



**HEDGING YOUR BETS DOES
NOT ALWAYS MAKE YOU A WINNER**

By W. Christopher Barrier
Mitchell, Williams, Selig, Gates & Woodyard, P.L.L.C.

I vividly remember the first baptism by immersion I witnessed. I was in grade school and we had no doubt spent a Sunday visiting my mother's family in Perry County. After evening services in the native stone First Baptist Church in Perryville, we drove out to a stock pond used by a parishioner's cattle. Which meant that you had to pay pretty close attention to where you were stepping.

The modest crowd of onlookers was all on one side of the pond, since about a third of it was cut off from the rest by a rustic wire (but not bob-war) fence that ran in a straight line from the road, through the pond, across a field and into the woods. My father explained that two farmers shared the stock pond but were careful to mark what they figured was their property line.

Dress for the occasion...

I remember being impressed by the preacher's poise and presence as he strode without hesitation into the stock pond, took the hand of the young woman being baptized and supported her as he lowered her into the water with a cloth over her face. (Not his first rodeo, obviously.) She was wearing a simple shift and shoes, but I worried most about the preacher's shoes and suit. My father again explained that he might well only have two suits and pairs of shoes, but one set was for everyday and the other for just this sort of event.

I was raised in a denomination of squeamish infant baptizers, and never saw the real thing again until high school, when I went with a friend to what is now the Acadia restaurant, but then was the Church of Christ in Hillcrest. Imagine my surprise when the immersing that evening was done in some sort of tub, behind glass, above and away from the congregation and in front of a

lighted mural. Somehow I felt the experience in the stock pond may have been deeper, but who am I to make such judgments. Besides which, that congregation was awesome at hymn time.

Don't leave any doubt...

I think about that stock pond fence from time to time, since the two farmers obviously worked together while leaving no doubt as to their respective rights and intentions, when I read the adverse possession and easement cases that seem to consume a disproportionate percentage of our appellate courts' time and energy. I also am reminded that you have to think differently in a rural setting or woodland than you do with your routine backyard encroachment.

The latest reminder is the 2011 case of *Emerson v. Linkinogger*. The property in question was indeed rural, largely pasture land used by the adjacent owners for running cattle and making hay. In simplest terms, the Emerson family took a fence with a lot of hedge growth on it (which we have all seen in the country) to be their fence line. Apparently, they mowed hay and ran cattle up to the fence/hedge.

Who knew?...

From the Linkinoggers' side, however, the hedge had completely engulfed the fence---it just looked like a wild and wooly escaped privet. Their surveyor determined that the true line was well onto the ground the Emersons were claiming. There was conflicting testimony as to whether the Emersons' occupancy had in fact originally been permissive and was merely tolerated, or whether the hedge was generally accepted as the property line.

But, the critical issues were whether, under the rules governing adverse possession in rural areas, the Emersons' use was in fact "hostile", which does not mean antagonistic (although that is what Black's Law Dictionary and the American Heritage Dictionary say it means). It merely means acting in such a way that your neighbor knows what you are claiming. Running a few cattle on ground is not enough when neither party is there everyday, and patches of hedge show up everywhere.

I have in fact handled a fence and hedge case in a platted subdivision, which raised a number of other issues. The fence/hedge made a noticeable jog in the property line and a buyer had to investigate to see what was up with that and with the encroaching neighbor. That is not always as straightforward under the rural rules and sometimes a claimant either has to witness, or suffer the consequences.

CHRIS BARRIER has practiced real estate and business law with Mitchell Williams in Little Rock for a long, long time.