

Adverse Possession in the State of Florida: Statutory Analysis and Considerations

Donovan A. McFarlane*

Adjunct Professor, H. Wayne Huizenga School of Business and Entrepreneurship, Nova Southeastern University, USA

*Corresponding author: Donovan A. McFarlane, Professor, H. Wayne Huizenga School of Business and Entrepreneurship, Nova Southeastern University, USA, Tel: 954-262-5162; E-mail: donovan@nova.edu

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Abstract

It is a fact that title to land may be acquired by holding it adversely to its true owner for a certain period of time. This is known as "Adverse possession." Adverse possession is a highly controversial practice that the law provides a pathway for, and when it occurs, individuals' rights, specifically property rights, as well as other rights are affected. This paper examines adverse possession in the State of Florida and the state's statute regarding the elements and requirements of adverse possession. The author discusses several topics and issues related to adverse possession by providing general definitions of adverse possession and examining the justifications or purposes for adverse possession. The general elements or requirements of adverse possession and those specific to Florida Statute are presented with examples of cases involving adverse possession. The advantages and disadvantages of the application of the Statute in the State of Florida in modern times are discussed and the author explores whether or not the Statute on adverse possession should be modified, and recommends potential changes or modifications to the Statute on adverse possession. Finally, a summary of the findings on adverse possession is presented and several important remarks regarding adverse possession in general are presented to engage the readers' minds in thinking about this practice from personal and non-personal point of views.

Key words:

Adverse possession; Adverse possessor; Color of Title (COT); Dispossession; Georgia test; Hostile dispossession; Majority test; Owner; Real estate; Statute of limitation.

Introduction

Adverse possession as a means of ownership or claim to ownership varies across state laws [1]. In Florida, the requirements for adverse possession include the following: (1) the person claiming adverse possession must possess the land openly, notoriously, and in a visible manner such that it is in conflict with the owner's right to the property; (2) this person must either have some sort of title on which to base claim of title or the person must have paid property taxes on the land claimed to be adversely possessed; and (3) this person must possess the land continuously and exclusively for a period of at least seven years [2]. Florida's law on adverse possession has certain elements built in that protect property owners and allow property owners to respond to adverse possessors claims through several legal maneuvers. For example, a prospective adverse possessor may be transformed into a trespasser if asked to leave the property by its rightful owner [2]. Thus, the law makes a clear delineation between owner and adverse possessor where the term "owner" refers to the original legal owner of a property rather than the adverse possessor of a property.

Under Florida laws governing adverse possession, where an individual or occupier defies an order to leave the property as personally communicated by the owner of the property, or if the trespasser does anything to cause destruction to the property, that trespasser is guilty of a misdemeanor of the first degree [Florida Statutes section 810.09] [2]. Additionally, in establishing adverse

possession, where one who becomes a trespasser is armed with a firearm or other dangerous weapon during the trespass, that person is guilty of a felony in the third degree under Florida Statutes. Thus, while adverse possession is often passionately viewed by real estate owners as an unreasonable and unfair process for others to make hostile claims of ownership, there are remedies to secure property owners' interests and rights. Thus, Florida's law has certain requirements to ensure that simple dispossession does not violate individuals' ownership rights. According to Buckley and Okrent (1997) [3], dispossession refers to a forced or fraudulent changing of possession of land from one person to another, and is also called ouster. Adverse possessors must understand the requirements of Florida law in order to avoid being charged with trespass; a misdemeanor of the first degree or felony where aggression and weapons are involved. Furthermore, they must meet the time period set by the statute of limitation under Florida law, usually seven (7) years.

Adverse Possession: Definition and Purpose

According to Anderson and Kumpf [1], the title to land may be acquired by holding it adversely to the true owner for a certain period of time, and specifically, as sufficient to meet the requirements specified by the law of any particular state. When this possession is maintained, the possessor will automatically become the owner of the property despite admittedly having no lawful claim to the land prior to adversely possessing it (Anderson and Kumpf [1]). Adverse Possession refers to a method of acquiring the title to real property by possession for a statutory period under certain conditions; that is, where an adverse possessor is someone who takes possession of property by a statute of limitations. Some individuals view adverse possession as a questionable legal practice in societies where it exists. However the

justifications and purposes of adverse possession provides sufficient rationale as to why this process is important: (1) it rewards people who use the land for useful purpose; (2) it punishes people for sleeping on their rights; (3) it establishes quiet title by means of a proceeding to establish a plaintiff's title to land by compelling the adverse claimant to establish a claim or be forever estopped from asserting it; (4) it helps eliminate conflicts and establishes one clear owner of property; (5) it proves title in property by having an evidentiary function where otherwise no title exists (whoever is on the land, if they have been there long enough then they are the owners) – this is consistent with Holmes' Theory, which states that when a man uses the land over a period of time there is a gradual association of one with the other as it takes root in his being and cannot be torn away without resenting the act however he came to possess the land. Furthermore, when there are mistakes in a deed or confusion over the description of the property, adverse possession can settle the matter.

General Legal Requirements or Elements of Adverse Possession

Adverse possession requires several elements to happen. The requirements for adverse possession include the following: (1) an actual entry giving exclusive possession, meaning that actual entry is required for adverse possession because it is necessary for the adverse possessor to be on the property for the owner to have a claim against him or her; (2) open and notorious occupation so that if there is another owner, he or she will be aware that the statute of frauds is running on the property. This means that the adverse possessor must use a reasonable manner in an open fashion and the adverse possessor must use the property the same way an owner of the property would use it. The theory behind the use of property or land is that it serves to put the true owner of the property on notice that someone is using that property; (3) possession must be adverse and under a claim of right, meeting the different ways the court approaches adverse possession – either by establishing or determining that an objective-state of mind is irrelevant (the Majority Test), which is used if the goal of adverse possession is to make titles clear and secure, through good faith where the required state of mind is, "I thought I owned it" or known as Georgia's Test and used if the Court wants to reward the adverse possessor for having a socially useful purpose for the property, and where there is aggressive trespass requiring a state of mind involving an "I thought I didn't own it, but I intended to make it mine" mindset, and is used if the purpose is to punish property owners for sleeping on their rights, or if the Court is concerned about the inactivity of the property owner (Dukeminier et al.) [4]. The final legal requirement for adverse possession is (4) possession must be continuous for the statutory period established by law or state statutes; it must involve exclusive possession for a period of time and be cannot be intermitted.

Anderson and Kumpf (1976) simplify the requirements for adverse possession by stating that, "In order to acquire title in this manner [through adverse possession], possession must be (a) actual, (b) visible and notorious, (c) exclusive, (d) hostile, and (e) continuous for a period of time" (p. 738). The period for adverse possession varies from state to state and occupation in the mistaken belief that one owns land usually satisfies "hostile possession." Adverse possession is usually curtailed by the law itself asserting individual property rights, and on many occasions, cases concerning adverse possession or attempt at such land in the court system before many individuals attempting to "seize" property in this way meet all the above requirements, especially the statutory time requirement. Thus, court systems are not

unnecessarily overburden with adverse possession cases. However, they are important and when they do exist, they bring into question fundamental property rights as well as other individually guarded and legally mandated rights.

Adverse possession transfers property by barring action by old owner and establishing new title with the adverse possessor. Regarding adverse possession, some theorists believe that good faith or bad faith doesn't matter, and neither a state of mind constituting psychological hostility, but rather hostility to the legal interest that the true owner has in the property. However, Twomey and Jennings (2011) [5] define adverse possession as the hostile possession of real estate, which when actual, visible, notorious, exclusive, and continued for a required period of time, will vest the title to the land in the person in such adverse possession. Furthermore, in some states, particularly Florida and Texas, an adverse possessor will require claim under a "Color of Title (COT)" by having some document, some writing, some statement that he or she thinks gives him or her legal right to the property. On June 2, 2011 the Republican Governor, Rick Scott, signed new adverse possession laws into being under Senate Bill No. 1142, Chapter 2011-107, amending s. 95.18, F.S. This section of Florida's Statute describing adverse possession under color or title and without color of title is discussed below (The Florida Legislature, 2014) [6].

Adverse Possession under Florida Statutes

In the State of Florida adverse possession occurs when a person loses title to his property because another person has occupied the land for at least seven (7) years, resulting in overlapping legal descriptions. In addition to the seven-year requirement, in order for an individual to adversely possess another's land, the individual must also possess the land in an open, notorious, and visible manner such that it conflicts with the owner's right to the property. In addition to these basic requirements for adverse possession, Florida law requires that an adverse possessor occupy the land for at least seven years and meet either of the two following requirements: adverse possession under color of title or adverse possession without color of title [2].

Under Florida Statute, section 95.16, adverse possession can take place under color of title or without color of title. An adverse possessor can claim property under color of title if he meets the following two conditions: (1) the adverse possessor must show that the claim of title to the land is based on a recorded written document (even if faulty). The adverse possessor must genuinely believe this document to be the correct claim of title (Bonifay v. Dickson, 459 So.2d 1089 [Fla. 1st DCA 1984; Seton v. Swann, 650 So.2d 35, Fla. 1995]; and (2) the adverse possessor must show possession of the property by doing one of the following to the land for at least seven years: (a) cultivating or making improvements; (b) protecting by a substantial enclosure (usually a fence); (c) if not enclosed, using the land for the supply of food or fencing timber for husbandry or the ordinary use of the occupant; and (d) partly improving a portion of a recognized lot or single farm, making the unimproved part, if in the custom of the area, considered occupied [2].

According to Olexa MT, Shuey EE, Cossey JA, Smallwood K (2010) [2], under Florida law, when an individual continuously occupies a property for seven consecutive years, lacking any legal document to support a claim to the land's title, he or she may establish adverse possession by filing a return with the county appraisers within one year of entry onto the property, and paying all taxes and liens assessed during possession of the property. This was recently addressed in the

amendments signed by Governor Rick Scott on June 2, 2011 [2], state that paying the taxes alone is insufficient to establish adverse possession or color of title under Florida statutes (Bentz v. McDaniel, 872 So.2d 978 [Fla. 5th DCA 2004]). The property is considered possessed only if the individual does one of these: (1) cultivates or improves the land, or (2) protects the land by a substantial enclosure, which is usually a fence (Mullins v. Culbert, 898 So.2d 1149 [Fla. 2005]).

Florida Statute Chapter 95, section .16 [95.16] outlines real property action and adverse possession under color of title. According to the Florida Statute 2011, possession commencing after December 31, 1945, shall not be deemed adverse possession under color of title until the instrument upon which the claim of title is founded is recorded in the office of the clerk of the circuit court of the county where the property is located (The Florida Legislature, 2014). Under Florida Statutes, property is deemed possessed in any of the following cases:

- (a) When it has been usually cultivated or improved.
- (b) When it has been protected by a substantial enclosure. All land protected by the enclosure must be included within the description of the property in the written instrument, judgment, or decree. If only a portion of the land protected by the enclosure is included within the description of the property in the written instrument, judgment, or decree, only that portion is deemed possessed.
- (c) When, although not enclosed, it has been used for the supply of fuel or fencing timber for husbandry or for the ordinary use of the occupant.
- (d) When a known lot or single farm has been partly improved, the part that has not been cleared or enclosed according to the usual custom of the county is to be considered as occupied for the same length of time as the part improved or cultivated (The Florida Legislature, 2014, p. 1) [6].

Under section 95.18 of the Florida Statutes concerning adverse possession without color of title, property is deemed to be possessed if the property has been: (a) protected by substantial enclosure; (b) cultivated or improved in a usual manner; or (c) occupied and maintained. Furthermore a person claiming adverse possession under this section must make a return of the property by providing to the property appraiser a uniform return on a form provided by the Department of Revenue. The return must include all of the following: (a) the name and address of the person claiming adverse possession; (b) the date that the person claiming adverse possession entered into possession of the property; (c) a full and complete legal description of the property that is subject to the adverse possession claim; and (d) a notarized attestation clause that states: "Under penalty of perjury, I declare that I have read the foregoing return and that the facts stated in it are true and correct" (The Florida Legislature, 2014, p. 1). There are several other rules and principles that adverse possessors are required to comply with, especially regarding tax and formalities with the County Appraiser.

Advantages and Disadvantages of the Application of Adverse Possession

Florida's statutes on adverse possession allow individuals to claim real estate that lies idle for extensive periods in the State, thereby putting what would have been wasted or idle land back into economic or productive use. This has several benefits including providing shelter

and food for families or individuals who would otherwise have no means of acquiring or owning real estate property, and also providing entrepreneurial opportunities including new business and employment where real estate acquired through adverse possession becomes the basis for business. In Florida, there are many properties that have been sitting wasted for several years, sometimes decades. However, because most Floridians are unaware of ownership by adverse possession and do not know the law, such properties, especially houses and buildings remain until they decay and fall apart and the lands on which they are located revert to forests or woodlands.

There are several disadvantages of the application of adverse possession as it exists under Florida law, and Bob Hurt of Clear Water, Florida, who is a blogger, is particularly knowledgeable on these. According to Hurt [7], the latest amendment made by Governor Rick Scott, who signed Senate Bill 1142 into law on June 2, 2011 modifying section 95.18, F.S. with regards to adverse possession, represents bad law for several reasons. Hurt [7] argues that in Florida, sheriffs tend to arrests adverse possessors for bogus crimes and the new law requires the property appraiser to return the adverse possessor's tax payment if the property owner pays later. Moreover, Hurt [7] argues that issues concerning adverse possession would not represent criminal, but civil law issues since we inherited adverse possession (AP) as a civil right, not merely a remedy, from English common law and statutory law (Florida Statute 2.01). Additionally, Hurt [7] argues that Florida Legislature has never bothered to codify the law regarding adverse possession so the people can know it and use it to protect their rights.

There are several other gaps or deficiencies in Florida's adverse possession law that act as disadvantage to both the adverse possessor and owner. According to Hurt [7], current law regarding adverse possession law should require the adverse possessor to provide notice to the owner, including any mortgagee or lien holder of record, the Home Owner's Association, and the Sheriff, all of whom may ultimately limit a claim that can ultimately affect possessory rights (p. 1). Furthermore he believes that if the adverse possessors cannot find the owners for the purpose of serving notice of AP, then they should be required to publish notice for two weeks in a newspaper that publishes legal notices. This makes sense as it helps the adverse possessor from facing further claims for violation by owners who later discover after-the-fact, or by the state where issues of legal claim comes before the courts. Hurt (2011) also believes that the law should require adverse possessors to provide photographic evidence on CD/DVD attached to the Notice of Adverse Possession as this is important in verifying condition of property and other important details necessary in claim and remedy by owners. This should also include requiring adverse possessors to keep a journal of maintenance and improvement of the realty for the statutory limitation period (the seven years as required by Florida law), since this meets a necessary requirement for adverse possession under Florida Statutes.

Modifications to Adverse Possession under Florida Statutes

Hurt (2011) sees several other problems with how Florida's current statutes regarding adverse possession are laid down, and believes that these can be rectified through several actions including the following: (1) allowing property owners to use court order and a writ of possession to get the sheriff's assistance in removing adverse possessors; (2) making adverse possessors pay for the cost of eviction when they are not willing to leave the realty after receiving a trespass warning, but not for any costs related to issuing trespass warning; (3)

requiring adverse possessors to provide photographic evidence of the condition of the realty immediately prior to final exit from it; (4) in case of eviction, requiring owners to pay for all of the adverse possessor's verified expenditures, including hourly rate for labor, for improvements to the property, and for taxes and other liens and assessments paid, and the adverse possessor should have the right to file a lien against the property for those amounts; and (5) providing for protection for adverse possessors against all aggressors who would interfere with their possessory dominion of the adversely possessed realty, except in the case of owner. Finally, Hurt [7] believes that the laws should be changed to allow the Florida Supreme Court to strike down the Sheriff's and Legislature's efforts to limit or criminalize adverse possession under the guise of protecting realty owners' rights.

Summary and Conclusion

Every American jurisdiction has one or more statutes of limitations that fix the period of time beyond which the owner of land is unable to bring action, or undertake self-help, for the recovery of land from another person in its possession. In the state of Florida, this is seven (7) years. Despite this, and the vast availability of lands that could be owned or claimed through adverse possession, Floridians overall are not educated about the law and the statutes regarding adverse possession. In fact, very few individuals, even most college graduates or otherwise highly educated individuals know what adverse possession means unless they have taken law courses or otherwise hear the term on law-related television series or from other media sources. Thus, there is a need to educate Floridians about adverse possession for several reasons: (1) to protect the rights of property owners; (2) to protect adverse possessors from misdemeanor trespass and felony where eviction challenges are met with aggression; and (3) to ensure

that there is a mechanism available to transfer property that does not violate the rights of property owners unreasonably and one which ensures that adverse possessors go through the right processes and channels to make claims on real estate. Adverse possession is at best controversial and it should be no surprise that the practice brings many challenges and problems to individual land owners, the adverse possessor, as well as the state. This increased education and awareness of the practice of adverse possession and its costs and benefits as an instrumental mode of not only preserving but ensuring property rights and ownership is very important from both an economic and legal perspective to individuals and the state.

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