**DON’T FENCE ME IN**

**BY: WILLIAM G. MORRIS, ESQ.**

Your neighbor’s fence includes part of your lot. You found out about the encroachment when you had your property surveyed, in part because you are feuding with the neighbor. You do not want the fence on your property but what can you do?

You can start by asking the neighbor to move the fence, but in the midst of a feud it is unlikely the neighbor will cooperate. That is especially true if it will cost money to move the fence. You can remove the fence yourself, but might be liable for damage to the fence even though it is “trespassing.” The law generally imposes a duty to take care of someone else’s property when it comes into your possession. And, as soon as you touch the fence the neighbor may meet you and violence ensues. That makes resort to court an option that is least likely to create new problems.

You might think that getting the fence off your property should be an open and shut case. Go to court, show your survey and ask the judge to order your neighbor to move the fence. Most of the time, that is exactly what happens. But, your lawyer fees are not recoverable and even a simple case can be expensive. In some cases, the judge will rule that the fence gets to stay. That means you have spend a lot of money to lose. How could you lose? Some of the ways you might lose are set forth in this column.

The neighbor might claim ownership of the fenced in property by adverse possession. Adverse possession means that someone has possessed property adversely to the legal titleholder for sufficient time so that the possession ripens into ownership. Adverse possession in Florida is governed by Sections 95.16 and 95.18 Fla. Stat.

Adverse possession can be claimed under color of title or without color of title. Color of title means there is some written instrument, such as a deed, that purports to convey ownership. The claimant must prove all elements of an adverse possession case by clear and convincing evidence. Clear and convincing evidence means much more evidence than greater weight of the evidence required in most lawsuits.

The claimant must establish that the claimant or claimant’s predecessor in interest has been in continuous possession for at least 7 years and that the property (a) has been usually cultivated or improved or (b) has been protected by a substantial enclosure or (c) has been used for the supply of fuel or fencing timber for air use of the occupant. Use has been defined to include use as a backyard.

The statutes require a person claiming title by adverse possession without color of title prove he or she paid the property taxes on the claimed property. The statutes also require recordation of the written instrument under which a person claims adverse possession under color of title.

Someone lacking a written instrument purporting to convey ownership can claim title by adverse possession, without color of title. Possession must be for the same continuous seven-year timeframe and the claimant must establish the property has been protected by substantial enclosure or the property has usually been cultivated or improved.

Possession must be open, exclusive, notorious and adverse to the other party claiming ownership. A frequent defense in these cases is that the possession has been permissive and therefore not adverse.

Enclosing property by fence is likely sufficient to meet requirement for a substantial enclosure. Florida courts have agreed that use as a backyard satisfies as cultivation and usual use. If fenced and used exclusively, adversity is generally established. These cases can be tough as the claimant is asking the court to award property that the claimant has acquired more or less by “squatting.”

Most of the time, claimants in these cases do not limit their claim to adverse possession, they also raise boundary by recognition and acquiescence or boundary by agreement. That way, if they lose the adverse possession claim they might still win ownership.

To acquire title under boundary by recognition and acquiescence, the claimant must establish 3 factors for success, (a) doubt as to the location of the boundary, (b) the parties have recognized and established a property line without regard to the “correct” property line and (c) the claimant (or the claimant’s predecessors) occupied the property in dispute without objection for at least 7 continuous years. Occupation is less stringent than possession, but the plaintiff must show at least some use of the property without objection by the neighbor.

Boundary by agreement is yet another way to establish title. This is similar to boundary by recognition and acquiescence. It requires some uncertainty as to the property line location, an oral or implied agreement by the parties establishing a boundary and occupation by the parties in accordance with that boundary. Requirement of an actual or implied agreement distinguishes boundary by agreement from boundary by recognition and acquiescence.

The evidentiary burden to establish title in these cases is difficult. That can lead the claimant to look for a legal theory that would at least allow continued use without title. One such theory is the equitable claim of laches. Laches can be raised as a defense when a neighbor seeks to eject someone from land.

Under laches, the claimant must establish (a) conduct on the part of the claimant or the claimant’s predecessor giving rise to the situation under which complaint is made, (b) that the neighbor with knowledge or notice of the claimant’s conduct, failed to pursue legal action to assert rights, (c) lack of knowledge on the part of the claimant that the neighbor would assert the right on which suit was filed and (d) injury or prejudice to the claimant in event the court orders the ejectment.

A good example of laches is the case of Trevett v. Walker. In that case, the claimant’s predecessor built a fence 4 feet into the neighbor’s property. Over the years, the neighbor installed planters and planted 20 palm trees along the fence, installed brick pavers and underground lighting abutting the palm trees and even repaired part of the fence. In 1987, the neighbor got a survey and found the fence encroachment, but did nothing. In 1995, the claimant’s commercial parking lot was repaved up to the fence line with no objection from the neighbor.

In 2001, the neighbor sent a letter to the claimant informing her of the fence encroachment and indicating desire that the fence be moved. Suit was not filed until 6 years later. The court ruled the neighbor had sat on their hands too long, that the claimant was innocent and that forcing the claimant to move fence and parking lot would damage the claimant. The court refused to order ejectment, but did not award title.

What seems like a simple issue in these cases can quickly escalate in complexity. The facts of each case will determine the outcome, so the parties are well advised to retain experienced attorneys to assess chances for success before a lawsuit is filed.

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