



## WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

### Law of Adverse Possession

Adverse possession<sup>1</sup> is a legal doctrine by which a person who occupies another person's property for a specified period of time may gain title to that property. Today, the law of adverse possession derives from a combination of statutes and court decisions. This Information Memorandum provides background information and an overview of relevant judicial decisions and statutes. It also describes two significant changes to the law of adverse possession made during the 2015 Legislative Session.

#### **OVERVIEW**

The law of adverse possession operates as a statute of limitation.<sup>2</sup> Until the statutory time period elapses, a property owner may bring an action (typically a trespass action) to remove an adverse possessor. After the time period expires, if the requirements for adverse possession have been satisfied, a property owner is barred from bringing an action to displace an adverse possessor.

After the required elements are satisfied, an adverse possessor may bring an action to obtain legal title to property. However, once the required elements are satisfied for the requisite time period, ownership is vested in the adverse possessor by operation of law, whether or not an adverse possessor obtains a court ruling to that effect. [*Wilcox v. Estate of Ralph Hines*, 2014 WI 60 at ¶ 19; *United States v. Chandler*, 209 U.S. 447 (1908); *Steinberg v. Salzman*, 139 Wis. 118, 124 (1909).] For that reason, some scholars have argued that it is incorrect to characterize adverse possession as a conveyance of property from an original owner to a new owner; instead, they characterize adverse possession as a method by which an adverse possessor is deemed to have gained a superior title to property.<sup>3</sup>

Although all 50 states have adverse possession laws, the requirements to obtain property through adverse possession vary. In some states, adverse possession is only an option for adverse possessors who are relying on a deed or who have been paying taxes on the property to be adversely possessed. Required time periods for adverse possession range from five years to 30 years.

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<sup>1</sup> Although this Information Memorandum refers to adverse possession, the law of adverse possession also generally applies to obtaining use rights, such as prescriptive easements. [s. 893.28 (1), Stats.]

<sup>2</sup> A statute of limitation is a statutory time period during which a given cause of action may be brought in court.

<sup>3</sup> See, e.g., Henry W. Ballantine, *Title by Adverse Possession*, Harv. L. Rev. 135 (Dec. 1918).

Although the elements of adverse possession, discussed below, are fairly straightforward in theory, adverse possession cases are fact-dependent and can be difficult to resolve in practice. In general, Wisconsin courts have construed the law of adverse possession strictly, ruling in favor of an original owner in cases where an adverse possessor lacks “clear and positive proof” of adverse possession. [*Stone Bank Improvement Company v. Vollriede*, 105 N.W.2d 769 (1960); *Illinois Steel Company v. Budzisz*, 81 N.W. 1027 (1900).]

### **SUMMARY OF HISTORY, RATIONALES, AND MODERN CRITIQUES**

Adverse possession is an old doctrine. Although the U.S. colonies borrowed the concept most directly from England, the English law of adverse possession had ancient origins. For example, a concept of adverse possession was codified in Mesopotamian legal codes dating to around 2000 B.C.<sup>4</sup>

Over time, various rationales have been articulated to support the doctrine of adverse possession. Legal scholars and other commentators debate whether some of those rationales remain persuasive in today’s society.

During the colonial period, a common rationale for adverse possession was that land should be cultivated and not neglected. That rationale supports what could be described as the central concept of adverse possession law: that if an owner of property fails to remove trespassers within a reasonable time, property should then be owned by the person who is actually putting the property to use – i.e., the adverse possessor. The Wisconsin Supreme Court has characterized adverse possession as a “penalty upon the negligent and dormant owner, who allows another for many years to exercise acts of possession over his property.” [*McCann v. Welch*, 81 N.W.2d 996 (1900).] That theory has been criticized as being out-of-date with modern land use concerns, including conservation. It has also been criticized as creating unjust results, particularly in situations in which an adverse possessor has acted with an intention to deprive a rightful owner of land.

A common alternative rationale is that the law of adverse possession serves as a method for settling questions of ownership that arise from lost original deeds, or mistakes in conveyances, surveys, or building. Some scholars have argued that this rationale continues to be a persuasive justification for the law of adverse possession, because it provides a judicial mechanism for assigning ownership to the person who has the strongest connection to property.<sup>5</sup> Other scholars

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<sup>4</sup> Robert C. Ellickson and Charles DiA. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 Chi.-Kent L. Rev. 321 (1995-1996).

<sup>5</sup> See, e.g., Jeffrey E. Stake, *The Uneasy Case for Adverse Possession*, Geo. L.J., 89, 2419 (2001).

note that modern survey instruments render that rationale less necessary, or that the rationale could theoretically be eliminated by shifting to a new system for registering property ownership.<sup>6</sup>

## **STATUTORY TIME LIMITATIONS AND REQUIRED ELEMENTS**

The general time period for adverse possession in Wisconsin is 20 years. As described below, shorter time periods apply in some circumstances.

### ***20-YEAR STATUTE OF LIMITATION***

The general adverse possession statute establishes a 20-year statute of limitation for adverse possession. In addition to the required 20-year time period, an adverse possessor must satisfy several elements, derived from common law and codified in s. 893.25 (2), Stats., before property will be considered to have been adversely possessed.

The elements of adverse possession include: (1) actual possession; (2) hostile use; (3) open and notorious use; (4) continuous; and (5) exclusive use of property. [s. 893.25 (2), Stats.] All of the elements must be present for the entire statutory time period before property is adversely possessed. Each of the elements is described in greater detail below.

#### ***Actual Possession***

First, an adverse possessor must take actual, physical possession of land. A court will consider the nature of the activity on the land to determine whether activity constitutes actual possession. Property is actually possessed if either of the following applies:

- The property has been protected with a substantial enclosure.
- The property has been usually cultivated or improved.

[s. 893.25 (2) (b), Stats.]

#### ***Hostile Use***

Second, the use of property must be “hostile” to the rights of the property owner against whom adverse possession is claimed.<sup>7</sup> In other words, the acts of the adverse possessor must be inconsistent with the rights of the owner. Following a recent Wisconsin Supreme Court decision, *Wilcox v. Estate of Hines*, 2014 WI 60, the adverse possessor need not have had any animus against the original owner, but the adverse possessor must have had a subjective intent to adversely possess the property. Permissive uses of land, such as uses under a lease or uses otherwise authorized by the original owner, are not a valid basis for adverse possession.

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<sup>6</sup> See, e.g., Susan Lorde Martin, *Adverse Possession: Practical Realities and an Unjust Enrichment Standard*, 37 Wash. & Lee Real Estate L.J. 133 (2008).

<sup>7</sup> The statutes refer to the “hostility” element as “occupation under chain of title,” but the Wisconsin Supreme Court has held that the “claim of title” requirement is the statutory equivalent of the common law requirement that the occupation be “hostile.”

### ***Open and Notorious Use***

The use of property must also be “open and notorious.” In other words, the use must leave visible evidence on the property and must be sufficient to give the owner notice that the owner’s rights have been invaded. [*Burkhardt v. Smith*, 115 N.W.2d 540 (Wis. 1962).] Concealed, clandestine, or intermittent uses, such as occasional tree cutting, are not a valid basis for adverse possession.

### ***Continuous Use***

The possession must be continuous. The property need not be in use every moment, but if there is a break in possession, the claim of adverse possession is defeated and the statutory time period commences again. Courts will construe intermittent uses as continuous if the use is by its nature intermittent. For example, land which is possessed for grazing purposes each growing season may be held to be continuous, even though the land is not used during the winter. Possession by successive adverse claimants can be combined to meet the required period of possession, but only if there is evidence that the earlier possessor intended to transfer possessory interest to the successor.

### ***Exclusive Use***

Finally, the use of property must be “exclusive,” meaning that the adverse possessor must show an intent to exclude others, including the owner, from using the property.

### ***10-YEAR STATUTE OF LIMITATION BASED ON TITLE***

As an alternative to the 20-year adverse possession statute, a 10-year statute of limitation applies to adverse possession that is based on the title to the real estate. To adversely possess property under the 10-year adverse possession statute, the following elements must be satisfied:

- **Good faith claim of title.** The adverse possessor (or the possessor’s predecessors in interest) must have originally entered into possession of the real estate under a good faith claim of title, exclusive of any other right, founded upon a written instrument as a conveyance of the real estate or upon a judgment of a competent court.
- **Recording within 30 days of entry.** The written instrument or judgment must have been recorded within 30 days of entry.
- **Actual, continued occupation.** The adverse possessor (and the possessor’s predecessors in interest) must have actually and continually occupied all or a material portion of the real estate described in the written instrument or judgment.

[s. 893.26, Stats.]

### ***SEVEN-YEAR STATUTE OF LIMITATION BASED ON TITLE AND PAYMENT OF TAXES***

A second alternative to the 20-year statute, a seven-year statute of limitation, applies to adverse possession that is based on both the title to the real estate and payment of taxes by the adverse possessor during the statutory time period. To adversely possess property under the seven-year statute, an adverse possessor must satisfy all of the criteria applicable to the 10-year statute of limitation, described above, and the following additional criteria:

- **Recording within 30 days of execution.** Any conveyance of the interest or judgment must have been recorded within 30 days after the conveyance was executed.

- **Payment of property taxes.** The adverse possessor (and the possessor's predecessors in interest) must have paid all real estate taxes and other taxes levied, or payments required in lieu of real estate taxes, during the seven-year period.

[s. 893.27, Stats.]

### **INTERRUPTION OF ADVERSE POSSESSION BY AFFIDAVIT**

2015 Wisconsin Act 200 created a method by which a person may “interrupt” adverse possession by recording an affidavit with the appropriate county register of deeds. Such affidavits have the effect of interrupting an adverse possession before any of the statutory time periods described above are satisfied.<sup>8</sup>

In this context, “interruption” has the effect of erasing any accumulated “time on the clock” for an adverse possessor. A new period of adverse possession may begin for the same property after the affidavit is recorded. [s. 893.305 (5), Stats.]

The interruption may not be interpreted as an admission by a record title holder that the real estate is being possessed adversely. In addition, because the Act specifies that an affidavit of interruption is not the exclusive method for interruption adverse possession, it appears that the legal bases for removing an adverse possessor and challenging a transfer of title under prior law remain valid options under current law. [s. 893.305 (8), Stats.]

#### ***REQUIRED ACTIONS***

A record title holder must take all of the following actions to effectively interrupt an adverse possession under the Act:

- Record an affidavit of interruption that includes the components described below, together with a recent survey of the parcel, in the office of the register of deeds for the county in which the parcel is located.
- Provide a notice, which must satisfy specified criteria, to a neighbor or other known adverse possessor or, if the adverse possessor is unknown, in the official newspaper for the relevant county.
- Record proof of the notice in the office of the register of deeds for the relevant county.
- If the adverse possessor is a neighbor, record a notice of the affidavit of interruption on the neighbor's abutting parcel.

[s. 893.305 (2), Stats.]

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<sup>8</sup> The Act did not retroactively invalidate transfers of title for situations in which all of the elements of adverse possession have already been satisfied.

***REQUIRED COMPONENTS OF THE AFFIDAVIT***

An affidavit of interruption must include all of the following components:

- A legal description of the parcel of land that contains the real estate that is being adversely possessed or adversely used.
- A statement that the person executing the affidavit is the record title holder of the parcel.
- A general description of the adverse possession or adverse use that the record title holder intends to interrupt by recording the affidavit.
- A statement that the adverse possession or adverse use of real estate is interrupted and that a new period of adverse possession or adverse use may begin the day after the affidavit is recorded.

[s. 893.305 (3), Stats.]

***PROHIBITION OF ADVERSE POSSESSION OF GOVERNMENT PROPERTY AND BY GOVERNMENT ENTITIES***

As second enactment in the 2015 Legislative Session made a significant change to the law of adverse possession as applied to government property and to adverse possession by the state and local government entities.<sup>9</sup> 2015 Wisconsin Act 219, which took effect on March 3, 2016, specifically prohibits adverse possession against any real property that is owned by the state or a local government entity. The Act also prohibits adverse possession by the state or a local government entity against private property.<sup>10</sup> [s. 893.29, Stats.]

Under prior law, state and local government property could typically be obtained through adverse possession if the use of the property had continued for more than 20 years and the use was based on a continuously maintained fence line which was mutually agreed upon by the landowners. Courts will continue to interpret and apply that standard in cases in which an adverse possessor claims that the elements of adverse possession were satisfied before 2015 Wisconsin Act 219 took effect.

***PROSPECTIVE EFFECT OF CHANGES TO THE ADVERSE POSSESSION LAW***

The Legislature has changed the statutory time period for adverse possession several times over the years, particularly with regard to adverse possession of government property. In general, Wisconsin courts have held that changes to the statutory time periods for adverse possession

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<sup>9</sup> The Act applies broadly to any city, village, town, county, school district, sewerage commission, sewerage district, “or any other unit of government within this state.” [s. 893.29 (1) and (1m), Stats.]

<sup>10</sup> The Act applies prospectively and to adverse possessions for which the statutory criteria above have not yet been satisfied. The Act does not retroactively invalidate any property interests obtained under the law of adverse possession before the Act took effect.

have only a prospective effect. Specifically, when the statutory time period has changed, courts have generally held that the time period that was in effect when possession began controls whether land may be adversely possessed. [See, e.g., *Petropoulos v. City of West Allis*, 436 N.W.2d 880 (Ct. App. 1989).]

Courts have limited those holdings by noting that the statutory changes at issue did not clearly state that they applied retroactively. From the case law, it appears that a change to the adverse possession law could be applied retroactively if legislation included an express statement to that effect. [See e.g., *Wisconsin Department of Natural Resources v. Building and all Related or Attached Structures Encroaching on the Lake Noquebay Wildlife Area*, 2011 WI APP 119 at ¶ 17.]

However, legislation that retroactively eliminates adverse possession even as applied to adverse possessors who have already satisfied the statutory time period and all other elements of adverse possession may be subject to legal challenge. For example, because such adverse possessors have already obtained rights to the adversely possessed property by operation of law, elimination of their right to such property could be construed as an unconstitutional taking of property without just compensation.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

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