

SEPTEMBER 7, 2016

IDAHO STATE BAR REAL ESTATE SECTION

BOUNDARIES

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I. BOUNDARY BY AGREEMENT OR ACQUIESCENCE

“Boundary by agreement or acquiescence has two elements: (1) there must be an uncertain or disputed boundary, and (2) a subsequent agreement fixing the boundary.” *Boyd-Davis v. Baker*, 157 Idaho 2014 (2014).

“Where the location of the true boundary line is unknown to either of the parties, and is uncertain or in dispute, such coterminous owners may orally agree upon a boundary line. When such an agreement is executed and actual possession is taken under it, the parties and those claiming under them are bound thereby. In such circumstances, an agreement fixing the boundary line is not regarded as a conveyance of any land from one to the other, but merely the location of the respective existing estates and the common boundary of each of the parties.” *Trappett v. Davis*, 102 Idaho 527, 531, 633 P.2d 592, 596 (1981); *Citing, Downing v. Boerhringer*, 82 Idaho 52, 56, 349 P.2d 306, 308 (1960).

“An orally agreed upon boundary cannot constitute the actual boundary between two pieces of property unless the true boundary line is ‘unknown to the parties and is uncertain or in dispute.’” *Berg v. Fairman*, 107 Idaho 441, 444, 690 P.2d 896 (1984); *Citing, Hyde v. Lawson*, 94 Idaho 886, 889, 499 P.2d 1242, 1245 (1972).

Where the true boundary line is known between coterminous owners, if known to either party, or is certain, and not in dispute, an oral agreement between them purporting to establish another line as the boundary between their properties is an attempt to convey the property in violation of the **statute of frauds**, and is invalid. *See Berg* at 444; *Citing, Gameson v. Remer*, 96 Idaho 780, 537 P.2d 631 (1975).

In *Berg*, the same Owner of two adjoining lots built the fence between the properties not on the boundary. The Owner then transferred the smaller lot to his son and kept the larger lot for the statutory period. Each transfer described the property only by the lot description [lots 1 or 2] and made no mention of the fence line. I.C. 5-210 (amended in 2006 from 5 years to 20 years). Adverse Possession was not available as no facts were presented to show non-permissive possession (because the predecessors in title were blood relatives of the original owner, their

possession of the disputed strip was presumptively permissive). Boundary by agreement did not work as the boundary line was not shown to be in dispute, unknown, or uncertain when the fence was erected.

In *Hyde*, the coterminous owners were uncertain as to the true boundary line. Without conducting a survey they agreed to a boundary line and drove stakes to establish the boundary. Seventeen years later a survey established the true boundary line and the defendants removed the inclosure. The Idaho Supreme Court confused the boundary by agreement theory with adverse possession and held the plaintiff's had succeeded in establishing adverse possession but only after headnotes one and two established a successful agreed boundary case. *Hyde v. Lawson*, 94 Idaho 886, 499 P.2d 1242 (1972) [red flagged] (overruled on other grounds) by *Nesbitt v. Wolfkiel*, 100 Idaho 396, 399 n. 2, 598 P.2d 1046, 1049 n. 2 (1979).

A. Adverse possession and agreed boundary are distinct theories. *Trappett v. Davis*, 102 Idaho 527, 531, 633 P.2d 592, 596 (1981).

There is no year requirement as for adverse possession. The period of acquiescence is merely regarded as competent evidence of the agreement. *Trappett*, 102 Idaho at 532, 633 P.2d at 596; *See also Paurley v. Harris*, 75 Idaho 112, 117, 268 P.2d 351, 353 (1954).

There is no tax requirement in agreed boundary cases. The court applies the following fiction: "Both parties, it must be conceded, have paid all taxes and assessments levied and assessed upon the lands as conveyed to them in their respective instruments of conveyance. However a finding, supported by substantial competent evidence, of an agreed boundary line has the effect of extending or diminishing the limits of the respective deeds to include and exclude the parcel of land in dispute; under such circumstances the payment of taxes and assessments in this manner is a payment in the land in possession of the respective parties and, hence, satisfies the requirements of the statute which requires the payment of taxes to perfect title by adverse possession." *Trappett v. Davis*, 102 Idaho 527, 633 P.2d 592, 596, 597 (1981); *Citing, Edgeller v. Johnston*, 74 Idaho 359, 355, 262 P.2d 1006, 1010-11 (1953). (Court pointing out that Idaho courts pay lip service to a fictional tax requirement in agreed boundary cases.)

B. What constitutes an "Agreement"

1. Express Agreement

May be oral or in writing. *See Wells v. Williamson*, 118 Idaho 37, 40-41, 794 P.2d 626, 629-630 (1990).

In 1976, coterminous owners orally agreed to construct a fence on what they believed to be the boundary. The true owner discovered the mistake in 1980 and wrote a letter, allowing the

fence to stand with her approval. In 1988, the subsequent owner asserted ownership. The Idaho Supreme Court upheld the trial court's summary judgment decision granting ownership to the non-title holding party according to the doctrine of boundary by agreement. *See e.g., Morrissey v. Haley*, 124 Idaho 870, 865 P.2d 961 (1993).

2. No Express Agreement - Acquiescence

“Since there must be an agreement, acquiescence is merely regarded as competent evidence of the agreement, and alone is not enough to establish boundary by agreement.” *Flying Elk Investment, LLC v. Cornwall*, 149 Idaho 9 (2010).

“In situations where no express agreement has been made, our cases have viewed a long period of acquiescence by one party to another party's use of the disputed property merely as a factual basis from which an agreement can be inferred.” *Wells v. Williamson*, 118 Idaho 37, 41, 794 P.2d 626, 630 (1990).

“Acquiescence is merely evidence of the agreement and can properly be considered as evidence of an agreement” *Wells v. Williamson*, 118 Idaho 37, 41, 794 P.2d 626, 630 (1990); *Downing v. Boehringer*, 82 Idaho 52, 57, 349 P.2d 306, 308 (1960), *quoting*, *Clapp v. Churchill*, 164 Cal. 741, 130 P. 1061 (1913).

II. IMPLIED BOUNDARY

Yet another term used by the Idaho Appellate Courts.

“On the theory of an express boundary by agreement,” “As to the theory of an implied boundary by agreement, the district court found. . . .” *Marek v. Lawrence*, 153 Idaho 50, 55, 278 P.3d 920, 925 (2012).

“The agreement need not be express, but may be implied by the surrounding circumstances and conduct of the parties.” *Wells v. Williamson*, 118 Idaho 37, 41, 794 P.2d 626, 630 (1990); *Edgeller v. Johnston*, 74 Idaho 359, 262 P.2d 1006 (1953).

The factors influencing whether an implied boundary will be found are: 1) the surrounding circumstances, and 2) the conduct of the parties, for example, including, the erection of a fence or other demarcation, possession of the property up to the fence, and a period of acquiescence. *Norwood v. Stevens*, 104 Idaho 44, 48, 655 P.2d 938, 942 (Ct. App. 1982) (1982).

In *Griffel v. Reynolds*, 136 Idaho 397, 34 P.3d 1080 (2001) the Supreme Court heard a case where a neighbor brought a negligence action against an adjoining landowner regarding a boundary dispute to property that the landowners purchased from the former owners. The

district court found that, “the adjoining owners did not know the exact location of the common boundary lines prior to the survey, but that all parties had acquiesced in the farming lines as boundaries for many years. *Id.* at 399. The district court entered judgment establishing the boundaries along the farming lines pursuant to the doctrine of boundary by agreement. *Id.* On appeal, the Idaho Supreme Court affirmed the decision of the district court stating that the true boundary lines between the adjoining property owners were uncertain, but the farming lines had not been substantially changed for at least 20 years, thus providing a sufficient basis to establish a boundary by agreement. *Id.* at 401.

In Idaho, the existence of a fence between adjoining landowners may establish a boundary by agreement even if there is no evidence regarding who built the fence or why the fence was built. *Neider v. Shaw*, 138 Idaho 503, 506, 65 P.3d 525, 528 (2003). If a fence has been in existence between two adjoining landowners for a number of year, it “strongly suggests it was put in place as a boundary by agreement.” *Id.* Further, if a landowner acquiesces to an adjoining landowner’s use of the disputed property over a long period of time, a factual basis will be created from which an agreement can be inferred. *Wells vs. Williamson*, 118 Idaho 37, 41, 749 P.2d 626, 630 (1990).

In *Wells*, the disputed property was bounded on one side by a fence which was evidently used to keep livestock. This fence was in existence when the current parties bought the property and there was contradicting evidence as to whether the fence constituted or was considered the boundary between the coterminous owners. This fence was later connected to by a fence to the east by agreement between the two owners and the western fence was built without express agreement but without argument either. The fences stood for approximately 14 years, and the land had been occupied for nearly 20 before the dispute arose. There was evidence that the true owner did not in fact believe the property was his. The Supreme Court of Idaho found the facts present to constitute a boundary by agreement.

The policy behind the doctrine of boundary by implication was described as follows: “Landmarks, such as fences, maintained for nearly half a century, coupled with actual occupation for forty years, ought not to be disturbed at the instance of one who has acquiesced therein for the same period of time Long acquiescence ought to also preclude a controversy that will involve rights that have been unquestioned for a generation.” *Norwood v Stevens*, 104 Idaho 44, 46, 655 P.2d 938, 940 (1982), quoting, *Bayhouse v. Urquides*, 17 Idaho 286, 298, 105 P. 1066, 1069 (1909).

III. WHAT CONSTITUTES AN “UNCERTAIN BOUNDARY”?

Incorrect survey constitutes uncertainty. *Morrissey v. Haley*, 124 Idaho 870, 873, 865 P.2d 961, 964 (1993); *Kessler v. Ellis*, 47 Idaho 740, 278 P. 366, 367 (1929).

“[I]gnorance as to what is later deemed the true boundary constitutes the requisite uncertainty. *Morrissey v. Haley*, 124 Idaho 870, 873, 865 P.2d 961, 964 (1993); *see, Wells v. Williamson*, 118 Idaho 37, 41, 794 P.2d 626, 630 (1990) (additional citations omitted).

“[The Supreme Court] and the Court of Appeals have clearly ruled that whether the correct boundary line is ascertainable elsewhere, via surveys or subdivision plats is irrelevant; the proper inquiry revolves about what the parties, at the time of their agreement, actually knew.” *Morrissey v. Haley*, 124 Idaho 870, 873, 865 P.2d 961, 964 (1993); *Wells v. Williamson*, 118 Idaho 37, 41, 794 P.2d 626, 630 (1990).

Uncertain essentially equates with unknown to both parties. *Norwood v. Stevens*, 104 Idaho 44, 45, 655 P.2d 938, 939 (1982).

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BOUNDARY BY AGREEMENT OR ACQUIESCENCE

1. Boundary by Agreement or Acquiescence has Two Elements:

1. There must be an uncertain or disputed boundary.
2. There must be a subsequent agreement fixing the boundary.

Boyd-Davis v. Baker, 157 Idaho 688 (2014).

Acquiescence, by itself, does not constitute a boundary by agreement. Boundary by Acquiescence is simply another name attached to the doctrine of boundary by agreement; it is not a separate legal theory.

Downey v. Vavold, 144 Idaho 592 (2007).

BOUNDARY BY AGREEMENT OR ACQUIESCENCE

2. True Boundary Line is Unknown to Either Party

Trappett v. Davis, 102 Idaho 527, 531, 633 P.2d 592, 596 (1981).

3. Uncertain and In Dispute

Berg v. Fairman, 107 Idaho 441, 444, 690 P.2d 896(1984).

- a) Courts reason that if the boundary is known, an attempt to convey the property is in violation of the statute of frauds, and is invalid.

Berg at 444.

ADVERSE POSSESSION VS AGREED BOUNDARY

The Two are Distinct Theories

- Adverse Possession has a Time Requirement (5 years prior to 2006, 20 years after 2006, per I.C. 5-210).
- Agreed Boundary **does not** have a Time Requirement.
- The period of acquiescence is merely regarded as competent evidence of the agreement.

Trappett, 102 Idaho at 532, 633 P.2d at 596; See also *Paurley v. Harris*, 75 Idaho 112, 117, 268 P.2d 351, 353 (1954).



ADVERSE POSSESSION VS AGREED BOUNDARY

- Adverse Possession has a Tax Payment Requirement (also I.C. 5-210).
- Agreed Boundary **does not** have a Tax Requirement.
 - Court Applies a legal fiction concluded all taxes have been paid because properties are adjacent.

Trappett v. Davis, 102 Idaho 527, 633 P.2d 592, 596, 597 (1981);
Citing, Edgeller v. Johnston, 74 Idaho 359, 355, 262 P.2d 1006,
1010-11(1953).



WHAT CONSTITUTES AN “AGREEMENT”?

1. Express Agreement

- a) May be oral or in writing. See *Wells v. Williamson*, 118 Idaho 37, 40-41, 794 P.2d 626, 629-630 (1990).

2. No Express Agreement – Acquiescence

“Though opposition is a hopeless task, acquiescence would be worse.” -- Thomas M. Disch

- a) Acquiescence is evidence of an agreement, but alone is not enough to establish a boundary by agreement.

Flying Elk Investment, LLC v. Cornwall, 149 Idaho 9 (2010).

- b) Idaho cases use the phrase “boundary by acquiescence” and “boundary by agreement” interchangeably, “although the latter more accurately describes the doctrine.

Cox v. Clanton 137 Idaho 492 (2002).

IMPLIED BOUNDARY

- Yet another term used on occasion by Idaho Appellate Courts.
 - “On the theory of an express boundary by agreement,.....” “As to the theory of an implied boundary by agreement, the district court found....” *Marek v. Lawrence*, 153 Idaho 50, 55, 278 P.3d 920, 925 (2012).
 - The factors influencing whether an implied boundary will be found are: 1) the surrounding circumstances, and 2) the conduct of the parties, for example, including, the erection of a fence or other demarcation, possession of the property up to the fence, and a period of acquiescence. *Norwood v. Stevens*, 104 Idaho 44, 48, 655 P.2d 938, 942 (Ct. App. 1982) (1982).
 - Parties had acquiesced in farming lines as boundaries for many years, finding of boundary by agreement was affirmed.
Griffel v. Reynolds, 136 Idaho 397, 34 P.3d 1080 (2001).

WHAT CONSTITUTES AN 'UNCERTAIN BOUNDARY'?

- **Incorrect Survey**

Morrissey v. Haley, 124 Idaho 870, 873, 865 P.2d 961, 964 (1993); *Kessler v. Ellis*, 47 Idaho 740, 278 P. 366, 367 (1929).

- What did the parties actually know?

- Whether the correct boundary line is ascertainable elsewhere, via surveys or subdivision plats is irrelevant; the proper inquiry revolves about what the parties, at the time of their agreement, actually knew.

Morrissey v. Haley, 124 Idaho 870, 873, 865 P.2d 961, 964 (1993); *Wells v. Williamson*, 118 Idaho 37, 41, 794 P.2d 626, 630 (1990).

- Uncertain means unknown to both parties.

Norwood v. Stevens, 104 Idaho 44, 45, 655 P.2d 938, 939 (1982).

QUESTIONS?

THANK YOU!

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