

**PROPERTY:
PRESCRIPTIVE EASEMENTS AND A CHANGE FROM
PERMISSIVE TO HOSTILE USE — *BOLDT V. ROTH***

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I. INTRODUCTION

An easement¹ is an important element of property law because

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it provides use, enjoyment, and privileges to land without actual title to the land.² Easements may be acquired through express grant, implied grant, or prescription.³ The common law doctrine of acquiring title to an easement through prescription protects a beneficial interest in land in which a landowner has not obtained an express grant for such use.⁴ This case note deals with some of the elements necessary to acquire an easement by prescription.

The Minnesota Supreme Court in *Boldt v. Roth*⁵ analyzed a prescriptive easement claim for a driveway right-of-way.⁶ The trial court and court of appeals⁷ denied Boldt the prescriptive easement, but the Minnesota Supreme Court reversed the decision and granted the easement.⁸ The key issue in this case was whether Boldt had sufficiently met the burden of changing a permissive use on the Roths' land to a hostile use, which then allowed Boldt to satisfy the elements necessary to acquire a prescriptive easement.

Even though the *Boldt* court correctly applied Minnesota law on the question of whether a use presumed to be permissive can be changed to hostile,⁹ the *Boldt* court only discussed one of the

1. BLACK'S LAW DICTIONARY 414 (7th ed. 2000) (defining easement as "[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose").

2. *Rogers v. Moore*, 603 N.W.2d 650, 657 (Minn. 1999) (stating that an easement grants a right of use, but not a right of possession). A servient estate is the land burdened by the easement; the dominant estate is the land benefited by the easement. In *re Burnquist*, 220 Minn. 48, 56, 19 N.W.2d 394, 398 (Minn. 1945).

3. *Braaten v. Jarvi*, 374 N.W.2d 279, 282 (Minn. Ct. App. 1984) (stating that easement can be obtained by express grant, implied grant, or prescription); CUNNINGHAM ET AL., THE LAW OF PROPERTY, §§ 8.3-8.7 (2nd ed. 1992).

4. 17 DUNNELL MINN. DIGEST *Easements* § 1.00 (4th ed. 1992). Generally the policy allowing a claimant to acquire title to an easement by prescription is to protect actual use and to award a diligent occupant or user at the expense of a careless owner. JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 5.01 (1988). In addition, the purpose of prescriptive easements is to settle disputes quickly before evidence is lost or destroyed resulting in stable property use. *Rogers*, 603 N.W.2d at 656.

5. 618 N.W.2d 393 (Minn. 2000).

6. *Id.* at 397. A right-of-way is an interest in land that grants the owner of the easement the privilege to cross another's land. *Minneapolis Athletic Club v. Cohler*, 287 Minn. 254, 257, 177 N.W.2d 786, 789; 17 DUNNELL MINN. DIGEST *Easements* § 1.02 (4th ed. 1992). A right-of-way can be anything from the right to cross another's land to the right to use the kitchen of a neighboring house for washing. See SPENCER G. MAURICE, GALE ON EASEMENTS 35 (14th ed. 1972) (citing the case *Heywood v. Mallalier*, 25 Ch.D. 357 (1883)).

7. *Boldt v. Roth*, 604 N.W.2d 117 (Minn. Ct. App. 2000).

8. *Boldt*, 618 N.W.2d at 398.

9. *Id.*

necessary factors required for such a change in use status. The court did not fully address the requirement that the servient landowner have knowledge of the change.

This case note will analyze the Minnesota Supreme Court's holding in *Boldt*.¹⁰ Included in the discussion will be a summary of the history of prescriptive easements focusing on the requirements to change a permissive use to a hostile use, a description of the *Boldt* case, and an analysis of the *Boldt* court's decision focusing on the knowledge requirement.

II. HISTORY OF A PERMISSIVE USE BECOMING ADVERSE.

A. *Prescriptive Easement in General*

An easement is an interest in another's land that only grants the owner of the easement limited use or enjoyment of the land.¹¹ Generally the concept of an easement is common law in nature, but in Minnesota some easements are defined by statute.¹² Since acquiring an easement is a land transaction, to be enforceable, an easement generally must be in writing because it falls within the Statute of Frauds.¹³ However, common law allows an exception to

10. *See id.*

11. CUNNINGHAM ET AL., *supra* note 3, § 8.1. There are two types of easements, affirmative and negative, and two categories of each type of easement, appurtenant and in gross. *In re Burnquist*, 220 Minn. 48, 55-56, 19 N.W.2d 394, 398(1945). An affirmative easement, such as a right-of-way, is an interest in land that grants the possessor of the easement the right to actually interfere with or enter the property of the servient estate. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2. A negative easement, which does not grant the owner of the easement the right to enter the servient tenement, provides the owner of the easement the right to prevent the servient tenement from doing something he would normally be able to do. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2. An easement appurtenant is an easement that is created to benefit the land, not the individual possessor of the land. *Burnquist*, 220 Minn. at 55-56, 19 N.W.2d at 398. An easement in gross is a personal interest in another's land. CUNNINGHAM ET AL., *supra* note 3, § 8.1.

12. *See, e.g.*, MINN. STAT. § 84C.01(1) (2000) (conservation easement); § 103F.311 subd. 6 (scenic easement); § 463.01 (building-line easement); § 238.35 subd. 1 (cable-communication easement); § 282.04 subd. 4 (tax-forfeited, property easement); § 500.30 subd. 1 (solar easement); § 500.30 subd. 1a (wind easement).

13. *Alstad v. Boyer*, 228 Minn. 307, 314, 37 N.W.2d 372, 377 (1944) (stating that because of the existence of the Statute of Frauds, an unwritten grant of an easement is void); 7 THOMPSON ON REAL PROPERTY, § 60.02(b) (David A. Thomas ed. 1994); MINN. STAT. § 513.04 (2000) (stating that "[n]o estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power

the writing requirement with the doctrine of prescription¹⁴ that allows the rights of an easement to be acquired through the passage of time¹⁵ and the operation of law.¹⁶ To gain an easement by prescription, the claimant must prove actual, open, continuous, and exclusive use that is hostile or adverse to the actual landowner and under a claim of right for fifteen years.¹⁷

B. *Origin of Prescriptive Easements*

The doctrine of prescriptive easements is complicated with a long history. While its exact origin is unknown,¹⁸ many early American courts have connected prescriptive easements to the fiction of a lost grant.¹⁹ Even today, the lost grant theory is still mentioned in decisions concerning prescriptive easements;²⁰ however, some courts now reject the theory altogether as irrelevant in establishing prescriptive easement claims.²¹

While the lost grant theory is often discussed with prescriptive

over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the parties creating, granting, assigning, surrendering, or declaring the same, or by their lawful agent thereunto authorized by writing.”) Generally, the statute of frauds requires all transactions of land to be in writing to be enforceable. BLACK’S LAW DICTIONARY 1143 (7th ed. 2000).

14. See *Alstad*, 228 Minn. at 314-15, 37 N.W.2d at 377; 28A C.J.S. *Easements* § 14 (1996). An easement may also be obtained without a written document through an implied grant. 17 DUNNELL MINN. DIGEST *Easements* § 3.01a (4th ed. 1992).

15. *Romans v. Nadler*, 217 Minn. 174, 177, 14 N.W.2d 482, 485 (1944).

16. *Alstad*, 228 Minn. at 314, 37 N.W.2d at 377.

17. *Burns v. Plachecki*, 301 Minn. 445, 448, 223 N.W.2d 133, 136 (1974). The elements of prescription are very similar to adverse possession.

18. Compare William B. Stoebuck, *The Fiction of Presumed Grant*, 15 U. KAN. L. REV. 17, 17 (1966) (stating that courts and scholars indicate two possible, inadequate theories on prescriptive easements), with A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 110 (2d ed. 1986) (stating that prescriptive easements may be based on local custom or private laws that circumvented common law).

19. E.g., *Lanier v. Booth*, 50 Miss. 410, 413-14 (1874).

20. E.g., *Alstad v. Boyer*, 228 Minn. 307, 314, 37 N.W.2d 372, 377 (1949) (stating lost grant as a fictional concept).

21. E.g., *Frandonson Properties v. N.W. Mut. Life Ins. Co.*, 744 F.Supp. 154, 156, 158-59 (W.D. Mich. 1991) (stating presumption of a lost grant is a hollow formality and applies concepts of adverse possession by analogy); *Fiest v. Steere*, 259 P.2d 140, 144 (Kan. 1953) (stating that presumptions of a grant have no application unless adverse use is first established); *Alstad*, 228 Minn. at 314, 37 N.W.2d at 377 (claiming that lost grant theory has no relation to facts and is simply a legalistic mirage).

easements, it is not the basis or origin of the doctrine.²² Legal scholars suggest there are earlier origins to prescriptive easements because hundreds of years prior to the first use of the lost-grant theory, a process similar to prescription allowed legal title to be acquired.²³

The origin of prescriptive easements prior to the first use of the lost grant theory is difficult to isolate.²⁴ Documented cases in England as early as 1202 supplied legal title through notions similar to modern day prescription.²⁵ In addition, prescriptive easements may be related, at least in some form, to the Roman law of *Usucapio*²⁶ or based on Roman concepts and principles.²⁷

Whether or not the lost grant theory was the origin of prescriptive easements, this fictional concept is important in the historical development of easements.²⁸ While debate exists on the first use of the lost grant concept,²⁹ this theory was created to alleviate the inconvenience of the prevailing English common law that required proof of the elements of prescription back until 1189.³⁰ Instead of proving the elements of prescriptive use back until 1189, which became more difficult as time passed,³¹ under the theory of the lost grant, the claimant of the prescriptive easement was presumed to have acquired a grant of the interest in land that he was claiming.³² Therefore, the claimant only had to prove the

22. Stoebuck, *supra* note 18, at 19, 22.

23. *Id.* at 19.

24. *Id.*

25. *Id.*

26. *Id.* at 18.

27. *Id.* at 19.

28. *Id.* at 18.

29. Compare Stoebuck, *supra* note 18, at 20 & n.24 (suggesting that the notion of the lost grant theory was created in 1607 in the English case of *Bedle v. Beard*, 77 Eng. Rep. 1288 (K.B. 1607)), with SIMPSON, *supra* note 18, at 266 n.90 (indicating that the case in 1607 was *Bedle v. Wingfield*, 12 Co. Rep. 4 (1607), and suggesting that the facts of *Bedle* were too specific to have created the general rule of the lost grant).

30. CUNNINGHAM ET AL., *supra* note 3, § 8.7. In 1275, the Statute of Westminster was enacted, setting the length of time a user had to prove prescriptive use. *Id.* The length of time was to be back to the date that King Richard ascended to the throne. Stoebuck, *supra* note 18, at 19. This date was subsequently known as the limit of English legal memory. *Id.*

31. For example, in the case of *Bedle v. Beard* in 1607, the claimant of a prescriptive easement would need to establish the elements of prescriptive use for 418 years, spanning several generations of ownership. Stoebuck, *supra* note 18, at 20. Such long periods of time would make evidence gathering difficult.

32. See *id.* at 20. In the case of *Bedle v. Beard*, the fictional grant was presumed to be created at the time the prescriptive use was started. *Id.* Later, English courts

elements of prescriptive use back until the date of his fictional grant.³³

Today, most states have at least copied the basic concept of the lost grant theory that limits the time necessary to prove the elements of prescriptive use.³⁴ In modern law, the time requirements of prescriptive easements are based more on concepts similar to the statute of limitations rather than a fictional, lost grant.³⁵ In America, title to an easement can be acquired by prescription after a statutory³⁶ or common law time limit has passed.³⁷

C. Prescription and Adverse Possession

The common law elements to acquire title to an easement by prescription are very similar to the requirements to obtain title to land through adverse possession.³⁸ Generally prescription is applied to incorporeal hereditaments³⁹ and adverse possession is applied to corporeal hereditaments.⁴⁰

Even through the elements of adverse possession are the same

adopted a 20-year limit. *Id.* at 21.

33. *Id.* (stating the common law rule that prescriptive use of an easement for twenty years gave the claimant title). In England, the concept of the fictional lost grant is well accepted. MAURICE, *supra* note 6, at 138.

34. See *infra* notes 36 and 37 for examples of statutes and common law examples.

35. BRUCE & ELY, *supra* note 4, §5.06.

36. *E.g.*, CONN. GEN. STAT. § 47-37 (1995) (fifteen years); GA. CODE ANN. § 44-9-1 (1981) (seven years on improved land or twenty years on unimproved land); IND. CODE § 32-5-1-1 (2001) (twenty years); MASS. GEN. LAWS ch. 187, § 2 (1991) (twenty years); OHIO REV. CODE ANN. § 2305.04(2001) (twenty-one years); N.J. STAT. ANN. § 2A:14-6 (2000) (twenty years); CAL. CIV. PROC. CODE § 321 (2000) (five years); MONT. CODE ANN. § 70-19-401 (1999) (five years); NEV. REV. STAT. 11.150 (1999) (five years).

37. *E.g.*, J.C. Veneen & Sons v. Hoover, 167 So. 45, 48 (Fla. 1936) (stating to avoid the necessity of proving such long duration a custom arose of allowing a presumption of a grant on proof of usage for a long term of years, which is now regulated by statute in most states); Gano v. Strickland, 211 Miss. 511, 516 (Miss. 1951); Hester v. Sawyers, 41 N.M. 497, 503 (N.M. 1937); Shippy v. Hollopeter, 304 N.W.2d 118, 121 (S.D. 1981).

38. Rogers v. Moore, 603 N.W.2d 650, 657 (Minn. 1999). Adverse possession is the common law doctrine of acquiring title to land after proving actual, open, continuous, and exclusive use that is hostile and under a claim of right. Romans v. Nadler, 217 Minn. 174, 177, 14 N.W.2d 482, 485 (1944).

39. An incorporeal hereditament is “[a]n intangible right in land, such as an easement.” BLACK’S LAW DICTIONARY 582 (7th ed. 2000).

40. A corporeal hereditament is “[a] tangible item of property, such as land, a building, or a fixture.” BLACK’S LAW DICTIONARY 582 (7th ed. 2000).

as the requirements for gaining title to an easement by prescription, there are some small differences between the two doctrines.⁴¹ In Minnesota, the main difference between the two theories is found in the definition of either continuous use⁴² or exclusive use.⁴³ Generally, adverse possession requires a strict application of these elements, while prescription has a less restrictive definition.⁴⁴ Consequently, in many judicial decisions, case law on adverse possession or case law on prescriptive easements may be interchanged as long as the elements of exclusive and continuous use are not at issue.⁴⁵

Such flexibility in supporting claims with either prescription or adverse possession precedent is possible for the analysis of *Boldt*.⁴⁶ The critical issues found in *Boldt* such as the effect of a familial relationship on use status,⁴⁷ the burden to prove a hostile use,⁴⁸ and the requirements needed to change a permissive use to hostile use⁴⁹ are similar in both adverse possession and prescriptive easements.⁵⁰ Therefore, cases that discuss either adverse possession or prescriptive easements will be helpful in analysis of *Boldt* because the element of exclusive or continuous use not at issue in this case.⁵¹

41. *Rogers*, 603 N.W.2d at 657; *Nordin v. Kuno*, 287 N.W.2d 923, 926 (Minn. 1980) (stating that degree of exclusivity is not the same with prescriptive easements as with adverse possession).

42. *Rogers*, 603 N.W.2d at 657.

43. *Nordin*, 287 N.W.2d at 926.

44. *Id.*

45. *Compare* *Boldt v. Roth*, 618 N.W.2d 393, 396 (Minn. 2000) (deciding a prescriptive easement claim by discussing *Wojahn v. Johnson*, 297 N.W.2d 306 (Minn. 1980), which is an adverse possession case), *with* *Norgong v. Whitehead*, 225 Minn. 379, 383, 31 N.W.2d 267, 269 (1948) (deciding an adverse possession claim by citing *Lustmann v. Lustmann*, 204 Minn. 228, 283 N.W. 387 (1939), a prescriptive easement case).

46. 618 N.W.2d 393 (Minn. 2000).

47. *Id.* at 396-97.

48. *Id.* at 397.

49. *Id.* at 397-98.

50. *Id.* at 396 (stating that a prescriptive easement claim involves the same elements as adverse possession except for the differences in how the land is possessed and used).

51. The right-of-way under dispute was the only access to Dorothy Boldt's property, and she used this driveway to access her house since its construction in 1966, which satisfies both the exclusive and continuous requirements. *Id.* at 395.

D. Proof of Adverse or Hostile Use

In Minnesota, the Supreme Court in *Swan v. Munch*⁵² established the general rule that if a claimant proves open, visible, continuous, and exclusive use for the required length of time, the use will be presumed to be under a claim of right and hostile or adverse to the rights of the landowner.⁵³ This concept of presumed hostility is well accepted in Minnesota courts today.⁵⁴ Under this rule, once the person claiming the prescriptive easement has proven the above four elements, the burden shifts to the servient landowner who may rebut the claim and provide evidence that the use was permissive and not adverse.⁵⁵ Consequently, if the use of the easement is eventually proven to be permissive by the servient landowner, the claimant may not obtain a prescriptive right.⁵⁶ For example, to defeat a prescriptive easement claim, the servient landowner may try to establish permissive use by demonstrating the existence of an oral agreement,⁵⁷ by demonstrating evidence of mitigating circumstances between the parties,⁵⁸ by showing the claimant asked permission to use land,⁵⁹ or by providing evidence of a conversation between the parties.⁶⁰

52. 65 Minn. 500, 67 N.W. 1022 (1896).

53. *Id.* at 504, 67 N.W. at 1024. In *Swan*, the defendant constructed a dam and at various times of the year blocked up the dam to flood land owned by the plaintiffs for the purpose of floating logs down river to sawmills. *Id.* at 502-503, 67 N.W. at 1024. Defendant engaged in this practice for twenty years during which time the plaintiffs did not object. *Id.* at 504, 67 N.W. at 1024. The Minnesota Supreme Court held that because there was no trick behind the defendant's actions, the act of flooding the plaintiffs' land was a sufficient open and notorious act to put the plaintiffs on notice that the defendant was occupying their land under a claim of right. *Id.* at 503-04, 67 N.W. 1064. Once the claimant has established open, notorious, continuous, and unexplained use, it was sufficient in law to presume a grant and the burden shifted to the other party to contradict or explain the events. *Id.*

54. *E.g.*, *Nordin*, 287 N.W.2d at 926; *Krinke v. Faricy*, 304 Minn. 450, 452, 231 N.W.2d 491, 492 (1975); *Burns v. Plachecki*, 301 Minn. 445, 448, 223 N.W.2d 133, 135-36 (1974); *Dozier v. Krmopotich*, 227 Minn. 503, 507, 35 N.W.2d 696, 699 (1949); *Block v. Sexton*, 577 N.W.2d 521, 524 (Minn. Ct. App. 1998).

55. *E.g.*, *Krinke*, 304 Minn. at 452, 231 N.W.2d at 492; *Block*, 577 N.W.2d at 524.

56. *Gandy Co. v. Freuer*, 313 N.W.2d 576, 579 (Minn. 1981).

57. *Alstad*, 228 Minn. at 311, 37 N.W.2d at 375.

58. *Dozier*, 227 Minn. at 508, 35 N.W.2d at 699 (stating that servient landowner tried to establish permissive use because he helped build and pay for a sidewalk over the servient estate that the claimant of the easement utilized).

59. *Block*, 577 N.W.2d at 525.

60. *Aldrich*, 217 Minn. at 256, 14 N.W.2d at 490.

E. Familial Relationships

In *O'Boyle v. McHugh*,⁶¹ the Minnesota Supreme Court established the existence of a familial relationship between the servient and dominant landowners⁶² as an important factor when analyzing the use of a prescriptive easement claim.⁶³ In *O'Boyle*, the court established that a close family relationship between landowners presumed the use to be permissive.⁶⁴ This presumption was quickly adopted in other decisions.⁶⁵ Over the years, the Minnesota Supreme Court has refined the *O'Boyle* rule to state that a family relationship between the dominant and servient landowner creates “an inference, if not a presumption” that the use is permissive.⁶⁶ This very language is still quoted in decisions today.⁶⁷

61. 66 Minn. 390, 69 N.W. 37 (1896).

62. See *supra* text accompanying note 2 (defining servient and dominant landowner).

63. *O'Boyle*, 66 Minn. at 391, 69 N.W. at 38. In *O'Boyle*, the parties' were parent and child. *Id.* at 392, 69 N.W. at 38. Plaintiff owned the land with her first husband, who died in 1868, until their mortgage was foreclosed in 1874 and sold to James Lawther. *Id.* at 391, 69 N.W. at 38. Lawther conveyed the land to the defendants, the plaintiff's children, in 1877. *Id.* Previously, plaintiff acquired a dower of 46 acres of land in 1875. *Id.* A dower is a common law right of a wife, upon her husband's death, to acquire a life estate of one-third of the land that her husband owned in fee, which is generally not affected by transfer of ownership in the land. BLACK'S LAW DICTIONARY 400 (7th ed. 2000). Even though the plaintiff continued to reside on the land after her children acquired the fee interest, she made no claim to the defendants, her children, that she intended to claim the land as her own except through her continuous possession. *O'Boyle*, 66 Minn. at 392, 69 N.W. at 38.

64. *Id.* The Minnesota Supreme Court held that a parent-child relationship between the parties “radically modifies the general rules of law as to what constitutes adverse possession between strangers.” *Id.* at 391, 69 N.W. at 38. The court held that even though *O'Boyle* had lived, farmed, and claimed the land as her own for seventeen years, such evidence was not sufficient to establish a hostile claim against her children. *Id.* at 392, 69 N.W. at 38.

65. *Collins v. Colleran*, 86 Minn. 199, 205, 90 N.W. 364, 366 (1902) (father and son relationship); see *Beitz v. Buediger*, 144 Minn. 52, 54, 174 N.W. 440, 440-41 (1919) (stating that evidence to show a hostile occupation between strangers is not sufficient to show a hostile occupation between family members).

66. *Burns v. Plachecki*, 301 Minn. 445, 449, 223 N.W.2d 133, 136 (1974) (brothers); *Alstad*, 228 Minn. at 313-14, 37 N.W.2d at 376-77 (stating that a parent-child relationship presumes a permissive use, but that non-family member relationship that is simply friendly does not infer a permissive use); *Lustmann v. Lustmann*, 204 Minn. 228, 232, 283 N.W. 387, 389 (1939) (brothers).

67. *Boldt v. Roth*, 618 N.W.2d 393, 397 (Minn. 2000); *Boldt v. Roth*, 604 N.W.2d 117, 119-120 (Minn. Ct. App. 2000); *Pickar v. Anderson* 382 N.W.2d 536, 538 (Minn. 1986) (brothers); *Meyers v. Meyers*, 368 N.W.2d 391, 393 (Minn. 1985) (husband and wife); *Wojahn v. Johnson*, 297 N.W.2d 298, 306 (Minn. 1980) (brother and sister relationship).

F. *Permissive Use Becoming Adverse*

Even if a servient landowner establishes that a use is initially found to be permissive, the claimant of a prescriptive easement may still succeed by providing evidence that the use has become hostile.⁶⁸ The court in *O'Boyle* further established that a permissive use could be changed into a hostile use if the claimant proves two facts.⁶⁹ To change use status, *O'Boyle* states that the claimant must show an "open assertion of hostile title" and "knowledge brought home to the owner of the land."⁷⁰

The Minnesota Supreme Court has refined the first element of the *O'Boyle* rule, open assertion of hostility, over the years. To prevail in a prescriptive easement claim through the notion of a changed use status, the claimant must provide evidence of either an assertion of right or an affirmative proof of hostility.⁷¹ Generally, without some form of affirmative proof, the use continues as permissive.⁷²

The second element of the *O'Boyle* rule requires knowledge of

68. 28A C.J.S. *Easements* § 35 (1996).

69. *O'Boyle*, 66 Minn. at 391, 69 N.W. at 38.

70. *Id.*

71. *Lechner v. Adelman*, 369 N.W.2d 331, 334 (Minn. Ct. App. 1985) (stating if original use is permissive, then use will continue until contrary is affirmatively shown); *Meyers v.* 368 N.W.2d at 393 (stating an adverse holding needs to be declared); *Wojahn*, 297 N.W.2d at 306 (stating affirmative showing of hostile use); *Adams v. Johnson*, 271 Minn. 439, 443, 136 N.W.2d 78, 81 (1965) (stating an explicit disclaimer of subservience and a notorious assertion of right is required); *Johnson v. Raddohl*, 226 Minn. 343, 345, 32 N.W.2d 860, 861 (1948) (stating an adverse holding needs to be declared); *Norgong*, 225 Minn. at 382, 31 N.W.2d at 269 (stating that a substantially declared adverse holding is required); *Aldrich v. Dunn*, 217 Minn. 255, 257-58, 14 N.W.2d 489, 491 (1944) (stating that a distinct and positive assertion of right hostile to the servient landowner is necessary); *Lustmann*, 204 Minn. at 231, 283 N.W. at 389 (notorious assertion of right); *In re Application of Board of Christian Serv. to Register Title v. Trustees of Swedish Evangelical Lutheran Church*, 183 Minn. 485, 488, 237 N.W. 181, 182 (Minn. 1931) (stating an open declaration of intent to claim hostile title or a distinct and positive assertion of right); *Naparra v. Weckwerth*, 178 Minn. 203, 206, 226 N.W. 569, 571 (1929) (notorious assertion of right); *Johnson v. Hegland*, 175 Minn. 592, 596, 222 N.W. 272, 273 (1928) (stating a distinct and positive assertion of right); *Beitz v. Buendiger*, 144 Minn. 52, 54-55, 174 N.W. 440, 441 (1919) (stating a notorious assertion of right is required); *Omodt v. Chicago, Milwaukee & St. Paul Ry Co.*, 106 Minn. 205, 207, 118 N.W. 798, 799 (1908) (stating a notorious assertion of right); *Kelly v. Palmer*, 91 Minn. 133, 135, 97 N.W. 578, 578-79 (1903) (stating that claimant must assert a claim of title in himself); *Collins v. Colleran*, 96 Minn. 199, 205, 90 N.W. 364, 366 (1902) (requiring an open assertion of hostile title).

72. *Pickar v. Erickson*, 382 N.W.2d 536, 539 (Minn. 1986).

the change in use statue by the owner of the servient estate.⁷³ This element of O'Boyle has been well accepted by Minnesota courts over time.⁷⁴ Knowledge does not necessarily need to be shown through an express declaration of intent, but the servient landowner's knowledge is usually inferred based on the facts of each case.⁷⁵ Consequently, knowledge by the servient landowner of the change in use status may be shown by conduct⁷⁶ or by circumstances.⁷⁷

Minnesota is not unique in requiring assertion and knowledge when a claimant of a prescriptive easement tries to change permissive use to hostile use. Along with Minnesota, many other states have adopted a similar two-part requirement.⁷⁸ The language

73. *O'Boyle*, 66 Minn. at 391, 69 N.W. at 38

74. *Lechner*, 369 N.W.2d at 334 (stating that servient landowner must have knowledge of the adverse claim); *Meyers*, 368 N.W.2d at 393 (stating that notice of change must be brought to knowledge of owner); *Freuer*, 313 N.W.2d at 579 (stating owner of land must have knowledge); *Ehle v. Prosser*, 293 Minn. 183, 191, 197 N.W.2d 458, 463 (1972) (owner of land must have knowledge); *Dozier v. Krmpotich*, 227 Minn. 503, 507, 35 N.W.2d 696, 699 (Minn. 1949) (stating that user must become adverse to knowledge of the owner of the servient estate); *Raddohl*, 226 Minn. at 345, 32 N.W.2d at 861 (stating that notice of change must be brought to attention of servient owner); *Norgong*, 225 Minn. at 382, 31 N.W.2d at 269 (notice brought to the attention of the owner); *Aldrich*, 217 Minn. at 257-58, 14 N.W.2d at 491 (assertion must be brought to the attention of the servient landowner); *Board of Christen Science*, 183 Minn. at 488, 237 N.W. at 182 (stating that change must be brought to attention of landowner); *Naparra*, 178 Minn. at 206, 226 N.W. at 571 (“[C]laim of right must be exercised with the knowledge of the owner of the servient estate.”); *Hegland*, 175 Minn. at 596, 222 N.W. at 273 (stating that change must be brought to attention of landowner); *Beitz*, 144 Minn. at 54, 174 N.W. at 441 (“[N]otice of such change brought to the knowledge of the owner.”); *Kelly*, 91 Minn. at 135, 97 N.W. at 578-79 (claim made know to grantee); *Collins*, 96 Minn. at 205, 90 N.W. at 366 (knowledge brought home to the owner of the land); *O'Boyle*, 66 Minn. at 391, 69 N.W. at 38 (knowledge brought home to the owner of the land).

75. *See Adams v. Johnson*, 271 Minn. 439, 443, 136 N.W.2d 78, 81 (1965) (concluding notice based on improvements and repairs made to property); *Beitz*, 144 Minn. at 55, 174 N.W. at 441 (inferring notice from with substantial improvements to land and payment of taxes).

76. *Naparra*, 178 Minn. at 206, 226 N.W. at 571.

77. *Adams*, 271 Minn. at 443, 136 N.W.2d at 81 (stating that improvements and repairs made to property were sufficient overt and unequivocal acts to conclude notice); *Raddohl*, 226 Minn. at 345, 32 N.W.2d at 861-62 (holding that farming by claimant was not a sufficient circumstance to infer notice); *Beitz*, 144 Minn. at 55, 174 N.W. at 441 (holding that lack of explanation by servient landowner combined with substantial improvements to land and claimant's payment of taxes was sufficient circumstances to conclude notice).

78. *See, e.g., Manitowoc Remanufacturing, Inc. v. Vocque*, 819 S.W.2d 275, 278 (Ark. 1991); *Carr v. Augusta Grocery Co.*, 188 S.E. 531, 534 (Ga. 1936); *Lorang v. Hunt*, 693 P.2d 448, 450 (Idaho 1984); *Smith v. Oliver*, 224 S.W. 683,

used in other jurisdictions is very similar to the language that *O'Boyle* used to establish this requirement in Minnesota.⁷⁹

G. *Transfer of Land*

As discussed above, in Minnesota it is presumed that a use is permissive in the context of a family relationship.⁸⁰ Therefore, an issue exists regarding the continuance of the permissive use when the servient estate is transferred to a non-family member.⁸¹ The court in *Wojahn v. Johnson*⁸² held that a transfer to a non-family member is sufficient to satisfy the affirmative showing of hostility found in the *O'Boyle* rule.⁸³ However, a few years later, the court in *Pickar v. Anderson*,⁸⁴ in dicta, stated that a transfer of land alone

685 (Ky. Ct. App. 1920); *Pitzman v. Boyce*, 19 S.W. 1104, 1105 (Mo. 1892); *Kimco Addition, Inc. v. Lower Platte S. Nat. Res. Dist.*, 440 N.W.2d 456, 460 (Neb. 1989); *Hester v. Sawyers*, 71 P.2d 646, 651-52 (N.M. 1937); *Reider v. Orme*, 68 S.W.2d 960, 962 (Tenn. Ct. App. 1933); *Wiegand v. Riojas*, 547 S.W.2d 287, 290 (Tex. Civ. App. 1977).

79. *Compare* *O'Boyle v. McHugh*, 66 Minn. 390, 391, 69 N.W. 37, 38 (1869) (“[T]here must be some open assertion of hostile title, and knowledge thereof brought home to the owner of the land.”) *with* *Manitowoc Remanufacturing, Inc.*, 819 S.W.2d at 278 (“[C]lear action placing the owner on notice.”); *Carr*, 188 S.E. at 534 (“[B]ecame hostile to the rights of the party owning the property . . . and notice of such hostile claim was given to the owner of the property.”); *Lorang*, 693 P.2d at 450 (“Absent unequivocal conduct giving the owner of the property notice of hostility and adverseness, we will not conclude that a use initiated with permission has somehow changed to one of hostility.”); *Oliver*, 224 S.W. at 685 (“[U]nless in the meantime there has been a distinct and positive assertion of a claim of right to the easement, and which assertion is brought home to the owner of the servient estate.”); *Pitzman*, 19 S.W. at 1105 (“[N]o adverse user can arise until a distinct and positive assertion of a right hostile to the owner, and brought home to him.”); *Kimco Addition, Inc.*, 440 N.W.2d at 460 (“[U]ntil notice that the use is claimed as a matter of right is communicated to the owner of the servient estate.”); *Hester*, 71 P.2d at 651-52 (“[D]istinct and positive assertion of a right hostile to the owner is brought home to him by words or acts.”); *Reider*, 68 S.W.2d at 962 (“[U]nless some distinct and positive assertion of a right hostile to the owner of the servient estate appears.”); *Wiegand*, 547 S.W.2d at 290 (“[T]here must be a distinct and positive assertion of a right which is brought to the servient owner’s attention.”).

80. *See supra* part II.E for discussion on family relationship on permissive use.

81. *See generally* *Wojahn v. Johnson*, 297 N.W.2d 298, 306 (Minn. 1980) (holding that the time period for prescriptive easement does not begin to run until servient estate is transferred to a non-family member). *But see* *Pickar v. Anderson*, 382 N.W.2d 536, 539 (Minn. Ct. App. 1986) (providing guidance to trial court by stating that transfer in ownership does not alone satisfy the affirmative showing that a permissive use has changed to a hostile use).

82. 297 N.W.2d 298.

83. *Id.* at 306.

84. 382 N.W.2d 536.

does not meet the affirmative showing of a change to hostile use.⁸⁵ These contrary decisions provided the status of the law in Minnesota concerning land transfers on the nature of a family-presumed permissive use when *Boldt* was decided.

III. THE BOLDT DECISION

A. *Facts*

May Boldt owned a parcel of land in Crow Wing County, Minnesota.⁸⁶ In 1966, she conveyed part of her property to Dorothy and James Boldt (Boldt Property) creating two adjacent parcels of land.⁸⁷ After the conveyance in 1966, the Boldts constructed a house on their property with access by a circular driveway.⁸⁸ Unfortunately,⁸⁹ part of the circular driveway existed on the remaining May Boldt property.⁹⁰ Dorothy and James Boldt did not obtain May Boldt's express permission to construct the circular driveway on the May Boldt property because they were family members.⁹¹

In 1979, May Boldt conveyed her portion of the property to a non-family member.⁹² Through subsequent conveyances, Kenneth and Mary Roth acquired the property (Roth property).⁹³

There were no arguments concerning the use or location of the circular driveway until 1997.⁹⁴ Dorothy Boldt hired a survey crew to determine the exact location of the boundary line because

85. *Id.* at 539.

86. *Boldt v. Roth*, 618 N.W.2d 393, 394 (Minn. 2000).

87. *Id.* at 395. May Boldt is James Boldt's mother. *See id.* Dorothy Boldt became the sole owner in 1985 when her husband passed away. *Id.*

88. *Id.*

89. The location of the driveway does not become an issue for another 31 years. *See id.* At the time, when the driveway was constructed there were no disputes on its location or use. *See id.*

90. *Id.* The driveway was originally gravel, but over the years the driveway was improved and paved. *Id.*

91. *Id.*

92. *Id.* May Boldt conveyed the remaining land to Wayne and Kathryn Vold. *Id.*

93. *Id.* In October 1982, the Volds conveyed the property to Leonard and Gwen Thompson. *Id.* In July 1990, the Thompsons conveyed the property to the Kenneth and Mary Roth. *Id.* Kenneth and Mary Roth are the sole defendants in this lawsuit. *Id.* at 396.

94. *Id.* at 395.

of a disagreement with the Roths over the location of landscape rock she was placing near the lakeshore.⁹⁵ The survey revealed that the circular driveway existed almost entirely on the Roth property.⁹⁶ Subsequent quarrelling over the boundary line resulted in Dorothy Boldt commencing an action to obtain a prescriptive easement for the use of the circular driveway that was located on the Roth Property.⁹⁷

B. Procedural Posture

The trial court denied Boldt the prescriptive easement claim⁹⁸ and stated that she had not proven that a hostile use existed because of the initial familial relationship when she acquired the property.⁹⁹ The court of appeals affirmed the trial court; however, this court based its decision on a different reason.¹⁰⁰ The court of appeals stated that the Roths never had knowledge of the Boldt's adverse use of the driveway over the Roth property.¹⁰¹ Essentially, the trial court and court of appeals based their decisions on different elements of the *O'Boyle* two-part rule.¹⁰² The trial court denied the prescriptive easement claim because Dorothy Boldt had not established an affirmative showing of hostile use, while the court of appeals denied the prescriptive easement claim because she had not proven that the Roths had the required knowledge of the adverse use.¹⁰³

95. *Id.*

96. *Id.*

97. *Id.* at 396. The Roths were actually starting to place a fence across the driveway on the surveyed property line that would have prevented Dorothy Boldt from accessing her property. *Id.*

98. *Id.* at 394. The trial court concluded that Dorothy Boldt had not established a hostile use on the driveway. *Id.*

99. *Id.* The original right-of-way was over property owned by May Boldt, Dorothy's mother-in-law. *Id.* at 395.

100. *Boldt v. Roth*, 604 N.W.2d 117 (Minn. Ct. App. 2000). The court of appeals stated that because the Roths did not have knowledge that the driveway was actually on their property, Boldt did not prove that the servient landowners had knowledge that the permissive use had changed to a hostile use. *Id.* at 120.

101. *Id.* The parties had stipulated that the Roths thought the driveway was completely on the Boldt's property. *Id.*

102. *See O'Boyle v. McHugh*, 66 Minn. 390, 391, 69 N.W. 37, 38 (1895) (requiring assertion of right and knowledge of hostility).

103. *See id.*

C. *Holding by the Minnesota Supreme Court*

The Minnesota Supreme Court reversed the court of appeals and granted Boldt the prescriptive easement.¹⁰⁴ Minnesota's highest court approached the issue differently than both lower courts. The Minnesota Supreme Court determined the critical issue to analyze was whether the permissive use based on the presumption of a close family relationship between original landowners can be changed to hostile simply by the conveyance of the servient estate to a non-family member.¹⁰⁵

The Roths maintained that once a use is established as permissive, it can only become hostile after a "notorious assertion of right"¹⁰⁶ and that the mere conveyance of the land is not a sufficient assertion of right.¹⁰⁷ To support their claim, the Roths cite *Pickar*.¹⁰⁸ However, the *Boldt* court did not find *Pickar* controlling because both the original and subsequent owners of the land in *Pickar* were family members.¹⁰⁹

Boldt argued that the decision in *Wojahn*¹¹⁰ indicated that a use originally established as permissive due to the presumption of a family relationship can become hostile simply from a conveyance to a non-family member.¹¹¹ The Minnesota Supreme Court agreed that the holding in *Wojahn* was controlling.¹¹² However, since the decision in *Wojahn* did not expressly explain why the use became

104. *Boldt*, 618 N.W.2d at 398.

105. *Id.* at 397. Neither the trial court nor the court of appeals discussed this line of reasoning. See *Boldt*, 604 N.W.2d 117, 118, 120 (Minn. Ct. App. 2000)

106. *Id.* The Roths were quoting language found in *Lustmann v. Lustmann*, 204 Minn. 228, 232, 283 N.W. 387, 389 (1939) and *Collins v. Colleran*, 86 Minn. 199, 205, 90 N.W. 364, 366 (1902). The Roths' assertion, at this point, was a correct statement of the first element of the *O'Boyle* rule. 66 Minn. 390, 391, 69 N.W. 37, 38.

107. *Boldt*, 618 N.W.2d at 397.

108. *Pickar v. Anderson*, 382 N.W.2d 536 (Minn. 1896). In *Pickar*, Clarence, Clifford and Bill Pickar purchased two sections of land. *Id.* at 537. Clarence owned one section and Clifford and Bill the other. *Id.* Clifford and Bill's section contained a road that was built to access the Clarence property. No grant of an easement was conveyed. *Id.* Clifford and Bill subsequently conveyed their land to Clifford's daughter and son-in-law, while Clarence conveyed his land to his son, Charles. *Id.* Charles was claiming a prescriptive easement over the original Clifford and Bill property. *Id.*

109. *Boldt*, 618 N.W.2d at 397. The *Boldt* court correctly identifies that the relationship between the dominant and servient landowners in *Pickar* still continues to be a family relationship. *Id.* (cousins).

110. 297 N.W.2d 298.

111. *Boldt*, 618 N.W.2d at 397.

112. *Id.* at 398.

hostile upon the conveyance to a non-family member,¹¹³ the *Boldt* court clarified the *Wojahn* holding.¹¹⁴ The court in *Boldt* concluded that once a servient estate burdened with a family-presumed, permissive right-of-way is transferred to a non-family member, the general rule that open and notorious use between land owned by strangers is sufficient to establish the hostile use of the roadway easement.¹¹⁵

IV. ANALYSIS OF BOLDT V. ROTH

The Minnesota Supreme Court correctly overruled the court of appeals and granted Boldt's claim for a prescriptive easement. The court in *Boldt* fully explained the rationale behind why a transfer of land to a non-family member satisfies the affirmative proof requirement establishing why the trial court's reasoning for denying the easement was in error.¹¹⁶ However, the court did not completely discuss the second element required to change a permissive use to a hostile use, which is knowledge by the servient landowner of the change in use status.¹¹⁷ Without a complete discussion of both these elements, the *O'Boyle* rule is not satisfied. Furthermore, because the court of appeals focused on the knowledge element in denying Boldt the easement, the Minnesota Supreme Court needed to more fully address this issue when deciding this case.

The analysis of this case note will briefly discuss the affirmative proof element in Boldt, examine the knowledge requirement in detail, explore the concept of constructive knowledge in property law, and conclude by discussing the effect the *Boldt* holding has on the defense of prescriptive easement claims.

A. *First Element: Affirmative Proof*

Since the *Boldt* court sufficiently analyzed why the rationale for allowing the transfer of land to a non-family member satisfied the

113. See *Wojahn*, 297 N.W.2d at 306.

114. *Boldt*, 618 N.W.2d at 398.

115. *Id.*

116. *Id.*

117. See *Boldt*, 618 N.W.2d at 397-98 (stating that subsequent servient owners have notice of their property boundaries). This brief statement is the only discussion on the topic of knowledge undertaken by the Minnesota Supreme Court.

affirmative proof requirement developed from O'Boyle,¹¹⁸ this element will only be briefly discussed. Two key factors help establish the affirmative change to hostile use in this situation.

First, if the servient estate no longer resides with a family member, the elements that give rise to the “inference, if not an presumption” of permissive use no longer exist.¹¹⁹ When land is conveyed to a non-family member, because the family relationship no longer exists, the hostility of the subsequent use can then be established using the general rule, which is presuming hostility based on actual, open, exclusive, and continuous use.¹²⁰

Second, the selling of land is an affirmative action.¹²¹ A land sale requires considerable effort including potential buyer inspections,¹²² contracts,¹²³ title searches,¹²⁴ title insurance,¹²⁵ closing documents,¹²⁶ the seller moving out, and the new buyer moving in. Because the procedures involved in a land sale require significant effort and are visible actions to both the existing, dominant landowner and the new, non-family, servient landowner, a land transaction satisfies the definition of an affirmative act.¹²⁷

Consequently, the conveyance of land to a non-family member is a sufficient action to satisfy the affirmative proof requirement because the permissive presumption no longer exists and the act of conveying land is by its nature—affirmative.¹²⁸

B. Second Element: Knowledge by the Servient Landowner

The second element to prove a change from permissive to

118. See *infra* part II.F for discussion on the development of the first element of the O'Boyle rule.

119. See *Alstad v. Boyer*, 228 Minn. 307, 314, 37 N.W.2d 372, 376-77 (1944) (indicating that even though friendly neighbors may resemble a close family relationship, a relationship with a neighbor is entirely different in character and degree; therefore declined to extend the family presumption to friendly neighbors).

120. See *infra* part II.D for discussion on general rule presuming hostility.

121. Affirmative is defined as “[t]hat [which] involves or requires effort.” BLACK'S LAW DICTIONARY 46 (7th ed. 2000).

122. John C. Payne, *A Typical House Purchase Transaction in the United States*, 30 CONV. & PROP. LAW. (N.S.) 194, 204 n.22 (1966).

123. *Id.* at 200.

124. *Id.* at 205-07.

125. *Id.* at 207.

126. *Id.* at 210.

127. See BLACK'S LAW DICTIONARY 46 (7th ed. 2000) (defining affirmative).

128. See *infra* note 75 for cases discussing affirmative proof requirement.

hostile use is knowledge of the change by the servient landowner.¹²⁹ An interesting twist in this case is the fact that the parties stipulated that the Roths believed the driveway was completely on the Boldt property.¹³⁰ The stipulation was the key fact that led the court of appeals to deny the prescriptive easement claim because the court stated the Roths did not have knowledge of the adverse use.¹³¹ Therefore, without a detailed discussion explaining the source of the Roths' knowledge of the change in use status, this stipulation thwarts the Boldt's prescriptive easement claim because it indicates that the Roths did not have knowledge of Boldt's adverse use.¹³²

The Minnesota Supreme Court in *Boldt* does not adequately satisfy this knowledge requirement or discuss the source of the Roths' knowledge. However, Minnesota case law¹³³ indicates that the Roths' knowledge of the correct boundary line and consequently the adverse use can be presumed through the concept of constructive knowledge.¹³⁴ To establish the necessary knowledge, discussion of three topics is required: (1) use of presumptions in prescriptive easement claims, (2) constructive knowledge of the correct boundary line, and (3) constructive knowledge of the hostile use.

1. Presumptions

First, *Alstad* states that presumptions have been allowed when establishing easements and generally only denied in certain specific situations.¹³⁵ The fact scenario of *Boldt* is not one of the situations

129. See *infra* part II.F for discussion on the knowledge requirement. In *Boldt*, the Roths are the servient landowners. See *supra* note 2 for text defining servient landowner.

130. *Boldt*, 618 N.W.2d at 394.

131. *Boldt*, 604 N.W.2d at 120.

132. See *infra* part II.F for discussion on the knowledge requirement necessary with a prescriptive easement to change a permissive use to a hostile use.

133. See *Smith v. Otto Hendrickson* Post 212, Am. Legion, 241 Minn. 46, 53, 62 N.W.2d 354, 360 (1954) (holding that owner of land is presumed to know the true location of his property).

134. BLACK'S LAW DICTIONARY 703 (7th ed. 2000) ("Knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person.").

135. 228 Minn. at 311, 37 N.W.2d at 375. *But see* *Village of Newport v. Taylor*, 225 Minn. 299, 303, 30 N.W.2d 588, 591 (1948) (stating that adverse possession must be established without use of presumptions). *Alstad* clarifies that the rule established in *Newport* is limited by the facts of the case. 228 Minn. at 311, 37 N.W.2d at 375. In addition, presumptions are often used when establishing title to interests in land when the hostile intent is established. *Nordin v. Kuno*, 287

where presumptions should be denied in a prescriptive easement claim. Presumptions have been denied when evidence clearly weighs against the presumption or when the claimant is attempting to supply a deficiency in the claim or length of time of his possession.¹³⁶

For example, if the evidence conclusively indicates a permissive use, then a hostile use may not be presumed or if the evidence does not show actual use for the full term of years, then a presumption can not satisfy the missing element.¹³⁷ In *Boldt*, after the transfer of the property away from a family member in 1979, the evidence clearly shows that the use is hostile to the rights of the servient landowners because Boldt is entering the property without permission.¹³⁸ No presumption is needed to establish the hostile nature of the use—the facts establish the hostility. In addition, the evidence also clearly shows that Boldt was using the driveway with no interruptions to gain access to her home since it was built in 1966;¹³⁹ therefore, no presumption is needed to establish continuous use for the required time limit.

2. *Constructive Knowledge of Boundary Lines*

Since it was established that presumptions can be used in this fact situation, the Minnesota Supreme Court in *Smith v. Otto Hendrickson Post 212, American Legion*¹⁴⁰ supplied the doctrine that helps establish the knowledge requirement. The *Otto Hendrickson* court stated that a fee owner of a lot is “presumed to know the true location of its boundaries.”¹⁴¹ The *Otto Hendrickson* doctrine uses the concept of constructive knowledge to hold a landowner to facts that can easily be verified with a survey and recorded document.¹⁴²

Therefore, even if the parties stipulated to the Roths’ belief on the location of the driveway, *Otto Hendrickson* indicates that it can be presumed that the Roths had knowledge of the actual location of the boundaries of their property from the legal description

N.W.2d 923, 926 (Minn. 1980); *Krinke v. Faricy*, 304 Minn. 450, 452, 231 N.W.2d 491, 492 (1975).

136. *Alstad*, 228 Minn. at 311, 37 N.W.2d at 375.

137. *Id.*

138. *See Boldt v. Roth*, 618 N.W.2d 393, 395 (Minn. 2000).

139. *See id.*

140. 241 Minn. 46, 62 N.W.2d 354 (1954).

141. *Id.* at 53, 62 N.W.2d at 360.

142. *See id.*

contained in the deed when they purchased the land.¹⁴³ Since there are no factual disputes in *Boldt*, the parties have indicated that the survey completed in 1997 and the legal descriptions of both the Boldt's and Roths' property are correct.¹⁴⁴

3. *Constructive Knowledge of the Adverse Use*

Using the doctrine of *Otto Hendrickson*, the Roths had constructive knowledge of the actual boundary lines leading to the conclusion that the Roths also had constructive knowledge that the circular driveway existed on their property. The Roths would have acquired the constructive knowledge of the actual boundary line and location of the driveway the day they acquired the property. The analysis can then close the loop and the law can presume that the Roths also had knowledge of Boldt's adverse use because the use of the driveway on their property was sufficiently open and notorious to put the Roths on notice that a hostile use may exist on their land.¹⁴⁵

The use of constructive knowledge to presume the Roths' notice of an adverse use on their property is in harmony with the line of cases that has developed since the original *O'Boyle* decision in Minnesota. Prior decisions have often stated that the *O'Boyle* knowledge requirement may be shown by circumstances or may be presumed.¹⁴⁶ Consequently, the analysis described above would be sufficient to establish the presumed knowledge of hostile use and satisfy the requirements of *O'Boyle*.

However, allowing constructive knowledge to presume a landowner knows the true location of his boundary line or of an adverse use on his property may be an overbroad interpretation of *Boldt*. Such interpretation of *Boldt* may indicate to individuals purchasing property that a survey may be needed as part of the buying process as a proactive measure to prevent such claims against their land in the future. On the other hand, in a fact

143. *See id.*

144. *See Boldt*, 618 N.W.2d at 396. In general, the primary purpose of completing a survey is to locate the boundary lines of the property on the ground. HAYHOE & THORFINNSON, *infra* note 147, at 6.

145. *See Dozier v. Krmpotich*, 227 Minn. 503, 507, 35 N.W.2d 696, 699 (1949). Once it can be presumed that the Roths had knowledge of the use of a right of way on their property, the general rule stated in *Dozier* is that open and notorious use may be presumed to be hostile. *See id.*

146. *Naporra v. Weckwerth*, 178 Minn. 203, 206, 226 N.W. 569, 571 (1929) (stating that knowledge of adverse use can be presumed).

situation similar to *Boldt*, when a driveway or other obvious right-of-way exists close to an assumed boundary line, verification of the exact location of the boundaries is the most diligent task for a landowner to complete.

In this fact situation, the Roths' could have avoided the legal confrontations by initially being inquisitive about a driveway very near the assumed boundary of their property and verified or rejected their assumptions. The Roths' are the cheapest cost avoider¹⁴⁷ in this situation and should bear the burden of their false assumption.

4. *Comparison to Other States.*

While the analysis of *Boldt* may be harsh to some homebuyers, a few other jurisdictions have taken a similar approach. Other states allow a constructive knowledge argument for a change in use status¹⁴⁸ and presumptions on knowledge of actual boundary lines.¹⁴⁹

C. *Use of Constructive Knowledge in Property Law*

The idea of presuming knowledge to a party based on a recorded document is not new to property law. In Minnesota, the doctrine of constructive knowledge in property law is almost as old as the prescriptive easement concepts found in *O'Boyle*.¹⁵⁰ For

147. "Cheapest cost avoider" is a term coined by legal scholars to identify the party who should bear the costs of a dispute because the party could have easily discovered facts or could have avoided the lawsuit altogether by exercising a higher degree of care. M. Stuart Madden, *Selected Federal Tort Reform and Restatement Proposals Through the Lenses of Corrective Justice and Efficiency*, 32 GA. L. REV. 1017, 1047 (1998).

148. *E.g.*, *Field-Escandon v. Demann*, 204 Cal. Rptr. 49, 54 (Ct. App. 1988) (holding that either constructive or actual knowledge is sufficient to provide notice to servient landowner); *White v. Ruth R. Millington Living Trust*, 785 S.W.2d 782, 786 (Mo. Ct. App. 1990) (holding that landowner need not have actual knowledge of adverse usage, but usage must be sufficient to charge the landowner with constructive notice).

149. *E.g.*, *Conaway v. Toogood*, 158 P. 200, 203 (Cal. 1916) ("An owner of a premises is presumed to know the true location of his boundaries, and is bound to take notice of the nature and extend of possession by a claimant."); *Hindall v. Martinez*, 591 N.E.2d 308, 310 (Ohio Ct. App. 1990) ("[L]aw presumes that an owner of property knows the condition and status of his land."); *Warren v. Swanzy*, 361 S.W.2d 479, 786 (Tex. Civ. App. 1962).

150. As early as 1907, Minnesota courts have presumed knowledge by a purchaser of land using the concept of constructive knowledge of facts found in public records. *Smith v. Lockwood*, 100 Minn. 221, 223, 110 N.W. 980, 980

example, the Minnesota legislature enacted the recording acts to provide protection to a subsequent purchaser of real estate who acts in good faith.¹⁵¹ Good faith has been defined by common law as a purchaser who does not have actual, implied, or constructive knowledge of rights of others in the same property.¹⁵² Therefore, even if the purchaser does not have actual knowledge of a prior, properly recorded interest, the subsequent purchaser can be denied the protection of the recording act with the concept of constructive knowledge.¹⁵³ The common law presumes notice to all purchasers of facts found within a properly recorded instrument.¹⁵⁴ The purchaser is presumed to have properly searched the records and is held to knowledge of facts found in the deed and is held to have notice of facts that can be derived from the deed.¹⁵⁵

As a comparison to the policies of the recording acts, it should not be unusual to apply the concept of constructive knowledge when determining the boundary line for a prescriptive easement purpose. The legal description is found in the deed,¹⁵⁶ which is a recorded document.¹⁵⁷ Because there were no disputes about the facts in this case,¹⁵⁸ holding the Roths to knowledge of facts in the deed, such as the legal description, and facts derived from the legal description, such as the actual boundary line, is not an unusual connection to make.

D. Ignorance of Property Lines

Lastly, the holding by the Minnesota Supreme Court in *Boldt* is significant in another matter. If the Minnesota Supreme Court had affirmed the denial of the prescriptive easement claim by the

(1907). The two-part rule of O'Boyle, defining the requirements to change a permissive use to a hostile use, was established in Minnesota in 1896. *O'Boyle*, 66 Minn. at 391, 69 N.W. at 38.

151. Minn. Stat. § 507.34 (2000). The recording act states that "every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith and for valuable consideration of the same real estate, or any part thereof, whose conveyance is first duly recorded . . ." *Id.*

152. *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 524 (Minn. 1990).

153. *Nussbaumer v. Fetrow*, 556 N.W.2d 595, 598 (Minn. Ct. App. 1996).

154. *Miller v. Hennen*, 438 N.W.2d 366, 369-70 (Minn. 1989).

155. *Latourell v. Hobart*, 135 Minn. 109, 113-14, 160 N.W. 259, 260-61 (1916).

156. § 507.07 (showing that the contents of a warranty deed contain a description of the premises).

157. § 507.34. "Every conveyance of real estate shall be recorded in the office of the county recorder of the county where such real estate is situated." *Id.*

158. *Boldt*, 618 N.W.2d at 396.

trial court and the court of appeals, the decision would have allowed a servient landowner, in some situations, to claim ignorance of his property lines as a defense to a prescriptive easement claim whether or not it was actually true.¹⁵⁹ If the servient landowner was allowed to defend the claim through ignorance, it would be difficult for the claimant to disprove the servient landowner's alleged ignorance. As a result, the claimant would not be able to establish the landowner's knowledge of the adverse or hostile use on the servient property. Most likely, such a tactic would deny the prescriptive easement claim.

The decision in *Boldt*, properly interpreted,¹⁶⁰ closes the door on this defense by using a well settled doctrine in property law and presuming the servient landowner has knowledge of the true boundary lines based on the facts found within a properly recorded document. Establishing the knowledge of the boundary lines based on a recorded document rather than a party's knowledge is the best way to provide clarification in disputes because evidence will be based on a document available to everyone. Facts in a deed are easily verifiable. On the other hand, parties knowledge, memory, or assumptions are often difficult to verify and easily falsified. Utilizing the concept of constructive knowledge in a prescriptive easement claim, similar to a recording act claim, provides clarity and guidance for future actions because parties rely on the recorded document.

V. CONCLUSION

Properly interpreted, the decision in *Boldt* satisfies the two-part rule established in *O'Boyle*. First, *Boldt* identifies that transferring land to a non-family member is sufficient affirmative proof to change a permissive use, due to a familial relationship, to a hostile use. Second, *Boldt* establishes that constructive knowledge of an adverse use is adequate to satisfy the knowledge requirement if the

159. The court of appeals denied the prescriptive easement claim because of the stipulation stating that the Roths believed the driveway was not on their property. *Boldt*, 604 N.W.2d at 120. There is no way to verify whether or not the Roths were truthful when stating they did not know the location of the driveway.

160. Because the Minnesota Supreme Court in *Boldt* offered very little discussion on the element of knowledge, future decisions may interpret that this element has been eliminated from the line of cases that follow *O'Boyle*. See *infra* notes 72 and 75 for cases following the *O'Boyle* rule.

use is actually on the servient landowner's property according to the legal description. Lastly, *Boldt* prevents a servient landowner from defending a prescriptive easement claim by simply claiming ignorance of the boundary lines. The decision in *Boldt* is important in Minnesota property law because the case brings together, affirms the existence, and clarifies the meaning of many of the key concepts of prescriptive easements.