# WHY YOU SHOULD RUN TITLE TO THE SOVEREIGN

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OFTEN I AM posed with the question "How far back should we run title," to which I reply "All the way to the Sovereign." While I recognize the cost considerations of exploration and production companies in running title, acquiring title opinions, and performing curative, there lies a huge risk in failing to run title to the Sovereign. What if there was a cotenant in the mid to late 1800s who disappears from the chain of title? Does adverse possession or limitations title apply? The answer is usually "no."

**Adverse Possession/Limitations Title - Generally**

Defects in the early chain of title are extremely common, and the most common way to cure early defects in the chain of title is through title by limitations. In addressing these defects, which usually exist prior to the early 1900s and are difficult to cure at such a late date, a title opinion may assume that the history of use and possession by the present record owners and their predecessors in title is of such a nature as to establish the perfection of title by limitations. The establishment of title by limitations requires proof of matters of fact when and if the necessity arises, which can be revealed by affidavits of use, occupancy, and possession.

Oftentimes, even when property has been in the possession and use of an occupant for years, there is a break in the chain of title, and some of the required paperwork to establish good, marketable title has been lost. The doctrine of adverse possession is a useful application to clear a chain of title where the property has been possessed for years but the occupant has a defective interest.
Adverse possession, also referred to as title by possession or title by limitation, is a legal doctrine providing that title to real property is given to the occupier of another's land upon the occupier's possession of the land for a statutory period of time. The current statutory definition of adverse possession in Texas, which has been unchanged for more than a century, is "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person." Tex. Civ. Prac. & Rem. Code Ann. §16.021 (1) Vernon 2002). More specifically, to prove adverse possession, a claimant must establish six elements: 1) actual possession of the disputed property; 2) that is open and notorious; 3) that is peaceable; 4) under a claim of right; 5) that is adverse or hostile to the claim of the owner; and 6) consistent and continuous for the duration of the statutory period. Dyer v. Cotton, 333 S.W.3d 703, 710 (Tex.App.–Houston [1st Dist.] 2010, no pet).

The doctrine of adverse possession is based on notice, along with the opportunity to respond to that notice. Once the record owner discovers the presence of a potential adverse possessor, or is otherwise placed on notice of an adverse possession claim, he must act to defeat the possessor's claim within the period prescribed by one of the four statutes of limitation, or he will lose title to his property. Texas has four statutory periods for adverse possession: 3 years; 5 years; 10 years; and 25 years. Which of the four statutes applies depends on the nature of the possession.

The Three Year Statute is applicable in situations where the possession occurs under "color of title." Tex. Civ. Prac. & Rem. Code § 16.024. A person who possesses land under "color of title" has some form of deed or other written instrument that purports to convey title, but due to a defect, does not actually convey title. Compared to the Three Year Statute, the Five Year Statute provides the record owner more time to bring suit when the adverse possessor has been using the land, paying taxes on the land, and has a deed of record on the land. Tex. Civ. Prac. & Rem. Code § 16.025. Unlike the Three Year Statute and the Five Year Statute, the Ten Year Statute does not require a written instrument conveying title; however, the claimant is limited to 160 acres (unless specifically enclosed). Tex. Civ. Prac. & Rem. Code § 16.026.

Texas also has the Twenty-Five Year Statute, which is most commonly relied upon by oil and gas companies. Like the Ten Year Statute, the Twenty-Five Year Statute does not require the property to be held under a deed or other instru-

ment, but requires the claimant to demonstrate that their use, occupancy, and possession has been continuous and uninterrupted for twenty-five years. Tex. Civ. Prac. & Rem. Code § 16.027. Generally, to establish such limitations, a trespass to try title action is brought and particular attention is given to the claimant's activities on the property, including: 1) the nature and occupancy of the property; 2) use and construction of improvements upon the property; and 3) construction of a fence or other property boundary.

**Adverse Possession/Limitations Title - Cotenancy**

Unlike adverse possession against any other person, adverse possession against a cotenant requires an additional element that is often overlooked. Cotenants to an undivided estate have an equal right to enter upon the common estate and equal rights to possession. As a result, a cotenant seeking to establish title by adverse possession must prove, in addition to the usual adverse possession requirements, an "ouster" of the cotenant not in possession or repudiation of the cotenancy relationship. Gonzalez v. Peña, 2015 Tex. App. LEXIS 1021, 7-8 (Tex. App. San Antonio Feb. 4, 2015); Dyer v. Cotton, 333 S.W.3d 703, 712 (Tex. App.–Houston [1st Dist.] 2010, no pet.) (quoting Byrom v. Pendley, 717 S.W.2d 602, 605 (Tex. 1986)). The additional element of ouster or repudiation in cases between cotenants is required because cotenants have rights to use of the property and ownership that a stranger typically would not have. Exclusive use and possession of the property for long periods of time is common in a cotenancy relationship and usually occurs with the acquiescence and/or knowledge of other cotenants. "A cotenant may not adversely possess against another cotenant unless it clearly appears he has repudiated the title of his cotenant and is holding adversely to it." Dyer, 333 S.W.3d at 710-711. (However, in Moore v. Knight, 94 S.W.2d 1137, (Tex. 1936), the court stated that a jury may infer that the long continued possession coupled with a deed filed of record from the possessory cotenant's predecessor in title, purporting to convey the interest of the non-possessory cotenant, was sufficient notice to commence running of limitations.)

So, when does a cotenancy relationship occur? Assume the following facts: 1) John Doe was the 100% record title owner of Blackacre in 1870; 2) John Doe dies intestate in 1880; and 3) John Doe was survived by three children (two sons and one daughter) as his sole heirs. According to the Texas laws concerning intestate succession, following the death of John Doe, his three children each own an undivided 1/3 interest in Blackacre, as cotenants. Thereafter, the two sons of John Doe in 1881 conveyed Blackacre, specifically conveying, "all of [their] right, title and interest in and to Blackacre" to Fred Smith, and a regular chain of title continues from Fred Smith to the present without any conveyance or further information from John Doe's daughter.

Since possession by a cotenant is presumed to be in recognition of common title, the cotenant in possession cannot claim title by limitations unless it clearly appears that he has repudiated the title of his cotenant ("ouster") and is holding adversely. In this respect, the notice of adverse possession "must be brought home" to the cotenants not in possession, either by information to that effect given by the cotenant in possession, or acts of unequivocal notoriety and the assertion of the adverse and hostile claim so that the non-possessory cotenants, as reasonable people, will be presumed to have notice of the adverse claim. Todd v. Bruner, 365 S.W.2d 155 (Tex. 1963). The key to commencement of the running of the statutes of limitations is notice of the adverse claim to the non-possessory cotenants, which must be established by clear and unequivocal evidence.

In Dyer v. Cotton, a trespass to try title suit, Eddie Dyer, co-owner of a piece of property with six other cotenants, sued Ronald Cotton, a buyer who bought the six other cotenants' interests in the property, claiming that, in addition to procuring the 1/7th interest to the property by conveyance, he also had acquired title to the remaining 6/7ths interest by adverse possession, applying the Ten Year Statute. 333 S.W.3d 703, 712 (Tex. App.–Houston [1st Dist.] 2010, no pet.). Dyer bought his interest in 1994, and received a special warranty deed from the Grantor which purported to convey the entire property instead of just the 1/7th interest that the Grantor owned. Dyer began possessing and using the property at that time. However, in the following ten years, the six cotenants and their heirs continued to visit the property. One of the cotenant heirs would visit to gather firewood from the property and fish in the tank pond about four or five times a year. Dyer never forbid her to enter the property or told her that she was a trespasser. Another cotenant assumed responsibility for paying the family's taxes on the property, and Dyer acknowledged that he paid taxes on a fractional undivided interest and that the other cotenants paid the remaining taxes owed on the property.

At trial, the jury found that Dyer did not adversely possess

the property because he failed to establish "ouster" of his co-tenants. On appeal, Dyer contended that the trial court erred by instructing the jury that Dyer had to prove that he ousted his fellow cotenants or otherwise repudiated the cotenancy relationship to establish his claim for adverse possession. The trial court gave the jury this instruction:

You are further instructed that the possession by an owner of an interest in property will be presumed to be his right as a co-owner. The possession, to be adverse to the other owner, or owners, must be of such acts as to amount to an ouster of the other owner, or owners, and must be of such an unequivocal nature and so distinctly hostile to the others' rights that the intention to claim the property is clear and unmistakable.

Dyer claimed that his deed from his predecessor in interest, which purported to convey the entire fee simple estate and not the actual 1/7th interest his Grantor owned, constituted a repudiation of the cotenancy relationship, and thus, Dyer would be relieved of proving the ouster element of adverse possession against a cotenant. Dyer argued that, by claiming title in a conveyance that purported to convey the entire title to him, and because that conveyance went unchallenged for the length of the statutory period – ten years in this case—the cotenancy relationship ended, and he was entitled to take actual title through adverse possession. The Court disagreed.

The Dyer court stated that if Dyer had entered into possession as a trespasser before obtaining deeds from the co-owners, or had procured conveyances purporting to convey the entire title to the land, an exception would apply. However, the court noted that a deed purporting to convey an interest greater than that held by the co-tenant is not sufficient, standing alone, to prove adverse possession. Also, a deed may only put cotenants on constructive notice of an adverse claim if it is on record before the other cotenants acquire their interests; the recordation of a deed after the other cotenants have already acquired their interest does not constitute constructive notice.

Thus, because Dyer received his deed after the other cotenants had already acquired their interests, and his predecessor in interest only had a 1/7th interest, that is all he could have conveyed to Dyer, and his deed did not constitute constructive notice for purposes of adverse possession.

Now, back to the example involving John Doe. The conveyance from the two sons to Fred Smith conveyed what the two sons owned – an undivided 2/3 interest. As only an undivided 2/3 interest was conveyed, Fred Smith remained a cotenant with the daughter of John Doe, who owned the remaining 1/3rd. Assuming an oil and gas company wanted to acquire leases and drill a well on Blackacre, had it only run title from the year 1900 forward, then the title documents would not have revealed the cotenancy relationship between Fred Smith and the daughter of John Doe, and a potentially 1/3rd unleased interest. As a 1/3rd unleased interest would severely impact the net revenue interest (and potentially, the legality of the location of a well), I always recommend running title to the Sovereign.

ABOUT THE AUTHORS

M. Ryan Kirby is a founding Partner, and Vy "Tina" Huynh is an Attorney with Kirby, Mathews & Walrath, PLLC, a firm founded on the idea that oil and gas operators are best served by individuals that understand the needs of the industry, as well as fulfilling those needs in an efficient, cost-effective and timely manner, all the while establishing a relationship and a dialogue with the client. In addition to his legal practice, M. Ryan Kirby is also a frequent speaker at seminars for various Landmen's organizations; he also serves as an Adjunct Professor at South Texas College of Law, where he teaches the Texas Oil, Gas and Land Titles course. Vy "Tina" Huynh is an attorney licensed and practicing in Texas and a member of the Oil, Gas and Mineral Law Section of the Houston Bar Association and State Bar of Texas.