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Adverse possession by a co-owner: intent to oust co-owner must be clear and unequivocal

By Ronald L. Richman

A co-owner (cotenant) of real property cannot acquire title to the entire property by adverse possession absent clear and unequivocal notice to the other cotenants of an intent to remove or "oust" them from the property.

Adverse possession is basically a "hostile takeover" of someone else's property. In California, the elements for adverse possession are:

- (1) Actual, open and notorious and exclusive possession of the property
- (2) Use that is hostile and adverse to the original owner
- (3) A claim to the property as his or her own property
- (4) Continuous and uninterrupted use of the property for a period of at least five years, and
- (5) Payment of taxes on the property

In California, an individual claiming adverse possession over real property owned by one person merely has to occupy the property without permission to start adverse possession. That is because a person does not have the right to occupy another's property. The *exclusive occupation* itself is a significant factor in establishing adverse possession against a sole owner. (States vary in their conditions under which adverse possession may take place. A brief outline of Oregon and Washington follows.)

Multiple owners, greater cotenant challenges

However, when there are multiple owners or cotenants of a piece of property, under California law, it is much harder for one cotenant to take the property away from all other co-tenants. Because each cotenant has a right to occupy the entire piece of property owned by co-tenants, *exclusive possession* by one co-tenant is not enough to meet the threshold standard for adverse possession. The possession of the property by one cotenant is deemed to be possession of the property by all cotenants. Each cotenant may assume that a cotenant exclusively possessing the property is in possession of the property on behalf of all cotenants and not adversely to the other cotenants.

In order to succeed on a claim of adverse possession, the occupying cotenant must demonstrate, in the clearest and most unequivocal manner, he or she intends to remove or "oust" every other cotenant from the property. Hacienda Ranch v. Superior Court (2011) 198 Cal. App. 4th 1122.

The term "ouster" is defined as *actual exclusion* from the property. "Ouster must be proved by acts of an adverse character, such as claiming the whole for himself, denying title of his companion, or refusing to permit him to enter." Acts that are considered "ouster" include denial of title, changing locks on gates or other entries to the property, posting "no trespassing" signs on the property, and denying admittance to the property.

In *Hacienda*, the plaintiffs purchased a 24.5% interest in an unimproved lot. Over the next five years, plaintiffs weeded the property 2-3 times per year, posted a "for sale" sign on the property and introduced themselves to third parties as the owners of the property. Based on this conduct, plaintiffs claimed they acquired title to the entire property by adverse possession.

The Court of Appeal rejected their claim. Plaintiffs never told their cotenants to stay off the property, never put up a fence or barrier prohibiting entry on the property and never excluded the other cotenants from the property. Plaintiffs' actions in weeding the property 2-3 times a year, posting a "for sale" sign on the property and representing themselves at one particular meeting as the owner of the property did not involve the type of open, notorious and unequivocal ouster of the cotenants required to establish title by adverse possession.

Oregon and Washington Conditions

Conditions in adverse possession vary by state and Bullivant's clients in other areas should be aware of conditions that are different than the California model.

In Oregon, a person claiming title by adverse possession must prove:

- (1) Actual, open, notorious, exclusive, hostile and continuous possession of the property for a period of 10 years; and
- (2) When the claimant or the claimant's predecessor in interest first entered into possession of the property, he or she had an honest belief that they were the actual owner of the property and that belief :
 - (a) Continued throughout the entire 10-year period;
 - (b) Had an objective basis;
 - (c) and was reasonable under the particular circumstances.

In Washington, a person must show that his or her possession was:

- (1) For ten years;
- (2) Exclusive;
- (3) Actual and uninterrupted;
- (4) Open and notorious; and
- (5) Hostile.

Protecting your rights as a cotenant.

Cotenants of real property must be aware of the use and occupation of the property by any other cotenant. This is especially true if the property is unimproved. It is very important for each cotenant of an unimproved lot to view the lot, at least twice a year, to make sure that there are no obvious signs of improvements and adverse activities directed against the other cotenants

such as barriers to access to the property.

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