Mort lingered on his deathbed, accompanied by his nurse, Wanda. He called his granddaughter, Dora, to his side and said, "I haven't got long to live and I want to give you something before I die." Mort gestured weakly toward his nightstand. "In that drawer you'll find a key. Take it out." Dora did so. Mort continued with difficulty, "That key opens the safe in my closet, where you will find my will and other important documents. The safe also includes a ruby necklace, which I recently purchased to give to you for your upcoming birthday. I don't think I'll survive that long, and I didn't make provision in my will for the necklace to pass to you, so I'd like for you to have it now." Dora opened the safe, removed the necklace, put it on, and turned to embrace Mort in thanks. She found, however, that he had already died. After recovering from her shock and sorrow, Dora reviewed the other contents of the safe. She discovered that the will said, in relevant part, "So that it will remain in the family, I leave my house and surrounding lands to my sole living descendent, Dora."

Not long thereafter, Dora ordered a survey of (what had been) Mort's house and surrounding lands. She thereby discovered that a wall dividing the property from that of a neighbor, Todd, had been placed 3 feet inside its proper boundary (into Mort/Dort's land). When asked about the wall, Todd said, "That was already in place when I purchased the property 5 years ago. The prior owner, Addie, told me that she had it built some 20 years earlier, but swore that it marked the proper boundary between her land and Mort's. I guess she was wrong."
### Property – Spring 2013

**Fraley**

**Grading Chart – Hypothetical Three**

<table>
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February 26\textsuperscript{th}, 2013  
Dr. Fraley

**Hypothetical Three**

**Issue #1:** Did Mort make a valid gift of a ruby necklace to Dora?

**Rules:**

A donor may use a testamentary gift to transfer real or personal property. To make a valid testamentary gift, the gift must be made with a will. Furthermore, the gift takes effect upon death. The outcome of a testamentary gift provides revocable title up to death.

An inter vivos gift may also be used to transfer real or personal property. A valid inter vivos gift has three requirements: intent, delivery, and acceptance. To satisfy intent, the court in *Gruen v. Gruen* required a present intent to transfer title, not intent for the gift to have future effect. To meet the delivery requirement, the delivery must be actual, constructive, or symbolic. In *Simpson v. Simpson*, the court decided a promise to give a gift alone does not satisfy the delivery requirement. Finally, a court assumes acceptance if the gift provides value to the recipient. The outcome of an inter vivos gift becomes irrevocable title.

A donor can use a gift causa mortis to transfer real or personal property. A donor makes a valid gift causa mortis under four requirements: intent, apprehension of death, delivery, and death. First, the donor must intend to make a gift. Second, the donor must apprehend death. According to *Estate of Smith*, an issue of apprehension may result if the donor commits suicide. Third, the donor must actually, constructively, or symbolically deliver the gift. Fourth, the donor conditions the gift on death, an event that must occur. A gift causa mortis’ outcome represents title, revocable until death.

If a donor fails to make a testamentary gift, inter vivos gift, or gift causa mortis, the law considers the gift invalid and the gift becomes part of the estate of the donor.
**Application:**

The validity of the gift determines whether a donee keeps a gift or the gift becomes part of the donor’s estate. The timing of Mort’s death provides uncertainty as to whether he successfully delivered the ruby necklace to Dora. Therefore, Mort’s gift to Dora has characteristics of both a valid and an invalid gift.

Dora could argue Mort’s gift represents a testamentary gift. After all, Mort can use a testamentary gift as a way to transfer personal property, such as the necklace. However, the evidence strongly refutes the necklace became a testamentary gift. Mort informed Dora he failed to make a provision in his will for the necklace to pass to her, indicating he did not make a valid testamentary gift. Furthermore, Mort told Dora he wanted her to have the necklace now, yet a testamentary gift takes effect only upon death. Mort’s failure to create a provision in his will and his intent to give Dora the necklace immediately prove a testamentary gift did not occur.

Dora could claim Mort made a valid inter vivos gift. Mort told Dora he originally bought the necklace as a birthday present but would like her to have it now before he died, indicating his present intent to transfer title to her. Furthermore, Dora can argue either constructive or symbolic delivery occurred. Because Mort informed Dora of the necklace’s existence, revealed its whereabouts, and gave instructions for her to possess the necklace while he watched, Mort constructively delivered the necklace. Alternatively, Dora can claim Mort symbolically delivered the necklace. Indeed, Mort revealed the hidden key’s location to access the safe and told her to take it out of the nightstand. Therefore, Mort symbolically delivered the necklace to Dora when she held the key in front of him and became the only person with access to the safe. Finally, Dora put on the necklace and turned to embrace Mort in thanks, proving Dora accepted Mort’s gift. Dora can distinguish her necklace from the guns in the *Simpson* case because Mort provided
much more than a mere promise of a gift. Instead, he delivered the inter vivos gift by providing Dora with a key and instructions that she followed immediately.

Dora could also argue the necklace represented a gift causa mortis. First, Mort informed Dora he would like her to have the necklace now before he died, indicating his intent to make a gift. Second, Mort lingered on his deathbed, had a nurse, told Dora he did not have long to live, and would not survive until her birthday, suggesting he apprehended death. Third, Dora can claim Mort delivered the gift through either constructive or symbolic delivery. Because Mort made Dora aware of the necklace, revealed its location, and provided instructions for her to possess the necklace immediately, Mort constructively delivered the necklace. Alternatively, Dora can argue Mort symbolically delivered the gift. After all, Mort revealed the hidden key to the safe and told her to take it out. Therefore, Dora’s possession of the key in front of Mort creates a symbolic delivery since she becomes the only person with full, exclusive, and immediate access to the safe’s contents. Fourth, Mort passed away in front of Dora, proving he actually died. Similar to the four checks and option to buy a Corvette from the Estate of Smith Case, Mort delivered the necklace to Dora therefore creating a valid gift causa mortis.

Mort’s estate could claim his gift to Dora serves as an invalid gift. The necklace certainly did not represent a testamentary gift because Mort failed to include a provision in his will. Furthermore, Mort failed to satisfy the delivery requirement of either an inter vivos gift or a gift causa mortis. To prove either an inter vivos gift or a gift causa mortis, the deliver must be actual, constructive, or symbolic. Because Mort did not directly hand the ruby necklace to Dora, he did not actually deliver the gift. Furthermore, providing someone with instructions on how to obtain an item does not constitute constructive possession. Mort never told Dora to take the necklace out of the safe immediately; therefore, his instructions could have been for the future, creating a
mere promise rather than constructive possession. Finally, giving Dora a key to the safe does not create symbolic delivery. They key only represents access to the necklace yet it does not represent the necklace itself. For example, had Mort given Dora the necklace’s empty box instead of a key to the safe then perhaps symbolic delivery would have occurred. Similar to the facts in *Simpson*, both the father and Mort failed to deliver a gift before death, indicating an unsatisfied delivery requirement and therefore an invalid gift.

**Conclusion:**

By providing Dora with a key to the safe, Mort symbolically delivered the necklace to Dora before he died. Therefore, Mort made a valid gift of a ruby necklace to Dora.

**Issue #2:** Does Todd’s possession of three feet of Dora’s land satisfy the actual and visual element of adverse possession?

**Rules:**

To prove adverse possession, a claimant must satisfy the following elements: continuous, actual and visible, claim of right, hostile, exclusive, and meet the statute of limitations requirement. To be continuous, a claimant must prove he had uninterrupted possession because the owner never reasserted their claim via an ouster. To be actual and visible, the claimant’s possession must be open and notorious in a contextual manner that gives the occupier notice. In *Mannillo v. Gorski*, the court decided possession of fifteen inches of disputed land does not satisfy the actual and visible requirement. To prove a claim of right, the claimant has different requirements depending on the jurisdiction. Some courts require neutral, objective actions that are inconsistent with the true owner’s rights while others require a subjective, good faith intent by the claimant. In *Halpern v. Lacy Investment*, the court refused to acknowledge the claimant’s claim of right because he acted in bad faith. Similar to claim of right, a claimant trying to prove
hostile possession has different requirements based on the jurisdiction. Some jurisdictions require neutral, objective actions that are inconsistent with the true owner’s rights while others require a subjective, bad faith intent by the claimant. To be exclusive, the claimant must prove others do not have mutual or shared use of the land. For example, the court in *Tran v. Macha* refused to acknowledge exclusive possession because mutual use of the land occurred.

Additionally, in *ITT Rayonier v. Bell*, the court decided shared and occasional use by others does not represent exclusive possession.

In addition to the elements of adverse possession, a claimant must establish he possessed the disputed land for the amount of time required under the jurisdiction’s statute of limitations. Most jurisdictions require a twenty-year occupation to prove adverse possession. However, tacking represents an exception to the statute of limitations. Tacking allows successive occupants of the land to satisfy the statute of limitations requirement by aggregating their years of occupation.

If a claimant fails to establish adverse possession, he has likely committed a trespass. A landowner proves trespass by establishing an individual made an unauthorized, direct entry to their land. An unintentional trespass does not require intent; however, an intentional trespass requires the individual to have intended to commit a trespass. The law awards a landowner who proves either unintentional or intentional trespass with damages.

**Application:**

The success or failure of an adverse possession claim determines the subsequent outcome of a trespass claim. The key to deciding if Todd’s adverse possession claim has merit depends on two elements: the actual and visible element and the jurisdiction’s intent requirement with respect to hostile possession. Because Todd’s wall only sits three feet onto the disputed land, the
actual and visible element may or may not be satisfied. Furthermore, Because Addie demonstrated a good faith intent, the jurisdiction will dictate the success of the adverse possession claim and a subsequent trespass claim.

Todd can argue three of the adverse possession elements are undisputed in this case. First, Mort never requested Addie or Todd to move the stonewall, suggesting an ouster did not occur therefore establishing continuous possession. Second, a stonewall becomes a physical barrier preventing others from using the lane, thus establishing Todd’s exclusive possession. Third, Todd can tack his possession to Addie’s possession to meet the twenty-year statute of limitations requirement in most jurisdictions. Todd has strong claims supporting his continuous and exclusive possession as well as meeting the statute of limitations requirement.

Todd can claim he also satisfies the requirement of actual and visible possession. Because the stonewall represents a large, long, and permanent structure, Todd can argue he had open and notorious possession which gave Mort notice of actual and visible possession. After all, a stonewall’s height and size becomes much more open and notorious as opposed to a flat, concrete sidewalk. Furthermore, Addie built the wall three feet inside its proper boundary, indicating a much stronger open and notorious possession claim compared to the mere fifteen inches in the Mannillo case. Indeed, Todd’s three feet of disputed land represents more than double the fifteen inches that the court ruled against. The stonewall’s height, size, and larger occupation space make Todd’s possession much more actual and visible than the flat, concrete sidewalk in the Mannillo case.

Dora can argue Todd’s stonewall failed to meet the actual and visible requirement of adverse possession. Because the stonewall’s location involved only three feet of disputed land, the amount does not meet an open and notorious requirement. After all, thirty-six inches of
disputed land does not represent a significantly larger amount than the fifteen inches in dispute in *Mannillo*. Furthermore, awareness of three feet of land in a grassy area becomes much more difficult to judge compared to a suburban neighborhood with small parcels of land. Because the amount of disputed land remains as insignificant as the land in *Mannillo*, Todd’s possession failed to establish actual and visible possession.

The type of jurisdiction where Todd brings the adverse possession claim will determine whether Todd satisfies the hostile element. Three types of jurisdictions are possible: (1) Claim of right and hostility merge and can be proven based on neutral, objective actions; (2) Claim of right can be proven based on neutral, objective actions while hostility must be in bad faith; or (3) claim of right must be in good faith while hostility can be proven based on neutral, objective actions.

If the jurisdiction allows claim of right and hostility to merge and be proven based on neutral, objective actions, then Todd can claim he satisfies both elements. Addie built a stonewall on the disputed land, indicating an objective action inconsistent with Mort’s rights as an owner. Addie’s construction of the wall represents an objective act which proves both claim of right and hostility in this type of jurisdiction.

If the jurisdiction requires proving claim of right through objective actions and hostility through bad faith, then Dora can claim Todd fails to satisfy the hostility element. Dora could acknowledge building a stonewall represents an objective action which proves Todd’s claim of right; however, his hostility claim fails. Addie swore to Todd that the wall marked the proper boundary between her land and Mort’s, suggesting she built the wall in good faith. Because Addie built the wall in good faith, she did not intentionally possess the disputed land therefore failing to prove hostility through bad faith in this type of jurisdiction.
If the jurisdiction requires proving claim of right through good faith and hostility through objective actions, then Todd can claim he satisfies both elements. Addie swore to Todd that the wall marked the proper boundary between her land and Mort’s, indicating she built the wall in good faith which satisfies the claim of right requirement. Furthermore, Addie’s construction of the wall represents an objective act inconsistent with Mort’s rights as an owner, suggesting Todd can prove the hostility element. Addie’s good faith construction satisfies both claim of right and hostility in this type of jurisdiction.

If Dora can prove Todd either fails to establish actual and visible possession or fails to establish bad faith hostility in a certain jurisdiction, she can claim Todd has trespassed on her land. Because Addie never received permission from Mort, the stonewall became an unauthorized entry. Furthermore, a permanent stonewall represents a direct entry onto the disputed land. Finally, even if Addie did not intend to build the wall on the disputed land, Dora can claim unintentional trespass. Dora will have a successful trespass claim if Todd’s adverse possession claim fails.

Conclusion:

Todd’s possession of three feet of disputed land satisfies the actual and visible element of adverse possession. Furthermore, the jurisdiction will likely have either a good faith or an objective, neutral actions requirement for hostility; therefore, Todd will likely prove hostile possession. Because Todd can satisfy all the elements, Todd will have a successful claim to adverse possession. Because Todd has a successful adverse possession claim, Dora’s trespass claim will fail.