DEALING WITH UNWRITTEN TITLE TRANSFERS

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Dealing with potential unwritten title transfers requires that property owners and their counsel have a firm grasp on the facts regarding an owner's use of the property and regarding the actions of adjoining landowners and others who potentially could make a claim of ownership on the property. Whether a court will reach a determination that ownership of property has been transferred or not depends on the precise nature of the usage of the property by the owner and those with potentially competing interests. As such, it is incumbent upon property owners and lawyers to know as exactly as possible what is happening with property and when. If a property owner does not have the details of his ownership at his fingertips, he is more likely to fall victim to the claims of one who might have an interest in filling in those gaps in a manner adverse to the owner's interest.

This paper provides a broad overview of the Georgia statutes and case law dealing with encroachments, acquiescence, estoppel, and adverse possession. The paper seeks to set forth the basic parameters of these legal doctrines to assist practitioners in recognizing property ownership issues and to make them aware both of potential remedies for these issues and of potential problems that may arise in the absence of any action.

I. 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 property of his neighbor." *MVP Inv. Co. v. North Fulton Express Oil, LLC*, 282 Ga. App. 512, 513 (2006). "The purpose of the action is to eject the defendant from possession of the disputed land." *Id.* (citing *Vinson v. Cannon*, 213 Ga. 339, 341 (2004)). "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." *Id.* As relief, the property owner may obtain the recovery of the property encroached upon and

removal of the intruding structure. *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.").

"In addition, the construction of a permanent structure encroaching upon adjacent property 'constitutes a continuing trespass and nuisance which may be abated as such.'" *Navajo Constr., Inc.* 271 Ga. App. at 129 (quoting Pindar's Ga. Real Estate Law & Procedure, § 14-3). "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.'" *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.").

In *Navajo Construction*, a construction company built a "spec" house on a lot in a new subdivision. 271 Ga. App. at 128. 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. *Id.* The plaintiff then had a survey done which showed that the defendants' house encroached on its lot by over five feet. *Id.* 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. *Id.*

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. *Id.* at 129. Although the defendants did not cause the encroachment, they intentionally possessed and occupied the encroaching structure. *Id.* 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. *Id.* "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." *Id.*

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. 282 Ga. App. at 512. 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." *Id.* According to plaintiff, the backfilling and sloping fill dirt resulted in an "earth slope and wall [created] to provide lateral support to the raised elevation of [defendants'] property" which encroached onto plaintiff's property. *Id.* 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. *Id.* at 512-13. Plaintiff brought claims for trespass and ejectment, both of which the trial court dismissed. *Id.* at 513.

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. *Id.* 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. *Id.* The court concluded that Georgia precedent supported plaintiff's contention that it was entitled to eject the defendants from possession of its property. *Id.* "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." *Id.*

at 514 (citing *Wachstein v. Christopher*, 128 Ga. 229 (1907)). 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 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. *Id.* 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.

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).

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." *Small v. Irving*, 291 Ga. 316, 317 (2012) (citing *Gay v. Strain*, 261 Ga. App. 708 (2003)). *See also McGlashan v. Snowden*, 292 Ga. 450, 451 n.2 (2013).

II. Acquiescence

"A common boundary line may be established by acquiescence." *McDilda v. Norman W. Fries, Inc.*, 278 Ga. App. 51, 55 (2006). "Acquiescence for seven years by acts or declarations of adjoining landowners shall establish a dividing line." O.C.G.A. §

44-4-6.[1] "Acquiescence by acts or declarations for seven years in the dividing line is sufficient to establish the true line between adjoining owners, whether it is the original line or not." *McDilda*, 278 Ga. App. at 55 (citing *Rogers v. Moore*, 207 Ga. 182, 183-84 (1950)). However, in order to establish a boundary line by acquiescence, "the line must not be known or certain." *Gillis v. Buchheit*, 232 Ga. App. 126, 128 (1998) (citing *Horn v. Preston*, 217 Ga. 165, 167-68 (1961)). "A line is uncertain or unascertained if its location on the ground is unknown even where the line is clearly described in the deeds, and even where the line is an original lot line." *Id.* (quoting *Cothran v. Burk*, 234 Ga. 460, 461-62 (1975)) (internal citation and quotation marks omitted). "A line may not be established by acquiescence unless there is some contention between the landowners over the location of the line as a result of which a boundary is established in which the landowners subsequently acquiesce." *Kendall v. Curtis*, 194 Ga. App. 37, 37 (1989) (quoting *Cothran*, 234 Ga. at 461).

Acquiescence "will not establish a divisional line, in disregard of definite boundaries fixed by deeds, and thus operate to create title to lands not embraced, by a fair construction, within the description in the deeds." *Henson v. Tucker*, 278 Ga. App. 859, 864 (2006) (quoting *Gauker v. Eubanks*, 230 Ga. 893, 899 (1973)). "The principle that a boundary line between adjoining landowners may be established by consent is not applicable in a case where one claiming to be an adjoining landowner has no independent title, but must rely on such consent to show title. To apply the principle in such a case would amount to a parol transfer of title to land." *Id.* (quoting *Gauker*, 230 Ga. at 898-99). The acquiescence rule cannot be used to establish title. *Id.* (citing *Gauker*, 230 Ga. at 899). However, "where a proved title, by a fair construction, will embrace the lands up to the line established by acquiescence, then title comes from the source proved, and the

[1] The first sentence of this statute was deleted by 2011 Georgia Laws Act 52 (H.B. 24), which was passed to "substantially revise, supersede, and modernize provisions relating to evidence." That sentence read: "General reputation in the neighborhood shall be evidence as to ancient landmarks of more than 30 years' standing."

acquiescence fixes the dividing line." *Dunn v. Lightle*, 223 Ga. App. 137, 137 (1996) (quoting *Veal v. Barber*, 197 Ga. 555, 563 (1944)) (internal punctuation omitted).

An "agreement may be executed by placing pins or a fence upon the agreed line where such placement is done with the knowledge and mutual assent of the respective property owners." *McDilda*, 278 Ga. App. at 55 (citing *Greenway v. Griffith*, 225 Ga. 632, 634-35 (1969) and *Barron v. Chamblee*, 199 Ga. 591, 592-93 (1945)). "An oral agreement establishing a boundary may be duly executed by marking the line with monuments or blazes with the consent of the adjoining landowners. *Id.* at 56 (citing *Cothran*, 234 Ga. at 462). However, mere "passive conduct and nothing more will not suffice" as an agreement. *Binion v. First Fed. Savings & Loan Assoc. of Milledgeville*, 259 Ga. 170, 171 (1989) (citing *Adair v. Atlanta Jewish Cmty., Inc.*, 228 Ga. 422 (1971) and *Gordon v. Ga. Kraft Co.*, 217 Ga. 500 (1962)).

In determining if a boundary has been set by acquiescence, the facts which tend to prove or disprove whether an agreement has been reached on a disputed line are of utmost importance. For example, in *Waters v. Spell*, 190 Ga. App. 790 (1989), the plaintiff and defendants were owners of adjacent parcels of land. Plaintiff filed a complaint against defendants alleging that he had acquired a claim of right to disputed land along the boundary of the two parcels and alleging a specific description of the location of the boundary line which he claimed was established by the acquiescence of defendants. *Id.* at 790. The jury returned a verdict in favor of the defendants.

On appeal, plaintiff argued that defendants' predecessors in title had acquiesced to the boundary he claimed by erecting fences. *Id.* He presented evidence that remnants of two old fences were found on the disputed property; one fence appeared to be 20 to 30 years old, and the other was even older and described as "ancient." *Id.* Plaintiff presented testimony of the daughter of his predecessor in title that in the 1920s, when she was a young girl, a wire fence was erected on her father's side of the boundary line between the two parcels. *Id.* She and another witness testified that the old fence was still present. *Id.* Defendants presented testimony of the son of a more recent predecessor to their title who testified he and his brother, at the direction of their father, had erected a

wire fence in approximately 1957. *Id.* He testified that they knowingly did not follow the course of the older existing fence to avoid having to wade through a pond and that they were punished for not erecting the fence along the true boundary. *Id.* Defendants also presented evidence that their predecessors in title continued to hunt game on the disputed land beyond the newer fence, and a licensed surveyor testified he had seen remnants of two different fences, one older than the other, and that they did not run the same course. *Id.* The Court of Appeals noted that the placement of a fence "does not necessarily indicate acquiescence in a boundary." *Id.* (citation omitted). "From the evidence the jury could find the more recent fence did not mark the boundary between the two properties and that the defendants and their predecessors did not acquiesce in establishing the fence as the dividing line." *Id.* at 790-91.

The plaintiff further argued that defendants' acquiescence was shown by the fact that plaintiff cultivated a garden every year since 1968 on the disputed land and that he placed two mobile homes and built a septic tank on the property in 1978. *Id.* at 791. However, testimony showed that the garden was cultivated with permission from the defendants and their predecessor, and the fact that permission was granted indicated defendants claimed ownership to the property. *Id.* Defendants also complained to plaintiff that the mobile homes were located on their land. *Id.* Therefore, the jury could conclude from the evidence that defendants had not acquiesced in establishing the newer fence, which their predecessors constructed, as the boundary line. *Id.*

In *Gillis v. Buchheit*, the plaintiff purchased certain lots in 1955 and agreed with the seller to establish a boundary line by blazing marks on a black gum and live oak tree and by setting three iron pipes and two concrete markers along the line (the "1955 line"). 232 Ga. App. at 127. The seller continued to own the adjoining property to the lots purchased, and during a seven-year period thereafter, the plaintiff filled in some marsh land to form a peninsula out to a point on a creek. *Id.* The seller continued to recognize the 1955 line and from 1956 to 1972, never interfered with plaintiff's activities to maintain the filled area. *Id.* In 1972, the defendant purchased property from the same seller and did not attempt to find the boundary line between his new property and that of

plaintiff. *Id.* Plaintiff continued to maintain the filled area and from 1972 until 1995 stored heavy equipment on it. *Id.* The defendant did not reside on his property but constructed a boatlift and dock in an area which plaintiff claimed. *Id.* Plaintiff testified that he permitted the defendant to build the boat dock in the disputed area and invited the defendant to use his property at defendant's convenience. *Id.* In 1995, when intending to build a house, the defendant hired a surveyor to locate the boundary line. *Id.* Based on this survey, the defendant then erected a chain link fence on land claimed by plaintiff. *Id.* The defendant cited the survey, the deed from the property seller, and a 1944 recorded plat in asserting entitlement to an area encompassing the 1955 line and a portion of the land plaintiff had filled. *Id.* The trial court granted summary judgment to the defendant. *Id.*

The Georgia Court of Appeals held that the trial court erred in finding as a matter of law that the boundary line at issue had not been established by acquiescence under O.C.G.A. § 44-4-6 or agreement. *Id.* at 128. The plaintiff testified without contradiction that when he purchased the land, he and the seller mutually understood that the boundary line would be the 1955 line that he and the seller had marked and blazed. *Id.* (citing *Warwick v. Ocean Pond Fishing Club*, 206 Ga. 680, 683 (1950)). According to plaintiff, both he and the seller honored this line for more than seven years. *Id.* Plaintiff's expert testified that after reviewing the 1944 plat upon which defendant relied, it was his opinion that the plat did not indicate that the original survey ever set out any markers along the side lot lines or rear corners. *Id.* And, even if the 1944 plat had specified the boundary line, its description would not be dispositive, if a subsequent line had been established by acquiescence or agreement. *Id. See also Dunn*, 223 Ga. App. at 137 (holding that where plaintiff had used and maintained land bordered by a fence, had stabled horses on the land, and had made uncontested statements of ownership regarding the land to defendants' family, and where the uncontested evidence showed that both parties agreed to a specific boundary line along the fence after driving out to the property and marking the boundary of the land by cutting tree limbs with a hatchet, the evidence supported the trial court's finding that defendants' acquiescence to plaintiff's use of the

land openly and adversely for the statutory period served to establish the boundary line); *McDilda*, 278 Ga. App. at 56 (where the boundary line was marked with the knowledge and consent of adjacent landowners more than 30 years before the action was filed, the record contained evidence to support the trial court's finding that the boundary was established by acquiescence).

III. Estoppel

A. Estoppel by Deed

"The maker of a deed cannot subsequently claim adversely to his deed under a title acquired after the making thereof. He is estopped from denying his right to sell and convey the property treated in the deed." O.C.G.A. § 44-5-44. This concept of "estoppel by deed" provides that a "grantor who conveys by warranty deed an interest that the grantor does not then own, but later acquires, is estopped to deny the validity of the first deed." *Smith v. Smith*, 281 Ga. 380, 383-84 (2006). "However, this doctrine cannot be used to transfer title or to remedy flaws in the legal requirements for the creation of a property interest." *Id.* at 384. As the Georgia Supreme Court has noted, estoppels do not convey title. *Kennedy v. Hannans*, 246 Ga. 55 (1980) (citing *Strain v. Monk*, 212 Ga. 194 (1956)). *See also Smith v. Hawks*, 182 Ga. App. 379, 381-82 (1987) (where a corporation did not have title to property when the corporation purported to convey it, an estoppel could not convey title to the property).

A review of Georgia cases shows that the estoppel by deed principle has been articulated more frequently than applied. *See Smith*, 281 Ga. at 384 (attempted conveyance was invalid because of lack of capacity, which is not addressed by the doctrine of estoppel by deed); *Reece v. Smith*, 276 Ga. 404, 406 (2003) (estoppel by deed did not grant title in entire tract of land to co-tenant who allegedly entered into an oral agreement with original owner of other part of tract for the sale of owner's original interest once the original owner reacquired that interest, which was ultimately sold to tenant who brought partition action, because there was no effective conveyance from the original owner to the co-tenant which satisfied the statute of frauds and because the co-tenant never sought to join the original owner as an indispensable party even though any

oral contract would have been enforceable against him); *Yaali, Ltd. v. Barnes & Noble, Inc.*, 269 Ga. 695, 697 (1998) (easement sought to be enforced failed at its inception and could therefore not be recognized based on estoppel by deed).

B. Estoppel By Conduct

The doctrine of estoppel by conduct is codified in O.C.G.A. § 51-6-4. *Montgomery v. Barrow*, 286 Ga. 896, 899 (2011). Specifically, "[o]ne who silently stands by and permits another to purchase his property, without disclosing his title, is guilty of such a fraud as estops him from subsequently setting up such title against the purchaser." O.C.G.A. § 51-6-4(b). As the Georgia Supreme Court has explained:

> [i]n the case where one, in the presence of the true owner, and with his knowledge, sets up title to property and sells it to another, there is a direct denial of the true owner's right. The sale, without more, is antagonistic to the title of the true owner. And if he stand silently by and permit the sale without announcing his right, he is estopped. … But when the right set up is only a lien or encumbrance, the simple sale of the title is not inconsistent with the lien; mere silence, in the presence of such an act, will not estop; one is not bound upon all occasions to give warning to incautious people.

Byers v. McGuire Props., Inc., 285 Ga. 530, 532-33 (2009) (quoting *Markham v. O'Connor*, 52 Ga. 183, 198 (1874)).

However, in order to have a valid claim of estoppel, "the one who purchased … the property [must have been] unaware of the true nature of the title and … [must have] relied upon the silence of the true title owner." *MPP Inv., Inc. v. Cherokee Bank, N.A.*, 288 Ga. 558, 561 (2011) (quoting *Clarence L. Martin, P.C. v. Chatham County Tax Comm'r*, 258 Ga. App. 349, 353 (2002)). The estoppel by conduct doctrine is inapplicable where a party "had actual knowledge of the rights of the other party who remained silent…" *Montgomery*, 286 Ga. at 899-900 (quoting *Anderson v. Manning*, 221 Ga. 421, 423-24 (1965)). Further, the doctrine is inapplicable where the purchaser "relied upon his own investigation or was not shown to have placed any reliance on the statement, action or inaction of the one claimed to be estopped." *Byers*, 285 Ga. at 534 (citations omitted).

Moreover, in "cases of silence there must be not only the right but the duty to speak before failure to do so can operate as an estoppel." *Hollifield v. Monte Vista Biblical Gardens, Inc.*, 251 Ga. App. 124, 126 (2001) (quoting *Tybrisa Co. v. Tybeeland, Inc.*, 220 Ga. 442, 445 (1964)) (emphasis in original). "Something more than mere passivity or inaction while the expense is being incurred is generally necessary to create an estoppel." *Id.* (quoting *McNabb v. Houser*, 171 Ga. 744, 752 (1931)). "One who has title in whole or in common to land and who sees another, in lawful possession, place valuable improvements on the land but does not give notice of his title to the builder is not subsequently estopped from asserting title." *Id.* at 127 (citing *Owen v. Miller*, 209 Ga. 875, 876 (1953)). One who holds a lien on a property has "a right to assume, if nothing appear to the contrary, that the purchaser[s] [have] been informed of the lien, [have] examined the record, and that the sale and purchase are in view of the truth of the case." *Byers*, 285 Ga. at 533 (quoting *Markham*, 52 Ga. at 198). "No duty to speak arises from the mere fact that a man is aware that another may take an action prejudicial to himself if the real facts are not disclosed." *Id.* (quoting *Wiser v. Lawler*, 189 U.S. 260, 271 (1903)).

In *MPP Investments*, the plaintiff bank filed a petition to quiet title on property to which it held a security deed, claiming that it possessed the first priority secured interest. 288 Ga. at 559. The bank recorded a notice of lis pendens and then filed an action seeking injunctive relief against a foreclosure action begun by Howe, the grantee of another security deed on the same property. *Id.* The parties agreed to a consent temporary restraining order to allow them time to try to settle the case, but at the conclusion of the TRO period, Howe foreclosed on his security deed and executed a deed under power to MPP Investments. *Id.* After the foreclosure, a special master appointed in the bank's action held a hearing and determined that Howe's foreclosure proceeding was invalid because he had failed to provide a 60-day cure period as required by his security deed. *Id.* at 559-60. The special master concluded that title to the property reverted to the prior owner, with the bank holding a first priority security deed, and the trial court adopted the special master's report. *Id.* at 560.

The Georgia Supreme Court rejected the argument that the bank should be estopped from asserting that title reverted under Howe's security deed because it did not raise this specific issue prior to the foreclosure sale. *Id.* at 561. The bank filed suit claiming superior title to the property and recorded a notice of lis pendens well in advance of the foreclosure sale. *Id.* MPP Investments admitted at the hearing before the special master that it knew of the suit against the property but decided to purchase it anyway. *Id.* MPP Investments also admitted that since Howe's security deed was public record, it had notice of the maturity date on the deed and the date on which automatic reversion could occur under O.C.G.A. § 44-14-80(a)(1). *Id.* Therefore, MPP Investments had constructive and actual knowledge of the bank's assertion of superior title and the possibility that title to the property pursuant to the security deed had reverted. *Id.* Finally, there was no evidence that MPP Investments had relied in any way upon the bank's "actions, silence, or inactions" in this matter. *Id.* (citation omitted). *See also Byers*, 285 Ga. at 534 (rejecting estoppel by conduct claim where the evidence failed to show that the purchasers relied on any words or conduct of the party sought to be estopped).

IV. Adverse Possession/Prescriptive Title

"The burden of establishing prescriptive title lies on the party claiming it." *Kelley v. Randolph*, 295 Ga. 721, 722 (2014) (citation omitted). 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." O.C.G.A. § 44-5-161(a). "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." *Bailey v. Moten*, 289 Ga. 897, 899 (2011) (citation omitted).

"While courts delineate what facts are sufficient to constitute adverse possession, whether such facts exist is generally a jury question." *Byrd v. Shelley*, 279 Ga. App. 886, 887 (2006) (citation omitted). "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." *Guagliardo v. Jones*, 238 Ga. App. 668, 668 (1999) (citations omitted). If there is any evidence to support a trial court's determination that a party acquired prescriptive title to disputed land, it will not be disturbed on appeal, even if there is evidence to support a contrary determination. *Williamson v. Fain*, 274 Ga. 413, 415 (2001) (citing *Nebb v. Butler*, 257 Ga. 145 (1987)).

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." O.C.G.A. § 44-5-162(a). 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. *Goodrum v. Goodrum*, 283 Ga. 163, 163 (2008). 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. *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.").

Additionally, when "actual or positive fraud prevents or deters another party from acting, prescription shall not run until such fraud is discovered." O.C.G.A. § 44-5-162(b). 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. *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).

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." O.C.G.A.

§ 44-5-165. "During the time required for the 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.'" *Ga. Power Co. v. Irvin*, 267 Ga. 760, 764 (1997) (quoting *Clark v. White*, 120 Ga. 957, 959 (1904)). 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." *Byrd v. Shelley*, 279 Ga. App. 886, 888 (2006) (quoting *Burgin v. Moye*, 212 Ga. 370, 374 (1956)).

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." *Kelley*, 295 Ga. at 723. "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." *Id.*
- 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 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." *Matthews v. Cloud*, 294 Ga. 415, 418 (2014). 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." *Id.* (quoting O.C.G.A. § 44-5-167).

- 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." *Bailey*, 289 Ga. at 899 (citation omitted).
- Occasional visits to property are not sufficient to establish possession. *Id.* (citing *Robertson v. Abernathy*, 192 Ga. 694, 699 (1941)).
- Clearing an area of vegetation or timber cutting have little value as evidence of possession. *Id.*
- Whether a disputed area is enclosed is an issue for the trier of fact. *Id.* (citing *Brookman v. Rennolds*, 148 Ga. 721, 731-32 (1919)).
- 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 personal construction projects on the disputed area, the residents could not show they had adverse possession of the property. *Campbell v. The Landings Assoc., Inc.*, 289 Ga. 617, 620 (2011).
- Installing a sprinkler system, by itself, would not establish adverse possession. *Id.*
- Actual "adverse possession by one claimant is inconsistent with and will prevail over mere constructive possession by another claimant." *Sacks v. Martin*, 284 Ga. 712, 714 (2008) (quoting *Shahan v. Watkins*, 194 Ga. 164, 167 (1942)).
- 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. *MEA Family Inv., LP v. Adams*, 284 Ga. 407, 408-09 (2008). 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 the second floor, such sporadic efforts were not generally sufficient to constitute actual possession. *Id.* at 409.

- A "mere entry, unaccompanied by an actual occupancy, is no possession at all" *Id.*
- "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." *Id.* at 409-10 (quoting *Denham v. Holeman*, 26 Ga. 182, 191 (1858)).
- 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. *Murray v. Stone*, 283 Ga. 6 (2008). 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. *Id.* at 7.

- Church acquired property by adverse possession where it used the property as church property regularly since 1957 and regularly maintained the property, mowing it 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. *Mobley v. Jackson Chapel Church*, 281 Ga. 122, 123-24 (2006).
- 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. *Friendship Baptist Church, Inc. v. West*, 265 Ga. 745, 745-46 (1995).
- Payment of taxes is not evidence of title and ownership. *Byrd*, 279 Ga. App. at 887 (citing *Brown v. Williams*, 259 Ga. 6 (1989)).
- "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. *Georgia Power Co.*, 267 Ga. at 367-68.

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 appropriation of it to his own use and benefit.'" *Ga. Power Co. v. Irvin*, 267 Ga. at 366 (quoting *Carter v. Becton*, 250 Ga. 617, 618 (1983)). "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.'" *Id.* (quoting *Carter*, 250 Ga. at 618 and 3 Am. Jur. 2d 170, 171, Adverse Possession § 75). 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. *Id.* at 367. 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). *Id.* 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. *Id.*

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 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." *Henson v. Tucker*, 278 Ga. App. 859, 862 (2006) (quoting *Walker v. Steffes*, 139 Ga. 520, 521 (1913)). "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." *Id.* at 862-63 (citing *Walker*, 139 Ga. at 521-22). 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. *Id.* at 863.

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. *Id.* at 59. "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 …" *Id.* 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. *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." *Walker v. Sapelo Island Heritage Auth.*, 285 Ga. 194, 196 (2009) (quoting *Ewing v. Tanner*, 184 Ga. 773, 780 (1937)). Where there are no allegations that the possession originated in fraud, the good

faith of the adverse possessor is presumed. *Kelley v. Randolph*, 295 Ga. 721, 723 (2014) (citing *Childs v. Sammons*, 272 Ga. 737. 739 (2000)). Indeed, "no prescription runs in favor of one who took possession of land knowing that it did not belong to him." *Id.* at 723 n.1 (quoting *Ellis v. Dasher*, 101 Ga. 5, 9-10 (1897)).

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." *Id.* at 197. 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. *Id.* 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 to the property. *Id.* at 198 (citations omitted). 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. *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").

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." O.C.G.A. § 44-5-161(b). 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. 314 Ga. App. at 144. 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. *Id.* The ventilation system has been in place since March 1980. *Id.* Defendant purchased the adjacent property in 2002. *Id.* 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. *Id.* Plaintiff declined this request. *Id.* 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 occupied by the ventilation system through its open and continuous use for more than 29 years. *Id.* 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. *Id.* 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. *Id.* at 145. 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. *Id.*

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. *Id.* at 146. 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. *Id.* at 146. 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). *Id.* Once it did so, the burden then shifted

to defendant to rebut the presumption of adverse possession with evidence of permissive use. *Id.* "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." *Id.* at 146-47. 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. *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).

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.'" *Ward v. Morgan*, 280 Ga. 569, 571 (2006) (quoting *Wright v. Wright*, 270 Ga. 530, 532 (1999)). 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. *Id.* 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 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. *Id.* 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.

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).

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. *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.").

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. *Id.* at 281. However, aerial photographs taken in 1963 and 1979 showed that the disputed tract was being maintained in a manner consistent with defendant's predecessor's property, and the county taxed him accordingly for the disputed tract. *Id.* A witness familiar with the disputed tract since 1967 testified that defendant's predecessor grew hay and later planted pine trees on the tract. *Id.* Defendant's immediate predecessor in interest acquired the tract in a 1992 warranty deed.

Id. 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. *Id.* The trial court adopted the special master's award and findings that defendant owned the disputed tract through adverse possession. *Id.* at 280.

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. *Id.* at 281-82. The disputed tract was under cultivation for years and was neither remote nor incapable of actual possession without enclosure. *Id.* at 282. 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. *Id.* (citing *Halpern v. The Lacy Inv. Corp.*, 259 Ga. 264 (1989)).

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 possession. The special master agreed, and the trial court adopted the special master's findings. *Id.* at 435.

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. *Id.* at 436. 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. *Id.* 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. *Id.* They frequently posted "No Trespassing" signs on the property and made trespassers on

the property leave. *Id.* 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. *Id.* Further, defendant admitted that she knew of plaintiff's predecessors' possession of the property and that she always believed that they owned the property. *Id.* Based on all the evidence, the trial court properly determined that possession of 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). *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).

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.[2] 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.

[2] 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.

Gigger v. White, 277 Ga. 68, 70 (2003) (quoting *Ponder v. Ponder*, 275 Ga. 616, 619 (2002)). 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." *Id.* at 70-71 (citing *Smart v. Miller*, 260 Ga. 88 (1990)). The Georgia Supreme Court 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.'" *Id.* at 71 n.3 (quoting *Smart*, 260 Ga. at 89 (internal citations omitted)).

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. *Id.* at 71. 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. *Id.* Plaintiff further had no knowledge of actual fraud in the quitclaim transaction and thus claimed the land in good faith. *Id.* Therefore, the writing plaintiff relied upon was sufficient color of title for purposes of acquiring prescriptive title to the property. *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).