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# The Effect of Agricultural Fence Lines on Minnesota Adverse Possession Claims: A Family Legacy

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**THE EFFECT OF AGRICULTURAL FENCE LINES ON  
MINNESOTA ADVERSE POSSESSION CLAIMS: A FAMILY  
LEGACY**

Jonathan D. Wolf<sup>†</sup>

I.	INTRODUCTION.....	373
II.	FENCE BUILDING WITH THE KOZAK FAMILY.....	373
	A. <i>The Odd Fence on the Southwest 40</i> .....	373
	B. <i>John Weis and Harry Kozak Clash over Adverse Possession</i> ..	375
III.	ESTABLISHING ADVERSE POSSESSION OR A BOUNDARY BY PRACTICAL LOCATION .....	376
	A. <i>Actual, Open, Hostile, Continuous, and Exclusive Possession</i> .....	380
	B. <i>Boundary by Practical Location Through Acquiescence, Express Agreement of the Parties and Acquiescence, or Estoppel</i> .....	384
IV.	REVISITING THE KOZAKS .....	386
	A. <i>Weis v. Kozak in the Court of Appeals</i> .....	386
	B. <i>A New Generation of Kozaks Go Back to the Southwest 40—To Argue About Adverse Possession</i> .....	388
V.	SOME THOUGHTS ON THE KOZAK CASES FOR PRACTITIONERS, JUDGES, AND LAWMAKERS .....	394
VI.	CONCLUSION .....	399

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## I. INTRODUCTION

Mark Twain is believed to have remarked, “History doesn’t repeat itself, but it does rhyme.” If you look for historical evidence that Twain actually coined this maxim, you won’t find it. But like the remark itself, the law often is more reflective of the echo that resonates down through time than the original utterance.

This is an article about the evolution of a very specific and, to be honest, obscure aspect of agricultural law: agricultural fence lines in adverse possession claims. But this obscure topic occasionally affects real people. Sometimes it affects generations of real people. And in this particular story, the historical echo starts with a man named Harry Kozak.

## II. FENCE BUILDING WITH THE KOZAK FAMILY

A. *The Odd Fence on the Southwest 40*

True to the spirit of Minnesota farmers, Harry Kozak was industrious and practical about his operation in Sherburne County.<sup>1</sup> He took care of his land,<sup>2</sup> he sought to improve it,<sup>3</sup> and he thought about the future.<sup>4</sup> In 1974, Harry expanded his farm by purchasing an eighty-acre tract.<sup>5</sup> He immediately set to work on it with the help of his fourteen-year-old son, Rodney.<sup>6</sup>

This was a time before the widespread use of track vehicles, before every (or any) farmer had a four-wheel-drive vehicle, and before GPS or satellite imagery.<sup>7</sup> Hands were the most effective tool.<sup>8</sup>

Harry tried to stay on his side of the property line and tried to put up the new fences as close to this property line as possible.<sup>9</sup> But it was not always easy going.<sup>10</sup> The Southwest 40 presented a

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1. See generally Declaration of Rodney A. Kozak, *Kozak v. Kozak*, No. 71-CV-15-1096 (Minn. Dist. Ct. Apr. 15, 2016).

2. *Id.*; see also Memorandum of Law in Opposition to Defendants’ Motion for Summary Judgment, *Kozak v. Kozak*, No. 71-CV-15-1096 (Minn. Dist. Ct. Apr. 20, 2016).

3. Declaration of Rodney A. Kozak, *supra* note 1.

4. *Id.*

5. *Id.* ¶ 4.

6. *Id.* ¶ 5.

7. *Id.*

8. *Id.*

9. *Id.* ¶ 7.

10. *Id.*

particular challenge.<sup>11</sup> There, Harry and young Rodney had to fight their way through thick willows and reed canary hay.<sup>12</sup>

On the south fence line of the Southwest 40, Harry hit a snag.<sup>13</sup> It was only when Harry finished the western fence (which runs north to south) that he realized what had happened. There was a significant amount of wire left on the western spool.<sup>14</sup> The premeasured wire was made to span exactly one side of a forty-acre parcel, and leftovers could mean only one thing.<sup>15</sup> The south fence angled away diagonally from the southern property line.<sup>16</sup>

Just the same, the fence was meant to be installed near the property line, but its purpose was not to *mark* the property line.<sup>17</sup> An angled fence keeps in sheep just as well as one that runs perfectly perpendicular.<sup>18</sup> The surrounding landowners of the Southwest 40—Harry’s brother Kermit to the north, Harold Cater to the west, and Arthur “Bud” Cater to the south—knew that the fence lines did not line up exactly with the boundaries.<sup>19</sup> Nothing was formally measured or surveyed, but this was the 1970s.<sup>20</sup> They were neighbors, some of them relatives. No one gave it much thought.<sup>21</sup>

The southern fence went through the toughest country on the whole parcel.<sup>22</sup> Bud Cater was a big man, over 300 pounds, and he did not have reason, desire, or ability to go into the few acres of brush and swamplands between his property line and the Kozak south fence.<sup>23</sup> He had about as little use for that kind of landscape as the sheep.<sup>24</sup> So the brand new south fence stayed where it was.<sup>25</sup>

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11. *Id.* ¶ 5. The “Southwest 40” refers to the forty-acre parcel of land bordering Harry Kozak’s southern property line. The southern edge of this parcel consists mainly of marshland.

12. *Id.*

13. *Id.* ¶ 8.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* ¶¶ 6–7.

20. *Id.*

21. *Id.*

22. *See id.*

23. *Id.* ¶ 10.

24. *Id.*

25. *Id.*

*B. John Weis and Harry Kozak Clash over Adverse Possession*

Years went by, and the diagonal fence on the Southwest 40 was largely forgotten.<sup>26</sup> Save for the keen interest of a youthful Rodney during the deer hunting seasons of the 1970s and 80s, no one paid much attention to the marshland between the southern fence and the southern property line for a long time.<sup>27</sup>

But trouble was brewing on a different Kozak parcel.<sup>28</sup> About a mile away, in another township, Harry Kozak owned a parcel of land next to another local farmer, John Weis.<sup>29</sup> Between 1963 and 1967, Harry, John, and Joe Weis (John's father) agreed to build a fence along their adjoining properties to prevent the comingling of their cattle.<sup>30</sup> Although it was built somewhat near the boundary, "[t]he fence was not intended to mark the exact boundary line because [the parties] did not know where it was."<sup>31</sup> After the fence was built, Harry Kozak told John Weis that the fence was not in the right place to mark the boundary line, but the parties decided to leave the fence where it stood.<sup>32</sup> Weis farmed up to the fence line on "his" side, and both parties grazed cattle up to the fence line on their respective sides.<sup>33</sup>

As part of a remonumentation project that began in 1974, Sherburne County began replacing old section corner posts left by the original government surveyors.<sup>34</sup> Completed in 1981, this survey made it appear as though the surveyed boundary line lay to the south

26. *See id.* ¶¶ 10–12.

27. *See id.*

28. *See Weis v. Kozak*, 410 N.W.2d 903 (Minn. Ct. App. 1987).

29. *Id.* at 904–05.

30. *Id.* at 905.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* "Remonumentation" is the process of replacing section markers. *See* MINN. STAT. § 160.15 (2016). A "section" is an area that is normally one square mile. Typically, thirty-six one-square-mile sections make up a township. Section markers are placed at the intersecting corners of the sections on the grid to aid in land surveying. Section markers may be made of a variety of materials, including, as is often the case in rural Minnesota, stone or concrete posts or plates. *See generally* George E. Leigh, *Bottles, Pots, and Pans: Marking the Surveys of the U.S. Coast & Geodetic Survey and NOAA, NAT'L OCEANIC AND ATMOSPHERIC ADMIN.*, [http://www.ngs.noaa.gov/web/about\\_ngo/history/Survey\\_Mark\\_Art.pdf](http://www.ngs.noaa.gov/web/about_ngo/history/Survey_Mark_Art.pdf) (last visited Dec. 14, 2016) (describing different types of survey markers used over the last 200 years).

and west of the Weis-Kozak fence line, which meant there was a narrow strip of Kozak land of approximately two and one-half acres on the Weis side of the fence.<sup>35</sup>

This did not sit well with Harry Kozak, particularly after John Weis cut down a number of trees on the disputed acres.<sup>36</sup> The Kozak-Weis boundary dispute was the subject of a lawsuit in the early 1980s, in which the trial court directed a verdict against Harry Kozak at the close of his case for failure to provide an independent survey of the property.<sup>37</sup> Harry Kozak appealed that case and lost.<sup>38</sup> Subsequently, a survey *was* obtained, showing that the property line did not align with the fence line, and Harry Kozak brought a new quiet-title action.<sup>39</sup> Weis countered with a claim of adverse possession on the disputed parcel, arguing in the alternative that the fence represented “a boundary by practical location.”<sup>40</sup> Harry won at the trial court level, and, this time, Weis appealed.<sup>41</sup>

### III. ESTABLISHING ADVERSE POSSESSION OR A BOUNDARY BY PRACTICAL LOCATION

This article will circle back to the Kozaks and what their unique family history has to do with Minnesota’s law of adverse possession.<sup>42</sup> But first, it is important to develop an understanding of the legal causes of action the Kozaks were up against.

In order to establish adverse possession under Minnesota law, five elements must be present. Possession of the disputed property must be (1) actual, (2) open, (3) hostile, (4) continuous, and (5) exclusive.<sup>43</sup> Moreover, “[m]ere possession is not enough to establish title to land by adverse possession.”<sup>44</sup> These elements must be established “without resort to any inference or presumption in favor

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35. *Weis v. Kozak*, 410 N.W.2d at 905.

36. *See Kozak v. Weis*, 348 N.W.2d 798, 799–800 (Minn. Ct. App. 1984).

37. *Id.* at 800–01.

38. *Id.* at 803.

39. *Weis v. Kozak*, 410 N.W.2d at 905.

40. *Id.*

41. *Id.*

42. *See infra* Part III.

43. *Johnson v. Raddohl*, 226 Minn. 343, 345, 32 N.W.2d 860, 861 (1948) (citing *Romans v. Nadler*, 217 Minn. 174, 177, 14 N.W.2d 482, 485 (1944)).

44. *Id.*

of the disseizor, but with the indulgence of every presumption against him.”<sup>45</sup>

Establishing a boundary by practical location is closely related to a claim of adverse possession but differs in some respects.<sup>46</sup> A boundary by practical location may be established in one of three ways: “(1) by acquiescence ‘for a sufficient length of time to bar a right of entry under the statute of limitations’; (2) by an express agreement of the parties claiming the land on both sides of the line and then by acquiescence; or (3) by estoppel.”<sup>47</sup>

The statute of limitations for both adverse possession and establishment of a boundary by practical location is fifteen years.<sup>48</sup> In other words, to be victorious, the claimant of the land must have adversely possessed the land, or, under the first method of establishing the boundary by practical location, the parties must have acquiesced in the practical location,<sup>49</sup> for at least fifteen years.

The claimant who seeks to adversely possess a parcel of land faces high evidentiary hurdles.<sup>50</sup> Each of the five elements of adverse possession must be shown for a period of at least fifteen years by clear and convincing evidence.<sup>51</sup> Likewise, establishing a boundary by practical location under Minnesota law requires “clear, positive, and unequivocal” evidence, which modern Minnesota courts have interpreted as equivalent to a clear-and-convincing evidentiary standard.<sup>52</sup>

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45. *Vill. of Newport v. Taylor*, 225 Minn. 299, 303, 30 N.W.2d 588, 591 (1948).

46. *Gabler v. Fedoruk*, 756 N.W.2d 725, 728–29 (Minn. Ct. App. 2008) (citing *Benz v. City of St. Paul*, 89 Minn. 31, 37, 93 N.W. 1038, 1039 (1903)) (noting that “an action for the establishment of a boundary by practical location” is “like the closely related action for adverse possession”). *But see* *Denman v. Gans*, 607 N.W.2d 788, 796 (Minn. Ct. App. 2000) (citing *Petition of Bldg. D, Inc.*, 502 N.W.2d 406, 408 (Minn. Ct. App. 1993); *Petition of McGinnis*, 536 N.W.2d 33, 35–36 (Minn. Ct. App. 1995)) (“Although the doctrine of practical location, at least in effect, is similar to acquiring title by adverse possession, the two theories are distinct and require proof of different elements.”).

47. *Gabler*, 756 N.W.2d at 729 (quoting *Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn. 1977)).

48. *See* MINN. STAT. § 541.02 (2016).

49. *See Theros*, 256 N.W.2d at 858.

50. *Ehle v. Prosser*, 293 Minn. 183, 189, 197 N.W.2d 458, 462 (1972).

51. *Id.*

52. The language often cited by Minnesota courts as the legal standard for establishing a boundary by practical location is that it requires “clear, positive, and unequivocal” evidence; this language seems to have been carried over from late nineteenth and early twentieth-century case law. *See Benz v. City of St. Paul*, 89 Minn.

A standard of proof assists the fact-finder in understanding “the degree of confidence our society desires the fact-finder to have in the correctness of his or her conclusions.”<sup>53</sup> Most civil cases, of course, only require proof by a preponderance of the evidence—a standard under which the parties “share the risk of error in roughly equal fashion.”<sup>54</sup> This standard is generally applied in civil litigation because society has only “a ‘minimal concern’ with the outcome of private suits.”<sup>55</sup> It is an oversimplification, but when issue spotting in real-life fact patterns, it is generally appropriate to equate fighting over money with the preponderance of the evidence standard.<sup>56</sup>

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31, 37, 93 N.W. 1038, 1039 (1903); *Beardsley v. Crane*, 52 Minn. 537, 546, 54 N.W. 740, 742 (1893). The “clear, positive, and unequivocal” language is still applied in the twenty-first century as the evidentiary standard required to establish a boundary by practical location in Minnesota. *See, e.g., Pratt Inv. Co. v. Kennedy*, 636 N.W.2d 844, 849 (Minn. Ct. App. 2001). However, many contemporary Minnesota courts make no distinction between “clear, positive, and unequivocal” evidence and the “clear and convincing” evidentiary standard and thus simply apply the “clear and convincing evidence” standard in establishing a boundary by practical location. *See Gabler*, 756 N.W.2d at 729; *Annett v. Snelling*, No. CI-00-2084, 2001 WL 641763, at \*1 (Minn. Ct. App. June 12, 2001). Other jurisdictions have struggled with similar language. *See, e.g., Kruse v. Horlamus Indus., Inc.*, 387 N.W.2d 64, 66 (Wis. 1986) (holding that the phrase “evidence of possession must be clear and positive” does not establish a higher standard to be used for the overall burden of proof but in fact only refers to the quality of evidence which may even be considered). Minnesota has not directly addressed, in a reported case, whether the “clear, positive, and unequivocal” evidentiary requirement is equivalent to a “clear and convincing” evidentiary standard, but a relatively recent unreported case in the court of appeals found that the “clear and convincing” evidentiary standard is correctly applied to establishing a boundary by practical location based on the “clear, positive, and unequivocal” language. *Potvin v. Hall*, No. C4-99-421, 1999 WL 759983, at \*2 (Minn. Ct. App. Sept. 28, 1999). Unlike some other states, Minnesota has absolutely established a “clear and convincing” evidentiary standard for adverse possession and has linked that cause of action closely to establishment of a boundary by practical location. For practical purposes, it is likely safe to assume that a Minnesota court will apply the clear and convincing evidentiary standard in deciding a claim of boundary by practical location.

53. *Carrillo v. Fabian*, 701 N.W.2d 763, 773–74 (Minn. 2005) (citing *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

54. *C.O. v. Doe*, 757 N.W.2d 343, 353 (Minn. 2008) (quoting *Addington*, 441 U.S. at 423) (discussing the differences between the lowest “preponderance of the evidence” standard, the higher “clear and convincing evidence” standard, and the highest “beyond a reasonable doubt” standard for criminal cases); *see also Carrillo*, 701 N.W.2d at 774.

55. *C.O.*, 757 N.W.2d at 353 (quoting *Addington*, 441 U.S. at 423).

56. *See id.*



When a more abstract value interest is at stake—a person’s physical or expressive freedom, or a person’s right to parent her child—a higher standard of evidence is likely to be applied.<sup>57</sup> Clear and convincing evidence is a lower standard than the beyond a reasonable doubt standard reserved for criminal cases,<sup>58</sup> but the two are certainly cousins.<sup>59</sup> Because “[o]nly civil cases with ‘quasi-criminal wrongdoing’ may use the clear and convincing standard,” the interests at stake are more substantial than those at issue in a typical civil case.<sup>60</sup>

Other types of civil cases to apply the clear and convincing evidentiary standard include civil commitments (in some cases, indefinite civil commitments), involuntary terminations of parental rights, obtaining deportation orders, and revocation of citizenship.<sup>61</sup> It is also telling which types of cases do *not* rise to the level of applying the clear and convincing evidentiary standard.<sup>62</sup> For example, it has been repeatedly argued in Minnesota courts that civil fraud should have to be proven by clear and convincing evidence as a quasi-criminal action, as is required in some other jurisdictions; but Minnesota courts have consistently rejected that argument and held that the standard of proof—even in a fraud case—need not be higher than preponderance of the evidence.<sup>63</sup> Clear and convincing evidence is a high standard.<sup>64</sup>

57. See *State ex rel. Humphrey v. Alpine Air Prods., Inc.*, 500 N.W.2d 788, 791 (Minn. 1993).

58. *State v. Miller*, 754 N.W.2d 686, 701 (Minn. 2008) (citing *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998)); see also *Santosky v. Kramer*, 455 U.S. 745, 769–70 (1982) (discussing standard of proof for determining parental rights); *Addington*, 441 U.S. at 432–33 (discussing physical freedom).

59. See *C.O.*, 757 N.W.2d at 353.

60. *Id.* (quoting *Carrillo v. Fabian*, 701 N.W.2d 763, 774 (Minn. 2005)).

61. *In re Linehan*, 557 N.W.2d 171, 179 (Minn. 1996) (noting that grounds for commitment must be demonstrated by clear and convincing evidence), *vacated on other grounds*, 522 U.S. 1011 (1997), *aff’d on remand*, 594 N.W.2d 867 (Minn. 1999); *Humphrey*, 500 N.W.2d at 791 (listing various legal actions that require clear and convincing evidence); *In re Welfare of Children of K.S.F.*, 823 N.W.2d 656, 663 (Minn. Ct. App. 2012) (explaining that the standard of proof in a termination of parental rights proceeding is clear and convincing).

62. See *Humphrey*, 500 N.W.2d at 791 (holding that the standard in all fraud cases is preponderance of the evidence).

63. See *id.* at 792 (stating that the Supreme Court uses the clear and convincing standard for fraud cases).

64. See *Vickery v. First Bank of LaCrosse*, 368 N.W.2d 758, 763 (Minn. Ct. App. 1985).

It makes some sense for the clear and convincing evidence standard to be applied to adverse possession claims. While a dollar value can be assigned to a piece of real property, an adverse possession claim is not about owing money. Land is not fungible, like money. The law assumes that every piece of realty is unique.<sup>65</sup> In the western legal tradition, there has long been something sacrosanct about one's own land or home. And adverse possession is unlike eminent domain, where the enumerated and carefully checked power of the state is applied, on behalf of the common good, to retain a piece of land only with just compensation provided.<sup>66</sup> No, the would-be adverse possessor seizes something unique and special, under no legal claim of right, offering nothing in return; if that seizure is to stand, the law requires at the least a damn strong showing that he should keep it.

*A. Actual, Open, Hostile, Continuous, and Exclusive Possession*

The clear and convincing evidentiary standard is the lens through which each of the elements to adverse possession must be viewed.<sup>67</sup> There is some overlap, but each element must be proven by clear and convincing evidence for the disseizor to win the day.<sup>68</sup> A failure on any one element will render the entire claim defective.<sup>69</sup>

The first element is actual possession.<sup>70</sup> Actual possession is the occupation of the disputed land in a sufficiently weighty fashion. The obvious part of actual possession is some sort of physical imposition on the property,<sup>71</sup> but there is a more metaphysical aspect of actual

65. *Mellin v. Woolley*, 103 Minn. 498, 499–500, 115 N.W. 654, 655 (1908) (stating that land is a “unique thing, not capable of being duplicated”).

66. *See Barmel v. Minneapolis-St. Paul Sanitary Dist.*, 201 Minn. 622, 624, 277 N.W. 208, 209 (1938) (“Of course our Constitution limits the right of eminent domain to the taking of private property for public use with just compensation therefor first paid or secured.”).

67. *Miller v. Martin*, 259 Minn. 177, 178, 106 N.W.2d 549, 550 (Minn. 1960) (explaining that a clear and convincing standard applies to each element of adverse possession).

68. *Ehle v. Prosser*, 293 Minn. 183, 189, 197 N.W.2d 458, 462 (Minn. 1972).

69. *See id.* at 189, 197 N.W.2d at 462.

70. *See Washburn v. Cutter*, 17 Minn. 361 (1871) (holding that actual or constructive possession of land is required).

71. *Fredericksen v. Henke*, 167 Minn. 356, 359, 209 N.W. 257, 258 (1926) (stating that the adverse possessor does not have to live on the disputed property, but the land must be “occupied and applied to the uses for which it is fit”); *Wallace v. Sache*, 106 Minn. 123, 124, 118 N.W. 360, 361 (1908) (“Actual possession’ means

possession as well. Not every physical intrusion onto land implies actual possession of that land. For example, in Minnesota, cultivation of agricultural land constitutes sufficient actual possession, but it is an open question as to whether pasturing livestock suffices, and different jurisdictions have come to different conclusions.<sup>72</sup>

The open possession requirement, the second element, could be described as making the fact of actual possession known—the disseizor keeping their “flag flying,” as many courts have pithily described it.<sup>73</sup> A significant part of this requirement is line-of-sight visibility.<sup>74</sup> Courts, although finding adverse possession on a portion of a property, have denied it for want of openness on another portion of the same property upon finding that a wooded area obscured the disseizor’s activities.<sup>75</sup> Openness can certainly come into play based on the physical features of a given piece of farmland.<sup>76</sup> But within the context of fence lines, there is little to say on openness. In Minnesota at least, agricultural fences generally consist of a few strands of barbed wire, a humming electrified strand, or waist-high chicken wire—none of which are typically effective as instruments of concealment.<sup>77</sup> A fence itself would only affect the openness factor if it hid what was on the other side—perhaps a feat accomplishable by a Trumpian border fence, but not the typical Holstein enclosure.

As for the third element, the hostility requirement refers “to the intention of the disseizor to claim exclusive ownership as against the world and to treat the property in dispute in a manner generally associated with the ownership of similar type property in the particular area involved,” rather than to “personal animosity or physical overt acts against the record owner of the property.”<sup>78</sup> In other words, the disseizor must treat the property as his own as

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the corporeal detention of the property when used in relation to adverse possession.”).

72. *Weis v. Kozak*, 410 N.W.2d 903, 906 (Minn. Ct. App. 1987).

73. *Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. Ct. App. 2003) (quoting *Romans v. Nadler*, 217 Minn. 174, 178, 14 N.W.2d 482, 485 (1944)); *see also* *Dean v. Goddard*, 55 Minn. 290, 297, 56 N.W. 1060, 1062 (1893).

74. *See Ganje*, 659 N.W.2d at 267.

75. *Id.*

76. *See id.*

77. *See* MINN. STAT. § 344.02 (2016); *see also* SAM RANKIN & GARY CURRIE, MINN. H.R. RESEARCH DEP’T, MINN. PARTITION FENCE LAW (1998), [www.house.leg.state.mn.us/hrd/pubs/fencelaw](http://www.house.leg.state.mn.us/hrd/pubs/fencelaw).

78. *Ehle v. Prosser*, 293 Minn. 183, 190, 197 N.W.2d 458, 462 (1972).

though he had title, given how one would expect the title owner of the given type of property to treat it.<sup>79</sup> This is sometimes phrased similarly to the exclusivity element: evincing an intention to exclude all others.<sup>80</sup> But that does not mean a successful disseizor has to spend fifteen years chasing the title owners off the land with a rolling pin. Attempting to keep everyone off the adversely possessed property is not the key; instead, the key is keeping anyone else from using the property *in the manner in which a fee owner would be expected to use that property*, given the type of property it is.<sup>81</sup> For example, on a residential property, enclosing parts of the fee owner's lot with a fence, occupying the interior of that fence, and occupying a portion of the lot with an encroaching garage are hostile acts; these acts preclude the fee owner from making similar residential use of the property.<sup>82</sup> In the agricultural context, hostile possession means putting the land to farming uses at the exclusion of the fee owner for purposes like the "grazing of cattle and sheep, building and maintaining fences, removing gravel, quarry[ing] rock and [removing] trees, and engaging in certain conservation practices on the land."<sup>83</sup> Rather than demanding this element fit in a single definition, "[h]ostility is flexibly determined by examining 'the character of the possession and the acts of ownership of the occupant.'"<sup>84</sup>

A special note on the element of hostility is warranted to address permissive use. By definition, use that is permissive cannot be characterized as hostile.<sup>85</sup> Further, "[w]here the original entry is permissive, the statute does not begin to run against the legal owner until an adverse holding is declared and notice of such change is brought to the knowledge of the owner."<sup>86</sup> To state it another way, a claimant who possesses land by the permission of the title holder does not get to start the fifteen-year clock on adverse possession until making it clear to the title holder, whether through express affirmation or through the character of the circumstances, that such

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79. *Ganje*, 659 N.W.2d at 268.

80. *Id.*

81. *See id.*

82. *See* *Romans v. Nadler*, 217 Minn. 174, 178, 14 N.W.2d 482, 485 (1944).

83. *Grubb v. State*, 433 N.W.2d 915, 918 (Minn. Ct. App. 1988).

84. *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 110–11 (Minn. Ct. App. 2002) (quoting *Carpenter v. Coles*, 75 Minn. 9, 11, 77 N.W. 424, 424 (1898)).

85. *See* *Meyers v. Meyers*, 368 N.W.2d 391, 393 (Minn. Ct. App. 1985).

86. *Johnson v. Raddohl*, 226 Minn. 343, 345, 32 N.W.2d 860, 861 (1948).

possession has become hostile.<sup>87</sup> And, “proof of inception of hostility must in all cases be clear and unequivocal.”<sup>88</sup> The same standards that govern a showing of hostility outlined above may transform permissive possession into hostile possession, but they must be clearly and unequivocally shown.<sup>89</sup> As a practical matter, a court is likely to apply a healthy degree of skepticism to any allegations of hostile intent when possession began as permissive.<sup>90</sup> Silence from the disseisor is not enough to declare hostile intent, and the title owner’s abandonment of the property is similarly ineffectual as evidence of hostile intent on the part of the would-be disseisor.<sup>91</sup> The title owner must be affirmatively notified of intent to hold the property adverse to her title, whether through words or action, in order to dislodge permissive use from continuing as permissive.<sup>92</sup> “When use of property begins as permissive, the continued use is also deemed permissive until the contrary is affirmatively shown.”<sup>93</sup>

Continuous possession, the fourth element, is exactly what it sounds like; the other elements have been maintained, without interruption, for the statutory period of fifteen years.<sup>94</sup> A successive occupant may tack together time from herself and her predecessor to make the requisite period if there is privity between them.<sup>95</sup> However, “[o]ccasional and sporadic trespasses,” even when they continue throughout the statutory period, are not enough to satisfy the continuity requirement.<sup>96</sup>

87. *Id.* at 345, 32 N.W.2d at 861–62.

88. *Id.* at 345, 32 N.W.2d at 862.

89. *Meyers*, 368 N.W.2d at 393–94.

90. *See id.*; *Raddohl*, 226 Minn. at 345, 32 N.W.2d at 861.

91. *See Meyers*, 368 N.W.2d at 393–94.

92. *See Omodt v. Chicago, M. & St. P. Ry. Co.*, 106 Minn. 205, 207, 118 N.W. 798, 799 (1908); *Pickar v. Erickson*, 382 N.W.2d 536, 539 (Minn. Ct. App. 1986).

93. *Weis v. Kozak*, 410 N.W.2d 903, 906 (Minn. Ct. App. 1987) (citation omitted).

94. *See Romans v. Nadler*, 217 Minn. 174, 177–78, 14 N.W.2d 482, 485 (1944). The plaintiff or the plaintiff’s predecessor must have maintained the fifteen years of continuity in order to maintain the action. MINN. STAT. § 541.02 (2016). *But see Olson v. Burk*, 94 Minn. 456, 458, 103 N.W. 335, 336 (1905) (“In order that adverse possession may ripen into title, there must be continuity of the adverse possession for the full statutory period. An acknowledgment by the adverse claimant of the owner’s title before the statute has run in his favor breaks the continuity of his adverse possession, and it cannot be tacked to any subsequent adverse possession.”).

95. *See Ford Consumer Fin. Co. v. Carlson & Breese, Inc.*, 611 N.W.2d 75, 77 (Minn. Ct. App. 2000).

96. They also fail to satisfy the requirement of hostility. *Romans*, 217 Minn. at

Exclusive possession is the fifth and final element of adverse possession. Possession must be made with the intent to exclude others, and this intent can be inferred from the use of the land.<sup>97</sup> Exclusive possession does not necessarily mean that the disseizors have to specifically act to exclude others from the land, such as by posting “No Trespass” signs or the like.<sup>98</sup> But there is no exclusivity if the title holders are still using the land.<sup>99</sup> Note, though, that entries by others which are only “brief and insubstantial” do not affect the exclusive character of the disseizors’ possession.<sup>100</sup>

*B. Boundary by Practical Location Through Acquiescence, Express Agreement of the Parties and Acquiescence, or Estoppel*

In any two-count complaint from a prospective disseizor, boundary by practical location is the natural counterpart to adverse possession.<sup>101</sup> Establishing a boundary by practical location still requires high evidentiary standards, as discussed above.<sup>102</sup> But in contrast to adverse possession, the location of an agricultural fence line is of much more practical relevance.

Yet, even in establishing a boundary by practical location, the fence itself is of very limited use without clear evidence of the surrounding circumstances.<sup>103</sup> The first way to establish a boundary by practical location is acquiescence alone for the statutory period

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178, 14 N.W.2d at 485.

97. *Fredericksen v. Henke*, 167 Minn. 356, 359, 209 N.W. 257, 258 (1926) (“Adverse or hostile intent may be inferred from the character of the possession.”); *Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. Ct. App. 2003) (explaining that intent to take the land is not necessary, but intent to exclude others is).

98. *See, e.g., Houdek v. Guyse*, No. A04-711, 2005 WL 406217, at \*2 (Minn. Ct. App. Feb. 22, 2005).

99. *See Ganje*, 659 N.W.2d at 267 (“[There was no exclusive possession in area from which both parties took wood], transplanted wild flowers, trimmed the lilacs, allowed their children to play, and otherwise ‘took advantage of the opportunity provided by the area.’”).

100. *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 109 (Minn. Ct. App. 2002).

101. *See Gabler v. Fedoruk*, 756 N.W.2d 725, 728–29 (Minn. Ct. App. 2008) (stating that an action for adverse possession is “closely related” to an action to establish boundary by practical location).

102. *See supra* Part II.

103. *See, e.g., Wojahn v. Johnson*, 297 N.W.2d 298, 305 (Minn. 1980) (finding a fence that was deteriorating and in disrepair at various times in the past was of little use in establishing a boundary by practical location in consideration of conflicting testimony regarding the purpose of the fence).

of fifteen years.<sup>104</sup> Acquiescence is not just accepting the existence of a fence, a tree line, or some other kind of physical boundary.<sup>105</sup> Acquiescence is agreeing, either “affirmatively or tacitly,” that the physical boundary created by the fence or other demarcation is the actual boundary.<sup>106</sup> It “is not merely passive consent to the existence of a fence . . . but rather is conduct or lack thereof from which assent to the fence . . . as a boundary line may be reasonably inferred.”<sup>107</sup> For instance, where parties jointly built a fence and attempted and intended to place the fence as near to the dividing line of their farms as possible and thereafter accepted the fence in question as the boundary line, there would be a strong inference of a boundary by practical location.<sup>108</sup> On the other hand, “a pasture fence built by one on his own land, the careless, irregular course of which indicated that the builder did not intend it as a true boundary line, ought not to be relied on by an adjacent landowner, who had nothing to do with its construction, location, or use as a division line by acquiescence.”<sup>109</sup>

A boundary by practical location that is the result of express agreement of the parties is similar to the simple acquiescence method.<sup>110</sup> The big difference is that with the former, there must be an express agreement between the parties as to the location of the true boundary line.<sup>111</sup> This does not have to be a formal agreement, but there must be at least a mutual and specific discussion identifying the boundary line.<sup>112</sup> The other difference is that where there is an express agreement, the acquiescence does not necessarily have to be for the full statutory period of fifteen years for the boundary by practical location to be effective.<sup>113</sup>

104. *Gabler*, 756 N.W.2d at 729.

105. *See Wojahn*, 297 N.W.2d at 304.

106. *Gabler*, 756 N.W.2d at 729; *see LeeJoice v. Harris*, 404 N.W.2d 4, 7 (Minn. Ct. App. 1987).

107. *Wojahn*, 297 N.W.2d at 305 (quoting *Engquist v. Wirtjes*, 243 Minn. 502, 507–08, 68 N.W.2d 412, 417 (1955)).

108. *Engquist*, 243 Minn. at 508, 68 N.W.2d at 417.

109. *Id.*

110. *See Ruikkie v. Nall*, 798 N.W.2d 806, 818 (Minn. Ct. App. 2011).

111. *Id.*

112. *Id.*; *see also Slindee v. Fritch Invs., LLC*, 760 N.W.2d 903, 910 (Minn. Ct. App. 2009).

113. *Ruikkie*, 798 N.W.2d at 818 (“[B]ecause this agreement is not an actual contract, acquiescence in the agreed-upon boundary must be for a substantial period of time, although not necessarily the full 15 years required under the

Finally, establishing a boundary by practical location through estoppel requires that the title holder knew the true location of the boundary line, but “silently looked on . . . while the other party encroached thereon or subjected himself to expense which he would not have incurred had the line been in dispute.”<sup>114</sup> The classic imagery of an estoppel situation is the chuckling neighbor rocking back and forth in his front-porch chair, sipping a cup of coffee, watching the hapless to-be disseisor putting up a garage bisected by the true property line.

#### IV. REVISITING THE KOZAKS

##### A. *Weis v. Kozak in the Court of Appeals*

Harry Kozak probably did not give much (or any) thought to the elements of adverse possession when he was running his farm. Harry just wanted a court to confirm that his land was, in fact, his land.<sup>115</sup> But the mantle of history is often advanced by unwitting participants. In seeking his confirmation, and defending it in the court of appeals, Harry created a precedent in Minnesota that contained a singular example of adverse possession law as it pertains to the location of a fence.<sup>116</sup>

John Weis’s claim of actual possession of the Kozak land on his side of the fence relied upon his farming of the disputed land.<sup>117</sup> While the court of appeals readily acknowledged that cultivation

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acquiescence theory.”); *see also* *Houston Cty. v. Burns*, 126 Minn. 206, 208, 148 N.W. 115, 115 (1914) (allowing a claim for acquiescence to an agreed-upon boundary almost ten years following survey and establishment of a fence); *Beardsley v. Crane*, 52 Minn. 537, 547, 54 N.W. 740, 743 (1893) (allowing a claim for acquiescence to an agreed-upon boundary nine years following survey and establishment of the fence).

114. *Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn. 1977) (citations omitted). A boundary by practical location arising through estoppel typically involves the erection of a building that encroaches over the true boundary line; it should be noted that the title holder “can be estopped only from asserting title to the prejudice and injury of plaintiff,” meaning that the boundary can only be extended through estoppel to the portion of the lot on which the building actually encroaches. *Benz v. City of St. Paul*, 89 Minn. 31, 40, 93 N.W. 1038, 1040 (1903).

115. *See Weis v. Kozak*, 410 N.W.2d 903, 904 (Minn. Ct. App. 1987).

116. *See id.*; *see generally* 82 AM. JUR. PROOF OF FACTS 3D 227 *Proof of Boundary Established by Parol Agreement or by Acquiescence of Adjoining Landowners* (Westlaw, database updated Apr. 2017).

117. *See Weis*, 410 N.W.2d at 905.



constituted sufficient use to satisfy the requirements of adverse possession, it seemed that the disputed land, or at least a significant portion of it, was not cultivated by Weis, but only served as grazing land for his cattle.<sup>118</sup> To date, no reported Minnesota case has directly addressed whether grazing cattle alone serves as actual possession for purposes of adverse possession.<sup>119</sup> Some jurisdictions have held that pasturing livestock is sufficient possession, and others have held the opposite.<sup>120</sup> The *Kozak* court also paid homage to the third group of states: those that found that it “depends upon the *surrounding circumstances*” of the pasturing of livestock.<sup>121</sup> At any rate, the court of appeals gave Weis the benefit of an assumption that he had proven actual possession.<sup>122</sup>

The remaining elements of adverse possession received relatively little attention in *Weis v. Kozak*.<sup>123</sup> This was not because these elements were unimportant. But the adverse possession claim in *Weis v. Kozak* was based on little more than the physical location of a fence.<sup>124</sup> “Aside from the location of the fence built by both parties, there [was] no evidence Weis claimed ownership of the property.”<sup>125</sup> The parties, while they jointly agreed to build the fence, did so to keep their cattle apart, not to designate a boundary line.<sup>126</sup> *Kozak* explicitly “told Weis the fence ‘wasn’t in the right place,’” and the parties agreed to leave it because of expense—an indicator of permissive, rather than hostile, use.<sup>127</sup> And when *Kozak* moved part of the fence in 1972 further onto the land Weis would subsequently claim, Weis made no effort to exclude him.<sup>128</sup> Ultimately, there was “no evidence Weis communicated an adverse intent to *Kozak* or occupied the property in an attempt to claim it as his own.”<sup>129</sup>

Neither did Weis get much traction in establishing a boundary by practical location. The court found that “[t]he evidence show[ed] that neither party attempted nor intended to build the fence on the

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118. *See id.* at 905–06.

119. *See id.* at 906.

120. *See id.*

121. *Id.* (emphasis added).

122. *See id.*

123. *See id.*

124. *See id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

boundary line.”<sup>130</sup> Rather, the evidence showed that the purpose of the fence was to separate cattle.<sup>131</sup> There was certainly no express agreement between the parties as to the location of the boundary line, nor was there reliance on the fence as a boundary line, as evidenced by the acknowledgments that it was not on the line and that Kozak moved part of the fence in 1972.<sup>132</sup>

*Weis v. Kozak* was not the first, nor the most recent, but is perhaps the clearest case in Minnesota to say it: the sole existence of a fence does not make an adverse possession claim.<sup>133</sup> Harry kept his land.<sup>134</sup>

*B. A New Generation of Kozaks Go Back to the Southwest 40—To Argue About Adverse Possession*

Harry Kozak created a bit of a legacy for his family name in defending title to his farmland against John Weis. As of the date of this writing, fourteen cases in the Minnesota Court of Appeals have cited to *Weis v. Kozak*.<sup>135</sup> The case offers something to practitioners

130. *Id.* at 907.

131. *Id.*

132. *Id.*

133. *Id.*; see also *Engquist v. Wirtjes*, 243 Minn. 502, 505, 68 N.W.2d 412, 415 (1955) (“[I]t is obvious that the erection of a fence by an adjoining landowner has little significance on the issue of adverse possession unless the disseizor uses and occupies the land up to the line established by the fence.”); *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 108 (Minn. Ct. App. 2002) (quoting *Engquist*, 243 Minn. at 505, 68 N.W.2d at 415) (“[T]he erection of a fence by an adjoining landowner has little significance on the issue of adverse possession unless the disseizor uses and occupies the land up to the line established by the fence.”).

134. *Weis v. Kozak*, 410 N.W.2d 903, 907 (Minn. Ct. App. 1987).

135. As of the date of this writing, fourteen cases in the Minnesota Court of Appeals have cited to *Weis v. Kozak*: *Ebenhoh v. Hodgman*, 642 N.W.2d 104 (2002); *Pratt Inv. Co. v. Kennedy*, 636 N.W.2d 844 (2001); *Quast v. Brose*, No. C7-00-2025, 2001 WL 1035039 (Sept. 11, 2001); *Annett v. Snelling*, No. C1-00-2084, 2001 WL 641763 (June 12, 2001); *Berbee v. Rimas*, No. C7-00-209, 2000 WL 1468144 (Oct. 3, 2000); *Denman v. Gans*, 607 N.W.2d 788 (2000); *Jacobsen v. Salin*, No. C7-99-980, 1999 WL 1216831 (Dec. 21, 1999); *Potvin v. Hall*, No. C4-99-421, 1999 WL 759983 (Sept. 28, 1999); *Brooten v. Mykleby*, No. C4-98-795, 1999 WL 10254 (Jan 12, 1999); *Jones v. Cullen*, No. CX-98-1269, 1998 WL 811558 (Nov. 24, 1998); *Kvaal v. Porter*, No. CX-97-1049, 1998 WL 217192 (May 5, 1998); *Friesen v. Droneck*, No. C4-96-1991, 1997 WL 228970 (May 6, 1997); *Application of Oldenburg*, No. C9-92-1752, 1993 WL 89664 (Mar. 30, 1993); *Bonanza Grain, Inc. v. Roverud Const., Inc.*, No. C8-92-1287, 1993 WL 52173 (Mar. 2, 1993). See *Weis*, 410 N.W.2d. 903 (showing fourteen cases from the Minnesota Court of Appeals in the “Citing References” tab on Westlaw as of December 22, 2016).

as well as judges. The most poignant lesson of *Weis v. Kozak*, distilled into its purest form, is relatively simple: throw away the existence of a fence, and if you still have an adverse possession claim, by all means pursue it. But this lesson is not being absorbed quickly by the legal profession, nor the Kozak family.

Remember the Southwest 40, where a teenage Rodney Kozak stalked deer in the swampland surrounding a diagonal fence line? Well, Rodney grew up.<sup>136</sup> And his aging parents had new neighbors to the south.<sup>137</sup> The fence no longer angled away from the boundary with the affable Arthur Cater; it angled away from the boundary with Pamela Kozak, Rodney's cousin.<sup>138</sup> Pamela Kozak harbored a far keener interest in the pie slice of land between the south fence and the boundary than Arthur Cater had.

To clarify, Pamela Kozak obtained title to what had been Arthur Cater's property in 1989.<sup>139</sup> At that time, and for a number of years afterward, Rodney continued his habit of deer hunting on his parents' land in the strip between the south fence and the southern boundary line separating his parents' property and the property now belonging to Pamela Kozak.<sup>140</sup>

But Rodney Kozak and Pamela (not to mention her husband) did not see eye-to-eye on a number of matters.<sup>141</sup> One of these matters was the use of the land south of the angled fence during hunting season.<sup>142</sup> Tension between the families rose, and much of it found an outlet in the simmering turf war over the hunting use of the disputed strip.

In 1997, Rodney Kozak helped his parents obtain a formal survey for the Southwest 40.<sup>143</sup> The next year, after some substantial legal wrangling, where Pamela Kozak first raised the specter of an adverse possession claim, Pamela and her uncle Harry Kozak (along with their respective spouses) signed a succinct agreement whereby the parties explicitly recognized that the location of the south fence

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136. See Defendants' Memorandum of Law in Support of Motion for Summary Judgment at 2, *Kozak v. Kozak*, No. 71-CV-15-1096 (Minn. Dist. Ct. Mar. 31, 2016).

137. See *id.* at 3.

138. *Id.*

139. *Id.*

140. Declaration of Rodney A. Kozak, *supra* note 1, ¶ 11.

141. *Id.* ¶ 12.

142. *Id.*

143. *Id.* ¶ 11.

was not on the common boundary line.<sup>144</sup> The Kozaks agreed that when the fence needed to be replaced or “significantly repaired,” it would be moved to the surveyed boundary line and the expense would be shared between the parties.<sup>145</sup> In the agreement, the parties waived “any claim which they may have against each other regarding the current location of the fence.”<sup>146</sup> The agreement was to run with the land and would thus bind the parties as well as their successors.<sup>147</sup>

Shortly after the signing of the 1998 agreement, Rodney acquired the Southwest 40 from his parents.<sup>148</sup> Having been involved in the process that birthed the 1998 agreement, and as the one who had hunted on the disputed territory for decades, Rodney was well aware of the circumstances he bought into. With the fully executed 1998 agreement in hand, Rodney decided not to invite further conflict.<sup>149</sup> He stopped hunting the strip of land between the fence and the boundary line.<sup>150</sup>

Rodney continued to stay off the strip of land south of his fence, although he kept paying the property taxes on it.<sup>151</sup> He told his cousin Pamela that she and her family could use that strip to hunt, and they did.<sup>152</sup> They also used it for four-wheeling, as did Rodney’s sons during high school when they were friendly with Pamela’s son.<sup>153</sup> Rodney continued to use the southern fence as a barrier to keep in livestock, and he continued to perform maintenance on the fence as necessary for that purpose.<sup>154</sup>

But adding a “piece of wire here and there” can only keep a fence with wooden posts going for so long.<sup>155</sup> By 2015, some forty years had passed since the fence’s construction. Parts of the south fence were completely derelict.<sup>156</sup> Rodney hired a contractor to get an estimate as to the cost of replacing the fence and, while they were inspecting it, discovered that some attempts at repair had been made

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144. *Id.* Ex. B.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* ¶ 12.

149. *Id.*

150. *Id.*

151. *Id.*; *see also id.* Ex. C.

152. *Id.* ¶ 12.

153. *Id.* ¶ 13.

154. *Id.* ¶ 14.

155. *Id.*

156. *Id.* ¶ 15.

by another party.<sup>157</sup> After this, Rodney sought compliance with the 1998 agreement, desiring that he and his cousin rebuild the south fence at shared expense, this time at the actual surveyed property line.<sup>158</sup> However, Pamela Kozak had other ideas.

Knowing that he was facing an adverse possession claim from Pamela, Rodney brought an action to determine adverse claims under Minnesota Statutes section 559.01.<sup>159</sup> He also sued for breach of contract for failure to honor the 1998 agreement and for declaratory relief finding the 1998 agreement enforceable as a matter of law.<sup>160</sup>

Pamela counterclaimed, alleging slander of title.<sup>161</sup> The parties exchanged discovery and conducted depositions on both Rodney and Pamela. Then, something unexpected happened. Pamela moved for summary judgment that as a matter of law she owned the disputed strip on the basis of adverse possession and the establishment of a boundary by practical location.<sup>162</sup>

Only when there is no dispute as to any material fact, and the movant is entitled to judgment as a matter of law, can a party be granted summary judgment.<sup>163</sup> In addition to the various presumptions against parties claiming adverse possession or a boundary by practical location and the high evidentiary standard they have to meet,<sup>164</sup> Pamela's motion added another hurdle on top of these presumptions. At summary judgment, all evidence must be viewed in the light most favorable to the party against whom judgment is sought.<sup>165</sup>

The textbook way to defeat a summary judgment motion is to convince the court that there is a material issue of fact, which cannot be decided at summary judgment but must be deferred for consideration by a fact-finder at trial.<sup>166</sup> There is an overwhelming

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157. *Id.*

158. Complaint at 3, *Kozak v. Kozak*, No. 71-CV-15-1096 (Minn. Dist. Ct. Oct. 14, 2015).

159. *Id.*

160. *Id.* at 4.

161. Answer and Counterclaim ¶¶ 28–31, *Kozak v. Kozak*, No. 71-CV-15-1096 (Minn. Dist. Ct. Nov. 23, 2015).

162. See generally Defendants' Memorandum of Law, *supra* note 136, at 2.

163. See MINN. R. CIV. P. 56.03.

164. See *supra* Part II.

165. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

166. See *Sauter v. Sauter*, 244 Minn. 482, 485, 70 N.W.2d 351, 353 (Minn. 1955) (“[A] summary judgment is proper where there is no issue to be tried but is wholly

abundance of Minnesota case law holding that the existence of adverse possession, or a boundary line by practical location, is a fact issue to be resolved at trial.<sup>167</sup> Practically, this means that one claiming adverse possession or a boundary by practical location virtually cannot win at summary judgment, as “any doubt . . . as to the existence of a genuine issue of material fact . . . must be resolved in favor of finding that the fact issue exists.”<sup>168</sup> Were the proper standard applied, the title holder opposing adverse possession would have to concede to every allegation underlying each element of the disseisor’s claim to lose at summary judgment.<sup>169</sup>

As if all of this was not enough, the Minnesota Supreme Court has established a further inference against adverse possession by a close family member: “[T]he existence of a close family relationship between the claimant of land and the record owner . . . created the inference, if not the presumption, that the original possession by the claimant of the other’s land was permissive and not adverse . . . .”<sup>170</sup> This inference probably applies when an adverse claimant is a first cousin to a title holder, if they have a close relationship—although it will not act to negate the existence of clearly hostile use.<sup>171</sup> Much more could be said regarding the inference against adverse possession by a family member and whether or not it was applicable on the Kozaks’ facts; suffice it to say, the inference provided a little more force behind the several damaging stakes already protruding from the heart of Pamela Kozak’s summary judgment motion.

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erroneous where there is a genuine issue to try.”).

167. See, e.g., *Wojahn v. Johnson*, 297 N.W.2d 298, 303 (Minn. 1980) (“A trial court determination as to a disputed boundary is one of fact . . . .” (citation omitted)); *Stevens v. Velde*, 138 Minn. 59, 61, 163 N.W. 796, 796 (1917) (“Usually the question whether the elements essential to adverse possession exist is one of fact.”); *Slindee v. Fritch Invs., LLC*, 760 N.W.2d 903, 907 (Minn. Ct. App. 2009) (“[A] boundary determination involves a fact issue . . . .”); *Ganje v. Schuler*, 659 N.W.2d 261, 266 (Minn. Ct. App. 2003) (“Whether the adverse possession elements have been established is a question of fact.” (citation omitted)); *Denman v. Gans*, 607 N.W.2d 788, 793 (Minn. Ct. App. 2000) (“[T]he question of adverse possession is for the fact finder, whether it be the jury or the court.”).

168. *Rathbun v. W.T. Grant Co.*, 300 Minn. 233, 230, 219 N.W.2d 641, 646 (1974).

169. See *id.*

170. *Norgong v. Whitehead*, 225 Minn. 379, 383, 31 N.W.2d 267, 269 (1948) (citation omitted).

171. See *Ebenhoh v. Hodgman*, 642 N.W.2d 104, 112 (Minn. Ct. App. 2002) (noting that a property transfer between close family members does not render permissive otherwise hostile possession).

For the readers keeping score, there are a few things at play in the motion. First, there is a movant in summary judgment who bears the highest burden of proof that exists in civil cases. Second, there is a binding Minnesota Court of Appeals case, involving the same family, that says the location of a fence—admitted by all parties to have been built to keep in livestock and not to mark a boundary line and admitted by all parties not to lie on the surveyed boundary line—is not of evidentiary use to a disseizor. Third, there is a presumption that permissive use continues as permissive, which is strengthened both by the inference that familial use begins as permissive and an assertion in this case by the title holder that use by the disseizor or her predecessor, if any, was permissive. Fourth, there is the summary judgment standard requiring that all facts be viewed in the light most favorable to the non-movant, decisive case law saying that resolving these claims requires fact-finding, and a number of factual allegations which would defeat the claims if true. Fifth, there is the fully executed 1998 agreement, in which the movant acknowledged that the fence was not on the true boundary line and waived any claim she had in regards to the current location of the fence. Sixth and last, there is a complete lack of Minnesota precedent speaking to whether or not hunting and four-wheeling on a piece of land could even rise to the level of possession sufficient to support an adverse possession claim.<sup>172</sup>

Pamela filed a memorandum in support of her summary judgment motion,<sup>173</sup> Rodney filed a memorandum in opposition,<sup>174</sup> and the case settled before the district court made a ruling.<sup>175</sup> The settlement was confidential.<sup>176</sup> It was a bit of an anti-climactic conclusion to a family legal saga four decades in the making.

At first blush, *Kozak v. Kozak* is a little deflating. Legal issues, seemingly put to rest thirty years prior, rose from the grave to once again haunt the same family, only to yawn and return to the ground. But maybe there is a lesson to be garnered along the journey from *Weis v. Kozak* to *Kozak v. Kozak*. And perhaps, for the optimist, there is even indicia of momentum toward progress.

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172. See Complaint, *supra* note 158, at 2–5.

173. See Defendants' Memorandum of Law, *supra* note 136.

174. See Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, *supra* note 2. In the interests of academic integrity by way of full disclosure, it is important to note that the author wrote this memorandum.

175. The author has personal knowledge of this case's resolution.

176. *Id.*

V. SOME THOUGHTS ON THE *KOZAK* CASES FOR PRACTITIONERS,  
JUDGES, AND LAWMAKERS

First, it is worth noting that, despite this author's (admittedly biased) perspective that Pamela Kozak's summary judgment motion was dead in the water from a legal standpoint, it may have had some value to her. The case did settle. The claims, long shots though they may have been at a summary judgment, helped resolve a controversy, which is the purpose of a trial in the first place.<sup>177</sup> Perhaps they could have even conceivably been successful with the right judge; a fence is powerful as a concept.

This article started by remarking on the obscurity of this particular topic area. Most laypeople, and many lawyers, have not the faintest clue about the precise legal effect the location of a fence line has on an adverse possession claim. Yet, the same laypeople, and the same lawyers, universally have some notion knocking around in the back of their heads that, if a person squats on a piece of land long enough, it becomes their own. Adverse possession is a historical doctrine, and it is not surprising that it has, at least superficially, seeped into the cultural awareness of every landowner in America.

Readers following along closely have ascertained this author's opinion as to the effect the location of a fence line has on an adverse possession claim—namely, none. The existence of a fence does nothing to show actual, open, hostile, continuous, or exclusive possession of land on either side of the fence, except to the extent that some such use may occur up to the fence itself. Of course, whether the fence existed or not, such use up to the same line would be just as actual, open, hostile, continuous, and exclusive.

The existence of a fence is slightly more helpful to a claim of boundary by practical location, but not much.<sup>178</sup> A landowner acquiescing or agreeing, through words or actions, to the location of a boundary different from the surveyed lines should be just as susceptible to a claim of boundary by practical location if that line is marked by a fence, an electrical wire, a stand of trees, a line in the sand, or nothing at all.<sup>179</sup> A boundary by practical location through

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177. Not to "search for truth," as a wise former professor of this author was fond of saying when reminding students to review Article III principles.

178. See *Ganje v. Schuler*, 659 N.W.2d 261, 270 (Minn. Ct. App. 2003) (citing a fence line and a roadway as indicia of a boundary line dispute).

179. Adjacent landowners jointly maintaining a fence is one of the better examples of how a fence might be useful in establishing a boundary by practical



estoppel, which perhaps presents the best equitable argument for a disseizor, could conceivably receive aid from the existence of a fence if the claimant alleged to have incurred significant expense upgrading the fence itself; other than this, it is hard to imagine an estoppel claim dependent on a fence line.

The existence of a fence, with nothing more, should neither help nor hurt an adverse possession claimant from a legal standpoint. So why does it keep coming up, again and again over more than a hundred years, as a focal point of many of these cases? Because it is a *fence*. It is a tangible—the tangible—archetypal concept of a “boundary.” People see a fence, and the immediate thought is that one is not supposed to be on the other side. Fences keep things in, and they keep things out. They separate things. Intangible legal property boundaries do the same, except it is simply the claim of right that keeps things in and keeps things out instead of a physical barrier. This article makes no claim to expertise in psychology, but it is easy to see how people could perceive the physical utility of a fence as be inextricably intertwined with the legal utility of a property line.

Not surprisingly, there is little empirical evidence to support this author’s suspicion that the mental association between fences and boundary lines leads to legal mistakes. But anyone who has hunted in rural Minnesota during deer season can attest to the innumerable squabbles that arise between landowners similarly situated to Rodney and Pamela Kozak and the central role the location of a decades-old fence plays in many of them. People tend to believe that what is on “their” side of a fence is “theirs.” And it is not only laypeople who are susceptible to this bias. Lawyers, and even judges, can get it wrong.

In the ideal world, the concepts of physical and legal barriers would dissociate, and the knowledge that the location of a fence line does not equal the location of a property line would diffuse amongst the property owners of Minnesota. In an only slightly more realistic world, lawyers would be sufficiently familiar with *Weis v. Kozak*, its forebears, and its progeny to properly advise their clients as the clouds darken over a fence-related boundary dispute. But in the real world, this is an obscure legal topic. In the real world, lawyers who

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location, because it tends to show that each side is treating the fence as the property of both and therefore as a demarcation of the boundary line; joint maintenance, however, is still no more than evidence of an agreement about the location of the property line, and it is the agreement, not the fence, that makes the line effective.

are typically taking agricultural adverse possession cases have a variety of other practice areas to keep up on.

Looking forward, someday, the continuing advance of technology may very well moot the need for the legal precedent on this issue. Today, there *is* GPS. Unlike in Harry Kozak's era, there are four-wheel-drive vehicles in every farmer's shed, and there is satellite imagery available at the touch of a button.<sup>180</sup> As old fences are replaced and new fences are built, fences intended to exactly mark a boundary line are more likely than ever before to actually mark that boundary line. On the other hand, if a fence is built for some other reason, it is more likely than ever before that the landowner will be aware that the fence does not align with a legal boundary line. Still, despite the current wondrous age of technology, there are a lot of fences still going up today in rural Minnesota without reference to GPS, Google Earth, or a formal survey. If landowners and lawyers are going to innovate their way out of this issue, it is still a long way off.

Of course, practitioners who have taken the time to read this article can and should use it to the present benefit of their clients. Landowners should be advised to ascertain and enforce the surveyed boundaries of their land, and for particularly risk-averse property owners, registration under the Torrens Act may be appropriate.<sup>181</sup> If others are using portions of a client's land, the client should ensure that it is understood and well-documented that such use is permissive. Whenever a landowner contemplates acquiring a new piece of property, candid advice should be liberally provided about the potential risks associated with adverse possession. And if an agricultural client bothers to consult her lawyer before constructing a new fence, consider advising her to put in a little forethought and a little money now to help avoid what could become a big problem down the road. An adverse possession claim related to a fence might

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180. See Gil Gullickson, *Precision Farming Can Better Target Inputs for Higher Yields*, SUCCESSFUL FARMING AT AGRICULTURE.COM (Nov. 18, 2016), <http://www.agriculture.com/crops/corn/precision-farming-can-better-target-inputs-for-higher-yields>.

181. See MINN. STAT. § 508.02 (2016) ("No title to registered land in derogation of that of the registered owner shall be acquired by prescription or by adverse possession, but the common law doctrine of practical location of boundaries applies to registered land whenever registered."); see also *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 232 (Minn. 2008) ("[A]cquisition by adverse possession is specifically disallowed by the Torrens Act [for properties properly registered under the Act].").

arise, at the earliest, fifteen years from its construction. It is hard to plan that far into the future. But the cost of using technological and legal means to ensure that a new fence is, depending on the purpose of the fence, actually on or not actually on the property line could easily be built into the construction costs. Amortized over the useful life of the fence, the risk-avoidance cost for doing the construction right in the first place would be a pittance.

With the right cases, the judiciary could also assist lawyers and their clients in clarifying some of the points raised in the *Kozak* cases. Adding a greater degree of certainty to the law might prevent a number of these cases from being brought in the first place or, at least, might spur more rapid resolutions. If it comes before them again, Minnesota appellate courts should join their sister jurisdictions in determining unequivocally whether or not pasturing livestock constitutes sufficient possession to sustain an adverse possession claim.<sup>182</sup> Minnesota courts could also decide whether hunting constitutes sufficient possession to sustain an adverse possession claim; if there are any Minnesota judges reading this, they are urged to join their colleagues across the St. Croix River in holding that it does not.<sup>183</sup> There are plenty of hunting-related boundary conflicts in rural Minnesota as it is.

Ultimately, the main thematic element of this article is in the hands of the judiciary. Minnesota courts could, and should, hold emphatically and unambiguously what most of them seem to have been at least toying at for years: that the mere existence of a fence is of no use in an adverse possession claim.

Of course, the legislature could also act to alter the law of adverse possession. One suggestion that has been gaining steam is to eliminate it altogether.<sup>184</sup> Although impassioned arguments exist for

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182. See *Weis v. Kozak*, 410 N.W.2d 903, 906 (Minn. Ct. App. 1987) (“A number of jurisdictions have held that pasturing livestock is sufficient possession to meet the requirements of adverse possession . . . . In the other states that have considered the question, the result depends upon the surrounding circumstances.”); *supra* note 72 and accompanying text (citing *Weis*, 410 N.W.2d at 906).

183. See, e.g., *Peter H. & Barbara J. Steuck Living Tr. v. Easley*, 785 N.W.2d 631, 635 (Wis. Ct. App. 2010). The Wisconsin Court of Appeals offered a well-reasoned opinion in *Easley* as to why the nature of hunting renders hunting an activity that generally cannot meet the elements of adverse possession; that analysis will not be repeated here, but is certainly worth a look for anyone with intellectual curiosity on the point. See *id.*

184. Wisconsin’s 2015 Senate Bill 344 proposed eliminating adverse possession with two exceptions: “1) [if] a court is unable to identify or locate the record title

the retention of adverse possession,<sup>185</sup> perhaps it is a doctrine that has outlived its usefulness and, indeed, its former romanticism. More than a century ago, Oliver Wendell Holmes, a favorite of this author, wrote in defense of adverse possession:

A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man. It is only by way of reply to the suggestion that you are disappointing the former owner, that you refer to his neglect having allowed the gradual dissociation between himself and what he claims, and the gradual association of it with another. If he knows that another is doing acts which on their face show that he is on the way toward establishing such an association, I should argue that in justice to that other he was bound at his peril to find out whether the other was acting under his permission, to see that he was warned, and, if necessary, stopped.<sup>186</sup>

Perhaps Holmes' lyrical prose captured the essence of the doctrine in a time in which coaxing a hardscrabble life from the dirt was the norm. Maybe he even spoke to the circumstances of a fourteen-year-old farm boy in the 1970s, building a fence by hand, alongside his father. But in an age of corporate farming, in which everyone carries around in their pockets tools capable of precision mapping, and globalization has set young people adrift from the family farm on the winds of mobility, the justifications for preserving the doctrine for the individual adverse claimant working the land no longer seem so at home. Perhaps the time is drawing near to declare that the property line is just the surveyed property line, although such a declaration would be purchased at the price of a tinge of nostalgia from this author. For the most part, the prospect of abandoning adverse possession is merely food for thought and is beyond the scope of this article. But it does make one wonder what the next generation of Kozaks might be fighting about.

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owner or the record title owner's successor in interest; or 2) [if] a principal building has been located on the real property for at least the required number of years of uninterrupted adverse possession." S.B. No. 344, 102d Leg., Reg. Sess. (Wis. 2015).

185. See, e.g., Jeffrey E. Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419 (2001), <http://www.repository.law.indiana.edu/facpub/221>.

186. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

## VI. CONCLUSION

There is no crisis around agricultural fence lines in adverse possession claims. It is not something that desperately demands congressional action or calls for the immediate resolution of a circuit split. It is an obscure subject matter, albeit one that could use a few tweaks in the courts. But it is a topic that can be important to the lives of real people. It is a topic that a lawyer practicing in agricultural law should at least be aware of. For the Kozak family in particular, it inhabits a distinct corner of Minnesota law over which they can claim a certain degree of ownership. Our legal system requires a real life controversy to test the boundaries of the law, hone its concepts, and at times, expose its absurdities. When Harry Kozak agreed to build a crooked fence with his neighbor in the 1960s, he probably never imagined a lawyer would be writing about it in 2016. But that crooked fence probably allowed his direct descendants to resolve a controversy a lot more expediently than would have otherwise been possible. It helped provide legal clarity and direction for dozens of similarly situated landowners who found themselves in personally troubling situations. That legacy is deserving of pride. And whatever precedential echo continues to pulsate forward in time, for the Kozaks and for all future Minnesota farmers, a part of it all started with a man named Harry, who wanted to build a fence.

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