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Who are you again?

By Lance R. Pomerantz

Experienced practitioners know that some of the most contentious title disputes arise out of joint ownership among family members. Some people find out that they have co-owners in the "family estate" that they don't want and didn't even know about. To make matters worse, getting rid of them can be difficult, time consuming and expensive.

Down on the Farm

Midgley v. Phillips, et al., 2013 NY Slip Op 30788(U) (Sup.Ct., Suffolk County, April 12, 2013) involved a 10-acre farm in Peconic. The last deed of record was into William Buckingham. The opinion includes evidence that Buckingham originally permitted his cousin, Howell, possession of the farm. When Buckingham died in 1924, his will did not devise the farm. Howell died in 1928 leaving all of his property to his daughter, the mother of Midgley, the instant plaintiff. Howell's source of title, if any, is not disclosed.[1]

Following the deaths of Midgley's parents, Howell's interest in the farm was specifically devised to Midgley and his brother-in-law, Sayre, as tenants-in-common, in 1970. Soon thereafter, Sayre refused to participate or contribute to Midgley's efforts to obtain title to the property or in the renting or operation of the farm. Since then, Midgley has by turns operated the farm, leased it to others, paid property taxes and made infrastructure improvements.

The instant action was brought to establish Midgley's title against Sayre's heirs, as well as anyone else who might claim an interest as a successor to Buckingham.2

Cutting off the cotenants

New York recognizes the common-law presumption that one cotenant's possession is possession by and for the benefit of all other cotenants. Therefore, non-possessory cotenants are protected from the inherent danger that one cotenant's exclusive possession could form the basis of an adverse possession. Nevertheless, the protection is not absolute.

A possessing cotenant can establish title by of adverse possession if, in addition to proving the required elements of adverse possession, they can show an *ouster* of the non-possessing cotenants. An ouster can be either express or implied. Proof of an express ouster is usually straightforward (physical exclusion from the property coupled with an expressed intent to exclude). Implied ouster, however, can be quite complex, especially when the possessor may not even be aware of the existence of the non-possessing cotenants.


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RPAPL §541 sets out the parameters for running the statute of limitations for adverse possession against non-possessing cotenants. Essentially, §541 limits the common-law presumption to a continuous 10-year period of exclusive occupancy. Once those 10 years has run, the 10-year period begins to run in connection with the adverse possession claim. Thus, a 20-year period of exclusive occupancy must be shown in order to cut off the interest of a non-possessing cotenant, *Myers v. Bartholomew,* 91 N.Y.2d 630 (1998.)

The Hard Part

Compliance with the §541 requirements is not that difficult, especially when the existence or identity of the non-possessing cotenants is unknown. In many instances, even the non-possessors are unaware of their status. The difficulty for the possessor is in proving the acts tantamount to an implied ouster.

The *Midgley* opinion is helpful because it summarizes some of the actions that are *inadequate* to accrue a claim of adverse possession. Paying mortgages, taxes or maintenance expenses, and providing for upkeep of the property are inadequate, because, in the absence of other factors, they are consistent with preservation of the property for the benefit of all cotenants. In addition, the mere recording of a deed (typically styled a "correction" of "confirmation" deed) without any change in possession or notice to putatively "ousted" cotenants, does not constitute an ouster for claim accrual purposes.

In *Midgley,* the court found that the "Plaintiff established adverse possession of the subject property by … farming, renting, maintaining, using and improving the subject property from 1971 onward with no monetary or other contributions from any of the defendants." In addition, "Defendants' mere contentment with their complete lack of involvement or monetary or other contribution … does not inure to their benefit …"

More where that came from

Why did this case arise after all this time? Most likely, a proposed sale, mortgage or regulatory submission triggered a title search that revealed the problem. Market pressure to monetize long-held "family owned" properties continues to increase. At the same time, latter-day generations of those families have become geographically dispersed and disconnected over the last several decades. It is safe to assume that these cases will continue to pop up for the foreseeable future. The common-law presumptions, statutory impediments and the vagaries of human nature place a premium on affirmative proof of exclusion and control.

Note: Lance R. Pomerantz is a sole practitioner who provides expert testimony, consultation and research in land title disputes. He is also the publisher of the widely read land title newsletter Constructive Notice. For more information, please visit www.LandTitleLaw.com.

1 The reported opinion presumes, but does not explicitly find, that the farm passed to Buckingham's heirs (including Howell) under the intestacy laws.
2 There are 37 named defendants.