues.**

Under this section, the possessor must have title (ie., a deed as part of a regular chain of title) or “color of title,” which refers to a claim of title that has some reasonable basis but for some legitimate reason does not fit within the usual chain of title. So, the possessor must be able to produce some paperwork to support his claim.

*Sec. 16.025 - The Five-Year Statute*

**(a) A person [ie., the original owner] must bring suit not later than five years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who:**

- (1) cultivates, uses, or enjoys the property;**
- (2) pays applicable taxes on the property; and**
- (3) claims the property under a duly registered deed.**

**(b) This section does not apply to a claim based on a forged deed or a deed executed under a forged power of attorney.**

Under this five-year statute, some sort of deed of record is still required.

*Sec. 16.026 - The Ten-Year Statute (Nicknamed the “Bare Possession Statute”)*

**(a) A person must bring suit not later than 10 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property.**

**(b) Without a title instrument, peaceable and adverse possession is limited in this section to 160 acres, including improvements, unless the number of acres actually enclosed exceeds 160. If the number of enclosed acres exceeds 160 acres, peaceable and adverse possession extends to the real property actually enclosed.**

**(c) Peaceable possession of real property held under a duly registered deed or other memorandum of title that fixes the boundaries of the possessor’s claim extends to the boundaries specified in the instrument.**

Note that under the ten-year statute a deed or “memorandum of title” is relevant only to establish the boundaries of the claimed tract. Otherwise the key to determining boundaries is what area is fenced in as a “designed enclosure” - not just a “casual fence.” *Rhodes v. Cahill*, 802 S.W.2d 643,646 (Tex. 1990).

Two other sections, Sec.16.027 and Sec.16.028, are less commonly used. The first

provides a 25 year statute of limitation “regardless of whether the person is or has been under a legal disability.” The second allows a 25 year statute based on a title instrument, even if that instrument is void on its face or in fact.

Statutes of limitation do not include any periods of disability on the part of the original owner (eg., he was under 18 years old, of unsound mind, or serving in the armed forces in time of war).

Statutes of limitation may be “tacked” or combined by various successive possessor of the property so long as there exists “privity of estate” between these persons.

Alternatively, an adverse possessor may be the one to file suit to establish his claim. To do so, he must prove (a) a visible appropriation and possession of the land, sufficient to give notice to the record title holder that is (2) peaceable, (3) under a claim of right hostile to the title holder’s claim, and (4) that continues for the duration specified in the applicable statute. What is a “visible appropriation?” The possessor must “visibly appropriate the property as to give notice to any other person that they claim a right to the property.” *Perkins v. McGehee*, 133 S.W.3d 291, 292 (Tex.App. - Forth Worth 2004, no pet.).

Finally, Sec. 16.034 provides that the prevailing in a suit for possession of real property may receive an award of costs and reasonable attorney’s fees.

What, however, is the remedy for an adverse possessor who believes that one of the above statutes allows him to claim ownership? The first and best option is for the adverse possessor to file a suit for a declaratory judgment in district court. However, if a lawsuit is not a feasible or affordable option, it may be useful to consider filing an affidavit in the real property records which contains specific wording that justifies a claim of adverse possession. Even more creatively, this can be followed by a deed to the subject property out of the adverse possessor (eg., to a third-party trustee) and then another deed back from the trustee into the name of the adverse possessor, taking care to obtain a proper legal description and/or survey of the adversely-held tract. These deeds should also contain specific and appropriate language, with the ultimate goal being to make title in the adverse possessor pass muster with a title company. Do-it-yourselfers beware. These transactions should be handled only by a capable real estate attorney in order to avoid doing more damage than help when it comes to the adverse possession claim.

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