



IT ISN'T NICE TO FOOL ANY MOTHER AT ALL

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Mike Kinard practiced law in Magnolia for decades and served in the General Assembly before his election to the Court of Appeals, so he is well-versed in the common law and statutory law and the confluence of the two, as well as human nature. (As a politician, he probably could have used the adage regarding incorrect certainty as worse than ignorance that I cited several columns back, but provided the correct attribution---Will Rogers.)

In any event, Judge K used all of that experience and skill in deciding two adverse possession cases last year almost back to back. The second of the two (*Ford V. Howard*) also demonstrates another adage: people will treat strangers better than their own families. In that case, a son claimed real estate by adverse possession title to which was in his mother.

Count on common law...

He admitted that his initial occupancy of the property was permissive, the issue being at what point such a use could be considered as having become adverse, within the meaning of Arkansas's common law---that is, "continuous, actual, open, notorious, hostile, exclusive and with intent to hold against the true owner."

Briefly, "actual" means physical, not constructive. "Open" means in plain view. "Notorious" means such that others will observe it. "Hostile" means against any other users. "Exclusive" means without sharing. And the last, as to "intent", was the central point of contention between Mrs. Ford and her boy, who certainly acted as if he wanted to possess the property.

Take down Paradise...

There was no argument that Mrs. Ford originally allowed Howard to use the property. He then remodeled a house on the property for an office and opened a used car lot. He also

remodeled a chicken house, ran cattle, took in tenants, allowed a trailer and took down a vineyard (the concept of “mixed use” being alive and well in Benton County). He paid the insurance and taxes and maintained the property.

But, he also illustrated another adage when he disclaimed the property in his divorce and property settlement, and ignored a conveyance by Mom to her own revocable trust---you rarely can have it both ways. The rules also require a clear expression of “intent” when the parties are parent and child, parents traditionally helping out their kids in various ways, without being too fussy about legalities. A juror might well imagine a child maintaining property of a parent in lieu of rent, with no intent to claim the land.

Fly your flag or fold it...

And that’s where Howard’s toe was legally stubbed. There was absolutely nothing in the record to establish that Howard **told** his mother he claimed the property—maybe he did not want to force the issue, which leads to other inferences. But, adverse possession requires that **all** of those seven (now nine) elements be established---stack high evidence on six, but miss the seventh, and it is all for naught. Mom took back the property.

What color is your title?...

Bratton v. Wilson requires a flow chart to trace the tax forfeitures, conveyances, redemptions, etc., but it is significant here to discuss the eighth and ninth elements added by statute in 1995, payment of taxes and “color of title.” Although, the entire tract in this case (and in the *Ford* case) was actually assessed in the name of the claimants, that is not necessary. The more usual adverse possession case involves a boundary line dispute, as to which payment of taxes on the claimant’s own property usually covers the disputed strip well enough.

“Color of title” is somewhat more specific. The person claiming must do so under an instrument of conveyance ---a tax deed may well suffice, but NOT a release deed, a redemption deed, etc. Also at issue in the *Bratton* case was a question as to the beginning of the seven-year period, when the instrument was a deed held in *escrow* for part of that time. The majority rule is that the original delivery of the deed conveyed **equitable** title which recording converted to **legal** title---relating back to the original delivery.

So, before you jump to the conclusion that a piece of real estate, large or small, has changed ownership by adverse possession, count to nine!!

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