

# **BOUNDARY, EASEMENT, AND PARTITION DISPUTES AND LITIGATION**

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## **I. Boundary, Easement and Partition Disputes and Litigation**

### **A. Using Surveys and Legal Descriptions to Resolve the Dispute**

Real estate lawyers must be well versed in many aspects of real estate law including the ability to read and understand surveys. Surveys are important in the development of real estate locating improvements, for construction of real estate, to establish boundaries, to provide visual representations of property being purchased or sold. In addition, owners of real estate use surveys to review encroachments and building site problems. Litigants use them in adverse possession claims. Parties needing to create easements, roads and other interests in land also require the use of surveys. In developing real estate, surveys are essential for subdividing large tracts of property into smaller tracts and lots.

#### **Survey Basics**

##### **1. What is a Survey?**

A survey is a visual depiction of measurements. In addition, 'to survey' means the surveying activity including taking field measurements, preparing evidence, taking notes, reviewing data and forming opinions about the data.

##### **2. Types of Surveys**

Several types of surveys are available, including boundary, land title, improvement location, and as built surveys. Topographic surveys are often used when construction is contemplated on a property.

a) *ALTA Survey*

The most common type of survey that is used in commercial transactions these days is the ALTA survey which is a survey prepared according to the “minimum standard detailed requirements” adopted by the American Land Title Association and the American Congress on Surveying and Mapping, and the National Society of Professional Surveyors. An ALTA survey typically shows where the boundaries are located, easements and locatable exceptions appearing on a title commitment for the property, major improvements located on the property, and utilities and access serving the property. In addition to the usual types of items shown on these surveys, there is an optional items table that includes such additional items that can be requested such as showing the location of highways and major street intersections, flood zone designations, measured height of buildings, and parking areas and numbered spaces, in addition to other items.

b) *Boundary Survey*

These surveys are often used in residential transactions and when putting in a fence or making other improvements to property. It is not as comprehensive as an ALTA Survey, but it is far better than a “spot survey”. Research is often done of surrounding tracts and requires field work and location of monuments. Improvements, roadways and easements are located.

c) *Surveyor’s Real Property Report (SRPR) (i.e., “spot survey”)*

Not as reliable or thorough as a Boundary Survey, this type of survey is often ordered in the standard residential real estate purchase or refinance. It is a location of the improvements and a cursory check for encroachments. These are not to be used for commercial properties.

3. What to Look for When Reviewing the Survey

Once the survey is received, it is critical in any transaction for the attorney to review the survey with an eye towards inclusiveness of items shown on the title commitment, and observing

issues that were unknown prior to the survey being performed. It is helpful to have a checklist available that is either customized for a particular type of transaction or a general one that can be used with any type of property or project, in order to make sure that all the bases are covered. Some of the more important aspects of survey review include the following:

a) The survey and the title commitment should conform; the legal description should match what is shown on the title commitment and the various encumbrances, appurtenant easements, and other matters appearing on the title commitment should all be properly shown on the survey;

b) The surveys should be reviewed for additional matters that do not appear on the title insurance commitment, such as additional easements not appearing on the title binder, insuring that there is access as expected by the purchaser involved, that all utilities are present on the property, that there is sufficient parking, that there are or are not appurtenant easements to the property needed for utilities, that no structures encroach over the property line or into any easements;

c) That the survey shows the correct number of improvements with the correct addresses. In looking at a survey, it is important to check the survey information including the scale, the north arrow, the legend, if any, the date the field work was completed, updated and the map drawn, the certifications and the surveyors seal and signature.

d) *Improvements/No Encroachments.* In connection with improvements that appear on the property, the survey should be reviewed for the location of the buildings and other improvements. Of particular importance is to make sure that no building or other improvements encroach onto or off of the property. In addition, it is important to make sure that there is no encroachment over a setback line or into easements. In addition, other types of encroachments

into easements or encroachments onto or off of the property that should be reviewed include fences, parking areas, sheds, signs, etc. If an encroachment is of a permanent nature, this can create serious problems for the purchaser and should be taken care of by a grant of an easement or monetary compensation before the closing of the transaction. If there are encroachments of small or movable structures that are not too expensive to remove, these encroachments are of less concern and often the title company will insure over them.

e) *Easements.* Any easements that appear on the title commitment should be located on the survey. It is also important to have copies of the easement documents for review. In connection with utility easements, if underground utilities are located on the property, the surveyor, if requested to do so, can review plans of the utility company to determine where the easements are located. Otherwise, they can hire companies with special equipment to detect where the utilities are located.

In addition to easements located on the property, appurtenant easements which benefit the property should also be shown on the survey. Sometimes, it will be necessary to obtain an appurtenant easement in case a utility runs off the property without any apparent supporting easement. If this is the case, it must be created and the adjoining owners will need to grant it. Sometimes, it becomes apparent from the survey that there is an appurtenant easement that does not appear on the title commitment. It is not unusual for a title company, once the order is placed on a particular parcel of property, not to include an appurtenant easement on the title commitment. If this happens, it is important that the survey be discussed with the title company in connection with researching the title to the appurtenant easement.

Sometimes an easement will appear on the survey that is not shown on the title commitment. Perhaps a gravel road across the property has been observed and placed on the

survey by the surveyor. It is important for the attorney to review these sorts of items with the title company to make sure that an easement is created or that it is taken into account in the title insurance policy. Other matters that ought to be recognized by a surveyor and shown on a survey might be a possible prescriptive easement or right of way that is unrecorded affecting the property. This may only be apparent from a visual inspection of the property by the surveyor. If such an easement is discovered, it should be thoroughly investigated and proper documents to validate it be drafted.

Sometimes an easement appearing on the title commitment does not affect the property and the surveyor will be able to determine this and the attorney can then request deletion from the title commitment.

As mentioned above, in connection with encroachments of improvements onto a property or over a property line, the easement areas should also be carefully followed for encroachments lying within them. In connection with title insurance matters, some encroachments are not extremely risky or would be inexpensive to remove and a title company is likely to insure over them. However, more permanent items, such as a swimming pool lying in the middle of a utility easement crossing the property would be another matter and likely need more significant measures to deal with removing them.

f) *Access and Parking.* Another very important item to consider in dealing with property transactions is the access to the property. One of the basic coverages under the ALTA forms of title insurance is insurance coverage that a property has legal access. A survey showing access on a public street usually satisfies the question. A survey showing access by way of a private roadway creates issues that need to be investigated to make sure that there is access from outside the immediate area. A private roadway must connect to a public right of way at some

point. Also, the attorney must make sure that any kind of private road agreement is properly drawn for the protection of all abutting property owners. It is not uncommon, however, to find that a property has been transferred that ends up being landlocked because a survey was not performed or because of an error in creating the legal description over the years.

If access is by an appurtenant easement, when ordering title insurance, you should make sure that you have title insurance coverage for the appurtenant easement. Typically, the title company will show the appurtenant easement as a second parcel on the Schedule A of the title insurance policy.

In addition to access issues, depending on the type of property involved, it may be important to show the parking areas in the survey. Often in connection with a commercial transaction, the local zoning authority will require a certain number of parking spaces in order to satisfy its zoning requirements. This would also be necessary to be shown on the survey in connection with trying to obtain an ALTA zoning endorsement.

g) *Utilities.* Any review of a survey should also include a review of the utilities servicing a particular property. Easements that are designated for utility purposes, for example on a plat, should be reviewed and the various utilities contacted to ensure that they are servicing the property. Sometimes a utility does not have an easement upon which to support its services. If this is discovered, it is important to make sure that an easement is obtained or that one is granted.

h) *Certification and Other Matters.* The review of the survey should also carefully make sure that the survey certification is properly made to the parties that were on the initial order and that the items that were placed on the order for specification in the survey have been

included. In addition, you want to make sure that the certification states that an actual on the ground survey was performed and the date of the survey and any updating work.

After the survey has been totally reviewed, it is necessary to do a list for the surveyor and possibly for the title company in connection with correcting any discrepancies between the survey and the title commitment. Once the thorough review and checklist have been completed with all discrepancies resolved, the attorney can be satisfied that he has provided a resolution to all title and survey issues possible in a proposed transaction.

#### 4. Types of Surveys and Descriptions and How to Read Them.

a) *“Metes and Bounds” Legal Descriptions.* Starting with the legal description, it is important to follow the “metes and bounds description” (meaning measurements and boundaries). The review should start at the point of beginning of the survey which is typically where the first bearing proceeds from after the point of beginning. The first bearing relates to a previously established line, perhaps a section line or a subdivision line, or a road). The description then follows the property boundaries along the courses and distances shown on the survey back to the point of beginning.

It is important that the description closes. The ALTA/ACSM certification assumes that there is closure in legal descriptions. (There are various forms of software available that will review a legal description to make sure that it closes.) Oftentimes legal descriptions are created by non-surveyors including attorneys, title officers and real estate agents who know enough about real estate and/or have enough information to be able to properly create a legal description. One who creates a legal description of the “south one-half of lot 1” usually will not have too much trouble if they know what “lot 1” looks like. However, it is important if not critical to have a surveyor prepare a correct metes and bounds legal description.

Typically, a surveyor in the field will attempt to locate previously set monuments establishing the boundaries of a piece of property. Some older legal descriptions use boundaries of old fences, “the old oak tree”, or rivers. Also, previously, some of the tools used were not exactly accurate. These included metal chains that stretched and contracted with the weather. (Older legal descriptions sometimes refer to “chains” and “links” as measurements.)

*b) Rectangular System/ Government System Description*

Another type of legal description is based on the rectangular system or government system which was adopted by the Continental Congress in 1785. Legal descriptions of this type are fairly common, especially in parts of the Southeastern United States. They are based on portions of the sections in a certain township and range with reference to a particular meridian. There are 36 sections in one square mile for a total of 640 acres. Each section is typically divided into further quarters and quarter quarter sections.

If you are reading or reviewing a legal description that is based on the rectangular system (the township and range type) it is oftentimes easier to work backwards through the legal description to locate where you are. See Section III below for more information on reading this type of survey.

*c) Subdivision Legal Description*

A third type of legal description is based on the subdivision of land. Most real estate attorneys have been exposed to a legal description such as “Lot 5 in block 4 of Pleasant Hills Plat 2, a subdivision in Fulton County, Georgia, according to the plat recorded in Plat Book 10 page 5 of the Fulton County records.” The subdivision name refers to a recorded subdivision plat that is recorded in the county records office. Typically all of the easements roadways and utility



easements are shown on the subdivision plats in connection with the approval process that typically occurs in the county where the subdivision is established.

The legal description on the survey should be the same as the legal description in the title commitment. The legal description and the title commitment generally come from the last vesting deed on the property. If there are differences between those legal descriptions, it is critical to determine those reasons for such differences because the seller of a tract of land that is described in a manner different than the deed where he purchased the property can create significant problems for the seller.

Sometimes there are differences in the deed that is used by the surveyor to create the measurements on the survey. Sometimes the measured call is different than the deed call. There are any number of reasons why there would be discrepancies in the legal descriptions including that the surveyor may have either made a typographical error, or that he started the description in a different place than on the title commitment. Regardless, it is important for the attorney to determine which is correct and have the surveyor reexamine and explain any discrepancies.

In addition to checking that the legal description on the face of the survey is the same legal description that appears on the commitment, it is important that the metes and bounds description should be followed around the boundary of the property and back to the point of beginning, paying attention to the calls to make sure that the distances and the directions are accurate. Often, there are reversed calls or other typographical errors.

##### 5. Handling Conflicting Descriptions and Surveys

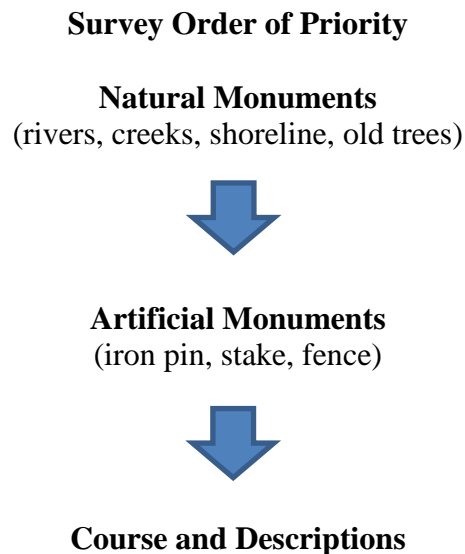
Sometimes there are differences in the deeds used by surveyors to create the measurements on surveys. Sometimes the measured call is different than the deed call. There are any number of reasons why there would be discrepancies in the legal descriptions including

that the surveyors may have either made typographical error, or started the description in a different place than on the title commitment. Regardless, it is important for the attorney to determine which is correct and have the surveyor reexamine and explain any discrepancies.

If adjoining property owners dispute the location of a common property boundary, the first step is to look at surveys used to create the legal descriptions. If the legal descriptions and surveys conflict, the property owners should ask their surveyors to review the surveys and the chains of title. It may be that a call or transfer was missed somewhere in the chain of title and is causing the current problem. The surveyors may be able to work together to resolve the conflict before the property owners have to resort to litigation. The best case scenario in this case: the surveyors can work it out. More often than not, however, the surveyors will be unavailable.

*a) Rules of Survey Priority*

When the surveyors are not available to resolve measurement conflicts in surveys, the courts will apply rules of survey priority.<sup>1</sup>



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<sup>1</sup> Martin v. Patton, 225 Ga. App. 157, 157-59, 483 S.E.2d 614, 617-18 (1997).



## References to Acres

### b) Case Studies.

*i. Dover v. Higgins.* What happens when the natural monuments referenced in the survey no longer exist years later? This was the case in *Dover v. Higgins*. In *Dover*, Dover acquired property that was described by identifying all contiguous parcels of land bordering it.<sup>2</sup> One of the contiguous parcels was the Patterson parcel, which was described in a 1918 deed through a series of calls based on monuments that existed in 1905.<sup>3</sup> When Higgins and Pepper obtained a deed to the Patterson parcel, they brought a quiet title action seeking to establish the boundary line between their parcel and Dover's tract.<sup>4</sup> The jury was left to interpret the calls in the Patterson deed, which included "the rock corner on the public road, the creek, the mouth at the creek's branch, and the rock corner below the mill."<sup>5</sup> The Court of Appeals held that the jury must weigh the evidence and determine the location of the ancient markers. "When there is conflicting evidence concerning the location of a monument upon which a boundary line is based, the jury is authorized to fix the boundary in accordance with a survey that presumes the location of the contested monument."<sup>6</sup> In that case, the jury was justified in finding that the survey prepared by the Higgins/Pepper surveyor established the correct boundary line.

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<sup>2</sup> 287 Ga. App. 861 (2007).

<sup>3</sup> Id. at 862.

<sup>4</sup> Id. at 863.

<sup>5</sup> Id. at 864.

<sup>6</sup> Id.

ii. *KDS Properties, Inc. v. Sims*. When a survey establishes corners but lines connecting the corners are not marked, a straight line is presumed. However, a marked crooked line will not be overruled.<sup>7</sup>

## **B. Criteria Needed, Evidence Tips, Remedies and Defenses**

### **1. Adverse Possession Original Actions/Affirmative Defenses**

“The burden of establishing prescriptive title lies on the party claiming it.”<sup>8</sup> In order for possession to be the foundation of prescriptive title, it: “(1) Must be in the right of the possessor and not of another; (2) Must not have originated in fraud except as provided in Code Section 44-5-162; (3) Must be public, continuous, exclusive, uninterrupted, and peaceable; and (4) Must be accompanied by a claim of right.”<sup>9</sup> “Prescriptive rights are to be strictly construed, and the prescriber must give some notice, actual or constructive, to the landowner he or she intends to prescribe against.”<sup>10</sup>

“While courts delineate what facts are sufficient to constitute adverse possession, whether such facts exist is generally a jury question.”<sup>11</sup> “A trial court is not justified in directing a verdict as to an adverse possession defense when there is some evidence or fact which could possibly support a jury’s findings as to the elements of prescription under O.C.G.A. § 44-5-161.”<sup>12</sup> If there is any evidence to support a trial court’s determination that a party acquired prescriptive

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<sup>7</sup> 234 Ga. App. 395, 397, 506 S.E.2d 903, 906 (1998).

<sup>8</sup> *Kelley v. Randolph*, 295 Ga. 721, 722 (2014) (citation omitted).

<sup>9</sup> O.C.G.A. § 44-5-161(a).

<sup>10</sup> *Bailey v. Moten*, 289 Ga. 897, 899 (2011) (citation omitted).

<sup>11</sup> *Byrd v. Shelley*, 279 Ga. App. 886, 887 (2006) (citation omitted).

<sup>12</sup> *Guagliardo v. Jones*, 238 Ga. App. 668, 668 (1999) (citations omitted).

title to disputed land, it will not be disturbed on appeal, even if there is evidence to support a contrary determination.<sup>13</sup>

*a) Claim Cannot Have Originated In Fraud*

“In order for fraud to prevent the possession of property from being the foundation of prescription, such fraud must be actual or positive and not merely constructive or legal.”<sup>14</sup> A person who claims title by virtue of adverse possession under color of title must have actual notice of any alleged fraud before that fraud will defeat his adverse possession claim.<sup>15</sup> Where the person claiming title by virtue of adverse possession had no notice of alleged fraud concerning the document in question, there could be no “actual or positive fraud” as required by the statute.<sup>16</sup>

Additionally, when “actual or positive fraud prevents or deters another party from acting, prescription shall not run until such fraud is discovered.”<sup>17</sup> But, if the alleged fraud does not “prevent or deter” a party from acting, the alleged fraud cannot bar a claim of title by adverse possession.<sup>18</sup>

*b) Hostile Possession*

“Actual possession of lands may be evidenced by enclosure, cultivation, or any use and occupation of the lands which is so notorious as to attract the attention of every adverse claimant and so exclusive as to prevent actual occupation by another.”<sup>19</sup> “During the time required for the

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<sup>13</sup> Williamson v. Fain, 274 Ga. 413, 415 (2001) (citing Nebb v. Butler, 257 Ga. 145 (1987)).

<sup>14</sup> O.C.G.A. § 44-5-162(a).

<sup>15</sup> Goodrum v. Goodrum, 283 Ga. 163, 163 (2008).

<sup>16</sup> Id. at 164. See also Gigger v. White, 277 Ga. 68, 71 (2003) (“To defeat prescriptive title, the fraud of the party claiming thereunder must be such as to charge his conscience. He must be cognizant of the fraud, not by constructive but by actual notice.”).

<sup>17</sup> O.C.G.A. § 44-5-162(b).

<sup>18</sup> Goodrum, 283 Ga. at 164 (where the appellants were unaware of the alleged fraud from 1989 to 2002, it could not be said that they failed to act based upon it).

<sup>19</sup> O.C.G.A. § 44-5-165.

ripening of prescription, it is necessary that ‘there shall be something to give notice that another is doing such acts or holding out such signs as to indicate the existence of a possession adverse to the true owner.’”<sup>20</sup> Possession “denotes the corporeal control of property, a state of actual occupancy, evidenced by things capable of being seen by the eye or of being ascertained by the use of the primary senses.”<sup>21</sup>

A review of Georgia case law shows what fact patterns the courts have determined to comprise adverse or hostile possession sufficient for prescriptive title to arise:

- Railroad tie terraces constructed in a backyard to raise and level the yard, and which encroached onto neighboring property along with construction debris, constituted adverse possession of the neighboring property. “It is undisputed that the terraces and construction debris encroaching onto [defendants’] property have remained in the same place continuously since at least 1990 when the terraces were built, thus satisfying the statutory 20-year prescriptive period. The building of the terraces changed the nature and appearance of the property and gave notice to all that the [plaintiffs] were exercising possession over the property in question.”<sup>22</sup> “Construction of the terraces also demonstrated [plaintiffs’] exercise of exclusive dominion over the property and an appropriation of it for their own use and benefit.”<sup>23</sup>
- The disputed land contained a pond created by a dam, which broke, resulting in the pond being drained. The adverse possessors entered onto the disputed land in order to reconstruct the dam at a substantial cost borne only by them, and the neighboring

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<sup>20</sup> Ga. Power Co. v. Irvin, 267 Ga. 760, 764 (1997) (quoting Clark v. White, 120 Ga. 957, 959 (1904)).

<sup>21</sup> Byrd v. Shelley, 279 Ga. App. 886, 888 (2006) (quoting Burgin v. Moye, 212 Ga. 370, 374 (1956)).

<sup>22</sup> Kelley, 295 Ga. at 723.

<sup>23</sup> Id.

property owner did not object to this act of actual possession and ownership. The work on the dam was visible from the public road that crossed the neighbors' property, and this evidence alone was "sufficient to establish open and notorious occupation to put the world on notice of actual possession of the disputed land."<sup>24</sup> The reconstruction of the dam also supported actual possession of all the disputed land, even though some of it was wild land that was not enclosed or cultivated, because "possession under a duly recorded deed shall be construed to extend to all the contiguous property embraced in such deed."<sup>25</sup>

- Mowing and occasionally cleaning up a disputed area is not generally sufficient to constitute actual possession; where the disputed area adjoins the property of the party claiming adverse possession, "other claimants could have interpreted such mowing and occasional clean-up as having a merely aesthetic objective and not as an intent to exercise dominion."<sup>26</sup>
- Occasional visits to property are not sufficient to establish possession.<sup>27</sup>
- Clearing an area of vegetation or timber cutting have little value as evidence of possession.<sup>28</sup>
- Whether a disputed area is enclosed is an issue for the trier of fact.<sup>29</sup>
- Where a community homeowners association permitted residents of the community to enjoy a disputed area as common property but did not permit them to take over the property for their own personal use and consistently impeded their attempts to do

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<sup>24</sup> Matthews v. Cloud, 294 Ga. 415, 418 (2014).

<sup>25</sup> Id. (quoting O.C.G.A. § 44-5-167).

<sup>26</sup> Bailey, 289 Ga. at 899 (citation omitted).

<sup>27</sup> Id. (citing Robertson v. Abernathy, 192 Ga. 694, 699 (1941)).

<sup>28</sup> Id.

<sup>29</sup> Id. (citing Brookman v. Rennolds, 148 Ga. 721, 731-32 (1919)).

personal construction projects on the disputed area, the residents could not show they had adverse possession of the property.<sup>30</sup>

- Installing a sprinkler system, by itself, would not establish adverse possession.<sup>31</sup>
- Actual “adverse possession by one claimant is inconsistent with and will prevail over mere constructive possession by another claimant.”<sup>32</sup>
- In a dispute over the rear portion of the second floor of a building, the tenant who rented the adjacent front portion of the second floor was determined to have title to the disputed space where he: replaced the door at the base of the stairwell leading to the second floor and did not provide a key to anyone; used the disputed space to store material for the renovation of the front portion; did not observe anyone other than himself and his agents either possessing the disputed space or maintaining it; and posted “No Trespassing” signs. This evidence showed that the owner of the first floor of the building, which had claimed the disputed space by adverse possession, could not prevail because it was not in continuous, exclusive, and uninterrupted actual possession of the space.<sup>33</sup> The owner of the first floor showed that it repaired the roof of the building on several occasions, but the purpose of those repairs seems to have been to protect its interest in the first floor, and even assuming the repairs could be considered as maintenance of the disputed space on

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<sup>30</sup> Campbell v. The Landings Assoc., Inc., 289 Ga. 617, 620 (2011).

<sup>31</sup> Id.

<sup>32</sup> Sacks v. Martin, 284 Ga. 712, 714 (2008) (quoting Shahan v. Watkins, 194 Ga. 164, 167 (1942)).

<sup>33</sup> MEA Family Inv., LP v. Adams, 284 Ga. 407, 408-09 (2008).



the second floor, such sporadic efforts were not generally sufficient to constitute actual possession.<sup>34</sup>

- A “mere entry, unaccompanied by an actual occupancy, is no possession at all”<sup>35</sup>
- “To constitute adverse possession, the [claimant] must either remain permanently upon the land, or else occupy it in such a way, as to leave no doubt in the mind of the true owner, not only who the adverse claimant was, but that it was his purpose to keep him out of his land. ... Adverse possession is to be made out by acts which are open, visible, notorious, and continuous; and does not depend upon the secret purpose or intention of the intruder; that he will return at his convenience, sooner or later, and reoccupy the land.”<sup>36</sup>
- Plaintiff established prescriptive title over disputed property by adverse possession where she showed that she exclusively used and occupied the property for more than 20 years by mowing, maintaining, fencing, and placing old cars, boats, a chicken coop, basketball goals, and a driveway on it. She also showed that the defendants never crossed a natural boundary line to use the property in question.<sup>37</sup> Although a neighbor testified that over the years he saw both plaintiff and defendants mowing the property, the credibility of that witness and the weight to be accorded his testimony were matters for the jury to resolve.<sup>38</sup>
- Church acquired property by adverse possession where it used the property as church property regularly since 1957 and regularly maintained the property, mowing it

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<sup>34</sup> Id. at 409.

<sup>35</sup> Id.

<sup>36</sup> Id. at 409-10 (quoting Denham v. Holeman, 26 Ga. 182, 191 (1858)).

<sup>37</sup> Murray v. Stone, 283 Ga. 6 (2008).

<sup>38</sup> Id. at 7.

approximately every two weeks, removing downed tree limbs, and cleaning up the cemetery twice per year. Church also presented evidence which established that the adjacent property owner had personal knowledge of the church's claim to the property in question dating back to August 1972. Trial court was authorized to conclude from the evidence presented that the church had acquired prescriptive title to the portion of the disputed property used and possessed by the church for church and cemetery purposes.<sup>39</sup>

- In contrast, where a church received rental payments from a sign company which maintained billboards on a disputed lot and where the church occasionally cleaned up the area, these things were insufficient to constitute actual possession. The billboards would give notice of nothing more than an easement and would not evidence actual possession by the church which was so exclusive as to prevent the occupation by others of the entire lot or even the area beneath the signs.<sup>40</sup>
- Payment of taxes is not evidence of title and ownership.<sup>41</sup>
- “Declarations by a person in favor of his own title shall be admissible to prove his adverse possession.” Where the claimant's declarations and occupancy “left no doubt on the mind of the true owner, not only as to who the adverse claimant is, but that it was his purpose to keep him out of the land,” his possession was adverse and without permission.<sup>42</sup>

c) *Exclusivity*

“Adverse possession, in order to ripen into title, must be exclusive. ‘Exclusive possession’ means that the disseizor must show an exclusive dominion over the land and an

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<sup>39</sup> Mobley v. Jackson Chapel Church, 281 Ga. 122, 123-24 (2006).

<sup>40</sup> Friendship Baptist Church, Inc. v. West, 265 Ga. 745, 745-46 (1995).

<sup>41</sup> Byrd, 279 Ga. App. at 887 (citing Brown v. Williams, 259 Ga. 6 (1989)).

<sup>42</sup> Georgia Power Co., 267 Ga. at 367-68.

appropriation of it to his own use and benefit.”<sup>43</sup> “And while ‘[t]wo persons cannot hold one piece of property adversely to each other at the same time,’ it has been recognized that ‘an adverse claimant’s possession need not be absolutely exclusive, it need only be a type of possession which would characterize an owner’s use.’”<sup>44</sup> Thus, Georgia Power’s use of certain land in a limited area above and below the earth’s surface for the limited purpose of generating hydroelectric power, including its occasional entry onto the land to maintain its lines and tunnel, was consistent with the surface use of the property by the plaintiffs seeking title by adverse possession and did not attempt to interrupt their occupancy.<sup>45</sup> Even though plaintiffs’ continuous and open possession for almost 100 years was subject to Georgia Power’s limited use and was therefore not “absolutely exclusive,” it was consistent with ownership and was sufficiently exclusive to satisfy O.C.G.A. § 44-5-161 (a)(3).<sup>46</sup> Georgia Power’s limited use of the property did not constitute joint possession which would negate the exclusivity of the plaintiffs’ possession and defeat their ability to acquire title by prescription.<sup>47</sup>

*d) Continuity*

To perfect prescriptive title to property, a claimant must show that his adverse possession was continuous over the required statutory period. *See Smith v. Stacey*, 281 Ga. 601, 603 (2007) (where possession of the claimant and his predecessors was not ever continuous for seven years or more, but rather was intermittent, with the property being vacant for various periods of time and interrupted by acts of possession of others, the jury was authorized to find that claimant failed to prove his claim of prescriptive title). However, the “rule requiring continuity of

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<sup>43</sup> *Ga. Power Co. v. Irvin*, 267 Ga. at 366 (quoting *Carter v. Becton*, 250 Ga. 617, 618 (1983)).

<sup>44</sup> *Id.* (quoting *Carter*, 250 Ga. at 618 and 3 Am. Jur. 2d 170, 171, Adverse Possession § 75).

<sup>45</sup> *Id.* at 367.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

possession is one of substance and not of absolute mathematical continuity. ... Thus, there may be 'slight intervals' in which the prescriber or his agent is not actually upon the land or there may be 'short intervals of temporary absence' of such persons."<sup>48</sup> "But it is necessary that, during the whole time required for the ripening of such prescription, there should be something to give notice that another is doing acts or holding out such signs as to indicate the existence of a possession adverse to the true owner."<sup>49</sup> Therefore, simply passing through a disputed tract of land on one occasion and marking drill rods and pins on the property did not constitute continuous possession.<sup>50</sup>

In *Jackson v. Turner*, 277 Ga. 58 (2003), as support for his ownership by adverse possession of a disputed tract, Jackson claimed that he grazed cattle, that he grew and cut hay, and that he built a barn partially located on the land. But the evidence established that Jackson's use of the tract was not continuous, exclusive, or uninterrupted for the required statutory period.<sup>51</sup> "Until the mid-1980's when Jackson constructed a gate, the property was accessible to the general public and was used regularly by local teenagers for parties, drinking, and carousing. It was also shown that Jackson did not keep cattle on the property during the entire prescriptive period ...."<sup>52</sup> The jury could have reasonably decided that this evidence demonstrated interruption of possession or lack of continuity and exclusivity such that Jackson's claim for prescriptive title failed.<sup>53</sup>

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<sup>48</sup> Henson v. Tucker, 278 Ga. App. 859, 862 (2006) (quoting Walker v. Steffes, 139 Ga. 520, 521 (1913)).

<sup>49</sup> Id. at 862-63 (citing Walker, 139 Ga. at 521-22).

<sup>50</sup> Id. at 863.

<sup>51</sup> Id. at 59.

<sup>52</sup> Id.

<sup>53</sup> Id. See also Gurley v. East Atlanta Land Co., 276 Ga. 749, 750 (2003) (sporadic use of the property by some of claimant's tenants was insufficient to show uninterrupted and continuous possession to establish adverse possession).

e) *Claim of Right*

The “term ‘claim of right’ is synonymous with ‘claim of title’ and ‘claim of ownership.’ While this does not mean that the possession must be accompanied by a claim of title out of some predecessor, it does mean that there must be some claim of title in the sense that the possessor claims the property as his own.”<sup>54</sup> Where there are no allegations that the possession originated in fraud, the good faith of the adverse possessor is presumed.<sup>55</sup> Indeed, “no prescription runs in favor of one who took possession of land knowing that it did not belong to him.”<sup>56</sup>

In *Walker*, the Georgia Supreme Court addressed whether the evidence allowed the reasonable inference that the plaintiffs performed acts on the property in question “under some claim that the property was theirs.”<sup>57</sup> The plaintiffs produced an affidavit showing that: although Charles Walker, their predecessor in interest, lived on a different piece of property, the lot in question was known as the Charlie Walker tract; Charles Walker used the property to raise crops and livestock from at least 1937 onward; Charles Walker fenced the property and erected storage buildings on it; one of the plaintiffs assisted Charles Walker in maintaining the lot in question; and he continued to maintain it after the 1957 death of Charles Walker until 1969.<sup>58</sup> The Court concluded that “[c]ontinuous farming of property, the erection of fences, and the construction of buildings are indicia of possession” sufficient to support the plaintiffs’ adverse possession claim

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<sup>54</sup> *Walker v. Sapelo Island Heritage Auth.*, 285 Ga. 194, 196 (2009) (quoting *Ewing v. Tanner*, 184 Ga. 773, 780 (1937)).

<sup>55</sup> *Kelley v. Randolph*, 295 Ga. 721, 723 (2014) (citing *Childs v. Sammons*, 272 Ga. 737, 739 (2000)).

<sup>56</sup> *Id.* at 723 n.1 (quoting *Ellis v. Dasher*, 101 Ga. 5, 9-10 (1897)).

<sup>57</sup> *Id.* at 197.

<sup>58</sup> *Id.*

to the property.<sup>59</sup> Accordingly, the plaintiffs produced evidence raising a material question of fact as to whether they possessed the property under a claim of right, and the trial court erred in granting summary judgment against them.<sup>60</sup>

f) *Lack of Permissive Use*

“Permissive possession cannot be the foundation of a prescription until an adverse claim and actual notice to the other party.”<sup>61</sup> In *Congress Street Properties, LLC v. Garibaldi’s, Inc.*, the Georgia Court of Appeals addressed the argument that a plaintiff claiming title to property by adverse possession is required to prove lack of permissive use as part of its case. The parties owned adjacent property lots.<sup>62</sup> Plaintiff acquired its property in 1979 and constructed a ventilation system on the outside of the west wall of its building which encroached onto the airspace above the adjoining property, owned by defendant’s predecessors in interest.<sup>63</sup> The ventilation system has been in place since March 1980.<sup>64</sup> Defendant purchased the adjacent property in 2002.<sup>65</sup> Prior to closing, plaintiff received a request from defendant’s predecessors in interest to sign a document acknowledging that the ventilation system encroached onto the neighboring property and agreeing to remove it if requested to do so.<sup>66</sup> Plaintiff declined this request.<sup>67</sup> In June 2009, defendant demanded that plaintiff remove the ventilation system, and plaintiff filed a declaratory judgment action, asserting that it had adversely possessed the space

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<sup>59</sup> Id. at 198 (citations omitted).

<sup>60</sup> Id. See also *Congress Street Properties, LLC v. Garibaldi’s, Inc.*, 314 Ga. App. 143, 145 (2012) (holding that a claim of right “will be presumed from the assertion of dominion, particularly where the assertion of dominion is made by the erection of valuable improvements”).

<sup>61</sup> O.C.G.A. § 44-5-161(b).

<sup>62</sup> 314 Ga. App. at 144.

<sup>63</sup> Id.

<sup>64</sup> Id.

<sup>65</sup> Id.

<sup>66</sup> Id.

<sup>67</sup> Id.

occupied by the ventilation system through its open and continuous use for more than 29 years.<sup>68</sup> Plaintiff filed an affidavit from its CFO, asserting that her father was responsible for acquiring its property and that she was unaware of any agreement reached between him and defendant's predecessors in interest regarding the encroachment of the ventilation system onto the latter's property.<sup>69</sup> The trial court granted summary judgment to plaintiff, holding that its use of the airspace occupied by its ventilation system since 1980 had been public, continuous, exclusive, uninterrupted, peaceable, and did not originate in fraud.<sup>70</sup> The trial court further held that there was no evidence in the record that demonstrates plaintiff had permission from the adjoining landowner when the ventilation system was originally built.<sup>71</sup>

The Georgia Court of Appeals held that there was no dispute that for a period of more than 20 years, plaintiff's possession of the airspace occupied by its ventilation system had been public, continuous, exclusive, uninterrupted, and peaceable.<sup>72</sup> Possession under a claim of right was presumed because of plaintiff's assertion of dominion, and there was no allegation that the possession originated in fraud.<sup>73</sup> The court further held that plaintiff did not have the burden to prove that its use of the airspace was not permissive as part of its prima facie case. Rather, in accordance with the plain language of O.C.G.A. § 44-5-161 and applicable Georgia law, plaintiff satisfied its burden once it established by a preponderance of the evidence each of the elements explicitly set forth in O.C.G.A. § 44-5-161(a).<sup>74</sup> Once it did so, the burden then shifted to

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<sup>68</sup> Id.

<sup>69</sup> Id.

<sup>70</sup> Id. at 145.

<sup>71</sup> Id.

<sup>72</sup> Id. at 146.

<sup>73</sup> Id. at 146.

<sup>74</sup> Id.

defendant to rebut the presumption of adverse possession with evidence of permissive use.<sup>75</sup> “To hold otherwise would not only inject into O.C.G.A. § 44-5-161(a) an additional essential element of the claim that was not included by the legislature, but also would place upon the adverse possessor the burden of proving a negative fact.”<sup>76</sup> Because defendant was unable to present any evidence of permissive use sufficient to rebut plaintiff’s evidence of adverse possession, the trial court did not err in granting plaintiff’s motion for summary judgment.<sup>77</sup>

g) *Cotenants*

“A party who asserts a claim of title by adverse possession against a cotenant has the burden of proving not only the usual elements of prescription ... but also at least one of the elements of O.C.G.A. § 44-6-123, which provides as follows: ‘There may be no adverse possession against a cotenant until the adverse possessor effects an actual ouster, retains exclusive possession after demand, or gives his cotenant express notice of adverse possession.’”<sup>78</sup> Where one cotenant submitted an affidavit that a fellow cotenant claiming adverse possession took no action to oust his cotenants, to demand and retain exclusive possession, or to give actual notice of adverse possession, the burden then shifted to the cotenant claiming adverse possession to point to facts giving rise to a conflict on the issue.<sup>79</sup> But the cotenant claiming adverse possession submitted an affidavit showing only that he paid taxes on the property, that his cotenants did not use the property, and that they never questioned his right

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<sup>75</sup> Id.

<sup>76</sup> Id. at 146-47.

<sup>77</sup> Id. at 147. See also Goodson v. Ford, 290 Ga. 662, 664 (2012) (defendants did not acquire title to a street, a rectangular strip of land running between properties and connecting to highway, by adverse possession, where their use of the street for anything other than access to the highway was occasional and permissive at most, with no adverse claim and actual notice to the property owners or their predecessors).

<sup>78</sup> Ward v. Morgan, 280 Ga. 569, 571 (2006) (quoting Wright v. Wright, 270 Ga. 530, 532 (1999)).

<sup>79</sup> Id.



to be on the property; these averments did not suffice to establish an ouster or to satisfy an “express notice” of a “hostile claim” criterion.<sup>80</sup> The Georgia Supreme Court explained:

The entry and possession of one joint tenant or tenant in common being, prima facie, in support of his cotenant’s title, to constitute an adverse possession there must be some notorious and unequivocal act indicating an intention to hold adversely, or an actual disseisin or ouster. The silent and peaceable possession of one tenant, with no act which can amount to an ouster of his cotenants is not adverse; so either actual notice of the adverse claim must be brought home to the latter, or there must have been unequivocal acts, open and public, making the possession so visible, hostile, exclusive, and notorious that notice may fairly be presumed, and the statute of limitations will begin to run only from the time of such notice. Exclusive possession, therefore, by a cotenant alone will be presumed not an adverse holding, but simply one in support of the common title.<sup>81</sup>

*h) Predecessors in Interest*

The Georgia courts have consistently considered the actions of predecessors in interest of a party seeking title to property through adverse possession in determining if the statutory requirements are met.<sup>82</sup>

For example, in *Crawford v. Simpson*, 279 Ga. 280 (2005), the plaintiff brought a quiet title action in 2003 against his neighbor to establish ownership of a disputed 1.32 acre tract. The evidence showed that a 1950 deed showed a boundary line between the two properties which placed the disputed tract in the property owned by the plaintiff’s predecessor in title.<sup>83</sup> However, aerial photographs taken in 1963 and 1979 showed that the disputed tract was being maintained

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<sup>80</sup> Id.

<sup>81</sup> Id. at 572 (quoting Hardin v. Council, 200 Ga. 822, 831-32 (1946)) (emphasis in original). But see Gigger v. White, 277 Ga. 68, 71 (2003) (“But when a person claiming prescriptive title does not enter possession as a cotenant but as owner of the entire estate under color of title, such possession is adverse to those who might be otherwise treated as cotenants, and the party in possession is not subject to the conditions of O.C.G.A. § 44-6-123.”) (citation and internal punctuation omitted).

<sup>82</sup> See Norton v. Holcomb, 285 Ga. App. 78, 81 (2007) (“Possession by different predecessors in interest may be added together when the previous possession also satisfies the other elements of adverse possession.”).

<sup>83</sup> Id. at 281.

in a manner consistent with defendant's predecessor's property, and the county taxed him accordingly for the disputed tract.<sup>84</sup> A witness familiar with the disputed tract since 1967 testified that defendant's predecessor grew hay and later planted pine trees on the tract.<sup>85</sup> Defendant's immediate predecessor in interest acquired the tract in a 1992 warranty deed.<sup>86</sup> In 1996, when plaintiff acquired his property, the seller did not warranty the disputed boundary line as shown by the 1950 deed, and when plaintiff in 2001 installed a fence along the 1950 boundary line, defendant had it removed.<sup>87</sup> The trial court adopted the special master's award and findings that defendant owned the disputed tract through adverse possession.<sup>88</sup>

On appeal, the Georgia Supreme Court noted that the evidence demonstrated that under defendant's predecessors in interest, the disputed property was cultivated beginning by at least 1963, the taxes were paid yearly, ownership of the property was warranted when it was conveyed in 1992, and plaintiff's fence was removed from the property in 2001.<sup>89</sup> The disputed tract was under cultivation for years and was neither remote nor incapable of actual possession without enclosure.<sup>90</sup> The evidence authorized the trial court and the special master to find that defendant's predecessors in interest maintained public, exclusive, and continuous possession of the disputed tract and that their hostile possession of the property was done in good faith under a claim of right.<sup>91</sup>

Likewise, in *Cooley v. McRae*, 275 Ga. 435 (2002), the plaintiff brought a quiet title action, contending that her predecessors in interest acquired title to property through adverse

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<sup>84</sup> Id.

<sup>85</sup> Id.

<sup>86</sup> Id.

<sup>87</sup> Id.

<sup>88</sup> Id. at 280.

<sup>89</sup> Id. at 281-82.

<sup>90</sup> Id. at 282.

<sup>91</sup> Id. (citing Halpern v. The Lacy Inv. Corp., 259 Ga. 264 (1989)).

possession. The special master agreed, and the trial court adopted the special master's findings.<sup>92</sup>

According to the Georgia Supreme Court, the record demonstrated that plaintiff's predecessor and his lineal descendants continuously occupied the property and openly declared to others that they owned the property from at least 1950 onward.<sup>93</sup> In 1951, plaintiff's predecessor sold timber rights on the property to an individual who testified that throughout the 1950s and 1960s, he and his family used the property for recreational purposes with the express permission of plaintiff's predecessor and in an honest belief that plaintiff's predecessor owned the property.<sup>94</sup> Since at least 1965, plaintiff's predecessor and his descendants regularly hunted on the property, cultivated the land, and constructed and maintained roads, fences, and gates on the property.<sup>95</sup> They frequently posted "No Trespassing" signs on the property and made trespassers on the property leave.<sup>96</sup> After plaintiff's predecessor's death in 1977, plaintiff claimed the property as her own, as shown by her filing of a survey plat asserting ownership of the property, her and her family's continuous and exclusive use of the property during her lifetime, and her conveyance by deed of portions of the property to her children.<sup>97</sup> Further, defendant admitted that she knew of plaintiff's predecessors' possession of the property and that she always believed that they owned the property.<sup>98</sup> Based on all the evidence, the trial court properly determined that possession of

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<sup>92</sup> Id. at 435.

<sup>93</sup> Id. at 436.

<sup>94</sup> Id.

<sup>95</sup> Id.

<sup>96</sup> Id.

<sup>97</sup> Id.

<sup>98</sup> Id.

the property by plaintiff's predecessors was public, continuous, exclusive, uninterrupted and peaceable, and under a claim of right as required under O.C.G.A. § 44-5-161(a).<sup>99</sup>

*i) Length of Time of Possession Required*

Generally, one claiming title to real property by adverse possession must be in possession of the property for a period of twenty years. O.C.G.A. § 44-5-163. However, possession of real property “under written evidence of title” for a period of seven years shall confer good title by prescription to the property.<sup>100</sup> O.C.G.A. § 44-5-164.

Color of title is a writing upon its face professing to pass title, but which does not do it, either from want of title in the person making it, or from the defective conveyance that is used – a title that is imperfect, but not so obviously so that it would be apparent to one not skilled in the law. ... [I]t must purport to convey the property to the possessor (to him holding either the corporeal or the legal possession), and not to others under whom he does not hold; it must contain such a description of the property as to render it capable of identification, and the possessor must in good faith claim the land under it.<sup>101</sup> An “administrator’s deed which purported to convey fee simple title, was sufficient color of title, for purposes of acquiring title to property by prescription, even though, unknown to all parties at the time of the transaction, the testatrix did not own the property at the time of her death.”<sup>102</sup> The Georgia Supreme Court

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<sup>99</sup> *Id.* (citing *Armour v. Peek*, 271 Ga. 202 (1999)). See also *Williamson v. Fain*, 274 Ga. 413, 415 (2001) (evidence showed that plaintiff’s parents and predecessors in title had carried out acts recognized as acts of actual possession by cultivating property from 1949 through 1983 and then had changed the nature and appearance of the land by clear-cutting, wind-rowing, and replanting a pine tree plantation was sufficient to authorize the trial court’s ruling that plaintiff acquired prescriptive title to the property).

<sup>100</sup> In either case prescriptive title is valid against “everyone except the state and those persons laboring under the disabilities stated in Code Section 44-5-170.” O.C.G.A. §§ 44-5-163, 44-5-164.

<sup>101</sup> *Gigger v. White*, 277 Ga. 68, 70 (2003) (quoting *Ponder v. Ponder*, 275 Ga. 616, 619 (2002)).

<sup>102</sup> *Id.* at 70-71 (citing *Smart v. Miller*, 260 Ga. 88 (1990)).

further has “delineated numerous types of instruments that are treated as color of title, including a void deed by a husband conveying his wife’s property, a sheriff’s deed without an execution, a deed executed by one as attorney in fact without authority, [and] a quitclaim deed, conveying ‘any rights of the grantor.’”<sup>103</sup>

In *Gigger*, a quitclaim deed to plaintiff purported to convey the entire interest in the property and contained a full legal description as to render it capable of identification.<sup>104</sup> The plaintiff believed the former owner of the property to be the sole owner and other than the owner’s son who executed the deed, plaintiff had no knowledge of the existence of any other children of the owner, or of any claim that they may have had to the property.<sup>105</sup> Plaintiff further had no knowledge of actual fraud in the quitclaim transaction and thus claimed the land in good faith.<sup>106</sup> Therefore, the writing plaintiff relied upon was sufficient color of title for purposes of acquiring prescriptive title to the property.<sup>107</sup>

## 2. Encroachments

### a) *Actions for Ejectment and Trespass*

“Georgia law allows an owner of real property to bring an ejectment action to remove an adjoining owner who, either by inadvertence or with predatory intent, encroaches upon the

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<sup>103</sup> *Id.* at 71 n.3 (quoting *Smart*, 260 Ga. at 89 (internal citations omitted)).

<sup>104</sup> *Id.* at 71.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* See also *Matthews v. Crowder*, 281 Ga. 842, 843-45 (2007) (a deed reserving a grantor’s right to live in a house for the remainder of her life was color of title for an adverse possession claim against a prior grantor’s heirs claiming an interest by intestate succession due to invalid deed between the grantors, and the owners under color of title could thus establish adverse possession against the heirs, with the seven-year prescriptive period beginning to run no later than the death of the grantor). But see *Haffner v. Davis*, 290 Ga. 753, 754 (2012) (plaintiff could not claim adverse possession under color of title because his deed depicted the disputed property as outside of the property he purchased and therefore did not provide written evidence of title).

property of his neighbor.”<sup>108</sup> “The purpose of the action is to eject the defendant from possession of the disputed land.”<sup>109</sup> “A land owner’s entitlement to an action in ejectment stems from our deep-rooted belief that the owner of real property has the right to possess, use, enjoy, and dispose of it, and the corresponding right to exclude others from the use.”<sup>110</sup> As relief, the property owner may obtain the recovery of the property encroached upon and removal of the intruding structure.<sup>111</sup> “In addition, the construction of a permanent structure encroaching upon adjacent property ‘constitutes a continuing trespass and nuisance which may be abated as such.’”<sup>112</sup> “In an action for trespass, the landowner may recover damages arising from ‘any wrongful, continuing interference with a right to the exclusive use and benefit of a property right.’”<sup>113</sup> In *Navajo Construction*, a construction company built a “spec” house on a lot in a new subdivision.<sup>114</sup> The defendants bought that house without obtaining a survey of the property. *Id.* Later, the plaintiff bought the lot next door to the defendants’ house, intending to build a spec house on it.<sup>115</sup> The plaintiff then had a survey done which showed that the

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<sup>108</sup> *MVP Inv. Co. v. North Fulton Express Oil, LLC*, 282 Ga. App. 512, 513 (2006).

<sup>109</sup> *Id.* (citing *Vinson v. Cannon*, 213 Ga. 339, 341 (2004)).

<sup>110</sup> *Id.*

<sup>111</sup> *Navajo Constr., Inc. v. Brigham*, 271 Ga. App. 128, 129 (2004). *See also* O.C.G.A. § 44-11-2 (“A plaintiff in ejectment may recover the premises in dispute upon his prior possession alone against one who subsequently acquires possession of the land by mere entry and without any lawful right whatsoever.”).

<sup>112</sup> *Navajo Constr., Inc.*, 271 Ga. App. at 129 (quoting Pindar’s Ga. Real Estate Law & Procedure, § 14-3).

<sup>113</sup> *Id.* (quoting *Lanier v. Burnette*, 245 Ga. App. 566, 570 (2000)); *see also* O.C.G.A. § 51-9-1 (“The right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie.”); O.C.G.A. § 44-11-7(a) (“By adding a count in his petition and submitting the evidence to the jury, the plaintiff in ejectment may recover by way of damages all such sums of money to which he may be entitled by way of mesne profits, together with the premises in dispute.”).

<sup>114</sup> 271 Ga. App. at 128.

<sup>115</sup> *Id.*

defendants' house encroached on its lot by over five feet.<sup>116</sup> Plaintiff then filed suit, asserting claims for trespass and negligence. The trial court denied the plaintiff's motion for summary judgment on its trespass claim and granted the defendants' cross-motion for summary judgment.<sup>117</sup>

The Georgia Court of Appeals held that the defendants' home's encroachment necessarily interfered with the plaintiff's right to possess, use, enjoy, and dispose of its entire parcel.<sup>118</sup> Although the defendants did not cause the encroachment, they intentionally possessed and occupied the encroaching structure.<sup>119</sup> Because the plaintiff adduced evidence making out a prima facie claim of trespass, the trial court erred in granting the defendants' motion for summary judgment.<sup>120</sup> "But it is also undisputed that, after failing to obtain a survey of the property, [plaintiff] purchased its parcel with the encroaching structure already in place. Because the [defendants had] adduced evidence in support of their defenses on the trespass claim, the trial court correctly denied [plaintiff's] motion for summary judgment."<sup>121</sup>

In *MVP Inv. Co. v. North Fulton Express Oil*, the defendants built an oil change facility on a piece of property adjoining the property of the plaintiff.<sup>122</sup> Plaintiff alleged that during the construction, the defendants raised the height of their property by four to five feet and "laterally supported the 4-to-5-foot increase in the ... [p]roperty's elevation by wrongfully backfilling and sloping fill dirt on [plaintiff's] property along the common boundary line."<sup>123</sup> According to plaintiff, the backfilling and sloping fill dirt resulted in an "earth slope and wall [created] to

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<sup>116</sup> Id.

<sup>117</sup> Id.

<sup>118</sup> Id. at 129.

<sup>119</sup> Id.

<sup>120</sup> Id.

<sup>121</sup> Id.

<sup>122</sup> 282 Ga. App. at 512.

<sup>123</sup> Id.

provide lateral support to the raised elevation of [defendants'] property” which encroached onto plaintiff’s property.<sup>124</sup> The plaintiff asserted that as a result of the encroachment, it could not develop its property as it intended unless it built an eight-to-ten-foot structural load-bearing wall to replace the lateral support supplied by the fill dirt.<sup>125</sup> Plaintiff brought claims for trespass and ejectment, both of which the trial court dismissed.<sup>126</sup>

The sole issue on appeal was whether the trial court erred in dismissing plaintiff’s claim for ejectment. The Georgia Court of Appeals noted that plaintiff alleged that the defendant constructed an “earth slope and wall” from fill dirt that extended over the common boundary and encroached onto plaintiff’s property.<sup>127</sup> Defendants continued to use the fill dirt that they deposited onto plaintiff’s property to laterally support the raised elevation of their own property, which plaintiff could not disturb.<sup>128</sup> The court concluded that Georgia precedent supported plaintiff’s contention that it was entitled to eject the defendants from possession of its property.<sup>129</sup> “Courts of this state have previously held that a permanent structure that has been unlawfully erected onto an adjacent owner’s property or that unlawfully encroaches onto that property necessarily interferes with the owner’s right to possess, use, enjoy, and dispose of his property.”<sup>130</sup> The earthen slope required to provide lateral support constituted a “structure” when it encroached upon the property of the adjacent landowner. *Id.* During the elevation of its own property, defendants appropriated plaintiff’s property to the extent they placed the fill dirt being

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 512-13.

<sup>126</sup> *Id.* at 513.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 514 (citing Wachstein v. Christopher, 128 Ga. 229 (1907)).



used as lateral support over the common boundary and onto plaintiff's property, and plaintiff was therefore entitled to an action for ejectment for this encroachment.<sup>131</sup> According to the court,

[I]f one party, building upon his own land, encroaches upon the adjoining land of his neighbor, no question should arise as to the right of the latter to maintain ejectment against the former. ... One who ousts another from the possession of his property must take all the consequences resulting from the application of the appropriate remedy given by the law to restore to the owner that of which he has been deprived.<sup>132</sup>

*b) Defense of Good Faith*

“In all actions for the recovery of land, the defendant who has a bona fide possession of the land under adverse claim of title may set off the value of all permanent improvements placed on the land in good faith by himself or other bona fide claimants under whom he claims.” O.C.G.A. § 44-11-9(a). “Whether a defendant has placed improvements on land in good faith is an issue for the trier of fact.”<sup>133</sup>

3. Easement and Right of Way Disputes

An “easement” is the right of an owner of one parcel of land to use the land of another for a special purpose.<sup>134</sup> Utility easements and rights of way (driveways) are common examples of easements. An easement that transfers an interest in the land must be in writing to satisfy the statute of frauds.<sup>135</sup>

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<sup>131</sup> Id.

<sup>132</sup> Id. (quoting Wachstein, 128 Ga. at 231-32). See also Duke v. S & J Marble, 277 Ga. App. 331 (2006) (where the defendant presented a survey showing that its building was constructed within the boundaries of its property, there was evidence to support the jury's verdict that the defendant's building did not encroach on plaintiff's property, and the plaintiff was not entitled to ejectment).

<sup>133</sup> Small v. Irving, 291 Ga. 316, 317 (2013) (citing Gay v. Strain, 261 Ga. App. 708 (2003)). See also McGlashan v. Snowden, 292 Ga. 450, 451 n.2 (2013).

<sup>134</sup> Brown v. Tomlinson, 246 Ga. 513, 272 S.E.2d 258 (1980).

<sup>135</sup> Barton v. Gammell, 143 Ga. App. 291, 238 S.E.2d 445 (1977).

*a) Appurtenant Easement vs. Easement In Gross*

An appurtenant easement runs with the land; an easement in gross is a personal right that does not run with the land.<sup>136</sup> Without sufficient language in the deed or recorded instrument, parties may inadvertently limit an easement as a personal right rather than one that runs with the land for the benefit of all future owners. The construction of language in a deed reserving an easement right as personal or appurtenant is a question for the court rather than a jury<sup>137</sup> and depends upon the terms of the grant, the nature of the right, the surrounding circumstances, and the parties' intent.<sup>138</sup> However, the law favors appurtenant easements over easements in gross.<sup>139</sup> Thus, where a right to pass over land is given for ingress and egress, the courts generally construe the grant as one for an appurtenant easement, rather than for an easement in gross in the absence of express language to the contrary.

*b) What is Necessary to Create an Express Easement?*

The express grant of an easement, like the conveyance of other interests in land or contracts for their sale, must contain language sufficient to designate with reasonable certainty the land over which it extends.<sup>140</sup> It is generally sufficient to identify the whole tract of land owned by the grantor over which the easement passes.<sup>141</sup> Notwithstanding, the grant of an easement containing an indefinite description will be upheld where its location has been established by consent of the parties.<sup>142</sup>

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<sup>136</sup> Barton v. Gammell, 143 Ga. App. 291, 238 S.E.2d 445 (1977).

<sup>137</sup> Feckoury v. Askew, 244 Ga. 128, 259 S.E.2d 70 (1979)

<sup>138</sup> Yaali, Ltd. v. Barnes & Noble, Inc., 269 Ga. 695, 506 S.E.2d 116 (1998).

<sup>139</sup> Id.

<sup>140</sup> Dyer v. Dyer, 275 Ga. 339, 566 S.E.2d 665 (2002).

<sup>141</sup> Lovell v. Anderson, 242 Ga. App. 537, 530 S.E.2d 233 (2000).

<sup>142</sup> Barton v. Gammell, 143 Ga. App. 291, 238 S.E.2d 445 (1977).

c) *Easement or License or Lease?*

An easement is distinguished from a lease in that it involves no occupancy of the premises.<sup>143</sup> A license is distinguishable from an easement in that it is a mere permissive use, generally revocable.<sup>144</sup> In addition, owner acquiescence means there is no “adverse” use and the use is merely a revocable license, not an easement by prescription.<sup>145</sup>

d) *Unrecorded Easements and Prescriptive Rights - Notice*

Generally, an unrecorded agreement regarding an easement is valid between the parties to the agreement regardless of whether it is recorded.<sup>146</sup> When an easement is properly recorded, the world has constructive notice of the easement whether or not they have actual notice and future grantees will take the property subject to the easement.<sup>147</sup> If unrecorded, the easement is merely a personal contract between the parties unless there is some other form of notice of the easement.<sup>148</sup> Land previously burdened with an easement is freed from the easement by a subsequent conveyance of the land if the purchaser takes without notice of the easement and purchases the property for value.<sup>149</sup>

For example, in *Rome Gas-Light Co. v. Meyerhardt*, 61 Ga. 287 (1878), the Georgia Supreme Court held that “[w]hether a purchaser of land through which a gas company had run its pipes by consent of a former owner, took subject to the easement or not, depends upon whether he had notice thereof at the time of the purchase, or had notice of fact sufficient to put a

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<sup>143</sup> *Southern Ry.Co. v. Wages*, 203 Ga. 502, 47 S.E.2d 501 (1948).

<sup>144</sup> *Barton v. Gammell*, 143 Ga. App. 291, 238 S.E.2d 445 (1977).

<sup>145</sup> *Eileen B. White & Associates, Inc. v. Gunnells*, 263 Ga. 360, 434 S.E.2d 477 (1993).

<sup>146</sup> *City of Statham v. Diversified Dev. Co.*, 250 Ga. App. 846, 550 S.E.2d 410 (2001).

<sup>147</sup> *Security Union Title Ins. Co. v. RC Acres, Inc.*, 269 Ga. App. 359, 604 S.E.2d 547 (2004).

<sup>148</sup> *City of Statham v. Diversified Dev. Co.*, 250 Ga. App. 846, 550 S.E.2d 410 (2001).

<sup>149</sup> *Webster v. Snapping Shoals Elec. Membership Corp.*, 176 Ga. App. 265, 266 (1985).

reasonable man on inquiry.”<sup>150</sup> In that case, the Supreme Court decided that the purchaser’s notice of the easement was a question of fact for the jury.<sup>151</sup> Similarly, in *Hopkins v. Virginia Highland Associates, L.P.*, 247 Ga. App. 243 (2000), the Georgia Court of Appeals reversed summary judgment in favor of the purported easement holder for underground sewer lines where (1) the easement was mis-indexed; and (2) the sewer lines were buried, and therefore were not open and obvious.<sup>152</sup> Typically, whether there are facts sufficient to give anything other than record or actual notice are issues of fact for the fact finder.<sup>153</sup>

*e) What Constitutes a Prescriptive Easement?*

An easement may also be created by prescription. The Georgia legislatures has codified the requirements for prescriptive easement at O.C.G.A. § 44-9-1. Pursuant to statute, a party claiming a private right of way easement by prescription must prove:

- a) Public, continuous, exclusive, uninterrupted use for **seven** years or more accompanied by a claim of right for a private right of way and 20 years or more of adverse use for “wild” or unimproved land;
- b) The use must be adverse rather than permissive
- c) private way does not exceed twenty feet in width, and that it is the same twenty feet originally appropriated; and
- d) prescriptive user has kept the private way in repair during the period of use.<sup>154</sup>

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<sup>150</sup> Id.

<sup>151</sup> Id.

<sup>152</sup> Id. at 247.

<sup>153</sup> Hopkins, 247 Ga. App. at 246.

<sup>154</sup> Moody v. Degges, 258 Ga. App. 135, 137, 573 S.E.2d 93, 95 (2002); Norton v. Holcomb, 285 Ga. App. 78, 83, 646 S.E.2d 94, 99 (2007).

With respect to establishing the prescriptive use period, note that weekend only use of a private right of way and has been found to be sufficient, *Lee v. Collins*, 249 Ga. App. 674, 547 S.E.2d 583 (2001), as has seasonal use of a private way for seven years.<sup>155</sup> As to the space restriction, the width of the roadway, not the width of use by the prescriber, is the determinative factor.<sup>156</sup> Finally, the repair requirement does not mean that user must make unnecessary repairs; instead, the purpose of repairs requirement is not so much the repairs but the notice which is given of adverse use by the repairs.<sup>157</sup> In *Simmons v. Bearden*, the prescriptive user's removal of dead trees and limbs from a road "from time to time" were insufficient repairs to put landowner on notice for purposes of creating a private right of way of the road by prescription.<sup>158</sup>

Note that prescription **cannot** run against:

- The state or its political subdivisions, whether held for governmental or proprietary purposes;<sup>159</sup>
- A minor during his minority;<sup>160</sup>
- A prisoner during incarceration<sup>161</sup>;
- A mentally ill person;<sup>162</sup>
- An unrepresented estate during its first 5 years;<sup>163</sup>

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<sup>155</sup> *Anneberg v. Kurtz*, 197 Ga. 188 (1944).

<sup>156</sup> *Revocable Trust of Timothy W. Griffin v. Timberlands Holding Co. Atlantic, Inc.*, 328 Ga. App. 33, 761 S.E.2d 458 (2014).

<sup>157</sup> *GDOT v. Jackson*, 322 Ga. App 212 (2013).

<sup>158</sup> 234 Ga. App. 81 (1998).

<sup>159</sup> *Glaze v. Western and Atl. R.Co.*, 67 Ga. 761 (1881), *Grand Lodge of Ga., Indep. Order of Odd Fellows v. City of Thomasville*, 226 Ga. 4, 9, (1970).

<sup>160</sup> O.C.G.A. § 44-5-170.

<sup>161</sup> O.C.G.A. § 44-5-170.

<sup>162</sup> O.C.G.A. § 44-5-170.

<sup>163</sup> O.C.G.A. § 44-5-173.

- A remainderman during the life estate;<sup>164</sup>
- A grantor cannot prescribe against his grantee.<sup>165</sup>

#### 4. Partition Actions/Jointly-Owned Real Property Disputes

There are three primary methods to partition jointly-owned property: 1) equitable partition; 2) statutory partition; and 3) partition by agreement.

##### a) *Equitable Partition*

O.C.G.A. § 44-6-140 *et. seq.* provides for equitable partition of jointly-owned property. In an equitable partition action, the court decides how to partition property physically.<sup>166</sup> Equitable partition is available only in the absence of an adequate remedy of law or upon a showing that circumstances make equitable relief more just and suitable.<sup>167</sup> The Georgia Supreme Court has strictly applied this concept to deny equitable partition where statutory partition is available.<sup>168</sup> Generally, equitable partition will be allowed only when presented as an integral part of other equitable claims.

If the court decides that a physical partition is impracticable, the court may order the property sold and the proceeds divided.<sup>169</sup> Equitable partition is simpler than statutory partition as it not subject to the convoluted rules of statutory partition and the rules of the Civil Practice Act govern.<sup>170</sup> Additionally, because partition actions generally are part of other disputes, the equitable partition procedure allows all issues to be decided in one proceeding.<sup>171</sup> For example,

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<sup>164</sup> Fish v. Tate, 132 Ga. 256 (1909), Ham v. Watkins, 227 Ga. 454, 457 (1971).

<sup>165</sup> Sweat v. Arline, 186 Ga. 460 (1938).

<sup>166</sup> See Gifford v. Courson, 224 Ga. 840, 165 S.E.2d 133 (1968).

<sup>167</sup> O.C.G.A. § 44-6-140; Larimer v. Larimer, 249 Ga. 500, 292 S.E.2d 71 (1982).

<sup>168</sup> See Burnham v. Lynn, 235 Ga. 207, 219 S.E.2d 111 (1975).

<sup>169</sup> Gifford v. Courson, 224 Ga. 840, 165 S.E.2d 133 (1968).

<sup>170</sup> See generally, Sikes v. Sikes, 233 Ga. 97, 209 S.E.2d 641 (1974).

<sup>171</sup> Gorman v. Gorman, 239 Ga. 312, 236 S.E.2d 652 (1977).

it is not unusual for two parties to dispute the title of the other but to request, alternatively, that property be partitioned if the court finds that they are tenants in common.

b) *Statutory Partition*

O.C.G.A. §§ 44-6-160 *et. seq.* governs statutory partition. In a statutory partition action, a common owner of land petitions to the superior court for a writ of partition in accordance with a detailed statutory procedure. Partition of jointly owned property is a remedy favored by the courts because it permits cotenants to avoid the inconvenience of sharing joint possession of land, it facilitates transmission of title, and avoids unreasonable restraints on the use and enjoyment of property.<sup>172</sup> Notably, even when statutory partition proceedings are instituted at law, the proceedings are in equity.<sup>173</sup>

The partition statute has been construed to apply only to tenants in common and not to joint tenants with a right of survivorship.<sup>174</sup> However, property held by husband and wife, whether as tenants in common or joint tenants, is not subject to partition by the common owners if the property is subject to the possession of one of them.<sup>175</sup> A person seeking partition must own an undivided interest in the property.<sup>176</sup>

It is not necessary for a petitioner to have a fee simple right to possession, *Teasley v. Hulme*, 150 Ga. 495, 104 S.E. 151, 12 A.L.R. 641 (1920), and a co-tenant does not have to be in actual possession of the property but must have a right to present possession.<sup>177</sup>

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<sup>172</sup> See *Harvey v. Sessoms*, 284 Ga. 75, 663 S.E.2d 210 (2008).

<sup>173</sup> *Nash v. Williamson*, 212 Ga. 804, 96 S.E.2d 251 (1957); *Waycross Military Ass'n v. Hiers*, 209 Ga. 812, 76 S.E.2d 486 (1953).

<sup>174</sup> *Wallace v. Wallace*, 260 Ga. 400, 396 S.E.2d 208 (1990).

<sup>175</sup> *Id.*

<sup>176</sup> O.C.G.A. 44-6-160; *Adams v. Butler*, 135 Ga. 405, 69 S.E. 559 (1910) (petition showing on its face that legal title was in someone other than petitioner dismissed).

<sup>177</sup> *Lankford v. Milhollin*, 200 Ga. 512, 37 S.E.2d 197 (1946).

i. Notice

Before seeking partition under the statute, the petitioner must give at least twenty (20) days notice to the other parties concerned that a petition for partition is being submitted.<sup>178</sup> This statutory notice has been held to be the equivalent of service of process, *Leggitt v. Allen*, 85 Ga. App. 280, 69 S.E.2d 106 (1952), although the better practice would be to serve the other parties with process pursuant to the Civil Practice Act.

After the notice period, a common owner of realty may file a writ of partition in the Superior Court where the property is located identifying by a petition for a writ of partition. O.C.G.A. 44-6-160. Upon receiving the petition, the court will examine the petitioner's title and share of the premises to be partitioned and will order the clerk of the Superior Court to issue a writ of partition.<sup>179</sup> However, if the court determines that the petitioner does not have an apparent interest or that the necessary interested parties have not received proper notice, the proceeding will be stopped at this point. If the court determines that the petitioner has sufficient title and that all interested parties have received notice, the court will then appoint five partitioners who, after giving all parties eight (8) days notice, shall partition the land in a just and equal manner.<sup>180</sup>

ii. Objection

After the partition has been returned to the court, any party with an interest in the land may raise an objection to the partition. O.C.G.A. § 44-6-165. If no objections are raised, then the partition is final. If an objection is raised, the matter is referred to a jury.<sup>181</sup>

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<sup>178</sup> O.C.G.A. § 44-6-162.

<sup>179</sup> O.C.G.A. §§ 44-6-163, 164; *Clay v. Clay*, 269 Ga. 902, 506 S.E.2d 866 (1998).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*



iii. Order for Physical Division or Sale

When practical, physical division of the property is the preferred remedy and the court will enter a writ of possession consistent with the partitioners' or jury's ruling.<sup>182</sup> The statute also provides two means of partition when the physical division of the land is not practical: private sale or public sale of the property.<sup>183</sup>

If the court agrees with an objecting party that the property cannot be practically divided, the court will appoints three appraisers to value the property.<sup>184</sup> A sale may ordered, for example, where the parties in interest agree that division of the land cannot be made without depreciating the value of the property.<sup>185</sup> If none of the owners elects to buy the property or the property is not sold at a private sale, then the property will be sold at public sale with the proceeds divided.<sup>186</sup> All public sales must be confirmed by the court.<sup>187</sup>

c) *Partition by Agreement*

Joint owners of property may also partition the property by agreement. Because a partition agreement is a contract and relates to land, the general rule is that such an agreement must satisfy the Statute of Frauds, *Thurmond v. Thurmond*, 179 Ga. 831, 177 S.E. 719 (1934), and must also meet the definiteness requirements of any other deed.<sup>188</sup> However, a parol partition agreement by cotenants in common may be enforceable where each owner takes exclusive actual possession, and one or more of the cotenants substantially improves the part of

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<sup>182</sup> O.C.G.A. § 44-6-166.

<sup>183</sup> See O.C.G.A. §§ 44-6-166.1, 167.

<sup>184</sup> O.C.G.A. § 44-6-166.1.

<sup>185</sup> *Jacobs v. Young*, 732 S.E.2d 69 (Ga. 2012).

<sup>186</sup> *Id.*

<sup>187</sup> *Oswald v. Johnson*, 140 Ga. 62, 78 S.E. 333 (1913).

<sup>188</sup> *Swindle v. Curry*, 218 Ga. 552, 129 S.E.2d 144 (1962).

the property assigned.<sup>189</sup> This results in a “perfect equity,” which is the equivalent of a legal title. *Paul v. Keene*, 272 Ga. 357, 529 S.E.2d 135 (2000).

Where a party has expressly or impliedly agreed to relinquish his right to partition, partition will not be granted. *Harvey v. Sessoms*, 284 Ga. 75, 663 S.E.2d 210 (2008). In fact, Partition agreements between tenants in common are highly favored by the courts, and where the rights of third parties have not intervened, they will generally be upheld.<sup>190</sup>

### C. Surveyors and Title Expert Deposition Strategies

#### 1. Defending a Surveyor’s or Title Expert’s Deposition.

##### 1. *Explain the Surveyor’s or Title Expert’s Role and Preferred Method of Communication.*

First, attorneys must explain to surveyors and title experts their role as a witness in litigation and confirm that all parties understand that surveyors and title experts, unlike attorneys, do not “represent” or “advocate” for a party. Instead, the surveyor or title expert is there to advocate for their opinion. Second, make sure the survey or title expert understands that a testifying expert’s communications with counsel or the party are **not** privileged. Consequently, instruct the witness to communicate by telephone whenever feasible.

##### 2. *Explain the Purpose for the Expert’s Deposition.*

The key point when an expert is giving a deposition is to recognize that the other side is not going through the exercise to learn what the expert’s opinion is. Opposing counsel likely already knows the substance and bases for the expert’s opinion. The purpose of the deposition is uncover weaknesses in the expert’s opinions and bases for the opinions and testing the witness’s credibility.

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<sup>189</sup> *Smith v. Smith*, 133 Ga. 170, 65 S.E. 414 (1909).

<sup>190</sup> *Young v. Bozeman*, 229 Ga. 195, 190 S.E.2d 523 (1972).

## 2. Taking a Surveyor's or Title Expert's Deposition

Based on the nature of surveying and that surveys depend on changing natural and artificial monuments, it is important for litigants to understand that there is no "perfect" survey and that most, if not all, surveys can be attacked on some point. The goal of the deposition is to find the errors in the surveyor's or title expert's opinions.

a) *Research the expert.* Review the expert's CV and locate the expert's prior sworn testimony, either about his or her own surveys or criticizing those of another expert. Has the expert criticized a flaw in his own survey or title opinion? Has another court criticized the expert on a present in his current report or opinion? Many published decisions discuss the surveys title reports advanced by the parties.

b) *Review everything the expert used to make his report or opinion.* Through written discovery, you should have already requested everything the survey expert used or relied on to conduct the survey or title report/opinion, including (for surveyors) completed respondent screening forms and questionnaires, survey instructions, survey coding guidelines, result breakdowns, and sampling error calculations.

c) *Look at the expert's professional affiliations.* Identify the professional organizations to which the survey expert belongs and determine the standards set by those organizations on conducting surveys. Are these standards in line with those used in your jurisdiction?

d) *Confer with your expert.* If you have retained your own surveying or title expert, be sure to consult with him or her. Provide your expert with all materials and ask them to point out the weaknesses in the expert's report or opinion.

e) *Did the witness perform the survey or title examination or did someone else do it?*

f) *Is the sample sufficient?* Determine whether the expert interviewed a representative sample of the universe, i.e., a sample large enough to allow the expert to extrapolate his or her findings to the universe.

g) *Were the expert's interview questions proper?* When conducting an investigation by interviewing witnesses with knowledge, the expert should ask open-ended questions. A leading question suggests the answer, and judges require that survey experts ask respondents fair and neutral questions.

h) *Was the survey was done correctly?* Confirm that the survey was properly implemented, i.e., that the interviewers used sound procedures and lacked knowledge of the survey's purpose, and the survey expert closely guided the data collection without becoming personally involved in the collection process.

i) *Is the report accurate?* Determine whether the survey or title expert accurately reported the data and analyzed it in accordance with accepted statistical principles.

j) *Confirm survey objectivity.* Make sure that the entire survey title examination process was objective, i.e., that there was no bias (even subtle bias) in the expert's design and implementation.

Once you have found the errors in your opponent's survey, exploit them. Courts will consider any error when deciding whether to admit opinion evidence based on a survey. Present all the possible errors to the court as part of, e.g., a preliminary injunction, a motion in limine, or a bench trial. The court can then decide whether the errors are so great that the survey, and any opinion based on it, should be excluded from evidence.<sup>191</sup> Give careful consideration, however, before presenting all survey errors to a jury. No matter how brilliant your cross-examination,

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<sup>191</sup> See Kumho Tire Co., Ltd. v Carmichael, 526 U.S. 137 (1999).

you will lose a jury if you spend 30 minutes asking a surveyor or title expert about the details of surveying or examining chains of title. For the jury, select three or four common-sense defects to exploit.

#### **D. Covenant Disputes**

Many boundary disputes involve contractual restrictions on buffers and boundary locations.

##### *1. Contract Construction.*

Georgia courts use the rules of contract interpretation when interpreting restrictive covenants.<sup>192</sup> Therefore, a court construing a contract should look to the document as a whole and interpret all parts “in a manner that permits all of the terms contained therein to be consistent with one another.”<sup>193</sup> All terms and phrases within in a contract must be given their ordinary meaning.<sup>194</sup> Moreover, “[t]he construction of a particular phrase that will uphold a contract in its entirety is preferred.”<sup>195</sup> Courts should avoid a construction that renders a portion of the contract meaningless.<sup>196</sup> When the language of a restrictive covenant is unambiguous, the trial court is not authorized to consider any extrinsic evidence of what the parties to the contract may have intended the language to mean.<sup>197</sup> However, if a court finds that restrictive covenants are ambiguous, the issue of what the ambiguous language means and what the jury or fact finder must resolve the parties’ intent.<sup>198</sup>

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<sup>192</sup> CPI Phipps LLC v. 100 Park Ave. Partners, LP, 288 Ga. App. 614, 618 (2007).

<sup>193</sup> Kreimer v. Kreimer, 274 Ga. 359, 361 (2001).

<sup>194</sup> Id.

<sup>195</sup> Kreimer, 274 Ga. at 361. See also O.C.G.A. § 13-2-2(4).

<sup>196</sup> Id.

<sup>197</sup> Black Island Homeowners Ass’n, Inc. v. Marra, 274 Ga. App. 265, 617 S.E.2d 148 (2005).

<sup>198</sup> Britt v. Albright, 282 Ga. App. 206, 638 S.E.2d 372 (2006).

## 2. Does the covenant run with the land?

Many boundary disputes involving restrictive covenants question whether the covenant “runs with the land.” To constitute a restrictive covenant that runs with the land, the covenant “must have relation to the interest” that is being granted.<sup>199</sup> The covenant “must concern the interest created or conveyed.”<sup>200</sup> “A covenant running with the land relates directly to the land and follows it into the hands of assignees. A personal covenant does not do so.”<sup>201</sup> “The distinction between mere *personal* covenants and covenants running with the land is this; in the former, the covenant has no relation to the land conveyed; in the latter, the covenant relates directly to the land conveyed, sticks to it, and follows it into the hands of the assignees of the latter covenant.”<sup>202</sup>

For instance, in *Johnson v. Meyers*, the plaintiffs asked the court to issue a declaratory judgment invalidating certain provisions of a contract entered into between the defendants and two of the three plaintiffs.<sup>203</sup> Prior to the suit, the two plaintiffs and the defendants executed a contract controlling the plaintiffs’ land. The contract placed seven restrictions upon the property, including restrictions regarding the number of dwellings on the property, that none of the dwellings would be leased, and an agreement that part of the property would be used as a buffer zone.<sup>204</sup> The two plaintiffs later sold a portion of the property to the third plaintiff, who sought to have the land use restrictions invalidated.<sup>205</sup> The trial court dismissed the action on the defendants’ motion, but the Supreme Court of Georgia reversed, finding that the restrictions in

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<sup>199</sup> Muscogee Mfg. Co. v. Eagle & Phenix Mills, 126 Ga. 210 (1906).

<sup>200</sup> Id.

<sup>201</sup> Id.

<sup>202</sup> Howard Mfg. Co. v. Water Lot Co., 53 Ga. 689, 693 (1875).

<sup>203</sup> 226 Ga. 23,24 (1970).

<sup>204</sup> Id.

<sup>205</sup> Id.

the contract were personal covenants that did not run with the land and could not be enforced against the third plaintiff.<sup>206</sup>

**E. Practice Tips to Settle Boundary Disputes and Negotiating Damages.**

Typically, boundary disputes are resolved through negotiations when the parties and their respective attorneys realize and understand that litigation almost invariably will consume far more time and expense than a negotiated resolution. Moreover, in most cases a negotiated resolution may be preferable to each party's likely best alternative outcome from litigation. During negotiations, each party's attorney will seek to use the substantive law and the known factual circumstances -- especially all surveys of the disputed area -- to advance his or her own client's position. Therefore, it is important that you have at your disposal the applicable law and the relevant facts and circumstances, particularly surveys, deeds, and expert reports. Insofar as the resolution of a boundary dispute most likely will affect permanently the parties' respective real properties, it is important to communicate with your client in order to understand and to educate them on the range of likely outcomes with respect to litigation or negotiation. Prior to engaging in settlement negotiations, you should take the following steps:

*Inspect the disputed area with the client.* Compare the site to the most recent survey, preferably one showing the location of trees, fences, and other prominent physical features in or about the disputed area.

*Take photographs of the disputed area.* Often clients can be very emotional about boundary disputes. Most clients will seek to preserve the integrity of the boundaries of their property as reflected in their deed. It may be especially important to maintain the integrity of the property's boundaries if the local municipality (i.e., the village, town, or city) has minimum lot

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<sup>206</sup> *Id.* at 24-26.

sizes or set backs set forth in the local zoning ordinance. Relocating a boundary line may make the clients' lot non-conforming -- a situation to be avoided if at all possible. In contrast, some clients, will want to continue to encroach on their neighbor's property. In either case, the attorney must gather all photographs, surveys, deeds, and other relevant documents (e.g., invoices for work done by or for the client in or about the disputed area).

*Make an initial list of the client's objectives.* In consulting with the client to this list, be sure the client is aware of any local zoning ordinances or requirements. If possible, the objectives should be put in order of priority, so you will know the client's most important objectives. Unfortunately, boundary disputes are often perceived to be "zero sum" games. Therefore, it is important to factor into your client's formulation of his or her objectives important values that might not be apparent otherwise. Insofar as boundary disputes typically involve neighboring landowners, there is significant value in resolving the dispute amicably and for the long run.

*Makes sure the client understands the worst case scenario.* By understanding the worst case scenario, you and your client can take steps to try to avoid it or minimize it.

*Understand the best case "negotiated" scenario.* The best case scenario and the best negotiated scenario are usually not the same. A best case scenario is likely available only by pursuing litigation. Each alternative to a negotiated settlement must be considered with the applicable statute of limitations firmly in mind.

*Understand the other side's interests in the matter.* Does the other party need the disputed area in order to be in compliance with local zoning ordinances? Does the other party want the disputed area to remain "natural" to serve as a buffer area? Does the other party want the disputed easement or right-of-way to gain access to some nearby facility or feature (such as a



body of water)? Does the other party want the disputed area to preserve certain vegetation or other physical features that the other party may have planted or erected inadvertently in the disputed area?