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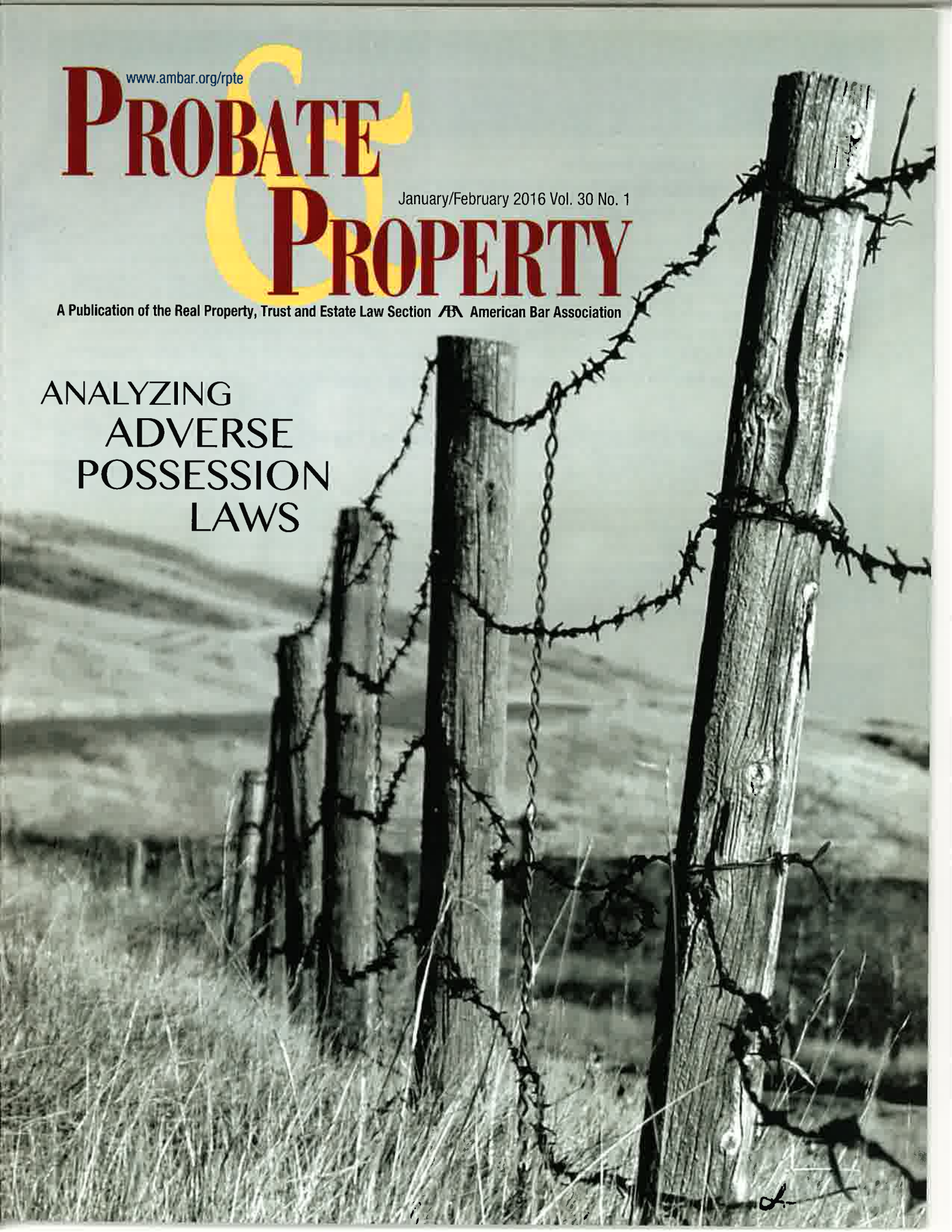
ANALYZING ADVERSE POSSESSION LAWS



Analyzing Adverse Possession Laws and Cases of the States East of the Mississippi River

By Adam Leitman Bailey and Matthew Eichel

The doctrine of adverse possession, under which a party can obtain title to real property owned by another, is surprisingly uniform throughout the eastern portion of the United States despite being a state law concept. The basic elements a party must demonstrate to successfully claim adverse possession are essentially the same throughout the 26 states that lie east of the Mississippi River. One must show by clear and convincing evidence that he or she has actually and exclusively possessed the land in an open, notorious, continuous, and hostile/adverse manner under claim of right for the statutory period. See, e.g., *Estate of Becker v. Murtagh*, 19 N.Y.3d 75, 81 (N.Y. 2012).

Nevertheless, nuances exist. One state, Indiana, deviates slightly from the others in the terminology used to describe the elements of the claim; nonetheless, Indiana courts interpret those elements to mean something similar to the required elements in other jurisdictions. See, e.g., *Garriot v. Peters*, 878 N.E.2d 431, 438 (Ind. Ct. App. 2007). The main differences among the states are in their definition of "hostile/adverse," the sufficiency of possession required under their laws, the length of their respective statutory periods, and the requirements of a few other idiosyncratic elements.

The discussion that follows breaks down each state's respective requirements and interpretations of the individual elements of an adverse possession claim. For an alternative version of this discussion containing additional case references, which space here does not allow, please refer to the authors' web posting at http://alblawfirm.com/articles/analyzingadversepossessionlaws_footnotes.

Adam Leitman Bailey is the founding partner of Adam Leitman Bailey, P.C., in New York, New York. **Matthew Eichel,** a third-year law student at the Benjamin N. Cardozo School of Law, was previously a summer associate and is now a law clerk at Adam Leitman Bailey, P.C.

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Actual Possession

Actual possession "means having dominion over the property." *Bride v. Robwood Lodge*, 713 A.2d 109, 112 (Pa. Super. Ct. 1998). It is manifested by "acts of occupancy [that] indicate a present ability to control the land and an intent to exclude others from such control." *Striefel v. Charles-Keyt-Leaman P'ship*, 733 A.2d 984, 989–90 (Me. 1999) (quoting *Flowers v. Roberts*, 979 S.W.2d 465, 469 (Mo. Ct. App.1998)). Taking up residence on the land, cultivating it, making improvements, and putting up fences are some obvious ways in which actual possession can be shown. But other acts of possession may suffice, particularly for unimproved lands such as woodlands or open fields. "Where property is so situated as not to admit of permanent useful improvements[,] the continued claim of the party, evidenced by public acts of ownership such as he would exercise over property which he claimed in his own right and would not exercise over property which he did not claim, may constitute actual possession." *Burns v. Curran*, 118 N.E. 750, 752 (Ill. 1918). Thus, "[w]hether a claimant 'actually' possessed and used the land at issue will depend on the nature and location of the property, the potential uses of the property, and the kind and degree of use and enjoyment to be expected of the average owner of such property." *Striefel*, 733 A.2d at 989–90.

Acts must be "substantial, and not sporadic." *Phillips v. Akers*, 103 S.W.3d 705, 708 (Ky. Ct. App. 2002); see also *Ky. Women's Christian Temperance Union v. Thomas*, 412 S.W.2d 869, 870 (Ky. Ct. App. 1967) (finding that cutting hay, digging a pond, and growing crops were insufficient); *Miller v. Cumberland Petroleum Co.*, 108 S.W.2d 514, 514–15 (Ky. Ct. App. 1937) (ruling that hitching horses, parking cars, and having picnics on disputed land was not enough); *Price v. Ferra*, 258 S.W.2d 460, 461 (Ky. Ct. App. 1953) (holding sporadic cutting of timber over a 40-year period was insufficient to establish adverse possession). The possessor must act in such a manner that any person could see these acts and reasonably believe the possessor to be the true owner. See *Delaware Land & Dev. Co. v. First & Cent. Presbyterian Church*, 147 A. 165, 179 (Del. Ch. 1929). De minimis acts such as the occasional mowing of the lawn are insufficient because they do not amount to an assertion of possession. See *Crown Credit Co., Ltd. v. Bushman*, 170 Ohio App. 3d 807, 821 (2007); *Johnson v. Tele-Media Co. of McKean County*, 90 A.3d 736, 741 (Pa. Super. Ct. 2014).

Courts may employ a "constructive possession" theory when the claimant has entered property under "color of title," that is, a deed or other instrument that purports to give good title to the claimant. This theory requires the claimant to have actual possession of a portion of the land described in the instrument, but the instrument provides "constructive" possession of the remainder of the tract. See *Paine v. Sexton*, 37 N.E.3d

1103, 1107 (Mass. App. Ct. 2015) ("the activities relied on to establish adverse possession reach not only the part of the premises actually occupied, but the entire premises described in a deed to the claimant").

Constructive possession does not apply, however, to any part of the property that is in the actual possession of another. Thus, if Party A enters into the southern 20 acres of a 40-acre parcel of land described in A's deed, Party A cannot claim constructive possession over the rest of the parcel if the northern 20 acres are in Party B's actual possession. Similarly, an adverse possessor cannot use the constructive possession theory if the true owner has actual possession over a part of the tract. In that case, the true owner is said to have constructive possession over the entire tract in the limits of his deed and the adverse possessor is limited to the portion of the tract that she actually possessed. See *Hines v. Symington*, 112 A. 814, 817 (Md. 1921).

Exclusive Possession

Exclusive does not imply use to the exclusion of all other individuals. It refers to use "exclusive of the true owner entering onto the land and asserting his right to possession." *Crown Credit Co., Ltd.*, 170 Ohio App. 3d at 822. It means "exclusive dominion over the land" or acting in ways expected of an owner of such a property and preventing the true owner from doing so. *Blanch v. Collison*, 199 A. 466, 470 (Md. 1938); see also *Marvel v. Barley Mill Road Homes*, 34 Del. Ch. 417, 424 (1954) (finding possession not to be exclusive when access was open to others to enter onto the property at their leisure to obtain water to feed livestock); *Striefel*, 733 A.2d at 993 (exclusive possession means "the possessor is not sharing the disputed property with the true owner or public at large").

Exclusivity, therefore, comes down to the nature of the respective actions of the possessor and the true owner. See *Gammons v. Caswell*, 447 A.2d 361, 368 (R.I. 1982) (determining that use would not be exclusive if there was evidence that the true owner "made improvements to the land or . . . used the land in a more significant fashion than merely walking across it").

Open and Notorious Use

Open and notorious use means use that is so apparent that it puts the true owner on notice of the adverse claim. See *Appalachian Reg'l Healthcare, Inc. v. Royal Crown Bottling Co., Inc.*, 824 S.W.2d 878, 880 (Ky. 1992) (stating that it is "legal owner's knowledge, either actual or imputable, of another's possession of lands that affects ownership"). To constitute notorious use, the possessor "must unfurl his flag on the land, and keep it flying so that the owner may see, if he will, that an enemy has invaded his dominions and planted his standard of conquest." *Grace v. Koch*, 81 Ohio St. 3d 577, 581 (1998); see also *Apperson v. White*, 950 So. 2d 1113, 1118 (Miss. Ct. App. 2007). Use must be such that a vigilant owner would know that someone is occupying the land and that such owner has "an opportunity to take steps to vindicate his rights by legal action." *Ottavia v. Savarese*, 338 Mass. 330, 333 (1959) (finding such requirement satisfied when the claimant inserted beams into a wall belonging to the other party to construct an additional room); see also *Blickenstaff v. Bromley*, 220 A.2d 558, 562 (Md. 1966); *Hewes v. Bruno*, 121 N.H. 32, 34 (1981) (stating that what matters is "[t]he acts of [the party's] entry onto and possession of the land should, regardless of the basis of the occupancy, alert the true owner of his cause of action").

One state, New Jersey, specifically distinguishes between minor encroachments and major encroachments for the open and notorious requirement. In *Mannillo v. Gorski*, the Supreme Court of New Jersey found that when an encroachment along a common border is not clearly apparent to the naked eye, the adverse possessor must prove that the record owner knew of the occupation. 54 N.J. 378, 389 (1969). When the adverse possession is clear and visible, however, actual knowledge by the owner is presumed and courts deem use open and notorious. Id.

In *Kaufman v. Geisken Enters., Ltd.*, the Court of Appeals of Ohio found that a person who used land "for recreation, planted and pruned trees, cultivated asparagus, parked cars, ran a go-cart, stored firewood, piled debris, placed burn barrels on the property, and kept the property generally attractive according to neighborhood standards" was enough to put a reasonable person on notice of possessor's claim. 2003-Ohio-1027, at *7 (Ohio Ct. App. Mar. 7, 2003). In *Apperson v. White*, the Court of Appeals of Mississippi determined that building a fence and planting corn were clear and visible indicators of occupation that should have put a reasonably vigilant person on notice of the occupation. 950 So. 2d at 1118.

Continuous Use

Continuous use means that the claimant's possession has not been interrupted by abandonment of the premises, by an intruder's presence that renders the possession nonexclusive, or by acts of possession by the record owner. *Ray v. Beacon Hudson Mountain Corp.*, 666 N.E.2d 532, 535 (N.Y. 1996). It does not require constant use, but uninterrupted use at times when the claimant could reasonably use the property. *Lewes Trust Co. v. Grindle*, 170 A.2d 280, 282 (Del. 1961).

Here, as with other elements, courts look to see if the use is

consistent with the nature of the land. See *Gunby v. Quinn*, 142 A. 910, 913 (Md. 1928) (determining that hunting/trapping was appropriate use of a marshland). A claimant's seasonal use, therefore, may satisfy the continuity requirement if that use is appropriate for the type of property. In *Robinson v. Robinson*, the plaintiffs operated a seasonal canoe rental and camping business on the property. 825 N.Y.S.2d 277, 280 (N.Y. App. Div. 2006). During the approximately five-month season each year, plaintiffs placed movable signage on the property, mowed the grass, cleared debris, and planted grass if it was washed out by spring flooding, transported boats to the property, kept incidents of the business on the site throughout the season, and blocked the use of the property by trespassers. The court held that this seasonal use "does not defeat their claim in light of the continuous and uninterrupted nature of that use." Id.; see also *Ray v. Beacon Hudson Mountain Corp.*, 666 N.E.2d at 536 (continuity satisfied by summertime use for a full month each season, coupled with repeated acts of repelling trespassers, improving, posting, padlocking, and securing of the property in claimant's absence).

Hostile: Three Different Views

One element that states interpret variously is the requirement that possession be hostile under a claim of right. Here, there are three basic approaches. The first is to make an objective evaluation of the claimant's acts of possession to determine whether they are adverse to the record owner's interest. The second and third approaches examine the adverse possessor's subjective intent, with some states requiring that the claimant be acting in good faith and others requiring that the claimant be acting with a hostile intent or in bad faith.

Objective

Most states east of the Mississippi River interpret hostile from an objective standpoint, requiring neither a good faith belief of ownership nor a bad faith desire to steal be demonstrated. See *Gorte v. Dep't of Transp.*, 202 Mich. App. 161, 170 (1993) (stating that adverse possession law will not be used to "reward[] the thief while punishing the person who was merely mistaken"). Under this view, hostile use simply connotes intent to possess and use the property as one's own. See, e.g., *Quatannens v. Tyrrell*, 268 Va. 360, 367 (2004). It means possession "unaccompanied by any recognition, express or inferable from the circumstances, of the real owner's right to the land." *Hungerford v. Hungerford*, 234 Md. 338, 340 (1964).

One element that states interpret variously is the requirement that possession be hostile under a claim of right.

A good faith but mistaken belief that one owns the property does not prevent an adverse possession claim if the claimant has actually possessed the land as if he were the owner. See *Kendall v. Selvaggio*, 413 Mass. 619, 623 (1992) (finding that a mutual mistake as to the boundary line did not defeat an adverse possession claim). What matters is not the claimants' subjective intent towards the property, but what actions they take regarding the property. *Flynn v. Korsack*, 343 Mass. 15, 18–19 (1961). A claimant must "shut out the rightful owner" through his actions. *Quatannens*, 268 Va. at 366. To quote the Court of Appeals of Michigan: "[I]t is not the knowledge or belief that another has a superior title, but the recognition of that title that destroys the adverse character of possession." *Connelly v. Buckingham*, 136 Mich. App. 462, 468 (1984). The claimant must act as if he were the true owner, no matter if he knew that he was not or believed that he was. See *MacDonough-Webster Lodge No.26 v. Wells*, 175 Vt. 382, 394 (2003) (holding that a person can gain title over property by adverse possession without showing an intent to take another's land provided that the claimant acts intending to exclude all others from possession).

In *Kimball v. Anderson*, a party claimed adverse possession over a driveway lying between two adjacent parcels. 125 Ohio St. 241, 241 (1932). The party's predecessor in title originally owned both parcels but sold one parcel to defendants' predecessor with a deed containing no reservation as to use of the driveway. Id. Defendants objected that use was not hostile because defendants' predecessor did not object to the claimants' predecessor's use, but the Supreme Court of Ohio disagreed. Id. It held that any use of the land inconsistent with the true owner's rights is defined as hostile. Id. at 244. Though there was no hostility when the predecessor owned both parcels, once he sold the parcel with a deed without reservation but continued to use the driveway, that use was adverse to the true owners' rights. Id.

Good Faith

Although most states take an objective approach to the hostility requirement, some states require a showing of good faith. Good faith means that the claimants must demonstrate that they had a basis to believe that they owned the property. Four states east of the Mississippi that require good faith in some form are Georgia, Illinois, New York, and Wisconsin.

To claim adverse possession in Georgia, a claimant must show "possession that is in the right of the party asserting possession and not another. . . ." *Kelley v. Randolph*, 295 Ga. 721, 722 (2014), meaning that "[n]o prescription runs in favor of one who took possession of land knowing that it did not belong to him." Id. at

723 n.1 (citing *Ellis v. Dasher*, 101 Ga. 5, 9–10 (1897)).

Under this approach, a claimant's mistaken, but good faith, belief of ownership is sufficient. In *Kelley v. Randolph*, for example, a party built a terrace on property it mistakenly believed that it owned. 295 Ga. at 721. The Supreme Court of Georgia rejected the true owner's argument that the claimant lacked good faith. The court emphasized that had the claimant known the property did not belong to him, that knowledge "would be fatal to their adverse possession claim." Id. at 723 n.1. But because the claimant had a good faith belief of ownership, and building the terrace was tantamount to asserting a claim of ownership, all elements of the adverse possession claim were satisfied. Id. at 723.

Illinois generally requires objective hostility. See *Joiner v. Janssen*, 85 Ill. 2d 74, 79-80 (1981). But, if a claimant wants to take advantage of a state statute that shortens the limitations period to seven years (rather than the typical 20 years), the claimant must show that it entered with color of title, in good faith, and paid taxes for that period. See 735 Ill. Comp. Stat. Ann. 5/13-109. Illinois courts define good faith as "the absence of an intent to defraud the holder of better title, or simply, as the absence of bad faith." *McCree v. Jones*, 103 Ill. App. 3d 66, 70 (1981). The claimants cannot have known that they were possessing land legally owned by another. See id. Good faith, however, is presumed and can be overcome only by evidence from the true owner showing "intent to deceive, mislead, or defraud." *Simpson v. Manson*, 345 Ill. 543, 553 (1931).

New York's adverse possession statute also requires good faith. N.Y. Real Prop. Acts. § 501 states that to show possession under a claim of right, the claimants must demonstrate that they had "a reasonable basis for the belief" that they owned the property. This statute was enacted in 2008 to overturn *Walling v. Prysbylo*, 7 N.Y.3d 228 (2006), which held that the law permits bad faith claims of ownership. Under the new law, a possessor who knowingly takes possession of another's land no longer can claim adverse possession. Notably, the 2008 amendments apply only to claims filed on or after the amendments' effective date, July 7, 2008. See L. 2008, ch. 269, § 9, eff. July 7, 2008. Courts have since ruled that if rights vested before the amendments took effect, the old law still applies. See *Estate of Becker v. Murtagh*, 19 N.Y.3d 75 (2012). Thus, claimants who have satisfied the elements of an adverse claim before 2008 need only show objective hostility. Id. There remains disagreement among New York courts, however, on the effect of the amendments on cases brought after the amendments took effect in which the rights allegedly vested before the effective date. Compare, e.g., *Franza v. Olin*, 73 A.D.3d 44 (N.Y. App. Div. 2010) (pre-2008 law applied), with *Sawyer v. Prusky*, 71 A.D.3d 1325 (N.Y. App. Div. 2010) (2008 amendments applied).

Bad faith means that the claimant need not just intend to own the property but must do so in full awareness that the property belongs to another.

Like Illinois, Wisconsin law provides for multiple ways to claim adverse possession and one of those possibilities requires good faith. Usually subjective motives are irrelevant. See, e.g., *Allie v. Russo*, 88 Wis. 2d 334, 343 (1979). There are two exceptions. First, evidence of subjective intent could be relevant to disprove that the claimant had the objective intent to own. In *Wilcox v. Estates of Hines*, 355 Wis. 2d 1, 18 (2014), the true owner submitted evidence establishing that the claimant's predecessor never intended to own the property because it sought permission from an entity it mistakenly thought owned the property. The court ruled that the claimant's use was non-adverse, stating that "[a] party who expressly disclaims ownership of property and seeks permission for its use is not 'claiming title' to the property." Id. The second exception is an adverse possession claim under a statute requiring that a party entered into possession "under good faith claim of title." See Wis. Stat. Ann. § 893.26. Wisconsin courts have interpreted the good faith requirement as preventing claimants who enter into a deed knowing it to be forged or fraudulent from claiming adverse possession. See *Orcutt v. Blum*, 344 Wis. 2d 122 (Wis. Ct. App. 2012).

Bad Faith

The final way the hostile requirement can be interpreted is to require possession in bad faith. Bad faith means that the claimant need not just intend to own the property but must do so in full awareness that the property belongs to another. South Carolina is the only state east of the Mississippi River that still today requires bad faith under certain circumstances.

Historically, South Carolina required bad faith in all instances. See *Lusk v. Callaham*, 287 S.C. 459, 461 (Ct. App. 1986). The claimants had to know they were possessing property owned by another to satisfy the hostility requirement. South Carolina has recently changed course, however, and now, in most instances, only requires a showing of an objective intent to own that is adverse to the true owner's interest. See *Jones v. Leagan*, 384 S.C. 1, 13–14 (Ct. App. 2009) (holding that claimant must engage in acts that manifest intention to own that are sufficiently apparent that a legal owner "by ordinary diligence" would have known about it). South Carolina distinguishes, however, between ordinary adverse possession

cases and "true border-line disputes." When a case involves a dispute over ownership of an entire tract of land, hostile is interpreted according to objective intent. See *Perry v. Heirs at Law and Distributees of Gadsden*, 316 S.C. 224, 225 (1994). If the case involves a claimant only asserting ownership over a small strip of the true owner's land at the boundary line between the properties, bad faith is still required. See id.

Boundary Line Disputes

As suggested by the preceding discussion, boundary line disputes have posed a special challenge for courts that apply a subjective approach. Under the good faith approach, courts require only that the claimant have a good faith belief that they owned up to the boundary line claimed; it does not matter if the claimant's belief is mistaken. Under a bad faith approach, however, a mistaken belief regarding the boundary line is fatal to the adverse possession claim. Thus, in South Carolina, "possession under a mistaken belief that property is one's own and with no intent to claim against the property's true owner cannot constitute hostile possession." *Lusk v. Callaham*, 339 S.E.2d 156, 158 (S.C. Ct. App. 1986).

Alabama takes an interesting hybrid approach to boundary line disputes, allowing a claimant to establish adverse possession in one of two ways. Through one approach, "if two coterminous proprietors agree on a boundary line, and each occupies to its location, the possession is presumed adverse, and after ten years has the effect of fixing such line as the true one." *Smith v. Brown*, 213 So. 2d 374, 380 (Ala. 1968). The second approach applies in the absence of such an agreement: "If a coterminous landowner holds actual possession of the disputed strip under a claim of right openly and exclusively for a continuous period of ten years, believing that he is holding to the true line, he thereby acquires title up to that line, even though the belief as to the correct location originated in a mistake, and it is immaterial what he might or might not have claimed had he known he was mistaken." Id. at 380. Conversely, possession is *not* adverse "if the occupancy to a line is with no intention to claim to it if it should be beyond the true location of the boundary." Id.

Permissive Use

No matter how a state interprets the hostility requirement, permissive use is by definition not adverse. See *Ryan v. Stavros*, 348 Mass. 251, 263 (1964) (stating that "permissive use is inconsistent with adverse use"). If the claimants have a license to be where they are or permission to do what they are doing, they cannot claim adverse possession. See *MacDonough-Webster Lodge No. 26 v. Wells*, 175 Vt. 382, 394–96 (2003) (dooming claimant's adverse possession claim because the claimant's construction of a wall and garden on the disputed property could be viewed by the true owners as part of claimant's employment as groundskeeper over the property); *Margolin v. Pa. Railroad Co.*, 168 A.2d 320, 322 (Pa. 1961) (use of bridge was not adverse when an agreement covered use of the bridge); *Myers v. Beam*, 713 A.2d 61, 62 (Pa. 2008) (finding no adverse possession when the claimant had requested a quitclaim deed to the disputed parcel).

Illustrative of the point that permissive use is the antithesis of adverse possession is *Grace v. Koch*, 81 Ohio St. 3d 577 (1998). In that case, the true owner granted the claimant permission to mow the grass on the disputed strip of land. Id. at 578. When the true owner later objected to the claimant laying gravel on the strip, the claimant asserted adverse possession. Id. The Supreme Court of Ohio rejected this claim, finding that the party had permission to use the strip and therefore use was not adverse. Id. at 582.

In *Jones v. Miles*, the claimants were given permission to use a driveway on the adjacent property owners' land. 189 N.C. App. 289, 290 (2008). The claimants proclaimed that they believed they owned the land through adverse possession, but they sought permission to be neighborly. Id. at 293. They argued that because the use was originally hostile, the subsequent giving of permission could not transform the use into a permissive one. Id. The Court of Appeals of North Carolina disagreed, stating that receiving permission negated the hostile nature of the possession. From the true owner's point of view, use began as permissive, and the claimant did nothing that amounted to open and notorious use that would have put the true owner on notice of the change in the use's character (that is, that the use remained hostile). Id. at 293–94. Therefore, use was not hostile and the adverse possession claim failed. Id. at 295.

Variation Between State Requirements

To assert a right to land legally owned by another, one generally must show actual possession of the land for the requisite time period. The time requirements differ by state, with some states offering shortened periods of time under certain circumstances. States also differ over whether additional requirements are imposed on the claimant, such as payment of taxes or having color of title.

Possession Means Possession

In 13 states east of the Mississippi, namely Ohio, Pennsylvania, Delaware, Maryland, Massachusetts, New Hampshire, Michigan, Connecticut, Vermont, Virginia, Mississippi, West Virginia, and Rhode Island, possession is established by using the property in accordance with the other elements of the claim for the statutory period, as described above. See, e.g., *Apperson v. White*, 950 So. 2d 1113, 1118 (Miss. Ct. App. 2007). Holding a deed to the property, paying taxes on the property, or enclosing the property may be evidence of possession, but such actions neither are required nor expedite the acquiring of title as in some other states.

The one significant way in which the adverse possession laws of these 13 states differ is in the length of their respective statutory periods for

actions to quiet title and recover real property possessed by another. These periods range from 21 years (Ohio and Pennsylvania) to 20 years (Delaware, Maryland, Massachusetts, and New Hampshire) to 15 years (Connecticut, Michigan, Vermont, and Virginia) to 10 years (Mississippi, Rhode Island, and West Virginia). See Conn. Gen. Stat. Ann. § 52-575(a); Del. Code Ann. tit. 10, § 7901; Mass. Gen. Laws Ann. ch. 260, § 21; Md. Code Ann., Cts. & Jud. Proc. § 5-103; Mich. Comp. Laws Ann. § 600.5801; Miss. Code Ann. § 15-1-7; N.H. Rev. Stat. Ann. § 508:2; Ohio Rev. Code Ann. § 2305.04; 42 Pa. Cons. Stat. Ann. § 5530; R.I. Gen. Laws § 34-7-1; Va. Code Ann. § 8.01-236; Vt. Stat. Ann. tit. 12, § 501; W. Va. Code Ann. § 55-2-1. To claim adverse possession, the claimants must establish that they have possessed the land to satisfy the other elements for the required statutory time period. True owners have until that time to assert their right to recover.

Possession Under Color of Title

Some states permit a common-law adverse possession claim but also have a statutory scheme under which the requisite period of possession can be shortened if certain conditions are met. The states that fall into this category include Georgia, Illinois, North Carolina, Tennessee, and Kentucky.

In Georgia, Illinois, North Carolina, and Tennessee, landowners generally have 20 years to recover possession of real estate. See Ga. Code Ann. § 44-5-163; 735 Ill. Comp. Stat. Ann. 5/13-101; N.C. Gen. Stat. Ann. § 1-40; *Wilson v. Price*, 195 S.W.3d 661, 666 (Tenn. Ct. App. 2005). But, if the claimants can show possession under color of title (that is, if they hold a deed to the property, even if such deed is mistaken), such claimants can, subject to the other applicable statutory requirements and limitations, assert adverse possession after only seven years. See Ga. Code Ann. § 44-5-164; 735 Ill. Comp. Stat. Ann. 5/13-109; N.C. Gen. Stat. Ann. § 1-40; Tenn. Code Ann. § 28-2-101. In Kentucky, the general period to recover property is 15 years, see Ky. Rev. Stat. Ann. § 413.010, but such can be shortened to seven years if the claimant can establish it has record title to the land. See Ky. Rev. Stat. Ann. § 413.060. As discussed further below, Wisconsin also offers a shortened statutory period for claims based on color of title.

To receive the benefit of a shortened statutory period, the claimant must have color of title that covers the extent of the claim. For purposes of adverse possession, color of title is "bestowed by an instrument that purports to convey title to land but fails to do so." *White v. Farabee*, 212 N.C. App. 126, 132 (2011). Because any document purporting to convey land will state the extent of some claim to land, even a defective or invalid deed can suffice for purposes of the color of title requirement. See *Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc.*, 824 S.W.2d 878, 880 (Ky. 1992). As the Supreme Court of North Carolina put it, "When the deed is *regular upon its face* and purports to convey title to the land in controversy, it constitutes color of title. . . . It is immaterial whether the conveyance actually passes the title. It is sufficient if it *appears* to do so." *Lofton v. Barber*, 226 N.C. 481, 484 (1946)(emphasis added). In *Appalachian Regional Healthcare, Inc. v. Royal Crown Bottling Co., Inc.*, the claimant had a deed that was subordinate to the deed of the true owner, but because the deed contained a description of the property matching with the extent of the asserted claim, the Supreme Court of Kentucky found this to be sufficient to satisfy the color of title requirement. 824 S.W.2d at 881.

Alabama is another state that allows for both a general common-law adverse possession claim and a statutory claim under which the required period of possession can be shortened. The common law period to recover real estate in Alabama is 20 years. See *Bradley v. Demos*, 599 So. 2d 1148 (Ala. 1992). By statute, however, a claimant can assert title by adverse possession after 10 years if the claimants can show that they had purported record title over the land, paid taxes on the property for 10 years, or received title by "descent cast or devise from possessor." Ala. Code § 6-5-200(a). "Descent cast" means receiving title from an ancestor via intestate succession.

Payment of Taxes

Some states east of the Mississippi River require the payment of taxes for adverse possession claims. Indiana, for example, has a 10-year statutory period for adverse possession, and requires annual payment of taxes on the property during such 10-year period as a prerequisite to acquiring rights by adverse possession. See Ind. Code § 32-21-7-1. In the past, Indiana courts had held the tax requirement was merely a supplement to the notice requirement, and if notice was otherwise provided to the true owner through use, the party need not show payment of taxes. See *Kline v. Kramer*, 386 N.E.2d 982, 989 (Ind. Ct. App. 1979). Courts have since eschewed that interpretation and held that even if all other elements of the claim are established, a claimant cannot acquire rights unless it meets the tax requirement. See *Fraley v. Minger*, 829 N.E.2d 476, 492 (Ind. 2005).

In Florida, a party can claim adverse possession in two ways: possession under color of title for seven years, see Fla. Stat. Ann. § 95.16, or payment of taxes for seven years, see Fla. Stat. Ann. § 95.18. Showing payment of taxes or color of title alone, however, is not sufficient. See *Cox v. Game*, 373 So. 2d 364, 365–66 (Fla. 1979) (holding that the claimant could not successfully demonstrate adverse possession when it could show payment of taxes on the disputed tract, but not acts of physical dominion over it). A party must also possess the property to satisfy the usual common law elements during those seven years. See, e.g., *Downing v. Bird*, 100 So. 2d 57 (Fla. 1958). Property is deemed possessed under Florida law if it is "usually cultivated or improved [or] enclosed by a substantial enclosure." Fla. Stat. Ann. § 95.18(2)(b). For case law discussing this requirement, see *Candler Holdings Ltd. I v. Watch Omega Holdings, L.P.*, 947 So. 2d 1231, 1234 (Fla. 2007), and

Grant v. Strickland, 385 So. 2d 1123 (Fla. Dist. Ct. App. 1980). In *Grant*, the court determined that because the claimants did not have color of title over the disputed tract, the claimants had to show evidence that the property had been substantially enclosed or usually cultivated or improved continuously for a seven-year period. Id. at 1124. The claimants argued that the property was enclosed because a fence sat on the northern boundary line, but the court found such evidence insufficient because it did not prove substantial enclosure of the entire parcel. Id. at 1125.

Wisconsin has a three-tiered statutory adverse possession scheme. If a claimant has continuously possessed the property under color of title and has paid taxes on it for seven years, then the claimant can assert adverse possession after seven years. See Wis. Stat. Ann. § 893.27. If the claimant has not paid taxes but has possessed the property under color of title, such a claimant can assert adverse possession after 10 years. See id. § 893.26. Possession is only adverse under this mode of adverse possession if the party, or its predecessor, entered into possession "under good faith claim of title." See id. To get the benefit of a shortened period of possession without payment of taxes, one must have received a deed for the property believing the deed to be valid and that such party legally took ownership of the property under the deed. See *Orcutt v. Blum*, 344 Wis. 2d 122 (2012). Finally, the statutory period for possession without color of title is 20 years. See Wis. Stat. Ann. § 893.25. There, possession must be evidenced by cultivation/improvement or substantial enclosure of the property. See id.

Color of Title or Improvement or Enclosure

South Carolina and New York have fairly similar laws that provide two ways to claim adverse possession by statute. The first is under color of title. See N.Y. Real Prop. Acts. Law § 512; S.C. Code Ann. § 15-67-220. The second is without color of title if the claimant can show that the property is usually improved or protected by a substantial enclosure. See N.Y. Real Prop. Acts. Law §§ 521, 522; S.C. Code Ann. §§ 15-67-240, 15-67-250. The statutory period in both circumstances is 10 years. See N.Y. Real Prop. Acts. Law § 511; S.C. Code Ann. § 15-67-210.

The general elements required to satisfy a common law adverse possession claim are the same five basic elements as in most other states.

The general elements required to satisfy a common-law adverse possession claim are the same five basic elements as in most other states (that is, open and notorious, exclusive, continuous, actual, hostile under claim of right). See, e.g., *Skyview Motel, LLC v. Wald*, 82 A.D.3d 1081, 1082 (N.Y. App. Div. 2011); *Frazier v. Smallseed*, 384 S.C. 56, 62 (2009). As discussed earlier, New York requires good faith unless the pre-2008 law allowing for bad faith claims applies, while South Carolina requires objective intent except in boundary disputes in which bad faith is required. The one distinguishing aspect is that if possession is not based on a written instrument, the claimant must show that the property was improved or substantially enclosed. See *Skyview Motel, LLC v. Wald*, 83 A.D.3d 1081, 1082 (N.Y. 2011). In *Skyview Motel*, a case in which the claimant had been using and storing machinery on the disputed property for over 10 years, the New York Appellate Division, 2nd Department, denied the adverse possession claim because the claimant did not have color of title and failed to show it had substantially enclosed, improved, or cultivated the parcel during that time. In *Frazier*, the South Carolina Court of Appeals rejected an adverse possession claim because the deed the claimants proffered failed to cover the extent of their claim, and the claimants had not fenced in, improved, or asserted dominion over the property. 384 S.C. at 62–63.

New York makes a statutory distinction between actual occupation and what it refers to as acts of maintenance and "de minimis nonstructural encroachments." Acts such as building a fence, planting a hedge, or mowing the lawn on a common boundary line are not enough to satisfy the "substantial improvement or enclosure" requirement. N.Y. Real Prop. Acts. Law § 543. Such acts are considered permissive and therefore not adverse.

Limitations Periods Varying by Property Type

Out of all the states east of the Mississippi, New Jersey has the most complex adverse possession statutory scheme. The general statutory period for right of entry into real estate is 20 years. See N.J. Stat. Ann. § 2A:14-6. But a separate statute provides that 30 years of possession is required for adverse possession of nonwoodland, developed land, while 60 years possession is required for adverse possession of woodlands and uncultivated land. See N.J. Stat. Ann. § 2A:14-30. If the record owner does not have actual possession of uncultivated property, the statute provides a presumption of possession by a claimant who has a recorded deed and has paid taxes on the property for at least five consecutive years. See N.J. Stat. Ann. § 2A:62-2. A claim by a party in possession, however, is superior to any claim by a party not in actual possession. See N.J. Stat. Ann. § 2A:14-31.

Although these statutes appear

In several states, the adverse possession statute provides a safety net for landowners who are in some way handicapped during the time in which the statutory right to recover accrues.

to conflict with one another, the Supreme Court of New Jersey has held this is not the case. See *J & M Land Co. v. First Union Nat'l Bank*, 166 N.J. 493, 518 (2001). According to the court, what these statutes mean is that a landowner has 20 years to recover land that is in the possession of another, but title by adverse possession does not vest in the possessor until after 30 or 60 years, depending on the type of land. In *J & M Land*, the claimants asserted a right to uncultivated marshland property on which they had placed billboards over a 39-year period. Id. at 497. The claimants argued that they had acquired rights by adverse possession because the true owner had failed to assert the right to recover within the 20-year period under N.J. Stat. Ann. § 2A:14-6. The Supreme Court of New Jersey disagreed, stating that title cannot vest under adverse possession until the claimant has satisfied the applicable 60-year period for uncultivated land under N.J. Stat. Ann. § 2A:14-30. Id. at 518. One other important thing to note about the case is that the trial court had held, based on *Mannillo*, 54 N.J. 378 (1969), that even if the claimant could satisfy the timing requirement, the claim would fail on the open and notorious element because the use was not apparent to the naked eye and the true owner lacked actual knowledge. Id. at 497.

Maine also bases its adverse possession requirements on the nature of the land at issue. The statutory periods for actions to quiet title and recover real property in Maine are 20 years. Me. Rev. Stat. tit.14, § 801. Only actual possession and use in satisfaction of the elements for the statutory period are required. See *Striefel v. Charles-Keyt-Leaman Partnership*, 733 A.2d 984, 989 (Me. 1999). Maine has a separate category, however, for uncultivated land in an incorporated place. To claim adverse possession over such real estate, one must not only possess the land for 20 years but also must pay taxes on the land during those 20 years. See Me. Rev. Stat. tit. 14, § 816.

Disability Extends the Time Period

In several states, the adverse possession statute provides a safety net for landowners who are in some way handicapped during the time in which the statutory right to recover accrues. Disabilities may include being a minor, being abroad, being imprisoned, or being mentally unstable. In such states, the right to recover may be extended a certain period of time after the disability is removed (for example, landowner is no longer a minor). Such extensions range from 25 years (Virginia) to 10 years (Ohio, Delaware, Maine, Massachusetts, Rhode Island) to five years (New Hampshire, West Virginia) to three years (Maryland, North Carolina, Kentucky) to two years (Illinois, Wisconsin) to one year (Michigan). See Conn. Gen. Stat. Ann. § 52-575(b); Del. Code Ann. tit. 10, § 7903; 735 Ill. Comp. Stat. Ann. 5/13-112; Ky. Rev. Stat. Ann. § 413.060; Md. Code Ann., Cts. & Jud. Proc. § 5-201; Me. Rev. Stat. tit. 14, § 802; Mich. Comp. Laws Ann. § 600.5851; Miss. Code Ann. § 15-1-7; N.C. Gen. Stat. § 1-17; Ohio Rev. Code Ann. § 2305.04; N.H. Rev. Stat. Ann. § 508:3; R.I. Gen. Laws § 34-7-2; Va. Code Ann. § 8.01-237; W. Va. Code § 55-2-3; Wis. Stat. Ann. § 893.16. The laws of the other 11 states east of the Mississippi River do not include a disability tolling provision.

Tacking If Privity

If a claimant cannot individually satisfy the timing requirement, he or she may tack on successive periods of prior possession if sufficient privity exists between the current occupant and the prior occupants. See, e.g., *Freed v. Cloverlea Citizens Ass'n, Inc.*, 228 A.2d 421, 431 (Md. 1967); see also *Lawrence v. Town of Concord*, 439 Mass. 416, 426 (2003) (allowing person claiming title by adverse possession to rely on the possession of his tenants to satisfy statutory period). In *Zipf v. Dalgarn*, the relationship between plaintiff and her predecessor was a direct grantor-grantee relationship, and the Supreme Court of Ohio determined that amounted to sufficient privity to permit tacking. 114 Ohio St. 291, 297 (1926). Because grantor and plaintiff continuously and cumulatively occupied that land adversely to its true legal owner for over 21 years, plaintiff successfully acquired title through adverse possession and could bar defendant for using the land. Id. at 298.

South Carolina's approach to tacking varies slightly from that of other states. South Carolina courts address tacking in a two-tiered fashion. A party can tack on a predecessor's possession to satisfy the requisite 10-year statutory period only if the relationship between the current possessor and the claimant is an ancestor-heir relationship. See *Terwilliger v. White*, 222 S.C. 176, 184 (1952). Besides the 10-year statutory period, however, South Carolina common law creates a presumption under which 20 years of use can lead to rights by adverse possession and tacking is permitted between any parties in privity. See id.

Adverse Possession Described Differently Is Still Adverse Possession

As indicated at the outset of this article, the one state that seemingly differs on the required elements of

an adverse possession claim is Indiana. Indiana courts list the elements as control, intent, notice, and duration. See, e.g., *Garriot v. Peters*, 878 N.E.2d 431, 438 (Ind. Ct. App. 2007). But, on closer examination, these elements are basically the same as those of the other jurisdictions. There must be use to such a degree as an average owner of similar property would use the property (control), intent to assert exclusive ownership over the property (intent), use sufficient to give the true owner actual or constructive notice of the claimant's intention to control the land (notice), and satisfaction of these elements for a required length of time (duration). Id.

In *Garriot v. Peters*, the claimant asserted possession over an undeveloped wooded tract it had rented out to farmers, sold timber off of, hunted on, picked berries on, drove vehicles on, and built a fence on over a 20-year period. Id. at 440. The Indiana Court of Appeals found that the claimant's use, particularly the building of the fence, the leasing to farmers, and execution of timber contracts, demonstrated sufficient evidence of control. Id. at 441. Contracting to lease the land and hiring people to cut timber showed that the party intended to own and possess the land. Id. at 442. That the claimant had a recorded deed to the tract and had erected a fence around the property in concert with the claimant's constant, visible use should have put a reasonable person on notice of the ownership claim. Id. at 442–43. As the party could show such use for longer than the required 10 years, the court found all elements of an adverse possession claim satisfied. Id. at 444. Because the claimant had been paying taxes on the property besides proving the requisite elements, the claimant had acquired rights by adverse possession. Id. at 438.

Additional Common Law Elements

Connecticut, Mississippi, Georgia, North Carolina, and Pennsylvania include additional common law elements. Connecticut courts refer to an ouster requirement, necessitating the alleged possessor to oust the true owner from possession. See *Eberhart v. Meadow Haven, Inc.*, 111 Conn. App. 636, 640 (2008). "Ouster" does not mean physically kicking someone off the land, however. In *Eberhart v. Meadow Haven, Inc.*, the Connecticut Appellate Court defined ouster as entry onto the land of another under claim and color of right. See *Eberhart v. Meadow Haven, Inc.*, 111 Conn. App. 636, 640 (2008). Therefore, the ouster requirement is just another way of saying taking of property intending to own to the exclusion of others. In that case, the court found ouster established when the claimant maintained, planted trees and hedges and installed landscape along, and made exclusive use of the driveway property in dispute. Id.

Mississippi and Georgia add that possession must be peaceful for the duration of the possession. See *Apperson v. White*, 950 So. 2d 1113, 1116 (Miss. Ct. App. 2007). Though usually opposites by definition, the terms "hostile" and "peaceful" do not contradict one another for adverse possession purposes. As hostile just means adverse to the true owner's rights, use can be both hostile and peaceful. The peaceful use requirement does not mean that the existence of a dispute bars an adverse possession claim; if there could be no disputes, there would be no such thing as adverse possession. See id. It just means there must be peaceful existence between the parties.

North Carolina requires that use be "under known and visible lines and boundaries." See, e.g., *Merrick v. Peterson*, 143 N.C. App. 656, 663 (2001). Such requirement makes sure the true owner knows that another party is asserting possession to property that the true owner legally owns. *McManus v. Kluttz*, 165 N.C. App. 564, 570 (2004). It is just another way of saying open and notorious use.

Pennsylvania also dictates that use be "distinct." See, e.g., *Parks v. Pennsylvania R. Co.*, 152 A. 682, 684 (Pa. 1930). Courts have interpreted this requirement to be merely a supplement to the need for the use to be exclusive, holding that distinct use simply means use to the extent that the true owner would use the property. *Brennan v. Manchester Crossings, Inc.*, 708 A.2d 815, 818 (Pa. Super. Ct. 1998).

Unique Statutory Provisions

Connecticut and Rhode Island each have a statutory provision that provides that if a landowner seeks to dispute the right of possession of property, such landowner can give to the person in possession a notice of intent to dispute. Such notice will serve to interrupt the tolling of the statutory period and prevent the possessor from acquiring rights through adverse possession by continued use. See Conn. Gen. Stat. Ann. § 52-575(a); R.I. Gen. Laws § 34-7-1.

Massachusetts has a unique law stating that if land is registered, it cannot be possessed adversely. See Mass. Gen. Laws ch. 185, § 53; see also *Feinzig v. Ficksman*, 42 Mass. App. Ct. 113, 114 (1997) (finding no adverse possession, despite open and continuous use of driveway and wall encroaching onto defendant's land for over 20 years, because of the fact that the parcel was registered). Maine has a statute specifically indicating that a good faith belief that one owns the land in dispute caused by a mutual mistake on the boundary line does not bar adverse possession. See Me. Rev. Stat. tit. 14, § 810-A. This was adopted in response to, and courts have interpreted it as overruling, Maine's previous jurisprudence requiring bad faith to claim adverse possession. See *Dombkowski v. Ferland*, 893 A.2d 599, 603 (Me. 2006).

Conclusion

The adverse possession requirements of most states east of the Mississippi River are substantially similar to one another, but important variations do exist from one state to another. Accordingly, real property lawyers cannot rely on general black letter principles learned in law school when faced with an adverse possession claim. Instead, close attention must be paid to both statutory and common law rules of the relevant jurisdiction. ■