

BOUNDARIES AND EASEMENTS
RESOLVING BOUNDARY DISPUTES

Aaron M. Barton
Branscomb | PC
abarton@branscombpc.com
(210) 598-5400

I. Types of Boundary Disputes

- Adverse Possession
 - Under the theory of adverse possession, the party seeking to extend a property line to take in additional land may contend that he or she has made an actual, visible appropriation of the extra land, doing so under a claim of right inconsistent with and hostile to the claim of the adjoining landowner, for such a period of time as to bar the adjoining owner's claim of title. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.021 et seq. (West 2017); *see also McAllister v. Samuels*, 857 S.W.2d 768 (Tex. App.—Houston [14th Dist.] 1993, no writ).
 - Adverse possession is a statute-driven theory that allows a person making a claim to real property thereunder to rely upon various “limitations” periods prescribed in the applicable statute. To definitively establish title under a theory of adverse possession, however, litigation will be necessary.
 - Adverse possession is not always the ideal way to claim an extension of the boundary line, because some elements might be practically impossible to prove in boundary line litigation. Some of the limitation statutes (three-year, five-year, and one of the twenty-five year statutes) *require* the adverse possessor to base their claim upon a title or deed. *See McAllister*, 857 S.W.2d at 776. Therefore, if a deed specifically excludes the property in question from the legal description, certain of the statutes do not apply and the adverse possessor must rely upon one of the longer running limitations periods. *See id.*

- Adverse possession also requires a showing that the appropriation or use of the disputed area is so visible as to give notice of the adverse claim to the title holder of the real property being encroached upon. What this means is that a slight encroachment a few feet over the property line likely will not to give the property owner sufficient notice of an adverse claim. *See McAllister*, 857 S.W.2d at 776-77 (minor intrusion of fence line onto neighboring property did not provide notice of “hostile possession” of portion of real property to support claim for adverse possession); *compare Fish v. Bannister*, 759 S.W.2d 714, 718 (Tex. App.—San Antonio 1988, no writ) (extensive use of strip of land on neighboring property approximately 800 feet wide due to incorrect placement of boundary line fence supported adverse possession claim under 10-year statute).
- Easements
 - Easements can often lead to boundary disputes. Consider the situation where an easement is granted to a neighboring landowner to use the adjacent property for access to their landlocked property, where crossing over the boundary lines and in to a neighboring tract of land is a right. Other times, a road might have been constructed at or near the boundary line, potentially overlapping both properties. Perhaps over time, the necessity for the easement has ceased to exist, or the easement has been abandoned. But, there might still be a claim to ownership of the additional land on either side of the boundary line, or a right to cross the boundary lines completely as if they are non-existent (albeit in the context of a defined right), based upon necessity or prior use, especially when the real property is purchased by someone else who was not aware of the rights granted before.
 - Implied easements fall within two broad categories: (1) necessity easements and (2) prior use easements. *See, e.g., Hamrick v. Ward*, 446 S.W.3d 377 (Tex. 2014). Easements for support of adjoining land (falling under the prior use easement) are, by their nature, typically culprits in the boundary dispute context. An implied easement and the rights granted/obligations incurred along with an

implied easement are not always clear. Easements formed by implication are susceptible to dispute for this reason.

- Express easements granted to a public utility can also lead to boundary disputes, especially considering the potential for encroachments along the boundary line with utility poles, wires, pipelines, and other infrastructure needed to support the utility.
- Boundaries
 - A dispute between adjoining property owners may exist because of a conflict between the descriptions of the properties contained in deeds or surveys. Errors in legal descriptions prepared by surveyors are often sources of dispute, for example, if the surveyor relied upon incorrect landmarks when resurveying real property and preparing an updated legal description, or instead had to make an assumed extension of a property line due to the calls from a prior legal description not “closing.” *See e.g., Wall v. Carrell*, 894 S.W.2d 788 (Tex. App.—Tyler 1994, writ denied) (stumps were confused for trees referenced in prior legal description); *City of Webster v. City of Houston*, 855 S.W.2d 176 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (failure of calls to close and surveyor’s extension of lines to ensure the calls close created dispute in boundary lines).
 - The construction of improvements along the boundary line can also lead to disputes when the improvements encroach upon the neighboring tract of real property. This could be a fence line, extension of a residence or some other structure, constructing water and other utility extensions along the property lines, etc. Any time construction of improvements is done at or near a property line, there is a risk of encroachment and a dispute concerning the boundary lines arising.

II. Obtaining and Reviewing Boundary Evidence

- Official Public Records

- Often, a lawyer or title examiner is hired to assist with locating defects in title, or other matters that would impact the rights of property owners, such as boundary claims or other claims of right.
 - A usual starting point for someone examining title to obtain and review boundary evidence is the official public records (“OPR”) of the county in which the subject real property is located.
 - The Grantor/Grantee index is a relatively simple way to search the OPR of any given county to obtain evidence concerning title to real property, including the boundary lines, based upon documents filed of record under the names of the parties holding title (or previously holding title) to the real property.
 - Deeds, boundary agreements, easement agreements, judgments, affidavits, plats, and other documents establishing and/or showing boundary lines on a particular piece of real property *should* be recorded in the OPR to provide notice to all third parties dealing with the real property of any rights being claimed in the real property and the limits and confines of the real property.
- Abstract of Title
 - The title examiner has the benefit of hiring a professional abstract company to assist with the title review. These companies note every document recorded in the county, and upon request will compile all the recorded documents, or summaries of them, that affect the title to a particular tract of land or its record owner. This compilation is the “abstract.”
 - Disputed boundaries are one of many issues that a title examiner is looking for when reviewing an abstract of title and/or title to a tract of land, generally.
 - The title examiner, after reviewing an abstract of title and/or other title evidence, will usually prepare a preliminary report describing the state of title, likely owners of interests in the real property

(including potential ownership interests), easements, and other encumbrances.

- Once issues are identified, including disputed boundaries, the parties will be tasked with either solving the issues or accepting the risks the issues pose. Whether the problems are solved will likely impact the ability to obtain title insurance or may limit the protections afforded by title insurance.
- Physical Inspection (“On the Ground”)
 - Though by itself not always the most effective method of obtaining boundary evidence, a physical, on the ground inspection of a tract of land can assist with efforts to compile boundary evidence and provide a more complete picture (along with a more comprehensive land survey) of the boundaries of a tract of real property.
 - The inspection might make note of and document fence lines, markings that perhaps indicate boundary lines, driveways, improvements that have been constructed on or near boundary lines, and other features that could potentially set the boundary lines or amount to encroachments onto an adjoining tract of land or from an adjoining tract of land. At this point, the focus is on the physical field evidence, whereas a search in the OPR or obtaining an abstract of title is focusing on the written record evidence and/or prior field measurements.
 - The physical inspection will also address improvements that have been made since the prior survey was completed. It could be that the amount of improvements are limited, but it could also be the case that since a prior survey, the property has been extensively developed. As such, a physical inspection is an integral part of obtaining boundary evidence.
- Surveys
 - New Survey: Obtaining a new survey is always an option available to parties attempting to determine the boundary lines of a tract of

real property. A new survey is not a flawless method of determining boundary lines, as there is always room for human error in preparing the survey. But, obtaining a comprehensive survey is generally accepted as one of the more reliable methods of determining boundary lines and establishing the confines of a tract of real property.

- Prior Survey(s): Prior surveys are also helpful in obtaining boundary evidence, because they might show how unified tracts have been parceled out over time, thereby showing boundary lines on a particular tract of land. They will also show what was determined to be the state of title at the time they were conducted. A major drawback of relying solely on prior surveys is that with the passage of time, owners of real property might have conducted improvements on the property, granted interests in the property to adjoining landowners (such as an easement), or allowed utilities to construct improvements at or near the boundary lines, potentially creating encroachments. This is why a title insurance underwriter will often require a sworn statement in the form of an affidavit from a seller of real property that the property is more or less the same now as it was at the time of the prior survey when their survey is more than a few years old, subject to any improvements disclosed therein.
- Landowner's and Adjacent Owner's Records
 - Vesting Deed: The legal description contained in a vesting deed is often a good place to start when attempting to determine a tract's boundary lines. It should note the dimensions of the property, and identify the monuments relied upon to prepare the legal description.
 - Title Policy: A current title policy is also effective in obtaining boundary evidence because it will note potential encroachments, easements, and other interests in the real property at the time of issuance of the title policy. It will also often include a metes and bounds description of the real property. As with a prior survey, however, the status and nature of the property could have changed since the issuance of the title policy.

- Survey: Along the lines of the above concerning prior surveys, the current owner's survey is always a good place to begin when attempting to determine the boundary lines for a tract of land. Likewise, an adjoining landowner's survey is also a useful tool, especially when read in connection with the current owner's survey. This assumes that the adjoining landowner is willing to provide such information, or even has such information in their possession.
- Receipts for Improvements: While straightforward, never overlook the potential that an owner of real property might have personal records concerning the construction of improvements, e.g. fences, driveways, etc. along the boundary lines. Sometimes, they might also have the plans for construction showing where the improvements would be (or were supposed to be) located on the real property in relation to the boundary lines. These types of records might also be helpful in establishing ownership of additional land on the boundary line through an adverse possession action because it will show dates in time that the potential adverse possession began.

III. Methods for Establishing Disputed Boundaries

- Affidavits
 - Because intent of the grantor is paramount when attempting to establish disputed boundary lines, an affidavit from the grantor of a tract of real property wherein the boundary line is in dispute by the current owner of the property and an adjoining landowner can help establish the disputed boundary line.
 - The affidavit must be sufficient under the applicable evidentiary rules as an admissible form of evidence, i.e. the grantor's testimony, concerning the facts of the real property, in this instance, the boundary lines.
 - The affidavit is essentially the affiant's testimony concerning what the grantor believed to be the boundary lines during his or her term of ownership of the real property, what facts supported the grantor's

belief, what agreements the grantor might have had with a neighboring landowner, etc.

- Likewise, the neighboring landowner might also prepare an affidavit concerning the facts as the neighboring landowner knew them to be.
 - Ultimately, there might be competing affidavits requiring submission to the courts for a judicial determination. There is also the risk that affidavits can/will create a cloud on title to the real property until ultimately resolved.
 - The affidavit will need to be recorded in the OPR of the applicable county or counties so that third parties dealing with the real property will have notice of the claims being asserted in the affidavits. If there are not competing affidavits in the public records, the statements made in the affidavit can be presumed to be true. This is not *always* sufficient for a title examiner or underwriting counsel for a title insurance company.
- Obtaining a New Survey
 - A new survey often can resolve boundary disputes or problems in existing property descriptions that might have arisen as property has changed hands throughout the years. The new survey can definitively establish those boundary lines that might be in dispute or close calls in the legal description of the real property being resurveyed in the event that a prior survey did not close.
 - Issues can arise, however, with a new survey. Most notably, if the new survey changes the boundary lines, one of the landowners will potentially be unsatisfied with the result, particularly the landowner that stands to lose a portion of their property due to the new boundary lines.
 - The adjoining landowner will often want to obtain their own survey to either reaffirm the supposed new boundary lines or alternatively, establish different boundary lines.

- If there are conflicting surveys, the most persuasive survey will be the survey that follows what is referred to as the “dignity of calls.” The “dignity of calls” is when a surveyor gives priority to the calls of the original grant in the following order: 1) natural objects; 2) artificial objects; 3) course or direction; and 4) distances. *See Mohnke v. Greenwood*, 915 S.W.2d 585 (Tex. App.—Houston [14th Dist.] 1996, no writ) (survey following fence *not* referred to in original grant and failing to reference any natural or artificial objects deemed not sufficient to set true boundary line). As such, the surveyor should, to the greatest extent possible, follow the “dignity of calls” in order to set the true boundary lines for a disputed tract of real property.
- The main consideration when courts consider competing surveys in order to establish disputed boundary lines is determining what the intent of the grantor was when they conveyed the property. The grantor’s intent can override a literal application of the “dignity of calls,” but a common problem is that the grantor is not always available to testify as to their intent, for any number of reasons.
- Boundary Agreements
 - Written Agreement: The parties in a dispute over boundary lines might wish to forego the courtroom altogether for various reasons. The courts can be unpredictable, final, and one side will inevitably be the “loser” in courtroom proceedings. Assuming the parties are at a point where they can agree to a resolution of the disputed boundary lines, they might enter into a written boundary agreement that usually involves a new survey to set the boundary lines, an agreement signed by both parties establishing the boundary lines per the new survey, and recordation of the boundary agreement in the OPR of the applicable county or counties.
 - Implied Agreement: The parties may alternatively agree to new boundary lines without entering into a written agreement. For example, the parties might just agree to settle the dispute by agreeing to mark the boundary lines on the ground by erecting a fence or by referencing other physical monuments, e.g. the tree line. The

drawback, of course, is that third parties dealing with the real property might not know of the agreement. But, even without a written agreement, an implied agreement can be enforceable and binding when there is proof that the boundary line was uncertain and the parties agreed to set the boundary line and carry out the agreement by erecting a fence or otherwise marking the boundary lines. *See, e.g., Cervantes v. Ramirez*, 414 S.W.2d 233 (Tex. Civ. App.—San Antonio 1967, no writ).

- Judicial Proceedings
 - A judgment from a court can set boundary lines that are in dispute. This method of establishing the true boundary lines will require one of the parties to file a lawsuit, either as a trespass to try title action, or requesting a declaratory judgment from the court establishing the true boundary lines.
 - The traditional method of establishing boundary lines through the courts is a trespass to try title action, in which both parties are claiming title to the same tract of land. This action extends to boundary disputes because both parties are making a claim to title of even just a disputed strip of land. *See Martin v. Amerman*, 133 S.W.3d 262 (Tex. 2004).
 - Under the Declaratory Judgments Act, a declaratory judgment is available when the *sole* issue before the court concerning title to the real property is the determination of the proper boundary line between the adjoining property owners. *See Northwest Indep. Sch. Dist. v. Carroll Indep. Sch. Dist.*, 441 S.W.3d 684 (Tex. App.—Fort Worth 2014, pet. denied). The main point here is that in order to support a request for declaratory relief (rather than the more general action of trespass to try title), the relief sought by the parties must be limited solely to establishment of the disputed boundary line rather than title to the property as a whole. *See id.*

IV. Participating in Dispute Resolution Techniques

- Litigation: Litigation is asking the court to resolve your dispute. Or rather, litigation will place the boundary dispute before a judge, jury, or both.

Litigation will determine a “winner” and a “loser” in the dispute, and while the parties might have the right to appeal the result, there will ultimately be a resolution of the dispute that the parties must abide by. This avenue takes the most control away from the parties to the dispute, and can create additional turmoil between “neighbors.”

- Arbitration: Like litigation, the parties are placing the fate of their dispute in the hands of third parties for resolution. Unlike litigation, the dispute will not be determined by a judge or jury, but by an arbitrator (or panel of arbitrators) under a different set of rules. While the parties might retain a little more control over the discovery process and rules governing the dispute, the arbitrator’s decision is final and binding, and the parties must accept the result.
- Mediation: Mediation is when the parties to a dispute attempt to resolve the dispute by involving a neutral third party to point out the strengths and weaknesses of the case, suggest alternatives that maybe the parties had not considered, and also takes some of the emotional investment out of the dispute. Mediation is typically non-binding, but provides far greater control to the parties to the dispute to work out differences, consider potential flaws in their case, and hopefully, come to some type of resolution before relinquishing control of the dispute to the courts or an arbitrator.
- Agreements: Mutual agreements between the parties provide the most control to the parties when it comes to resolving a boundary dispute. Here, the parties can agree to anything they want (assuming it is not illegal) in relation to the boundary issues. They can set boundary lines, they can agree to maintenance obligations, use of each other’s properties, and any other issue that is creating the dispute. The main drawback with attempting to resolve a boundary dispute by mutual agreement is that it requires a willingness on the part of all parties to actually agree.
- Title Insurance: Title insurance can assist with the resolution of boundary disputes through the claims process. Perhaps an adjoining landowner is claiming an ownership interest along a boundary line, or there is an encroachment on to adjoining property. If not specifically excluded from coverage under the title policy, title insurance might initiate litigation to resolve the claim and/or defend title to the property, offer a settlement to

the party creating the dispute in an effort to resolve the dispute, or if the claim amounts to a loss under the policy that cannot be resolved, pay the owner impacted by the adverse claim for the loss. The claims process requires participation from the owner making the claim, and failure to participate or respond timely can be detrimental and allow title insurance to deny the claim altogether.

- V. Examining Boundary Dispute Case Studies: Exploring Techniques for Resolving Sample Disputes