

### **EXAMINER'S ANALYSIS OF QUESTION NO. 5**

Patty may have rights to the island under theories of adverse possession and prescriptive easement.

Under the doctrine of adverse possession, one can obtain title to property owned by another. A party claiming adverse possession must show clear and cogent proof of possession that is actual, open, visible, notorious, exclusive, hostile, continuous and uninterrupted for the relevant statutory period. *Burns v Foster*, 348 Mich 8, 14 (1957); *Marlette Auto Wash, LLC v Van Dyke SC Props, LLC*, 501 Mich 192, 202 (2018). The relevant statutory period is 15 years. MCL 600.5801(4).

Generally, the occasional or periodic entry upon land does not constitute actual possession. *Dauids v Davis*, 179 Mich App 72, 82 (1989). However, it has been acknowledged that the "[d]etermination of what acts or uses are sufficient to constitute adverse possession depends upon the facts in each case and to a large extent upon the character of the premises." *Burns*, 348 Mich at 14. Further, "[i]t is a well-recognized rule in Michigan that the acts required to support a finding of adverse possession are sufficient if those acts are consistent with the character of the premises in question." *Dauids*, 179 Mich App at 83 (Citation omitted). The property in question in this case is an island. Patty and Sam regularly used the property in the summer, which are seasonal acts consistent with character of the premises and thus should constitute the actual possession of the land. See *Nechtow v Brown*, 369 Mich 460, 462 (1963) (noting that "regular use of property as a summer home and for recreational purposes is a sufficient basis for a claim of adverse possession").

"The possession must be so open, visible, and notorious as to raise the presumption of notice to the world that the right of the true owner is invaded intentionally, and with the purpose to assert a claim of title adversely to his, so that if the true owner remains in ignorance it is his own fault." *Marlette*, 501 Mich at 211 (Citations omitted). The construction of the foot bridge, mowing of the grass, continued general maintenance on the island, and continued use of the hammock and table suggest visible, open and notorious possession of the island capable of asserting a presumption of notice to the world of Patty and Sam's intention to assert a claim of right.

The facts do not address the issue of whether Sam's or Patty's use of the island was exclusive, however, the facts also do not imply that their use of the island was anything but exclusive.

As to the continuous possession, Patty only owned the Valleyfield property for eight years, thus not meeting the 15-year statutory period alone. This by itself is not dispositive, however, because a party may 'tack' on the possessory periods of predecessors in interest to achieve this fifteen-year period by showing privity of estate. *Connelly v Buckingham*, 136 Mich App 462, 474 (1984). Privity of estate may be established "by mention of the disputed lands in the instrument of conveyance or parol references at the time of the conveyance." *Id.* at 474. Considering the facts provide that the disputed property was understood to be within the boundaries of the Valleyfield property when sold, privity of estate is clearly established. Sam owned the Valleyfield property for ten years prior to selling it to Patty. With Sam's ten years tacked on to Patty's eight years, Patty will be able to claim an 18-year period of continuous possession, thus meeting the requisite fifteen year time period.

Although both Sam and Patty had a mistaken belief that they owned the island and did not intend to occupy the land of another, their maintenance and use of the island over 18 years clearly established their intent to claim title to the island, and the hostile character of the possession follows from this conduct. See *Id.* at 468 (noting that the intention of the parties is the dispositive test in determining whether land is held adversely, and the conduct of the parties in openly manifesting a claim of ownership is sufficient to determine this intent). Further, there is no evidence that either Patty or Sam intended to respect only the true boundary of the property they acquired. See *DeGroot v Barber*, 198 Mich App 48, 52 (1993) (noting that there are two types of claims involving a mistaken boundary: those with an intent to hold to the true boundary line, which does not satisfy the hostility requirement, and those with an intent to claim land to a visible and recognizable boundary regardless of the true boundary, which does manifest hostility).

Thus, the existence of the hammock and table on the island, the seasonal mowing of the grass and the continued handling of general maintenance for 16 years, and the construction of the foot bridge, evidence that Patty's and Sam's possession of the island was actual, visible, open, notorious, hostile, continuous and uninterrupted for the requisite 15-year statutory period. Assuming that their use was also exclusive, and assuming that Patty is able to present clear and cogent proof thereto, a court would likely find that Patty has acquired the property by adverse possession.

If, on the other hand, Patty is unable to show exclusive use of the island by either her or Sam, she may have a prescriptive

easement right to it - to use the island in a manner consistent with her prior use. The establishment of a prescriptive easement right requires the same elements as a claim for adverse possession, with the exception that it does not have to be exclusive. *Marlette*, 501 Mich at 202 (2018). So, Patty could obtain a prescriptive easement even if the island was used by others, assuming the other elements are satisfied.