Adverse Possession after House Bill 1148

by Geoffrey P. Anderson and David M. (Merc) Pittinos

The 2008 Colorado General Assembly made significant changes to Colorado's adverse possession law. This article examines the law before and after the new statute and offers some thoughts on where this area of the law is headed.

A highly contentious and nationally publicized adverse possession suit in Boulder[1] led the Colorado General Assembly to make adverse possession reform a high priority during the 2008 legislative session. House Bill 08-1148 (Act),[2] which took effect on July 1, 2008, is the result of that reform effort and has radically altered Colorado's statutory adverse possession law.[3] This article summarizes the changes and outlines the potential effect of the Act on future adverse possession suits and claims.[4]

The Act amends the adverse possession statute in four fundamental respects:

1. The burden of proof in adverse possession cases filed on or after July 1, 2008 is heightened (regardless of when the adverse possession claim accrued), so that the elements of adverse possession now must be proven by clear and convincing evidence rather than by a preponderance of the evidence.[5]
2. For claims where title by adverse possession vests[6] on or after July 1, 2008, an adverse possessor must prove all common law elements of adverse possession and establish a reasonable good faith belief that the person adversely possessing (or his or her predecessor) was the true owner of the property.[7]
3. The Act gives the court discretion to award damages, if fair and equitable under the circumstances, to the person losing title.[8] These damages may include the actual market value of the property lost, as well as the amount of taxes and other assessments (plus interest at the statutory rate) paid by the losing party during the period commencing eighteen years prior to the suit and ending the date a final, nonappealable judgment is entered.[9]
4. If a party asserts adverse possession as an affirmative defense to a claim for trespass, forcible detainer, forcible entry, or other similar claim (rather than as a direct claim), the burden of proof remains the preponderance of the evidence standard.[10] In this situation, the putative adverse possessor must give up its claim to legal title to and possession of the disputed parcel.

These changes are discussed below.

Heightened Burden of Proof—Clear and Convincing Evidence

For adverse possession suits filed on or after July 1, 2008, an adverse possessor must establish his or her claim by clear and convincing evidence rather than by a preponderance of the evidence.[11] This change reverses *Gerner v. Sullivan*,[12] where the Colorado Supreme Court held that under CRS § 13-25-127(1), the proper standard was preponderance of the evidence.[13] *Gerner* overruled *Raftopoulos v. Monger*,[14] a 1983 Colorado Supreme Court case holding that one claiming title by adverse possession has the burden of proving the claim by clear and convincing evidence.[15]

In *Gerner*, the Colorado Supreme Court identified standards of proof that had been used in prior adverse possession cases.[16] These standards included clear and convincing, competent and adequate, and clear and satisfactory evidence.[17] The Court noted that CRS § 13-25-127, which established the preponderance of the evidence standard for civil cases, was designed to eliminate the often arcane and difficult distinctions among different burdens of proof.[18] The Court also cited the various burdens of proof in Colorado's adverse possession cases as an illustration of the inconsistencies the statute was designed to address.[19]

Proof of a fact by a preponderance of the evidence means proof that leads the trier of fact to find the existence of a contested fact more probable than not.[20] Proof by clear and convincing evidence is proof that persuades the trier of fact that the truth of the contention is highly probable, or without serious or substantial doubt.[21]

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The clear and convincing standard falls between the preponderance of the evidence and beyond a reasonable doubt standards. Although the clear and convincing standard should be more difficult to prove than the preponderance of the evidence standard, the practical difference between these standards is not clear in the context of an adverse possession claim.

Adverse possession decisions are inherently fact-specific.[22] To establish adverse possession, a claimant must prove multiple elements whose tests are elastic and provide the trier of fact with flexibility and discretion. As a result, it is not likely this new standard will have a significant impact on the outcomes of adverse possession cases, though it may provide an avenue for uncertainty and more litigation. In particular, it will be critical in future adverse possession cases to consider the heightened burden of proof when citing adverse possession appellate decisions decided between 1989 and the first appellate decision under the revised statute, because these cases were decided under the preponderance of the evidence standard. Appellate cases decided before 1989 will be most relevant to decisions under the heightened burden of proof.

The Act's Effect on Claims Where Title Vested Prior to July 1, 2008

The changes to the adverse possession statute went into effect on July 1, 2008.[23] The clear and convincing burden of proof applies to all adverse possession cases filed on or after July 1, 2008, even if title vested in the adverse possessor prior to July 1, 2008.[24] All of the other statutory changes apply to cases where title vests through adverse possession on or after July 1, 2008.[25] Thus, if a party can show that title vested by adverse possession prior to July 1, 2008, he or she will not have to demonstrate good faith as required by the new statute,[26] pay the fair market value of the property as compensation to the party losing title,[27] or reimburse the party losing title for taxes and assessments levied and paid (plus statutory interest).[28]

To avoid the most significant statutory changes, parties asserting adverse possession claims will vigorously seek to establish that an adverse possessor's title vested prior to July 1, 2008. Success on this front will protect clients from the possibility of an award of market value damages and reimbursement for taxes and assessments paid and from the need of establishing that the client or a predecessor reasonably believed in good faith that he or she was the actual owner of the property adversely possessed.

Proving All Common Law Elements of Adverse Possession

The Act requires that a party prove all common law elements of adverse possession.[29] Identifying the common law elements of adverse possession is more difficult than it might seem—no single Colorado case clearly defines and analyzes all of the elements, and cases define the list of elements and the tests for each element differently. Additionally, this seemingly innocuous provision potentially could gut three, if not more, judicially created presumptions of adverse possession law.

Elements of Common Law Adverse Possession

The most recent appellate decision to state Colorado's adverse possession test is *Schuler v. Oldervik*.[30] Under *Schuler*, a party must prove that the disputed parcel was possessed for the statutory period of eighteen years and that the possession was hostile, adverse, actual, under a claim of right, exclusive, and uninterrupted.[31] Once a claimant demonstrates that he or she has been in actual and exclusive possession of the property for the statutory period, a presumption arises that this possession was adverse; however, for this presumption to arise, the use must be sufficiently open and obvious to apprise a true owner who exercises reasonable diligence that the possessor intends to claim adversely.[32]

This test originated in the 1983 Colorado Supreme Court decision *Raftopoulos v. Monger*.[33] *Raftopoulos* highlights two problems with the current adverse possession test. First, when outlining the elements of adverse possession, the case does not require open and notorious possession. *Raftopoulos* cited *Dzuris v. Kucharik*,[34] where the Colorado Supreme Court eliminated the element of open and notorious possession, without explanation.[35] This is notable because the requirement of open and notorious possession is the backbone of adverse possession law;[36] it is designed to prevent surreptitious land theft and ensures an adverse possessor's conduct is sufficient to provide the record owner with notice of the adverse claim.

It is not clear whether the elimination of open and notorious possession as an element of adverse possession was intentional or accidental, because there is no discussion in *Dzuris* regarding the change. As recently as 2006, the Colorado Court of Appeals required proof of open and notorious possession in a case involving adverse possession of water rights.[37] Open and notorious possession also is required in prescriptive easement cases.[38] The statute of limitations for adverse possession of water rights and for prescriptive easement cases is established by CRS § 38-41-101 and is not different from the statute of limitations for adverse possession of land. In any event, most cases decided before 1983 require open and notorious possession, while most cases decided after 1983 do not (with the exception of water rights and prescriptive easements).

To comply with the new statutory requirement that an adverse possessor present evidence to satisfy all common law elements of adverse possession, Colorado appellate courts will need to decide whether a person claiming title by adverse possession must prove open and notorious possession. Such a resolution is critical because, as discussed below, it is likely that the common law presumptions applicable to proof of adverse possession claims will no longer apply. If the presumptions are eliminated, the requirement of proof of possession sufficiently open and obvious to apprise the true owner, in the exercise of reasonable diligence, of an intention to claim adversely, will no longer be required. In that case, it will be

essential that the courts address whether open and notorious possession is required.

Additionally, in *Raftopoulos*, and in a few cases decided after *Segelke v. Atkins*,[39] courts have inserted a comma between "hostile" and "and under a claim of right."[40] Prior to *Segelke*, the adverse possession test typically was patterned after the test in *Haymaker v. Windsor Reservoir & Canal Co*.[41] That case provided that possession must be: (1) actual; (2) adverse; (3) hostile to the owner and under a claim of right; and (4) open, notorious, exclusive, and continuous.[42] No Colorado case has defined a difference between hostility and claim of right, and cases that have explained these elements do not draw a distinction between them.[43] Several leading property law treatises state that there is no distinction;[44] multiple law review articles define the element as "hostile under a claim of right";[45] and the Washington and Nebraska Supreme Courts have held that "hostility" and "a claim of right" are the same element.[46] Separating these elements seems an unnecessary complication to adverse possession law.

Under Colorado law, to establish hostility, the person claiming adverse possession must occupy the property with the belief that the property is his or hers and not another's.[47] Colorado's case law is not clear whether an adverse possessor must prove a claim that is both "hostile" and "under a claim of right" or "hostile under a claim of right." The courts could treat these elements as one or define a difference between the elements. Treating these two elements as one would simplify the common law test, ensure consistency in the common law of adverse possession, and help provide more clarity in what an adverse possessor must prove when presenting evidence to satisfy all of the elements of a claim for adverse possession under common law in Colorado. If the open and notorious element is recognized and hostility and claim of right are treated as one rather than distinct elements, a claim of adverse possession would be established with proof of possession that is: (1) actual; (2) adverse; (3) hostile under a claim of right; (4) open and notorious; (5) exclusive; and (6) continuous for the statutory period.

Meaning of the Elements

Just as the adverse possession cases over the last several decades include different tests and burdens of proof, these decisions also define the elements differently and sometimes in contradictory fashions. For example, in *Segelke*,[48] the Colorado Supreme Court held that when an adverse possessor acknowledges or recognizes the title of the owner during the period of the claimed adverse possession, he or she fatally interrupts the adverse possession.[49] In contrast, in *Schoenherr v. Campbell*,[50] the Colorado Supreme Court held that recognition of record title does not demonstrate an intent not to possess adversely, and such recognition might even strengthen a claim of adverse possession.[51]

This type of contradiction makes analysis of adverse possession claims difficult both for judges and attorneys. To assist in that process, below is a summary of the tests associated with each of the elements and, where appropriate, an explanation of what type of conduct is required to prove each of these elements.

Actual possession: the what and where of adverse possession. Proof of actual possession focuses on the type of use (farming, grazing, hunting, or other uses) supporting an adverse possession claim and the physical boundaries of that use. Acts characterizing possession as "actual" depend on the nature and location of the property, the uses to which it can be applied, and the facts and circumstances of a particular case.[52] The more similar the alleged adverse use is to the typical use of the property, the more likely a court will find that use is actual. For example, grazing cattle on someone else's property historically used for grazing satisfies the element of actual possession; hunting on land historically used for grazing might not satisfy the element of actual possession.

The extent of actual occupancy is a question of fact for the trial court to determine.[53] The boundary might be defined by a fence line or other structure, or a court might determine the boundary by analyzing factors like the evidence of visible occupation by the adverse possessor, the characteristics of the property, and the land necessary for the adverse use.[54]

Adverse—not permissive—possession. Adverse use is use that is not permissive.[55] If permission to use property is given during the period of adverse possession, the adverse claim is defeated.[56] This is an issue on which many adverse possession cases are resolved. Thus, it is critical to inquire, when investigating the facts surrounding an adverse possession claim, whether the record owner granted permission to use the disputed parcel to the party (or his or her predecessors) claiming title by adverse possession. Some courts and commentators examine permissive use in the context of an analysis of hostility. If Colorado were to do so, the test for adverse possession could be simplified without any impact on the substantive law of adverse possession.

Hostile under a claim of right: claiming property as one's own. To establish hostility, the person claiming adverse possession must

occupy the property with the belief that the property is his or hers and not another's.[57] In *Antholz v. Squirrell*,[58] the party claiming title by adverse possession built a fence as a boundary between two properties, but the fence did not mark the true boundary line. The parties and their predecessors in interest believed they were possessing their own land. The court upheld the finding that hostile possession had been established.[59]

The Colorado Court of Appeals also has held that maintenance of a fence and seasonal grazing of cattle are sufficient acts to prove hostility.[60] The Colorado Supreme Court has held that irrigation, gardening, and stock grazing, in conjunction with a longstanding belief of ownership, are sufficient to prove hostility.[61]

As discussed below, the new statutory "good faith" requirement[62] may not require adverse claimants to prove anything other than hostility. For example, in *Brehm v. Johnson*,[63] the court of appeals noted, "[t]he hostility requisite to establishing adverse possession in such circumstances is merely that of a person occupying property with the belief that the property is his own." The difficulty courts will face is whether proof of the "belief" requires inquiry into what an adverse possessor believed (his or her subjective intent), the adverse possessor's conduct, or both. The Colorado Supreme Court first addressed the complications of this analysis in *Vade v. Sickler*.[64] This issue is one that will be resolved in future decisions as the courts grapple with what constitutes a reasonable good faith belief that the adverse claimant or predecessor was the actual owner of the disputed property.

Open and notorious possession: overt acts. Very few Colorado cases discuss the element of open and notorious possession. *McIntyre v. Board of County Comm'rs, Gunnison County*,[65] a public road by prescription case, states that notice of a claim must include some overt act that would put a reasonably diligent landowner on notice of the adverse possessor's claim.[66] What use is sufficient to establish open and notorious possession is case-specific; it will depend on the nature and characteristics of the land, the type of use, and when the use takes place. These acts could include grazing on fenced land, farming, erecting or maintaining a fence or other barrier, maintaining a ditch, irrigating, leasing, planting a garden, paving or using a driveway, and building or maintaining a shed or other structure. Whatever the act, it must be overt and it must provide notice of the adverse claim—secretive possession will never become adverse possession.[67] The requirement of open and notorious possession thus provides a mechanism for preventing surreptitious land theft.

Exclusive—not joint—possession. To establish exclusive possession, the possession must be such that the true owner is wholly excluded from the property.[68] When possession by the adverse possessor and the record owner is joint or common, the possession is not exclusive.[69] In *Raftopoulos*, the Colorado Supreme Court held that possession of the disputed parcel was joint, and not exclusive.[70] Raftopoulos held title to the property and used the property three to fifteen days a year for grazing sheep.[71] Monger claimed the land by adverse possession; he used the property for grazing cattle and also maintained a fence around the disputed parcel.[72] The fence was gated and not "sheep-tight."[73] Raftopoulos's sheep could easily pass through and under the fence into the disputed parcel.[74] The Court held that even though Raftopoulos used the disputed parcel only three to fifteen days per year, his use was consistent with the nature of the land and was not a casual or limited entry.[75] The parcel was arid, sheep could graze the entire area very quickly, and the use of the parcel was part of Raftopoulos's regular annual grazing regimen. Because this use, although limited, was part of customary ranch operations, Monger's use was not exclusive.[76]

Continuous: all elements, all eighteen years. Each common law element of adverse possession must be established for the entire eighteen-year period. When analyzing continuity, courts often are asked whether seasonal use is continuous use. Whether seasonal use is sufficient to show continuity will depend on the nature of the property and how that property typically is used. For example, seasonal farming, seasonal grazing, and seasonal use of vacation property are typical and can be sufficiently continuous to establish this element.

Additionally, issues of continuous use arise when the record owner grants permission to use property or the adverse claimant recognizes the record title of the owner.[77] Transfer of property does not defeat evidence of continuity. By statute, as long as there is no interruption of the adverse possession between successive owners, successive periods of adverse possession can be "tacked" together.[78]

Although not explicitly stated in the Act, the new "good faith" requirement was not intended to require proof of continuous good faith possession for the entire statutory period. The Real Estate Section and Legislative Policy Committee of the Colorado Bar Association (CBA) worked closely with the legislature to draft and modify the statutory language. James Benjamin, on behalf of the CBA, provided testimony[79] and handouts to the legislature outlining positions regarding various proposals related to the adverse possession bill. One of those handouts[80] notes:

> someone in the adverse possessor's chain of title must have had good faith but it is not necessary that everyone have had such good faith or that it need exist for the entire 18-year period.

Although the statutory changes implicitly acknowledge this point, it is possible to read this subsection and not be clear whether the legislature intended a requirement that good faith be proven over the entire statutory period. One second of good faith during the

eighteen-year statutory period is sufficient to establish this new element.

What Happens to the Presumptions

Colorado courts have defined four tests by which an adverse claimant can establish a rebuttable presumption of adverse possession. The claimant establishes the presumption by either: (1) proving two or more elements of the adverse possession test; or (2) showing that property owners believed that a boundary was established by a fence for more than eighteen years. It is not clear how the Act will impact these presumptions.

First, *Harren v. More*[81] holds that where the original entry is not permissive (that is, where the possession is "adverse"), the claimant must prove only exclusive and continuous possession for the statutory period to create a presumption that the possession was adverse. The possession also must be sufficiently open and obvious to apprise the true owner, in the exercise of reasonable diligence, of an intention to claim adversely, and must constitute such control and dominion over the premises as usually and ordinarily are associated with ownership.[82] Although no Colorado case discusses this issue, this presumption test appears to require proof of all of the elements of common law adverse possession. Nonetheless, because the statutory changes require that a claimant establish all of the common law elements of adverse possession, it appears that courts no longer can rely on this presumption when analyzing proof of adverse possession.

Second, *Sleeping Indian Ranch, Inc. v. West Ridge Group, L.L.C.*[83] holds that a presumption of adversity arises after the claimant demonstrates that he or she has been in actual and exclusive possession of the property for the statutory period. To receive the benefit of this presumption, the claimant's use must be sufficiently open and obvious to apprise the true owner, in the exercise of reasonable diligence, of an intention to claim adversely.[84] Like the test in *Harren*, the language of this test, although it focuses on different elements, may be broad enough to require proof of all of the elements of adverse possession. Regardless, the Act's changes probably eliminate a claimant's ability to establish a rebuttable presumption of adverse possession.

Third, *Haney v. Olson*[85] holds that to establish a presumption of adversity, the party claiming adverse possession must submit sufficient evidence to allow the court to conclude that possession was actual, adverse, hostile, open, notorious, exclusive, under claim of right, and continuous for the statutory period (which, of course, is the adverse claimant's entire case). This presumption appears an anomaly, has not been cited by later cases, and probably will not be affected by the new statutory provision requiring proof of all elements of common law adverse possession.

Fourth, when two property owners believe that a fence has marked the true boundary of the property for at least eighteen years, there is a presumption of adversity.[86] The burden then falls on the record owner to overcome the presumption.[87] If the record owner cannot provide evidence sufficient to overcome the presumption, the trial court is obligated to find in favor of the adverse

claimant.[88] The Act's changes also appear to eliminate a claimant's ability to rely on the existence of a fence to establish a presumption of adverse possession.

When deciding an adverse possession case under the new statutory provisions, one of the first issues that trial courts will confront is whether the statutory changes effectively invalidate the ability of claimants to rely on these presumptions. If so, the presumptions would not be applicable to adverse possession cases filed on or after July 1, 2008.[89] It appears that the changes effectively invalidate these presumptions, but the appellate courts will have to resolve this issue.[90]

Reasonable Good Faith

Under the Act, the adverse claimant or a predecessor in interest of the claimant must have a good faith belief that he or she was the true owner of the property.[91] The adverse possessor also must establish that this belief was reasonable under the circumstances.[92] In the context of adverse possession law, "good faith" means that the claimant believed that the land belonged to him or her.[93] "Bad faith" means the opposite: continuing a trespass the claimant knows to be without right.[94] The difficulty courts will face is determining what type of evidence is appropriate to establish good faith.[95]

Colorado's new good faith requirement is very similar to the test for establishing hostile possession. When analyzing whether good faith should be considered in adverse possession suits, commentators typically focus on the relationship between a claimant's good faith and proof that the possession is hostile under a claim of right.

Colorado's courts consistently have held that the hostility required to prove adverse possession is merely that of a person occupying property with the belief that the property is his or her own.[96] Because of the similarity of the requirements of good faith and hostility, it is not clear that the new good faith requirement will affect how courts decide adverse possession cases. Although the statute does not state how the inquiry must be made, it requires courts to determine what a claimant or his or her predecessor believed about the state of the title of the land being possessed. This belief might be established by proof of conduct (the "pure possession" approach); by proof of subjective intent (the adverse possessor's mental state); or both. Regardless of which method courts choose, proving good faith will not be easy. The difficulty was addressed by the Colorado Supreme Court in *Vade v. Sickler*:

> Where one holds possession beyond his true line in good faith believing the additional land to be embraced within the description in his deed, and later, still so believing, make conveyance of the land, it is patently impossible for him thereafter to assert with finality what he would have done, or what his intent would have been, had he learned during his ownership that he was occupying beyond his true line. There could be no existing intent in relation to a non-existing situation, and any subsequent declaration of intent could be only a supposition or surmise largely by rationalization, with little if any probative value.[97]

One recent commentator provided additional explanation:

> In a great many adverse possession cases, there is simply no evidence of the possessor's intent, nothing to show one way or another whether he honestly thought the property belonged to him.[98]

By injecting the question of intent into the analysis of adverse possession claims, Professor R.H. Helmholz worried that courts would be encouraging speculation—and even perjury—with very little benefit.[99] The Act puts the pure possession versus subjective intent debate squarely before the courts.

Interestingly, when deciding the Boulder case that prompted the enactment of the Act, the trial court used a pure possession approach to analyze the facts supporting the adverse possession claim. When citing the test for hostility, the trial court relied on the following:

> For use to be "hostile," the adverse possessor must demonstrate an intention to claim exclusive ownership of the property occupied. The possessor need not have the specific intent to take property from the owner for the hostility requirement to be satisfied.[100]

In finding hostility, the trial court noted:

> Plaintiffs knew that the disputed property was owned by someone else, and Mr. McLean testified that neither he nor Ms. Stevens asked for permission from Defendants to use the disputed property.[101]

The trial court did not cite those cases that hold that proof of hostility requires proof that the adverse claimant occupied the property with the belief that it was his or her own. Instead, the trial court took a pure possession approach to analyzing hostility. The trial court could have analyzed subjective intent, but did not.[102] The question that the courts now will have to resolve is whether trial courts must analyze subjective intent, conduct, or both when analyzing hostility.

Damages and Reimbursement of Taxes and Assessments (Plus Interest)

Under the Act, courts are provided the discretion, when fair and equitable under the circumstances, to order a monetary award to the party losing title by adverse possession. The court can award damages measured by the actual value of the property and award all or part of the taxes and assessments levied and paid by the party losing title, plus statutory interest, over the time period commencing eighteen years before the adverse possession action is filed and expiring on the date of the award or entry of final nonappealable judgment, whichever is later. For example, if a parcel adversely possessed is assessed $500 in taxes every year during the eighteen-year period, the adverse possession claim is filed immediately after title vests, and the case is resolved by the Supreme Court six years after the case was filed, the adverse possessor would have to pay the market value of the property plus an additional $40,000 for taxes and interest.

The statute does not state what date should be used for the market value calculation. It could be calculated on the date that adverse possession commences, the date that title vests by adverse possession, the date a suit is filed, or the date trial commences. One commentator has suggested that the date for measuring market value should be the date that adverse possession commences, because in adverse possession suits title relates back to the date of original entry.[103] The Colorado Supreme Court has held that "adverse possession does relate back to the beginning of possession for some purposes."[104] It is not clear whether the date for determination of market value is one of those purposes—the appellate courts have not faced that question.

Additionally, there are evidentiary[105] and financial issues associated with use of the market value as of the date of original entry. The statute does not state whether the party losing title also is entitled to recover pre- and postjudgment interest on the "market value" damages award; if prejudgment interest is assessed from the time adverse possession commenced, the impact of this change could be even more significant.

Interjecting the potential for awards of significant sums into highly contentious neighbor disputes is sure to complicate adverse possession litigation. In 1984, Professor Thomas W. Merrill analyzed whether adverse possessors should be required to indemnify record title owners whose property is taken by adverse possession.[106] He concluded that "[i]f we required indemnification in all cases of adverse possession, such a reform would rather clearly undermine the rationale for adverse possession."[107] Instead, he advocated a limited indemnification scenario, one where only bad faith adverse possessors were required to indemnify property owners losing title by adverse possession.[108]

Courts have discretion, without direction from the General Assembly, to award damages and reimbursement. Professor Merrill's

analysis provides some potential guidance: One method for determining whether an award is fair and equitable would be to make such an award only in situations where there is bad faith adverse possession. This would avoid the conflict the new statutory provisions create with the precepts of adverse possession law, prevent someone who was acting in good faith from paying significant sums of money to correct title issues, and impose a significant financial burden on those who set out to use adverse possession as a mechanism for taking land they know belongs to someone else.

This new provision probably will encourage settlement and resolution of claims before they are filed. In the alternative, it may prompt record title owners—who have lost title to property by adverse possession—to file quiet title claims. The record owners either recover title to their property because the adverse possessor chooses not to confirm and defend its vested title in court, or lose their title in exchange for an award of the market value of their lost property, plus any taxes and assessments paid, plus at least eighteen years of interest.

These are almost no-lose cases for property owners who have lost some of their property through adverse possession. Colorado is not alone in requiring payment of taxes. No other state, however, appears to require payment of the market value of the property lost by adverse possession plus taxes.[109] Appellate decisions on this issue certainly will attract attention from across the country.

Preponderance of the Evidence for Defensive Adverse Possession

Adverse possession can be asserted affirmatively or defensively.[110] When a record title owner initiates a trespass, forcible entry, forcible detainer, or similar affirmative claim against an adverse possessor, the adverse possessor may assert adverse possession as a defense without seeking an award of legal title (to avoid paying damages, taxes, assessments, and interest). Under the Act, when a party asserts adverse possession defensively, the burden of proof for adverse possession remains a preponderance of the evidence standard.[111] Notice of such a defense must be provided in a pleading filed within ninety days after the defendant files an answer.[112] Notice of the defense is binding on the defendant in the action.[113]

Easements by Prescription and Boundary-Acquiescence

Except in the most contentious of cases, the potential for significant financial exposure will deter adverse possession claims that vest on or after July 1, 2008. As a result, for many years to come, adverse claimants will go to great lengths to prove that their title vested prior to July 1, 2008. If that does not work, adverse claimants have two other options: easements by prescription and statutory boundary-acquiescence claims.

The statutory changes specifically exclude easements by prescription, implication, prior use, and estoppel.[114] Instead of claiming fee simple title to property by adverse possession, parties may make claims for prescriptive easements and avoid significant financial exposure while maintaining essentially the same benefits of use they would have as fee title owners. Whether the courts will allow this result and, if so, under what circumstances, remains to be seen.

To avoid financial exposure, parties also can bring claims under Colorado's twenty-year boundary acquiescence statute.[115] There are very few cases construing this statute. Such a claim requires a special statutory proceeding not entirely governed by the Colorado Rules of Civil Procedure[116] that may be tried before a commission appointed in the discretion of the court.[117] The commission is either the county surveyor or one or more disinterested surveyors.[118] Where the eighteen-year adverse possession statute now includes uncertain financial implications, the boundary-acquiescence statute has its own set of uncertainties.[119]

Conclusion

The Act's changes to the adverse possession statute will have unexpected consequences, and anyone seeking to prove title by adverse possession vesting after July 1, 2008 will have an uphill battle to fight. The burden of proof will be higher, the litigation will be longer and more expensive, and the financial risks of the suit will be more severe. On the other hand, the changes will provide Colorado courts with an incentive and opportunity to simplify and clarify Colorado's large body of adverse possession law. The changes also may encourage settlement, prompt more hostile neighbor disputes, and increase the number of prescriptive easement and boundary-acquiescence cases. Whatever the results, Colorado's adverse possession law will continue to attract attention from across the country.

Notes

1. *McLean v. DK Trust*, No. 06cv982, (Boulder County District Court). This case currently is on appeal at the Colorado Court of Appeals (Case No. 08CA0060) and likely will not be resolved for some time. The Boulder *Daily Camera* provided extensive coverage of this lawsuit and the Act at www.dailycamera.com/news/Ongoing-Coverage/adversepossession.
2. Act of April 25, 2008, ch. 190, 2008 Colo. Sess. Laws 688.
3. Codified at CRS §§ 38-41-101 *et seq*.
4. This article addresses only the eighteen-year adverse possession statute of limitations (CRS § 31-41-101), because the statutory changes do not affect the seven-year adverse possession statutes of limitations (CRS §§ 31-41-106, -108, and -109).
5. CRS § 38-41-101(3)(a).
6. Title to property acquired by adverse possession vests into an absolute fee interest after the eighteen-year statutory period has expired. *Doty v. Chalk*, 632 P.2d 644, 646 (Colo.App. 1981). After title vests, a party still must file a quiet title action to establish record ownership.
7. CRS § 38-41-101(3)(b)(i) through (ii).
8. CRS § 38-41-101(5)(a)(i) through (ii).
9. *Id*.
10. CRS § 38-41-101(5)(b). Under CRS § 38-41-113, a party can assert an adverse possession claim both affirmatively and defensively.
11. CRS § 38-41-101(3)(a).
12. *Gerner v. Sullivan*, 768 P.2d 701 (Colo. 1989).
13. *Id.* at 706.
14. *Raftopoulos v. Monger*, 656 P.2d 1308 (Colo. 1983).
15. *Id.* at 1311.
16. *Gerner, supra* note 12 at 704.
17. *Id.*
18. *Id*.
19. *Id.*
20. *Page v. Clark*, 592 P.2d 792, 800 (Colo. 1979); CJI-Civ. 3:1 (CLE ed. 2007).
21. *Page, supra* note 20 at 800; CJI-Civ. 3:2 (CLE ed. 2007).
22. *Sea Pines Condominium III Ass'n v. Steffens*, 814 N.E.2d 752, 762 (Mass.App. 2004).
23. CRS § 38-41-101(3)(a).
24. *Id.*
25. Act of April 28, 2008, ch. 190, Colo. Sess. Laws 670, § 2.
26. CRS § 38-41-101(3)(b)(ii).
27. CRS § 38-41-101(5)(a)(i).
28. CRS § 38-41-101(5)(a)(ii).
29. *Smith v. Hayden*, 772 P.2d 47, 55 (Colo. 1989); *Welsch v. Smith*, 113 P.3d 1284, 1287 (Colo.App. 2005); *Bd. of County Comm'rs of Cheyenne County v. Ritchey*, 888 P.2d 298, 303 (Colo.App. 1994).
30. *Schuler v. Oldervik*, 143 P.3d 1197, 1201 (Colo.App. 2006).
31. *Id*. at 1202.
32. *Id*. at 1203.
33. *Raftopoulos, supra* note 14.
34. *Dzuris v. Kucharik*, 434 P.2d 414 (Colo. 1967).
35. *Id.* at 416.
36. *Contra* Cunningham, "Adverse Possession and Subjective Intent: A Reply to Professor Helmholz," 64 *Wash. U. L.Q.* 1, 12 (1986) (arguing that open and notorious probably has independent significance only in subsurface adverse possession cases, because the element probably does no more than require the proof of characteristics of actual possession).
37. *Archuleta v. Gomez*, 140 P.3d 281, 286 (Colo.App. 2006).
38. *Lobato v. Taylor*, 71 P.3d 938, 950 (Colo. 2002).
39. *Segelke v. Atkins*, 357 P.2d 636, 638 (Colo. 1960).
40. *Raftopoulos, supra* note 14 at 1311.
41. *Haymaker v. Windsor Reservoir & Canal Co.*, 254 P. 768 (Colo. 1927).
42. *Id.* at 771.
43. *See* Anderson, *Colorado Quiet Title Actions* § 10.1 (Bradford Pub. Co. 2008).
44. 4 Tiffany and Jones, *Tiffany Real Property* § 1147 (1975); *Powell on Real Property* § 91.05; Sprankling, *Understanding Property Law* 441 (2000).
45. Helmholz, "Adverse Possession and Subjective Intent," 61 *Wash. U. L.Q.* 331, 334 (1983); Merrill, "Property Rules, Liability Rules, and Adverse Possession," 79 *Nw. U. L.Rev.* 1122, 1123 (1984); Stake, "The Uneasy Case for Adverse Possession," 89 *Geo. L.J.* 2419, 2423 (2001), *citing* Stoebuck and Whitman, *The Law of Property* 854 (3d ed. 2000).
46. *Chaplin v. Sanders*, 676 P.2d 431, 434 (Wash. 1984) (holding that Washington courts traditionally have treated the hostility and claim of right requirements as one and the same); *Berglund v. Sisler*, 313 N.W.2d 679, 682-83 (Neb. 1981) (holding that "hostile" means "under a claim of right"). Additionally, the Maryland Court of Appeals recently relied on an earlier Nebraska Supreme Court case for the proposition that "claim of right" means "hostile." *Yourik v. Mallonee*, 921 A.2d 869, 876 (Md.App. 2007), *citing Barnes v. Milligan*, 241 N.W.2d 508, 511 (1976). One commentator, however, asserts that a distinction does exist. Cunningham, *supra* note 36 at 1, 12-15, 16-22 (discussing hostility and claim of right).
47. *Anderson v. Cold Spring Tungsten, Inc.*, 458 P.2d 756, 758 (Colo. 1969).
48. *Segelke, supra* note 39.
49. *Id.* at 638.
50. *Schoenherr v. Campbell*, 472 P.2d 139 (Colo. 1970).
51. *Id.* at 141.
52. *Smith v. Hayden*, 772 P.2d 47, 55 (Colo. 1989).
53. *Id.* at 52.
54. *See Anderson, supra* note 47 at 760.
55. *See Smith, supra* note 52 at 55-56. Colorado courts have defined adversity as nonpermissive possession. *Id.* Adverse use is not a typical common law element of adverse possession, and whether use is permissive typically affects whether the claimant has established use that is hostile under a claim of right. Merrill, *supra* note 45 at 1142; Helmholz, *supra* note 45 at 337-38. As a result, courts also could disregard this element and note that permissive use is inconsistent with use that is hostile under a claim of right. This position is supported by *Haaren v. More*, 525 P.2d 475, 476 (Colo.App. 1974), which holds that if original entry is permissive, notice of hostility, not adversity, must be given to the holder of legal title.
56. *McKenzie v. Pope* cites a Colorado Court of Appeals decision not selected for official publication in which permission granted after the statutory period of adverse possession commenced defeated an adverse possession claim. *McKenzie v. Pope*, 33 P.3d 1277, 1280 (Colo.App. 2001), *citing Jesmer v. Hodge*, 471 P.2d 645, 646 (Colo.App. 1970) (not selected for official publication).
57. *Anderson, supra* note 47 at 758.
58. *Antholz v. Squirrell*, 528 P.2d 257, 259 (Colo.App. 1974).
59. *Id*.
60. *See Niles v. Churchill*, 482 P.2d 994, 995 (Colo.App. 1971).
61. *Moss v. O'Brien*, 437 P.2d 348, 349 (Colo. 1968).
62. CRS § 38-41-101(3)(b)(ii).
63. *Brehm v. Johnson*, 531 P.2d 991, 993 (Colo.App. 1974).
64. *Vade v. Sickler*, 195 P.2d 390, 392 (Colo. 1948) (emphasis added).
65. *McIntyre v. Bd. of County Comm'rs, Gunnison County*, 86 P.3d 402 (Colo. 2004).
66. *Id*. at 414.
67. Fennell, "Efficient Trespass: The Case for 'Bad Faith' Adverse Possession," 100 *Nw. U. L.Rev.* 1037, 1053 (2006), *citing Houston v. U.S. Gypsum Co.*, 652 F.2d 467, 474 (5th Cir. 1981); *Boyle v. Ball Props.*, No. C.A. 85C-AU-III, 1989 WL 16986 at *4 (Del.Super.Ct. Feb. 21, 1989); Helmholz, *supra* note 45 at 334 (noting that the requirement of open and notorious possession requires only that the possession be manifested to the world at large, in part to alert the record owner to the availability of a cause of action against the possessor).
68. *Dzuris, supra* note 34 at 416.
69. *Id*.
70. *Raftopoulos, supra* note 14 at 1311.
71. *Id*. at 1310.

72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 1311.
76. *See id.*
77. *Trask v. Nozisko*, 134 P.3d 544, 553 (Colo.App. 2006); *Pagel v. Reyman*, 628 P.2d 166, 168 (Colo.App. 1981).
78. CRS § 38-41-102.
79. Senate Committee on Judiciary, Bill Summary for HB08-1148 (March 12, 2008), available at www.leg.state.co.us/CLICS/CLICS2008A/commsumm.nsf/IndSumm/65FDA546CD6ACDCE8725740A006DA3DF?OpenDocument.
80. Benjamin, "Colorado Bar Association, Notes Pertaining to HB081148," available at www.leg.state.co.us/CLICS/CLICS2008A/commsumm.nsf/7b79d855a6446fab87256d6d0055ffbb/65fda546cd6acdce8725740a006da3df/$FILE/081203SenateJudAttachB.pdf.
81. *Haaren v. More*, 525 P.2d 475, 477 (Colo.App. 1974) (emphasis added), *citing Hodge v. Terrill*, 228 P.2d 984, 988 (Colo. 1951).
82. *Vade, supra* note 64 at 391.
83. *Sleeping Indian Ranch, Inc. v. West Ridge Group, L.L.C.*, 107 P.3d 1028, 1031 (Colo.App. 2004), *rev'd on other grounds* 119 P.3d 1062, 1070 (Colo. 2005) (emphasis added); *Palmer Ranch, Ltd. v. Suwansawasdi*, 920 P.2d 870, 872 (Colo.App. 1996); *Smith v. Hayden*, 772 P.2d 47, 52 (Colo. 1989); *Miller v. Bell*, 764 P.2d 389, 390 (Colo.App. 1988); *Raftopoulos, supra* note 14 at 1312.
84. *Sleeping Indian Ranch*, *supra* note 83 at 1031, *quoting Hodge, supra* note 81 at 988.
85. *Haney v. Olson*, 470 P.2d 933, 936 (Colo.App. 1970).
86. *Welsch v. Smith*, 113 P.3d 1284, 1287-88 (Colo.App. 2005); *Littlefield v. Bamberger*, 32 P.3d 615, 620 (Colo.App. 2001); *Bd. of County Comm'rs of Cheyenne County v. Ritchey*, 888 P.2d 298, 304 (Colo.App. 1994); *Riggs v. McMurtry*, 400 P.2d 916, 918-19 (Colo. 1965), *citing Lively v. Wick*, 221 P.2d 374 (Colo. 1950).
87. *Welsch, supra* note 86 at 1288; *Auslaender v. MacMillan*, 696 P.2d 836, 837 (Colo.App. 1985), *quoting Trueblood v. Pierce*, 179 P.2d 671 (Colo. 1947); *Niles v. Churchill*, 482 P.2d 994, 995 (Colo.App. 1971), *quoting Trueblood v. Pierce*, 179 P.2d 671 (Colo. 1947).
88. *Marr v. Shrader*, 349 P.2d 706, 710 (Colo. 1960); *Hodge, supra* note 81 at 988.
89. Act of April 28, 2008, ch. 190, Colo. Sess. Laws 670, § 2.
90. There are several other presumptions involved in adverse possession decisions—not addressed in this article—that further complicate Colorado's adverse possession law. Anderson, *supra* note 43 at § 10.9. Those do not appear to be affected in the same way as the presumptions discussed above.
91. CRS § 38-41-101(3)(b)(ii).
92. *Id.*
93. Helmholz, "More on Subjective Intent: A Response to Professor Cunningham," 64 *Wash. U. L.Q.* 65, 69 (1986).
94. *Id.*
95. *Compare* Helmholz, *supra* note 45 (arguing that most courts do not require the adverse possessor to plead and prove good faith, but regularly award title to the good faith trespasser and regularly do not award title to the possessors who knew they were trespassing) *and* Helmholz, *supra* note 93, *with* Cunningham, *supra* note 36 (challenging Professor Helmholz's conclusion and arguing that courts do not draw a distinction between good faith and bad faith possession).
96. *Anderson v. Cold Spring Tungsten, Inc.*, 458 P.2d 756, 758 (Colo. 1969); *Brehm v. Johnson*, 531 P.2d 991, 993 (Colo.App. 1974).
97. *Vade, supra* note 64 at 392.
98. Helmholz, *supra* note 45 at 357.
99. *Id.*
100. October 17, 2007 Order in Boulder County District Court Case No. 06CV982 at 7 (quotations and citations omitted).
101. *Id.* at 9.
102. Helmholz, *supra* note 45 at 342 ("[t]he very elasticity of the rubric 'claim of right' provides the opportunity to distinguish good from bad faith trespass").
103. Merrill, *supra* note 45 at 1146-47.
104. *Spring Valley Estates, Inc. v. Cunningham*, 510 P.2d 336, 338 (Colo. 1973).
105. Merrill, *supra* note 45 at 1146-48 (discussing problems prompted by lost evidence, the difficulty of proving subjective intent, and the potential for holders of remote and fractional claims lining up to be compensated by the adverse possessor).
106. Merrill, *supra* note 45.
107. *Id.* at 1126, 1148, 1149.
108. *Id.* at 1126.
109. Professor Merrill did not consider this windfall. He was concerned with requiring indemnification for "good faith" adverse possessors.
110. CRS § 38-41-113.
111. CRS § 38-41-101(5)(b).
112. *Id.*
113. *Id.*
114. CRS § 38-41-101(4).
115. CRS §§ 38-44-101 *et seq.*
116. C.R.C.P. 81(a).
117. CRS § 38-44-103.
118. CRS § 38-44-104.
119. *See* Anderson, *supra* note 43 at ch. 11. ■