

**8060 ADVERSE POSSESSION NOT FOUNDED ON WRITTEN INSTRUMENT
(WIS. STAT. § 893.25)**

(Name of adverse possessor) claims ownership of real estate based on adverse possession. To claim ownership of real estate based on adverse possession, a person, together with his or her predecessors in interest, must have had uninterrupted adverse possession of the real estate for at least 20 years. Real estate is adversely possessed when the person claiming adverse possession (together with (his) (her) predecessors in interest) has had actual continued occupation of the real estate, under a claim of title, exclusive of any other right and the real estate claimed and occupied is either protected by a substantial enclosure or is usually cultivated or improved.

[In determining whether real estate is adversely possessed, you must look at the physical character of the possession. The physical possession must be open, notorious, exclusive, continuous, and hostile for at least 20 years.]

[The adverse possession must be sufficiently open and obvious to have apprised (title holder) of both the fact of the possession and the intent to exclude others from possession. Exclusive possession does not mean absolutely exclusive but rather the kind of possession that would characterize an owner's use.]

[Note: The following paragraph should be given where the use claimed to be continuous is seasonal in nature: Where the adverse possession is seasonal in character, the requirement of continuity of possession is satisfied by the use of the real estate according to the existing seasonal uses, needs, requirements, and limitations, taking into consideration the location and the adaptability of the real estate for the seasonal use.]

["Hostile" does not mean a deliberate, willful, or unfriendly intent. If the characteristics of open, notorious, exclusive, and continuous possession are satisfied, the law presumes the element of hostile intent. "Hostile" means that the person in actual possession of the land claims exclusive right to it.]

[Land is "actually occupied" when it is used in a way it is ordinarily capable of being used and in such a manner as an owner would use it. Actual occupation is not limited to structural encroachment, although that it is a common physical characteristic of possession.]

The requirement of "substantial enclosure" must alert a reasonable person of a dispute over the land. "Usually cultivated or improved" means the one in possession has put the land to the same kind of use that a title holder might generally put the land.

(Title holder) is presumed to be in possession of the land claimed by (adverse possessor). Therefore, the burden is on (adverse possessor) to establish (his) (her) claim.

Finally, (adverse possessor) has the burden of proof to clearly define the area of land claimed to be adversely possessed. While absolute precision or utilization of a surveyor is not required to establish lines of occupancy, the evidence must provide a reasonably accurate basis upon which to determine the boundary of the land adversely possessed.

[Burden of Proof, Wis JI-Civil 200]

COMMENT

This instruction and comment were approved in 1996. The comment was updated in 2011, 2015, 2016, and 2018. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

Elements. To constitute adverse possession, "the use of the land must be open, notorious, visible, exclusive, hostile and continuous, such as would apprise a reasonably diligent landowner and the public that the possessor claims the land as his own." Pierz v. Gorski, 88 Wis.2d 131, 137, 276 N.W.2d 352 (Ct. App. 1979) (citations omitted); see also Steuck Living Trust v. Easley, 2010 WI App 74, 325 Wis.2d 455, 785 N.W.2d 631; Wilcox v. Estate of Hines, 2014 WI 60, 355 Wis.2d 1, 849 N.W.2d 280. "Hostile" does not mean a deliberate and unfriendly animus; rather, the law presumes the element of hostile intent if the other

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requirements of open, notorious, continuous, and exclusive use are satisfied. Burkhardt v. Smith, 17 Wis.2d 132, 139, 115 N.W.2d 540 (1962). Kruckenberg v. Krukar, 2017 WI App 70, 378 Wis.2d 314, 903 N.W.2d 164. "Both the fact of possession and its real adverse character" must be sufficiently open and obvious to "apprize the true owner in the exercise of reasonable diligence of the fact and of an intention to usurp the possession of that which in law is his own." Allie v. Russo, 88 Wis.2d 334, 343-44, 276 N.W.2d 730 (1979) (citations omitted). The size and nature of the disputed area are relevant in deciding if the use is sufficient to apprise the true owner of an adverse claim. See Pierz, 88 Wis.2d at 139.

In 2017, the Wisconsin Legislative Council published an information memorandum, IM-2017-04, which provides background information on the law of adverse possession and provides an overview of relevant court decision and statutes.

Tacking. The Judicial Council Committee's note following Wis. Stat. § 893.25 indicates that the phrase "in connection with his or her predecessors in interest" expresses the doctrine of "tacking" together periods of possession by adverse possessors in privity with each other.

Presumption of Hostile Possession. In Wilcox v. Estate of Hines, 2014 WI 60, 355 Wis.2d 1, 849 N.W.2d 280, the Wisconsin Supreme Court held that evidence regarding a possessor's subjective intent to claim title may be relevant in an adverse possession claim to rebut the presumption of hostility that arises when all other elements of adverse possession are satisfied. The court said the circuit court properly considered the predecessors in interest subjective intent and concluded that the adverse possession claimants failed to establish adverse possession for the requisite statutory period. The question presented in this case was whether the plaintiffs could establish that they adversely possessed the disputed property when their predecessors in interest expressly disclaimed ownership of it and sought permission to use the property from an entity that they mistakenly believed was its true owner.

Burden of Proof. This instruction is similar to the one used by the trial court in Kruse v. Horlamus Indus., 130 Wis.2d 357, 387 N.W.2d 64 (1986). It also conforms with the supreme court's clarification in Kruse as to the burden of proof to be used in adverse possession cases. The court held that the civil burden, not the middle burden, of proof applies in adverse possession cases. Some older cases used the term "clear and positive" evidence regarding evidence of possession. The court stated at page 362:

The confusion surrounding the phrase "clear and positive," derives from the word, "clear," which frequently appears in the middle burden of proof. Because of the confusion which this portion of the instruction may cause, we direct that the words, "must be clear and positive and," be omitted from the instruction. The amended instruction will therefore read, "The evidence of possession must be strictly construed against the claimant." The instruction as so modified comports with the presumption of § 893.30 Stats. that favors the holder of the legal title.

Titleholder. As suggested in a footnote in Kruse (p. 361), this instruction uses the term "title holder" as opposed to the term "true owner" to avoid possible confusion.

Seasonal Use. In both Laabs v. Bolger, 25 Wis.2d 17, 23, 130 N.W.2d 270 (1964) [involving a deer-hunting shack] and Kraus v. Mueller, 12 Wis.2d 430, 440, 107 N.W.2d 467 (1960) [involving a summer-cottage property], the court cites the A.L.R. annotation, "Adverse Possession: Sufficiency, as regards continuity, of seasonal possession other than for agricultural or logging purposes," 24 A.L.R. 2d 632, 633, for the rule that seasonal use can satisfy the continuity requirement under certain circumstances, with the annotation stating:

The requirement of continuity of possession as one of the essential elements of adverse possession is satisfied, as regards activities which are seasonal in character (other than those relating to agriculture and logging), by the use of land commensurate with and appropriate to existing seasonal uses, needs, requirements, and limitations, having regard for the location and adaptability of the land to such uses.

Defining the Area Possessed. The requirement that the adverse possessor provide a reasonably accurate basis upon which a legal description of the occupied area can be based is stated in Droege v. Daymaker Cranberries, Inc., 88 Wis.2d 140, 146; 276 N.W.2d 356 (Ct. App. 1979). The trial court must be provided with a reasonably accurate basis to determine the boundary. Otto v. Cornell, 119 Wis.2d 4, 11, 349 N.W.2d 703 (1984).

The court of appeals in Klinefelter v. Ditch, 161 Wis.2d 28, 37, 467 N.W.2d 192 (Ct. App. 1991) notes:

§ 893.25 Stats. makes no distinction between "wild lands" and any others. Whether land is wild or not, a substantial enclosure plus "actual continued occupation" under a claim of right results in adverse possession if maintained for twenty years.

Permission. Hostile intent does not exist if the use is pursuant to the titleholder's permission. Northwoods Dev. Corp. v. Klement, 139 Wis.2d 695, 129 N.W.2d 121 (1964). See also Wilcox v. Estate of Hines, 2014 WI 60, 355 Wis.2d 1, 849 N.W.2d 280.

Substantial Enclosure. See Steuck Living Trust v. Easley, 2010 WI App 74, 325 Wis.2d 455, 785 N.W.2d 631; Illinois Steel Co. v. Bilot, 109 Wis. 418, 444, 84 N.W.2d 855 (1901); Kruckenbergh v. Krukar, 2017 WI App 70, 378 Wis.2d 314, 903 N.W.2d 164.

Acquiescence. The adverse possessor may contend that, by tolerating his or her use, the titleholder was acquiescing in the use rather than permitting it, and argue that use by acquiescence is adverse. Allie v. Russo, 88 Wis.2d 334, 343, 276 N.W.2d 730 (1979). However, for the doctrine of acquiescence to apply, the adverse possessor's use of the disputed property must be exclusive. See Allie v. Russo, *supra*, at pp. 345-47, and cases cited therein.

The doctrine of acquiescence is a "supplement" to the older rule of adverse possession which held that adverse intent was the first prerequisite of adverse possession. Chandelle Enters., LLC v. XLNT Dairy Farm, Inc., 2005 WI App 110, 282 Wis.2d 806, 699 N.W.2d 241. Northrop v. Opperman, 2010 WI App 80, 325 Wis.2d 445, 784 N.W.2d 736; Steuck Living Trust v. Easley, 2010 WI App 74, 325 Wis.2d 455, 785 N.W.2d 631. Courts have developed the doctrine of acquiescence, which substitutes "mutual acceptance" for adverse or hostile intent. Buza v. Wojtalewicz, 48 Wis.2d 557, 562-63, 180 N.W.2d 556 (1970). See also Shrestha, Jessica, "Hey! That's My Land," Wisconsin Lawyer, Vol. 83, No. 3, March 2010 and Vol. 88, No. 7, June 2015.