Boundary Dispute Resolution

D. Scott Crook
D. Scott Crook Law, PC
2150 South 1300 East, Suite 500
Salt Lake City, Utah 84106
www.scottcrooklaw.com
scott@scottcrooklaw.com
theutahemploymentlawyer.blogspot.com
Telephone: 801.326.1943
Facsimile : 801.665.1567

The most common boundary problems fall into specific categories. The first category consists of problems created by the conveyances themselves. In many cases, when real property is passed to another person the legal description found in the deed may have a defect. These defects include legal descriptions that do not close. The Utah Supreme Court recently explained this defect:

> Often deeds are legally described by metes and bounds, which is a description of the boundary line by length and direction. To properly close, the metes and bounds boundary description must begin and end at the same geographical point. To say a deed "fails to close" is to say that the legal description of the boundary of a parcel of property does not completely describe the metes and bounds properly so that the boundary completely encompasses the parcel and returns to the point of the boundary description's inception.[1]

When a deed does not close, but is sufficiently definite to convey property, a question may still arise as to where the true boundary should be located.

Another boundary problem caused by a deed defect can be a conflict between elements of the legal description. For instance, a deed may describe a boundary in two different ways, such as with a metes and bounds description and by reference to a landmark, i.e., "thence South 07 54' 36" West along a ditch 680.8 feet . . . to the point of

[1] Ault v. Holden, 2002 UT 33, ¶11 n.8, 44 P.3d 781.

beginning."[2] If the metes and bounds description places the boundary short of the landmark, an ambiguity arises regarding the correct boundary.[3]

A second category of common boundary problems includes problems created by the conduct of the parties. For instance, abutting landowners may decide that they would like to place a fence between their properties but they fail to have the properties surveyed to identify the correct boundary.[4] Other landowners may decide to construct a common driveway on what they think is the correct boundary line.[5]

A third category of common boundary problems include problems created by the conduct of a third-party who has no property interest or special connection to the properties at issue. The most common of these problems is caused by surveys conducted early in the state's history with less precise surveying equipment. Diligent landowners, attempting to assure that they were constructing fence lines on correct boundary lines, often hired competent surveyors who simply had less precise equipment than surveyors have now. Resulting boundary lines could be off by only five to ten feet, but off nonetheless.[6] The result could be acres and acres of abutting properties off by five to ten feet on parallel boundaries.

A. Boundary Agreements

Most of the discussion regarding boundaries deals mostly with the change of the conveying documents or declarations by Courts that would effect a change in the legal description of property held by particular individuals. What these discussions often ignore is the fact that most people live within the boundaries of local governments. Additionally, most of those people live in subdivisions within the boundaries of those local governments.

What this means is that any time there is a boundary change, individuals should investigate the local ordinance regarding the requirement to amend subdivision lot lines, or "lot line adjustments." In fact, although boundary agreements are expressly permitted

[2] Khalsa v. Ward, 2004 UT App. 393, ¶8 n.1, 101 P.3d 843.
[3] *Id.* ¶¶2-4.
[4] *See, e.g.*, RHN Corp. v. Veibell, 2004 UT 60, ¶4, 96 P.3d 935.
[5] *See, e.g.*, Orton v. Carter, 970 P.2d 1254, 1255 (Utah 1998).
[6] Mason v. Loveless, 2001 UT App. 145, ¶4, 24 P.3d 997.

D. Scott Crook
D. Scott Crook Law, PC
801.326.1943

by Utah law,[7] it is a violation of Utah law for any person to change the boundaries of a lot line without amending the plat with the approval of the appropriate governmental entity.[8]

Utah statute provides a mechanism for lot line adjustment for subdivision plats established in cities or counties. Although counties and cities may enact subdivision ordinances that are distinct and vary from the Utah statutory requirements,[9] the Utah code requires, at the very least, that owners submit lot line adjustment requests to "the planning commission, or such other person or board as the municipal [county] legislative body may designate." [10] Once submitted, the appropriate body must approve an adjustment if "no new dwelling lot or housing unit will result" and no zoning requirements will be violated.[11]

B. Affidavits and Notices of Interest

One method of preserving or, at least, notifying the world of a person's claims of ownership to a property is through the recording of a "Notice of Interest" or similar affidavit that identifies a claim that the person has to the real property at issue. Although this is a simple way to encumber property, it is fraught with danger, as a person may be subject to statutory penalties and attorney fees for the filing of a wrongful lien.[12]

C. Quiet Title Actions

Utah Code Ann. § 78B-6-1301 provides that a party may file an action to determine the rights any person may have in real property. Through the use of this statutory mechanism, parties are able to finally solve any boundary dispute through the use of different legal and equitable theories. The appropriate theory will depend on the problem the person is trying to solve

1. Problems with the Conveyance

The first category consists of problems created by the conveyances themselves. In many cases, when real property is passed to another person the legal description found

[7] Utah Code Ann. § 57-1-45.
[8] *See* Utah Code Ann. §§ 10-9a-608(7)(a); 10-9a-611(2)(a); 17-27a-608(7)(a); 17-27a-611(2)(a).
[9] *See id.* §§ 10-9a-601; 17-27a-601.
[10] *Id.* §§ 10-9a-608(7)(a); 17-27a-608(7)(a).
[11] *Id.* §§ 10-9a-608(7)(b); 17-27a-608(7)(b).
[12] *See id.* § 38-9-1.

in the deed may have a defect. These defects include legal descriptions that do not close. The Utah Supreme Court recently explained this defect:

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When a deed does not close, but is sufficiently definite to convey property, a question may still arise as to where the true boundary should be located.

Another boundary problem caused by a deed defect can be a conflict between elements of the legal description. For instance, a deed may describe a boundary in two different ways, such as with a metes and bounds description and by reference to a landmark, i.e., "thence South 07 54' 36" West along a ditch 680.8 feet . . . to the point of beginning."[14] If the metes and bounds description places the boundary short of the landmark, an ambiguity arises regarding the correct boundary.[15]

There are several doctrines that are applicable to these types of problems.

a. Deed Construction

"Deed construction is a proceeding in law," in which "the court 'will determine the parties' intent from the plain language of the four corners of the deed.'"[16] "A court may also look to extrinsic evidence if the deed is ambiguous."[17]

In a deed construction case, a court reviews a deed and attempts to ascertain the parties' intent from the deed and finally resolve any ambiguity that may have arisen in the deed language. "A court is limited to interpreting only the language contained in the deed," it does not "add new terms to a deed or alter the original language of a deed to conform to the parties' intent."[18]

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[13] Ault v. Holden, 2002 UT 33, ¶11 n.8, 44 P.3d 781.
[14] Khalsa v. Ward, 2004 UT App. 393, ¶8 n.1, 101 P.3d 843.
[15] *Id.* ¶¶2-4.
[16] RHN Corp. v. Viebel, 2004 UT 60, ¶40, 96 P.2d 935 (quoting Ault v. Holden, 2002 UT 33, ¶38, 44 P.3d 781).
[17] *Id.*
[18] *Id.* ¶41.

In a deed construction action, a court applies specific rules of construction to the interpretation of legal descriptions. "Generally, 'in interpreting legal descriptions, a call to a monument or marker takes precedence over courses and distances.'"[19] Additionally, "where . . . land is conveyed and described with reference to a map or plat, such map or plat is regarded as incorporated in the deed."[20] Map references generally control a metes and bound description.[21] Metes and bounds descriptions control general descriptions.

Thus, the order of precedence in deed construction is:

1. Calls to manual or artificial monuments
2. Maps incorporated in the conveying document
3. Meets and bounds descriptions
4. General descriptions

It must be remembered; however, that all such rules of construction are presumptions and those presumptions may be overcome if, in the particular case, "the presumption is unreasonable."[22]

b. Deed Reformation

"'Reformation of a deed is a proceeding in equity.'"[23]

> [Reformation of a deed] is appropriate where the terms of the written instrument are mistaken in that they do not show the true intent of the agreement between the parties. There are two grounds for reformation of such an agreement: mutual mistake of the parties and ignorance or mistake by one party coupled with fraud by the other party.[24]

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[19] Clark v. Smay, 2005 UT App. 36, ¶8 (Mahas v. Rindlisbacher, 808 P.2d 1025, 1026 (Utah 1990)); *see also* Ottman v. Baldwin, 2007 UT App 187, ¶ 11, 164 P.3d 450; Khalsa v. Ward, 2004 UT App. 393, ¶8, 101 P.3d 843.

[20] Coop v. George A. Lowe Co., 71 Utah 145, 263 P. 485, 487 (1927).

[21] *See* Iselin v. C.W. Hunter Co., 173 F.2d 388, 392 (5th Cir. 1949) ("Ordinarily, in case of inconsistency or repugnancy, a general description in a deed gives way to a description by metes and bounds, and the latter gives way to a map that is used by reference to identify the land intended to be conveyed."); Mazzucco v. Eastman, 236 N.Y.S.2d 986, 988 (N.Y. Equity 1960) ("It is a well-established principle of law that when there is a conflict between a specific description by metes and bounds and a lot as shown upon a map by which a tract of land is conveyed, the latter provision will control.").

[22] Clark, 2005 UT App 36, ¶¶ 9, 15 (citing Khalsa v. Ward, 2004 UT App 393, ¶8, 101 P.3d 843) (involving depiction of creek in subdivision plat that was "roughly draw" on the map, "not called to in the subdivision plat," and excluded "angles or measurements connecting the creek to the boundaries").

[23] RHN Corp. v. Veibell, 2004 UT 60, ¶35, 96 P.3d 935.

[24] *Id.* (quoting Hottinger v. Jensen, 684 P.2d 1271, 1273 (Utah 1984)).

Unlike deed construction claims, a deed reformation claim allows "a court of equity . . . to add new terms to a deed or alter the original language of a deed to conform to the parties' intent."[25] "The controlling consideration in a reformation claim is the intent of the parties," and the court may apply deed construction "rules of construction in a reformation claim."[26] Deed reformation could be helpful in asserting that a legal description that fails to close should be corrected so as to close the description consistent with the intentions of the parties.[27]

2. Problems Caused by the Conduct of the Landowners

As discussed above, a second category of common boundary problems includes problems created by the conduct of the abutting landowners. For instance, abutting landowners may decide that they would like to place a fence between their properties but they fail to have the properties surveyed to identify the correct boundary.[28] Other landowners may decide to construct a common driveway on what they think is the correct boundary line.[29] The courts have created a number of doctrines that apply to establish boundaries based on the conduct of landowners.

a. Boundary by Agreement

Two primary doctrines developed to allow landowners to "establish boundary lines without a written agreement": boundary by agreement and boundary by acquiescence.[30] These doctrines were developed, in part, as acceptable exceptions to the statute of frauds.[31] The doctrine of boundary by agreement as originally defined "required an express parol agreement with respect to a boundary."[32] This doctrine, "premised on a contractual theory, requires '(1) an agreement, (2) between adjoining landowners, (3) settling a boundary that was uncertain or in dispute, and (4) executed by

[25] *Id.* ¶41.
[26] *Id.* ¶42.
[27] *Cf.* Ault v. Holden, 2002 UT 33, ¶¶ 26-30, 44 P.3d 781.
[28] *See, e.g.*, RHN Corp. v. Veibell, 2004 UT 60, ¶4, 96 P.3d 935.
[29] *See, e.g.*, Orton v. Carter, 970 P.2d 1254, 1255 (Utah 1998).
[30] *See* Halladay v. Cluff, 685 P.2d 500, 503 (Utah 1984), *overruled on other grounds*, Staker v. Ainsworth, 785 P.2d 417 (Utah 1990).
[31] *See id.* at 505; Staker, 785 P.2d at 423.
[32] *See* Halladay, 685 P.2d at 503.

actual location of a boundary line.'"[33] Under the boundary by agreement doctrine there must be uncertainty or a dispute regarding the true border of the property, otherwise "there is no consideration exchanged and the agreement fails."[34]

b. Boundary by Acquiescence

The other doctrine established to avoid the application of the statute of frauds prohibition against parol agreements regarding land is the doctrine of boundary by acquiescence. What made this doctrine acceptable to avoid the statute of frauds was that, despite the absence of an express parol agreement, the doctrine "required a lengthy period of acquiescence."[35] '"The elements of boundary by acquiescence are (i) occupation up to a visible line marked by monuments, fences, or buildings, (ii) mutual acquiescence in the line as a boundary, (iii) for a long period of time, (iv) by adjoining landowners.'"[36]

1. Occupation to a Visible Line

The occupation to a visible line element does not require that "a boundary must be a single uninterrupted structure."[37] However, there must be a something visible to mark or identify the boundary.[38]

2. Mutual Acquiescence in the Line as a Boundary

"[T]he party attempting to establish a particular line as the boundary between properties must establish that the parties mutually acquiesced in the line as separating the properties." [39] This requires that a party "shows *both* parties recognized and acknowledged a visible line, such as a fence or building, as the boundary of the adjacent parcels."[40]

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[33] Staker, 785 P.2d at 423 n.4 (quoting Backman, *The Law of Practical Location of Boundaries and the Need for an Adverse Possession Remedy*, 1986 B.Y.U.L. Rev. 957, 963).
[34] Staker, 785 P.2d at 423.
[35] Halladay, 685 P.2d at 503.
[36] RHN Corp. v. Ault, 2004 UT 60, ¶23, 96 P.3d 935 (quoting Jacobs v. Hafen, 917 P.2d 1078, 1080 (Utah 1996)).
[37] Orton v. Carter, 970 P.2d 1254, 1257 (Utah 1998) (citing Olsen v. Park Daughters Inv. Co., 29 Utah 2d 421, 511 P.2d 145, 147 (1973)).
[38] *See* Edgell v. Canning, 1999 UT 21, ¶7, 976 P.2d 1193 ("Here, there was no visible line. There was no fence, stream, wall, line of trees, or monument along the boundary line claimed by plaintiffs. Even the location of the picnic table upon which plaintiffs rely as a boundary marker was admittedly a few feet over the same boundary that they claimed it marked.")
[39] *Ault*, 2002 UT 33, ¶18.
[40] *Id. See also* Brown v. Jorgensen, 2006 UT App 168, ¶15, 136 P.3d 1252 (quoting Argyle v. Jones, 2005 UT App 346, ¶11, 118 P.3d 301).

Thus, "'[w]hen the parties agree that the line to which they occupy is not the true line and agree subsequently to ascertain the true boundary, the quality of acquiescence is destroyed and no boundary is fixed by continued occupation.'"[41] "Indeed, mere conversations between the parties evidencing either an ongoing dispute as to the property line or an unwillingness by one of the adjoining landowners to accept the line as the boundary refute any allegation that the parties have mutually acquiesced in the line as the property demarcation."[42]

3. For a long period of time

"The requirement that mutual acquiescence be for a long period of time has been interpreted in Utah to mean at least twenty years."[43] The twenty year time frame must be twenty consecutive years.[44]

4. Adjoining Landowners

This is a fairly straightforward element. If the landowners did not own adjoining properties, there would unlikely be a boundary dispute.[45]

5. Objective Uncertainty

In 1984, the Utah Supreme Court adopted a fifth element for a boundary by acquiescence claim: "objective uncertainty" regarding the location of the true boundary.[46] The rule required a person to show "that during the period of acquiescence there was some objectively measurable circumstance in the record title or in the reasonably available survey information (or other technique by which record title

[41] *Id.* (quoting 12 Am. Jur. 2d *Boundaries* § 83 (1997)).
[42] *Id.* ¶20.
[43] RHN Corp., 2004 UT 60, ¶ 30.
[44] *Cf.* Orton v. Carter, 970 P.2d 1254, 1258 (Utah 1998) ("It is true that common ownership of adjoining properties, even for a brief season, restarts the clock for determining boundary by acquiescence. (Citing Salazar v. Terry, 911 P.2d 1086, 1089 (Colo. 1996) (en banc).))
[45] It would seem that the facts in *Massey v. Griffiths*, 2007 UT 10, 152 P.3d 312, might have been a case where this element may have come into play given that two owners had treated a third parcel as their own and divided it with a fence. *See id.* ¶2-5. If the two offending parties had attempted to use the boundary by acquiescence doctrine against the owner of the middle parcel, it probably would not have applied. However, the court never reached that issue since it decided the case on an adverse possession theory. *See id.* ¶9.
[46] *See* Halladay v. Cluff, 685 P.2d 500 (Utah 1984), *overruled by* Staker v. Ainsworth, 785 P.2d 417 (1990).

information was located on the ground) that would have prevented a landowner, as a practical matter, from being reasonably certain about the true location of the boundary."[47]

In 1990, despite a wonderfully written dissent regarding the role of *stare decisis* by Chief Justice Hall, the Utah Supreme Court abandon the "objectively uncertain" element of the boundary by acquiescence doctrine.[48] However, in a few recent appellate court opinions, the Utah Supreme Court and the Utah Court of Appeals have created the impression that objective uncertainty may be returning---not through the front door but through the back door.

For instance, in *Wilkinson Family Farm, LLC v. Babcock*, 1999 UT App 366, 993 P.2d 229, the Utah Court of Appeals stated, incorrectly:

> The "very foundation of the doctrine is that the law *implies* that the adjoining landowners were once uncertain . . . and that the boundary was marked on the ground in settlement thereof. After the parties have for a long period of time acquiesced in that marked boundary, the law protects it." In contrast, "if there is no uncertainty as to the location of the true boundary line the parties may not, knowing where the true boundary line is, establish a boundary line by acquiescence at another place."[49]

While it is true that the cases cited by the Utah Court of Appeals said what the Court of Appeals said they did, both of those statements were wrong. Even *Halladay*, the case establishing the objective uncertainty requirement in Utah, never claimed that the historic boundary by acquiescence doctrine included an element of uncertainty of the true boundary line.[50] The doctrine of boundary by acquiescence was established as a method to "identify circumstances in which landowners [could] establish boundary lines without a written agreement." [51] Although the law might imply an agreement in such circumstances, it was never necessary for there to be any uncertainty regarding the boundary to successfully assert the doctrine of boundary by acquiescence.

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[47] *Id.* at 505.
[48] *See* 785 P.2d 417.
[49] *Id.* ¶12 (quoting Stratford v. Morgan, 689 P.2d 360, 366 (Utah 1984) (Howe, J., dissenting); Nunley v. Walker, 13 Utah 2d 105, 369 P.2d 117, 122 (1962).)
[50] 685 P.2d at 503-05 ("The confusion stemming from the intermingling of boundary by agreement and boundary by acquiescence has carried over to the subject of uncertainty or dispute over the boundary. Originally, this was mentioned as a requirement only in connection with boundary by agreement.")
[51] *Id.* at 503.

Thus, although *Wilkinson Family Farm* stated that it was not applying the "objective uncertainty" requirement, it did import an uncertainty element back into the boundary by acquiescence doctrine.

In 2002, though, the Utah Supreme Court clarified that there was no uncertainty element required in a boundary by acquiescence case. In *Ault v. Holden*, 2002 UT 33, 44 P.3d 781, the Court stated in unequivocal language that a party's knowledge of the true boundary line was irrelevant to the doctrine of boundary by acquiescence.

> In other words, to acquiesce, a landowner must recognize and treat an observable line, such as a fence, as the boundary dividing the owner's property from the adjacent landowner's property, *regardless of whether the landowner knows where the actual boundary lies or whether the boundary is uncertain.* The acquiescence, or recognition, may be tacit and inferred from the evidence, i.e., the landowner's actions with respect to a particular line may evidence the landowner impliedly consents, or acquiesces, in that line as the demarcation between the properties.[52]

Unfortunately, the Utah Supreme Court has again confused the issue. In 2004, the Utah Supreme Court decided *RHN Corp. v. Veibell*, 2004 UT 60, 96 P.3d 935, a case involving a complicated boundary dispute. Although the Court expressly stated that it has repudiated the "objective uncertainty requirement" in rejecting an argument that one of the parties should have been held to have constructive notice of the boundaries of the property from the legal description found in a conveyance,[53] it appeared to have concluded that a party's acquiescence ended at the time the party received actual notice of the true boundary.[54] The Court held that the party "acquiesced in the fence as a boundary beginning in 1938 and continuing at least up until either 1979 or 1981 when [that party] discovered the true location of the record boundary. [The party's] occupancy and possession for a long period of time 'ripened into a legal title' long before he discovered the actual location of the record boundary."[55] It was equally clear that the party never objected to the boundary "prior to the 1990s."[56]

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[52] Ault v. Holden, 2002 UT 33, ¶19, 44 P.3d 781.
[53] RHN Corp. v. Veibell, 2004 UT 60, ¶28 96 P.3d 935
[54] *See id.* ¶ 30
[55] *Id.* ¶30. A similar comment found its way into *McElprang v. Jones*, 2007 UT App 118, 2007 WL 1087556, at *2 (Utah Ct. App. April 12, 2007) ("McElprang knew the fence did not demarcate the actual boundary.")
[56] *Id.* ¶7.

What the *Wilkinson Family Farm* and *RHN Corp.* cases signal is a move toward the adoption of some standard that incorporates in the mutual acquiescence element an element that the parties not actually know what the true boundary is.

6. A Note on Timing

Finally, there is a particularly interesting problem created by the boundary by acquiescence doctrine. The courts have very clearly stated that "[o]nce adjacent landowners have acquiesced in a boundary for a long period of time, the operation of the doctrine of boundary by acquiescence is not vitiated by a subsequent discovery of the true record boundary by one of the parties."[57] Thus, even if parties who had once acquiesced in a fence line as a boundary for a sufficient time to create a boundary began again treating the true boundary as the boundary line, the fence-line boundary is established as the boundary regardless of the change in treatment by the parties.[58] One would presume, however, if the landowners treated the true boundary as the boundary for twenty years after the fence-line boundary was established, the doctrine of boundary by acquiescence would be applicable to change the boundary back to the true boundary line.

c. Equitable Estoppel

Another doctrine available to establish a boundary in a situation where problems arise by the conduct of the parties is the doctrine of equitable estoppel. "The elements of equitable estoppel are '(i) a . . . failure to act [that is] inconsistent with a claim later asserted; (ii) reasonable action . . . taken . . . on the basis of the . . . failure to act; and (iii) injury . . . would result from allowing [a repudiation of] such . . . failure to act.'"[59]

In certain circumstances, this doctrine could be very helpful. For instance, if a landowner, Mr. Spite, knowing that his neighbor, Ms. Bliss, is building a covered pool on a portion of Mr. Spite's property that Mr. Spite knows Ms. Bliss believes is on her property, says nothing, he may be equitably estopped from asserting a claim against Ms. Bliss for her alleged trespass on his property.[60]

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[57] RHN Corp., 2004 UT 60, ¶31.
[58] *See id.*
[59] Dahl Investment Co. v. Hughes, 2004 UT App. 391, ¶14, 101 P.3d 830.
[60] *See id.* ¶15 ("Dahl Investment failed to notify the Hugheses of its claim and . . . requiring the Hugheses to abandon or remove the driveway would constitute an injury" sufficient to equitably estop Dahl Investment from making a claim that the driveway encroached on Dahl Investment property.)

d. Prescriptive Easement

Another potential theory to use in a boundary dispute regarding neighbors is the doctrine of prescriptive easement. Although such a doctrine does not reestablish a boundary, it permits a party to the continued use of property within a proscribed boundary. "A prescriptive easement is created when the party claiming the prescriptive easement can prove that 'use of another's land was open, continuous, and adverse under a claim of right for a period of twenty years."[61]

Because prescriptive easements have been discussed thoroughly in other materials, this section will not attempt to an exhaustive description of the requirements. One thing should be noted, however. Permissive use of a common boundary throughout the prescriptive period is presumed to be adverse.

> [I]t is our opinion that the reasonable conclusion to be drawn from the facts here shown, where the parties (predecessors) jointly established and used a driveway on what they thought their common boundary, is that the use meets the requirements of being open, notorious, continuous and adverse for more than 20 years and therefore has established a prescriptive right to continue to use it.[62]

"To further that end [of assuring the peace and good order of society], [courts] presume[] that the once mutually permissive [use] should be deemed adverse for purposes of the adverseness requirement."[63]

e. Express Easement

Another doctrine available to establish use of property up to a boundary line is the establishment of an express easement over the property.

> Generally, an agreement to transfer an interest in land falls within the statute of frauds. In Utah, the statute of frauds requires that no interest in real property shall be created otherwise than by a conveyance in writing signed by the party creating the interest. It is clear, however, that a verbal agreement to transfer an interest in land can be taken out of the statute of frauds, and that one can be estopped from challenging the oral agreement if three requirements are met: A court must find (1) that there was such an

[61] Orton v. Carter, 970 P.2d 1254, 1258 (Utah 1998).
[62] *Id.* at 1259.
[63] *Id.*

> agreement, (2) that there had been part or full performance, and (3) that there was reliance thereon.[64]

f. Adverse Possession

Another doctrine that may be useful in the boundary dispute arena is the doctrine of adverse possession.

> In Utah, a person without legal title is deemed "to have been under and in subordination to" the owner with legal title unless that person has adversely possessed the property. When an occupant has entered into possession of property under a claim of title, the occupant may establish adverse possession by demonstrating that (1) the property was "occupied and claimed for the period of seven years continuously," (2) the party, his predecessors and grantors have paid all taxes which have been levied and assessed [on the property]," and (3) the property was, in pertinent part, "usually cultivated or improved," protected by a substantial inclosure[,] or "used . . . for the ordinary use of the occupant."[65]

Given the requirement that parties pay the taxes on a parcel of property for the period of occupancy, the doctrine of adverse possession has limited usefulness.

3. Problems Created by Third Parties

As described above, a third category of common boundary problems include problems created by the conduct of a third-party who has no property interest or special connection to the properties at issue. The most common of these problems is caused by surveys conducted early in the state's history with less precise surveying equipment. Diligent landowners, attempting to assure that they were constructing fence lines on correct boundary lines, often hired competent surveyors who simply had less precise equipment. Resulting boundary lines could be off by only five to ten feet, but off nonetheless.[66] The result could be acres and acres of abutting properties off by five to ten feet on parallel boundaries.

Given the variety of problems that can be created by a third party, any one of the doctrines identified in the two categories above could be applicable to the varying

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[64] *Id.*
[65] Salt Lake County v. Metro West Ready Mix, Inc., 2004 UT 23, ¶22, 89 P.3d 155 (citations omitted). *See also* Massey v. Griffiths, 2007 UT 10, 152 P.3d 312.
[66] Mason v. Loveless, 2001 UT App. 145, ¶4, 24 P.3d 997.

situations. For instance, in the event a surveyor incorrectly surveys property, a resort to deed correction or deed reformation might be appropriate. If both adjoining landowners treated a fence line that they believed to be the true boundary as the boundary for more than twenty years, a boundary by acquiescence claim may also be appropriate.

D. Tips, Techniques and Strategies for Resolving Disputes Without Going to Court

Knowing that there are common problems with boundary issues and that problems spring from common sources, alert property owners, real estate agents, developers, and attorneys can formulate strategies to identify likely problems and to quickly hear the warning whistle of the misplaced boundary.

The first thing a person should do is view the property. Although this may seem like a foreign idea or an inconvenience to some professionals, it is a step that could potentially save weeks of pain and mountains of money. The professional will be able to see important geological features, such as creeks, ditches, hills, or cliffs, old and new fence lines, survey stakes, neighbor activities, gates, wheel ruts, and other such things.

Seeing the geological features of a piece of property can help in many ways. First, if a legal description describes property by reference to landmarks or monuments, the person who has viewed the property will be able to recognize the landmark or any ambiguities in the descriptions of the landmarks. For instance, if there is a call to a fence line, but there is an old fence line and a new fence line on the property, an alert professional will note the potential problems and ask questions of a surveyor to determine what the call is to. Second, the geological features themselves can indicate problems with the conduct of the landowners that may cause the description in old deeds to vary from the actual boundaries. For instance, if an ancient fence line exists near the boundary of the property and it appears that the abutting landowner is using all the property to the fence line, an alert professional will want to assure that the fence line is, in fact, on the boundary and to further investigate the use of the properties along the fence line.

The second thing a professional will want to do to alert him or herself to a potential problem is to carefully review the legal descriptions of the deeds in the chain of title of the property. If possible, the professional should plot the lot lines using each description. Additionally, the professional should compare those deed descriptions to the

legal descriptions of the properties abutting the property to assure that there is no variance in the description of the boundaries for each of the properties. If a plat map or subdivision plat is available the professional should compare the descriptions of the boundaries in those plats to the legal descriptions of the property in the deeds.

Finally, a professional should have the property surveyed. A survey will alert the professional to any problems in the boundary lines. The surveyor may also determine that a previously surveyed area was off by a few feet causing properties in the area to have boundaries that are off by several feet.

E. Working With Your Attorney to Prepare for Litigation

As is evident from the discussion and materials presented at this seminar, a significant part of any boundary case will involve a determination of the historical use of the property. For example, to establish a prescriptive easement a party must show that there has been adverse use for a period of twenty years,[67] or to gain property by adverse possession, a party must show that the party possessed the land for, at least, seven years.[68] As a practical matter, most of the issues in these types of cases will involve historical evidence and research.

Historical research can be done in many ways. This section merely outlines a few suggestions of places a lawyer may want to look for history on a particular road. A researcher will want to look in the most obvious places. The first thing that a careful lawyer should always do is visit the road or affected land at issue. This will give the lawyer the ability to place important landmarks in perspective on any maps or descriptions of the property. Additionally, the attorney should research the title history of the particular parcels at issue. He or she should look at any plat maps, subdivision plats, historical county maps, historical city maps, and the official county maps kept pursuant to Utah Code Ann. § 72-3-105. Additionally, an attorney should look at historical USGS maps, field notes of township and homestead surveys, and homestead entry and certificate records.

Another resource available to Utah attorneys is the University of Utah and Brigham Young University libraries. Each of these institutions has large collections of

[67] *See* Alvey Development Corp. v. Mackelprang, 2002 UT App. 220, ¶10, 51 P.3d 45.
[68] *See* Utah Code Ann. § 78-12-12.

local community histories. Although not all of these histories are completely accurate, most are very good and describe local conditions quite well. Additionally, many communities have local historical societies that have significant resources.

As is obvious, the best historical research is quite comprehensive and can be time-consuming. However, it is absolutely essential to properly represent a client and to give fair and accurate advice.

Here are some suggested resources:

- County Offices.
    - Recorder's Office:
        a. Land records,
        b. subdivision plats,
        c. historical county maps,
        d. official county maps kept pursuant to Utah Code Ann. § 72-3-105.
        e. Patent and homestead entry records
    - Public Works
        a. road maps
    - County Surveyor
    - Find the right office for
        a. local histories
        b. historical society officers
        c. museums
        d. historical maps
        e. County commission meeting minutes
        f. historical ordinances
- BLM offices:
    - Government Land Office records: homestead and patent information. www.glorecords.blm.gov/search/search.asp
    - Survey maps and field notes
    - Township survey maps and field notes
    - GIS Maps

- National Archives
    - Maintains the case reports for homesteads.
- Private entities
    - Local historians
    - Aerial photography firms
    - University of Utah and BYU libraries have great local historical sections.
    - Your clients' photo album
    - Old timers in the area
    - Title search

D. Scott Crook

D. Scott Crook Law, PC
2150 South 1300 East, Suite 500
Salt Lake City, Utah 84106
www.scottcrooklaw.com
scott@scottcrooklaw.com
Telephone: 801.326.1943
Facsimile : 801.665.1567

D. Scott Crook, the owner and founder of D. Scott Crook Law, PC, has more than fifteen years of experience as a lawyer, concentrating his practice in the areas of employment and labor, commercial litigation, appellate practice, land use, and water. He is a member of both the Utah and Idaho bars and has extensive experience in both states. He has spoken on or written articles about employment issues, jury selection, boundary law, road and access law, law firm management, and appellate practice. He is the former chair of the Appellate Section of the Utah State Bar.

Mr. Crook received his juris doctor degree from Brigham Young University in 1996, graduating magna cum laude in the top 10% of his class, and was elected a member of the Order of the Coif. While attending law school, he received several awards and distinctions, including the Foundation Press Award for excellence in constitutional law and the Scholarly Writing Award. He obtained his Bachelor of Arts Degree in political science with a minor in Asian studies from Weber State (1993), graduating summa cum laude. He is a former editor of the Brigham Young University Law Review and the B.Y.U. Journal of Public Law. Additionally, Mr. Crook was a law clerk to Judge Norman H. Jackson, Utah Court of Appeals and to Judge William H. Woodland, Idaho Sixth Judicial District Court, in Pocatello, Idaho.