

# Insights

## Finding Elements of Adverse Possession Unmet, Record Owner Awarded Real Estate

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The Indiana Court of Appeals recently handed down a decision concerning adverse possession.<sup>[1]</sup> For those unfamiliar with the concept, adverse possession "entitles a person without title to obtain ownership to a parcel of land upon clear and convincing proof of control, intent, notice, and duration."<sup>[2]</sup> Title will be conveyed to the claimant if certain elements are met which, from the view of the divested legal owner, amounts to acknowledging "squatter's rights," and usurping title from the property's legal owner.

Thus, understanding and implementing the adverse possession elements will assist the real estate owner in determining whether he or she has legally acquired possession of disputed property. Upon a favorable showing that the elements have been met for the statutory period of time, title is legally vested in the person or entity who has adversely possessed. Conversely, when faced with a threatened or actual quiet title action, the target of adverse possession may be able to defeat the same by demonstrating that his or her opponent has failed to prove the necessary elements occurred for ten years.

In addition to applying the necessary adverse possession elements, this case makes it clear that the court will not imply that the necessary elements were met from the circumstances, but instead will require specific evidence to be admitted.

### Ownership Interests and Facts Involved in the Dispute:

Stephen Presley ("Owner") purchased certain property in 2002 that abutted property owned by Joseph DeRozier ("Neighbor 1") and Daniel McCain ("Neighbor 2"). Certain strips of land (the "Contested Property") abutted property owned by the parties. While fences and gates had been erected by former owners around portions of the Contested Property, Owner was never excluded from the Contested Property, and according to the original plat from 1837, the Contested Property legally belonged to Owner.<sup>[3]</sup>

However, Neighbors 1 and 2 alleged they had acquired the Contested Property by way of adverse possession, and sought to quiet title to reflect the same. In support of their theory, Neighbors 1 and 2 testified that in 2016, Neighbor 1 affixed a lock and "no trespassing" sign on the gate servicing part of the Contested Property. Further, Neighbors 1 and 2 testified that for some time, Owner requested Neighbor 2's permission to use another portion of the Contested Property – though Neighbor 2 never denied Owner's use of the same.<sup>[4]</sup> At trial, the Judge found

Neighbors 1 and 2 had acquired title to the Contested Property through use of adverse possession, and Owner appealed.

Elements Necessary for Adverse Possession:

The Court of Appeals first restated the elements required to acquire property by adverse possession, which requires the party seeking to obtain title to prove the following occurred for the statutory period of ten years<sup>[5]</sup>:

1. Control—The claimant must exercise a degree of use and control over the parcel that is normal and customary considering the characteristics of the land (reflecting the former elements of “actual,” and in some ways “exclusive,” possession);
2. Intent—The claimant must demonstrate intent to claim full ownership of the tract superior to the rights of all others, particularly the legal owner (reflecting the former elements of “claim of right,” “exclusive,” “hostile,” and “adverse”);
3. Notice—The claimant’s actions with respect to the land must be sufficient to give actual or constructive notice to the legal owner of the claimant’s intent and exclusive control (reflecting the former “visible,” “open,” “notorious,” and in some ways the “hostile,” elements); and,
4. Duration—the claimant must satisfy each of these elements continuously for the required period of time (reflecting the former “continuous” element).<sup>[6]</sup>

In this case, there was insufficient evidence to support these necessary elements. As for Neighbor 1, it was not until 2016 that he demonstrated the necessary “intent” to exclude Owner from the Contested Property by placing the lock and “no trespassing” sign on the gate, and even if these actions were sufficient, the ten year “duration” element was certainly not met. As for Neighbor 2, he and Owner jointly used the disputed portion of the Contested Property. Such frequent use by another will defeat a claim for adverse possession because the “intent” element, which includes the former element of claimant’s “exclusive” use, is lacking, and the mere existence of a fence was not sufficient.<sup>[7]</sup>

[1] *Presley v. McCain*, No. 19A-MI-88, 2019 WL 5090647, at \*1 (Ind. Ct. App. Oct. 11, 2019).

[2] 9 Ind. Prac. § 41.23 (3d ed.).

[3] *Presley*, 2019 WL 5090647, at \*1.

[4] *Id.* at \*2.

[5] In Indiana, the adverse possession elements must be maintained for a period of ten (10) years. See Ind. Code § 34-11-2-11; *Celebration Worship Ctr., Inc. v. Tucker*, 35 N.E.3d 251, 254 (Ind. 2015).

[6] *Presley*, 2019 WL 5090647, at \*3 (citing *Fraley v. Minger*, 829 N.E.2d 476, 486 (Ind. 2005)).

[7] *Id.* at \*4.