

14-0898

IN THE CIRCUIT COURT OF WEBSTER COUNTY, WEST VIRGINIA

Donald Cottle,  
Petitioner,

v.

Mary Davis,  
Respondent.

Case Number: 13-P-20

2014 JUL -9 PM 12:03  
FILED  
JEANIE WOOD  
CIRCUIT COURT  
WEBSTER COUNTY, VA

**AMENDED OPINION and FINAL ORDER  
FOLLOWING BENCH TRIAL**

On the 29<sup>th</sup> day of April, 2014, a bench trial was held in the above matter where there appeared the Petitioner, Donald Cottle, in person, pro se; and the Respondent, Mary Davis, in person and by counsel, Dan Hardaway. The parties adduced testimony and further evidence was placed upon the record. The parties posited closing arguments in support of their respective positions, whereupon, the Court took the matter under advisement and informed the parties a written decision would follow. Having afforded a plenary review of the underlying record and pertinent legal authority, the Court finds and concludes as follows:

**FINDINGS OF FACT**

1. The Court finds it has jurisdiction in this matter, in that the situs of the real property at issue is located in the Glade District of Webster County, West Virginia.
2. It is undisputed and the Court so finds the pertinent chain of title relevant to the Court's determination in this matter is as follows:
  - a. The parent tract of land is identified as, Deed Book 156, Page 610, dated October 8, 1979: E.D. Short, A.B. Short, B.R. Post, and P.V. Post to Terry Eagle Coal Co. (Petitioner's Exhibit No. 13). (hereinafter, the "parent tract")
  - b. Deed Book 192, Page 426, dated October 2, 1981: Terry Eagle Coal Co. to Charles R. Grose and Annabelle Grose. (Petitioner's Exhibit No. 14) (hereinafter, "Eagle/Gross Deed").

- c. Deed Book 196, Page 468, dated October 29, 1982: Charles R. Gross and Annabelle Grose to Thomas Bailes and Lillian J. Bailes. (Respondent's Exhibit No. 3) (hereinafter, "Gross/Bailes Deed").
- d. Deed Book 198, Page 21, dated July 28, 1983: Charles R. Gross and Annabelle Grose to Robert E. Kamm, Jr. (Respondent's Exhibit No. 5) (hereinafter, "Gross/Kamm Deed").
- e. Deed Book 202, Page 643, dated May 3, 1985: Charles R. Gross and Annabelle Gross to Fred A. Mays and Carol R. Mays. (Respondent's Exhibit No. 4) (hereinafter, "Gross/Mays Deed").
- f. Deed Book 206, Page 662, dated August 13, 1986: Charles R. Grose and Judith Ann Gross to Fred A. Mays and Carol S. Mays. (Respondent's Exhibit No. 1) (hereinafter, "Gross/Mays Deed II").
- g. Deed Book 216, Page 544, dated December 21, 1989: Judith A. Grose and Charles R. Grose to Donald Cottle. (Petitioner's Exhibit No. 11) (hereinafter, "Gross/Cottle Deed").
- h. Deed Book 218, Page 10, dated April 12, 1990: Judith A. Grose and Charles R. Grose to Frank Davis and Mary Ann Davis. (Respondent's Exhibit No. 2) (hereinafter, "Gross/Davis Deed").

3. The Court finds the following language within the Eagle/Grose Deed to be relevant, *"This conveyance is made subject to all other conveyances, out-sales, exceptions, and reservations as contained in all prior deeds to the herein described real estate."*

4. The Court finds the Grose/Bailes Deed conveys a portion of the land conveyed in the Eagle/Grose Deed. Further, the Court finds the Grose/Bailes Deed makes the following pertinent reservations:

- a. "[T]he grantees, their successors and assigns, shall have the right to use the permit as held by the grantors through the Monongahela National Forest, as well as a right of way of 33 feet in width to be used in common with others over the residue of the land of which the subject 2.29 acre tract is a part. This right of way as granted has been established and such right of way shall not go outside the bounds of the said established right of way."
- b. "The grantees shall have the right to use water from a spring as located on the residue of the tract of which the subject tract is a part and shall further have the right to lay and maintain water lines from said spring to the property herein conveyed. The grantees, by the acceptance of this deed, agree that this right goes only to the grantees and not to their successors or assigns."

- c. "This conveyance is made subject to any and all exceptions and reservations as contained in prior deeds to the same effect as if fully set forth herein and presently applicable."

5. The Court finds the Grose/Mays Deed pertains to a portion of the land previously conveyed in the Eagle/Grose Deed, as well as the same land conveyed to Charles R. Grose by Annabelle Grose by deed dated November 26, 1985 and of record in the office of the Clerk of the County Commission of Webster County in Deed Book 204 at Page 347. (hereinafter, "Grose/Grose Deed"). The Grose/Mays Deed contains the following reservation: *"This conveyance is made subject to the same restrictions and limitations that may be contained in all prior deeds of record insofar as the same are still applicable and pertinent and have not heretofore been released."*

6. Grose/Mays Deed II conveys a portion land previously conveyed in the Eagle/Grose Deed. The Court finds the Gross/Mays Deed II makes the following reservations:

- a. "[T]he parties of the first part further grant unto the parties of the second part, with survivorship as aforesaid, their heirs, successors, and assigns, the right to use in common with others the 30-foot wide right-of-way which runs through the real estate of the grantors as it presently exists for the purposes of ingress and egress."
- b. "[T]he parties of the second part shall have the right to use the existing roads and water spring on the residue of the real estate of the grantors. This right is a personal grant to the grantees only, and shall not include heirs, successors and assigns."
- c. "This conveyance is subject to all exceptions and reservations contained in former deeds of record."

7. The Grose/Cottle Deed pertains to a portion of the real estate conveyed in the Eagle/Grose Deed. The Grose/Cottle Deed reserves the following:

- a. "It is expressly understood that the parties of the second part shall install no septic or sewage system of any kind, no septic tank or leach bed on the real estate herein conveyed."

- b. “[T]he parties of the first part do further grant and convey unto the party of the second, a right-of-way for ingress and egress as the same now exists.”
- c. “This conveyance is made subject to all exceptions and reservations contained in prior deeds in the chain of title to this tract or parcel of land, and the same, if any, shall herewith and automatically become part of this deed.”

8. The Grose/Davis Deed is the same residue of real estate conveyed by the Grose/Grose Deed. The Grose/Davis Deed maintains and reserves that, “[t]his conveyance is expressly made subject to any and all exceptions and reservations as may be contained in prior deeds of record.”

### ***Petitioner’s Right of Way Claims***

9. The Petitioner alleges that since his deeded purchase in 1989, he has cared for and maintained the 30 foot right of way without objection. Petitioner further contends that on or about May 15, 2013, the Respondent ousted him from the full use and enjoyment of the right of way by ordering his use of the right of way be limited to 12 feet for ingress and egress, as well as attempting to have Petitioner arrested for trespassing.

10. At trial the Respondent stipulated that the Petitioner, by deed, is granted and reserved a 30 foot right of way for the purpose of ingress and egress over the Respondent’s property. However, the Respondent contends that the Petitioner should only be entitled to a 12 foot right of way because 12 feet is a sufficient width for ingress and egress.

11. Petitioner further asserts that he has established prescriptive easements in the form of right of ways around and through Respondent’s property, in that, he claims he has maintained and used other roads adjoining the 30 foot right of way that subsequently abut or cross Respondent’s property and has done so since approximately 2003.

12. Petitioner asserts that he allowed a “temporary tool trailer” to be placed upon

the right of way by the Respondent and her deceased husband, Frank Davis, following their deeded purchase of property in 1990. Further, Petitioner argues that the parties agreed the trailer be removed after the Davis's home was completed; however, such removal has not occurred. In this regard, the Respondent argues that the trailer has been in its current location for upwards of ten years and that the Respondent has had actual ownership and possession of the land upon which it sits at all times; and thus, she does not have to move the tool trailer.

13. Petitioner contends that the Respondent has a gate across the right of way which, at times is kept locked. The gate was in place when Petitioner purchased the property in 1989 and the Petitioner has a key to the lock. However, the Petitioner argues the locked gate is unreasonable and asks that the gate be removed or kept open and unlocked at all times.

14. Petitioner posits that there are numerous trees running along the 30 foot right-of-way that impede and limit his full use and enjoyment of the same and therefore, petitions the Court to order their removal.

#### ***Petitioner's Remaining Claims***

15. Petitioner asserts that there is a 100-year old cemetery, known as "Bennett-Williamson cemetery" located on the Respondent's property near his right of way. Further, Petitioner asserts he has maintained this cemetery for over twenty years and requests the right of ingress and egress to continue the same. Whereas, the Respondent contends the West Virginia Code § 37-13A-1, *et seq.* (2000) (Repl. Vol. 2014) is controlling on the issue and thus prohibits the Petitioner from obtaining ingress and egress to visit, maintain or care for the cemetery.

16. In addition to the above-mentioned claims, the Petitioner also seeks monetary damages totaling approximately \$8,076.50.

***Respondent's Counterclaim***

17. The Respondent's counterclaim alleges that the Petitioner has constructed a septic system on his property that is expressly prohibited by language contained in the 1989 Gross/Cottle Deed and must be removed. In this respect, Petitioner testified that the reason for the septic system restriction was because of a natural spring on the property and the fear a septic system would cause contamination, as well as that at the time of Mr. Cottle's purchase, Charles R. Grose had intended to construct a camp on the property he eventually sold to the Respondent. Albeit those reasons, the Petitioner contends that because the water in the spring is not drinkable, in addition to, Mr. Grose selling the property and never constructing the camp, the prohibition against the septic system should be stricken from his Deed.

***Motions made at trial***

18. Following the Petitioner's case and chief, the Respondent made motions for dismissal of the complaint or in the alternative judgment as a matter of law with respect to those claims the Court felt the Petitioner had failed to prove.

19. The Court denied the motion to dismiss the complaint in its entirety, but granted the Respondent's motions for judgment as a matter of law with respect to the prescriptive easement(s) and cemetery access claims, finding the Petitioner was not an "authorized person" under West Virginia Code 37-13A-1, *et seq.* (2000) (Repl. Vol. 2014), and further finding the Petitioner had failed to establish a prima facie case regarding the alleged prescriptive easements.

20. The Court took the remaining issues under advisement and informed the parties a written decision would follow.

## **DISCUSSION**

As previously described, the Court was presented with numerous arguments at trial. Due to the there being multiple issues to resolve and in order to succinctly address and fully dispose of these issues between the parties, and render a final judgment in this matter, the Court has chosen to discuss each issue separately.

### **I. THE PETITIONER'S RIGHT OF WAY CLAIMS**

#### **A. The plain and ordinary language of the Grose/Cottle Deed clearly grants the petitioner a thirty-foot right of way for the purpose of ingress and egress across Respondent's property.**

The first issue before the Court is whether the Petitioner is granted a 30 foot right of way for the purposes of ingress and egress across the Respondent's property. Having considered the evidence, relevant legal authority, and the reasons set out more fully below, the Court accordingly holds that the Petitioner is entitled to a 30 foot right of way as described and reserved in the Petitioner's chain of title and the 1989 Grose/Cottle Deed.

It is a long-settled principle of West Virginia law that deeds are subject to the principles of interpretation and construction that govern contracts generally. Thus, in construing a deed it is not the place of the court to destroy the clear meaning and intent of the parties as express in unambiguous language in their written [deed] or to make a new or different [deed] for them. Moreover, parties are bound by the general and ordinary meanings of words used in deeds. See Syllabus Points 3, 7 and 8 of *Faith United Methodist Church v. Morgan*, 231 W. Va. 423, 745 S.E.2d 461 (2013).

The Court finds the facts forthright on this issue. The Petitioner's Deed clearly states "[T]he parties of the first part do further grant and convey unto the party of the second, a right of way for ingress and egress as the same now exists." Applying the ordinary meaning of the language quoted above, the Court is of the opinion, that the right of way described clearly references the same 30 foot right of way also reserved in the Grose/Mays Deed II. This conclusion is aptly supported by the fact that both the Grose/Mays Deed II and the Grose/Cottle Deed pertain to tracts of land originally conveyed as part of the larger tract in the Eagle/Grose Deed, the remainder of which was eventually conveyed to the Respondent by the Grose/Davis Deed in 1990. Based on these facts, the Court finds the 1989 Grose/Cottle Deed unambiguously grants the Petitioner a 30 foot right of way for the purpose of ingress and egress across the Respondent's property.

Furthermore, the Court's holding in this regard is also supported by the Respondent stipulating at trial that the Petitioner was reserved a 30 foot right of way for the purposes of ingress and egress in his 1989 Deed. The Court does note that while the Respondent voluntarily stipulated to the width of the right of way, the Respondent further argued that a 30 foot right of way solely for ingress and egress is unreasonable. In the alternative, the Respondent posited that the Petitioner's needs of ingress and egress could be readily accomplished with a right of way limited to 12 feet. The Court finds this argument unavailing and such a contention to be clearly contradictory to the plain and ordinary meaning of the Grose/Cottle Deed.

The Respondent's 1990 Grose/Davis Deed clearly maintains that "[t]his conveyance is expressly made subject to any and all exceptions and reservations as may be contained in prior deeds of record." Further, as previously noted, the Petitioner's Deed granted him "a

*[30 foot] right-of-way for ingress and egress as the same now exists."* Thus, according to the Grose/Davis Deed, the Respondent acquired her tract of land in 1990 subject to all exceptions and reservations contained in prior deeds of record. As such, the Court is of the opinion the Respondent took her property subject to the 30 foot right of way previously reserved to the Petitioner in his 1989 Deed that was properly recorded in the land records of Webster County.

Therefore, the Court finds that not only was the Petitioner's Deed properly recorded, but also that the Respondent had actual or constructive notice of the same because the Petitioner's 30 foot right of way is clearly described within the relevant chain of title and therefore, the Respondent knew or should have known of the existence of the same. Furthermore, among the principles of deed interpretation and construction is that parties are bound by the ordinary language used in deeds. That being so, the Court finds the Respondent is hereby bound by the language of the Grose/Cottle Deed and being that it unambiguously grants the Petitioner a 30 foot right of way for purposes of ingress and egress across the Respondent's property, the Petitioner is hereby entitled to the same. As such, the Court further finds the Respondent's trees to be interfering with Petitioner's access to the entire width of the right of way and thus shall be removed.

**B. The Petitioner has failed to prove by clear and convincing evidence that he has established the right to any prescriptive easement across or through the Respondent's property.**

Next, the Court must address the issue of prescriptive easements and whether the Petitioner has established that he is entitled to one or more easements across Respondent's property. While the Court granted the Respondent's motion for judgment as a matter of law

regarding this issue, the Court finds it important to further explain its finding that the Petitioner failed to establish a prima facie case in this regard.

At trial, the Petitioner proffered to the Court that he has either used or maintained roads that adjoin the principle 30 foot right of way on Respondent's property since 2003— if not earlier. Petitioner is asking the Court to find he has established prescriptive easements in the form of right of ways for the purposes of ingress and egress. The West Virginia Supreme Court of Appeals recently addressed the issue of prescriptive easements in *O'Dell v. Stegall*, 226 W.Va. 590, 703 S.E.2d 561. The *O'Dell* Court adopted the following holdings:

“A person claiming a prescriptive easement must prove each of the following elements: (1) the adverse use of another's land; (2) that the adverse use was continuous and uninterrupted for at least ten years; (3) that the adverse use was actually known to the owner of the land, or so open, notorious and visible that a reasonable owner of the land would have noticed the use; and (4) the reasonably identified starting point, ending point, line, and width of the land that was adversely used, and that manner or purpose for which the land was adversely used.” *O'Dell*, 226 W.Va. at 597, 703 S.E.2d at 568.

“A person claiming a prescriptive easement must establish each element of prescriptive use as a necessary and independent fact by clear and convincing evidence, and the failure to establish any one element is fatal to the claim.” *Id.* at Syllabus Point 3.

Having reviewed the evidence of record and applicable law the Court adopts its holding at trial; and so finds that based on the holding in *O'Dell*, the Petitioner has failed to establish, by clear and convincing evidence, the four factors necessary to establish the existence of any prescriptive easement with respect to the Petitioner's cause of action.

The Court finds the only evidence brought before it during the trial was witness testimony, photographs, and copies of numerous deeds. Of this evidence, the only evidence remotely prevalent to the Petitioner's prescriptive easement claim was brief testimony of

one witness and the Petitioner, who both claimed to have used or maintained the adjoining roads for more than ten years; however, the Court is of the opinion that this minimal testimony falls significantly short of the clear and convincing evidentiary standard. Even if the evidence as a whole, were afforded a liberal interpretation, the Court finds the Petitioner has failed to establish any, let alone all of the four necessary elements by clear and convincing evidence. More specifically, the Petitioner has failed to show, (1) that his land use was adverse to the true owner; (2) that his adverse use was continuous and uninterrupted for at least ten years; (3) that the true owner was actually aware of his adverse use, or that his use was so open, notorious and visible that a reasonable owner of the land would have noticed the same; and (4) the reasonably identified starting point, ending point, line, and width of the land that was adversely used by the Petitioner, and that manner or purpose for which the Petitioner adversely used the land. It is for those reasons that the Petitioner's prescriptive easement claim(s) are herein denied.

For the record, the Court notes that testimony was adduced at trial and exhibits made part of the underlying record show that some of the roads on which the Petitioner is seeking a prescriptive easement(s) appear to be within the boundaries of the Monongahela National Forest and jurisdiction of the United States Forestry Service. The Court again notes, as it did upon the record at trial, that this Court lacks jurisdiction to determine those respective boundaries. As, such the Court must further deny the claims in that respect and further find those issues are more aptly reserved for the appropriate United States District Court.

**C. The existence of the Respondent's gate does not impose an unreasonable burden upon the Petitioner. The Petitioner has acquiesced to the placement of the Respondent's tool trailer.**

Next, the Court must address Petitioner's claims regarding the often-locked gate and tool trailer located on the right of way. The Petitioner posits that the gate, when locked, is unreasonable and therefore, seeks a judgment from this Court that the gate be removed, or in the alternative, be left unlocked and open at all times. Also, the Petitioner claims that he permitted the Respondent and her deceased husband to place a tool trailer along the right of way while their house was being constructed and upon its completion the trailer was to be removed. Petitioner contends that it has been upwards of ten years since the trailer was placed on the property and the house has long since been completed, and therefore, Petitioner seeks an order from this Court that the trailer be removed from the right of way.

As to the issue of gates, this State has long-since adopted the following principle of law:

"It is true that *Washburn on Real Property* (vol. 2, p.337) says: 'As a general proposition, the owner of a servient estate, over which there is a private way, may maintain gates or bars across the way, provided it do[es] not materially interfere with the use of it, or the way, by the terms of the grant, is to be kept open;' and the same doctrine may be found in *Washburn on Easements*, and many other authorities..." *Weikle v. Bolling*, No. 12-0549 (W.Va. Supreme Court, June 24, 2013)(memorandum decision); 2013 WL 3184956(quoting, *Rogerson v. Shepherd*, 33 W.Va. 307, 10 S.E. 632 (1889)<sup>1</sup>.

In this respect, the Court finds that there was ample evidence presented at trial to support a finding that the presence of the gate, whether locked or unlocked, is not an unreasonable or material interference with the Petitioner's use of the right of way. First, the Petitioner acknowledged that the gate in question was in place when he purchased the property from Charles R. Grose in 1989 and therefore, by law, the Petitioner is charged with actual notice

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<sup>1</sup> Pursuant to Rule 21(e) of the West Virginia Rules of Appellate Procedure, memorandum decisions may be cited as authority in any court in this State.

of the gate. Even if the gate had not been in existence at the time of purchase, the Court still finds that the Respondent had the authority, as owner of the servient estate, to place and maintain the gate upon the property; and its existence whether locked or unlocked, does not materially interfere with the Petitioner's use of the right of way. It is undisputed that the gate at times is left locked; however, the Petitioner admitted that he has a key to the lock, and therefore, the Court cannot reasonably conclude that when locked, the gate imposes an unreasonable burden upon or materially interferes with the Petitioner's access to the right of way or his property located.

Additionally, there is no evidence within the deeds made part of this record, nor was the Court presented with further extrinsic evidence to suggest that the parties agreed the gate remain open at all times. Thus, it is for those reasons that the Court does not find the gate to be a hindrance to the Petitioner and therefore holds it may remain in place and locked if the Respondent so desires.

As to the presence of the tool trailer, the Court notes that the Petitioner seeks removal of the trailer based on his claim that he granted permission for the placement of the trailer upon the right of way with the condition that it be removed after the Respondent's home was completed. However, being as though the trailer has been in place for at least ten years and that the home has long-since been completed, the Court finds this argument without merit.

First, there is no evidence to suggest that the placement of the trailer unreasonably or materially interferes with the Petitioner's ingress and egress through the right of way. Evidence at trial indicates that the trailer has been in its present location for at least ten years and the Respondent's home was completed some time ago. Quite simply, the Court is

of the opinion that if the trailer had imposed such a burden upon the Petitioner, he would have objected to its continued placement along the right of way long before the recent trouble between the parties and this instant litigation. Thus, because the Petitioner failed to complain of the trailer in the ten years prior to now or seek its removal immediately after the home was completed, the Court finds the Petitioner has acquiesced by waiver to the tool trailer being affixed to the land. Further, inasmuch as his present complaint appears to be a mere outgrowth of the current animosity between the parties, the Court accordingly holds that the trailer does not place an unreasonable burden upon the Petitioner's ingress or egress along the right of way and therefore, the tool trailer may remain in place until such time the Respondent, her heirs, successors, or assigns, voluntarily choose to remove the same.

## II. PETITIONER'S REMAINING CLAIMS

### A. Pursuant to West Virginia Code § 37-13A-1, the Petitioner is not an "authorized person" entitled to a right of ingress or egress to visit the cemetery located on Respondent's property.

As previously set forth above, the Court granted the Respondent's motion for judgment as a matter of law regarding Petitioner's claim for the right of ingress and egress to visit and maintain the "Bennett-Williams" cemetery located on the Respondent's property. The Court finds it important to further elaborate the basis for its ruling that dismissed the Petitioner's claim at trial. Relevant to the Court's determination is West Virginia Code § 37-13A-1(a), which allows certain persons access to cemeteries and graves located on private land. The aforesaid statute states in pertinent part:

*"Any authorized person who wishes to visit a cemetery or grave site located on privately owned land and for which no public ingress or egress is available, shall have the right to reasonable ingress or egress . . ."* W. Va. Code § 37-13A-1(a) (2000) (Repl. Vol. 2014) (emphasis added).

In addition, the Court finds West Virginia Code § 37-13A-2, also instructive as it describes an “authorized person” under the language of W.Va. Code § 37-13A-1(a), as follows:

*“[a] a family member, close friend or descendant of a deceased person; [b] a cemetery plot owner; [c] a person who has the written permission of a family member or descendant of a deceased person to enter the property solely for the purpose of installing monuments or grave markers or preparing the cemetery plot for burying a deceased person by those granted rights of burial to that plot; or [d] a person engaged in genealogy research.”* W. Va. Code § 37-13A-2 (2000) (Repl. Vol. 2014) (emphasis added).

Through witness testimony, the cemetery is described as a small area, appearing to have smooth rocks or stones marking two unnamed graves. Testimony indicated that folklore suggest the stones are graves, however, testimony further indicated that it is uncertain who, if anyone, is buried at the alleged grave site. Additionally, the Petitioner admitted that he could not be related to any individual buried on the site nor did he present evidence that he was conducting genealogical research. Having considered the relevant evidence of record, the Court is of the opinion the Petitioner is not an “authorized person” as described under W. Va. Code 37-13A-1, *et seq.*

First, there is nothing upon the record before this Court that would indicate who, if anyone, is buried at the grave site and therefore, absent such information, there is no plausible way for the Petitioner to claim he is a family member, close friend, or a descendant of a deceased person buried therein. Thus, subpart (a) of the statute weighs against the Petitioner. Second, it is undisputed that the Petitioner is not a plot owner at the cemetery and therefore subpart (b) also weighs against the Petitioner.

Third, subpart (c) first and foremost, requires an individual seeking ingress and egress to visit a cemetery on private land to have *“the written permission of a family member or*

*descendant of a deceased person to enter the property,”* however, as the Court previously indicated, there is no evidence of record to show if the stones are actually marking graves, let alone the identity of any individual(s) who may, or may not be buried there. Thus, subpart (c) also weighs against the Petitioner because no written permission was obtained and assuming *arguendo*, it were, absent genealogical proof of who, if anyone, is buried there, such permission would be speculative and premature at best due to the lack of evidence establishing a familial relationship between the deceased and the grantor of access. Finally, subpart (d) requires the Petitioner to be an individual engaged in genealogical research; however, the record is devoid of any evidence showing the Petitioner to be a genealogical researcher and thus, subpart (d) must be weighed against the Petitioner.

Thus, the Court finds that the Petitioner is not an “authorized person” as intended within W. Va. Code § 37-13A-1, and therefore, his request for ingress and egress onto the Respondent’s property to visit, care for and maintain the cemetery is hereby denied.

**B. The Petitioner has failed to affirmatively prove, by a preponderance of the evidence, that he is entitled to any further damages.**

The Court must also address the Petitioner’s claim for damages related to the costs and expenses he personally incurred as a result of this cause of action. It has been a long standing principle under West Virginia jurisprudence that the burden of proof is always upon the party claiming damages to show the amount with reasonable certainty. *Stone v. Gilbert*, 56 S.E.2d 201, 133 W.Va. 365 (1949). Furthermore, such proof cannot be sustained by mere speculation or conjecture. *Taylor v. Elkins Home Show, Inc.*, 558 S.E.2d 611, 210 W.Va. 612 (2001).

As part of his prayer for relief, the Petitioner asks the Court to award him over \$8,000 (eight thousand dollars) in damages, reimbursing him for a variety of expenditures including: court costs, mileage, fuel costs, copy fees, and what can be best described as “pro se attorney fees” for the time he has spent preparing to represent himself in this instant litigation. As previously stated, a party claiming damages must affirmatively prove the same by a preponderance of the evidence. In the present case, the Court is of the opinion that the Petitioner has failed to meet his burden of proof. The Petitioner merely proffered to the Court the value of the aforementioned damages and absent some indicia of further proof, such as receipts or invoices, the Court finds the proffer to be nothing more than speculation and conjecture. As such, the Petitioner having failed to prove by a preponderance of the evidence that he is entitled to further damages; his claim(s) in this respect are hereby denied.<sup>2</sup>

### **III. THE RESPONDENT’S COUNTERCLAIM**

#### **A. The septic system installed by the Petitioner violates an express restrictive covenant in the 1989 Deed between the Petitioner and Mr. Grose that clearly prohibits the installation of the same on Petitioner’s land.**

The final issue before the Court is the Respondent’s counterclaim regarding whether the Petitioner’s placement of a septic tank upon his property violates an express restrictive covenant within his Deed. In support of her position, the Respondent points to the following language within the Petitioner’s Deed, “**It is expressly understood that the parties of the second part shall install no septic or sewage system of any kind, no septic tank or leach bed on the real estate herein conveyed.**” (emphasis added). In

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<sup>2</sup> The Court, having denied those claims on evidentiary grounds, need not further discuss which of those damages, if any had been proven, would actually be recoverable damages under West Virginia law.

response, the Petitioner contends that the reasoning for this covenant was because at the time of his purchase from Charles R. Grose in 1989, Mr. Grose indicated that did not want any septic system constructed because he intended to build a camp on the property now owned by the Respondent and also to protect the natural spring nearby. Petitioner further contends that because Mr. Grose failed to build the camp and subsequently sold the property, in addition to, the fact the natural spring produces little water of which none is consumable, the restrictive covenant is inoperable and the Court should order the covenant stricken from the 1989 Grose/Cottle Deed. The Court is of the opinion that the evidence of record and applicable law supports a finding that the Petitioner's installation of a septic system violates the express covenant within his Deed prohibiting the same. The reasons for this decision are set out below.

As previously noted, parties are bound by the general and ordinary language used in deeds. Syllabus Point 8, *Faith United Methodist Church*, 231 W.Va. 423, 745 S.E.2d 461 (2013). Furthermore, a court is not to alter the clear meaning and intent of the parties when expressed by clear language in their written deed, nor is a court to make a new deed for the parties. Syl. Point 7, *Faith United Methodist Church*, 231 W.Va. 423, 745 S.E.2d 461 (2013). The Court finds the language in the Petitioner's Deed to be quite clear. As a basis of the bargain for the Petitioner's purchase, Charles R. Grose requested and the Petitioner expressly agreed not to build a septic system of any kind on the real estate inevitably acquired. Further, the language of the Petitioner's Deed in this regard does not impose a limitation on the restrictive covenant. More specifically, there is no wording or phrasing within the Deed that would indicate the restrictive covenant could be disregarded if certain events took place or failed to occur, such as, Mr. Grose failing to build the camp, Mr. Grose

transferring the remaining tract of land, or if the natural spring ceased production or the water became undrinkable.

Therefore, applying the plain and ordinary meaning to the phrase, "*[i]t is expressly understood that the parties of the second part shall install no septic or sewage system of any kind, no septic tank or leach bed on the real estate herein conveyed,*" the Court is of the opinion that Mr. Grose and the Petitioner intended for this covenant to be in perpetual existence and not personal in nature, thereby running the covenant with the land to both parties' heirs, successors and assigns. Moreover, had the parties intended for the restrictive covenant to be rendered inoperable upon the happening of or absence of an event they would have done so. Being as it is not within the Court's discretion to modify, alter, or rewrite a deed for the parties, the Court finds the Petitioner is hereby bound by the language of his Deed and that he violated the same by installing a septic system. Thus, the Petitioner shall remove the septic system from his property.

Subsequent to the hearing, this Court granted a temporary injunction as to the gate upon the subject right of way, enjoining the Petitioner from interfering with the locking of said gate. This Court having resolved the issue of the gate herein, finds no further action or hearing is necessary as to the gate and a permanent injunction is issued as set forth in this Order.

### **CONCLUSION**

Based on the principles set forth herein, the Court hereby concludes and does accordingly **ADJUDGE** and **ORDER** as follows:

1. The Petitioner was unambiguously granted by Deed and the Respondent stipulated

at trial, that the Petitioner is entitled to use of a thirty-foot right of way for the purpose of ingress and egress across the Respondent's property. Thus, the Petitioner is entitled to, and shall have, the full use and enjoyment of the entire length and width of the same.

2. The Respondent shall **within ninety (90) days** of the entry of this Order, have the trees on the aforesaid right of way **REMOVED**, with any and all costs and profits associated thereto be solely attributed to the Respondent. Further, Respondent must clear the trees and leave the right of way in a manner that neither restrains nor impedes the Petitioner's right to ingress and egress through the 30 foot right of way.

3. The Petitioner has failed to prove by clear and convincing evidence the elements necessary to maintain a cause of action for a prescriptive easement across any portion of Respondent's property, and therefore such claim(s) are **DENIED**.

4. The Respondent's tool trailer has been placed in the same location on Respondent's property for at least ten years. The Petitioner has at all times been aware of its placement on the right of way and continued to allow its placement thereon and enjoy the right of way without objection. Therefore, having failed to seek its removal or complain of an impediment to the use and enjoyment of the right of way prior to this action, the Petitioner has hereby acquiesced to the trailer being affixed to the land and therefore, it shall remain as a permanent structure thereon unless or until the Respondent, her heirs, successors, or assigns voluntarily choose to permanently remove the same from the subject property.

5. Under the laws of the State of West Virginia and the facts set forth herein, the Court concludes that the presence of the locked gate is not unreasonable. The Petitioner acknowledges the gate at issue was in place in 1989 when he purchased his tract of land and therefore is charged with actual notice of its existence. Further, while the gate may, at

times remain locked, the Petitioner has a key and therefore, is not deprived of access to, or the use and enjoyment of, the right of way or his property. Therefore, the gate and the lock attached thereto shall remain in perpetual existence; unless or until the Respondent, her heirs, successors, or assigns voluntarily choose to permanently remove the same.

6. Under West Virginia Code § 37-13A-1, the Petitioner is not an “authorized person” statutorily entitled to the right of ingress and egress to visit or maintain the “Bennett-Williams” cemetery located on the Respondent’s property. Therefore, Petitioner’s claim in this respect is **DENIED**.

7. The Petitioner has failed to prove by a preponderance of the evidence that he is entitled to further damages as they are alleged and therefore, those claims are **DENIED**.

8. The Petitioner shall **within ninety (90) days** of the entry of this Order, have the septic system, leach beds, and all components associated thereto **REMOVED** from his property, being as there is a restrictive covenant within the 1989 Grose/Cottle Deed that unambiguously prohibits the existence of the same. Petitioner shall bear all costs for the removal of the septic system.

9. The Petitioner, his guests and agents are forever **ENJOINED** and **RESTRAINED** from interfering, altering, modifying or manipulating the Respondent’s tool trailer, gate, or real and personal property. The Petitioner is **ORDERED** to keep his person, guests and agents, in addition to, his and their real and personal property confined to ingress and egress on the 30 foot right of way and the boundaries of his real property.

10. The Respondent, her guests and agents are forever **ENJOINED** and **RESTRAINED**

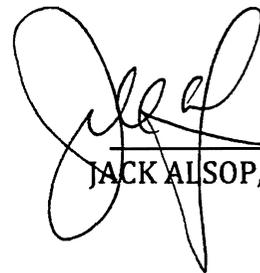
from interfering with the Petitioner's use of ingress and egress on the 30' foot right of way. Further, the Respondent is **ORDERED** to keep her person, guests and agents, in addition to her and their real and personal property off the Petitioner's property.

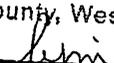
11. This case is hereby **REMOVED** from the active docket of this Court

The parties' objections and exceptions are noted by the Court.

The Clerk of this Court is further directed to send certified copies of this Order to the Petitioner and counsel for the Respondent.

**ENTERED** this 9 day of July, 2014.

  
\_\_\_\_\_  
JACK ALSOP, JUDGE

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office  
Attest: Jeanie Moore  
Webster County, West Virginia  
By   
\_\_\_\_\_  
Deputy Clerk

DONALD COTTLE

VS. MARY DAVIS

LINE	DATE	ACTION
1	09/16/13	CASE FILED
2	09/16/13	CIVIL CASE INFO SHEET, SUMMONS AND PETITION FILED AND DELIVERED
3		TO THE SHERIFF OF WEB. CO. TO SERVE MARY DAVIS
4	09/17/13	SUMMONS AND PETITION SERVED ON LINDA FALL FOR MARY DAVIS BY
5		KEITH STOUT, PROCESS SERVER
6	10/10/13	CIVIL CASE INFO SHEET, ANSWER, AND COUNTER CLAIM FILED BY
7		MARY DAVIS.
8	10/10/13	MOTION FILED BY DONALD COTTLE
9	10/21/13	CIVIL CASE INFO SHEET AND ANSWER TO COUNTER COMPLAINT
10	11/20/13	CERT. OF SERVICE FOR PLAINTIFF'S FIRST SET OF REQUESTS TO ADMIT,
11		INTERROGATORIES AND REQUESTS TO PRODUCE TO DEFENDANT
12	11/22/13	ORDER, BOOK 20, PAGE 373 (12-02-13 AT 1:10PM)
13	12/03/13	SCHEDULING ORDER, BOOK 20, PAGE 376 (PRE-TRIAL 04-14-14 AND
14		TRIAL 04-29-14)
15	12/17/13	CERT. OF SERVICE FOR DEFENDANT'S RESPONSE TO PLAINTIFF'S FIRST
16		SET OF REQUESTS TO ADMIT, INTERROGATORIES AND REQUEST TO PRODUCE
17		TO DEFENDANT
18	12/20/13	PLAINTIFF'S FIRST SET OF REQUESTS TO ADMIT INTERROGATORIES
19		AND REQUESET TO PRODUCE TO DEFENDANT
20	01/10/14	DEFENDANT'S INITIAL DISCLOSURE OF FACT WITNESSES, CERTIFICATE
21		OF SERVICE.
22	01/06/14	MOTION
23	01/06/14	DEFENDANT'S INITIAL DISCLOSURE OF FACT WITNESSES
24	01/14/14	ORDER, BOOK 20, PAGE 392
25	01/17/14	CERT. OF SERVICE FOR DEFENDANT'S RESPONSE TO PLAINTIFF'S SECOND
26		SET OF REQUESTS TO ADMIT, INTERROGATORIES AND REQUESTS TO
27		PRODUCE TO DEFENDANT STYLED BY PLAINTIFF THE "MODIFIED AND
28		AMENDED FIRST SET
29	01/28/14	MOTION TO WITHDRAW MOTION TO COMPLY BY DONALD E. COTTLE,
30		PLAINTIFF
31	01/31/14	PLAINTIFF'S SECOND SET OF INTERROGATORIES, AND REQUESTS TO
32		PRODUCE
33	02/27/14	DEFENDANT'S MOTION FOR ADDITIONA TIME TO RESPOND TO PLAINTIFF'S
34		SECOND SET OF INTERROGATORIES AND REQUEST TO PRODUCE
35	03/04/14	MOTION FILED BY DONALD COTTLE
36	03/21/14	CERTIFICATE OF SERVICE
37	04/10/14	PRETRIAL MEMORANDA
38	04/14/14	DEFENDANT'S PRETRIAL MEMORANDUM
39	04/24/14	SUBPOENA SERVED ON ZEF CHRISTAIN BY K. STOUT, WC PROCESS SERVER
40	04/28/14	SUBPOENA SERVED ON JANE BAY BY KEITH STOUT, PROCESS SERVER
41	04/28/14	SUBPOENA NOT EXECUTED ON FRED MAY; NOT BEING FOUND IN FAYETTE CO
42	05/16/14	DEFENDANT'S MOTION FOR AN INTERIM PROTECTIVE ORDER
43	05/16/14	AFFIDAVIT OF MARY DAVIS
44	05/19/14	INTERIM PROTECTIVE ORDER. BOOK 20, PAGE 431
45	05/21/14	IMMEDIATE MOTION TO WITHDRAW INTERIM PROTECTIVE ORDER
46	05/21/14	MOTION FOR IMMEDIATE PROTECTIVE RESTRAINING ORDER
47	06/11/14	OPINION AND FINAL ORDER FOLLOWING BENCH TRIAL.
48	06/11/14	FINAL ORDER ENTERED
49	06/18/14	MOTION AMENDING JUDGEMENT AND NEW TRIAL FILED BY MR. COTTLE.
50	07/07/14	ORDER, BOOK 20, PAGE 473 (9-2-14 @ 11:50A)

WALD COTTLE

VS. MARY DAVIS

LINE	DATE	ACTION
51	07/09/14	ORDER DENYING PETITIONER'S MOTION. BOOK 20, PAGE 474.
52	07/09/14	AMENDED OPINION AND FINAL ORDER FOLLOWING BENCH TRIAL. BOOK 20
53		PAGE 475.
54	08/12/14	SUMMONS SERVED ON RICHARD ROSE BY KEITH STOUT, PROCESS SERVER
55	08/12/14	SUMMONS SERVED TO SANDY COCHRAN ON BEHALF OF GEORGE CLUTTER BY
56		KEITH STOUT, PROCESS SERVER
57	08/22/14	MOTION TO WITHOLD JUDGEMENT. COPY GIVEN TO JUDGE ALSOPS' OFFICE
58	08/22/14	MOTION TO FOLLOW WEBSTER COUNTY HEALTH DEPT. RECOMMENDATIONS
59		COPY GIVEN TO JUDGE ALSOPS' OFFICE.
60	08/27/14	SUBPOENA SERVED ON RHONDA HAYHURST FOR GEORGE CLUTTER, BY WC
61		PROCESS SERVER, K. STOUT

IN THE CIRCUIT COURT OF WEBSTER COUNTY, WEST VIRGINIA

DONALD COTTLE,

Plaintiff,

vs.

Civil Action No. 13-P-20

MARY DAVIS,

Defendant.

2013 DEC - 3 PM 2:08  
JEANNE W. HARRIS  
CIRCUIT CLERK  
FEB 11 2014

SCHEDULING ORDER

**Trial 04/29/14**

**Pre-trial 04/14/14**

On the 2<sup>nd</sup> day of December, 2013, came the plaintiff, Donald Cottle, in person, pro se, and defendant, Mary Davis, by counsel, Dan Hardway, for a scheduling conference.

The following schedule and procedures were adopted and ORDERED by the Court:

1. The plaintiff shall disclose unto the defendant the names and addresses of all fact witnesses the plaintiff may call to testify in the plaintiff's case in chief on or before the 3<sup>rd</sup> day of **January, 2014**.

2. The defendant shall disclose unto the plaintiff the names and addresses of all fact witnesses the defendants may call to testify in the defendants' case in chief on or before

the 3<sup>rd</sup> day of **February, 2014.**

3. The plaintiff shall serve first request for interrogatories, demands for production of documents and requests for admissions on or before the 3<sup>rd</sup> day of **January, 2014.**

4. The defendants shall serve all interrogatories, demands for production and requests for admissions on or before the 3<sup>rd</sup> day of **February, 2014.**

5. Any amendments to any pleadings shall be filed only by leave of Court.

6. An objection to any interrogatory, notice of deposition, request for admission, or production of document and/or reports shall be filed within thirty (30) days after service of the same. Any such objection not filed within thirty (30) days shall be waived. Any such objection shall not extend the time in which the objecting party must otherwise appear or respond to any discovery to which no objection was filed. The party objecting to the requested information shall schedule, simultaneously with the filing of the objection, a hearing with the Court as to the appropriateness of the objection. An objection for which no hearing is so scheduled shall be deemed waived.

If a party fails to answer an interrogatory or a request

for admission, or fails to produce a document or disclose anything herein required and does not file an objection thereto, then the party seeking the information shall timely file a motion to compel and shall schedule a hearing thereon with the Court. If the party seeking the information does to file a motion to compel and schedule a hearing on said motion, the request for such information shall be deemed waived.

7. In any event, unless extended by the Court, all discovery shall be completed on or before the **28<sup>th</sup>** day of **February, 2014**.

8. All pre-trial motions including, but not limited to, motions to dismiss, motions for summary judgment or motions in limine shall be filed on or before the **14<sup>th</sup>** day of **March, 2014**, with any responses thereto filed by the **28<sup>th</sup>** day of **March, 2014**. Hearing on all such motions shall be heard on the **14<sup>th</sup>** day of **April, 2014, at 1:30 p.m.**, the final pre-trial conference. WVRE 103 (c) contemplates that all motions in limine should be determined prior to trial. Accordingly, unless a matter could not have been reasonably anticipated by a party, the Court will not, as a general rule, consider motions in limine at or during the time of trial. All dispositive motions shall be scheduled so that they can be heard and resolved of the pre-trial conference.

9. A pre-trial conference shall be held with the Court on the 14<sup>th</sup> day of **April, 2014, at 1:30 p.m.**, at the Webster County Courthouse, Webster Springs, West Virginia, at which time lead trial counsel shall appear fully prepared to discuss all aspects of the case. At least two (2) days prior to the pre-trial hearing the parties shall prepare and provide the Court and opposing counsel with a pre-trial memoranda to include at least the following:

- (1) Statement of the case including a brief summary of the material facts and theory of liability or defense;
- (2) Itemized statement of damages;
- (3) Stipulation of uncontested facts;
- (4) General statement of contested issues of law and in particular, those contested issues of law requiring court ruling before commencement of trial;
- (5) List of the names and addresses of all witnesses, and, if any expert witness, the purpose of the testimony and whether the qualifications of the expert are to be stipulated;
- (6) Legal authorities to be relied upon;
- (7) For each party, a list of depositions and

exhibits to be offered as evidence at trial, indicating as to each whether there are objections to either authenticity or relevancy (if there are objections, the lines and pages of depositions being objected to must be identified), and a statement that copies of exhibits have been exchanged by counsel or that opposing counsel have examined the exhibits;

(8) Settlement possibilities.

10. A bench trial of the within matter shall be held on the 29<sup>th</sup> day of April, 2014, at 9:00 a.m.

11. The failure of any party to comply with the terms and conditions of this scheduling order may result in the imposition of sanctions, including possible dismissal or pleadings being stricken, default judgment being entered, or such other sanctions as the Court deems appropriate. The parties, may not, by agreement, modify any of the terms of this scheduling order without Court approval.

The Clerk is directed to forward a copy of this Order to counsel of record.

Entered this 3 day of December, 2013.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.  
Attest: Jeanie Moore  
Webster County, West Virginia  
By [Signature]  
Deputy Clerk

[Signature]

JACK ALSOP, JUDGE

IN THE CIRCUIT COURT OF WEBSTER COUNTY, WEST VIRGINIA

Donald Cottle,

Plaintiff

V.

CASE # 13-P-20

Mary Davis,

Defendant.

ORDER

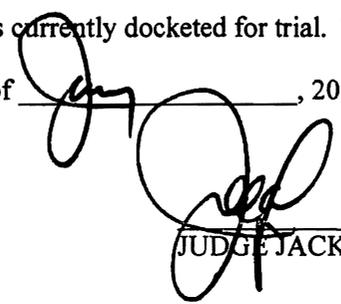
2014 JAN 14 AM 9:05  
JEANIE MOORE  
CLERK  
CIRCUIT COURT  
WEBSTER COUNTY  
WEST VIRGINIA  
FILED

On the 6<sup>th</sup> day of January, 2014, came the Plaintiff, Donald Cottle, in person, appearing pro se, and came the Defendant, in person and by counsel, Dan L. Hardway, upon Plaintiff's Motion for Entry of a Default Judgement.

After hearing argument on said Motion and reviewing all matters of records in this case, the Court does hereby find that the Complaint in this matter was filed on September 16, 2013; and served upon Defendant on September 17, 2013; the Answer was filed herein on October 9, 2013, by Defendant; was recorded in the Office of the Clerk of this Court on October 10, 2013 at 9:22 a.m; the Plaintiff's Motion for Default was herein was filed with the Clerk's office at 1:41 p.m. of October 10, 2013.

The Court finds that while the Answer was filed two days late, there was no showing of prejudice to the Plaintiff, and no actual prejudice to the Plaintiff. The Court has previously entered a scheduling Order in this matter and the case is currently docketed for trial. The Motion is, therefore, denied.

Entered this 14 day of Jan, 2014.



JUDGE JACK ALSOP

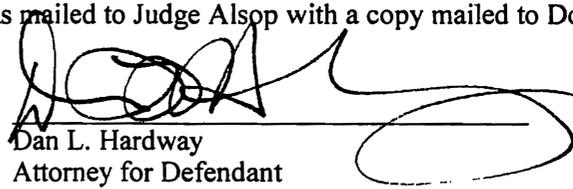
Counsel is hereby notified that any objections to this Order must be filed, in writing, with the Court within ten (10) days of receipt of the proposed order. Otherwise, the Court shall consider the Order approved as to form for entry by the Court.

I hereby certify that the original of this Order was mailed to Judge Alsop with a copy mailed to Donald Cottle on January 8, 2013.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office

Attest: Jeanie Moore  
Webster County, West Virginia

By Jeanie Moore  
Deputy Clerk



Dan L. Hardway  
Attorney for Defendant

IN THE CIRCUIT COURT OF WEBSTER COUNTY, WEST VIRGINIA

Donald Cottle,  
Petitioner

v.

Mary Davis,  
Respondent

Case Number: 13-P-26

JEANIE MOORE, CLERK  
WEBSTER CO.  
CIRCUIT COURT, VA

2014 JUL -9 PM 12:08

FILED

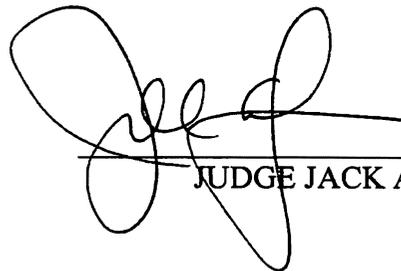
**ORDER DENYING PETITIONER'S MOTION**

The Court has considered the motion to amend judgment and/or new trial, the Court is of the opinion that the motion be and the same is hereby **DENIED**.

The parties' objections and exceptions are noted by the Court.

It is further **ORDERED** that the Clerk send certified copies of this Order to counsel of record for the Respondent and the pro se Petitioner.

ENTERED this 9 day of July, 2014.



\_\_\_\_\_  
JUDGE JACK ALSOP

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office  
Attest: Jeanie Moore  
Webster County, West Virginia  
By   
Deputy Clerk

**IN THE CIRCUIT COURT OF WEBSTER COUNTY, WEST VIRGINIA**

**DONALD COTTLE**

**VS.**

**13-P-20**

**MARY DAVIS**

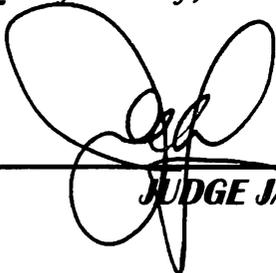
**ORDER**

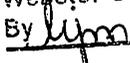
**FILED**  
2014 JUL -7 PM 3:25  
JEANIE MOORE, CLERK  
WEBSTER COUNTY  
CIRCUIT COURT, W. VA.

***It is ADJUDGED and ORDERED that the above-matter be and is hereby set for hearing on the 2<sup>nd</sup> day of September, 2014 at 11:50 a.m. or as soon thereafter as the same may be heard, in the courtroom of the Webster County Courthouse, Webster Springs, West Virginia.***

***It is further ADJUDGED and ORDERED that the Clerk of the Court serve a certified copy of this order upon the parties, forthwith.***

**ENTERED this the 7 day of July, 2014.**

  
\_\_\_\_\_  
**JUDGE JACK ALSOP**

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office  
Attest: Jeanie Moore  
Webster County, West Virginia  
By  Deputy Clerk