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Can a Co-owner Acquire Title to Their Co-owner's Share through Adverse Possession?

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Case Commented On: *Denesik v Verhulst Estate*, 2016 ABQB 36

Acquiring title through adverse possession in Alberta is difficult and successful cases are rare. For co-owners seeking to acquire shares of their fellow co-owners, making out a claim will be even more difficult and success even rarer. This is the message from the recent case of *Denesik v Verhulst Estate*, 2016 ABQB 36.

Facts

This case concerned an application for a declaration for title to three parcels of land through the doctrine of adverse possession (also known as "prescriptive title" or "squatter's rights" in other jurisdictions). The land consisted of a 159 acre "home quarter" and two river lots totalling 96 acres. The home quarter and river lots were approximately 6 km apart.

The land had been acquired as part of a joint venture between the applicant, Mr. Denesik, and the late Mr. Verhulst. They had bought the land to harvest the timber on it and divide the profits. By 1995, operations had ceased. In 1996, Mr. Denesik moved on to the home quarter and lived there until the date of his application in late 2015. He lived in a trailer with a home-made water system and no electricity or gas. Mr. Denesik argued that his occupation of the land continuously over this time period had "ripened into ownership" (at para 5).

The application was brought against the Estate of Mr. Verhulst, who had passed away in 2008. Mr. Denesik sought title to the land pursuant to Alberta's *Limitations Act*, RSA 2000, c L-12 ("*LA*") and section 74 of the *Land Titles Act*, RSA 2000, c L-4. Verhulst's Estate cross-applied, asking for an order for partition and sale under sections 15 to 17 of the *Law of Property Act*, RSA 2000, c L-7. The matter was heard before Master W.S. Schlosser in chambers.

Decision & Commentary

Master Schlosser began his analysis by noting that adverse possession is an "important but rarely used way of acquiring title to land" (at para 9). The required elements are that: (1) the true owner of the land must be out of possession of the claimed lands; (2) the claimant must be in use and occupation of the claimed lands; (3) the claimant's use and occupation must be exclusive, continuous, open or visible and notorious for the requisite 10 year period, and (4) the fact of use and occupation by the claimant must be the only determinant while the belief, ignorance, mistake or intention of the claimant is immaterial.

Master Schlosser noted that a claim for adverse possession is based, in part, on the passage of time and the effect of limitation statutes. In essence, adverse possession arises as a way to claim

title to land where someone has taken possession of land and the owner of the land has failed to respond within the statutory time period for bringing an action to recover the land. It is, as Master Schlosser remarked (at para 10), a significant exception to the principle of indefeasibility in Alberta's land titles system.

Although the passage of time involved in this case spanned more than one limitation regime, Master Schlosser held that the language of the current *LA* applied. Through a combination of sections 3(1)(b), 3(3)(f), 3(4) and 3(6) of that Act, the time limit for someone to bring an action to recover land is "10 years after the claim arose". More specifically, section 3(3)(f) states that a claim for an order to recover possession of real property arises "when the claimant is dispossessed of the real property". In short, the "dispossession" must have lasted longer than 10 years.

So when is a claimant "dispossessed" of real property? Master Schlosser correctly noted that "dispossessed" is not defined in the *LA* and therefore resort must be had to the common law. Citing case law and scholarly commentary on the doctrine of adverse possession, he concluded that "mere use or occupation is not enough" (at para 15) and that "physical possession alone may not be enough" (at para 18). Moreover, not every type of possession will necessarily amount to a dispossession; at the same time, however, an "ouster" (or illegal dispossession) is not required. Instead, "the quality of possession must be such that the owner (or reasonable person in the position of the owner) realizes that he [*sic*] should assert his [*sic*] right or risk losing the land." (at para 18). As stated by Professor Bruce Ziff, and cited by Master Schlosser, the type of use "must be such as to put the proper owner on notice that a cause of action has arisen" (at para 16).

So can a co-owner like Mr. Denesik dispossess a fellow co-owner like Mr. Verhulst for purposes of making out a claim for adverse possession? The short answer is, as Master Schlosser's decision implies, yes, as matter of theory, but in practice, it will be very rare.

As Master Schlosser explained, as tenants in common, Mr. Denesik and Mr. Verhulst had equal rights to use and possess the entire property with no right of survivorship to the other's interest. Citing case law, he noted that possession is not adverse to the extent that it refers to lawful title. Because a co-owner has lawful title, the burden on a co-owner to establish a claim for adverse possession "is much heavier" than in cases where "the adverse possessor has no [such] underlying right" (at para 22). According to Master Schlosser, the circumstances will have to be exceptional for one co-owner to "dispossess" another. The onus is on the applicant, here Mr. Denesik, to show the requisite level of dispossession.

Moreover, Master Schlosser referred to case law to conclude that it is irrelevant that the co-owner seeking title through adverse possession has only dispossessed the co-owner of uses the co-owner never intended or desired to make of the land. A co-owner's lack of interest in a jointly-owned property is similarly not relevant. On the facts of this case, Mr. Verhulst had been indifferent to the land once the timber operations ceased. But this indifference to the property, or to the enjoyment of it by his co-owner, was not "in itself (…) enough to give Mr. Denesik title" (at para 24).

Mr. Denesik's application was thus dismissed. Master Schlosser held on the facts that at no time was Mr. Verhulst dispossessed of his land, or "dispossessed to the point where he should have realized that he had to seek a remedial order to recover possession, or lose title" (at para 26). A co-owner putting a trailer on part of the land and living there was not enough to establish a claim to the entire home quarter, let alone to the river lots that were 6 km away.

Instead, Master Schlosser ordered partition and sale of the lands. The Verhulst Estate was ordered to sell its ½ interest in the home quarter to Mr. Denesik for $1, and Mr. Denesik was ordered to sell his ½ interest in the two river lots to the Verhulst Estate for an amount which equalled ½ of the difference in value between these two lots and the home quarter.

There is no doubt that Master Schlosser reached the right conclusion in this case. As first-year property law students will know, tenants in common like Mr. Denesik and Mr. Verhulst are entitled to exclusive use and occupation of their land vis-à-vis third parties, but they have no right to exclude one another from the land. Unity of possession characterizes all forms of co-ownership. This means that even though co-owners have a percentage share of ownership, they have a right to undivided possession of the whole. A co-owner cannot exclude another co-owner from a certain part of the land or restrict the use of any part of the land even if s/he has a larger share than the others.

Any reasonable person in Mr. Verhulst's shoes would have simply assumed that Mr. Denesik was using the land as any co-owner would. Mr. Denesik had a legal right to be there and to use and enjoy the land. Master Schlosser is correct that for a co-owner to dispossess another, the circumstances will have to be exceptional. It is hard to think of examples, and Master Schlosser offers none. Ultimately, while it may be theoretically possible for a co-owner to make a claim to a co-owner's share through adverse possession, as a matter of practice, success will be very rare.