

ANSWER TO QUESTION NO. 11

Mr. and Mrs Murphy:

You have asked me to advise you regarding your rights with respect to the boundary line dispute between your neighbor, Mr. Zehnder, and you, with respect to Lots 26 and 27 of Happy Land Subdivision.

Trespass is an intentional and unauthorized invasion of another person's interest in the exclusive possession of his property. *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 344 (1997); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 195 (1995). So, at first blush, you are technically trespassing on Zehnder's property. However, that does not conclude the issue. You may have rights under the theories of adverse possession, prescriptive easement or acquiescence.

Adverse Possession: A person who is a trespasser may be able to avoid being ousted from possession of another's land if the statute of limitations on trespass has run and certain other requirements are met. The theory is that if the record owner is barred from ousting you from land because of the 15-year statute of limitations, then nobody can oust you and, accordingly, you become the effective owner of the property. In order to secure title by adverse possession, the claimant must establish by clear and cogent proof that his or her possession is actual, visible, open, notorious, exclusive, continuous and uninterrupted for the statute period of 15 years, hostile and under cover of claim of right. *Burns v Foster*, 348 Mich 8, 14 (1957). You have been living on Lot 27 for only seven years.

Even though you have been living there for only seven years, you may be able to "tack" Mr. Brown's 27 or 28 years of possession onto your seven years in order to meet the 15-year requirement. Tacking is the ability to assume the adverse possession of one's predecessor. *Connelly v Buckingham*, 136 Mich App 462, 467-468 (1984). So, if Mr. Brown's possession was adverse, you can add his 27 or 28 years to your seven years of possession to meet the 15-year possession requirement.

The existence of the fence for 34 years, the fact that the fence was built by Mr. Brown, the planting of the hedge in the disputed area, the construction of the shed in the disputed area, installation of the sprinkler in the disputed area, and the maintenance of that area by the owner of Lot 27 since 1973-1974, are evidence that your possession and your predecessor's was

actual, visible, open, notorious, exclusive, continuous and uninterrupted. Because Brown erected the fence without regard for the boundary line, the possession was hostile. *Werner v Noble*, 286 Mich 654 (1938), and *DeGroot v Barber*, 198 Mich App 48 (1993).

Acquiescence: There is an alternative theory, known as acquiescence, under which you might be able to acquire title to the property. The law of acquiescence applies the statute of limitations to cases of adjoining property owners who are mistaken about where the line between their property is. Adjoining property owners may treat a boundary line, typically a fence, as the property line. If the boundary line is not the recorded property line, this results in one property owner possessing what is actually the other property owner's land. Regardless of the innocent nature of this mistake, the property owner whose land is being possessed by another would have a cause of action against the other property owner to recover possession of the land. After fifteen years, the period for bringing an action would expire. The result is that the property owner of record would no longer be able to enforce his title, and the other property owner would have title by virtue of his possession of the land. See *Jackson v Deemer*, 373 Mich 22, 26 (1964). This theory is based on an implied agreement between the adjoining property owners.

As discussed above, the fact that the fence between Lots 26 and 27 has been in existence since 1974 and that both owners treated it as their boundary shows an implied agreement that the fence was the practical boundary between the two lots. So, acquiescence is a viable theory in your case.

Prescriptive Easement: A prescriptive easement is similar to adverse possession. The difference is that if you are successful, you will not own the disputed area, but will have the right to use it. In order to obtain a prescriptive easement, you must show all of the same elements that are required for adverse possession except that the possession by the party claiming the easement does not have to be exclusive. *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511 (1995). So, you could obtain a prescriptive easement even if the disputed area was used by the owners of both Lots 26 and 27, as long as you satisfy the other elements.

General: Adverse possession is not a favored theory. Therefore, you must have clear and convincing evidence to show adverse possession.