Bellevue
Neighborhood Mediation Program

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Sometimes Fences Make BAD Neighbors

By Terry Leahy

What do you have in common with Henry Kissinger and George Mitchell? Like them, you may one day end a war. Henry and George each brokered a peace between nations. The nations were in dispute over the same piece of dirt. It was a very large piece of dirt, mind you, but it was dirt just the same. You, too, may have your chance to create peace between two neighbors who each lay claim to the same piece of dirt. The war you'll encounter is called a Boundary Dispute.

To call it a war is no exaggeration. Neighbors do fight to defend a strip of dirt each is sure is his. Creating peace between such neighbors is no easy task. But the task is made a little easier if you master these three simple truths: (1) Saying "It's mine" and *proving* it are two very different things; (2) in practical terms, they may *both* own it; and (3) no peace is truly final until the land mines are removed.

"It's Mine!" A boundary dispute typically crops up when Dick has a survey done and discovers that his real boundary is five feet or so beyond the fence which separates his yard from Jane's. That five foot strip between the fence and the real boundary (that is, the boundary described in his deed) is called the Disputed Strip.

Jane, when confronted with the survey, is likely to say "That's nice, Dick, but the *fence* is the real boundary now, because it's been there for over ten years. My brother is a lawyer and he told me about Adverse Possession. He says that when someone uses land that belongs to someone else and continues using it for ten years, he becomes the owner of the land he's been using. He knows about my fence and he thinks it's a slam dunk case." Jane, of course, repeats all this when she and Dick start their mediation. Is Jane right? Is it really a slam dunk?

No, it usually isn't. Because, when it comes to adverse possession, claiming it and proving it are two different things. A statute says that if someone is using your land without your permission, you must sue to eject the trespasser within ten years of when the use started. If ten years pass before Dick sues, then Dick can no longer sue to eject Jane. On the first day of the eleventh year of adverse use, the courthouse doors slam shut, barring a lawsuit to eject, and title to the Disputed Strip transfers automatically to the adverse user.

'No fair!' you say? You're right. Many consider it legalized land theft. Courts take a different view. They figure ten years is plenty of time to take action to stop the adverse user from continuing to use the land. If neighbors have been living with, say, a fence separating their yards for ten years, it makes some sense to bring legal title into alignment with the physical boundary the neighbors themselves have used (the fence line).

Note that I said that title transfers "automatically." It *does,* assuming an adverse possession has actually occurred. Trouble is, buyers and title companies don't want to trust your assumption that adverse possession has actually occurred. They want proof. They want to see a deed from Dick. Or they want to see a court order that says that title has, indeed, transferred to Jane. And that's where Jane runs into trouble. Dick may say "I'm not signing any deed. If you think you own it, then go to court and *prove* it."

What must she prove? To win an adverse possession claim, she must prove these five things: (1) actual possession of the Disputed Strip for ten years; and that the possession was (2) "open and notorious"; (3) "hostile"; (4) "uninterrupted"; and (5) "exclusive."

Sound like legal gobblygook? It is. Let me translate into plain English the five questions the judge is really asking.

Actual Possession: Did Jane use the Disputed Strip like I'd expect an owner to use it?

Open and Notorious: Was Jane's use "open" enough that Dick was able to notice it?

Hostile: Was Jane's use the kind a normal owner might find objectionable? (Note: If Dick has given express permission for Jane to use the land, it is not hostile. Jane does not need to actually *know* the Disputed Strip is Dick's for the use to be considered hostile).

Uninterrupted: Did the use (Jane's and whoever owned her house before her) continue in a consistent way, without a real break in the pattern, for more than ten years?

Exclusive: Did Jane exclude Dick from using the Disputed Strip, except as a neighborly accommodation every once in awhile?

If the judge answers "Yes" to all five of those questions, Jane wins. But getting to "Yes" can be very expensive for Jane. Especially if Dick hires a lawyer, investigates facts and develops enough of a defense that at least one of these five questions is open to some debate. Doing that means Jane must go through a trial before she can "win". Trials are very expensive, and are often more expensive than the value of the Disputed Strip.

So, sure, maybe Jane is right. Maybe she is destined to win. But the fact that she will have to *prove* she's right through an expensive process is why it behooves her to mediate the dispute with an open mind. Guiding Jane to an appreciation of that may be necessary before any productive negotiation can occur.

Likewise, Dick may need reminding that simply moving a more-than-ten-year-old-fence back where it belongs can prove quite costly too. That's trespass, a criminal offense. It also gives Jane a right to recover her attorneys' fees and triple damages from Dick.

"It's Ours!" Once Dick and Jane come to appreciate that what they have is a genuine agreement to disagree, what you are actually mediating is a division of property among co-owners. That is, until a court declares one the winner, both Dick *and* Jane have claims to the Disputed Strip. Legally, they are not co-owners. But, in practical terms, they might as well be. Until a judge severs their relationship, or until they themselves extricate themselves from this co-claimants relationship, they are each attached to that Disputed Strip. Their challenge is to either extricate themselves from the relationship of co-"owners" of this strip or, perhaps, to fashion for themselves a continuation of their relationship on more palatable terms. As mediator, it is also useful to work with Dick and Jane to quantify the value of the Disputed Strip. One way is to extrapolate a dollar value from information on a property tax statement. Another is to elicit from both (perhaps in private caucus) which specific parts are particularly important to each of them.

"Clear Out The Land Mines!" Alas wars often end with a now silent battlefield still littered with hidden land mines, itching to explode. Creating a *valid* new legal boundary is not simply a matter of getting Dick and Jane to both say "I Do." There are others who must say "We Do, Too." They might be local government, the tax assessor, Dick and Jane's lenders (who have deeds of trust tied to what Dick's deed once said), to name just a few.

One more potential land mine: If Dick is considering surrendering the Disputed Strip to Jane, he might not want to make a final decision about that without at least thinking through some land use implications. Will it leave him with an undersized lot, one the city deems to be "unbuildable?" If Dick's parcel is large and can be subdivided, is giving up the Disputed Strip going to cost him one lot when he later subdivides? (If it is, the value of the Disputed Strip to Dick has just jumped astronomically).

Couple all of what you've just read with your own experience and intuitive wisdom and then you, too, will one day experience the joy Henry and George once felt when they guided their combatants to a just (if not lasting) peace.

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