

12-0080

IN THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA

MARVIN MORGAN,

Plaintiff,

v.

Civil Action No.: 11-C-27

BERLIN D. CUPPETT, et al.,

Defendants.

**ORDER REGARDING OWNERSHIP OF SUBJECT TRACT
UNDIVIDED 1/7 OIL AND GAS INTEREST**

On the 19th day of September, 2011, came the Plaintiff, Marvin Morgan, by counsel, C. Seth Wilson, Esquire, and Joshua L. Jarrell, Esquire; Defendants, Faith United Methodist Church and Cemetery and Trinity United Methodist Church, by counsel, Steven L. Shaffer, Esquire; Defendants, Mary Virginia Moore Jones, Thomas S. Jones, and Audra Jones Hansen, by counsel, Mary Elizabeth Georg, Esquire; Defendant Lane Liston, Jr., pro se; and Guardian ad Litem, Trudy H. Goff; all pursuant to the Court's Order entered August 26, 2011, to conduct a bench trial as to Count One of the complaint in the above-styled matter. The Court heard testimony and additional evidence was introduced into the record regarding ownership of the undivided one-seventh (1/7) oil and gas mineral interest at issue.

The Court thereupon took the matter under advisement and requested the parties submit their proposed findings of fact and conclusions of law. On October 20, 2011, Lane Liston, Jr., filed his proposed findings of fact and conclusions of law. On October 21, 2011, counsel for Faith United Methodist Church and Cemetery and Trinity United Methodist Church; Marvin Morgan; and Audra Jones Hansen, Mary Virginia Moore Jones, and Thomas S. Jones submitted their proposed findings of fact and conclusions of law.

Whereupon, after reviewing the motions, memoranda, exhibits, testimony, and applicable law relevant to this case, and upon consideration of the arguments of counsel, this Court **FINDS** and **CONCLUDES** as follows:

Findings of Fact

1. Plaintiff Marvin Morgan ("Mr. Morgan") is the owner of a 225 acre tract of land situate in Portland District, Preston County, West Virginia (the "Subject Tract"). Mr. Morgan acquired his interest in the Subject Tract as a joint tenant with H.E. "Pete" Morgan by deed dated February 7, 1967, and recorded in Deed Book 389, at Page 516 (the "Vesting Deed").

2. H.E. "Pete" Morgan died on September 18, 1969, and sole ownership of the Subject Tract vested in the Plaintiff, Mr. Morgan, pursuant to the survivorship provision contained in the Vesting Deed.

3. The Vesting Deed excepted all the coal underlying the Subject Tract, but contained no other reference to oil, natural gas, or any other minerals associated with the Subject Tract.

4. A title search of the Subject Tract revealed that Calvin C. Forman became vested in the Subject Tract in 1869 by virtue of two deeds: one dated January 12, 1869, and recorded in Deed Book 43, at Page 307, conveying an undivided 1/2 interest to the Subject Tract; and one dated May 1, 1869, and recorded in Deed Book 43, at Page 296, conveying the remaining undivided 1/2 interest to the same.

5. Prior to 1900, Calvin C. Forman died intestate survived by the following seven children as his only heirs at law: Charles Forman, Olive B. Jones, Margaret S. Wolfe,

Lillie M. Forman, Walter S. Forman, Ruth Cuppett, and Florence Forman. Each heir inherited an undivided one-seventh (1/7) fee interest in the Subject Tract.

6. By various deeds prior to 1902, Walter S. Forman became vested with a fee simple six-sevenths (6/7) interest in and to the Subject Tract. Florence Forman remained vested with the remaining one-seventh (1/7) interest.

7. By deed dated February 22, 1902, and recorded in Deed Book 95, at Page 151, Walter S. Forman and Zoura A. Forman, his wife, and Florence A. Forman conveyed "all the coal upon and under" the Subject Tract to W. G. Brown and F. C. Todd (the "Coal Severance Deed").

The Coal Severance Deed stated, in part:

the said Grantors do sell, convey, transfer and assign, with covenants of General Warranty, unto the said Grantees, the following described real estate, situate in Portland District, Preston County, West Virginia, on the waters of Roaring Creek and bounded and described as follows: Being all the coal upon and under the following tracts of land . . .

There is excepted from this conveyance the three foot vein of coal known as the fuel coal for domestic purposes the same being located in the top of the hill and the same that is now open and being worked in said farm, together with the right to dig and sell therefrom for domestic use. And the said Grantors further convey unto the said Grantees the following mining and rights and privileges, to wit: All necessary and convenient rights of way through and over and under said land, together with the free right of ingress, egress and regress in, upon and under said land and the right to mine and remove all of said coal, and to remove upon and under said land, the coal from and under other lands, with necessary drainage, ventilation and ventilating shafts to remove said coal upon and under said land, and also to remove the coal under neighboring lands; and the parties of the second part are to be free from all liabilities growing out of the exercise of these privileges.¹

8. Nowhere in the February 22, 1902 Coal Severance Deed is there mention of, or any language purporting to convey, any interest in oil, natural gas, or other minerals.

¹ This Order does not address the ownership of the coal under the subject tract.

9. By deed dated November 14, 1907, and recorded in Deed Book 120, at Page 119, Florence A. Forman conveyed her undivided one-seventh (1/7) interest in the Subject Tract to her brother, Walter S. Forman (the "Forman Deed"). The Forman Deed contained the following granting language:

Witnesseth: That in consideration of the sum of Three Hundred Dollars, the receipt of which is hereby acknowledged, the said party of the first part does grant unto the said party of the second part, the following described property, that is to say: Her one-seventh interest in the surface only with the hereditaments² and appurtenances³ thereto belonging, (the coal and mining privileges having been previously sold) in the two hundred and twenty-five acre tract of land, situate in Portland District, County of Preston, and State of West Virginia, of which Calvin C. Forman died seized. And the said Florence A. Forman hereby covenants with the said party of the second part, that she will warrant generally the property hereby conveyed.

(Emphasis added).

10. The Forman Deed did not contain any exceptions or reservations of oil and gas.

11. As a result of the Forman Deed, Walter Forman became the sole owner of the Subject Tract. The Subject Tract was conveyed several more times before vesting in the Plaintiff Marvin Morgan in 1969.

12. Plaintiff, Mr. Morgan, argues that the coal severance parenthetical contained in the Forman Deed⁴ serves to qualify and define the "surface only" granting language, making clear that Florence Forman intended to convey her entire undivided interest in

² *Black's Law Dictionary* defines "hereditament" as "[a]ny property that can be inherited; anything that passes by intestacy[]" and "real property; land." *Black's Law Dictionary* 743 (8th ed. 2007).

³ *Black's Law Dictionary* defines "appurtenance" as "something that belongs to or is attached to something else." *Id.* at 111. W. Va. Code § 36-3-10 (1923) (Repl. Vol. 2005) states: "Every deed conveying land shall, unless an exception be made therein, be construed to include all buildings, privileges, and appurtenances of every kind belonging to the land therein embraced."

⁴ The coal severance parenthetical states: "(the coal and mining privileges having been previously sold)[.]"

the Subject Tract, including any previously unsevered oil and gas, to Walter Forman excepting and reserving the coal previously conveyed in the Coal Severance Deed.

13. The Defendants argue that the “surface only” granting language contained in the Forman Deed unambiguously refers only to that superficial part of the earth used for agricultural purposes and that Florence Forman therefore intended to reserve or sever an undivided 1/7 interest in and to the oil and gas minerals underlying the Subject Tract.

14. At a bench trial held September 19, 2011, the Plaintiff presented the testimony of Charles Morgan Haymond and Assessor Terri Funk. The Defendants did not present any testimony.

- a. Morgan Haymond testified that he is a professional landman who has examined ownership interests of oil, gas, coal, timber, and other estates in land for over 30 years in West Virginia, and has worked extensively in Preston County, West Virginia. He testified that he performed a title examination for the Subject Tract in the office of the County Clerk of Preston County and testified that the oil and gas underlying the Subject Tract has never been specifically reserved or severed from the surface estate. He testified that neither Florence Forman, nor any of her heirs or assigns, ever conveyed, leased, devised, or mortgaged a one-seventh (1/7) interest in and to the oil and gas underlying the Subject Tract. He testified that no estate records for Florence Forman, nor any of her heirs or assigns, recognized or contained any mention of a one-seventh (1/7) interest in the oil and gas underlying the Subject Tract. He testified that neither Florence Forman, nor any of her heirs or assigns, ever entered a one-seventh (1/7) interest in the oil and

gas underlying the Subject Tract on the Preston County landbooks for property tax assessment purposes.

- b. Terri Funk is the Preston County Assessor and is responsible for, among other things, administrating property tax assessments in Preston County, West Virginia. Ms. Funk testified that she and/or members of her staff examined the property tax assessments related to the Subject Tract from the late 1800's through present day. Ms. Funk testified that it was common practice in Preston County for the Assessor to identify an interest in real property as "fee" prior to the severance of the coal during the late 1800's and early 1900's. Ms. Funk testified that upon severance of the coal it was common practice for the Preston County Assessor's Office to make separate entries for the same tract of land on the landbooks to ensure that both the "surface" estate and the "coal" estate were properly assessed for property tax purposes. Ms. Funk testified that historically the Assessor's office did not separately assess oil and gas for real estate tax purposes unless and until specifically and expressly severed from the overlying surface estate. Ms. Funk testified that in instances in which oil and gas minerals were not specifically and expressly severed from the surface estate then the oil and gas underlying said tract of land would be properly assessed as part of the "fee" (if the coal had not been severed) or as part of the "surface" (if the coal had been severed). The Subject Tract was assessed on the Preston County landbooks in "fee" in and prior to 1902. The coal estate was severed from the surface estate for the Subject Tract in 1902. The Subject Tract has been assessed as "surface" or "fee" since 1903 through 2010 and has never been delinquent. No portion of

the oil and gas underlying the Subject Tract has ever been separately assessed. Ms. Funk testified that the Preston County Assessor's office recently contacted the Plaintiff, Mr. Morgan, to inform him that the Subject Tract was erroneously assessed as "surface" and that the Assessor's Office had revised his assessment to state "fee (less coal)." Ms. Funk further testified that this assessment was revised to clarify that Mr. Morgan owned all of the oil and gas underlying the Subject Tract. Ms. Funk testified that Mr. Morgan was not requested to pay any back taxes in light of this revised assessment.

15. Defendants presented no evidence that Florence Forman, or any of her heirs or assigns, took any actions consistent with ownership of an interest in and to the Subject Tract.

16. The record contains no evidence that demonstrates that Florence Forman intended to sever the surface from the remaining estate in the Forman Deed or to reserve unto herself, her heirs and assigns, an interest in the oil and gas underlying the Subject Tract other than the "surface only" language of the Forman Deed.

Conclusions of Law

1. The Plaintiff, Marvin Morgan, is the successor in title to Walter Forman and presently owns one hundred percent of the oil and gas underlying the Subject Tract.

2. W. Va. Code § 36-1-11 (1923) (Repl. Vol. 2005) provides:

When any real property is conveyed or devised to any person, and no words of limitation are used in the conveyance or devise, such conveyance or devise shall be construed to pass the fee simple, or the whole estate or interest, legal or equitable, which the testator or grantor had power to dispose of, in such real property, unless a contrary intention shall appear in the conveyance or will.

3. It is a bedrock principle that courts focus on ascertaining the grantor's intent when attempting to interpret conveyance language in a deed; and, as a general rule, it is necessary to consider the entire instrument as a whole in order to ascertain that intent. *See Hall v. Hartley*, 146 W. Va. 328, 119 S.E.2d 759 (1961).

4. If a deed is unambiguous, a court may not ordinarily consider extrinsic evidence to determine the intent of the parties. *Pocahontas Land Corp. v. Evans*, 175 W. Va. 304, 308, 332 S.E.2d 604, 609 (1985) (citations omitted).

5. If the grantor's intent is not clear from the four corners of the instrument, however, the deed is ambiguous on its face. The court may then consider extrinsic evidence to determine the grantor's intent or resort to common law rules of construction to give effect to the instrument. *See Ramage v. South Penn Oil Co.*, 94 W. Va. 81, 118 S.E. 162 (1923); *Hall*, 146 W. Va. 328, 119 S.E.2d 759.

6. Use of the term "surface" in granting language accompanied by a qualifying phrase must be interpreted within the context in which it is used. *Syllabus, Ramage*, 94 W. Va. 81, 118 S.E. 162 ("The term 'surface,' when used as the subject of a conveyance, is not a definite one capable of a definition of universal application, but is susceptible of limitation according to the intention of the parties using it; and in determining its meaning regard may be had, not only to the language of the deed in which it occurs, but also to the situation of the parties, the business in which they were engaged, and to the substance of the transaction.").

7. The *Ramage* court interpreted an ambiguous deed which conveyed the "surface," but reserved the oil and gas rights to the grantors and concluded that the grantors did not intend to reserve the coal by emphasizing certain extrinsic factors, including the fact that at that time there was no coal development in that area; that the grantors knew about the disputed

coal because they had drilled through it on a neighboring tract to develop the oil and gas; and because they failed to have the coal entered on the land books for taxation purposes for 25 years. *Ramage*, 94 W. Va. 81, 118 S.E. 162.

8. Failure to enter and pay taxes upon a separate mineral estate is evidence that a grantor did not intend to retain or reserve any interest in minerals. *Id.*, 118 S.E. at 171.

9. The “surface only” granting language in the Forman Deed is qualified by the language “with the hereditaments and appurtenances thereto belonging” as well as the coal severance parenthetical:

Her one-seventh undivided interest in the surface only with the hereditaments and appurtenances thereto belonging, (the coal and mining privileges having been previously sold) in the two hundred and twenty-five acre tract of land, situate in Portland District, County of Preston, and State of West Virginia, of which Calvin C. Forman died seized.

(Forman Deed).

10. “Surface only” in this context could mean (a) that Florence Forman intended to sever the surface from the remaining estate, thereby retaining unto herself and her heirs all unsevered minerals; or (b) that she included the coal severance parenthetical to qualify “surface only” and clarify to the grantee that she intended to convey her entire interest, being an undivided 1/7 interest in the Subject Tract except the coal sold under the Coal Severance Deed.

11. Failure to convey, devise, lease, mortgage, or recognize a separate mineral estate in estate records is evidence that a grantor did not intend to retain or reserve any interest in the oil and gas. There is no evidence that Florence Forman and her successors conveyed, devised, leased, mortgaged, or recognized any interest in the oil and gas.

12. Had Florence Forman intended to sever or reserve unto herself, or her heirs and assigns, an undivided 1/7 interest in previously unsevered oil and gas associated with the Subject Tract she, or her heirs, would have thereafter acted in a manner consistent with ownership of such oil and gas. Based upon the extrinsic evidence introduced before the court, however, it is clear that no action was taken by Florence Forman, or her heirs, or assigns, to demonstrate an intent to retain an ownership interest in the Subject Tract. Therefore, Marvin Morgan owns the Subject Tract in fee, less the coal estate previously conveyed by his predecessor in title.

13. Neither Marvin Morgan nor his predecessors in title forfeited any mineral estate with respect to the Subject Tract merely because the property remained entered as "surface" for property tax purposes throughout the ownership of the property.

14. A surface owner who owns an interest in minerals does not forfeit the minerals simply because the land is assessed as "surface." (*See State v. Guffey*, 82 W. Va. 462, 95 S.E. 1048, 1049 (1918) ("[T]he owners of these tracts, entered as 'surface,' for all the years for which forfeiture is claimed, continued to own undivided interests in the oil and gas, and presumptively the value of their interests therein was included in the valuation of the land entered as 'surface,' and certainly the general allegation that these oil and gas interests or estates were not subsequently taxed will not overcome the presumption that said undivided interests continued charged to the owners of the estates entered as 'surface.'").

15. Finally, while the exercise of examining extrinsic evidence to determine the grantor's intent is helpful, it is not necessary. Courts have consistently

resorted to well-recognized rules of construction when confronted with ambiguous deeds that are susceptible to one or more interpretation.

16. The Forman Deed is susceptible to more than one interpretation.

17. In cases of doubt or ambiguity in deed language, the prevailing rule is to interpret the language most strongly against the grantor and in favor of the grantee. Syl. Pt. 8, *Zimmerer v. Romano*, 223 W. Va. 769, 679 S.E.2d 601 (2009) (“ “ ‘Where there is ambiguity in a deed, or where it admits of two constructions, that one will be adopted which is most favorable to the grantee.’ Pt. 6, syllabus, *Paxton v. Benedum-Trees Oil Co.*, 80 W. Va. 187[, 94 S.E. 472 (1917)].” Syl. Pt. 3, *Hall v. Hartley*, 146 W. Va. 328, 119 S.E.2d 759 (1961).’ Syllabus Point 5, *Cottrill v. Ranson*, 200 W. Va. 691, 490 S.E.2d 778 (1997).”).

18. Because the Forman Deed is ambiguous it should also be construed against Florence Forman, the grantor, and in favor of Walter Forman, the grantee.

Accordingly, based upon the evidence available to the Court and well-recognized rules of construction, the Court **FINDS** and **CONCLUDES** that ownership of the undivided 1/7 oil and gas interest at issue herein is vested solely in Plaintiff Marvin Morgan.

All parties are saved their exceptions to the ruling of the Court.

The Court further **ORDERS** that the Clerk of the Court shall personally deliver or deliver by first-class mail a certified copy of this Order to Joshua L. Jarrell, Esquire; Steven L. Shaffer, Esquire; Mary Elizabeth Georg, Esquire; Lane Liston, Jr.; and Trudy H. Goff, Esquire.

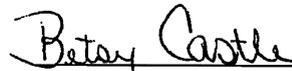
5-Copies
510 11-9-11

ENTER this 9 day of November, 2011.



Lawrance S. Miller Jr., JUDGE

ENTERED this 9 day of November, 2011.



Betsy Castle, CLERK

by: Lisa Feishman, Deputy

A TRUE COPY:

ATTEST: S/BETSY CASTLE
CLERK OF THE CIRCUIT COURT

BY: Lisa Feishman, Deputy

IN THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA

MARVIN MORGAN,

Plaintiff,

v.

Civil Action No.: 11-C-27

BERLIN D. CUPPETT, et al.,

Defendants.

ORDER SETTING STATUS CONFERENCE

On the 9th day of November, 2011, the Court entered an "Order Regarding Ownership of Subject Tract Undivided 1/7 Oil and Gas Interest." On its own motion upon finding such a hearing necessary, the Court hereby **ORDERS** that a status conference be held on **Friday, December 16, 2011, at 9:30 a.m.** The parties are permitted to appear for the status conference by calling in to the Court at (304) 329-0066. To facilitate and permit such a phone call, the parties are directed to coordinate one phone call coming in to the Court.

The Court further **ORDERS** that the Clerk of the Court shall personally deliver or deliver by first-class mail a certified copy of this Order to Joshua L. Jarrell, Esquire; Steven L. Shaffer, Esquire; Mary Elizabeth Georg, Esquire; Lane Liston, Jr.; and Trudy H. Goff, Esquire.

5-Copies
5/11 11-17-11

ENTER this 17 day of November, 2011.

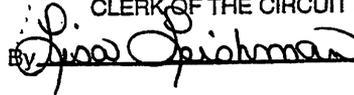


Lawrance S. Miller Jr., JUDGE

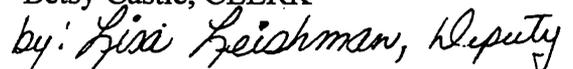
ENTERED this 17 day of November, 2011.

A TRUE COPY:

ATTEST: S/BETSY CASTLE
CLERK OF THE CIRCUIT COURT

By:  Deputy


Betsy Castle, CLERK

by: , Deputy

IN THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA

MARVIN MORGAN,

PLAINTIFF,

vs.

// CIVIL ACTION NO: 11-C-27

BERLIN D. CUPPETT and
BETTY JO CUPPETT, ET AL.,

DEFENDANT.

**ORDER FROM STATUS CONFERENCE AND
ORDER DIRECTING PAYMENT OF GUARDIAN AD LITEM FEE**

On the 16th day of December, 2011, came the Plaintiff, Marvin Morgan, by counsel, Joshua L. Jarrell, telephonically; Defendants Faith United Methodist Church and Cemetary and Trinity United Methodist Church, by counsel, Steven L. Shaffer; Defendants Mary Virginia Moore Jones, Thomas S. Jones and Audra Jones Hansen, by counsel, Mary Elizabeth Georg; telephonically; Defendant Lane Liston, Jr., *pro se*, telephonically; and Guardian *ad Litem* Trudy H. Goff, telephonically; all pursuant to the Court's order entered November 17, 2011, for a status conference in regard to the above-styled matter.

Whereupon, the Court stated that the purpose of the Court's scheduling the status conference was to determine if there were any outstanding issues in the case remaining after the Court's "Order Regarding Ownership of Subject Tract Undivided 1/7 Oil and Gas Interest" entered November 9, 2011. Plaintiffs' counsel stated that the Plaintiff requested no further relief but reserved the right to preserve the ground for relief asserted in the second count of the complaint in the event the Court's order of November 9, 2011, was appealed and reversed. Counsel for Faith United Methodist Church and Cemetary and Trinity United Methodist Church stated that he did not believe there were any other issues outstanding other than appeal.

Whereupon, Trudy Goff, the Guardian *ad Litem* for the unknown heirs, having diligently performed her duties, is discharged of her obligations. For her services and costs in the matter, it is hereby **ORDERED** that she be paid the sum of \$750.00, with that sum to be paid by Plaintiff Marvin Morgan.

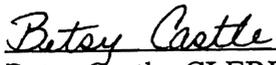
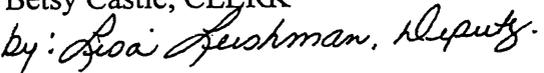
The Court further **ORDERS** that the Clerk of the Court shall personally deliver or mail by first-class mail a certified copy of this order to Joshua L. Jarrell, Esquire; Steven L. Shaffer, Esquire; Mary Elizabeth Georg, Esquire; Lane Liston, Jr.; and Trudy H. Goff, Esquire.

ENTER this 22nd day of December, 2011

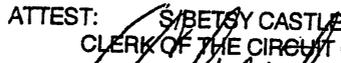
5-Copies
S/D 12-22-11
J. Jarrell
SLS
MEG
L. Liston Jr
T.H. Goff


Lawrance S. Miller, Jr., JUDGE

ENTERED this 22 day of December, 2011


Betsy Castle, CLERK
by:  Deputy

A TRUE COPY:

ATTEST: 
CLERK OF THE CIRCUIT COURT

By  Deputy

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FAITH UNITED METHODIST CHURCH AND
CEMETERY OF TERRA ALTA, WEST VIRGINIA,
AND TRINITY UNITED METHODIST CHURCH OF
TERRA ALTA, WEST VIRGINIA,

Petitioner,

v.

Docket No.: _____

MARVIN D. MORGAN,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I served a true and actual copy of the hereto annexed "*Notice of Appeal*" upon the respondent and all counsel of record by mailing the same by first class mail, postage prepaid, to the following addresses:

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Guardian ad Litem

Betsy Castle, Circuit Clerk
Preston County Courthouse
101 W. Main Street
Kingwood, WV 26537

All on this 10 day of January, 2012.



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