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No. 69565-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LEIGH M. KELLOGG and RUTH. E. PELAN, Appellant

vs.

GARY D. CORPRON and SUSAN M. CORPRON, Respondents

BRIEF OF APPELLANTS

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Abbreviations

CP	-	Clerk's Papers
CL	-	Conclusions of Law
EX	-	Exhibit
FF	-	Findings of Fact
RP	-	Report of Proceedings

I. INTRODUCTION

The trial court denied the Appellant Kellogg's adverse possession claim as to a portion of Respondent Corprons' record ownership. The 688.9 foot surveyed common line¹ located between the two Snohomish County five acre parcels at issue together with a depiction of the Disputed Area is set forth in a June, 2010 survey admitted into evidence at trial as Exhibit 3 as well as Exhibit 16 which, as pointed out by the second paragraph of Finding of Fact 3 (CP 25) "contains more detailed measurements "of the" location and dimensions of the Disputed Area." The Appellant seeks a reversal of the trial court's decision denying her claim of adverse possession and/or a remand to the trial court for further consideration/deliberation.

II. ASSIGNMENT OF ERROR.

1. Assignment of Error No. 1: The entry of Finding of Fact No. 5 and the related Conclusion of Law No. 5, both of which state as follows:

Finding of Fact 5 (CP 28-29):

Historic Use and Maintenance of Disputed Area. The testimony and exhibits admitted at trial showed neither Kellogg nor her predecessors used, maintained or kept a line fence in the Disputed Area for any consecutive ten-year period. More

¹

This distance measurement, according to the survey evidenced by Exhibit 3, is exclusive of an undedicated but County maintained 20 foot right of way known as 132nd Street NE located on the south side of both parcels.

specifically, at trial, the evidence showed the following regarding the historic used of the Disputed Area:

a. Van Putten/Takaki. From approximately May 1995 to 2000, Van Putten and Takaki kept horses on the Kellogg Real Property and in the Disputed Area. After approximately 2000, no one kept animals in the Disputed Area.

From approximately 1999-2000, Van Putten mowed a small patch of grass near the Southeastern corner of the Kellogg Real Property. A portion of that grass was located in the Disputed Area.

As discussed herein, in May of 1995, the Van Putten Fence was installed, but the portion extending northerly of the Wood Lattice Fence was removed February of 2005.

Neither Van Putten nor Takaki otherwise regularly used or maintained the Disputed Area during Van Putten's ownership of the Kellogg Real Property.

b. Selvig. From approximately 2003 to 2004, Selvig mowed the small patch of grass near the Southeastern corner of the Kellogg Real Property, a portion of which was located in the Disputed Area. Selvig also, on a single occasion in approximately 2003 or 2004, removed saplings from the Kellogg Real Property, some of which were in the Disputed Area.

Except as stated above, between 1999 and 2004, Selvig did not otherwise use or maintain the Disputed Area. Selvig did not: (1) keep horses or other animals; (2) add to or maintain any fencing; (3) install any improvements; and or (4) weed, in the Disputed Area. There was no continuous use of the Disputed Area from the time Van Putten and Takaki occupied the Kellogg Property to the time Selvig occupied that Property. During Selvig's ownership of the Kellogg Property, apart from the maintenance in 2003 and/or 2004 described above, the Disputed Area became and remained overgrown with weeds and brush.

c. Use by the Corprons. The Corprons testified at trial they regularly used and maintained the Disputed Area from 2003 to 2010 and that, during that period, they mowed, weeded, removed debris (including tree branches), raked and removed rocks. Kellogg's testimony at trial indicated she used the Disputed Area and did not observe the Cordons using that Area from Spring 2005 until 2010. The Court found neither Party's testimony persuasive by a preponderance of the evidence and specifically found the Corprons' position on this issue to lack credibility.

d. Kellogg. When Kellogg purchased her Real Property in 2004, the Disputed Area was unmaintained and overgrown with weeds and brush. Kellogg did nothing to maintain the Disputed Area until approximately six months after she purchased that Property.

Conclusion of Law 5 (CP 30):

Even if the Corprons had not removed the section of the Van Putten Fence prior to the expiration of 10 years, Defendants' adverse possession claim would still fail because they and their predecessors failed to use, possess or maintain the Disputed Area in the manner of a true owner over the required 10-year period. The use and maintenance in the Disputed Area by Van Putten, Takaki and Selvig (periodically keeping animals, mowing a small patch of lawn and/or once removed saplings) did not last for any continuous 10-year period and was insufficient to be actual, open, and/or notorious. Because of the breaks in use and maintenance of the Disputed Area between: (a) the ownership of Van Putten and Selvig; and (b) the ownership of Selvig and Kellogg, no continuous adverse possession of that Area can be shown.

Issue related to Assignment of Error No. 1: Whether or not evidence of "use" within an otherwise enclosed and fenced area is relevant to a finding of adverse possession. (See generally *Wood v. Nelson*, 57 Wash. 2nd 539

(1961).

2. Assignment of Error No. 2: The entry of Conclusion of Law No. 3

which states as follows:

Conclusion of Law No. 3 (CP 30):

3. Defendants failed to prove their possession, and/or that of their predecessors, of the Disputed Area was: 1) exclusive, 2) actual and uninterrupted, 3) open and notorious, and/or 4) hostile and under a claim of right, during any continuous 10-year period.

3. Assignment of Error No. 3: The entry of Conclusion of Law No. 4

which states as follows:

Conclusion of Law No. 4 (CP 30):

4. Because the Corprons removed the portion of the Van Putten Fence in February of 2005, less than 10 years after its installation in May of 1995, Defendants cannot meet their burden to show exclusive possession over a 10-year period. Once that section of Fencing was removed, it left only a "hanging" fence allowing easy access from one side to the other.

4. Assignment of Error No. 4: The entry of Conclusion of Law No. 7

which states as follows:

Conclusion of Law No. 7 (CP 31):

7. Title to the Corpron Real Property and the Disputed Area shall be and hereby are quieted in the Corprons and against Defendants Kellogg and Pelan and/or anyone holding by or through them.

5. Assignment of Error No. 5: The entry of Conclusion of Law No. 8

which states as follows:

Conclusion of Law No. 8 (CP 31):

8. Defendants Kellogg and Pelan shall be and hereby are immediately ejected from the Corpron Real Property and Disputed Area.

6. Assignment of Error No. 6: The entry of Conclusion of Law No. 10

which states as follows:

Conclusion of Law No. 10 (CP 31):

10. Plaintiffs are the prevailing parties in this action.

7. Assignment of Error No. 7: The entry of Conclusion of Law No. 12

which states as follows:

Conclusion of Law No. 12 (CP 31) and the related Judgment

(CP 21-22):

12. Plaintiffs shall have and are awarded a judgment against Defendant Kellogg in the amount of \$400.00 for labor for the fencing removed by Kellogg; in the amount of \$200.00 for statutory attorney's fees; and in the amount of \$634.26 for statutory costs.

Issue pertaining to Assignment of Errors No. 2 through No. 7: Whether or not the Appellant sustained her burden of proof at trial that her possession of the Disputed Area was 1) exclusive, 2) actual and uninterrupted, 3) open and notorious, and/or 4) hostile and under a claim of right, during any continuous 10-year period.

III. STATEMENT OF THE CASE

1. The affected parcels and the surveyed common line between them: The Appellant Kellogg and the Respondents Corpron each own adjacent 5-acre parcels of improved residential real estate. (FF 1, 2 and 3 at CP 24-25) The common line between the two parcels (the Appellant's east line and the Respondents' west line) is, as stated above, 688.9 feet long. (RP 15; Ex 3)

In June, 2010, the Respondents hired a surveyor to locate that common line. (RP 12 -13; FF 3 at CP 25)

The resulting survey established that the record common line between the two properties was located to the west of an existing fence line which fence line encroached over onto the Respondents' side of the common line. (RP 14; Ex 3; Ex 16)

On October 8, 2010, the Respondents Corpron filed this litigation against the Appellant Corpron seeking the entry of an order quieting title to the surveyed common line. (CP 68-74) The Appellant counterclaimed for the entry of an order quieting title to the fence line under the theory of adverse possession. (CP 65-67)

The trial court ultimately ruled in favor of the Respondents and entered an order quieting title in their favor to the surveyed common line.

(CP 21-22)

2. The chain of title: The pertinent chain of title for both parties is as follows:

Appellant's chain:	11/13/89	Lindquist to John Van Putten ²
	01/05/95	John Van Putten to Mike Van Putten
	03/30/99	Mike Van Putten to Mark Selvig
	10/28/04	Mark Selvig to Appellant Kellogg ³
Respondents' chain:	03/13/87	Ward Shields to Elmer & Evelyn Dorsett
	09/16/03	Evelyn Dorsett to Respondents Corpron ⁴

3. Survey history of the Appellant's parcel: Within two months of purchasing the Appellant's parcel, John Van Putten had a survey performed and then he had the property logged of the export wood. (RP 64-65) After the initial logging was done, John Van Putten and his son Mark cleaned up brush, stacked and piled it and took additional trees down. (RP 66)

² As of the trial date, John Van Putten, the father of Mike Van Putten, was deceased.

³ All of the above deeds evidencing Appellant's chain of title were admitted into evidence as a single Exhibit. (RP 59; Ex 1)

⁴ All of the above deeds evidencing Appellant's chain of title were admitted into evidence as a single Exhibit. (RP 26; Ex 2)

Later, John Van Putten had a second survey performed the purpose of which was to aide in the creation of a two-lot subdivision that would have divided the Appellant's property into equal parts with a north half and a south half of 2.5 acres each. (RP 76 - 77) According to the undisputed testimony of Mark Van Putten, and again for the purpose of aiding in creating the proposed two lot subdivision, the surveyor placed a stake on the east line of the Appellant's parcel in the middle of what was believed to be common line with Respondents' parcel. (RP 77 - 78) Stakes had also been placed in the four corners of Appellant's parcel. (RP 77)

4. Characteristics of the surveyed fence and its construction

history: The fence line as depicted on the survey (Ex 3) was constructed at an angle to the surveyed common line. (RP 16)

The fence line depicted on the survey (Ex 3) is straight. (RP 19 - 20; 109) In other words, the fence did not meander. (RP 21)

Based upon the distance calls set forth on Exhibit 3, the length of the fence line depicted by the survey is approximately 70% of the 688.9 foot surveyed common line. But, as depicted by Exhibit 3, the fence did not touch or meet either the north or the south common boundaries of the two parcels. (RP 16)

The fence line that is depicted on Exhibit 3 was constructed in stages.

Each of those stages is described in the following paragraphs. Each stage is also illustrated by Exhibit 16 which was admitted into evidence as illustrative of the testimony introduced at trial (RP 39):⁵

Stage 1 (the “Lattice Fence): From at least 1991 through the date of the 2012 trial, there existed between reference points D - E as depicted on Exhibit 16 a post and cedar lattice fence (the “Lattice Fence”) which had been originally constructed by the Dorsetts, the Respondents’ immediate predecessors in title.⁶ (RP 70; 30; 39; 142; 153) The Lattice Fence was and is 116 long. (Ex 16)

The Lattice Fence can be seen on the 1991, 1995 and 1996 aerial photographs admitted as Exhibit 5 (1991) (RP 69; 71), Exhibit 6 (1995) (RP 72 - 73) and Exhibit 7 (1996) (RP 86). It is also depicted on Exhibit 18 as viewed from the Appellant’s side of the Lattice Fence.⁷ (RP 39) Reference

⁵ Exhibit 16 is referenced several times in the Court’s Findings of Fact as setting forth “more detailed measurements” as to the location of the “Disputed Area,” (CP 25) the “Wood/Lattice Fence,” (CP 26) the “Van Putten Fence,” (CP 27) and the “Kellogg Fence.” (CP 28)

⁶ Darold Anderson, Jean Dorsett’s son, testified that he believed that the Lattice Fence was built sometime between 1987 - 1989. (RP 150)

⁷ As depicted on Exhibit 18, the Lattice Fence is covered on the Corpron side of the fence by cedar planking. That planking was installed after 1995 by the Dorsetts. (RP 70; 84-85)

point D on the Lattice Fence as depicted on Exhibit 16 is also depicted on Exhibit 19 looking north on the Appellant's side of the Lattice Fence. (RP 39 - 40) The most northerly portion of the Lattice Fence as seen from the Respondents' side is depicted by Exhibit 35. (RP 34 - 35) Finally, Exhibit 15, a 2011 Google aerial, depicts the Lattice Fence as well as a later extension hereafter described as the Cedar Plank Fence both of which are easy to distinguish in that Exhibit because of the Respondents' removal of a number of fir trees adjacent to that fence line that, in other aerials introduced into evidence, obscured the fence. (RP 138, 184)

The existing Lattice Fence was also in line with a dilapidated barbed wire fence that extended north of the north end of the Lattice Fence (RP 94, 156, 163 and 172)

The fence posts on the Lattice Fence were buried in concrete. (RP 227-228)

Stage 2 (the "Van Putten Fence"): In May, 1995, Mike Van Putten started the construction of a split cedar post fence (10 foot on center) with 4" by 4" heavy mesh wire along the east side of his property (the "Van Putten Fence".) (RP 75; 165)

To establish the line that the Van Putten Fence was to follow, Mark Van Putten located what he believed to be the survey line between the two

parcels that had been established by the surveyor hired by his father to aide in the creation of a two-lot subdivision discussed above. (RP 76 - 77) According to Mark Van Putten, the mid-point stake placed by the surveyor on the Appellant's east line was located 4 - 5 feet north of the north end of the Lattice Fence as represented by reference point D as depicted on Exhibit 16 and was in line with the Lattice Fence. (RP 77 - 78; 106)⁸

Then, between the then existing northeast and southeast corner survey stakes and the midpoint stake, Mark Van Putten ran a string line the entire length of the property and used that line to mark out the location of the fence posts for the Van Putten Fence (RP 76 - 79) The resulting line so strung was located immediately adjacent to the pre-existing Lattice Fence. (RP 79)

The Van Putten Fence was then constructed along that string line between reference points G to C as depicted on Exhibit 16 at which reference point it turned to the northwest and continued to encircle and enclose the Disputed Area. (RP 82; 107; 119; Ex 6) Under Finding of Fact 4(b), the trial court specifically found as follows:

b. Van Putten Fence. Van Putten testified at trial he installed

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When constructing the Van Putten Fence, the remnants of an old wire fence north of the north end of the Lattice Fence was also found. (RP 93) The old fence had also been observed by others and was in a direct line with the Lattice Fence. (RP 93; 156; 163; 172)

a wire gauge and post fence in the Disputed Area in May of 1995 (the "Van Putten Fence"). That Fence generally ran northerly-southerly and immediately adjacent the western side of the Wood/Lattice Fence **and served to enclose that portion of the Disputed Area lying immediately adjacent to it, thereby preventing passage from one side to the other**, until it was removed as described herein in February of 2005. (Emphasis supplied. See also RP 109; 119)

The area north of the north end of the Van Putten Fence (north of reference point C as depicted on Exhibit 16) was "pretty wet" leaving the area to the south of the Van Putten Fence as it encircled the cleared area as the only "dry spot" behind the house. (RP 66, 110, and 200) In fact, the ability to improve the area between reference points A - B or B - C along the common line was limited due to the existence of "critical areas" as later depicted on the recorded Critical Area Site Plans that ultimately encumbered both parcels:

In consideration of Snohomish County code requirements, except as otherwise provided herein, the CAPA (Critical Area Protection Area) shall be left permanently undisturbed in a substantially natural state. No clearing, grading, filling, building construction or placement, or road construction of any kind shall occur within said CAPA, except the allowed activities set forth in Snohomish County Code (30.62A.010(2), 30.62A.510, 30.62A.530) when approved by the County. (Ex 23 and Ex 24)

The Van Putten Fence between reference point G and E as depicted on Exhibit 16 is shown in a series of pictures admitted into evidence as Exhibit 21. (RP 83) The Van Putten Fence was specifically described as a

sturdy fence. (RP 109)

The portion of the Van Putten Fence that ran along the common line between the two Parcels took a week and a half to two weeks to build. (RP 84) The Dorsetts observed the construction of the Van Putten Fence and never objected to its location. (RP 85)

At the time that the Van Putten Fence was constructed, the Respondents' property north of the north end of the Lattice Fence (reference point D as depicted on Exhibit 16) was wooded/covered with natural growth. (RP 85;147; 156)

Stage 3 (covering and extending the Lattice Fence): The Lattice Fence was later covered with cedar planking and a cedar planking fence (the Cedar Planking Fence) was also extended from the south end of the Lattice Fence 126 feet south along and immediately adjacent to the 1995 Van Putten Fence. (RP 84-85; 145; Ex 21 and 22.) This work was done by the Dorsetts. (RP 84) (The Cedar Planking Fence stopped 11 feet short of the southerly terminus of the Van Putten Fence. (RP ____; Ex 21.)

Stage 4 (the partial removal of Van Putten Fence): In February, 2005, the Respondent's removed the 122 feet of the Van Putten Fence that extended north from the north end of the Lattice Fence – i.e.,

between reference points C and D as depicted on Exhibit 16⁹

No other portion of either the balance of the Van Putten Fence between reference points G and D as depicted on Exhibit 16 (253 feet) or the adjacent Lattice Fence or the Cedar Planking Fence between reference points F and D as depicted on Exhibit 16 was removed by the Respondents.

Stage 5 (the replacement and extension of the removed portion of the Van Putten Fence): In October 2007, the Appellant replaced the 122 feet of the 1995 Van Putten fencing previously removed by the Corprons in January, 2005 between reference points “C” and “D.” That fencing was installed in the same location as the 1995 Van Putten fencing had been located – that is on the same line as the Lattice Fence and the Cedar Plank Fence projected north. However, it was extended another 78 feet by

The trial court’s Findings at CP 27 described the circumstances of the removal of this portion of the Van Putten fence as follows:

Conflicting testimony was given at trial as to whether the Corprons asked permission from Kellogg before removing the referenced portion of the Van Putten Fence. The Corprons testified they did not request permission to remove that section of fencing. Kellogg testified she gave Sue Corpron permission to remove that section of fencing, stating that she was going to replace it anyway. Based on viewing the testimony of the witnesses and weighing their credibility, the Court finds the Corprons did not ask for permission from Kellogg prior to removing that section of the Van Putten Fence. Kellogg would have gladly given permission.

Kellogg from reference point “C” to reference point “B” as Kellogg had cleared some additional area into the wet area in the back. After that, as shown by Exhibit 3 and Exhibit 16, the fence returned in a north-west direction back onto the Kellogg side of the surveyed common line at which point it continued around to the west side of the Kellogg property. That 2007 Appellant Kellogg fencing is depicted by Exhibits 19 and 20 all of which pictures were taken from the south looking north. (RP 92 and 40) See also Exhibit 14 – a 2009 aerial photo. (RP 211)

Stage 6 (replacement of remaining portion of Van Putten Fence): In 2009, more than ten years following its initial construction, the Appellant Kellogg removed the remaining 253 feet of the 1995 Van Putten fencing between reference points “D” and “G” and replaced it with other fencing all in the same original location. (RP 186-187)

5. Pre Van Putten Fence construction history: Between the date that the Van Putten Fence was constructed to the date that *a portion* of the Van Putten Fence was removed between reference points D and C as depicted on Exhibit 16, the original Van Putten Fence in its entirety had existed for 3-4 months less than 10 years. However, the undisputed trial testimony established that there were other acts of possession that occurred in the disputed area:

(1) John Van Putten had the property surveyed about two months after he purchased it. (RP 64)

(2) After the property was surveyed, John Van Putten, with the assistance of a logger, had portions of the property logged of the export quality trees. (RP 64 - 66)

(3) Thereafter, John Van Putten and his son Mike spent “years” cleaning up the brush, stacking it, piling it and taking more trees down. (RP 66 - 67)

(4) In approximately 1993, a mobile home was placed on the Kellogg property by Mike Van Putten and Mike Van Putten moved into it. (RP 68, Trial Exhibit 6 per RP 73) A well and a septic system were also installed. (RP 68)

(5) But most significantly, in preparation for the installation of the Van Putten Fence, the area along the eastern side of the Van Putten Fence was rough graded. (RP 75) This “rough” grading was completed “months before” the Van Putten Fence was constructed. (RP 75) The location of the grading line on the east side of the Appellant’s parcel was established through reference to the second survey and the associated staking that Mark Van Putten’s father had hired a surveyor to perform in anticipation of subdividing Appellant’s parcel. (RP 76)

(6) Then, in February, 1995, in anticipation of the construction of the Van Putten Fence, Mark Van Putten began the construction of the finish grade:

Well, before I constructed it [the fence], I had to flatten out the area where the fence was going to go, but put, grade it out, smooth it up so when I brought a tractor in to bore holes, it wasn't rough. (RP 75)

(7) In 1995, after he had installed the fencing described above, Van Putten also built a barn in the area immediately adjacent to the solid cedar plank fence. Photographs of that barn under construction are depicted on Exhibit 17. The top picture of page 1 of Exhibit 17 shows that portion of the 1995 Van Putten Fence extending south of the Lattice Fence from reference point "E" can be seen behind the barn. (The Lattice Fence is not visible in Exhibit 17 nor is the barn visible in the 1995 aerial (Ex 6) as construction on it had not yet started when Exhibit 6 was taken. However, the barn is visible on Exhibit 7, a 1996 aerial.)

IV. ARGUMENT

A. Elements of Adverse Possession:

The elements of adverse possession are well known.

In order to establish a claim of adverse possession, the possession must be: (1) exclusive, (2) actual and uninterrupted (3) open and notorious and (4) hostile and under a

claim of right made in good faith.¹⁰

The period throughout which these elements must concurrently exist is 10 years. RCW 4.14.020.

B. Burden of Proof is on the Party Claiming Adverse Possession:

Because the presumption of possession is in the holder of legal title, the party claiming adverse possession has the burden of establishing each element. *ITT Rayonier*, 112 Wash.2d at 757, 774 P.2d. Adverse possession is a mixed question of law and fact. Whether essential facts exist is for the trier of fact; but whether the facts, as found, constitute adverse possession is for the court to determine as a matter of law. *Chaplin*, 100 Wash.2d at 863, 676 P.2d 431.¹¹

C. *Chaplin v. Sanders*, 100 Wash.2d 853 (1984) Made the Subjective Intent of the Adverse Possessor Irrelevant:

In *Chaplin*, the Supreme Court overruled the holdings of a number of prior adverse possession cases where the outcome had turned on the subjective intent of the one claiming adverse possession. After *Chaplin*, subjective (i.e., good faith) intent no longer plays a role in determining whether or not the “hostility/claim of right” element of adverse possession is met:

. . . . The hostility element requires simply “that the claimant treat the land as his own against the world throughout the statutory period.” *Chaplin*, 100 Wash.2d at 860-861, 676 P.2d 431. Thus only the

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Chaplin v. Sanders, 100 Wn.2d 853, 857, 676 P.2d 431 (1984).

¹¹

Stokes v. Kummer, 85 Wash.App. 682, 689-690 (1977).

claimant's treatment of the land is relevant, not his subjective belief about his true interest in the land. *Chaplin*, 100 Wash.2d at 861, 676 P.2d 431.¹²

* * * *

Today, we reaffirm our commitment to the rule enunciated in *Chaplin v. Sanders, supra*:

The “hostility/claim of right” element of adverse possession requires only that the claimant treat the land as his own as against the world throughout the statutory period. The nature of his possession will be determined solely on the basis of the manner in which he treats the property. His subjective belief regarding his true interest in the land and his intent to dispossess or not dispossess another is irrelevant to this determination. Under this analysis, permission to occupy the land, given by the true title owner to the claimant or his predecessors in interest, will still operate to negate the element of hostility. The traditional presumptions still apply to the extent that they are not inconsistent with this ruling.

(Footnotes and citations omitted.) *Chaplin v. Sanders*, 100 Wash.2d at 860-62, 676 P.2d 431. Accordingly, good faith no longer constitutes an element of adverse possession.¹³

D. The Role of “Use” Evidence in Proving Exclusive Possession:

To satisfy the elements of adverse possession, the “possession” must be of a certain quality. Therefore, it is important that this Court understand the role that “use” evidence plays in the outcome of adverse possession cases:

. . . . And a party who claims by adverse possession must show that

¹²

Riley v. Andres, 107 Wash.App. 391, 397 (2001).

¹³

ITT Rayonier v. Bell, 112 Wash.2d 754, 761 (1989).

its use is that of a true owner, given the lands' nature and location. *Chaplin v. Sanders*, 100 Wash.2d 853, 863, 676 P.2d 431 (1984).¹⁴

* * * *

But adverse possession does not require establishing a clearly demarcated line. *Lloyd v. Montecucco*, 83 Wash.App. 846, 853-54, 924 P.2d 927 (1996). The court need not find a "blazed or manicured trail" establishing the disputed boundary; rather, the court may project a line between objects where it is reasonable and logical and the claimant's use of the land was open and notorious. *Lloyd*, 83 Wash.App. At 854, 924 P.2d 927.¹⁵

* * * *

. . . . A claimant can satisfy the open and notorious element by showing either (1) that the title owner had actual notice of the adverse use throughout the statutory period or (2) that the claimant used the land such that any reasonable person would have thought he owned it. *Anderson v Hudak*, 80 Wash.App. 398, 404-05, 907 P.2d 305 (1995).¹⁶

But, bottom line, "specific instances of property use merely provide evidence of possession":

Nevertheless, by pointing to specific instances of his own use of the property, Bell attempts to establish his exclusive possession. . . . As this court has held, specific instances of property usage merely provide evidence of possession:

Evidence of use is admissible because it is ordinarily an indication of possession. It is possession that is the ultimate fact to be ascertained. Exclusive dominion over land is the essence of possession, and it can exist in unused land if others

¹⁴ *Riley v. Andres*, 107 Wash.App. 391, 397 (2001).

¹⁵ *Riley, supra* at 396.

¹⁶ *Riley, supra* at 396-397.

have been excluded therefrom. A fence is the usual means relied upon to exclude strangers and establish the dominion and control characteristic of ownership.

Wood v. Nelson, 57 Wash.2d 539, 540, 358 P.2d 312 (1961).

Possession itself is established only if it is of such a character as a true owner would make considering the nature and location of the land in question. *Young v. Newbro*, 32 Wash.2d 141, 144-45, 200 P.2d 975 (1948), overruled on other grounds, *Chaplin v. Sanders*, *supra*. As quoted in *Wood v. Nelson*, *supra*, use alone does not necessarily constitute possession. The ultimate test is the exercise of dominion over the land in a manner consistent with actions a true owner would take. Thus, Bell's burden was to establish specific acts of use rising to the level of exclusive, legal possession.¹⁷

Wood v. Nelson, *supra* was a pre-*Chaplin* case. In that case the claimant had two sections of land with the second section located adjacent to and north of the other. Both sections had an old dilapidated encroaching fence that ran up the same side of the two sections. The first section had a road running along side of the fence that ran for 263 feet. The record owner conceded that the claimant had established adverse possession over the first section because of the road "use," but argued that as to the second section, "the only evidence of *adverse use* of this section is a few instances when the [claimant] cut wild grass thereon." The court agreed that "such a limited use would not of itself conclusively establish adverse possession of wild,

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Itt Rayonier v. Bell, 112 Wash. 2d 754, 759-60 (1989).

unimproved or unfenced land.” Nevertheless, the court upheld the adverse possession claim by stating as follows:

But this land is not unfenced, and, moreover, it is not the fact of *use* with which we are here concerned. Evidence of *use* is admissible because it is ordinarily an indication of *possession*. It is *possession* that is the ultimate fact to be ascertained. Exclusive dominion over land is the essence of possession, and it can exist in unused land if others have been excluded therefrom. A fence is the usual means relied upon to exclude strangers and establish the dominion and control characteristic of ownership.¹⁸

* * * *

Where a fence purports to be a line fence, rather than a random one, and when it is effective in excluding an abutting owner from the unused part of a tract otherwise generally in use, it constitutes prima facie evidence of hostile possession up to the fence. We know of no requirement that a particular degree or kind of use be established as to every part of a fence tract of land as a prerequisite to finding possession thereof.¹⁹

Therefore, as in *Wood*, the fence at issue in this case is a line fence that acted/acts to exclude strangers – hence the actual “use” of the property enclosed by or within this fence is irrelevant as it excluded others from entering the Appellant’s property. (CP 26-27 and FF 4(b))

E. The Grading Activities that Preceded the Van Putten Fence Started the 10-Year Period Running:

The following facts are undisputed: (1) that the 1995 Van Putten

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Wood v. Nelson, 57 Wash.2d 539, 540 (1961).

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Wood, *supra* at 541.

Fence was constructed in May, 1995; (2) that following its construction, exclusive dominion over the land enclosed by the fences was established and continued uninterrupted between reference points G and D as depicted on Exhibit 16 for a period of time 3- 4 months short of a full 10-year term when the Respondents removed that portion of the Van Putten Fence that had existed up to that point in time between reference points D and C as depicted on Exhibit 16; and, (3) that all other fencing between reference points G and D as depicted on Exhibit 16 remained in place and fully functional. But in finding for the Respondents, the trial court failed to consider other evidence of use that occurred prior to the construction of the Van Putten Fence – specifically, the land clearing and grading activities that occurred between reference points G and C as depicted on Exhibit 16 up to the line of the Lattice Fence and the then existing survey staking. As contended by the Appellant, it is those grading activities that “unfurled the flag” of hostile ownership and began the 10-year period of adverse possession.

As to those activities, the following facts are undisputed: (1) that final grading activities up to the Lattice Fence began in February, 1995 between reference points G through C as depicted on Exhibit 16; (2) that the final grading activities followed the completion of rough grading “several months” earlier; and (3) that the grading activities were observed by the Dorsetts while

they were occurring; and, (4) the grading activities were carried out with reference not only to a line that was previously surveyed but also with reference to the line of the long time existing Lattice Fence. But even more important than the above testimony is the 1991 aerial photograph admitted as Exhibit 6 that not only clearly supports the above described facts but also establishes that the line established by the grading was obvious upon the ground and was further open and notorious as the character of the land and its use required and permitted.

A similar fact pattern is found in *Frolund v Frankand*, 71 Wash. 2d 812 (1967) involving two partially cleared water-front properties on Bainbridge Island. In that case, following the completion of a survey which staked the location of the common boundary between the two properties at issue, the Defendants, relying on the survey, “bulldozed and cleared the northwesterly portion of their beach and recreational area up to the staked line.” (*Frolund*, supra at 814.) In the process of clearing the land, an old and obscured fence was also partially destroyed. However, as to the effect of the grading, the court reached the following conclusion:

Under these circumstances, we are satisfied that defendants ‘unfurled the flag’ of hostile ownership when they destroyed the fence and cleared the land to their survey line in the recreational or yard area, and have since, within the contemplation of the law of adverse possession, occupied the disputed wedge for more than the statutory

period (10 years under RCW 4.16,020) actually and uninterruptedly, openly and notoriously, hostilely and exclusively, and under a claim of right made in good faith. *Bowden-Gazzam Co. v. Hogan*, 22 Wash.2d 27, 154 P.2d 285 (1944); *Taylor v. Talmadge*, 45 Wash.2d 144, 273 P.2d 506 (1954); *Booten v. Peterson*, 47 Wash.2d 565, 288 P.2d 1084 (1955).

At the outset, it is essential to bear in mind that what constitutes possession or occupancy of property for purposes of adverse possession necessarily depends to a great extent upon the nature, character, and locality of the property involved and the uses to which it is ordinarily adapted or applied. In this vein, we have accepted the view that the necessary occupancy and use of the property involved need only be of the character that a true owner would assert in view of its nature and location. *Skoog v. Seymour*, 29 Wash.2d 355, 187 P.2d 304; *Bowden-Gazzam Co. v. Hogan*, supra.²⁰

* * *

Plaintiff further argues that defendants' actions did not establish or reveal a clear and definitive line, nor otherwise indicate a claim to any property east of the cleared area. Again, the nature and use of the properties involved, and the fact that any boundary line between them necessarily followed a straight course negates plaintiff's argument. A survey stake stood at the northwesterly corner of defendants' cleared area and the common easterly corner was ascertainable. The line established by defendants' cleared area was obvious upon the ground, as well as any reasonable projection thereof, and patently at variance with the old fence line. Prudent observation or inquiry by plaintiff during the span of years involved would have revealed the extent of defendants' claimed ownership. Under these circumstances, defendants were not required to fence, clear, or blaze a trail along the path of their survey line in order to establish their claim to the uncleared portion of the disputed wedge. The extent to their claim was as open and notorious as the character of the land and its use required and

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Frolund v. Frankland, 71 Wash. 2d 812, 817, 431 P.2d 188, 191 (1967) overruled by *Chaplin v. Sanders*, 100 Wash. 2d 853, 676 P.2d 431 (1984).

permitted.²¹

F. Uninterrupted Continuity of Possession.

First, it is undisputed that the 1995 Van Putten Fence in that area between reference point “D” and “G” remained in place from May, 1995 until it was replaced by the Defendant Kellogg in 2009 (14 years) and that the replacement fence remained in place through the trial of this matter. It is further undisputed that the Dorsett Lattice Fence and the Cedar Panel Fence have jointly existed between reference points “D” and “F” since 1996 and remained in place through the trial of this matter. Therefore, the continuity element as to the disputed area on the west side of those fences between reference points “D” and “G” has been satisfied.

As previously stated, it is undisputed that this 122 foot section of the 1995 Van Putten fence was removed by the Defendants just shy of 10 years having lapsed since the date of its construction. But it was not the installation of that fence that started the 10-year period as to the area between reference points “D” and “C” – rather it was the logging, clearing and grading activities up to that line as described above that started the 10-year period running.

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Frolund v. Frankland, 71 Wash. 2d 812, 819-820, 431 P.2d 188, 191 (1967) overruled by *Chaplin v. Sanders*, 100 Wash. 2d 853, 676 P.2d 431 (1984).

Therefore, by the time that the subject portion of the Van Putten Fence was removed, the 10-year period had already lapsed thereby resulting in compliance with the continuity element for this area also.

As to the areas adjacent to a projected line from reference point "G" to reference point "H" and from reference point "C" to reference point "B," the continuity element cannot be established. However, under the following authority, the trial court had the ability to project a line:

The Lloyds contend the new common boundary drawn in the upland tract by the court was in error because the boundary is straight while the Montecuccos' actual possession would be more fairly represented by a jagged line. Noting that there is no direct evidence the Montecuccos actually possessed every square yard of the disputed tract, we conclude nonetheless that the trial court's demarcation was proper. Courts may create a penumbra of ground around areas actually possessed when reasonably necessary to carry out the objective of settling boundary disputes. *Stoebuck*, § 8.9, at 495. Regarding the straight line the trial court drew between the fence and the bulkhead, courts will project boundary lines between objects when reasonable and logical to do so. *Frolund v. Frankland*, 71 Wash.2d 812, 820, 431 P.2d 188 (1967), *overruled on other ground*, *Chaplin v. Sanders*, 100 Wash.2d 853, 676 P.2d 431 (1984). Courts are not required to find a blazed or manicured trail along the path of the disputed boundary; it is reasonable and logical to project a line between objects when the extent of the adverse possessor's claim is open and notorious as the character of the land and its use requires and permits. *Frolund*, 71 Wash.2d at 820, 431 P.2d 188. A steep bank and wooded area do not easily permit a clear demarcation. Based upon Shoblom's testimony that he knew the Lloyds maintained the wooded area between the fence and the bulkhead, based upon the Montecuccos planting and harvesting of trees, and considering the area was heavily wooded and steep, the trial court did not err in drawing a straight line between the outside perimeter of the northwest

corner of the fence and the northern edge of the bulkhead.²²

In this case, it is clearly reasonable to project such a line from reference point “G” to reference point “H” given the small amount of square footage involved so as to maintain a uniformity to the look of the property line. It is also reasonable to project the line from reference point “C” to reference point “B” given that reference point “B” appears to be the beginning of the wetland or at least near to it.

V. CONCLUSION

The John Van Putten surveys and the associated staking of the east line at both ends as well as at its midpoint, the clearing of the parcel, the rough and finish grading of the Disputed Area followed by the running of a string line with reference to the survey line in preparation of the construction of the Van Putten fence all served to “unfurl the flag” at which time the 10-year period began to run.

The construction of the Van Putten Fence and its enclosure of the Disputed Area then finished out the 10-year period and should have resulted in judgment in favor of the Appellant.

Whether or not the “use” within the enclosed Disputed Area was

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Lloyd v. Montecucco, 83 Wash. App. 846, 853-54, 924 P.2d 927, 931 (1996)

sufficient by itself to establish adverse possession, under the above facts, is irrelevant.

Appellant therefore seeks a reversal of the trial court's decision with a remand to the trial court to enter a quiet title judgment in favor of the Appellant.

Respectfully submitted this 10th day of July, 2013.

DENNIS JORDAN & ASSOCIATES,
INC., P.S.

By 

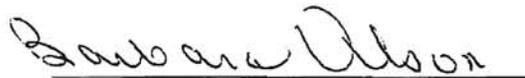
Dennis Jordan, WSB# 4904
Attorney for the Appellants

DECLARATION OF MAILING

I declare under the penalty of perjury of the laws of the State of Washington that a copy of the foregoing document was on this day transmitted via email to:

Patrick Vail
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3232 Rockefeller Avenue
Everett, WA 98201

Executed at Everett, Washington on this 10th day of July, 2013.



Barbara Olson