

## **Chapter Four - Fence Law, Straying Animals, Boundary Disputes and Adverse Possession**

One of the most basic aspects of owning land is to know what you actually own. Traditionally the way we mark ownership is to put fences around our land to separate it from the land owned by our neighbors. We all recognize fences have many functions besides marking what we own – most importantly keeping our livestock in and keeping other people’s livestock out. This chapter addresses the laws relating to fences and straying animals and what these laws require of Iowa landowners. Several other related issues are covered – such as what happens when people can’t agree where the boundary is between their properties - which may involve what is known as “acquiescence in boundaries” - and resolving disputes when someone claims to own the land of another, often referred to as “adverse possession.” As you might imagine, Iowa courts have decided cases on all of these topics, providing guidance on Iowa’s law for disputes such as these.

### **Fence Law**

What do I need to know about fence law – when do I need to have fences and what happens if there is a dispute with my neighbor over a fence?

These are good questions and are on the minds of all landowners. We all know the saying “good fences make good neighbors.” Judging by the number of court cases over the years the converse is also true - bad fences can lead to nasty legal disputes. Iowa has had laws on fences in the state code since before the time of statehood. Presently, the main law is found in Iowa Code Chap. 359A (formerly Chap. 113). Here are the basic points important for landowners to know about fence law in Iowa.

First, there is no law requiring you to have a fence between your and the neighbor’s property, except in a few circumstances. Of course, there are many practical and traditional reasons to have a fence. Most importantly to mark the boundary of your property so people know what you own. But Iowa law does not require maintaining fences. If you want evidence of this think of all the farm fields you drive by where there are no fences between the crops and the road ditches.

Second, there are several exceptions for when a legal duty to have a partition fence is required, including the following:

#### 1. Fencing Agreements

The first exception is when the parties have entered a fencing agreement allocating who is responsible. Iowa Code § 359 A.12 provides for such agreements and allows the parties to have the agreements to be recorded with the county. This means the agreement is binding not just on the people who sign it, but on all their future owners who might buy, inherit or lease the property. This is why it is important to check the land records to see if a fencing agreement exists when you are considering purchasing a piece of land.

#### 2. Owning Livestock

A second situation that may require a person to maintain fences is if you own large livestock such as horses, cattle, hogs or sheep. Under Iowa law, the owner of livestock has a duty to control them and keep them on your property or be liable for the damages they cause. This provision in Code §359A.22A is what makes Iowa a “fence-in” state, meaning if you own livestock you must fence them in.

### 3. Your neighbor owns livestock

Another Iowa law provides livestock owners are not liable if their animals enter onto another person's property because of an inadequate fence. This provision is found in the last sentence of §169C.4 (1)(a) and provides, "A livestock owner shall not be liable for damages incurred by a landowner if livestock trespassed through a fence that was not maintained by the landowner as required pursuant to chapter 359A." This important exception is part of Iowa Code Chapter 169C on "Trespassing or Stray Livestock." Legally it means Iowa is also a "fence out" state requiring people to maintain fences in order to keep neighbor's livestock from trespassing on their property. Because Iowa is both a "fence in" and a "fence out" state, this means the third situation when you may have a duty to fence your land is to protect your crops from damages caused by your neighbor's livestock.

Does this mean I may be required to pay to have fences because my neighbor keeps livestock – even though I do not have any livestock?

Yes, that is exactly what Iowa law provides and the Iowa Supreme Court most recently in a \_\_\_\_\_ case has said the law is constitutional and fairly balances the duty to fence between neighboring property owners.

### 4. Fence Viewer's Order requires fences to be maintained

How do neighbors determine what part of the fence they are responsible for maintaining?

This question brings us to the fourth and final way Iowa law can be used to create a duty to maintain fences – by an order of the fence viewers. Before explaining this process it is important to recognize in almost all situations any landowner is by practicality someone else's neighbor – and by tradition, most neighboring landowners have fences between their respective properties. The fences aren't there because some authority ordered it – or - as we have learned because the law requires them – the fences are there by tradition and because it makes sense.

Having said that, it is understandable disputes over fences can arise, for example in situations such as when:

- livestock have escaped and there is disagreement where it occurred,
- the fences have been knocked down by snow drifts or deteriorated over time,
- there is a belief a fence is in the wrong place and needs to be moved, and
- there is a change in owners and a new neighbor wants to have the fencing responsibility determined.

Because these situations will arise, the Iowa law provides a process for deciding who is responsible for maintaining the fences, it is §359 A.3, known as the fence viewing law. Before explaining the law it is important to repeat the idea most fences between neighbors did not result from use of this process; instead, most partition fences exist through tradition and necessity.

I have heard Iowa fence law is based on the "right hand rule" – what is that?

Part of the Iowa fencing tradition is known as the "right-hand rule" - a common sense method for allocating the part of the fence to be maintained by each neighbor. Under the "right hand rule" the neighbors meet at the midpoint of their common boundary line and when facing each other accept responsibility for the half of the boundary fence to their right. This "right hand rule"

approach has been used throughout Iowa history and is widely recognized - so much so that most people claim it is the law – however, it does not appear in the Iowa Code. This means neighbors can agree to any division of the fences they find fair. For example if there is a stream on one portion – it may be more difficult or costly to fence so the neighbors can agree to a three quarters and one quarter fencing division.

There are several things to recognize about these divisions. First, unless an agreement has been reduced to writing and filed with the county recorder, the agreement may not bind future owners. Second, this means if you do want an agreement to bind future owners, then you must agree to put it in writing, have the parties sign it, and then record it with the county so it runs with the title to the property.

#### What is the procedure if the neighbors have a dispute and no fencing agreement exists?

To begin, Section 359A.1A provides “The respective owners of adjoining tracts of land shall upon written request of either owner be compelled to erect and maintain partition fences or contribute there to and keep the same in good repair throughout the year.” This section provides the foundation for Iowa fence law. As noted above, the fourth way a duty to fence your property can arise is when ordered by the fence viewers.

#### Who are the fence viewers?

Iowa law §359A.3 provides the township trustees serve as the fence viewers and have the power to resolve fencing disputes. The procedure set out in §§359A.3-11 is fairly straightforward. Any landowner who wants to have a fence dispute resolved can file a complaint with the township trustees. If you don’t know who they are for your township, contact the county auditor’s office. When the fence viewers receive a complaint they will provide legal notice to the landowners holding title and set a date for the neighboring landowners and the fence viewers to meet on the disputed property to “view” the fence. After doing so, the fence viewers will issue a ruling determining the legal responsibility of each neighboring landowner to maintain a designated portion of the fence. In most cases the fence viewers will use the “right hand” rule in making the allocation, but they are not required to do so. The law allows the fence viewers to make any allocation of responsibility they feel is equitable and fair.

#### What happens once the fence viewers make a decision?

Once the fence viewers have rendered a ruling, the landowners have a set period of time, 30 days by law, to construct or repair the fence. If the landowner fails to do so, the fence viewers can arrange to have the fence built. The costs of fixing the fence are charged to the responsible landowner and will ultimately be collected in the same way as property taxes – under §359A.6.

#### Who pays for all of this?

Clearly there are costs involved in resolving a fence dispute. Under §359A.4 when the fence viewers issue an order it will include both the time period allowed for the work and a determination of who must pay for which portion, including “the fees of the fence viewers and costs.” If the fence is not erected, rebuilt or repaired in the time allotted, then the fence viewers can request the complaining party make a deposit of a sum of money sufficient to pay for the fence and the costs. The complaining landowner will be reimbursed as soon as the costs and fees assessed against the party in default, meaning the neighbor, are collected.

### What if I don't agree with the ruling of the fence viewers?

If a landowner does not agree with the ruling the landowner has twenty days to appeal the decision of the fence viewers to the district court for the county where the property is located. See §359A.23. The district court will hold a hearing on the appeal and can issue a ruling. This trial is said to be “de novo” meaning it starts new so the court can hear its own evidence and isn't limited to what the fence viewers said or did.

The district court ruling will allocate the fencing responsibility of the parties – and this ruling can also be appealed to the higher courts if the losing party decides to do so.

### Can the fence viewers decide one landowner, such as the only one with livestock, must maintain 100% of the fence?

The fence viewers can make an equitable allocation but because the Iowa Supreme Court has ruled both neighbors have some fencing responsibility (and benefit from the fence), the fence viewers cannot make one party bear all of the costs for fencing. The only situation where some type of complete responsibility for the costs of fencing might exist is if the parties for some reason in the past had agreed to it and recorded the agreement. Then it would bind future owners and could not be reversed by an action the fence viewers.

### Are all fences treated the same under Iowa laws?

The short answer is no. Iowa law provides for several types of fences. A “lawful” fence under §359A.18 is one adequate to mark the partition or boundary and can be of different types, for example, three strands of barbed wire may be adequate. But Iowa law also provides for a “tight” fence under §359A.20 meaning a fence that will hold livestock, such as requiring woven wire on the bottom and barbed wire on top. If one landowner makes their portion of the fence “tight” then the fence viewing process can be used to require the neighboring landowner to also upgrade their own portion of the fence to meet the “tight” standard, a more costly process, see Iowa Code §359A.19 “Duty to maintain tight fences”.

### If the fence is built on the property line who owns it?

The property line is an imaginary line, meaning anything built on it is by definition on the property of both adjoining owners, a fact recognized under Iowa law §359A.16. The answer to the question of “who owns the fence” is both do because part of the fence is on both sides of the property line. However, if one party built and paid for the fence they are considered to be the owner of that portion, see §359A.16. This law gives an owner the right to remove the fence as if it was entirely on their land. But it is important not to confuse the right to “remove” a fence because you “own” it with the separate duty to maintain your portion of a fence if you have been ordered, or have agreed, to do so. You can't remove a fence without considering the potential of exposing crops to damage from any livestock that might be present now or in the future.

### **Acquiescence in Boundaries**

We have owned our farm for over 50 years and our neighbor of longstanding recently sold 40 acres adjoining our land. The new buyer had it surveyed and sent us a letter claiming the fence is in the wrong place and is almost 40 feet on “his” land. He wants us to move the fence so he can farm “his” land. This fence has been there since before we bought the farm – doesn't it fix the boundary regardless what the survey shows?

You have encountered an issue that is not uncommon – what happens when fences between neighbors are not in the right place. The situation is so common the Iowa Code contains a chapter on it. “Chapter 650 Disputed corners and Boundaries” providing a procedure to resolve disputes like yours. Given the facts, first with the fence having been there for many years and, second with both neighbors treating it as the boundary – you are correct the court will most likely rule it is the accepted property line and you will not need to move the fence.

This legal concept is known as “Acquiescence in Boundaries” and has been the subject of several Iowa Supreme Court cases. A 1994 case *Tewes v. Pine Lane Farms, Inc.*, is not unlike yours. In that case there was no fence between the two 80 acre tracts of farmland but instead three fence posts were used to mark the dividing line. The farmer landowners on both sides treated the posts as the boundary, but in 1991 when one decided to sell his land the prospective purchaser requested a survey to determine the boundary. The survey showed the legal property line to actually be 26 feet beyond the three posts, meaning 2 and 1/2 acres of land claimed by the neighbor was now in question. The purchaser asked the neighbor to agree to recognize the new boundary, but the neighbor refused to do so, claiming the parties had treated the posts as the boundary marker and had acquiesced in this as the legal boundary.

The dispute was tried by the district court and based on evidence the history of ownership showed the parcels once had a common owner, helping explain the lack of a fence. The trial included evidence about previous disputes over the exact boundary but no legal action had ever been taken since the 1970s. The district court ruled the parties had acquiesced in the three post boundary for the minimum of 10 years as required in §650.6 and §650.14 and ruled for the defendant. On appeal, the Iowa Supreme Court examined the evidence of when the landowner who sold to the purchaser either knew or had the opportunity to know where the boundary was being drawn by the neighbors. The Court noted acquiescence disputes are factual and it examined the evidence – such as crop residue and USDA photos. Ultimately the Court agreed with the trial court ruling acquiescence for the necessary 10-year period had been established.

#### What lessons can we learn from a dispute like *Tewes*?

One lesson is if you believe this is a problem with a boundary, you need to take action to address the issue. In *Tewes* a survey had been done in the 1970s because of an earlier dispute with a previous owner, and the survey showed the property line was located improperly. But the landowner did not take any legal action to challenge or change the boundary. Because the acquiescence provision of Chapter 650 fixes the new boundary after 10 years – it operates like a tolling provision, meaning once sufficient time has passed, you may not be able to reverse the result. So the lesson is – don’t let property line disputes linger or you may have waited too long.

#### How do disputes like the one in *Tewes* get in front of the district court?

Chapter 650 provides “when one or more owners of land, the corners or boundaries of which are lost, destroyed or in dispute, desire to have the same established, they may bring an action in the district court of the county....” where the property is located. The Code provides the procedure for giving notice to the parties and for resolving disputes. The law gives the court authority to appoint one or more disinterested surveyors to serve as a commission to hold a hearing and to establish the disputed corners or boundaries. The commission is given 60 days to file a report with the district court. The court may then hold an additional hearing and hear testimony after which it shall issue an order decreeing where the corner and boundary is located. The decree is

binding on the parties and establishes the boundaries although the decree can be appealed, as done in *Tewes*.

Iowa law provides the issue of acquiescence for 10 years can be raised before the commission (§650.10) but the issue can also be first raised with the district court, which at its discretion can resolve the acquiescence issue before a commission is even appointed (§650.6).

Can the parties enter their own agreement establishing the boundary or corner?

Yes, Iowa Code §650.17 provides for boundaries by agreement whereby a written agreement signed and acknowledged by all the parties affected, can be recorded, if accompanied by a plat of the properties and it “shall be binding upon the heirs, successors and assigns.” This is similar to what Iowa law provides for written fencing and drainage agreements.

So what happens in a situation like *Tewes* if the purchaser ends up with 2 and 1/2 acres less than bargained for?

In situations like this, the answer will depend on the language of the land purchase contract and the timing of when the discrepancy was discovered. Often a real estate listing for land will include the abbreviation “M/L” for “More or Less.” So if the sale was for “80 acres M/L” then the issue is whether 2 and 1/2 acres is too great a discrepancy and if the buyer accepted the risk of the “L” being larger than expected? If a sale is made pending a survey to establish the exact amount of land involved, then the buyer will only be required to pay for what is actually obtained. In a situation where the problem is discovered and resolved years later the person who came up short some property may not have any legal remedy.

### **Prescriptive Easements, Adverse Possession, and Disputes over Ownership of Land**

There are a variety of ways people can come into conflict over the ownership of property and the Iowa courts have addressed many disputes, such as issues of disputed boundaries and acquiescence. The discussion about tenancy in Chapter Fourteen addresses the ability of the parties to request and the court to order the “partition” of the land into separate pieces or to sell it. In addition to these examples there are two other related theories parties may use to try to establish ownership interests in land claimed by someone else:

- prescriptive easements and
- adverse possession.

As you will see there are similarities in what the courts require to establish these claims, but the key differences is a prescriptive easement is a claim by someone to use the property of another, such as to drive over it or to let water drain across it, for the benefit of their adjacent property. But with adverse possession the claim is to actual exclusive ownership and use of the property in question. The issue of adverse possession often arises when there is some “confusion” about who owns a parcel of land, such as the strip of land in an abandoned street next to a property, or for a tract of land in the interior of a section for which no fences or boundaries have been marked in recent years. Typically, someone is using the land under the belief they own it, and then they are challenged by someone who claims to own the legal title. The disputes are often brought before the district court in what are called “quiet title” actions, meaning the party wants the court to give a clear ruling on who has ownership. The Iowa courts

have established a definite set of legal requirements needed be proven to establish ownership through adverse possession. The claim must be: “hostile, actual, open, exclusive and continuous possession, under claim of right or color of title for at least ten years.” The Iowa courts have issued opinions detailing what each of these elements mean and what is required. For example, merely using a piece of land does not meet the test of being “hostile” because it doesn’t deny the other person’s ownership, for example tenants use land they don’t own. To be hostile the possession of the property needs to show an intention of holding the exclusive title such as by paying the taxes or fencing it, however not fencing the land is not enough to defeat an adverse possession claim. The idea of having a claim of right or title means the person must have some reason why they believe they own the property. As you can see, the facts required to establish or defeat a claim of adverse possession are very specific to each situation. If you believe you may have such a claim you should contact your attorney. As importantly, if you believe another person may be in a situation to try to claim ownership of your land through adverse possession, then you should consider taking action to prevent it. Reminding someone their ability to use your land is only by your permission would be good evidence against the person later claiming their use was hostile to yours and could interrupt the ten-year tolling requirement. Putting the communications like this in writing, such as by sending a letter, and keeping a copy, could be valuable evidence if a court fight develops in the future.

Under Iowa Code §564.1 the rules for establishing a prescriptive easement are very similar to the rules for adverse possession but with one key difference. The courts require someone claiming a prescriptive easement to show the use of the property was open, hostile, notorious, continuous for at least 10 years and based on a claim of right or “color of title” (having at least some form of legal property claim). Section 564.1 specifically provides “the use of the same (meaning the land) shall not be admitted as evidence” the party is claiming a right to an easement. Instead the law requires: “the fact of adverse possession shall be established by evidence distinct from and independent of its use, and that the party against whom the claim is made had express notice thereof; ...”

As you can see, this statute is designed to make the legal test for claiming a prescriptive easement in the property of another very difficult. While prescriptive easements are hard to establish, an alternative is to claim a “permissive” easement. In this situation the claim of a right to use the property is based on some statement or action by the owner showing they agreed to the use by the other party and are aware it is happening.