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## Deeds on the Ground or Words in the Deed: Bryant v Blevins

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*Roger Bernhardt*

**Deeds on the Ground or Words in the Deed: *Bryant v Blevins***

In the past, when a property owner told her attorney that she was not sure that the fence between hers and her neighbor's land was truly on the lot line, several responses were appropriate. If the matter were important enough to warrant the expense, she could be advised to have a survey made. Less formal, but more practical, advice would have been that if she and her neighbor were content with treating the fence as the line, they could simply agree on that fact. Finally, if the fence had already been there long enough, it probably constituted the legal line as an agreed boundary. Now, in light of a recent California Supreme Court decision, that advice needs revision.

The agreed boundaries doctrine provides that in certain cases neighbors may informally agree on a dividing line between their properties that will take precedence over the legal line between them. In *Ernie v Trinity Lutheran Church* (1959) 51 C2d 702, 707, 336 P2d 525, the court stated the rule as follows:

The doctrine requires that there be an uncertainty as to the true boundary line, an agreement between the coterminous owners fixing the line, and acceptance and acquiescence in the line so fixed for a period equal to the statute of limitations or that substantial loss would be caused by a change of its position. It is not required that the true location be unascertainable, that an accurate survey from the calls in the deed is possible, or that the uncertainty should appear from the deeds. The line may be founded on a mistake. [Citations omitted.]

This rule eliminates the expense of hiring both a surveyor and a lawyer to achieve an obvious and straightforward result. If you and I aren't sure about where the exact lot line is, but we are both content to let the fence serve as the divider, the rule saves us paying a surveyor \$1000 or more to tell us that the line is really one foot west of the fence and then paying a lawyer another \$1000 to draft a deed conveying that one-foot strip to the other party in order to make the fence be both the actual and the legal line.

Recently, however, a divided California Supreme Court significantly restricted that doctrine, fearing that it allowed "unreliable boundaries created by fences or foliage, or by other inexact means of demarcation" to usurp the "sanctity of true and accurate legal descriptions." *Bryant v Blevins* (1994) 9 C4th 47, 55, 36 CR2d 86. The doctrine survives, but not in the circumstances in which it is most likely to be needed.

*Bryant* does not repudiate the notion that agreements between neighbors can trump legal descriptions, but it does require a much heavier burden of proof for the proponent. Formerly the rule was, "the court may infer that there was an agreement between the coterminous owners ensuing from uncertainty or a dispute, from the long-standing acceptance of a fence as a boundary between their lands." *Ernie v Trinity Lutheran Church* (1959) 51 C2d 702, 708, 336 P2d 525. Now that inference is confined to cases in which the true boundary cannot be ascertained from the records. Conversely, when the records can show the legal line (as is almost always the case), the proponent of the agreement must prove that an agreement actually was made and cannot rely on long-standing acquiescence as a substitute for that proof.

Because the basic doctrine has not been rejected, *Bryant* does not make it wrong to advise neighbors that they can make their own agreement. That advice should now be supplemented with

an admonition to put the agreement in writing and store it in the same place as the deed and title policy (which was always good advice).

*Bryant* does, however, make it bad advice to opine that a long-standing fence has probably become the lot line. If the neighbor gets a survey showing the true line is somewhere else, the age of the fence is not going to prevail against it. (Nor is adverse possession likely to help in light of its requirement that tax payments be made for the strip. See *Gilardi v Hallam* (1981) 30 C3d 317, 178 CR 624.) Moreover, from the nature of things, agreed boundary claims are far more likely to arise in disputes between successor owners than between the parties who originally made the agreement (and probably remained content with it). Although the acquiescence inference was an important prop in proving cases in which the original fence builders were long gone, now the better advice is, “Don’t build too close to that fence unless you are sure that is where the lot line is.”

Indeed, to be ultracautious, one should also say, “Don’t even buy property unless you have first had it surveyed.” The old rule told buyers that what they saw was what they got, *i.e.*, they didn’t have to worry that their fence, or hedge, or wall would one day be determined to be encroaching and therefore have to be abated, because antiquity had validated it. But those deeds on the ground have now diminished in importance relative to the words in the deed.

Although this new rule augers well for both surveyors and litigators, it probably does not do mere property owners much good.