

Litigation of Surveying Court Cases

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How Property is Held in Oregon

- Fee Simple
- Life Estate
- Easement
- License

Fee Simple

- The fee simple estate is full ownership of the property.

Life Estate

- A life estate grants property to a person or persons to use throughout their natural life.

Easement

- An easement is an interest in the land of another.
- The holder of the easement is entitled to a limited use or enjoyment of the land.
- The easement holder is protected from interference with the use and enjoyment.
- A right of way is an easement that allows one to pass over, through, or across land.

Licenses

- A license allows the use of another's land for a stated reason.
- A land owner may revoke it at any time for any reason.

Land Must be Held in Deed Form

- ORS 93.850-93.870
- This 1973 statute defines terms, language, and forms.

Warranty Deed

- **§ 93.850¹**
Warranty deed form
- **• effect**
- **(1)**Warranty deeds may be in the following form:
 - _____
 - _____, Grantor, conveys and warrants to _____, Grantee, the following described real property free of encumbrances except as specifically set forth herein: (Describe the property conveyed.)
 - (If there are to be exceptions to the covenants described in ORS [93.850 \(Warranty deed form\)](#) (2)(c), here insert such exceptions.)
 - (Following statement of exceptions, here insert statement required under ORS [93.040 \(Mandatory statements for sales agreements, earnest money receipts or other instruments for conveyance of fee title to real property\)](#) (1).)
 - The true consideration for this conveyance is \$ _____. (Here comply with the requirements of ORS [93.030 \(Contracts to convey, instruments of conveyance and related memoranda to state consideration\)](#).)
 - Dated this _____ day of _____, 2____.
 - _____
- **(2)**A deed in the form of subsection (1) of this section shall have the following effect:
 - **(a)**It shall convey the entire interest in the described property at the date of the deed which the deed purports to convey.
 - **(b)**The grantor, the heirs, successors and assigns of the grantor, shall be forever estopped from asserting that the grantor had, at the date of the deed, an estate or interest in the land less than that estate or interest which the deed purported to convey and the deed shall pass any and all after acquired title.
 - **(c)**It shall include the following covenants, each of which shall run in favor of the grantee and the successors in title of the grantee as if written in the deed:
 - **(A)**That at the time of the delivery of the deed the grantor is seized of the estate in the property which the grantor purports to convey and that the grantor has good right to convey the same.
 - **(B)**That at the time of the delivery of the deed the property is free from encumbrances except as specifically set forth on the deed.
 - **(C)**That the grantor warrants and will defend the title to the property against all persons who may lawfully claim the same.
- **(3)**If the grantor desires to exclude any encumbrances or other interests from the scope of the covenants of the grantor, such exclusions must be expressly set forth on the deed. [1973 c.194 §1; 1999 c.214 §1]

Full Statutory Warranty Deed

- This form of deed provides the most protection.
- It protects the land owner against items such as encroachments and defects.

Bargain and Sale Deed

- **§ 93.860¹**
Bargain and sale deed form
- **• effect**
- **(1)**Bargain and sale deeds may be in the following form:
 - _____
 - _____, Grantor, conveys to _____, Grantee, the following described real property: (Describe the property conveyed.)
 - (Following description of property, here insert statement required under ORS [93.040 \(Mandatory statements for sales agreements, earnest money receipts or other instruments for conveyance of fee title to real property\)](#) (1).)
 - The true consideration for this conveyance is \$_____. (Here comply with the requirements of ORS [93.030 \(Contracts to convey, instruments of conveyance and related memoranda to state consideration\)](#).)
 - Dated this _____ day of _____, 2____.
 - _____
- **(2)**A deed in the form of subsection (1) of this section shall have the following effect:
 - **(a)**It shall convey the entire interest in the described property at the date of the deed which the deed purports to convey.
 - **(b)**The grantor, the heirs, successors and assigns of the grantor, shall be forever estopped from asserting that the grantor had, at the date of the deed, an estate or interest in the land less than that estate or interest which the deed purported to convey and the deed shall pass any and all after acquired title.
- **(3)**A bargain and sale deed shall not operate to provide any covenants of title in the grantee and the successors of the grantee. [1973 c.194 §3; 1999 c.214 §3]

Special Warranty Deed

- **93.855¹**
Special warranty deed form
- **• effect**
- **(1)**Special warranty deeds may be in the following form:
 - _____
 - _____, Grantor, conveys and specially warrants to _____, Grantee, the following described real property free of encumbrances created or suffered by the grantor except as specifically set forth herein: (Describe the property conveyed.)
 - (If there are to be exceptions to the covenants described in ORS [93.855 \(Special warranty deed form\)](#) (2), here insert such exceptions.)
 - (Following statement of exceptions, here insert statement required under ORS [93.040 \(Mandatory statements for sales agreements, earnest money receipts or other instruments for conveyance of fee title to real property\)](#) (1).)
 - The true consideration for this conveyance is \$ _____. (Here comply with the requirements of ORS [93.030 \(Contracts to convey, instruments of conveyance and related memoranda to state consideration\)](#).)
 - Dated this _____ day of _____, 2____.
 - _____
- **(2)**A deed in the form of subsection (1) of this section shall have the same effect as a warranty deed as described in ORS [93.850\(Warranty deed form\)](#), except that the covenant of freedom from encumbrances shall be limited to those encumbrances created or suffered by the grantor and the covenant of warranty shall be limited to read: That the grantor warrants and will defend the title to the property against all persons who may lawfully claim the same by, through or under the grantor.
- **(3)**If the grantor desires to exclude any encumbrances or other interests from the scope of the covenants of the grantor, such exclusions must be expressly set forth on the deed. [1973 c.194 §2; 1999 c.214 §2]

Bargain and Sale Deed or Special Warranty Deed

- If a land buyer is accepting a bargain and sale deed or a special warranty deed, he or she should obtain an extended title insurance policy.
- An ALTA survey is required by most title insurance companies before an extended policy is issued.

An Effective Deed

- It contains a description sufficient and definite.
- A surveyor should be able to determine what land was intended to be conveyed.
- A surveyor may use extrinsic evidence.
- If an interest in land less than the whole is being conveyed, those words must be in the description.

Drafting a Life Estate

- There are no definite words needed to convey a life estate.
- The intent to create a life estate must be clear.

Drafting Easements

- To create an easement, the use of the easement must be specified.
- Beware of language that will turn an easement into a fee simple.

Recording of Easements

- Easements are recorded.
- Recording creates notice of the terms of the easement.

Situations That May Benefit From a Survey

- To make sure that that all improvements are within the property boundaries
- To make sure that all setbacks and private restrictions are met
- New Construction
- Construction Liens
- Lenders may require
- Buying Acreage

Survey and Title Report Considerations

- Reviewed in tandem with the title report to ensure that all recorded easements are shown on the survey
- Easements noted in survey must be noted as exceptions on the title report
- Property description and title report must match

Survey and Title Report Considerations

- Title insurance companies usually require that the survey meet the minimum ALTA/ACSM standards.
- Lenders may require more.

Survey Endorsement

- Lenders will often require a survey endorsement.
- This provides additional protection in addition to a surveyor's certification.

The Survey Itself

- The survey may show:

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- Visible physical improvements on the property
- Physical evidence of easements
- Surface indicators of underground easements
- Physical evidence of encroachments

- Joint, common, or encroaching driveways
- Streams
- Rivers
- Ponds

CREATION OF EASEMENTS

- The use of land adverse to the deed can become an easement by prescription.
- A prescriptive easement is similar to gaining title to land through adverse possession.

A Prescriptive Easement

- To establish a prescriptive easement, the use must be (1) for the prescriptive period (10 years, ORS 12.050); (2) open, notorious, and adverse to the rights of the servient owner; and (3) continuous and uninterrupted according to the nature of the use.

The Statute: Prescriptive Easements

- **§ 105.170¹**
Definitions for ORS 105.170 to 105.185
- For purposes of ORS [105.170 \(Definitions for ORS 105.170 to 105.185\)](#) to [105.185 \(Application of ORS 105.170 to 105.185\)](#):
- **(1)**Easement means a nonpossessory interest in the land of another which entitles the holders of an interest in the easement to a private right of way, embodying the right to pass across another's land.
- **(2)** Holders of an interest in an easement means those with a legal right to use the easement, including the owner of the land across which the easement passes if the owner of the land has the legal right to use the easement. [1989 c.660 §1; 1991 c.49 §1]

Prescriptive Easement v. Adverse Possession

- Prescriptive Easements are similar to Adverse Possession
- Prescriptive Easements are not favored in Oregon law

Creation of Easements by Implication

- Prior use of one portion of a property for the benefit of another can give rise to an easement by implication.

Easement Implied from Necessity

- This type of easement arises when there is no other means of access to property.

Easement Implied from Reference to a Plat or Street

- Buyers of lots receive an easement in all streets, parks, or other open areas.

The Terms of the Easement

- Rights are determined by the purpose and character of the easement.
- Use is limited to the use that is reasonably necessary and convenient for the intended purpose of the easement.
- The intended use of the easement is not always clear.

Locating the Easement

- When the location of an easement is not specifically defined the location may be decided by its use since its creation.
- Practical use is the guiding principle.

Blanket Easement

- Generally describes the land it affects
- Has not yet been located
- Clouds the title
- Can make the property unmarketable
- Can affect financing
- Can affect transferability

CONSIDERATIONS IN DRAFTING EASEMENTS

- The land is identified by reference to it.
- If a map or plat is involved, attach or incorporate the document
- Determine if is recorded
- A scale diagram is helpful

Highway Access

- **This statute governs when a landowner has no access to a public road.**
- **§ 376.150¹**
Definitions for ORS 376.150 to 376.200
- As used in ORS [376.150 \(Definitions for ORS 376.150 to 376.200\)](#) to [376.200 \(Transfer of jurisdiction over establishment of ways of necessity to circuit court\)](#):
- **(1)**Public road means the entire right of way of any road over which the public has the right of use or any right of way held by the state or a political subdivision of the state for road purposes that is not open for public use.
- **(2)**Way of necessity means:
- **(a)**A road established under ORS [376.150 \(Definitions for ORS 376.150 to 376.200\)](#) to [376.200 \(Transfer of jurisdiction over establishment of ways of necessity to circuit court\)](#) to provide motor vehicle access from a public road to land that would otherwise have no motor vehicle access;
- **(b)**A route established under ORS [376.150 \(Definitions for ORS 376.150 to 376.200\)](#) to [376.200 \(Transfer of jurisdiction over establishment of ways of necessity to circuit court\)](#) to provide utility service access from an existing service location to a service point that would otherwise have no utility service access; **or**
- **(c)**A route established under ORS [376.150 \(Definitions for ORS 376.150 to 376.200\)](#) to [376.200 \(Transfer of jurisdiction over establishment of ways of necessity to circuit court\)](#) to provide a continuation of preexisting sewer service to land that has access to a public road. [1979 c.862 §1; 1989 c.674 §1; 2009 c.318 §1]

Adverse Possession

- By actual, open, and notorious possession
- Exclusively
- By hostile intent
- Continuously for the period of the statute of limitations of 10 years
- Under a claim of right or color of title

Boundary Line Disputes

- When land was held in large acreage parcels, errors in metes and bounds were not that critical to land owners.
- Modern land development requires different concerns.

Boundary Litigation Arises From

- Errors, discrepancies, and ambiguities on the conveyance
- Discrepancies between boundaries as stated in the conveyance as they exist physically
- Occupation of land that conflicts with boundary lines that are fixed by reference to natural or artificial monuments.

Boundary Litigation Arises From

- Natural and artificial boundaries change over time.
- Errors in subsequent surveys

SURVEYING WATER BOUNDARIES

- Difficult to Describe
- Navigable v. Nonnavigable

Encroachments

- A material object that has been placed on, above or under the land without the land owner's consent

Encroachments

- Most common type: mistake in the location of a common boundary line
- Eaves that overhang
- Neighbor's tree
- Overhanging wires
- Remedy can be harsh

CONFLICTING CALLS IN DESCRIPTIONS

- **§ 93.310¹**
Rules for construing description of real property
- The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful, and there are no other sufficient circumstances to determine it:
- **(1)**Where there are certain definite and ascertained particulars in the description, the addition of others, which are indefinite, unknown or false, does not frustrate the conveyance, but it is to be construed by such particulars, if they constitute a sufficient description to ascertain its application.
- **(2)**When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles or surfaces, the boundaries or monuments are paramount.
- **(3)**Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both.
- **(4)**When a road or stream of water not navigable is the boundary, the rights of the grantor to the middle of the road, or the thread of the stream, are included in the conveyance, except where the road or bed of the stream is held under another title.
- **(5)**When tidewater is the boundary, the rights of the grantor to low watermark are included in the conveyance, and also the right of this state between high and low watermark.
- **(6)**When the description refers to a map, and that reference is inconsistent with other particulars, it controls them, if it appears that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars.

CONFLICTING CALLS IN DESCRIPTIONS

- These are rules of construction
- Not law
- Look to grantor's intent
- These are fallback rules

Forms of Litigation

Suits To Quiet Title

- **§ 105.605¹**

- **Suits to determine adverse claims**

- Any person claiming an interest or estate in real property not in the actual possession of another may maintain a suit in equity against another who claims an adverse interest or estate therein for the purpose of determining such conflicting or adverse claims, interests or estates. Any municipal corporation or county of this state claiming any interest or estate in real property which is not in the actual possession of another, including real property acquired by foreclosure of delinquent tax liens situated in the same county, may maintain a suit in equity against all persons who claim an adverse interest or estate in all or any part of the property for the purpose of determining the conflicting or adverse claims, interests or estates. One or more parcels may be included in one suit and the issue made by the pleadings in any suit by a municipality or county relating only to a certain parcel or part of the real property, shall be separately tried and determined upon motion of any interested party.

Statutory Method

- **§ 105.705¹**
Right to bring action
- **filing of judgment**
- **(1)**When any dispute or controversy exists between owners of adjacent or contiguous lands in this state, concerning the boundary lines thereof, or the location of the line dividing such lands, any party to the dispute or controversy may bring an action in the circuit court in the county where all or part of the lands are situated, for the purpose of having the controversy or dispute determined, and the boundary line or dividing line ascertained and marked by proper monuments upon the ground where such line is ascertained.
- **(2)**Upon final determination of the dispute by the court, the clerk of the court shall file one copy of the judgment in the office of the county surveyor, one copy in the office of the county assessor and one copy in the office of the county officer who keeps the records of deeds for recording in the county deed records. [Amended by 1965 c.24 §1; 1979 c.284 §97]

Ejectment

- **§ 105.010¹**
Contents of complaint
- The plaintiff in the complaint shall set forth:
- **(1)**The nature of the estate of the plaintiff in the property, whether it be in fee, for life, or for a term of years; including, when necessary, for whose life and the duration of the term.
- **(2)**That the plaintiff is entitled to the possession thereof.
- **(3)**That the defendant wrongfully withholds the property from the plaintiff to the damage of the plaintiff for such sum as is therein claimed.
- **(4)**A description of the property with such certainty as to enable the possession thereof to be delivered if there is recovery.

Injunctive Relief

- Temporary Restraining Order
- Preliminary Injunction
- Permanent Injunction

Injunctive Relief Defenses

- Consent
- Lack of Clean Hands
- Laches

Reformation of Deed

- Reformation of deed: Either party may ask the court to reform a deed to resolve a boundary dispute.

Rescission of Land Sale Contract

- Suit by purchaser to rescind or cancel a land sale contract or earnest money agreement
- Mistake
- Misrepresentation

Action for Damages

- Timber Trespass
- Trespass
- Nuisance
- Wildfire

Declaratory Judgment

- Determination by declaratory judgment.
- ORS chapter 28, provides the court with broad authority to review not only the issues in a boundary line dispute but also collateral issues.

Partition Suit

- **§ 105.205¹**
Who may maintain partition
- When several persons hold real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, or when several persons hold as tenants in common a vested remainder or reversion in any real property, any one or more of them may maintain a suit for the partition of the real property according to the respective rights of the persons interested therein, and for a sale of all or a part of the property if it appears that a partition cannot be had without great prejudice to the owner.

Surveyor as Witness-Testifying About Own Survey

- Both private and public surveys may be admissible as evidence under OEC 40.460 803(6)-(8)
- A survey or a surveyor's map may be contradicted, explained, or interpreted

Surveyor as Witness-Testifying About Own Survey

- A surveyor testifying must state more than the result
- The surveyor must detail the facts of the survey

Hearsay OEC 40.460 Rule 803

- (6) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.
- (7) Evidence that a matter is not included in the memoranda, reports, records, or data compilations, and in any form, kept in accordance with the provisions of subsection (6) of this section, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.
- (8) Records, reports, statements or data compilations, in any form, of public offices or agencies, including federally recognized American Indian tribal governments, setting forth:
 - (a) The activities of the office or agency;
 - (b) Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, in criminal cases, matters observed by police officers and other law enforcement personnel;
 - (c) In civil actions and proceedings and against the government in criminal cases, factual findings, resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness; or
 - (d) In civil actions and criminal proceedings, a sheriff’s return of service.

Surveyor As Expert Witness

- **40.415¹**
Rule 703. Bases of opinion testimony by experts
- The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. [1981 c.892 §59]

Surveyor As Expert Witness

- Trial by ambush
- Client hired v. Attorney hired
- Drafts
- Reports
- Protection
- Communications

Surveyor As Commissioner

- **§ 105.715¹**

- **Mode of proceeding**

- The mode of proceeding in a boundary action is analogous to that of an action not triable by right to a jury. At the time of entering the judgment fixing the true location of the disputed boundary or dividing line the court shall appoint three disinterested commissioners, one of whom shall be a registered professional land surveyor, and shall direct the commissioners to go upon the land of the parties and establish and mark out upon the grounds, by proper monuments, the boundary or dividing line as ascertained and determined by the court in its judgment. The monuments shall be established by or under the direct supervision of the registered professional land surveyor who shall file a record of survey, complying with ORS [209.250 \(Survey by registered land surveyor\)](#), with the county surveyor. [Amended by 1979 c.284 §98; 1991 c.150 §1]